QUADERNI FIORENTINI

per la storia del pensiero giuridico moderno

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PAGINA INTRODUTTIVA

Il volume 32° dei « Quaderni Fiorentini » ha un carattere miscellaneo, nel rispetto di una 'tradizione' che vuole che ad un numero monografico segua un 'Quaderno' composto di saggi sparsi, inquadrati nelle consuete sezioni: nella prima sezione ('Modelli e dimensioni') vengono raccolti scritti che, per la loro impostazione o appartenenza disciplinare, non intervengono direttamente sul terreno della storia del pensiero giuridico, ma offrono ad essa punti di riferimento e sollecitazioni; nella seconda sezione ('La dimensione giuridica'), compaiono saggi impegnati nell'analisi storica di profili generali dell'esperienza giuridica, mentre nella terza sezione ('Figure dell'esperienza') l'attenzione si concentra sulla dinamica storica di istituti specifici.

Anche l'attuale volume mantiene queste scansioni e, nella sua prima sezione, presenta saggi tematicamente molto diversi, ma confluenti nell'offrire allo storico del pensiero giuridico preziose occasioni di arricchimento.

Michelangelo Bovero, successore di Norberto Bobbio nella cattedra torinese di filosofia politica, apre il 'Quaderno' con uno scritto che, accompagnando il lettore nel 'labirinto' delle opere del grande Maestro scomparso, si presenta come il più autentico e non retorico ricordo di un autore che costituisce per tutti noi un fondamentale punto di riferimento.

Paolo Grossi invita a ripensare il ruolo del giurista alla luce di una vicenda storica che ha cancellato il ruolo demiurgico della sovranità statale esaltato dalla tradizione positivistica e ha fatto emergere la dimensione sociale ed 'esperienziale' del diritto e il ruolo creativo dell'interpretazione e della prassi. I Deug-Su ci conduce a riflettere sulle origini di uno 'spazio europeo' e sul problema della

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sua storica 'pensabilità', in ideale continuazione del precedente volume monografico dei « Quaderni », dedicato alle fondazioni dell'ordine giuridico europeo. Rafael del Águila si interroga sulla dimensione 'tragica' del pensiero di Machiavelli, offrendoci un'interpretazione originale e stimolante dell'autore del *Principe* e, in filigrana, una riflessione sui nodi essenziali dell'azione politica.

La seconda sezione del 'Quaderno' si apre con due saggi (di Paulo Ferreira da Cunha e di Bartolomé Clavero) accomunati dal volgere lo sguardo oltre l'Europa, nella consapevolezza dell'importanza che riveste (anche solo per la comprensione dell'esperienza giuridica europea) il rapporto dell'Europa con le realtà extra-europee. Paulo Ferreira da Cunha offre una ricostruzione ricca e problematica degli aspetti fondamentali del regime giuridico brasiliano in una fase cruciale della sua storia, durante il governo di Giovanni VI, mentre Bartolomé Clavero aggiunge un ulteriore e prezioso tassello al mosaico che da anni sta mettendo a punto: una ricostruzione tanto documentata quanto appassionata delle trasformazioni e delle torsioni cui va incontro la civiltà giuridica europea non appena entra in (traumatico) contatto con le culture 'altre'.

Lo sguardo torna a fermarsi sull'Europa con il saggio di Eric Gilardeau, che, attraverso una precisa analisi delle « Annales » di Pellegrino Rossi, ci offre una suggestiva immagine di un primo Ottocento europeo caratterizzato da un'intensa circolazione di idee e di modelli politico-giuridici. È in una prospettiva europea e 'comparatistica' che si muove anche il saggio di Bernardo Sordi, impegnato a mettere a fuoco l'attività amministrativa attraverso le due fondamentali coordinate del tempo e dello spazio, mentre Paolo Grossi, facendo tesoro dell'esempio del diritto canonico, sottolinea l'esigenza di un ripensamento complessivo del sistema delle fonti.

Nella terza sezione ('Figure dell'esperienza') viene pubblicato un saggio, di Daniela Giaconi, che, attingendo a una ricca, e anche inedita, documentazione, ricostruisce il pensiero di un interessante studioso, l'economista Ghino Valenti, e le riflessioni da lui dedicate al problema agrario e all'istituto della proprietà.

Nella sezione 'Letture' compaiono infine varie recensioni e alcuni più ampi interventi che, traendo spunto da specifici testi, ne discutono il tema centrale: quali i saggi di Andrea Bortoluzzi sulla donazione, di Alberto Gargani sul sistema penale 'fra liberalismo e

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positivismo', di Luca Mannori sulla personalità e l'opera di Pietro Verri, di José María Vallejo García-Hevia sulla monarchia di Filippo II e di Filippo Ruschi sul problema dello *ius praedae*.

L'ultima sezione è intitolata 'Strumenti': una sezione che ha ospitato in passato opere di carattere meramente bibliografico, ma che in questo caso ha una portata più ampia e accoglie saggi che offrono al lettore le coordinate indispensabili per la messa a fuoco del problema affrontato. È in questa ottica che Dolores Freda ci parla del *law reporting* nella tradizione di *common law*, Faustino Martínez Martínez illustra il tema del rapporto fra diritto e letteratura nell'opera di Rabelais e José Ramón Narváez Hernández presenta il problema del federalismo nella storia costituzionale messicana.

Concludono il 'Quaderno' le pagine dedicate da Paolo Grossi ad Adriano Cavanna: uno storico del diritto, prematuramente scomparso, che con la ricchezza della sua opera e la sua umana disponibilità al dialogo è stato per noi e per tutti i lettori dei "Quaderni" un interlocutore prezioso.

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MICHELANGELO BOVERO

NORBERTO BOBBIO. PERCORSI NEL LABIRINTO DELLE OPERE

1. Una esposizione esauriente del pensiero di Norberto Bobbio, anche se volesse limitarsi ad una semplice ricognizione, ad una pura ricostruzione descrittiva e sintetica del contenuto delle sue opere, è probabilmente impossibile. O comunque è fra le imprese più ardue che io riesca ad immaginare. Certamente non è comprimibile nello spazio di questo intervento. Le monografie più complete sull'argomento sono due, entrambe in lingua spagnola, e ciascuna di esse si occupa solo di uno dei due universi del sapere più frequentati da Bobbio: i due libri messi insieme, quello di Alfonso Ruiz Miguel, dedicato al pensiero giuridico (*Filosofía y derecho en Norberto Bobbio*, Centro de Estudios Constitucionales, Madrid 1983), e quello di Andrea Greppi, dedicato al pensiero politico (*Teoría e ideología en el pensamiento político de Norberto Bobbio*, Marcial Pons, Madrid-Barcelona 1998), superano le 800 pagine. Ma molti aspetti della produzione di Bobbio non hanno trovato posto, se non per accenni o richiami marginali, né nell'uno né nell'altro. Perché? La risposta più banale è anche la più vera.

L'opera di Bobbio è inabbracciabile, sia in senso quantitativo, sia qualitativo. Nella bibliografia elettronica dei suoi scritti, consultabile sul sito web allestito dal Centro Studi Piero Gobetti di Torino (www.erasmo.it/bobbio), si possono contare, se si ha pazienza, 3134 titoli. Il calcolo è complicato e il risultato approssimativo, per ragioni che sarebbe troppo noioso illustrare in dettaglio. La cifra — cui sono giunto per sottrazione a partire da un numero di schede superiore a 4000 — è comunque iperbolica, e va ancora presa *cum grano salis*. Com'è noto, tra le pubblicazioni di Bobbio vi sono molte raccolte di saggi, dunque un certo numero di scritti compare in bibliografia due o più volte; ma non è raro che tra un'edizione e l'altra di un medesimo

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saggio vi siano varianti significative. Un altro effetto di moltiplicazione dipende dalle traduzioni di saggi singoli o di raccolte: caso-limite il volumetto *Destra e sinistra*, che è stato pubblicato in più di venti lingue. Eccetera. Per converso, non compaiono ovviamente in bibliografia le opere inedite, la cui mole è ingente. Voglio soltanto menzionare, tra queste, i manoscritti di interi corsi di lezioni non trasformati in dispense ma quasi pronti per la pubblicazione: ad esempio (ma non è l'unico), quello relativo al corso sul tema del mutamento politico e sul concetto di rivoluzione, che fu l'ultimo corso tenuto da Bobbio, nell'anno accademico 1978/79. Al di là delle addizioni e sottrazioni nel numero dei titoli, quel che più è — o meglio, sarà — impressionante, anche se per ora incalcolabile con precisione, è il numero delle pagine scritte da Bobbio: tra le quali sono ovviamente da includere quelle dell'epistolario, la cui consistenza è stimata in dieci o quindicimila lettere.

Non meno importante, per rendersi conto della inabbracciabilità dell'opera di Bobbio, è l'aspetto qualitativo: alludo alla varietà straordinaria dei campi specifici del sapere che Bobbio ha frequentato, e in qualche caso inaugurato, almeno nella cultura italiana. Nella prefazione alla prima edizione in volume della sua bibliografia, del 1984, con il suo tipico *understatement* scriveva: « chi getti uno sguardo sulla successione delle schede (…) stenta a raccapezzarvisi e si chiede dove sia e se ci sia un filo rosso che le attraversi. Dico subito che un filo rosso probabilmente non c'è. Io stesso non l'ho mai intenzionalmente cercato. Questi scritti sono frammenti di più disegni non sovrapponibili l'uno sull'altro [*scil.*: non ricomponibili entro lo schema di un unico disegno], e ciascuno incompiuto » (1). Molti anni dopo, nel 1997, rispondendo a Luigi Ferrajoli che gli aveva comunicato la decisione dell'Università di Camerino di conferirgli la laurea *honoris causa*, rimproverava i colleghi camerti « di aver un po' esagerato nella motivazione », nella quale veniva indicato come « l'intellettuale italiano più illustre ed influente nella

(1) « Prefazione » a *Norberto Bobbio: 50 anni di studi. Bibliografia degli scritti 1934-83*, a cura di Carlo Violi, Franco Angeli, Milano 1984, pp. 13-14. Per la bibliografia, oltre al sito web, si può far riferimento alla più recente edizione cartacea: *Bibliografia degli scritti di Norberto Bobbio 1934-1993*, Laterza, Roma-Bari 1995. La Prefazione del 1984 è stata poi ripubblicata in N. B., *De senectute*, Einaudi, Torino 1996, pp. 81-93 (il passo citato si trova a p. 85).

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seconda metà del Novecento », e si schermiva dicendo: « Ho iniziato, sì, tante strade, ma non ne ho condotto alla fine nessuna » (2). Tante strade, che incrociandosi in molti punti formano un dedalo nel quale, appunto, è difficile « raccapezzarsi ».

2. Com'è noto, Bobbio è ricorso molte volte alla metafora del labirinto per illustrare la sua concezione del mondo e della storia. Ma come abbiamo appena visto, ha suggerito un'immagine "labirintica" anche della propria opera. In uno scritto autobiografico del 1996, con una delle sue caratteristiche "variazioni sul tema", ha paragonato scherzosamente la sua bibliografia ad un « bazar », dove si può trovare di tutto, disordinatamente (3). Ora, i lettori di Bobbio sanno che il suo pensiero, intendo il suo modo di ragionare e di procedere nell'analisi di qualsiasi argomento, è invece rigorosamente ordinato. Ma anche un labirinto, per quanto complicato possa essere, è qualcosa di scientemente ordinato. Ebbene: se si volesse provare a mettere ordine nel bazar, e a questo scopo immaginare la figura di un labirinto adeguata alla natura dell'opera e al metodo del pensiero di Bobbio, io lo disegnerei come un sistema intricatissimo di *biforcazioni*, dove ogni tratto rettilineo termina in un bivio ed è a sua volta il braccio di un bivio anteriore. Ne risulterebbe una struttura ad albero le cui ramificazioni, intersecandosi, formano un fitto reticolo di *dicotomie*.

Il pensiero di Bobbio è eminentemente dicotomico, si sviluppa per così dire secondo una logica binaria, come quello di Hobbes, il classico da cui ha tratto la principale ispirazione di metodo, o se si vuole, di stile filosofico. Sono innumerevoli le dicotomie che si incontrano leggendo le opere di Bobbio. Per fare qualche esempio, scelto tra i più noti: « società e stato », « politica e morale », « pubblico e privato », « libertà ed egualianza », « democrazia e autocrazia », « riforme e rivoluzione », « pace e guerra », eccetera. Sono alcune fra le coppie concettuali più comprensive, come tali utili ad individuare le strutture portanti di quel *labirinto oggettivo*

(2) Questi brani della lettera di Bobbio sono stati citati da Luigi Ferrajoli nella *laudatio* camerte, *Ragione, diritto e democrazia nel pensiero di Norberto Bobbio*, pubblicata nel volume *Diritto e democrazia nella filosofia di Norberto Bobbio*, a cura di L. Ferrajoli e P. Di Lucia, Giappichelli, Torino 1999, p. 5.

(3) N. Bobbio, *De senectute* cit., p. 163.

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che è per Bobbio la realtà umana, o il « mondo della pratica » come usava anche chiamarlo, e ad orientarne l'esplorazione. Delle coppie maggiori, quella che si presta a tracciare un primo disegno di quel *labirinto soggettivo* — riflesso del labirinto oggettivo — che è l'opera di Bobbio agli occhi del suo stesso autore, è certamente « diritto e potere ». Tra le molte, scelgo questa considerazione sintetica di Bobbio, del 1999: « Ho sempre considerato la sfera del diritto e quella della politica, per usare una metafora che mi è familiare, due facce della stessa medaglia. Il mondo delle regole e il mondo del potere. Il potere che crea le regole, le regole che trasformano il potere di fatto in un potere di diritto » (4). La formulazione è fortemente riduttiva; ma suggerisce l'idea di due universi contigui, o meglio, apparentemente tali ma in realtà intersecati, o meglio ancora sovrapposti, pur rimanendo distinti e analiticamente distinguibili: come il *recto* e il *verso* della medaglia. Questi due universi hanno costituito gli oggetti delle due discipline principali insegnate da Bobbio per quasi cinquant'anni, la filosofia del diritto e la filosofia politica (5). E l'insegnamento universitario è stato la fucina quasi esclusiva delle idee di Bobbio.

3. Pur avendo affermato in uno scritto del 1984, dunque in tempi non risalenti ai suoi esordi come studioso, di considerarsi « appartenente alla famiglia dei filosofi » (6), Bobbio ha sempre fatto un uso guardingo della parola « filosofia », almeno dalla fine degli anni quaranta, cioè dall'epoca che coincide con il suo ritorno all'Università di Torino. La sua malcelata diffidenza per la parola aveva probabilmente origine nell'aperta ostilità contro « l'ultima ubriacatura metafisica » (7) da cui era stata pervasa la nostra cultura, l'idealismo gentiliano, che era giunto quasi ad identificarsi, e ad

(4) Traggo questo brano dalla lettera inedita indirizzata da Bobbio al preside e ai colleghi della Facoltà di Scienze politiche dell'Università di Torino, e datata 17 ottobre 1999.

(5) Senza dimenticare che per una decina d'anni tenne per incarico anche l'insegnamento di Scienza della politica. Del suo interesse per questa disciplina la più nota testimonianza è il volume *Saggi sulla scienza politica in Italia*, Laterza, Bari 1969, nuova edizione accresciuta Roma-Bari 1996.

(6) Cfr. *De senectute* cit., p. 84.

(7) N. BOBBIO, *Discorso su Nicola Abbagnano*, Introduzione a N. Abbagnano, *Scritti scelti*, Taylor, Torino 1967, p. 36, ripubblicato col titolo *Nicola Abbagnano* in N. Bobbio, *La mia Italia*, Passigli, Firenze 2000, p. 68.

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essere identificato, con « la » filosofia, e che Bobbio considerava espressione emblematica di una pervicace « ideologia italiana » (8).

Questi atteggiamenti e questi giudizi di Bobbio si riflettevano nel modo non solo di concepire il metodo e l'indirizzo principale dei suoi studi, ma persino di nominare le materie del suo insegnamento. È rimasta celebre la sua contrapposizione tra « la filosofia del diritto dei filosofi e la filosofia del diritto dei giuristi », ironicamente rivolta contro i primi (9). Meno nota, forse, la sua presa di distanza dal modo di interpretare la filosofia politica, divenuto egemone negli ultimi decenni, come filosofia normativa della giustizia *à la* Rawls (10). Certo è che per definire il suo insegnamento alla parola filosofia preferiva il termine « teoria ». Lo affermò con chiarezza, persino con qualche forzatura, in una conferenza del 1980, rispondendo alla domanda "Che cosa fanno oggi i filosofi?": « … ho insegnato per molti anni due materie filosofiche, la filosofia del diritto e la filosofia della politica, ma l'una e l'altra, come le ho intese io, hanno ben poco a che vedere, a mio giudizio, con la Filosofia con la maiuscola (…). La maggior parte delle dispense che hanno studiato gli studenti non le ho intitolate *Filosofia di…*, ma sempre *Teoria generale del diritto*, *Teoria generale della politica*, *Teoria delle forme di governo*, eccetera » (11). In realtà, soltanto quest'ultimo titolo corrispondeva allora, nel 1980, ad un volume effettivamente pubblicato: invece, *Teoria generale del diritto* è il titolo di un libro di Bobbio uscito solo molti anni dopo, nel 1993, anche se questo libro non è che la ripubblicazione in un volume unico di due famosi corsi universitari risalenti a molti anni prima; la *Teoria generale della politica*, di cui dirò più avanti, è del 1999.

In ogni caso: poiché considerava il diritto e la politica come due facce della stessa medaglia, allo stesso modo concepiva la filosofia

(8) Cfr. N. Bobbio, *Profilo ideologico del Novecento italiano*, Einaudi, Torino 1986, pp. 3-4.

(9) Cfr. N. Bobbio, *Giusnaturalismo e positivismo giuridico*, Comunità, Milano 1965, pp. 43 ss.

(10) Cfr. N. Bobbio, *Prologo* a A. Greppi, *Teoría e ideología en el pensamiento político de Norberto Bobbio*, Marcial Pons, Madrid-Barcelona 1998, p. 10.

(11) Così si legge nel testo di una lezione tenuta da Bobbio nell'ambito di un ciclo organizzato dalla Biblioteca comunale di Cattolica nel 1980: il testo è pubblicato senza titolo in AA.VV., *Che cosa fanno oggi i filosofi?*, Bompiani, Milano 1982 (la cit. si trova a p. 159).

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del diritto e la filosofia politica, interpretandole entrambe nella forma della « teoria generale », come discipline congeneri e contigue (ma ripeto: non affiancate bensì sovrapposte, appunto come le facce della medaglia). Con uno sguardo retrospettivo, nel 1998 Bobbio aveva sintetizzato il suo pensiero con queste parole: « ciò che le due teorie hanno nei miei scritti in comune [...] è non soltanto il fine, esclusivamente conoscitivo (non propositivo), ma anche il modo di procedere per raggiungerlo. È il procedimento [della] "ricostruzione", attraverso l'analisi linguistica non mai disgiunta da riferimenti storici agli autori classici, delle categorie fondamentali, che permettono di delimitare all'esterno e di ordinare all'interno le due aree, quella giuridica e quella politica, e [di stabilire] i loro rapporti reciproci » (12). Va da sé che queste formulazioni sintetiche sono, ancora una volta, riduttive.

4. È anzitutto da precisare che la stessa espressione "teoria generale" ha negli scritti di Bobbio un significato (chiedo scusa per il bisticcio) più generale e uno più specifico. Nell'accezione più stretta, "teoria generale del diritto" (o "teoria formale del diritto", o semplicemente "teoria del diritto") indica una sola delle quattro maniere, classificate da Bobbio con alcune varianti in diversi scritti, di intendere lo studio e l'insegnamento della filosofia del diritto: quella che consiste nella elaborazione e determinazione del concetto di diritto e di tutte le nozioni generali ad esso connesse. Dalla teoria del diritto così intesa distingueva: *a*) la teoria della giustizia, ovvero la riflessione sui valori che informano o dovrebbero informare l'ordinamento giuridico; *b*) la sociologia giuridica, ossia lo studio del diritto come fenomeno storico e sociale, e dunque dei problemi concernenti il rapporto tra diritto e società; *c*) la metodologia e la teoria della scienza giuridica, comprendente gli studi sulla logica delle proposizioni normative e delle argomentazioni dei giuristi.

In modo del tutto simile, con il nome di "teoria generale della politica" nell'accezione più stretta Bobbio indicava una delle quattro maniere di interpretare la natura e i compiti della filosofia politica: quella che mira alla determinazione del concetto di politica e dei concetti fondamentali in esso inclusi o ad esso correlati. E dalla

(12) N. BOBBIO, *Prologo* a A. Greppi, *Teoría e ideología* cit., p. 9.

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teoria generale della politica così intesa distingueva: *a*) la teoria normativa dell'ottima repubblica, come quella elaborata dagli utopisti; *b*) la riflessione sul fondamento del potere e sui temi connessi della legittimità e dell'obbligo politico; *c*) gli studi sul metodo della scienza politica e di analisi del linguaggio politico. Ma non è raro che l'espressione "teoria generale della politica" compaia in un'accezione più ampia, ad indicare una visione complessiva dell'universo politico e dei suoi problemi, tale da abbracciare anche le altre aree di studio e riflessione delineate classificando le specie principali e più o meno tradizionali di filosofia politica. È in questo senso, ad esempio, che le opere dei grandi classici, dove i problemi politici sono affrontati in tutta la loro complessità e interconnessione mediante l'elaborazione di modelli concettuali di vasto orizzonte, vengono qualificate da Bobbio come « teorie generali della politica ». In realtà, l'analisi dei *Grundbegriffe* propria della "teoria generale della politica" in senso stretto, più volte indicata da Bobbio come la maniera « più utile » e da lui preferita di interpretare la funzione della filosofia politica (13), si rivela nella sua opera non tanto un campo di studi circoscritto accanto ad altri, quanto una prospettiva aperta, entro la quale vengono considerati e trattati in modo peculiare tutti i grandi problemi del mondo politico (14). Basta pensare al tipico modo in cui Bobbio è intervenuto, come "filosofo militante", nel dibattito (in largo senso) ideologico, ad esempio nella discussione degli anni cinquanta con gli intellettuali comunisti sul problema della libertà: attraverso la chiarificazione concettuale, scopo eminentemente conoscitivo del "teorico", mirava allo scopo anche pratico e propositivo di emendare pregiudizi, dissolvere equivoci e superare contrapposizioni rigide.

Suggerisco, almeno come espediente euristico, di vedere anche nella "teoria generale del diritto" la prospettiva privilegiata entro la quale Bobbio ha considerato e affrontato i principali problemi dell'universo giuridico. Del resto, non credo vi siano particolari difficoltà a far rientrare in una accezione ampia di "teoria generale del diritto" i suoi studi metodologici e metateorici, così come, per altro

(13) Cfr. N. Bobbio, *Ragioni della filosofia politica* (1990), ora in N. Bobbio, *Teoria generale della politica*, a cura di M. Bovero, Einaudi, Torino 1999, p. 38.

(14) Rinvio alla mia *Introduzione* a N. Bobbio, *Teoria generale della politica* cit., pp. xx-xxiii.

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verso, quelli sul rapporto tra diritto e società; ma anche i lavori riconducibili alla teoria della giustizia risultano elaborati nel medesimo stile dell'analitica concettuale.

Ancora una osservazione sul modo bobbiano di intendere e di praticare il lavoro del "teorico". Nell'opera di Bobbio sono maldistinguibili gli scritti di "teoria" da quelli di "storia" (soprattutto) del pensiero giuridico-politico (ma anche delle istituzioni). Per un verso, scopo eminente e dichiarato dei suoi lavori storici è quello della elaborazione e sistemazione di modelli concettuali. Nella Prefazione della sua prima raccolta di saggi dedicata ai classici si legge: « Nello studio degli autori del passato non sono mai stato particolarmente attratto dal miraggio del cosiddetto inquadramento storico (…): mi sono dedicato, invece, con particolare interesse alla enucleazione di temi fondamentali, al chiarimento dei concetti, all'analisi degli argomenti, alla ricostruzione del sistema » (15). Per l'altro verso, non vi è lavoro teorico su concetti fondamentali che non sia corredato da continui riferimenti alla storia del pensiero, o addirittura costruito su di essa: basti pensare al libro su *L'analogia nella logica del diritto* (Istituto giuridico della R. Università, Torino 1938) o a quello su *Il positivismo giuridico* (Editrice cooperativa libraria universitaria, Torino 1961, seconda edizione Giappichelli, Torino 1979), alla raccolta di saggi *L'età dei diritti* (Einaudi, Torino 1990, ultima edizione 1997) o al volume di dispense su *La teoria delle forme di governo* (Giappichelli, Torino 1976). Aggiungo, infine, che nei lavori espressamente dedicati al pensiero dei classici tracciare una netta distinzione tra scritti giuridici e scritti politici non ha molto senso: qui la "medaglia" viene voltata e rivoltata continuamente, ovvero, con altra metafora, il mondo bifronte della pratica viene guardato da entrambi i lati, quello del potere e quello delle norme.

5. Bobbio non ha mai tentato, e neppure progettato, una vera sistemazione della miriade dei suoi scritti (più propriamente) giuridici, al di là di alcune famose raccolte di saggi che ricorderò più avanti. Né altri ha sinora provato concretamente a "riordinare il bazar", con le parziali eccezioni di Alfonso Ruiz Miguel (curatore del volume *Con-*

(15) N. BOBBIO, *Da Hobbes a Marx*, Morano, Napoli 1965, pp. 6-7.

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tribucion a la teoria del derecho, Torres, Valencia 1980, seconda edizione ampliata Debate, Madrid 1990) e di Riccardo Guastini (curatore dei *Contributi ad un dizionario giuridico*, Giappichelli, Torino 1995). Come primo esperimento da parte mia, molto selettivo e sommario, ed anche un po' esitante giacché non sono un giurista (16), qui di seguito indico — in senso, per così dire, puramente segnaletico-topografico — tre percorsi esplorativi principali nel labirinto (soggettivo) degli scritti giuridici di Bobbio, ciascuno dei quali articolato in una pluralità di sentieri contigui e sovente incrociati.

Il primo percorso affronta anzitutto gli studi di « Metateoria e teoria della scienza giuridica ». Il punto di partenza lo si può rintracciare senz'altro nel saggio *Scienza del diritto e analisi del linguaggio* (1950), in cui molti riconoscono l'atto di fondazione della teoria analitica del diritto in Italia. Troviamo subito dopo il corso sulla *Teoria della scienza giuridica* (Giappichelli, Torino 1950); poi alcuni altri contributi sulla stessa tematica, tra cui il saggio *Essere e dover essere nella scienza giuridica* (1967). Di carattere metateorico, oltre che storico, sono prevalentemente gli scritti raccolti nel volume *Giusnaturalismo e positivismo giuridico* (Comunità, Milano 1965). In questo stesso percorso, ma come sentiero distinto e ben definito, collocherei gli studi di logica deontica: il saggio su *La logica giuridica di Eduardo Garcia Maynez* (1954), nel quale Bobbio — anticipando in una certa misura Kelsen, Alchourrón e von Wright — elabora la distinzione tra norme e proposizioni su norme, e quella tra logica del diritto e logica della giurisprudenza; e il saggio *Diritto e logica* (1962). Un sentiero contiguo è quello che attraversa gli studi sul ragionamento giuridico e sulle argomentazioni dei giuristi, iniziando dal libro del 1938, già ricordato, dedicato all'analogia. Da non trascurare infine, a mio avviso, il sentiero degli scritti di carattere propedeutico, tra i quali indicherei alcune dispense degli anni quaranta: le *Lezioni di filosofia del diritto* (1941 e 1945) e la *Introduzione alla filosofia del diritto* (1948).

Il secondo percorso esplora la « Teoria generale del diritto » in senso stretto, o "teoria formale" come a volte Bobbio preferiva

(16) Ho attinto molti spunti di orientamento da L. FERRAJOLI, *La cultura giuridica nell'Italia del Novecento*, Laterza, Roma-Bari 1999, e da numerosi studi bobbiani di Riccardo Guastini, tra cui mi limito qui a menzionare *Bobbio, o della distinzione*, in R. GUASTINI, *Distinguendo. Studi di teoria e metateoria del diritto*, Giappichelli, Torino 1996.

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chiamarla. Incontriamo innumerevoli saggi, articoli, voci di enciclopedia, in gran parte raccolti in diversi volumi: *Studi sulla teoria generale del diritto* (Giappichelli, Torino 1955); *Studi per una teoria generale del diritto* (Giappichelli, Torino 1970); *Dalla struttura alla funzione. Nuovi studi di teoria del diritto* (Comunità, Milano 1977), e i già ricordati *Contributi ad un dizionario giuridico* (1995), a cura di Riccardo Guastini. Sono studi che attraversano pressoché tutti i temi e problemi della riflessione giuridica contemporanea, a partire dalla determinazione del concetto di diritto: la nozione di norma e la tipologia delle norme, i principi generali del diritto, la consuetudine, la validità, le lacune e le antinomie, la sanzione, e naturalmente il concetto di ordinamento giuridico. Come ho accennato all'inizio, il volume di Bobbio che reca il titolo *Teoria generale del diritto* (Giappichelli, Torino 1993) riunisce i due corsi universitari sulla *Teoria della norma giuridica* e sulla *Teoria dell'ordinamento giuridico* (pubblicati dallo stesso editore, rispettivamente nel 1958 e nel 1960). Bobbio stesso ha più volte dichiarato il suo debito nei confronti della teoria del diritto di Kelsen. Gli esperti però sottolineano che i caratteri identificanti della sua costruzione teorica — segnatamente, la teoria della norma e il problema della lacune e delle antinomie, che riguarda la natura dell'ordinamento — non soltanto non sono riconducibili al sistema kelseniano, ma ne rappresentano una critica radicale.

Il terzo percorso, più appartato, che invito a rintracciare riguarda la « Teoria della giustizia », sempre considerata secondo la prospettiva, da Bobbio preferita, dell'analisi concettuale. Indico anzitutto l'articolo *Sulla nozione di giustizia* (1952); le dispense sulla *Teoria della giustizia* (1953); la Prefazione al libro di Chaïm Perelman, *La giustizia* (Giappichelli, Torino 1959); e infine il saggio nuovamente intitolato, come il primo, *Sulla nozione di giustizia*, comparso sul numero inaugurale della rivista « Teoria politica », nel 1985. Ma è da ricordare che quasi tutti gli scritti di Bobbio dedicati al problema politico dell'eguaglianza, soprattutto la voce omonima redatta per l'*Enciclopedia del Novecento* (vol. II, 1977), contengono puntigliose analisi delle dimensioni propriamente giuridiche del concetto di giustizia. A questo punto il passaggio alla teoria politica è quasi obbligato.

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6. Guastini ha affermato che Bobbio non ha mai « avuto voglia » di dare ai propri contributi di teoria generale del diritto una forma sistematica. Al contrario, negli scritti di Bobbio degli ultimi trent'anni si trovano numerosi accenni espliciti al progetto di redigere una *Teoria generale della politica*, concepita come un'opera sistematica di ampio respiro, da elaborarsi attraverso lo studio di quelli che Bobbio chiama i « temi ricorrenti » nella storia del pensiero politico dai greci ad oggi. L'opera avrebbe dovuto essere una trattazione ordinata dei concetti politici fondamentali, e in tal modo fornire una rappresentazione generale dell'universo « Politica », quasi una « mappa », ovviamente labirintica, e insieme una « bussola » per orientarsi nella complessità del labirinto reale, ovvero del versante politico di quel labirinto oggettivo che è il mondo della pratica. Il progetto non solo non è stato condotto a termine da Bobbio, ma neppure propriamente iniziato da lui (se si eccettuano due o tre abbozzi, composti come contributi ad opere collettanee). Sul finire del 1996, ho chiesto a Bobbio di lasciarmi tentare la realizzazione di quel progetto, recuperando e ricomponendo in un ordine sistematico una quarantina di saggi, scelti in maggioranza tra i meno noti della sua produzione (che però non sono affatto "scritti minori"): ha così preso corpo la *Teoria generale della politica*, uscita da Einaudi il giorno del novantesimo compleanno, il 18 ottobre 1999.

Per realizzarla ho dovuto provarmi, con l'aiuto e il consiglio di Bobbio stesso, a tracciare una mappa del labirinto *soggettivo* degli scritti di Bobbio, concernenti il labirinto *oggettivo* del mondo politico. Il risultato finale corrisponde alla struttura del volume, che si articola in sei *parti*, ciascuna delle quali si suddivide in due *capitoli*. I percorsi che indico sul versante politico del labirinto bobbiano (che conosco meglio per averlo ricostruito, il che mi consente una più precisa articolazione del disegno complessivo) sono dunque sei, ma ciascuno di essi è duplice, composto di due sentieri affiancati, che si incrociano in più punti. Per illustrarli — ancora in modo estrinseco e segnaletico-topografico: non più che un invito alla lettura o alla rilettura "ordinata" — farò riferimento non solo e non tanto ai saggi ricompresi nel volume della *Teoria generale della politica* (d'ora in poi richiamato come *TGP*), ma soprattutto ai titoli di alcuni fra i libri più noti di Bobbio.

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Il primo percorso, intitolato (nella *TGP*) « La filosofia politica e la lezione dei classici », non riguarda ancora direttamente l'oggetto "politica" ma i diversi possibili modi di considerarlo, da un lato, e dall'altro il caratteristico modo bobbiano di affrontarne l'analisi attraverso lo studio e il confronto delle opere classiche. Per un verso, si tratta degli scritti metateorici, in tutto quattro saggi brevi, recuperati (quasi per intero) nel volume della *TGP*; per l'altro verso, ci troviamo invece di fronte alla *ingens silva* degli studi di storia del pensiero politico — o meglio giuridico-politico, essendo insensato separarli in due gruppi, come ho già detto —, tra i quali voglio solo segnalare qui la raccolta intitolata *Thomas Hobbes*, del 1989, perché dedicata all'autore politico più ammirato. Ma i classici di Bobbio sono molti, non soltanto quei dieci che egli ha esplicitamente indicato nella Prefazione alla prima edizione della sua bibliografia (17): direi che sono quasi tutti i grandi e meno grandi scrittori politici della cultura occidentale. Tra i saggi meno noti, compresi nella *TGP*, voglio segnalare quello del 1981 su *Max Weber, il potere e i classici* e quello del 1983 su *Marx, lo stato e i classici*.

Il secondo percorso, « Politica, morale, diritto », affronta direttamente il problema della determinazione del concetto di politica, da un lato, e dall'altro quello dei rapporti tra la politica e le altre dimensioni del mondo della pratica. Sul primo versante, campeggia la lunga voce « Stato », redatta per l'*Enciclopedia Einaudi* e concepita da Bobbio come un abbozzo di teoria generale della politica, poi ripubblicata insieme ad altre voci della stessa enciclopedia nel volume *Stato, governo, società* (Einaudi, Torino 1980); ma sullo stesso versante di questo percorso incontriamo i saggi sul « modello giusnaturalistico », specialmente quello più ampio, ricompreso (insieme con un saggio di M. Bovero) nel volume *Società e stato nella filosofia politica moderna* (Il Saggiatore, Milano 1979); e tra gli scritti compresi nella *TGP* è da segnalare in particolare un saggio del 1987, *La politica*, che costituisce anch'esso una sorta di "teoria generale in nuce". Sul secondo versante, incontriamo una ulteriore biforcazione: da un lato, gli studi sui rapporti tra etica e politica, tra i quali emerge il saggio omonimo, compreso nella *TGP* e inoltre, insieme ad altri

(17) E sono: Hobbes, Locke, Rousseau, Kant, Hegel, Cattaneo, Croce, Pareto, Weber e Kelsen.

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scritti su temi affini, nell'aureo libretto intitolato *Elogio della mitezza* (ultima edizione Nuova Pratiche Editrice, Milano 1998); dall'altro lato troviamo gli studi sui rapporti tra politica e diritto, tra i quali risalta il saggio *Dal potere al diritto e viceversa*, compreso anch'esso nella *TGP*, ma la cui prima versione è stata redatta da Bobbio nel 1981, in occasione del conferimento del *Prix Européen de l'Essai* della *Fondation Charles Veillon*: in esso compare per la prima volta la metafora delle « due facce della medaglia ».

Il terzo percorso è dedicato al tema « Valori e ideologie », ovvero ai tre principi sommi — libertà, eguaglianza, giustizia — con le loro ambiguità e differenti interpretazioni, da un lato, e dall'altro ai movimenti e alle correnti ideali che li hanno elaborati e sostenuti. Per il primo aspetto mi limito a menzionare il libro *Eguaglianza e libertà* (Einaudi, Torino 1995), che raccoglie due lunghe voci di enciclopedia scritte molti anni prima; ma voglio almeno ricordare, inoltre, il famoso saggio su *La libertà dei moderni comparata a quella dei posteri*, scritto nel 1954 come contributo alla discussione con gli intellettuali comunisti, poi confluito nel celebre *Politica e cultura* (Einaudi, Torino 1955). Per il secondo aspetto, indico il fortunato libretto *Quale socialismo?* (Einaudi, Torino 1976) e il saggio *Liberalismo e democrazia*, concepito come contributo ad un'opera collettanea ma uscito anche in edizione autonoma (Franco Angeli, Milano 1985); ma non posso tralasciare gli scritti sul liberalsocialismo, di cui l'ultimo, uscito nel 1994, è ricompreso nella *TGP*. Appartengono inoltre a questo percorso i saggi teorici (non solo storici) sul fascismo e sull'ideologia della resistenza, in gran parte raccolti nel volume *Dal fascismo alla democrazia* (Baldini & Castoldi, Milano 1997).

Il quarto percorso concerne la « Teoria delle forme di governo », a cui Bobbio ha dedicato un corso universitario, ripetuto con varianti per due anni di seguito, ricavandone il noto volume di dispense, già ricordato, del 1976; e insieme ad essa (come se, in questo caso, si trattasse non di un secondo sentiero, ma di un solco profondo tracciato al centro del primo) la teoria della « Democrazia », cioè il tema a cui sopra ogni altro è legata la notorietà più vasta dell'opera di Bobbio. Piuttosto, è proprio il tema specifico della democrazia ad essere considerato da un duplice punto di vista: quello dei « principi » e quello delle « tecniche ». Fin troppo ovvio

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menzionare qui la raccolta di saggi intitolata *Il futuro della democrazia* (Einaudi, Torino 1984). Ma non bisogna dimenticare che gli scritti di Bobbio sulla democrazia, sui principi e sulle tecniche, sono moltissimi. Segnalo che nella *TGP* sono compresi due saggi fino ad allora inediti, del 1986 e del 1987, concernenti rispettivamente la definizione più specificamente bobbiana della democrazia come « governo pubblico in pubblico », e la connessione tra l'ideologia democratica e gli « universali procedurali », cioè le regole del gioco.

Il quinto percorso esamina i problemi de « I diritti dell'uomo e la pace », che Bobbio considera interconnessi e che insieme alla democrazia compongono la triade dei *suoi* ideali. Sul primo versante, i contributi più noti si trovano raccolti nel volume *L'età dei diritti* (Einaudi, Torino 1990, ultima edizione arricchita 1997); ma voglio ricordare almeno un saggio del 1963, compreso nella *TGP*, che contiene l'analisi della Dichiarazione universale. Sul secondo versante, il rilievo maggiore spetta al libro intitolato *Il problema della guerra e le vie della pace* (Il Mulino, Bologna 1979), più volte ripubblicato con varianti, nel quale tra l'altro si trova la prima riflessione sulla metafora del labirinto; ma non meno importante è la raccolta di saggi dal titolo *Il terzo assente* (Sonda, Torino 1989); e non rinuncio a segnalare un saggio del 1967 sui rapporti tra diritto e guerra, compreso nella *TGP*, che sviluppa e innova lo scritto più noto sull'argomento, del 1965, che era già confluito nel primo dei volumi di quest'ultima serie.

Il sesto percorso conclude l'esplorazione complessiva con le riflessioni su « Mutamento politico e filosofia della storia », attraversando il tema dell'antitesi tra riforme e rivoluzione, al quale Bobbio ha dedicato l'ultimo corso accademico, come ho già detto rimasto inedito, e un certo numero di saggi, alcuni dei quali ricompresi nella *TGP*, ad esempio quello del 1974, assai poco noto, su *Cattaneo e le riforme*; e approdando infine alle considerazioni sul senso delle vicende umane, sul problema del male, sulla tragedia del comunismo, sul revisionismo storico, sul divario tra progresso scientifico e progresso morale: considerazioni disperse in una vasta congerie di scritti, alcuni dei quali recuperati nella *TGP*.

Sarei tentato di aggiungere un settimo percorso, che non ha rispondenza nel disegno da me tracciato della *TGP*, dedicato agli scritti di storia e critica della cultura e al tema dei rapporti tra cultura

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e politica. Un percorso anch'esso duplice: su un versante, collocherei i saggi teorici sul problema degli intellettuali e della relazione tra intellettuali e potere, quasi tutti raccolti nel volume *Il dubbio e la scelta* (La Nuova Italia Scientifica, Roma 1993); ma anche buona parte di quelli compresi in *Politica e cultura*, già citato. Sull'altro versante, oltre al *Profilo ideologico del Novecento*, più volte ristampato con varianti e aggiunte (l'ultima edizione, presso Garzanti, è del 1990), menzionerei per il loro rilevante significato politico, e non solo storico ma anche teorico, le raccolte di ritratti e testimonianze, che sono quattro: *Italia civile* (Lacaita, Manduria 1964, nuova edizione Passigli, Firenze 1986), *Maestri e compagni* (Passigli, Firenze 1984), *Italia fedele, il mondo di Gobetti* (Passigli, Firenze 1986), e da ultimo *La mia Italia* (Passigli, Firenze 2000). Proprio qui, accanto a questi, metterei gli scritti autobiografici raccolti nel *De senectute* (Einaudi, Torino 1996), e naturalmente, anche se per supremo paradosso non è propriamente uno scritto di Bobbio, l'*Autobiografia* (Laterza, Roma-Bari 1997).

7. Un'ultima considerazione. Il labirinto degli scritti di Bobbio non solo è molto complicato, ma è pieno di sorprese. I puri e semplici titoli dei saggi e dei libri, pur essendo sempre pertinenti ed efficaci, sono ben lontani dal servire come indicazioni sufficienti della ricchezza e varietà dei contenuti. Per esempio: chi potrebbe sospettare che sotto il titolo asettico *La cultura italiana fra Ottocento e Novecento* (un saggio breve del 1981) si nascondano, nelle tre pagine iniziali, considerazioni di filosofia della storia sul concetto di secolo, e sulla fine del secolo e del millennio? Ne riporto qui di seguito un paio di brani.

« Il concetto di secolo, cioè della divisione della storia umana in serie di cento anni, (…) è un concetto convenzionale, ma la storia è fatta dagli uomini anche attraverso le loro convenzioni. Il concetto di secolo è un tipico esempio di una convenzione utile o pratica che si trasforma in idea regolativa: nella storiografia corrente il secolo non è soltanto una serie temporale ma si trasforma quasi in un organismo che ha come tutti gli organismi un percorso prestabilito, segnato da una nascita, da uno sviluppo prima ascendente e poi discendente, e infine da una morte. Quanto l'idea che ci facciamo del secolo influisce sulla rappresentazione della storia reale che si svolge in quel

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periodo di tempo? (…). Si tratta nientemeno del problema del rapporto fra il corso delle cose e l'idea che gli uomini si fanno sul corso delle cose (…). Per restare nel tema (…) del passaggio da un secolo all'altro, certo è che l'avvicinarsi della fine del secolo, che è obbiettivamente parlando soltanto la fine di una serie temporale arbitrariamente scelta, è di solito percepito come il risolversi di una crisi o spirituale o morale o politica o economica (quante volte troviamo congiunti i due concetti di "crisi" e di "fin di secolo") e insieme come la premessa di un rinnovamento; (…) o, per riprendere la metafora dell'organismo, di un vero e proprio ringiovanimento ».

« Il giudizio che siamo soliti dare sul passaggio dall'Ottocento al Novecento non è diverso da quello che siamo indotti a esprimere per altre transizioni da secolo a secolo. Per non andar troppo lontani, si legga il primo famoso capitolo della *Storia d'Europa nel secolo decimonono* di Croce (...). La religione della libertà con cui si apre il secolo XIX è esaltata come l'effetto dell'"avanzamento" che il nuovo secolo ha prodotto criticando "il dissidio, che si era acuito nel razionalismo settecentesco e nella Rivoluzione francese, tra ragione e storia" (…). Per quel che riguarda la fine del nostro secolo, ne siamo ancora troppo lontani [Bobbio scriveva queste parole nel 1979] per trovarci nello stato d'animo proprio della *fin de siècle*, tanto più che questa volta la fine del secolo coincide con la fine del millennio, e le cose si complicano. A giudicare dall'unico precedente di cui abbiamo testimonianza, le previsioni non dovrebbero essere molto allegre. Si tratta nientemeno della fine del mondo. La prima volta l'attesa andò delusa. Questa volta i pronostici sono meno rassicuranti » (18) .

Molto tempo dopo, il 15 maggio 1999, durante la guerra nei Balcani, Bobbio inviava un messaggio agli organizzatori della presentazione, alla Fiera del libro di Torino, del sito web dedicato alla sua opera. Vi si legge, tra l'altro: « Da "intellettuale" incallito, sono stato più spettatore che attore. Anche in questi giorni, in cui il nostro tragico secolo ventesimo sta per finire tragicamente. Non mi faccio

(18) N. BOBBIO, *La cultura italiana fra Ottocento e Novecento*, in AA.VV. *La cultura italiana tra '800 e '900 e le origini del nazionalismo*, Atti del congresso (Firenze, 9-10-11 novembre 1979), Olschki. Firenze 1981, pp. 1-3 (*passim*).

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alcuna illusione che il prossimo sia per essere più felice. Nonostante le prediche dai più diversi pulpiti contro la violenza e le guerre, sinora gli uomini non hanno trovato altro rimedio alla violenza che la violenza. Ed ora assistiamo ad una guerra che trova la propria giustificazione nella difesa dei diritti umani, ma li difende violando sistematicamente anche i più elementari diritti umani del paese che vuole salvare ».

La vita e l'opera di Bobbio coincidono quasi esattamente con lo sviluppo del tragico secolo ventesimo. Bobbio ha deciso di allontanarsi dalla vita, anzi, di allontanare la vita da sé, di respingerla, di sospingerla via, di metterla alla porta, il 22 aprile del 2001, quando è scomparsa la moglie Valeria. Dopo le estreme parole rivolte a Valeria e lette al funerale, non ha scritto più nulla, eccetto alcune lettere, quasi tutte del periodo immediatamente successivo. L'epistolario, quando sarà pubblicato, ci restituirà del secolo tragico una serie impressionante di immagini. Ma il significato e il valore dell'opera di Bobbio — oso dire sottovoce, anche se non può più sentirmi — va al di là del secolo in cui ha vissuto, e che ha vissuto quasi per intero e tanto intensamente: come il valore dei classici. Quei classici che ci ha sempre raccomandato di non smettere di studiare.

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PAOLO GROSSI

LA FORMAZIONE DEL GIURISTA E L'ESIGENZA DI UN ODIERNO RIPENSAMENTO METODOLOGICO

1. *Il sopore del giurista e l'esigenza di un immediato ripensamento metodologico.*

Il titolo di questa relazione (*) non è mio, ma dell'infaticabile ammirevole organizzatore del nostro Incontro; però è titolo opportunissimo quando mette a fuoco che v'è una dimensione epistemologica da affrontare con urgenza sia da parte dello scienziato del diritto, sia da parte del docente chiamato a insegnare a livello universitario discipline giuridiche. Ricerca scientifica e insegnamento, se non si vuol tradire la vera essenza dell'Università, sono infatti in un rapporto di indefettibile simbiosi.

Qualcuno, annoiato — e non a torto — dai troppi richiami, e spesso a vuoto, alle parole grosse che sono 'epistemologia' ed 'epistemologico', le potrà ritenere anche qui un lustrino retorico o, peggio, un tributo ai luoghi comuni. Lo tranquillizzerei. Per noi, in questa sede, un siffatto richiamo ha solo il senso di sottolineare

(*) È il testo della relazione da me tenuta nell'Aula Magna dell'Università di Firenze, il 28 febbraio 2003, nell'àmbito del Convegno, organizzato e coordinato dal Prof. Orlando Roselli, su 'La riforma degli studii giuridici'.

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l'esigenza di un appuntamento culturale che il giurista ha con se stesso e che non può essere rimandato se non col rischio grave di mummificare la sua identità e di attenuare (o, addirittura, perdere) il proprio ruolo sociale. Occorre, insomma, *hic et nunc*, un ripensamento metodologico fondamentale da parte del giurista, che valga a scuoterlo da un sopore che, in Italia, lo avvince e lo avvolge da almeno duecento anni.

Da duecento anni — e per buona parte ancora oggi, malgrado le percezioni di alcune coscienze vive e culturalmente vigilanti durante lo svolgersi del Novecento — il giurista ha vissuto e vive docilmente il ruolo che gli è stato assegnato dal potere politico, completamente prono a un breviario di verità indiscutibili scolpite da quel potere in una sorta di sacratissima tavola mosaica: lo Stato quale rappresentante e interprete della volontà popolare, con il conseguente corollario del primato della legge quale voce dello Stato e ovviamente quale manifestazione genuina della volontà generale; rigidissimo principio di legalità; rigidissimo e attuatissimo principio della divisione dei poteri con la assoluta riserva al potere legislativo (cioè politico) della produzione del diritto.

Non ci sono incoerenze in questa costruzione, che è accostabile a un teorema di geometria nelle sue linee perfette. Tutto torna a puntino, se non fosse per quell'assioma di fondo, che tutto sorregge e che riveste il carattere di suprema finzione a sostegno di una occhiuta strategia politica: l'identificazione fra Stato e società civile, l'identificazione del contenuto della legge nella volontà generale. Suprema finzione perché mai lo Stato è capace di esprimere tutta la complessità e ricchezza della società, tanto meno uno Stato monoclasse elitarissimo come quello uscito dalla rivoluzione borghese dell'89, lontano dagli interessi e dai bisogni delle masse popolari non meno della vecchia monarchia d'antico regime.

Il problema storico-giuridico, che taluni storici del diritto mostrano ancora incredibilmente di non avvertire (1), sta proprio nel

(1) Una non edificante anche se — ohimè per lui — schiettissima dimostrazione è offerta da Ugo Petronio, il quale, malgrado che il tema non lo consentisse proprio, ha approfittato della sua premessa a una recente ristampa del Codice napoleonico di procedura civile per vomitare parecchio fiele contro il mio tentativo di valutare storiograficamente certi fondamenti giuridici dell'età borghese alla luce di una spassionata

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presentarsi di questo complessivo ideario quale sistema perfetto e compiuto di verità geometriche: come il chimico e il fisico settecenteschi hanno letto, grazie alla riconquistata capacità dei loro occhi, le regole oggettive ed eterne che sottostanno alla natura delle cose e la detèrminano, in analoga guisa gli estirpatori del decrepito e soffocante apparato prerivoluzionario hanno potuto mettere in chiaro dopo un'opera squisitamente liberatoria l'ordine naturale ed essenziale d'una società politica (2). Il problema sta cioè in un insieme di principii e regole che si presentano non come soluzioni per la Francia di fine Settecento, bensì proiettati per l'eternità ed estendibili ad ogni dove quali percezioni d'una verità oggettiva e portatori d'una intrinseca giustizia. V'è di più: principii sacralizzati pur nella loro intima secolarità, e pertanto patrimonio intangibile verso il quale è dovuto un illimitato rispetto. Debbo confessarlo: io non ho mai trovato atteggiamenti così autenticamente devozionali come nei movimenti rivoluzionarii e post-rivoluzionarii di fine settecento e dell'ottocento; un gregge di devoti impegnato in atteggiamenti di devozione, incapace di una valutazione critica delle conquiste compiute.

Assumiamo ad esempio uno di questi principii-càrdine, la legalità; è agevole constatare che si è immediatamente cambiato in legolatria (3). Ogni manifestazione giuridica, purché fosse legislativa, purché provenisse cioè dall'organo depositario della sovranità sta-

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consapevolezza critica e deponendo finalmente i soliti ossequii liturgici a pesanti e non più sopportabili luoghi comuni. Si tratta di un livido e arrabbiato attacco in pagine palesemente scritte sotto l'influsso di cattivi umori e rivelanti un legame più con i visceri dello scrittore che con la sua dimensione critica, pagine, che, nella loro astiosità e nella loro incapacità dialettica, denunciano una inaccettabile ideologizzazione e una forzata partigianeria; che però denunciano anche come per taluni storici del diritto ragionar criticamente di certe fondazioni (o pretese tali) sia da assimilare alla profanazione d'un sacrario. Additiamo volentieri al lettore quale esempio la sopracitata introduzione di Petronio e lo invitiamo a constatare di persona con una lettura imparziale: *I Codici Napoleonici — T. I — Codice di procedura civile, 1806*, introd. di U. PETRONIO, Milano, Giuffrè, 2000.

(2) Il lettore avveduto avverte subito che, nel nostro testo, si riproduce quasi alla lettera il titolo di un celebre libello politologico-economico del fisiocrate francese Paul-Pierre Le Mercier de la Rivière 'L'ordre naturel et essentiel des sociétés politiques' (1767).

(3) Su questo passaggio e sulla costruzione moderna di una vera e propria 'mitologia giuridica' si vedano le nostre riflessioni contenute in: *Mitologie giuridiche della modernità*, Milano, Giuffrè, 2001.

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tuale, la si è ritenuta equa e meritevole di totale obbedienza, quasi che il legislatore fosse una sorta di re Mida abile a mutare in oro tutto ciò che toccava.

Per tutta l'età moderna si son ripetute genuflessioni immotivate alla legge, senza che si fosse sfiorati dalla considerazione elementare che essa altro non era che un vaso vuoto e che invece soltanto i contenuti potevano meritare l'osservanza dei destinatarii. Di fronte a talune immotivate espressioni di ossequio alla legge conclamate con sincera convinzione anche a mezzo del Novecento, io mi son permesso di ricordare l'amarissimo episodio delle leggi italiane del 1938 sulla tutela della razza ariana, iniquissime come ogni provvedimento che si ispiri al razzismo e nelle quali la forma legislativa non cancellava ma nemmeno attenuava l'inaccettabilità di un contenuto odioso per la comune e ricevuta coscienza (4).

Il problema storico-giuridico sta tutto qui: nella diffusa credenza di conquiste ultime ed eterne, nella fissazione di una dommatica inchiodante, nella indiscutibilità di certe categorie; il problema — che è squisitamente metodologico — sta nella de-storicizzazione di tutto un materiale storicissimo, rispettabile frutto di vicende storiche, e pertanto discutibile, e pertanto consegnato al divenire del tempo e alla sua usura.

Il peggio è che, se un siffatto risultato è comprensibile come avveduta strategia del potere politico moderno per controllare tutta la dimensione giuridica ritenuta ormai indispensabile al proprio efficiente esercizio, lo è assai meno la accettazione prona dei giuristi, la loro abdicazione a un ruolo attivo, anzi il loro concorso a legittimare la consegna del diritto nelle mani dei detentori del potere.

Il peggio — ancor più gravemente — è che questa passività psicologica, questo atteggiamento rinunciatario, non lo si verifica solo nel giurista ottocentesco imbeverato dai trionfalismi post-rivoluzionarii e risorgimentali, ma lo si constata pressoché intatto nell'animo del giurista odierno, il quale — vittima di un plagio bisecolare — persiste nel non deporre gli occhiali deformanti che gli

(4) Ci abbiamo riflettuto in una nostra amara 'commemorazione' del sessantennio delle leggi del '38. Cfr. *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 27 (1998) — *Pagina introduttiva (a sessanta anni dalle leggi razziali italiane del 1938)*.

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furono posti sul naso duecento anni fa e nel ritenere gelose conquiste ciò che era il frutto di una indebita espropriazione.

L'odierno giurista — il riferimento è alla maggioranza e non a taluni spiriti liberi e intraprendenti — è malato di decrepitezza, è sempre più vecchio, ed è soprattutto logorato da un morbo sottile che da sempre è stato il suo vizio occulto, la pigrizia, la pigrizia intellettuale. In una conferenza da me svolta presso la Accademia dei Lincei sul tema incandescente della globalizzazione giuridica, io non ho potuto fare a meno di evocare la splendida immagine hegeliana dei filosofi agguagliati alla civetta che evita la luce del giorno e che si leva in volo soltanto al crepuscolo, applicandola alla smorta figura del giurista pigramente operante in una coperta zona d'ombra, protettiva indubbiamente ma anche vincolantissima (5).

Lo storico del diritto, forte del suo ruolo d'essere la coscienza critica in seno a una Facoltà giuridica, ha il dovere culturale di ricordare che, all'inizio, ci fu soltanto la avveduta strategia di un ceto socialmente e politicamente vincente; che, se di conquista si trattò, si trattò pur sempre di un prodotto storico, e che è arrivato il momento di scrollarsi di dosso un fardello troppo gravoso che limita il raggio d'azione dei giuristi e nemmeno consente al diritto di svolgere il ruolo che gli è connaturale nell'ordinamento della società.

Ecco perché deve ritenersi benvenuto l'invito implicito — contenuto nel titolo — a una rinnovata presa di coscienza, la quale non può essere avviata se non ripensando criticamente certe fondazioni (o pretese tali) del nostro sapere, cominciando col collocarle nel grembo storico e nel fascio di motivazioni storiche che le hanno generate e verificando se, ormai inadatte alla attuale situazione strutturale e alla attuale riflessione scientifica, non debbano essere oggetto di scelte maggiormente *consapevoli*.

2. *Il diritto quale mancipio del potere politico: un espediente della modernità.*

Ancor oggi, al normale giurista appare naturale il nesso tra

(5) P. Grossi, *Globalizzazione, diritto, scienza giuridica*, in *Atti della Accademia Nazionale dei Lincei*, CCCIC (2002), p. 491 ss. (ma anche in *Foro Italiano*, maggio 2002, V, 151).

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diritto e potere politico concepito senza esitazioni come un vincolo *necessario*: il diritto non può che essere prodotto da chi esercita poteri sovrani, è in tal modo fornito di autorevolezza garantendosi l'osservanza da parte della comunità dei sudditi; si manifesta in regole generali astratte rigide, rispetto alla formazione delle quali la comunità non è chiamata a dare alcun contributo, trattandosi di comandi insuscettibili di elasticizzazione e reclamanti una pura e semplice obbedienza. E non v'è dubbio che il più delle volte sia così: atti d'imperio provenienti dall'alto perché in alto pensati e definiti, passivamente subìti da una massa informe e anonima di destinatarii.

Tutto ciò consegue a una visione squisitamente potestativa del diritto, che fa del produrre norme giuridiche un rigoroso monopolio dell'apparato statuale, appartenendo il diritto al nòvero degli *arcana imperii* e degli *instrumenta imperii*.

Ciò non è smentibile. Lo storico ha però il dovere e la responsabilità di aggiungere che quanto ci appare come naturale, cioè come connesso alla natura stessa del diritto, è soltanto il frutto di una trasformazione che questo ha sofferto in un tempo storico e in uno spazio geografico ben delimitati. Per spiegarci meglio, è trasformazione verificàtasi soltanto nel colmo dell'età moderna e nell'Europa continentale. Ciò che può apparirci naturale, è invece storicamente relativo; come si diceva più sopra, è nulla più che il portato di una sagace strategia della classe borghese, conscia della rilevanza del diritto per un compiuto esercizio del potere e risoluta a controllarlo.

È tanto vero tutto questo che l'età precedente — medievale e post-medievale — e che, nella stessa età borghese, il distaccato e parallelo pianeta di *common law* in grazia del nesso di continuità con i valori medievali, impostano e costruiscono su altre basi il proprio ordine giuridico. In queste esperienze, in una visione maggiormente pluralistica delle fonti del diritto, il cómpito della individuazione delle regole giuridiche e del loro continuo adeguamento, è prevalentemente affidato a un ceto di giuristi impegnato a fissare e categorizzare tecnicamente le indicazioni provenienti da una sottostante piattaforma consuetudinaria, soprattutto maestri di diritto nell'Europa continentale prerivoluzionaria, soprattutto giudici al di là della Manica e, dipoi, nelle tante colonie inglesi.

Acquisire piena consapevolezza della storicità e relatività di un ideario giuridico che grava sulle nostre spalle è tanto elementare

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quanto affrancatorio; se quell'ideario fu, per buona parte, un espediente politico, sarà più facile liberàrsene.

E ne abbiamo assolutamente bisogno oggi quando il monopolio dello Stato è messo in crisi da una proliferazione e frammentazione di fonti produttrici sia sul piano ufficiale che su quello dell'effettività quotidiana. La rigida visione potestativa del diritto, indiscutibile per i nostri padri, si sta vistosamente sgretolando particolarmente nel campo del diritto privato dove il mutamento sociale ed economico, ma ancor più le mirabolanti novità della tecnica in continua rincorsa, rèlegano ben spesso in un paleolitico giuridico le previsioni contenute in autorevoli quanto inutilizzabili testi legislativi, facendoci assistere al loro progressivo svuotamento ad opera di una solerte autoregolazione dei privati (6). Ma il processo di erosione è generale e non risparmia nemmeno zone gelosamente collegate all'esercizio della sovranità e pertanto sottoposte fino a ieri a una legalità rigorosissima: l'esempio di una zona penalistica completamente coperta dall'ombra della legge è incrinato dall'affiorare nella cultura giuridica europeo-continentale di un diverso ruolo dell'autorità statale (7).

Il movimento in atto, inarrestabile in civiltà sempre più complesse e sempre più de-territorializzate come la odierna e la prossima futura, comunque lo si voglia valutare, ha il pregio di arginare ma

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(6) Ne abbiamo trattato nella nostra prolusione per l'inizio di attività della 'Scuola di specializzazione per le professioni legali' dell'Università di Firenze: *Il diritto tra norma e applicazione. Il ruolo del giurista nell'attuale società italiana*, in *Università degli studi di Firenze — Facoltà di Giurisprudenza — Scuola di specializzazione per le professioni legali — Inaugurazione dei corsi d'insegnamento dell'anno accademico 2001/2002*, Firenze, Imprima Unigraf, 2002 (ma anche in *Quaderni fiorentini per la storia del pensiero giuridico moderno* 30 (2001), nonché in *Rassegna Forense*, XXXV (2002)).

(7) Le parole sono prese quasi di peso da un acuto saggio di R. Orlandi, *Giustizia penale e ruolo dello Stato: un rapporto in crisi*, in *Il Mulino*, LI (2002), p. 863 ss.. Per una vasta disàmina del dibattito attuale e per una lucida messa a punto in rapporto anche al degrado degli organi parlamentari contemporanei si veda F. Palazzo, *Riserva di legge e diritto penale moderno*, in *Studium iuris*, 1996. È tutto da leggere anche il ripensamento critico di M. Vogliotti, *La 'rhapsodie': fécondité d'une métaphore littéraire pour repenser l'écriture juridique contemporaine.Une hypothèse de travail pour le champ pénal*, in *Revue interdisciplinaire d'études juridiques*, 2001. 46, p. 142 ss., unitamente alle preziose considerazioni comparatistiche di E. Grande, *Principio di legalità e diritto giurisprudenziale: un'antinomia?*, in *Politica del diritto*, XXVII (1996), p. 469 ss..

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anche di rettificare un processo di esiziale snaturazione a cui il diritto si è trovato sottoposto nei paesi di *civil law*: lo *ius* concepito come *iussum*, l'universo giuridico che si esprime compiutamente quale universo di comandi.

3. *Potestatività e testualità del diritto nel pianeta di* civil law*: l'esilio della interpretazione/applicazione.*

Non si tratta di esercitazioni lessicali; la snaturazione è profonda. Il diritto non è còlto come ordinamento della società ma piuttosto come strumento di potere, e profonde sono le conseguenze.

Il comando, infatti, è il modo con cui una autorità manifesta la propria superiorità. Nel comando la comunità dei consociati si pone necessariamente a un livello più basso, senza coinvolgimento alcuno: perché il comando è frutto della volontà del superiore, la quale è già perfetta e compiuta nel momento in cui viene manifestata all'esterno.

Dal che discende la prima conseguenza di gran rilievo: ciò che conta in un ordinamento a base potestativa è restringere l'attenzione all'atto di volontà imperativa, sceverarne il contenuto, magari chiarirlo grazie all'analisi di come e per quali motivi si formò. Le colonne d'Ercole di questa attenzione sono però ben fissate, e si còllocano intorno all'atto di manifestazione; al di qua di questo v'è soltanto una vita storica del comando nella società, che è assolutamente irrilevante.

Calando a un discorso più specifico e più pregnante, in questa visione il diritto è una realtà che è già completa nel momento in cui l'autorità se ne distacca; il suo processo di formazione è già interamente compiuto né ad esso può in qualche modo contribuire il suo immettersi nel tessuto dell'esperienza. Insomma, in questa visione, l'interpretazione/applicazione si pone come un qualcosa di esterno e non già la fase di un procedimento *in fieri*; e il ruolo dell'interprete/applicatore è ridotto ovviamente al minimo. In un ordinamento a base rigidamente potestativa l'interprete/applicatore ha una posizione di sostanziale passività con un ruolo meramente conoscitivo. L'unico soggetto legittimato a *volere* è il titolare del comando, e quel volere è depositato nel testo autorevole.

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E siamo alla seconda conseguenza, che è parimente di gran rilievo. Il comando reca in sé la pretesa ad essere obbedito, ma deve poter essere conosciuto; non solo, ma deve immobilizzarsi in uno scritto per fugare ogni pretesto di inosservanza.

Il comando tende inevitabilmente a divenire *testo*, a rinchiudersi in un testo cartaceo dove chiunque possa leggerlo e dove sia al sicuro da tutti i mutamenti che incidono a livello di esperienza, in un testo il più possibile inelastico e cioè tale da impedire le ripercussioni delle turbolenze esterne; testualità del moderno diritto continentale europeo, ben simboleggiata dal testo più concluso e conchiuso che immaginar si possa, da quel Codice che è invenzione dei moderni, della loro presunzione, della loro spasmodica volontà di controllare la dimensione giuridica.

Perché di controllo si tratta, e di controllo rigorosissimo. La codificazione tende infatti a coprire ogni territorio dell'esperienza giuridica, senza tralasciare quei rapporti quotidiani fra privati nell'esercizio della vita privata su cui il ceto borghese vincente vuol dir la sua e soprattutto quegli istituti vitalissimi della costituzione tacita d'una società borghese che sono la proprietà individuale e il contratto ugualmente individuale. Né è senza significato che la prima e più esemplare opera codificatoria — quella francese di Napoleone I — prenda il suo avvìo nel 1804 proprio dal *Code civil*, regolazione di un diritto civile che i monarchi assoluti di antico regime avevano concretamente rispettato nella sua urna bimillenaria di tessuto consuetudinario.

E il Codice, ogni codice, è necessariamente minuziosissimo, con una previsione analitica di ogni possibile fattispecie, con il disegno di ogni istituto tracciato puntigliosamente fornendone spesso la definizione e scendendo via via a fissarne le più minute ossature.

Io ho parlato, a più riprese, di assolutismo giuridico per sottolineare l'interesse tutto nuovo del potere politico borghese per il diritto (8): il liberalismo economico pretende il controllo della

(8) Io ne cominciai a parlare nel 1988, quando si avviò in tutta Europa il gran rumore per il bicentenario dell'89 con uno scialo generale di retorica apologetica. Cfr. *Epicedio per l'assolutismo giuridico (dietro gli 'Atti' di un convegno milanese e alla ricerca di segni)*, ora in *Assolutismo giuridico e diritto privato*, Milano, Giuffrè, 1998. Il mio itinerario di riflessione può essere seguìto leggendo la premessa anteposta al volume

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dimensione giuridica per garantire appieno i valori su cui è fondata la sua costituzione non scritta, valori di libertà economica che avrebbero trovato sicuro appoggio non su delle *déclarations* ancora intese come aeree conclamazioni filosofico-politiche (9), bensì negli articoli inchiodanti di un testo normativo.

E di venature assolutistiche indubbiamente si tratta, perché il sistema giuridico diventa chiuso: affermazione di un rigido monismo giuridico con la cancellazione delle vecchie fonti tradizionali (consuetudine, giurisprudenza pratica, giurisprudenza teorica), primazia della legge al vertice di una scala gerarchica e, in buona sostanza, solitudine della legge ben al di sopra delle altre manifestazioni ormai completamente devitalizzate, idealizzazione — anzi, mitizzazione — di un legislatore pensato senza vizii e senza macchia, omnipotente e omnisciente e pertanto insindacabile.

Che si sia trattato di assolutismo giuridico e di assolutismo fondato su un inattaccabile fondamento mitico lo dimostra la estrema difficoltà con cui si è consolidato in Europa continentale il principio fecondo di un controllo dell'operato del legislatore. In un libretto dedicato a segnare i tratti mitologici della nostra cultura giuridica moderna non mancai di sottolineare (10) il pervicace rifiuto e quindi la incredibile tardività con cui il principio si è affermato in una Francia novecentesca erede e assertrice — ancora a metà del ventesimo secolo — del vecchio progetto giacobino; un progetto materia di tanto forti credenze (in altre parole: mitizzato) da far identificare la istituzione di un 'Conseil Constitutionnel' da parte di un illustre rappresentante della *gauche* francese addirittura in un 'coup d'état permanent', in una sorta di mina deflagratrice del sacro edificio dello Stato inaugurato con la presa della Bastiglia (11).

Non aveva torto François Mitterrand — ché di lui si parlava due righi sopra —: per una costruzione voluta e sapientemente progettata come una fortezza inespugnabile dall'esterno, il principio di un controllo costituzionale rappresenta una breccia che lede al pro-

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collettaneo or ora citato: *Ancora sull'assolutismo giuridico (ossia: della ricchezza e della libertà dello storico del diritto)*.

(9) Com'è, per esempio, nell'art. 17 della 'Déclaration' del 1789, che afferma la inviolabilità e la sacralità del diritto di proprietà.

(10) *Mitologie giuridiche della modernità*, cit., p. 75 ss..

(11) F. MITTERRAND, *Le coup d'état permanent*, Paris, Plon, 1964.

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fondo quelle strutture; è soprattutto il castello di credenze che viene scosso, cioè quel complesso armonico di miti che aveva reso indiscutibile la sua fondazione e aveva psicologicamente disarmato i possibili assedianti. Quel controllo faceva precipitare sulla terra giù dal suo Olimpo il legislatore, ogni legislatore, e rendeva tutto discutibile; in altre parole, lo dissacrava.

Ma torniamo al castello normativo così ben murato grazie al cemento rivoluzionario giacobino; della sua costruzione abbiam segnato finora due conseguenze gravi, l'indifferenza per il momento interpretativo/applicativo e la rigorosa testualità, due pietre angolari dell'edificio. Ne vogliamo aggiungere una terza e una quarta, che possono considerarsi però due aspetti di una sola conseguenza. Questo diritto così coniato peccava di artificiosità e si caratterizzava per una sua sostanziale estraniazione al movimento e al divenire sociale.

Artificiosità. È chiaro che il diritto, tutto il diritto, è artificio perché creazione di uomini per uomini, perché frutto della storia e certamente non scritto in una natura cosmica preumana. Abbiamo avuto, nel lungo corso della riflessione giuridica — e lo storico lo sa bene —, anche dei tentativi di leggere trame giuridiche nella stessa natura fenomenica, ma debbono essere considerati — né più né meno — che il risultato della ingenuità e della immaturità culturale dei pur generosi proponenti. Il diritto appartiene invece alla storia; suoi contrassegni sono l'umanità, la socialità, la politicità intesa *lato sensu*, la storicità. Quando però qui si segna come conseguenza grave la artificiosità, si intende denunciare un castello di precetti tecnici che, in forza del loro arroccamento in comandi, in forza dell'impegno di rinchiudere tutto il giuridico nella volontà del legislatore, di arrestare il processo di produzione al momento espressivo della volontà e di mummificarlo in un testo coriaceo, rischia di smentire la sua umanità, socialità, politicità, storicità; rischia cioè di essere artificio in questo senso specifico, non già nel senso di realtà non fenomenica.

Ed è immediato un altro rischio: l'estraniazione dalle forze vitali circolanti nell'esperienza, forze in continuo divenire e pertanto insofferenti a qualsivoglia immobilizzazione. Si è voluto controllare la dimensione giuridica, la si è resa ben controllabile fissando la sua origine dall'alto e la sua consolidazione nel guscio duro d'un testo, ma la si è troppo spesso separata dal flusso continuo della società.

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4. *Un recupero per il diritto: esprime la società prima ancora che lo Stato.*

Si impone un recupero per il diritto; un recupero, tuttavia, che si potrà pienamente conseguire solo se si irrobustisce la nostra coscienza critica e, in grazia di un siffatto irrobustimento, si riuscirà a collocarci su un osservatorio liberato da credenze indiscutibili e quindi da liturgie cultuali sfocianti in quei luoghi comuni che sono la palude asfittica d'ogni uomo di cultura. In altre parole — e torniamo alle righe iniziali e al titolo di questa relazione —, se si opererà quel lavacro epistemologico che il giurista più sveglio ha senza dubbio cominciato a fare ma che deve investire la sonnolenta maggioranza silenziosa ancora immersa in una comoda pigrizia.

E si dovrà partire dalla conclusione segnata con fermezza nelle pagine precedenti: che il legame necessario potere/diritto, che una visione potestativa del diritto è storicamente relativa, è frutto della strategia dell'assestamento socio-politico operante in un certo clima storico, e che il diritto, al di là dei tanti immiserimenti occasionali che lo storico non ha difficoltà a cogliere ed enumerare, è nella sua essenza qualcosa di ben diverso da un espediente del potere, da uno strumento del potere.

E riteniamo che sia necessario riafferrare la salutare intuizione di chi, nel corso del Novecento, seppe distaccare il diritto dall'abbraccio costringente dello Stato e lo ricollocò nel grembo materno della società, di essa espressione fedele e compiuta. Il diritto pertiene *naturalmente* alla società, perché è una insopprimibile dimensione con cui la società vive la sua storia; direi di più: quale dimensione ordinante, il diritto si propone come salvataggio storico della società, la quale si esprime in civiltà, in tante diverse maturità di civiltà storiche, solo perché è anche giuridica, solo perché può contare sulla forza storicamente vincente del diritto.

Il lettore comprende subito che questo approccio è esattamente l'opposto di quello della genuina modernità nell'Europa continentale: lì lo sforzo di controllo porta a condensare, a formalizzare, a separare *ius* e *facta*, a innalzare una grande muraglia fra *ius* e *facta* consegnando le uniche chiavi delle porte nelle mani dei detentori del potere elevati al rango di rappresentanti d'una volontà generale; qui si insiste sulla onticità del diritto per l'intiera società, dove il difficile

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vocabolo di calco greco, lungi dall'essere uno sfoggio sapienziale, è piuttosto la parola pregnante a significare la sua naturalità, la sua coessenzialità; e poiché la società — al contrario di quella creatura semplicissima che è lo Stato moderno — è strutturalmente plurale e complessa, il diritto che le è speculare non potrà non registrare queste qualità, non potrà non proporsi che plurale e complesso. Dove — si badi — pluralità e complessità non significano caoticità ma piuttosto registrazione fedele delle diversità — diversità di valori — che la società serba nelle sue molteplici pieghe, al contrario dello Stato che — in quanto apparato di potere — è banditore di un modello condizionante, anche il cosiddetto Stato democratico-parlamentare.

Lo spostamento dell'asse portante dallo Stato alla società non costituisce smentita che lo Stato è sempre il normale produttore del diritto (però con ruolo calante in una realtà storica sempre più tesa alla globalizzazione), bensì il recupero al diritto di tutte le forze agenti nella società. In una lezione inaugurale fiorentina di qualche anno fa io volli mettermi dalla parte dell'uomo della strada con le sue perentorie diffidenze verso il diritto, dichiarando esplicitamente che le condividevo (12): perché ai suoi occhi la dimensione giuridica si presentava sempre nella veste potestativa e sanzionatoria del giudice, dell'ufficiale di polizia, dell'esattore di un'imposta, perché sempre egli si accorgeva del diritto soltanto nel momento della violazione, cioè nel suo vistosissimo momento patologico, mentre gli era difficile percepirlo nella fisiologia sociale, nella scansione della sua vita quotidiana, pur costellata da mane a sera di una infinità di atti giuridici.

La nostra passata cultura ha creato schermi troppo spessi fra il sociale e il giuridico, facendo perdere non solo all'uomo della strada ma altresì al giurista teorico e pratico il senso della appartenenza del secondo alla pura e semplice fisiologia del primo. Occorre un recupero, un recupero non più procrastinabile (13). Né si tema la dispersione del giuridico nell'indistinto sociale e la sua

(12) Cfr. *Scienza giuridica e legislazione nella esperienza attuale del diritto*, che il giurista può leggere oggi in *Rivista di diritto civile*, XLIII (1997).

(13) È su questo recupero che si fonda anche un mio — testé apparso — tentativo di iniziazione alla comprensione del diritto: *Prima lezione di diritto*, Bari, Laterza, 2003.

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perdita d'identità. È chiaro che non tutto il sociale è giuridico, e che il secondo è un filtro energico del primo, manifestandosi solo dove una regola sociale, connettendosi a precisi valori, riceve adesione e osservanza, realizzando nella storia il grande mistero del diritto.

La civiltà giuridica continentale europea della piena modernità ha troppo spesso trasformato il filtro in uno schermo, come si accennava più sopra, e si è attuata troppe volte una separazione fra sociale e giuridico, con un reciproco impoverimento, il primo abbandonato alle risse incomposte della quotidianità episodica, il secondo all'inaridimento proprio di una corteccia distaccàtasi dalla linfa sottostante. Il formalismo legalista, cioè il diritto costruito come dimensione formale fondata non sui fatti ma sulla legge quale appropriatrice e interprete unica dei fatti, ha trasformato il terreno giuridico in un recinto chiuso.

Al suo interno, un ingombrante principio informatore: lo Stato è la sola potestà autorizzata a trasformare in giuridica la grezza regola sociale, e i valori di cui esso è portatore determineranno l'ordine giuridico nelle sue scelte; uno solo è pertanto il canone di misura della giuridicità, e cioè quello della validità, ossia della corrispondenza di ogni atto al modello fornito dallo Stato nomopoieta.

Oggi, si avverte la decrepitezza di questo castello di altri tempi, assolutamente inadeguato con il suo fossato isolante, il suo ponte levatoio, le mura interrotte da minime feritoie, le bertesche in alto. Lasciando le immagini evocatrici, non ci si può esimere dal riscontrare che il mondo intiero corre in una direzione, che non è già quella del rinserramento nella corazza della validità ma di una valorizzazione dell'opposto principio di effettività; si guarda cioè alla carica vitale di certi fatti e alla loro incisività nel sociale, una incisività determinata da una loro propria forza interiore.

Effettività più che validità, con il risultato immediato di un abbandono del vecchio inadeguato monismo giuridico per una apertura sostanzialmente pluralistica, giacché se unitario e compatto è il regno del *valido*, composito, plurale, complesso è invece il regno dell'*effettivo*. Né sembra più una bestemmia puntare sulla Repubblica Italiana quale realtà ampia e complessa in cui lo Stato si

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propone come semplice elemento (14), né ci sembra più lirismo politico-giuridico il disegno aperto consegnato dalla sapienza preveggente dei nostri costituenti nei primi articoli della nostra carta costituzionale (15).

5. *Per una visione ordinamentale del diritto.*

Salutare per il rinnovamento epistemologico del giurista italiano è prender definitiva coscienza del carattere ordinamentale del diritto. Anche qui non si tratta di un semplice cambio lessicale, ma del rinnovamento di un ideario che pròvoca una visione rinnovata.

Come ho scritto altre volte (16), far capo alla nozione di ordinamento ha quasi il senso di una rivoluzione copernicana per il giurista continentale europeo, perché significa deporre una visione verticistica del diritto incentrata sulla volontà del produttore della norma e sul suo atto di produzione per valorizzare la realtà oggettiva che la norma intende ordinare e che può efficacemente ordinare

(14) Così, per esempio, nell'art. 114 della Costituzione italiana nel testo deliberato nel 2001, dove si constata essere la "Repubblica… costituita dai Comuni, dalle Province, dalle Città metropolitane, dalle Regioni e dallo Stato", con una messa a fuoco ancora insufficiente perché ancora priva di quella totale apertura alla complessità del sociale che si sarebbe potuto desiderare, ma che è sicuramente un passo avanti nella riscoperta della complessità repubblicana.

(15) Disegno aperto, senza dubbio, ma che avrebbe potuto essere reso in una maggiore evidenza sol che si fosse accolto l'o.d.g. presentato, il 9 settembre 1946, da Giuseppe Dossetti in seno alla Prima Sottocommissione della Assemblea Costituente, un o.d.g. rinviato e poi mai più discusso perché trovava sostanzialmente sorda od ostile la stragrande maggioranza. L'o.d.g. proponeva alla Sottocommissione di riconoscere « ad un tempo la necessaria socialità di tutte le persone, le quali sono destinate a completarsi e perfezionarsi a vicenda mediante una reciproca solidarietà economica e spirituale: anzitutto in varie comunità intermedie disposte secondo una naturale gradualità (comunità familiari, territoriali, professionali, religiose, ecc.), e quindi, per tutto ciò in cui quelle comunità non bàstino, nello Stato » (*La Costituzione della Repubblica nei lavori preparatori della Assemblea Costituente*, Roma, Camera dei Deputati, 1970, VI, 323). Si sarebbe, con la impostazione dell'on. Dossetti, andati ben oltre, nel 1946, la modesta conquista rappresentata dall'art.114 nel testo deliberato nel 2001, articolo che pure abbiamo creduto di menzionare e sottolineare nella nota precedente.

(16) Cfr. *Oltre le mitologie giuridiche della modernità*, ora in *Mitologie giuridiche della modernità*, cit..

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soltanto se tien conto di esigenze ed istanze provenienti dal basso perché in basso circolanti.

Ordine, ordinamento, è nozione salvifica proprio per questo suo ineliminabile carattere complesso, che unisce in sé la dimensione soggettiva dell'ordinatore e dell'attività ordinante e quella oggettiva di una struttura reale che si pone come limite, che va letta e capìta, che non può essere violentata dall'arbitrio dell'ordinatore; e la carica di normatività — ìnsita in ogni regola giuridica — vede qui attenuato il carattere meramente potestativo, con la possibilità di raggiungere il risultato d'una osservanza fondata più sulla persuasione dell'utente che sull'ossequio passivo.

Ma è salvifica anche sotto altro profilo. Precisamente per questa sua dimensione oggettiva, l'orizzonte non può più limitarsi al testo della norma, alla volontà che il produttore ha preteso di immettervi e al solo momento magico della produzione, ma deve ampliarsi all'incontro con i fatti successivi e alla vita del testo normativo nella società.

In questa visione, il testo, in ragione della sua astrattezza, reca in sé una normatività potenziale che attende, per compiersi, di distendersi ed intrecciarsi con i fatti di vita degli utenti. Ed emerge in tutta la sua vitalità giuridica quel momento interpretativo/applicativo, che la dommatica costituzionale borghese aveva espunto dal processo formativo del diritto e che, al contrario, sembra essere il vero momento perfezionativo, compimento perfezionante del procedimento, ma — quel che più conta — interno al procedimento stesso: la norma è veramente tale se, lasciata la propria genericità, grazie alla interpretazione/applicazione diventa regola di vita.

Taluno dirà: si stanno sfondando porte aperte; del diritto come ordinamento si parla da parecchio, la nozione circola, e non siamo distanti da quando celebreremo — magari con enfasi generale — il centenario della pubblicazione del famoso libriccino di Santi Romano; lo stesso si può dire di quel rinnovamento profondo della concezione del rapporto fra testo normativo e interprete che passa sotto il nome di ermeneutica giuridica, tanto più che oggi, grazie alla benemerita azione diffusoria del compianto Luigi Mengoni (17),

(17) Di MENGONI si vedano soprattutto i saggi raccolti in: *Ermeneutica e dogmatica giuridica*, Milano, Giuffrè, 1996.

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l'opera basilare di Hans Georg Gadamer, egregiamente tradotta in lingua italiana (18), circola sufficientemente nella comunità dei giuristi.

Di vero c'è questo: che sono ormai tanti i giuristi italiani che si sentono in dovere di citare Romano e anche Gadamer; ma è fondatissimo il dubbio sul grado di effettiva consapevolezza che sorregge quelle citazioni. Purtroppo, assomigliano maledettamente al belletto appiccicaticcio che una vecchia signora mette sul suo volto rugoso e che un po' di pioggia rischia di dissolvere mostrando una immagine che è restata vecchia e solcata dalle stesse rughe.

Malgrado le citazioni esornative, la psicologia è rimasta immutata, ancorata a vecchi schemi, quegli schemi che costituiscono il provvidenziale riposo per la proverbiale pigrizia intellettuale del giurista. A relativa difesa del quale va detto che il vecchio paesaggio imperniato sulle sole due colonne dello Stato e della legge era parecchio suadente perché semplice, chiaro, certo, mentre il nuovo paesaggio ordinamentale, per l'appunto perché complesso, per l'appunto perché consente un tumultuoso prorompere della pluralità dei fatti, impone una difficile e faticosa attività interpretativa, ben dissimile dalla elementare esegesi di un testo.

6. *Norme e forme, comandi e testi, alle prese con l'odierno mutamento tecno-socio-economico.*

Ma non sono i giuristi a teorizzare sopra i fatti e magari contro i fatti imponendovi le proprie teorizzazioni. Sono piuttosto i fatti che ribollono nell'attuale clima storico a pretendere il superamento dei vecchi semplicismi. Statualità del diritto, rigoroso legalismo, visione potestativa e, quindi, gerarchia delle fonti assomigliano a una camicia di forza per un corpo in crescita straripante.

Diritto e giurisperiti hanno sempre (e da sempre) fatto i conti con il mutamento socio-economico, perché la naturale tendenza a stabilizzarsi faceva cozzo con la altrettanto naturale tendenza a

(18) La grande sintesi gadameriana *Verità e metodo* ha potuto godere di una assai curata traduzione italiana da parte del filosofo Gianni VATTIMO (Milano, Bompiani, 2000); si deve però aggiungere che non si trattava della prima traduzione in lingua italiana.

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seguire il divenire della società per poterla convenientemente ordinare; ma, quando, come oggi, il mutamento depone la lentezza tipica degli assetti socio-politici statici e si cambia in una dinamica rinnovàntesi rapidissimamente nei tempi brevi; quando, come oggi, il mutamento nella vita economica e sociale si accompagna al prodigioso rinnovamento delle tecniche in continuo e quasi quotidiano superamento con soluzioni stravolgenti per quella stessa vita, comandi e testi vengono stritolati da una mobilità che non ha riscontri nel passato remoto e prossimo, con scelte imperiose per soluzioni duttili e disponibili, con il rifiuto di ogni struttura irrigidente. Il castello giuridico della modernità ci appare, se non come un castello di sabbia, almeno come quelle costruzioni di fango lentamente erose dalle piogge battenti.

Ieri, fu il trionfo della politica (ma di una politica come esercizio, tecnica teorizzazione del potere), immedesimata e risolta in quel formidabile apparato potestativo che è lo Stato, al quale veniva sciaguratamente riconosciuto il monopolio della politicità. Il risultato fu la cancellazione delle società intermedie quali manifestazioni della naturale e spontanea politicità dell'uomo sociale, una forzosa contrazione di questa e uno statalismo esasperato con uno spazio geografico frammentato in territorii definiti secondo le rigide proiezioni del potere.

Oggi, è il trionfo dell'economia e della tecnologia con un palcoscenico mondiale dove campeggiano protagonisti prima sconosciuti, tutti mobilissimi, tutti sfuggenti a confinazioni nette, tutti quasi delle entità impalpabili e cangianti. Ai fini di questa relazione ci basti di additarne due.

Il primo è senza dubbio il mercato, il complesso di operatori e di strumenti economici, che si pone ormai come dimensione autonoma della realtà complessiva. Quando io, cinquanta anni fa, maneggiavo quale studente novizio di Giurisprudenza i libri istituzionali di diritto privato, vi si poteva trovare ancora l'inutile traccia dell'*insula in flumine nata* con i derivanti iperteorici problemi di appartenenza, ma certamente del mercato non si faceva menzione se non occasionalmente e sempre con un aggettivo specificativo (mobiliare, finanziario, e via dicendo) che legittimasse in mano ai giuristi una nozione di valenza squisitamente economica e quindi da lasciare senza rimpianti alla attenzione degli economisti. Nei 'manuali' oggi

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circolanti, almeno nei più sensibili alla evoluzione in atto, se ne parla largamente e anche senza aggettivazioni. Come per significare che dietro singole attività economiche v'è un pianeta economico con proprie istanze e proprie regole, un ordine autonomo, che non desidera codificazioni, anzi ne aborrisce, dinamicissimo e plasticissimo.

E i civilisti parlano di mercato sino a farlo diventare un luogo comune, chi convintamente come Irti (19), chi con parecchio scetticismo come nel libro appena giùntomi dalla Francia di una allieva di Lyon-Caen, Marthe Torre-Schaub (20). E il mercato diventa il protagonista nella ricostruzione di istituti condotta secondo i canoni dell'analisi economica: un esempio egregio l'abbiamo avuto in Italia recentissimamente con il libro di Ugo Mattei sulla proprietà (21), dove si prende atto con lucidità di un ruolo non più solitario di essa e del resecamento ormai interamente avvenuto con la dimensione etica del soggetto, e la si esamina al cuore del mercato, al centro di meccanismi economici che l'hanno in buona parte esautorata. E ha ragione Mattei di coglierla, con linguaggio osservatorio approccio novissimi, come "la risultante istituzionale di una competizione fra mercato e gerarchia" (22), giacché mercato e gerarchia sono le due realtà alternative che presiedono ad ogni processo produttivo.

Questo fugace accenno alla gerarchia ci introduce a parlar brevemente del secondo protagonista: la rete. Vocabolario e ideario assolutamente estranei alla tradizione giuridica, ma con una ben precisata derivazione sociologica e politologica. E son proprio sociologi e politologi che ne han parlato per primi, seguìti oggi da un numero sempre più folto di giuristi attenti alle attuali trasformazioni (23).

Il concetto di rete va lentamente esautorando quello di gerarchia

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(19) Natalino Irti se ne è occupato frequentemente, ma di lui conviene soprattutto vedere la sintesi contenuta in: *L'ordine giuridico del mercato*, Bari, Laterza, 1998.

(20) M. Torre-Schaub, *Essai sur la construction juridique de la catégorie de marché*, Paris, L. G. D. J., 2002.

(21) U. Mattei, *I diritti reali — 1 — La proprietà*, Torino, Utet, 2001.

(22) Ibidem, p. 28.

(23) Uno dei primi interessanti esperimenti a livello anche giuridico fu, in Italia, quello del volume collettaneo *L'Europa delle reti*, a cura di A. Predieri e M. Morisi, Torino, Giappichelli, 2001. Oggi, si dispone di un tentativo di sintesi dalla forte

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quale scansione portante dell'universo giuridico, sostituendo a una realtà piramidale fatta di comandanti e comandati perché imperniata sul comando (e quindi innervata di ineliminabili rapporti gerarchici) una realtà strutturalmente diversa dominata dalla interconnessione fra varii soggetti e posizioni, appunto la rete, dove non emerge una graduazione gerarchica ma un gioco (e intreccio) di reciproci condizionamenti e integrazioni, che si sviluppa non in proiezioni geografiche ristrette e frazionate com'erano i territorii delle vecchie entità statuali ma in aree sempre più larghe ed aperte, tendenzialmente mondiali.

7. *Riscoperta della complessità dell'ordinamento giuridico: la rivincita della prassi.*

Paesaggio giuridico non semplice e nemmeno chiaro e certo, con una netta prevalenza della dimensione economica su quella *stricto sensu* politica, con vecchi attori protagonisti sempre più emarginati o compressi nella loro azione: è esemplare la parabola discendente dello Stato, che ieri era il titolare indiscusso di un pressoché assoluto monopolio e che oggi vede la propria sfera d'azione restringersi di parecchio, sempre più contesa da quei protagonisti emergenti cui è congeniale l'attuale movimento rapidissimo e particolarmente il suo orientamento globalistico.

L'emarginazione ha ripercussioni incisive: la compressione della sfera d'azione statuale è liberatoria per altre forze che la congiunzione vincolante tra formalismo e legalismo aveva in passato ridotto e tenuto in catene. Il paesaggio, come si diceva qualche rigo sopra, ha perduto in semplicità e certezza ma ha acquistato in espressività; esprime cioè tutta la ricchezza dell'ordine giuridico e non soltanto quella porzione fatta emergere dal diritto ufficiale.

Esattamente un anno fa, in questa stessa Aula Magna dove oggi ci troviamo riuniti, ebbi l'onore di esser chiamato a tenere insieme a Giuliano Vassalli la prolusione per l'inaugurazione della 'Scuola di specializzazione nelle professioni legali' dell'Ateneo fiorentino. In quella occasione io credetti di dover sottolineare che l'attuale mo-

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dimensione teorica: F. OST-M. Van DE KERCKHOVE, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Bruxelles, FUSL, 2002.

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mento rivela all'osservatore attento una rivincita della prassi (24); né lo feci per conquistare un pubblico formato in buona parte da giudici avvocati notai o da giovani aspiranti a quelle nobili professioni. Fu la obbiettiva contemplazione di una vistosa svolta storica, tanto più vistosa per me che — in grazia del mestier mio — avevo agio di compararla con il precedente cammino costellato di serramenti e di chiusure.

Il ruolo del giudice si è ingigantito; è facile constatazione che istituti nodali del vivere civile, fuori delle secche di un legislatore troppo lento e anche troppo distratto, hanno avuto e stanno tuttora avendo una formazione giudiziale (e anche dottrinale): l'esempio della responsabilità civile, specchio fedele degli attuali rivolgimenti con le sue frontiere mobilissime (25), ci si presenta come davvero emblematico. E la stessa civilistica italiana più sensibile si interroga da tempo sul valore del 'precedente' trapiantando con disinvoltura una mentalità peculiare a un pianeta ritenuto fino a poco tempo fa distante ed alieno come il *common law* (26). E, se negli anni Quaranta e Cinquanta, eran ritenute bizzarrie di un grand'uomo le insistenze di un commercialista come Ascarelli su una dilatazione della nozione di fonte fino a ricomprendervi non solo i giudici e gli uomini di scienza ma addirittura gli stessi uomini di affari (27), tutto l'odierno parlare di globalizzazione giuridica si riduce a prendere atto che i

(24) Nella sopracitata prolusione: *Il diritto tra norma e applicazione. Il ruolo del giurista nell'attuale società italiana*.

(25) Ci si appropria qui del titolo di un saggio di Francesco GALGANO, *Le mobili frontiere del danno ingiusto*, in *Contratto e impresa*, I (1986).

(26) Una riflessione corale è riprodotta nel volume: *La giurisprudenza per massime e il valore del precedente con particolare riguardo alla responsabilità civile*, a cura di G. VISINTINI, Padova, Cedam, 1988, particolarmente rilevante perché si tratta della riflessione di un gruppo di civilisti e promossa da una cultrice del diritto civile, e cioè perché si muove nel campo giuridico italiano più legato a una educazione rigidamente legalistica e codicistica; particolarmente rilevante perché assume a oggetto privilegiato la responsabilità civile dove libertà del giudice e libertà dello scienziato hanno potuto esprimere tutta la propria carica vitale per la evoluzione di un istituto così immerso nella storicità. È da leggere con profitto la prefazione di Giovanna Visintini, che chiarisce bene le motivazioni della felice iniziativa.

(27) Mi sia consentito di rinviare a quanto ne scrissi qualche anno fa, riflettendo sul messaggio ascarelliano: *Le aporie dell'assolutismo giuridico (ripensare, oggi, la lezione metodologica di Tullio Ascarelli*, ora in *Assolutismo giuridico e diritto privato*, cit., p. 354 ss..

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canali di scorrimento del diritto sono plurali e che, accanto al canale maestro del diritto dello Stato, vi sono canali privati in cui protagonisti sono gli uomini di affari con le loro invenzioni di meccanismi tecnici collaudati nel vivo della prassi e più atti a un commercio navigante a livello mondiale sui cavalli alati delle conquiste infotelematiche (28).

La complessità dell'attuale paesaggio giuridico obbliga il giurista a una nuova messa a fuoco e a nuovi strumenti di osservazione. Egli è portatore di un sapere incarnato, può permettersi anche di filosofarvi sopra, ma non può permettersi il lusso di arcaismi ostacolanti la continua incarnazione. La messa a fuoco fa oggi crudamente emergere la frammentazione e moltiplicazione delle fonti di produzione del diritto, facendo galleggiare nel vuoto il fascistissimo art. 12 delle preleggi con le sue chiusure statalistiche (29), la cui antistorica vigenza formale, anche se in palese contrasto con il respiro aperto della Costituzione del 1947, può però offrire il destro a qualche odierno credente delle passate mitologie.

Siamo, invece, tutti chiamati a costruire un nuovo edificio, assumendo a pietra angolare quella verità elementare calpestata e occultata negli ultimi duecento anni che il referente del diritto non è già nello Stato ma nella società. È un elementare ma vitale spostamento della nostra orientazione e della nostra direzione di marcia, con la possibilità di realizzare alcuni recuperi cui abbiamo accennato nelle pagine precedenti e di cui abbiamo un assoluto bisogno.

8. *Il diritto e la sua radicazione nello strato dei valori.*

Se non tardiamo a operare presto questi recuperi, possono essere tratti alcuni insegnamenti fecondissimi da valer quale bussola

(28) Mi sono sforzato di offrire qualche precisazione nella sopracitata relazione su *Globalizzazione, diritto, scienza giuridica*.

(29) Com'è ben noto, a fronte dell'art. 3 contenuto nelle preleggi al Codice liberale del 1865 dove si parla di 'principii generali di diritto' con dizione tanto vaga da consentire — secondo taluni scrittori — di ricomprendervi perfino il diritto naturale, l'art. 12 delle preleggi al Codice del 1942, risentendo della impostazione del regime autoritario, parla di 'principii generali dell'ordinamento giuridico dello Stato'.

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efficace per farci doppiare con sicurezza il capo Horn in cui ci troviamo e transitare finalmente da un oceano all'altro.

Il primo, elementare e fondamentale insieme, è l'acquisizione d'una consapevolezza piena che il diritto attinge a una realtà sommersa di valori storici, che le sue radici trovano nutrimento insostituibile in quello strato riposto.

È una percezione che abbiamo immediata e intensa in quel terreno giuridico di frontiera che siamo soliti chiamare 'diritto costituzionale, un insieme armonico non già di comandi, bensì di principii e regole che, affondando nei valori d'una civiltà storica ed esprimendoli, affida la propria indubbia normatività ad una osservanza caratterizzata da una forte componente di adesione più che di obbedienza passiva. E la Corte Costituzionale è la cerniera fra la testualità normativa delle leggi ordinarie e quel mondo di valori ricevuti che nemmeno il legislatore può violare: il suo giudizio è innanzi tutto verifica della loro preservazione.

Ma la facile percezione nel campo costituzionale deve estendersi ad ogni branca del diritto, anche se è meno agevole scorgere queste nervature vitali sepolte sotto la pur necessaria ferraglia delle tecniche o sotto la pur necessaria impalcatura formale.

E veniamo pianamente a un secondo insegnamento: se il diritto, quale dimensione ordinante della società, non può rinunciare a un suo assetto formale, questo deve sempre nutrirsi di valori legittimanti, deponendo la perniciosa presunzione di una autolegittimazione col solo fondamento di un testo normativo autorevole; altrimenti, la costruzione è palafitticola ed è destinata a non reggere di fronte alla usura dei fatti storici.

Il giurista, soprattutto il civilista, ha cavalcato in un recente passato un simile progetto, tutto preso dal miraggio di una scienza pura liberata dalle molte scorie della carnalità storica, Per conseguire questa pretesa purezza, si appagava di ancorare i proprii pinnacoli formali in una realtà virtuale di testi purché si evitasse il contatto impuro coi fatti: il diritto si proponeva ad essi sopraordinato, indenne dal logorìo del divenire.

Questo giurista era però chiamato presto a fare i conti con un clima storico per lui allarmantissimo: un mutamento socio-economico tanto rapido da disseccare e isterilire ogni dimensione formale; l'emarginazione dello Stato; un cumulo di leggi il più delle volte

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improvvisate, partigiane, oscure, tardive, con alle spalle un legislatore impreparato e unilaterale. Il formalismo legalista appariva in tutta la sua drammaticità come una scelta suicida.

E, infatti, chi ha voluto, con ammirevole coerenza, cavalcarlo fino in fondo è giunto a posizioni dichiaratamente nichilistiche. È esemplare, a questo proposito, l'itinerario del civilista Natalino Irti, un collega con cui ho avuto da lunga data una familiarità continua mai turbata dalla decisa contrapposizione dialettica che ha sempre animato l'uno verso l'altro. Egli si è costantemente ispirato al formalismo legalista, che lo ha portato qualche tempo fa a proporre ai giuristi dei primi anni Ottanta un rinnovato metodo esegetico, una sorta di neo-esegesi (30). Poi, è avvenuto il montare della insoddisfazione fino all'approdo di un totale nichilismo (31). Conviene che lo seguiamo nel suo cammino intellettuale dando a lui stesso la parola.

Due anni fa, dialogando con il filosofo Emanuele Severino, Irti esce in frasi di una franchezza disarmante: "il diritto positivo si è ripiegato per intero nelle procedure, che, come vuoti recipienti, sono capaci di accogliere qualsiasi contenuto. La validità non discende più da un contenuto che sorregga e giustifichi la norma, ma dall'osservanza delle procedure proprie di ciascun ordinamento" (32). Il che si fa commentare con un esempio già evocato più sopra: dinanzi alle leggi italiane del'38 sulla tutela della razza ariana l'unica preoccupazione del giurista ha da essere procedurale, cioè egli deve esser pago unicamente dell'osservanza corretta delle procedure previste. Il contenuto sembra non contare, e la società italiana del 1938, ivi compresi i molti cittadini israeliti, non è toccata dalle iniquità immesse nella norma da un legislatore aberrante.

Ancora: « il valore, cioè il valore per il diritto, è determinato dai criteri procedurali…valore è la validità procedurale » (33). Discorso chiaro e fermo, recante in sé il coraggio della sincerità; discorso che

(30) *La proposta della neo-esegesi (a modo di prefazione)*, in *Scuole e figure del diritto civile*, Milano, Giuffrè, 1982 (ristampata autonomamente anche in *Giustizia civile*, XXXI (1982).

(31) N. IRTI, *Nichilismo e metodo giuridico*, in *Rivista Trimestrale di Diritto e Procedura Civile*, LVI (2002), p. 1159 ss..

(32) N. IRTI - E. SEVERINO, *Dialogo su diritto e tecnica*, Bari, Laterza, 2001, pp. 7-8.

(33) Ibidem, p. 9.

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funge da premessa alla conclusione dell'ultimo Irti, amaro contemplatore di un ordine giuridico ridotto *hic et nunc* per i suoi occhi a una miserevole crisalide rinsecchita: « le norme sono venute nell'esclusivo e totale dominio della volontà umana…, al pari di qualsiasi bene di mercato, sono 'prodotte': vengono dal nulla e possono essere ricacciate nel nulla. La forza che le 'produce', ossia le chiama innanzi o le rifiuta, le costruisce o le distrugge, è soltanto il volere degli uomini » (34). Vengono dal nulla, sono legate al potere e al volere di uomini; si potrebbe chiosare: all'arbitrio di uomini. Ed è ovvio che la conclusione lasci amara anche la bocca di chi la pronuncia; ed è ovvia la scelta finale che è pessimistica, addirittura nichilistica; ed è ovvio che, in altra pagina, Irti veda lo svuotamento dello Stato come l'apertura di un abisso da cui prorompono forze (aggiungo io: negative) prima rattenute e compresse.

La posizione di Irti — me lo consenta il mio vecchio e caro e stimabile amico — è simile a quello studioso, protagonista di un antico apologo, che, avendo invaso da un ventaccio il proprio scrittoio, si dava da fare nel cercare oggetti per fermar le carte e non provvedeva invece all'unico rimedio veramente risolutivo, e cioè alla chiusura della finestra.

Il vento squassatore e demolitore può essere eliminato, o almeno di gran lunga attenuato, se si avrà il buonsenso di guardare al di là del diritto formale, di non contentarsi del suo manifestarsi in forme e norme, di coglierne quelle radici che, sempre, lo si voglia o non, attingono allo strato riposto dei valori.

Lo storico, constatando che il mito della purezza è tutto e solo moderno (e in un ben definito spazio geografico del moderno), guardando alle energiche smentite offerte dall'esperienza medievale e da quella di *common law*, si sente di protestare invece la carnalità del diritto, immerso nella vita, nascente dalla vita, proteso alla vita.

Irti, nella pagina or ora citata, analizzando il presente alla luce della sua visione, esce in questa affermazione desolante: "tutto ciò che garantiva unità e verità del diritto è ormai tramontato" (35). Ma la verità del diritto non può essere consegnata e ridotta in un testo cartaceo autoritario; la verità non può che star dietro quel testo,

(34) Irti, *Nichilismo e metodo giuridico*, cit., p. 1161.

(35) Ibidem, p. 1161.

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nella macro e micro-storia che il diritto ordina contribuendo in modo decisivo a fare di quell'ammonticchiarsi di tempi una civiltà storica. Il divenire ci offre un orizzonte di tante maturità, diversissime certamente ma ciascuna con un proprio messaggio compiuto. In questa catena ininterrotta composta di molteplici anelli differenti, il diritto muta, svaria, si rinnova, ma non tramonta mai, perché sempre sarà portatore di verità storicamente emergenti.

9. *La dimensione giuridica, la sua vocazione universalistica e il ruolo odierno del giurista.*

Riferire il diritto alla società significa corrispondere alla attuale ripugnanza verso confini netti e invalicabili, verso spazii frammentati. Liberarci d'una psicologia e d'una cultura statalistiche e potestative implica la liberazione dalla schiavitù dei confini. È lo Stato che impone frontiere, che vive di frontiere; la società, realtà complessa e slabbrata, senza immedesimazioni potestative, ha confini che non si trasformano mai in frontiere. Affrancare il diritto dal vincolo necessario con lo Stato costituisce affrancazione dagli immiserimenti della politica spicciola.

Lo storico può recare un esempio illuminante, quello dello *ius commune* medievale e post-medievale: una Europa frazionata in una miriade di poteri politici, tutti con anguste proiezioni geografiche; in ciascuna di queste, ordinanze di Principi locali, statuti di comunità, consuetudini, cioè manifestazioni giuridiche legate strettamente al territorio particolare. Ma, al di sopra, circola una dimensione giuridica universale, un ordine giuridico della vita quotidiana della comunità umana, che investe anche il particolare ma non nasce da esso, vige in ogni dove senza che ci sia bisogno di autorizzazioni da parte dei detentori del potere. È il regno sconfinato, autenticamente sconfinato, dello *ius commune*, che si contraddistingue per essere in primo luogo opera di scienziati, di maestri universitarii, di uomini di cultura insofferenti alle frontiere segnate dal potere, cittadini del mondo che trasmigrano da una sede universitaria all'altra, insegnano a studenti provenienti da ogni parte d'Europa e disegnano le linee della intelaiatura giuridica unitaria dell'orbe allora conosciuto. Nella civiltà medievale si conseguì un risultato degno di considerazione: a fronte di uno smi-

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nuzzante particolarismo politico, si staglia una dimensione giuridica universale di marchio scientifico.

Ho detto e scritto altra volta (36) che il passato non serba e non può proporre modelli per irretire il presente. Il passato può unicamente offrirci dei momenti dialettici capaci di arricchire la nostra visione monca di personaggi immersi in un tempo che stiamo vivendo e che non siamo in grado di oggettivare pienamente.

Qui il momento dialettico è forte: stiamo — ieri, oggi e ancor più domani — costruendo qualcosa di sopranazionale; qualche settimana fa (redigo questo testo nell'estate del 2003), a Salonicco, i capi di Stato hanno definito la bozza di un progetto di 'costituzione' europea. Prescindiamo dal valutare i suoi contenuti e arrestiàmoci al risultato formale. Se ostacoli ci sono stati, ci sono e ci saranno, questi sono provenuti e provengono e proverranno dalle volontà miopi ed egoistiche di uomini politici schierati ancora in difesa di interessi particolari.

Ci sorregge, ovviamente, la speranza che il cammino per l'unità politica prosegua senza intoppi, ma, forse, una strada unitaria più pervia è quella della realizzazione di una unità giuridica, cominciando da quel terreno del diritto privato, meno mescolato con le velleità dei politici, che fu la articolazione sostanziale del vecchio *ius commune*.

Stiamo dibattendo vivacemente se il futuro di un diritto civile e commerciale europeo potrà consolidarsi o non in una codificazione. Tralasciamo un èsito finale che oggi ci interessa meno e prendiamo atto di quel che si sta muovendo di straordinariamente fecondo a livello puramente scientifico: giuristi intraprendenti, prescindendo da mandati di organi statuali o internazionali, stanno tessendo in tema di contratti — e di contratti commerciali in specie — (ma anche in altri campi) una tela preziosissima di principii."Prodotti c. d. di *soft law*… sono di per sé privi di efficacia vincolante e possono

(36) Cfr. quanto sostenevo nell'Incontro internazionale organizzato in Ascona da Pio Caroni e Gerhard Dilcher nell'aprile del 1996: *Modelli storici e progetti attuali nella formazione di un futuro diritto europeo*, leggibile negli 'atti' dell'Incontro ma, più comodamente per il giurista italiano, in *Rivista di diritto civile*, XLII (1996), parte prima. Cfr. anche quanto ho ritenuto di confermare recentissimamente in: *Unità giuridica europea. Un medioevo prossimo futuro?*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 31 (2002), tomo I.

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soltanto sperare di essere applicati in pratica grazie al loro valore persuasivo" (37), ma già fin da ora se ne constata una cospicua influenza sia come modello per parecchi legislatori nazionali (con il risultato di un diritto, che, anche se nazionale, procede in modo sempre più uniforme), sia come guida nella negoziazione e redazione di contratti commerciali internazionali e nella risoluzione di controversie commerciali internazionali (38).

Si tratta, come si vede, non di esercizii teorici avulsi da ogni traduzione in realtà concrete; la loro rilevanza sta però, a nostro avviso, soprattutto in un aspetto: sono giuristi — in massima parte, uomini di scienza — che, dietro una vocazione che è tipica dello scienziato, disegnano una trama giuridica pensata come sopranazionale, tendenzialmente universale. Il cómpito di trame coraggiose che sùperino le miserie del particolare può essere affidato alla scienza giuridica, l'unica fonte che ha in sé le risorse intellettuali e spirituali per vincere tentazioni frazionistiche.

Sono giuristi, e anche ciò è assai significativo: dopo la lunga espropriazione perpetràtasi durante tutto il moderno, dopo i secoli di condanna ai lavori forzati dell'esegesi, il diritto torna ad essere quello che fu nei grandi momenti della storia giuridica occidentale, il romano e il medievale, o che è stato ed è nel pianeta del *common law*: cosa da giuristi.

Che sia tale lo prova l'attuale contesto storico con le sue vocazioni universalistiche, con giuristi protagonisti nella elaborazione e fissazione di principii, con giuristi protagonisti del fenomeno globalizzatorio (39). Oggi, questo stregone tenuto con i suoi alambicchi in una segreta del castello a servile disposizione del potente, si mostra con un suo ruolo ingigantito. Non è più il tecnico che gestisce modesti apparecchi ortopedici per sopperire alle claudicanze dell'omnipotente legislatore, ma è, lui, ultimo anello di una catena bimillenaria di tradizioni culturali, quale percettore di valori universali e altresì capace di tradurli in regole, il personaggio cui può

(37) Così M. J. BONELL, *Introduzione*, in *I principi Unidroit nella pratica — Casistica e bibliografia riguardanti i principi Unidroit dei contratti commerciali internazionali*, a cura di M. J. BONELL, Milano, Giuffrè, 2002, p. 1.

(38) La dimostrazione è nell'ampio volume citato alla nota precedente.

(39) Ho creduto di doverlo sottolineare nella mia relazione su *Globalizzazione, diritto, scienza giuridica*, cit..

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essere confidato l'ufficio impegnativissimo di tessere quella rete di cui abbiamo bisogno. Il nuovo protagonismo dei giuristi non risponde a superbia di ceto, ma a una richiesta del nostro tempo storico.

È con questo messaggio consolante che mi piace chiudere la relazione di fronte a un pubblico dove sono tanti i giovani giuristi in formazione.

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I DEUG-SU

« YTALIA » UND « GERMANIA » IM MITTELALTERLICHEN EUROPA

In mittelalterlichen Quellen stößt man des öfteren auf die Wortverbindung *Gallia atque Germania*. Nicht selten überschneidet sich dabei die Bezeichnung *Germania* inhaltlich mit deren Nachbargebieten: Bisweilen umfaßt sie die *Gallia Belgica* bzw. *Gallia Celtica*, dann wieder scheint sie der *Francia Orientalis* oder der *Francia* überhaupt zu entsprechen, und in nochmals anderen Fällen tritt sie als Synonym für *Alamania* und *Theutonia* auf. Diese Schwankungen hängen von verschiedenen Faktoren ab, vor allem aber von der Tatsache, daß eine Festlegung geographischer Bezeichnungen, mit genauer Angabe von Ausmaß und topographischen Merkmalen, die Menschen im Mittelalter nicht besonders interessierte. Was nun speziell die *Germania* betrifft, so wäre zudem daran zu erinnern, daß die zwischen Rhein und Donau liegende *Germania Romana* nur einen Teil der Gebiete ausmachte, die die Germanen bewohnten, waren sie doch auf ihren Wanderungen in alle Teile des westlichen Europa, ja bis hin nach Nord-Afrika gelangt (1).

Auf ein weiteres wichtiges Motiv wäre hier hinzuweisen: Zur Zeit, als sich die jeweilig gesprochene Sprache zum entscheidenden Faktor für die ethnische und geographische Terminologie entwickelte, machte sich die Tendenz bemerkbar, den Begriff *Theutonicus* oder *Theuto* der Bezeichnung *Germanus* vorzuziehen. Dabei blieben

(1) Vgl. W. WOSTRY, *Germania, Teutonia, Alemannia, Bohemia*, Prag, 1943; A. BORST, *Der Turmbau von Babel*, I-IV, München 1995 (Nachdruck der 1957 bis 1963 erschienenen Originalausgabe); F. GRAUS, *Lebendige Vergangenheit*, Köln-Wien, 1975; A. BORST, *Ketzer und Artisten. Welten des Mittelalters*, München-Zürich, 1988; C. BRÜHL, *Deutschland — Frankreich. Die Geburt zweier Völker*, Köln-Wien, 1990; W. POHL, *Le origini etniche dell'Europa. Barbari e Romani tra antichità e medioevo*, Roma, 2000.

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die inhaltlichen Bezüge jedoch weitgehend offen, und zu den alten Termini der *Cimbri et Theutones* bestand keinerlei Verbindung mehr.

Dies betrifft die Entwicklung ungefähr vom 10. Jahrhundert an: Besonders nachdem das Kaisertum von den *Franci* auf die Sachsen übergegangen war, ließ sich die einschneidende Veränderung, die dies bedeutete, mit einem Hinweis auf die Sprache der neuen Herrscher besser darstellen als mit einem Bezug auf deren ethnische Merkmale. Denn diese waren — auf Grund der komplexen verwandtschaftlichen Verbindungen — nicht immer besonders deutlich. Bezeichnend ist, daß Otto von Freising im 12. Jahrhundert Wert auf die Feststellung legte, daß Otto I. der erste König gewesen sei, auf den das Attribut *Theotonicus* zugetroffen habe (2). Ein derartiges Auftauchen des Begriffes *Theotonicus* läßt in diesem und in anderen Fällen ein neues 'Nationalgefühl' erkennen, das nach einer Unterscheidung von den 'Latini' strebt, zu denen die *Italici*, die *Galli* und die frankophonen *Franci* zählten — um von weiteren abzusehen. Diese neue Bedeutung des Begriffes *Theotonicus* ist von besonderem Gewicht, wenn er sich auf die *Germani* im allgemeinen bezieht oder grosse geographische Räume damit abgedeckt werden.

Die *Theutonia* war weder eine Verwaltungseinheit, noch zeichnet sie sich in den mittelalterlichen Texten durch eine genaue Lokalisierung aus. Selbst wenn damit die Gegend des *Noricum* gemeint war, zu dem auch Teile von Bayern gehörten, neigte das Bedeutungsfeld der Bezeichnung dazu, sich bis hin zum biblischen Armenien zu erstrecken — das nach einer Heiligenlegende das Herkunftsland der Bayern darstellte — um in der entgegengesetzten Richtung bis nach Spanien zu reichen. Hierhin soll *Noricus*, der mythische Begründer des *Noricum*, den Vater Herakles bei der Verrichtung einer seiner allerletzten Heldentaten begleitet haben. Jedenfalls ist, was das späte Auftreten eines 'teutonischen', d.h. pangermanischen Bewußtseins betrifft, die späte Erfindung des Gottes Teut in der germanischen Mythologie, die Thomas Ebendorfer im 15. Jahrhundert in seiner *Chronaca Austriae* (3) festhält, sehr bezeichnend.

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(2) OTTONIS episcopi Frisingensis *Chronica sive Historia de duabus civitatibus*, ed. A. Hofmeister, in: MGH, SS, XLV, Hannover, 1912.

(3) Ed. A. LHOTSKY, in: MGH, SS, XIII, München, 1967.

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Bei dieser Lage der Dinge ist einleuchtend, daß die beiden Begriffe *Germania* und *Italia* nicht so ohne weiteres gekoppelt werden konnten wie dies bei den *Franci sive Theutonici*, den *Gothi sive Getae*, den *Huni sive Hungari* oder *Huni sive Avares* — um nur diese Beispiele zu nennen — der Fall war. Jedoch neigte Gottfried von Viterbo im 12. Jahrhundert dazu, eine Parallele zwischen den *Theutonici* und den *Italici* zu ziehen, allerdings auf einer ganz anderen Ebene. Drei Werke von ihm sind dazu heranzuziehen: das *Speculum Regum*, die *Memoria seculorum* und das *Pantheon* (4). Das *Speculum* ist in Versen abgefaßt und Heinrich VI., dem Sohne Friedrich Barbarossas, gewidmet. Das Gedicht möchte dem Leser eine vollständige *genealogia omnium regum et imperatorum Troianorum et Theutonicorum* vor Augen führen, von der Sintflut bis in die Zeit des Autors, und weist einen Zusatz auf, der sich mit den *gesta* Barbarossas befaßt. Im Incipit kommt Gottfried implizit zu der Feststellung, daß sich die *Theutonici* aus den *Franci*, den *Sassones*, den *Svevi* und den anderen *Germani* zusammensetzen. Dem liegt eine generelle, verallgemeinernde Bedeutung des Begriffes *Theotonicus* zu Grunde, die Gottfried — einer nunmehr verbreiteten Tendenz folgend — mit größter Ungezwungenheit anwendet. Die Karolinger versteht er dabei als *Theutonici*, woraus sich u.a. das Folgende ergibt: Die Unterbrechung, die durch die *translatio imperii* von den *Franci* zu den *Sassoni* eintritt, läßt sich eleminieren, und die Legende der Abstammung der *Franci* von Troja auf die *Theutonici* übertragen; zudem kann die *nobilitas* der *Theutonici* in Parallele zur *nobilitas* der *Romani* und der *Ytalici* gesetzt werden.

Die Parallele, die Gottfried hier zieht, ist natürlich nicht neu: Wir kennen die Geschichtsdarstellungen von Fredegar, Sigebert von Gembloux, Honorius Augustodunensis, Otto von Freising und anderen. Aber bei Gottfried ist die Parallele besonders interessant, vor allem weil er sie ausdrücklich dazu benutzt, um zu zeigen, daß sich die *Theutonici* und die *Romani* oder *Ytalici* zu einem Reich und einem Volk (*unum regnum* und *unus populus*) verbinden müssen. Nach Gottfried beruht die gemeinsame *nobilitas* der beiden Völker auf ihrer Zugehörigkeit zum trojanischen Geschlecht, das auf den

(4) Ed. G. Waitz, in: MGH, SS, XXXII, Hannover, 1872, S. 21-93, 98-104, 138-303.

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ersten König von Athen zurückgeht, der seinerseits von Sem, dem Sohn Noahs, abstamme. Die Herleitung der 'teutonischen' und 'italischen' Könige von Sem ist ungewöhnlich, da der patristischen und mittelalterlichen Bibelexegese zufolge die drei Söhne Noahs (Sem, Ham, Japhet) die Vorfahren der Völker der drei Erdteile sind: also Asiens, Europas und Afrikas (Sem der Völker Asiens, Ham derjenigen Afrikas und Japhet der Völker Europas). Auch Gottfried selbst folgt in seinem *Pantheon* diesem Schema. Noch spezieller wird Sem jedoch in der mittelalterlichen Überlieferung als der Ahnherr der Juden betrachtet, der die priesterliche *dignitas* auf diese übertragen habe. Vermutlich ging es Gottfried darum, eine solche oder eine entsprechende *dignitas* auch dem Königtum 'teutonischer' bzw. 'römischer' Qualität zuzuschreiben. Jedenfalls zeigt sich bei ihm ein gewisser Proselytismus, wenn er die parallele Abstammung der *Theutonici* und der *Romani* oder *Ytalici* von der königlichen *prosapia* in Athen bis in jüngere Zeiten verfolgt. In seinen Augen hat sich diese *prosapia* in zwei Zweige aufgeteilt, an deren Anfang jeweils Priamus und Anchises stehen. Von dem jüngeren Priamus nun, einem Neffen des *Magnus Priamus* und Sohn seiner Schwester, stamme die *universa Theutonicorum nobilitas* ab (5).

In Karl dem Großen seien dann die beiden parallel verlaufen-

(5) S. auch andere Quellen: *Historia Daretis Frigii de origine Francorum*, ed. B. KRUSCH, in: MGH, SS.r. Merov., II, Hannover, 1888, S. 199; GREGORIUS VON TOURS, *Liber historiarum Francorum*, ed. B. KRUSCH, ibid., S. 241-242; *Gesta Treverorum*, ed. G. WAITZ, in: MGH, SS, X, S. 130-131, 134-158; ADAM VON BREMEN, *Gesta Hammaburgensis ecclesiae*, ed. B. SCHMEIDLER, in: MGH, SS. r. Germ., Hannover, 1917, S. 4-6, 61, 79, 159, 248-249; WIPO, *Gesta Chunradi II. Imperatoris*, ed. H. BRESSLAU, in: MGH, SS r. Germ., Hannover/Lepzig 1915, S. 16; HUGO VON FLEURY, *Historia regum Francorum*, ed. G. WAITZ, in: MGH, SS, IX, Hannover, 1851, D. 395; VINZENZ VON BEAUVAIS, *Speculum Historiale*, Douai, 1624 (Nachdr. 1965), S. 24-28; THEODORICH AEDITUUS VON DEUTZ, *Summa chronicorum*, ed. O. HOLDER-EGGER, in MGH, SS, XIV, Hannover, 1883, S. 571-573; *Die „Gesta Hungarorum" von Simon Kézai*, ed. A. DOMANOVSZKY, in: SS. Rer. Humgarorum, I, Budapest, 1937; G. SILAGI/L. VESPRÉMY 8 edd. 9, *Die "Gesta Hungarorum" des anonymen Notars*, Sigmaringen, 1991, S. 28; *Marci chronica de gestis Hungarorum*, edd. F. TOLDY/C. SZABÜ, Budapest, 1876, II-III; JOHANNES VON VIKTRING, *Liber certarum historiarum*, ed. F. SCHMEIDLER, in MGH, SS, r. Germ., Hanover/Leipzig 1909/1910, S. 239-241; AENEAS SYLVIUS PICCOLOMINI, *Cosmographia*, Helmstadt, 1700. S. 299. Vgl. A. BORST, *Der Turmbau von Babel* I-IV, München, 1995 (Nachdr. der Originalausgabe 1957-1963); H. HOMMEL, *Die Sage von der trojanischen Herkunft der Franken*, in: Württembergisch-Franken, N. F. 50, 1966, S. 11 ff.

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den Abstammungslinien zusammengelaufen. Denn dieser stamme väterlicherseits vom trojanischen Geschlecht ab, da sein Vater, Pippin der Jüngere, *rex Theutonicorum* gewesen sei; gleichzeitig aber habe er in Verbindung zu den *reges et imperatores Ytalici* gestanden, und zwar durch seine Mutter Bertha, da deren Mutter, wie Gottfried meint, eine Tochter des byzantinischen Kaisers Heraklius gewesen und somit dem *genus imperatorum et Grecorum* zuzurechnen sei. Die Herkunft Berthas aus Byzanz war zweifellos ad hoc erfunden, um die doppelte Abstammung von der trojanischen *nobilitas*, die Karl der Große geerbt habe, zu demonstrieren, den Gottfried als *patre Theutonicus et matre Romanus* bezeichnet. Diese zweifach vornehme Abstammung Karls des Großen sei durch die päpstliche Salbung, die der Petrus-Nachfolger Zacharias seinem Vater, dem Karolinger Pippin, im Jahre 752 erteilt habe, besiegelt worden sowie durch die Kaiserkrönung Karls des Großen selbst, die im Jahre 800 in Rom stattfand. Gottfried legte jedoch Wert auf die Feststellung, daß Karl das *imperium* auf Grund eigener Qualität (wörtlich: *suis viribus*) in Händen halte. Damit sollte die absolute Gleichheit gegenüber dem Königtum der 'italischen' Könige und Kaiser und gegenüber allen anderen mit *sceptra regalia seu imperialia* Begabten deutlicher herausgestellt werden — auch gegenüber dem *patrimonium*, das Konstantin der Große Papst Sylvester verliehen habe. Was das *Constitutum Constantini* (6) betrifft, so hatte Otto III. ein Jahrhundert zuvor Zweifel an seiner Echtheit geäußert, und auch Friedrich II., der Sohn Heinrichs VI., sollte seine Verwunderung darüber zum Ausdruck bringen — das war jedoch erst ein halbes Jahrhundert nach dem Tode Gottfrieds. Vermutlich paßte ihm die plumpe Fälschung, die das *Constitutum Constantini* darstellte, in seine gewagten Erfindungen hinein, mit denen er die Abstammung seiner Könige darzustellen suchte — ja, sie diente ihm dazu, die Würde des *imperium Theutonicum* zu erhöhen, indem er auf dessen Funktion, die Wahrung der Schenkung Konstantins zu garantieren, hinwies.

Im *Speculum* stoßen wir auch auf weitere Parallelen zwischen den *Theutonici* und den *Ytalici*. Sie werden zwar nur implizit

(6) Ed. H. FUHRMANN, in: MGH, *Fontes iuris Germanici Antiqui* i.u.s.s.e., X, Hannover, 1968 (Nachdruck 1984).

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geäußert, waren im mittelalterlichen Kontext aber eindeutig zu verstehen: Die gemeinsame *propago* der *Theutonici* und der *Ytalici* hatte sich nach Gottfried, wie gesagt, in zwei *semina* aufgeteilt, von denen das eine das Diadem in Rom erlangte, das andere die *Theutonica regna beata* in Händen hielt. Die Parallelität zu den unmittelbar zuvor erwähnten *dyademata Rome* ist hier nicht zu übersehen.

Die einzelnen Etappen, die die trojanischen Flüchtlinge auf ihrer Wanderung zurücklegten, sind von großem Interesse. Sie ließen sich nach Gottfried zunächst in der *Ungaria* nieder, die der Autor auch *Pannonia* nennt, wo sie ein neues Troja mit dem Namen *Sicambria* gründeten, worauf ihre neue Bezeichnung *Sicambri* zurückzuführen sei. Von hier aus gelangten sie zu neuer Macht, indem sie angrenzende Gebiete eroberten. Im Laufe dieser Invasionen nahmen sie das ganze Germanien (*tota Germania*) ein, in dem sie schließlich, zusammen mit den unterworfenen Stämmen, ein Volk (*unus populus*) und eine vollkommene Gemeinschaft bildeten, in der die Prinzipien des *commune bonum*, der *communis vita* und des gemeinsamen Ruhmes (*una pompa*) galten (Verse 727-729: *Nunc ducibus regitur populus; quodcumque lucratur / Est commune bonum, communis vita paratur, / Unus ei populus unaque pompa datur.* Die *Germania* erscheint hier als die neue Heimat der *Sicambri*, die sich — von der Lieblichkeit der Natur angezogen — dort niederließen und die neue 'teutonische' Sprache und die neuen 'teutonischen' Gewohnheiten annahmen und sich schließlich per Gesetz *Germani* nannten. Auf diese Weise sei dann das ein Volk (*unus populus*), das zugleich germanisch (*Germanus*) und 'teutonisch' (*Theutonicus*) gewesen sei, entstanden. Das geschilderte Eroberungsgeschehen spiegelt, so scheint es uns, in etwa die 'Gesta' der Hunnen wider, denen man zur Zeit Gottfrieds anfing, große Beachtung zu schenken, und zwar in gleichem Maße wie die *Hungari*, die sich *Huni sive Hungari* nannten, allmählich auf der politischen Bühne des Okzidents an Bedeutung gewannen.

Doch sind die Begriffe *unus* und *communis* von größerer Bedeutung, da sie Gottfrieds erklärtem Vorhaben entsprechen, die Einheit des 'teutonischen' (*theutonicus*) und des italischen (*ytalicus*) Volkes darzustellen. An dieses Vorhaben hält sich Gottfried bei seiner Erzählung sehr eng. Auf die liebliche Natur in der *Germania* haben wir schon hingewiesen. Auch diese Lieblichkeit steht bei

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Gottfried in Parallele zu Lieblichkeit der Natur in der *Ytalia*, die im Mittelalter — wie deren *nobilitas* — ein gängiger Topos war. Die weitere Darstellung Gottfrieds geht dann zu ausgesprocheneren Parallelen über, die die Einheit von *Germani* und *Romani* unter Beweis stellen sollen: Jenseits der Alpen lag die Alleinherrschaft in den Händen der *Germani*, während in *cuncta Cisalpina regna* die *Romani* die gleiche Funktion ausübten. In einer solchen Situation absoluter Parität sollten nach Gottfried die beiden Herrschervölker wie Brüder vereint sein. Diese brüderliche Einheit sei im übrigen durch das Band ihrer gemeinsame Herkunft vorherbestimmt, auf Grund dessen beide Völker — einst *alumpni* von *Troia* — jetzt *domini summi* und *consocii* seien. In den Versen 774-776 faßt Gottfried dann seine Überlegungen in der folgenden Weise zusammen: *Romanus fore Troianum natura fatetur; / Germanus patriota suus fraterque videtur, / Troia suis populis mater utrique fuit* — wobei er sich das Wortspiel *Germanus* und *frater* zunutze macht. Diese Verse könnte man in der folgenden Weise paraphrasieren: Der Trojaner ist, so sagt man, seiner Natur entsprechend zum Römer geworden, sein Landsmann (der Natur entsprechend) zum 'Germanen', d.h. zu seinem 'Bruder'. Denn beide hatten *Troia* zur Mutter.

Auf Grund dieses Verhältnisses der Parität wird nach Gottfried der *Iermanus* (d.h. *Germanus*) zum *civis Romanus* und das Imperium zum *communis patriae regnum*, das von beiden zum gemeinsamen Ruhm errichtet wird. Die Parität der beiden Völker demonstriert auch die Episode von der Invasion der *Germani* in die *Maeotidae paludes* gegen die *Alani*, die sich gegen die *Romani* erhoben hatten. Die *Germani* eilten den *Romani* zur Hilfe, zwar von der versprochenen Belohnung angespornt, vor allem jedoch deshalb, weil sie die *consocii* der Römer waren.

Der Sieg der *Germani* wurde durch die neue Bezeichnung *Franci* besiegelt, die ihnen Valentinian *ex lege* zuteilte, um damit ihre *feritas* zu preisen. Dieser Sieg stellte auch die Wende zu einem noch glücklicheren Schicksal dar, das dazu führte, daß schließlich die *Francia summa* gegründet worden sei, als deren größter Repräsentant Karl der Große zu gelten habe. Das Gedicht schließt mit einem Hinweis auf die *corona*, die Karl *in Urbe*, in Rom, verliehen worden sei. Gottfried beendete also seine Darstellung mit einem Lobpreis der *Francia* und der *Franci*, hatte aber auf die synonyme Bedeutung

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dieser Begriffe mit dem Terminus *Theutonicus* (und seinen Ableitungen) schon im Incipit des zweiten Buches hingewiesen, als er dessen Inhalt mit den Worten *De progenie regum Teutonicorum seu Francorum* zusammenfaßte. Diese Synonyme gehören im Grunde in die Reihe der weiteren gleichbedeutenden Ausdrücke, die sich in Gottfrieds Erzählung finden: wie die *Sicambri*, die sich in der *Ungaria* bzw. *Pannonia* aufhalten, oder die *Germani* bzw. *Franci*, die in der *Germania* leben.

Das besondere Anliegen, das Gottfried in seiner Erzählung verfolgt, läßt sich deutlicher erkennen, wenn wir damit kurz die Darstellungen vom trojanischen Ursprung der Franken vergleichen, die vor ihm geschrieben worden sind.

Die im siebten Jahrhundert entstandene Chronik Fredegars ist bekanntlich im Mittelalter eine wichtige Quelle gewesen (7). Ihr Autor will, was die trojanischen Flüchtlinge betrifft, vor allem zeigen, daß sie in der *Asia* und der *Europa* verbreitet gewesen seien und, nachdem die *Macedoni* und *Romani* ihre Kraft verloren hatten, die Rolle der Beherrscher des *orbis* übernommen hätten. Fredegar nennt *Priamus* als ersten König der Flüchtlinge, erwähnt Anchises und Äneas aber nicht. Später, zwischen dem 11. und 12. Jahrhundert, schreibt Sigebert vom Gembloux die Geschichte noch einmal und geht dabei mehr in die Einzelheiten, wozu er verschiedene andere Quellen heranzieht (8). Er teilt die trojanischen Flüchtlinge in zwei Gruppen: an der Spitze der einen habe Äneas gestanden, an der der anderen *Antenor*, der mit den Seinen *in finitimas Pannoniae partes secus Meotides paludes* gezogen sei. Dann berichtet er von dem neuen großen Volk von *Sicambria*, das sich bis zu den *Galliae* (*usque ad Gallias ferocitatis suae vestigia dilataverunt*) hin erstreckt habe, dann aber von Konstans, dem Sohn Konstantins des Großen, besiegt und unterjocht worden sei. Als später Valentinian als Belohnung für diejenigen, die die *Alani* in den *intransibiles Meotides paludes* besiegen würden, eine 10jährige Befreiung von Tributzahlungen versprochen habe, sei dies für die Flüchtlinge eine Gelegenheit gewesen, wieder an Bedeutung zu gewinnen.

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(7) *Chronicarum quae dicuntur Fredegarii Scholastici* libri IV, ed. B. KRUSCH, in: MGH, SS. r.Merov., II, Hannover,1888, S. 92-95.

(8) *Chronica*, ed. L. C. BETHMANN, in: MGH, SS, VI, Hannover, 1884, S. 300-302.

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Sigebert verweist in diesem Zusammenhang auf Priamus als *dux* des Heeres der trojanischen Flüchtlinge. Nach ihrem Sieg seien sie von Valentinian zunächst *Antenoridae*, dann *Sicambri* und auch *Franci* genannt worden, was die griechische Entsprechung von lateinisch *feroces* darstelle. Sigebert teilt uns weitere Erklärungen für den Namen *Franci* mit und spricht über einen *Priamus*, der in der Zeit vo r Valentinian gelebt habe und der das Volk durch seinen Namen an die *nobilitas illius Priami sub quo eversa est Troia* erinnert habe. In erster Linie war Sigebert jedoch an den Barbaren interessiert, die die Welt beherrschten und die — nach Darstellung des Jordanes, eines Autors aus dem 6. Jahrhundert und Sigeberts hauptsächlicher Quelle (9) — fast alle aus der *Scythia* kamen. Die Geschehnisse, von denen er uns berichtet, spielen sich zu großen Teilen vor in der *Scythia*, der *Pannonia* und den *Maeotidae paludes* ab.

Honorius Augustodunensis hingegen, der seine Werke im 12. Jahrhundert verfaßte, erwähnt lediglich die Flüchtlinge *Francus* und *Aeneas* (10). *Francus* habe ein neues Troja am Rhein gegründet, in einem Gebiet, das dann — nach seinem Namen — *Francia* genannt worden sei. Aber diesem Hinweis läßt der Autor keine weiteren Überlegungen folgen. Etwas später, immer noch im 12. Jahrhundert, geht Otto von Freising ausführlicher auf die Geschichte der Flüchtlinge ein, wobei er auf Sigebert von Gembloux zurückgreift (11). Da ihn aber hauptsächlich die Beziehung zwischen den *Romani* und den *Franci* interessiert, übergeht er die Episode des Sieges über die Alanen, berichtet vielmehr, daß den Flüchtlingen die *libertas* auf Grund ihrer freiwilligen Unterwerfung unter die *Romani* gewährt worden sei. Dann allerdings erwähnt er diese 'Freiheit' mit Nachdruck in einem anderen Zusammenhang, in dessen Mittelpunkt *Priamus* und *Antenor* stehen: Sie seien die Fürsten gewesen, die sich auf Grund der *libertas* ihres Volkes gegen die *Romani* erhoben hätten; und Otto von Freising erklärt diesen ihren ausdrücklichen Freiheitswillen mit ihrer Herkunft aus Troja.

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(9) *De Getarum sive Gothorum origine et rebus gestis*, ed. C. A. Clos, Stuttgart, 1866, S. 13-188.

(10) *De imagine mundi*, in: PL, 172, Sp. 121-133.

(11) *Chronica*, ed. A. Hofmeister, in: MGH, SS r. Germ., Hannover/Leipzig, 1912, S. 22 und 31-32.

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Von diesen Berichten über die trojanischen Flüchtlinge finden sich im *Speculum regum* Gottfrieds von Viterbo nur wenige Elemente wieder. Aber gerade sie offenbaren indirekt, welches Anliegen seiner Erzählung zu Grunde lag und was ihn dazu bewegte, die Geschichte der Flüchtling fast völlig umzuschreiben. Die Tatsache jedoch, daß auch im *Speculum* im wesentlichen die gleiche geographische Bühne, auf der sich die Geschehnisse abspielen, auftaucht wie in den Gottfried vorliegenden Quellen, macht einen weiteren Vergleich mit dem mittelalterlichen Kontext notwendig. Die wiederholt erwähnten Gebiete *Pannonia*, *Ungaria* und *Maeotidae paludes*, gehörten nach mittelalterlichem Verständnis zur *Scythia*, die man sich zwischen Asien und Europa gelegen vorstellte.

In der Antike rühmte sich die *Scythia*, wie Herodot im vierten Buch seiner *Historien* erzählt, eine ältere Kultur als Ägypten zu besitzen; sie sei auch der Ort gewesen sei, an dem die Prometheus-Tragödie des Äschylos gespielt habe. In römischer Zeit wurde die *Scythia* an den Rand gedrängt, um dann im Mittelalter — in ganz anderem Zusammenhang — als bevorzugte Bezeichnung für das Gebiet zurück zu kehren, das man als Wiege der Barbarenvölker betrachtete, die sich über ganz Europa ergossen hatten (12).

In den mittelalterlichen Quellen (13) erscheint die *Scythia* auf Grund ihrer ungewöhnlichen natürlichen Gegebenheiten und der Legenden, die sich gerade daran knüpften, von Geheimnissen umgeben: Ihre Sümpfe, die *Maeotidae paludes*, seien vom Meer und einer Wüste umgeben, die man bisweilen als *Dimirice Evilat* bezeichnete, wie die imaginäre Wüste an den Grenzen Indiens hieß, an deren äußerstem, unerreichbaren Ende sich der Garten Eden befinden sollte. Die *paludes* seien *intransmeabiles* oder *inaccessibiles* gewesen und daher niemals von anderen Völkern erobert worden (nicht einmal von Darius oder Alexander dem Großen, Pyrrhus oder Julius Cäsar; und wenn die Hunnen oder Ungarn doch in diese Sümpfe einzudringen vermochten, so sei dies nur durch die wun-

(12) Vgl. *Popoli delle steppe: Unni, Avari, Ungari*, Spoleto, 1988 (XXXV Settimana del Centro italiano di studi sull'alto medioevo).

(13) Unter anderen Isidor von Sevilla, Jordanes, der Geographus Ravennas, Vinzenz von Beauvais, die *Gesta Hungarorum* des anonymen Notar, die *Gesta Hungarorum* von Simon von Kézai.

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derbare Hilfe eines Hirsches möglich gewesen, der ihnen den Weg zu der einzigen existierenden Furt gewiesen habe). Durch die unzugänglichen *paludes* seien die von den *Gothi* verlassenen Ehefrauen geirrt, aus deren Verbindung mit den *silvestres homines* die Hunnen hervorgegangen seien, und hier hätten sich auch die Prostituierten und Zauberinnen aufgehalten, die — von den Hunnen verjagt — als *Amazones* weiterlebten. Als Vaterland der Hunnen, die unter Attila die Funktion des Gottesurteils, des *flagellum Dei* übernommen hätten, um die Sittenlosigkeit der Christen bestraften, galt die *Pannonia*. Weitere Legenden um die in der Nähe der Sümpfe liegenden *Caspia Porta* schlossen sich an: Alexander der Große habe sie zum Schutze 'Europas' vor den *gentes immundae* verriegelte, bevor sie von den grausamen Hunnen durchbrochen worden sei (14).

Die mittelalterlichen Quellen stellen die *Scythia* als ein gastfreundliches Land dar — trotz oder gerade wegen ihrer weiten Steppen und der soeben erwähnten Charakteristiken. Sie gilt als beinahe obligatorische Etappe für die auf Wanderschaft befindlichen Barbarenstämme, die sich dort niedergelassen und so sehr vermehrt hätten, daß sie sich auf die Suche nach einer neuen Heimat begeben mußten. Damit habe dann die Geschichte der Goten, Hunnen, Langobarden und anderer germanischer Völker begonnen. Die moderne Wissenschaft hat denn auch die *Scythia* mit einem 'Zauberhut' verglichen, aus dem all die kühnen Barbarenvölker 'hervorgesprungen' seien, die Europa zusammen mit den Griechen und Römern bevölkerten. Auf Grund der phantastischen geographischen Vorstellungen des Mittelalters lassen sich die Grenzen der *Scythia* schwer definieren: So erstreckte sie sich im Okzident bis hin zur *Germania* und der *Histria*, um im Norden beinahe bis zum baltischen Meer zu reichen: Hinweise des Geschichtsschreibers Jordanes (6. Jahrhundert) und Adams von Bremen (11. Jahrhundert) gehen in diese Richtung. Jordanes berichtet, dasss die *Gothi* oder *Getae* usprünglich auf der *Scancia Scythiae insula* gelebt hätten, während Adam von einer in der Nähe des baltischen Meeres

(14) Z. B. die Alexander-Legende in der *Historia Alexandri Magni* von Quilichinus von Spoleto, ed. W. KIRSCH, QUILICHINUS DE SPOLETO, *Historia Alexandri Magni*, Skopje, 1971.

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gelegenen skythischen Stadt *Iumna* spricht, die die größte Stadt 'Europas' gewesen sei (15).

Was die Verbindung zwischen der *Scythia* und der *Germania* betrifft, so ist eine Bemerkung, die sich in der *Cosmographia* von *Ethicus Ister* befindet, von Interesse. Das Werk läßt sich schwer einordnen, ist aber vielleicht von einem *Scytha* Ende des 7. Jahrhunderts verfaß (16). Es heißt dort, ein Trojaner namens *Franco* hätte sich, *via Raetia*, in die unzugänglichen Wüsten (*invia et deserta*) der *Germania* zurückgezogen. Diese Beschreibung der *Germania* erinnert bis zu einem gewissen Grade an die landschaftliche Charakterisierungen, wie sie für die *Maeotidae paludes* und die *Scythia* typisch waren.

Die phantastischen Züge der *Scythia* zeigen uns, daß ihre symbolischen Bedeutung von vielen mythischen Motiven durchdrungen war, und machen deutlich, wie stark das geheimnisvolle Land die Vorstellungskraft des Mittelalters beschäftigte. Neben den mythischen spielten die biblischen eine große Rolle, die sich an Japhet, den dritten Sohn Noahs knüpften, der sich in der *Scythia* niedergelassen haben soll, und die die apokalyptischen Völker Gog und Magog, das Urbild der Barbarenhorden, einbezogen.

Die Geschichte von den drei Söhnen Noahs Sem, Ham und Japhet, Gen. 9, 18 bis 27, ist bekannt. Die patristischen und mittelalterlichen Quellen interpretieren sie in der folgenden Weise: Die Nachkommen Japhets werden mit den Nicht-Juden identifiziert, die sich nach der Prophezeiung Noahs bis hin zu den Zelten Sems, des Ahnherrn der Juden, ausdehnen. Die Nicht-Juden sind die *multitudo* der zum christliche Glauben Berufenen; ihre schnelle Vermehrung zeigt sich auch an der etymologischen Bedeutung des Namens Japhet (nämlich *latitudo* und *dilatatio*). Mit diesen Erklärungen verbindet sich dann die Theorie des *tripertitus orbis* verbunden, wobei die drei Teile des *orbis* den drei Söhnen Noahs entsprechen und *Europa* zum Land Japhets, des dritten Sohns, (*tertia orbis pars*) und seiner Nachkommen wird.

Schon Flavius Josephus (†95) teilte mit, daß die Söhne Japhets bis zum Fluß *Tanais* und dem *Taurus*-Gebirge gekommen seien, den

(15) MGH, SS.r.G.in u.s.s.e. II, Hannover, 1977.

(16) O. PRINZ (ed.), *Die Kosmographie des Aethicus*, München, 1993.

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emblematischen Orten des *initium* von Europa (17). Später hat Hieronymus die gleiche Vorstellung wiederholt (18). Auch Isidor bleibt grundsätzlich dabei, mißt aber dem einheitlichen Gebiet *Skytiens* größere Bedeutung bei (19): Er stellt fest, daß die erste *regio* von *Europa*, die *Scythia inferior* sei, schreibt aber der Nachkommenschaft Japhets die gesamte *Scythia* zu, die sich zum Orient hin bis auf einen Teil Asiens erstrecke (20). Er stellt die *Scythia* als ein geheimnisvolles, schwer zugängliches Land dar, in dem unter anderem die *Maeotides paludes* von ungeheurer Ausdehnung seien — ein Land, das von Indien, in Asien, bis an die Grenzen Germaniens reiche. Dieses Bild, das Isidor von Scythien entwickelt, ist wichtig um die Vorstellung vom *initium Europae* im Mittelalter zu verstehen, die in einer besonderen Verbindung zu Asien steht, als dessen *prima regio* Indien gilt. Die Definition Indiens sollte kanonische Geltung erlangen, wie es uns der Geographus Ravennas um 700 (21) und eine Reihe anderer Autoren aus späterer Zeit vor Augen führen. Kurz vermerkt sei noch, daß Isidor auch den Garten *Eden* in Indien lokalisierte, und zwar jenseits riesiger, unzugänglicher Wüsten, geschützt durch eine von Engeln bewachte Feuermauer. Genau in diesem Gebiet tauche auch die Sonne nach ihrer geheimnisvollen nächtlichen Bahn wieder auf.

Die für Japhet bestimmte *Scythia* weist also die oben geschilderten Dimensionen auf und hat emotionale, religiöse und kulturelle Verbindungen zu Asien. In diesem Bilde der *Scythia* ist die Verbreitung der Nachkommen Japhets Realität geworden, die vom *Taurus*-Gebirge ausgehend, im Orient bis nach Asien hinein gelangen und

(17) *Antiquitates Iudaicae*, übers. V. H. St. J. THACKERAY, in: Loeb Library IV, S. 117-119.

(18) *S. Hieronymi presbyteri Hebraicae quaestiones in libro Geneseos*, ed. P. DE LAGARDE, in: *Corpus Christianorum*, SL, 72, Turnhout, 1959, S. 11: « Iafeth filio Noe nati sunt septem filii, qui possiderunt terram in Asia ab Amano et Tauro Syriae Coeles et Ciliciae montibus usque ad fluvium Tanain ».

(19) Ed. W. M. LINDSAY, *Isidori Hispalensis episcopi Etymologiarum sive Originum libri XX*, Oxford 1857, lib. IX,II: *De gentium vocabulis*, und lib. XIV,IV: De Europa. Vgl. Auch *De laude Spaniae und De origine Gothorum*, ed. Th. MOMMSEN, in: MGH, AA, XI, Berlin, 1894, S. 267-295.

(20) *Ebenda*.

(21) *Cosmographia*, ed. J. SCHNETZ, in: *Itineraria Romana*, Stuttgart, 1990. S. 15.

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im Okzident *omnem Europam usque Oceanum Brittanicum* (22) in Besitz nehmen. Kurz, die Skythen sind eine *gens antiquissima*, voller Geheimnisse (so gehört z.B. *Zoroastres, inventor magicae artis* und König der Baktrer zu ihnen) und besitzen große körperliche und kriegerische Tüchtigkeiten (selbst die Amazonen sind ihnen zuzurechnen). Die *Scythia* ist aber auch die Wiege anderer starker Völker. In diesen Zusammenhang gehört die enge Verbindung, die nach Isidor zwischen den Völkern besteht, die von den ersten Söhnen Japhets, Gomer und Mag, abstammen: die Gallier von ersterem und die Skythen und Goten von dem zweiten, wie Hieronymus berichtet.

Ohne hier weitere Belege meiner — im übrigen keineswegs abgeschlossenen — Forschungen häufen zu wollen, möchte ich noch einen kurzen Blick auf die, wie ich sie nennen möchte, 'skythische' Geschichtsschreibung werfen, d.h. auf die beiden frühesten ungarischen Geschichtsdarstellungen, die die bei Regino von Prüm zwischen dem 9. und 10. Jahrhundert zuerst auftauchende Gleichsetzung von Ungarn und Skythen übernommen haben: auf die (um 1200 verfaßten) *Gesta Hungarorum* eines anonymen Notars (23) und auf ein weiteres Werk mit gleichem Titel von Simon von Kézai (†nach 1285) (24). Beide Werke zeigen sich vom 'skythischen Geist' durchdrungen. Ich würde darin nicht, wie es die neuere Literatur tut, lediglich den Ausdruck eines gewissen Patriotismus erkennen, sondern hier ein neues geschichtliches Interesse am Werke sehen, das vom 'skythische Geist' Europas geprägt ist — ein geschichtliches Interesse, das noch eingehender zu untersuchen wäre.

Die Werken des ungarischen Anonymus und Simons von Kézai berichten uns im Grunde von den sagenhaften Heldentaten der Ungarn während ihrer kriegerischen Streifzüge, weswegen sie, wie in den Quellen zu lesen ist, auch Haß, Verachtung und Schrecken eingeflößt haben — neben heimlichem Respekt für ihre kriegerische Tüchtigkeit. Diese hervorragenden Krieger hätten sich, nach den

(22) *Etymologiae* lib. IX, ii.

(23) G. SILAGI-L. VESPRÉMY (ed.), *Die "Gesta Hungarorum" des anonymen Notars*, a.a.O.

(24) Ed. A. DOMANOVSZKY, in: *SS. Rer. Hungarorum*, I, a.a.O.

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beiden Chronisten, in der unzugänglichen, von niemandem berührten *Scythia* gestählt. Auch die Bezeichnung Attilas, der gleichfalls den Skythen zugerechnet wird, als *flagellum Dei* zeigt vor allem die Angst, aber auch die Bewunderung, die die Hunnen hervorgerufen haben. Der anonyme Notar verspürt keinerlei Bedenken, den Ursprung der Stämme Skythiens auf Gog und Magog zurückzuführen, die apokalyptischen Verbündeten des Satans, zu denen — wie er meint — auch Alexander der Große gehört habe. In seiner ganz auf die *Scythia* und die Darstellung des Kriegsruhms der Ungarn konzentrierten Erzählung findet sich vielleicht ein Anklang der *Europa*-Idee, wenn er beschreibt, daß sich die besonderen Fähigkeiten der Skythen durch die Eroberungen Attilas und des ersten Königs der Ungarn Almus nach Westen hin verbreitet haben.

Auch Kézai weist im *Prologus* auf die dunkle Vorgeschichte der Ungarn hin: Sie stammten von weiblichen Dämonen ab, die durch die *diserta* und die *paludes Maeotides* geschweift seien. Allerdings beziehen sich seine Quellen (Hieronymus, Orosius usw.) dabei auf die Hunnen, denn die Bezeichnung *Hungarus* kommt überhaupt erst im frühen Mittelalter in Gebrauch. Die mangelnden Trennung zwischen den *Hungari* und den anderen Stämmen Skythiens und der Grenzgebiete nutzend, schreibt Kézai den Ungarn — beinahe mit Gefallen — die ursprünglich den Hunnen geltenden diffamierenden Geschichten zu. Er spricht auch ganz explizit von den *Huni sive Hungari*, um die *feritas* Attilas und der Hunnen für die Ungarn in Anspruch nehmen zu können.

Für Simon besteht kein Zweifel, daß *Skythien* in *Europa* zu lokalisieren ist: *Scythia enim regio in Europa situm habet*, wobei er sich bei den genaueren geographischen Angaben auf das *initium Europae* beschränkt. Jedoch ist seine Terminologie von größerem Interesse, wenn sie keinerlei Anklang an den Terminus *Europa* erkennen läßt, z.B. in den Ausdrücken *terra latina*, *Teutonici et Latini*, *Christiana regio* und *terrae Christianorum*. Die beiden gemeinsamen Nenner darin sind *latinus* und *Christianus* — Begriffe, die Kézai allerdings nicht auf die Ungarn bezieht, auch wenn sie gegen Ende des 13. Jahrhunderts, als er sein Werk verfaßte, schon längst christianisiert waren und Kézai in Latein schrieb.

Noch viele andere Werke der ungarischen Geschichtsschreibung und der angrenzenden Zonen müßten untersucht werden, um

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festzustellen, wie sie auf das Interesse des Westens reagiert haben, das sich diesen Gebieten zuwandte, als sie in vorderster Front die mongolischen und türkischen Invasionen erlebten. Aber das würde an dieser Stelle zu weit führen.

Was übrigens die Interpretation des Begriffes *Europa* mittels der entsprechenden christlichen Ausdrücke betrifft, so hat man sie ohne Berücksichtigung der im Mittelalter aus der Antike rezipierten geographischen Vorstellungen gemacht. In der Antike vertraten die Griechen die Meinung, die Welt bestehe aus zwei Teilen: Europa und Asien (wobei Libyen als Teil Asiens galt), später hat man daraus ein Dreier-Schema gemacht: Europa, Asien, Libyien (das bei den Römern zu Afrika wurde). Die Drei-Teilung des *orbis* hatte in der römischen Welt und in den christlichen Jahrhunderten bis hin in die Zeit des Humanismus kanonische Geltung. Flavius Josephus, Strabo, Plinius der Ältere, Pomponius Mela, Solinus und viele Autoren aus patristischer und mittelalterlicher Zeit sind dieser Drei-Teilung, dem *tripertitus orbis*, wie Orosius sagte, treu geblieben (25).

In den mittelalterlichen Erörterungen waren die Grenzen zwischen den Weltteilen von besonderer Bedeutung. Man legte sie sozusagen endgültig fest, vor allem auf Grund der zusammenfassenden Darstellungen von Orosius und Isidor von Sevilla, um nur die wichtigeren zu nennen. Orosius, ein Schüler Augustins, beschreibt die Grenzen *Europas*, indem er im wesentlichen den Wasserläufen und Meeren folgt. Das *initium* des Erdteils liegt beim *Tanais*, dem heutigen Don, dessen Quellen im *Riphaei*-Gebirge entspringen und der nach der Durchquerung der ungeheuren *paludes Maeotides*, Sumpfgebiet am Schwarzen Meer, in den *Oceanus Sarmaticus* mündet. Die Grenzlinie führt weiter über das Wasser nach Konstantinopel und zum *mare nostrum*, durch das man schließlich zum *terminus Europae* gelangt. Dieser *terminus* ist durch die *columnae Herculis* auf den *Gades*-Inseln, die in der Enge liegen, durch die das *mare nostrum* in die *fauces Oceani* mündet, genau bezeichnet (26).

(25) Vgl. D. HAY, *Europe. The Emergence of an Idea*, a.a.O., S. 1-15.

(26) « Europa incipit ut dixi sub plaga septentrionis, a flumine Tanai, qua Riphaei montes Sarmatico aversi oceano Tanaim fluvium fundunt, qui praeteriens aras ac terminos Alexandri Magni in Rhobascorum finibus sitos Maeotidas auget paludes, quarum inmensa exundatio iuxta Theodosiam urbem Euxinum Pontum lato ingreditur.

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Des weiteren ist *Europa* durch Inseln im britannischen Ozean begrenzt, nämlich *Thyle* und *Hibernia*: « Hi sunt fines totius Europae » (27). Auch in anderen geographischen Darstellungen sollten diese Orte die wichtigsten Grenzpunkte *Europas* sein. Ein weiterer bedeutender Beitrag, den Orosius in diesem Zusammenhang für das Mittelalter geleistet hat, ist seine schematische Beschreibung der drei Teile des *orbis*, die die Grundlage der sogenannten T-O-Landkarte oder Isidor-Karte bildete (28).

Isidor von Sevilla ist wichtig, auch wenn er uns keine vollständige Beschreibung *Europas* an die Hand gibt, denn seine Angaben wurden im Mittelalter mit Vorliebe verwandt. Der Bischof geht stärker auf die einzelnen Gebiete und Völker *Europas* ein (29): Die *Scythia inferior* sei die *prima Europae regio* und erstrecke sich von den *Maeotides paludes* bis zur *Germania* hin. Auf diese Weise verbindet er die antiken Mythen der *Scythia* und der *Maetodides paludes* mit Germanien und weist uns auf die Bedeutung hin, die die Beziehung zwischen der *Germania* und den unbesiegbaren Kriegern in Skythien und den *Maeotides paludes* bei der wenig genauen geographischen Vorstellung von *Europa* gehabt hat. *Europa* setzt sich im übrigen für Isidor aus zwei Teilen zusammen: der eine ist die *Hesperia*, zu der Italien und Spanien gehören; der andere umfaßt die Regionen im Norden und Westen, wo die aus Skythien stammenden *gentes barbaricae* lebten. Den Zusammenhang zwischen diesen *gentes barbaricae* und der *Scythia* erklärte Isidor durch ihre Abstammung von Japhet, dessen Nachkommen sich der mittelalterlichen Exegese zufolge von Skythien her ausbreiteten.

Wir haben etwas länger bei der *Scythia* verweilt, vor allem um zu zeigen, daß deren Beziehung zu Asien und den germanischen Völkern eine wichtige Komponente in der Vorstellung Isidors von *Euro-*

Inde iuxta Constantipolim longae mittuntur angustiae, donec eas mare hoc quod dicimus Nostrum accipiat. Europae in Hispania occidentalis oceanus termino est, maxime ubi apud Gades insulas Herculis columnae visuntur et Tyrrheni maris faucibus oceani aestus inmittitur »(*Pauli Orosii Historiarum adversum Paganos libri VII*, ed. C. ZANGEMEISTER, in: CSEL, V, Wien, 1882, S.10).

(27) Ebenda, S. 30.

(28) Ebenda, S. 9-12.

(29) *Etymologiae libri XX*, lib. IX, ii (*De gentium vocabulis*) und lib. XIV, iv (*De Europa*).

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pa darstellt. Die gleichen Charakteristiken der *Europa*-Vorstellung findet sich auch bei anderen mittelalterlichen Autoren: Immer wieder stoßen wir bei ihnen auf Hinweise auf das antike Skythien. In der *Cosmographia* des Geographus Ravennas heißt die Japhet zugewiesene *portio Europa* (wobei der Autor angibt, einer Bezeichnung der *phylosophi* zu folgen); gleichzeitig charakterisiert er die *Scythia patria* als *heremosa* und stellt fest, daß sie im Westen an Germanien grenze. Im Osten reiche sie bis Indien, jenseits dessen sich das Ende der Welt und der Garten *Eden* befänden; hinter dem Garten *Eden* erstrecke sich schließch der Ozean, der *deo nostro tantummodo* bekannt und dem Menschen verboten sei. Dieser Ozean stehe, da der *orbis* die Form einer Kugel habe, in Verbindung zu dem Ozean im Westen. Der Mensch dürfe daher nicht über die britannischen Inseln hinaussegeln, wo *Europa* ende. Damit hatte *Europa* ein *initium*, das zum Orient hin offen war, auch geographisch, im Westen aber eine feste Grenze. Auch diese Beschreibung von *Europa* — weitere gleichfalls wichtige übergehen wir — macht deutlich, welche zentrale Rolle *Skythien* bei der mittelalterlichen *Europa*-Vorstellung spielte.

Von dieser *Scythia* ist in den Werken Gottfrieds von Viterbo die Rede. Im *Speculum* schreibt er mit Bezug auf die *Alani* der *Maeotidae paludes*, daß sie eine *gens terribilis* seien, die sich durch ungeheure Stärke (*viribus eximia*) auszeichne, und hält fest, daß ihre Heimat *silvestris* und *immanis* sei und von der *Maeotida palus* beschützt werde. Auch von den Frauen berichtet Gottfried, die in diesen Sümpfen mit entblösten Brüsten kämpfen, wobei er sicherlich die Amazonen der Mythologie vor Augen hat. In der *Memoria seculorum* kommt er gleichfalls auf die *Maeotidae paludes in finibus Asie et Europe* und die *Pannonia* zu sprechen, die er auch *nova Ungeria* nennt, erzählt von den Flüchtlingen aus *Troia* mit zusätzlichen Einzelheiten — z.B. hätten die *Sicambri* den neuen Doppelnamen *Germani et Teutonici* angenommen —, und geht auf den Unterschied zwischen *Franci* und *Francigenae* sowie anderes mehr ein.

Im *Pantheon* nimmt die *Scythia* einen noch größeren Raum ein, und zwar wenn Gottfried von der Geschichte der *Goti*, der Hunnen oder Avaren, der Langobarden und der *Franci* berichtet. Was die *Franci* betrifft, so zählt er die einzelnen Etappen ihrer Wanderung

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auf, die wir schon kennengelernt haben, und betont das von Gleichheit und naher Verwandtschaft geprägte Verhältnis, das zwischen den *Iermani* und den *Romani* geherrscht habe. Dabei hält sich Gottfried — mit minimalen Veränderungen — an die entsprechenden Verse des *Speculum*. In der *Particula* XVIII des *Pantheon*, die den Titel *De origine omnium Gothorum* trägt, erzählt er dann die Geschichte der Gothen, beginnend mit Japhet und den apokalyptischen Völkern, die in der *Scythia quae est in finibus Asiae et Europe inter Meotidas paludes inaccessibiles* hausten.

Nach dem, was wir bisher gesehen haben, muß man davon ausgehen, daß die Parallelsetzung von *Theutonici* und *Romani* oder *Ytalici*, die Gottfried von Viterbo vornimmt, im Mittelalter von Bedeutung war und wesentlich mehr Konsistenz besaß, als man bei einer Lektüre seiner Werke zunächst geneigt ist anzunehmen.

Fassen wir bisherigen Ergebnisse zusammen: Der Terminus *Europa* stellte eine geographische Kategorie mit präzisen Charakteristiken dar, die weitgehend von den Vorstellungen über die Lage seines *initium* abhingen und die mit einer Reihe von antiken und neueren Mythen verknüpft waren. Wir haben hier die Rezeption einer geographischen Überlieferung aus der Antike vorliegen, die eine starke kulturelle, besser: emotionale Komponente aufweist. Diese Komponente ist ohneweiteres in dem rhetorischen Wert zu erkennen, der dem Terminus *Europa* in den literarischen Texten der Zeit zukommt.

Einige der mittelalterlichen Geschichtsdarstellungen und Erzählungen beginnen mit dem Hinweis auf die verschiedenen Teile des *orbis*: wie Bedas *Historia ecclesiastica gentis Anglorum* (30), die *Historia Langobardorum* von Paulus Diaconus (31), die *Antapodosis* von Liudprand von Cremona (32), die *Historiae* von Richer (33), das

(30) B. COLGRAVE - R. S. MYNORS (ed.), *Bede's Ecclesiastical History of the English People*, Oxford, 1959 (Oxford Medieval Texts).

(31) *Pauli Historia Langobardorum*, ed. G. WAITZ, in: MGH, SS, LXVIII, Hannover, 1878.

(32) *Liudprandi Opera*, ed. J. BECKER, in: MGH, SS, XLI, Hannover, 1915.

(33) *Richeri Historiarum libri IIII*, ed. G. WAITZ, in: MGH, SS, LI, Hannover, 1877.

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Carmen de Synodo Ticinensi (34), die *Gesta Treverorum* (35) und das *Waltharilied* (36). Die topographischen Anfänge der historischen Werke könnten zwar Topoi sein, wie es auch die chronologischen sind, aber man hat doch den Eindruck, daß die Autoren deren symbolischen Wert bewußt einsetzen, wofür die Darstellung der Ursprünge Triers in den *Gesta Treverorum* als Stütze herangezogen werden kann. Der anonyme Autor preist die Stadt dadurch aufs höchste, daß er sowohl auf die zentrale Lage hinweist, die Trier mitten in *Europa* einnehme, als auch darauf, daß es die älteste Stadt in *Europa* sei, die folglich einen ersten Beitrag zur Bevölkerung in *Europa* geleistet habe. Bei den *Europa*-Vorstellungen spielten die Begriffe *initium*, *fines*, *medium*, *caput*, *ultimum* usw. eine besondere Rolle. Schon Isidor hatte, um seinem Lande besondere Ehre zu erweisen, das Attribut *ultimum* verwandt, als er davon sprach, daß die *Hispania* als die *ultima et vera Hesperia* zu betrachten sei, und das Kapitel *De Europa* mit einem Passus voller Wortspiele schloss, in deren Mittelpunkt die Vorstellung von der *ultima terra* stand (37). Auch Vinzenz von Beauvais (†1264) wollte der *Apulia* ein besonderes Gewicht verleihen, wenn er sie als *finis Europae contra meridiem, quae solo mari e barbaria est divisa* charakterisierte. Bei dem gleichen Autor diente der Terminus *Europa* dazu, nicht nur eine Region, sondern auch ein ganzes Land hervorzuheben: *Inter omnes autem Europae regiones occidentales Italia obtinet principatum* — Italien gebühre der Primat unter allen westlichen Gebieten *Europas*. Verblüffend ist auch ein ganz anderer Aspekt, der sich bei Sulpicius Severus (5. Jh.) in den *Dialogi* findet: *Europa* könne auf Grund der Heiligkeit Martin von Tours' neben dem an Heiligen reichen Ägypten und der *universia Asia* bestehen.

Wenden wir uns nach dieser allgemeinen Übersicht jetzt den karolingischen Autoren zu, die die Faszination des Terminus *Europa*

(34) Ed. G.WAITZ, in: MGH. SS. R. Langob. et Italic. saec. VI-IX, Hannover, 1878.

(35) MGH, SS, X, S. 30-31, 134-158.

(36) W. HAUG - B. K. VOLLMANN, *Frühe deutsche Literatur und lateinische Literatur in Deutschland 800-1150*, Frankfurt a.M., 1991 (Bibliothek des Mittelalters, I), S. 164-258.

(37) *Etymologiae* lib. XIV, IV.

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in besonderer Weise verspürt haben müßen. Im Brief Cathwulfs (38), der vor allem wegen der Vorstellungen vom *rex in vice Dei* und Bischof *in secundo loco* bzw. *in vice Christi tantum* bekannt ist, findet sich auch der Terminus *Europa*. Der Brief ist oft als ein Schlüsseldokument für das sakrale Herrschaftsverständnis der Karolinger und die Oberhoheit der weltlichen Macht über die kirchliche Autorität verstanden worden. Könnte der Terminus *Europa* dann nicht doch in den Zusammenhang dieser karolingischen Herrschaftsideologie gehören? Dies ist im Grunde zu verneinen: Der Brief will bekanntlich den Aufstieg Karls zur Macht verherrlichen — einer Macht, die nach Cathwulf ihren Höhepunkt erreichte, als der König die *Italorum regna* eroberte und die *aurea et imperialis Roma* betrat. Karl war damit zum *honor glorie regni Europe* geworden. Mit *Europa* meint hier Cathwulf sicherlich das Reich Karls des Großen, aber nicht in realem Sinne, sondern im einer panegyrisch-ideellen Ausweitung, die sein *regnum* an die Seite der *aurea et imperialis Roma* stellt. Offensichtlich kommt es Cathwulf im Rahmen seines panegyrischen Anliegens nicht auf die vom Petrusnachfolger vorgenommene *unctio* und die damit verbundene sakrale Legitimation der karolingischen Macht an, sondern was er vor allem herausstellen möchte, ist die Tatsache, daß der Herrscher das *maximum* erreicht und das größte Reich, das *regnum Europe*, geschaffen hatte (auch wenn dieses ihm nach christlicher Vorstellung von Gott gegeben war).

In dem anonymen Gedicht *Carolus et Leo papa* (39), das wahrscheinlich kurz vor der Kaiserkrönung im Jahre 800 verfaßt worden ist, wird Karl der Große in kaiserlichem Lichte gepriesen — nicht nur durch den Hinweis auf die *Roma secunda* oder *nova Roma*, sondern auch durch die Zuweisung des Beinamens *Augustus*. Um jedoch eine noch stärkere Emporhebung des Herrschers zu erreichen, bezeichnet ihn der Verfasser als *Europae veneranda pharus, caput orbis*, *Europae venerandus apex*, *Europae celsa pharus*, *pater Europae*. Die Termini *orbis* und *Europa* haben keinen realen Bezug auf die karolingische Herrschaft, verherrlichen jedoch die Macht Karls des Großen und die Größe seines Herrschaftsgebietes.

(38) Ed. E. Dümmler, in: MGH, Ep, IV, Berlin, 1895, S. 501-505.
(39) Ed. E. Dümmler, in: MGH, PLMA, I, Berlin, 1881, S. 368-379.

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Gehen wir zu Theodulf von Orléans (†821) über (40). Nach dem Tode Karls des Großen und nach der *divisio imperii* unter seinem Sohn Ludwig dem Frommen hat man in der Forschung jeden Quellen-Bezug auf *Europa*, wenn parallel dazu vom göttlichen Ursprung der weltlichen Macht die Rede war, als bedeutungslos betrachtet oder lediglich als eine Rückerinnerung an die Herrschaft Karls des Großen und deren europäische Dimension. Die Verse, die Theodulf Ludwig dem Frommen widmete, könnten dies veranschaulichen: *Qui tibi sceptra dedit* — diese Aussage beziehe sich auf die *unctio* des Petrusnachfolgers, auf die sich das karolingische Königtum stütze, während die ihm von Gott verliehenen *Europeia regna* einen Rückgriff auf das Reich Karls des Großen darstellten, das jetzt in *regna* aufgeteilt war. Die Erinnerung an Karl den Großen ist hier ganz offensichtlich, jedoch steht in meinen Augen die panegyrische Überhöhung im Vordergrund, wenn Theodulf von den *Europeia regna* spricht, mit denen die Königreiche *Europas* gemeint sind, und auf diese Überhöhung ist es auch zurückzuführen, wenn er an Ludwig II. gewendet wünscht, der *totus orbis* möge sich mit Gottes Hilfe als *inclinatus sub tua iura* erweisen.

Übergehen wir andere karolingische Autoren — auch Sedulius Scotus (41), —, um in die spät-ottonische Zeit überzugehen, und zwar zu der *Annalium Quedlinburgensium continuatio* (42). Sie erzählen, dass Otto [der] III. auf dem Rückweg von Italien auf Grund einer Epidemie an einem Alpenpaß viele *milites* verloren habe, daß ihm aber die *mater Europa*, womit die *Germania* gemeint war, Verstärkung gesandt habe. An dieser Stelle offenbart sich eine affektive Einstellung gegenüber *Europa*. Vielleicht spielte eine solche gefühlsmäßige Haltung schon bei den zuvor zitierten Beispielen

(40) Ebenda, S. 531.

(41) CARMINA, ed. L. TRAUBE, in: MGH, PLMA, III, Berlin 1896, S. 166-237: « Est pius ille melis condignus, laude canoris, / Europae sidus nobilitasque potens »(S. 166); « Europae quoniam nimias transcurrere metas / Gressibus exiguis ipse sophista nequit » (S. 174); « Nobilis emicuit Karolus de semine regum / Europae princeps, imperiale decus » (S. 182); « His Europa micat, his gaudet filia Sion » (S. 183); « Haec nova stella micat, laus orbis, spes quoque Romae, /Europae populis haec nova stella micat » (S. 189) « Caesar erat Karolus toto clarissimus orbe / Europae princeps, imperiale decus » (S. 193); « Te quoque magnanimo duce sic Europa coruscat » (S. 195).

(42) MGH, SS, III, Hannover 1839, S. 88.

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eine Rolle (man erinnere sich an die Formulierung *pater Europae*, in der der Eindruck, den die Person Karls des Großen hervorgerufen hat, mitschwingt), so daß sie nicht einfach nur panegyrisch-rhetorisch zu erklären wären. In dem Bedeutungsfeld des *Europa*-Begriffes muß demnach die Möglichkeit vorhanden gewesen sein, die Faszination von Persönlichkeiten oder anderen Größen zum Ausdruck zu bringen.

In einem solchen Bedeutungsfeld des Europabegriffes und im Rahmen der damit verbundenen „europäischen" Genealogien war es also für die Zeitgenossen möglich, die Faszination von Persönlichkeiten oder auch anderen Größen zum Ausdruck zu bringen.

Der mythologische Hintergrund *Europas* kann diese Qualität nicht vermittelt haben. Denn die Entführungsgeschichte der phönizischen Prinzessin *Europa* war im Mittelalter niemals besonders beliebt, daran konnte auch der Erfolg Ovids nichts ändern: Japhet war in mittelalterlichen Texten wesentlich präsenter. Ohne Zweifel haben die Japhet-Exegese und das sich daraus ergebende Bild einer kompakten Einheit *Europas* die mittelalterliche Vorstellung von Europa geprägt, und zwar mit all den semantischen Appellen, die mit den alten und neueren Mythen um die *Scythia* verbunden waren. Besonders zeigt sich dies in der Verbindung zwischen den mittelalterlichen Mythen und Aeneas als dem römischen Gründerheros. Diese Parallele hat auch sicher dazu beigetragen, daß man während des gesamten Mittelalters ein noch stärkeres Gewicht auf Rom legte. Das wiederum hatte Auswirkungen zu Gunsten des westlichen Christentums, ohne daß deshalb die von der modernen Wissenschaft vertretene christliche *Europa*-Idee gerechtfertigen wäre.

Die Sage von *Europa* blieb im Mittelalter ohne besonderer Bedeutung, außer als *evocatio*, für das *Europa*-Konzept. Diese Evocationskraft, auch wenn *Europa* im Mittelalter nicht auf eine spektakuläre Bühne gestellt worden ist, war jedoch tief im Bewußtsein, im Spannungsfeld Europas zusammenzugehören, verwurzelt. Sonst wäre unerklärbar die Faszination des Begriffes *Europa*, die die mittelalterlichen Autoren verspürt haben müssen, insbesondere die affektive Einstellung Karls des Großen al *pater Europae* (43) gegen-

(43) *Carolus et Leo papa*, ed. E. DÜMMLER, in: MGH, PLMA, I, Berlin 1881, S. 379:

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über *Germania* als *mater Europa* (44), das heißt *mater* Namens *Europa*, wie es viele mittelalterliche Belege Dokumentieren.

Es sei mir hier noch eine Bemerkung erlaubt, die das nach *Asien* offene *initium* Europas betrifft und die mit einem Anflug von Sehnsucht nach der natürlichen Zivilisation *Indiens*, genauer: nach dem verlorenen Paradies verbunden ist.

Für die Vorstellung, die man im Mittelalter von der *Asia*, d.h. der *India* hatte, ist die gefälschte Briefsammlung zwischen Alexander dem Großen und dem Brahmanen-König Dindimus (45), die schon im 11. Jh. im Umlauf war, ein wichtiges Dokument. Man kann darin, wie ich glaube, eine Kritik an den ethischen Vorstellungen des Okzidens, also so etwas wie Selbstkritik erkennen. In dieser Funktion, nämlich als orientalisches Gegenbild zur westlichen Ethik, spielt die *India* in der Alexander-Legende, auch an anderen Stellen eine wichtige Rolle. Diese Selbstkritik nimmt sich bedeutungsvoll aus im Vergleich zu den Säkularisierungen des heiligen Krieges in der Kreuzzugszeit. Es ist interessant in diesem Kontext festzustellen, daß die Alexander-Legende in der Zeit Friedrichs [des] II. einen großen Erfolg hatte, woran der Hofrichter des Kaisers, Quilichinus, nicht ganz unbeteiligt war, der sie in Verse setzte, mit dem offensichtlichen Ziel, für Friedrich II. einen *speculum regis* zu entwerfen (46).

In der ersten Hälfte der Verse des Quilichinus tritt Alexander der Große als ein mit allen Tugenden ausgestatteter Held auf, der den stolzen Darius unter seine Herrschaft beugt, erscheint als Eroberer *Europas* und des *orbis*; in der zweiten Hälfte ergibt sich jedoch ein ganz anderes Bild: Schon beim Betreten *Indiens* erfährt Alexander der Große von Dindimus' radikale Kritik an der aggressiven Haltung des Westens; im Innern *Indiens* geht er dann — ohne Gewalt zu erleiden — in eine mit List gestellte Falle der Königin

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« Rex, pater Europae, et summus Leo pastor in orbe / Congressi, inque vicem vario sermone fuuntur ».

(44) *Annales Quedlinburgenses*, ed. G. H. PERTZ, in: MGH, SS, III, Hannover 1839, S. 88.

(45) F. PFISTER (ed.), *Kleine Texte zum Alexanderroman. Commonitorium Palladii, Briefwechsel zwischen Alexander und Dindimus, Brief Alexanders über die Wunder Indiens*, Heidelberg, 1910, S. 10-20.

(46) W. KIRSCH (ed.), *Quilichinus de Spoleto*, *Historia Alexandri Magni*, a.a.O.

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Candacis, die dem zitternden und wehrlosen Makedonier entgegenhält, er sei ein *destructor orbis*, während sie ihn jetzt ohne Waffen, nur durch ihre *virtus* gefangen genommen habe (*nullo pugnante te, te mea virtus habet*) (47). Als sie sieht, daß seine Zähne klappern und sein Haupt aus Angst unruhig hin — und herfährt, redet sie ihn an: « Sag,' wo ist jetzt Deine kaiserliche virtus » (*Dic, ubi nunc virtus imperialis adest!*) (48).

Die Philosophie *Indiens*, von der in der Alexander-Legende wiederholt berichtet wird, kann man ohne weiteres dem Interessenbereich des Kaisers zuordnen, der bekanntlich ein Weltverständnis besaß, das sich nicht auf das Christentum allein beschränkte. Besonders bezeichnend dafür scheint der Begriff *Europa imperialis* zu sein, den man erstmals am Hofe Friedrichs II. benutzte (49) und der sicherlich kein christliches und intolerantes *Europa* bezeichnete, das an einem Überlegenheitsgefühl gegenüber der Kultur an seinen Grenzen litt.

Demgegenüber ist die moderne Geschichtswissenschaft zu dem Ergebnis gekommen, daß die Vorstellung von Europa im Mittelalter im wesentlichen auf den westlichen Kontinent bezogen gewesen sei und daß man für diese Vorstellung ein genaues Entstehungsdatum nennen könne: das Jahr 732, in dem Karl Martell die Araber bei Poitiers besiegte (50). Denn in der Fortsetzung der Chronik Isidors von Sevilla (†636) werden die Soldaten Karl Martells, die nach der Meinung Henri Pirennes und vieler anderer Europa vor der arabischen Gefahr gerettet haben, von Isidor Pacensis *europenses* genannt (51) — womit er einen bedeutungsvollen Neologismus geschaffen hatte.

Das Bewußtsein der Zusammengehörigkeit der auf dem Kontinent lebenden Europäer ist — dieser Forschung zufolge — später, in karolingischer Zeit, durch Theodulf von Orléans (†821) gefestigt

(47) Ebenda, S. 156.

(48) Ebenda.

(49) Petrus de Vinea, *Friderici II. Imperatoris epistulae*, I, ed. J. R. Iselius, Basel 1740 (Nachdruck: Hildesheim 1991).

(50) Vgl. D. de Rougemont, *Europa. Vom Mythos zur Wirklichkeit*, München, 1962 (Die französische Originalfassung: Paris 1961), S. 45-49.

(51) Ed. Th. Mommsen, in: MGH, AA, XI, Berlin, 1894, S. 362.

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worden, der in einer Analogiebildung von den *Europeia regna* (52) sprach. Habe der Begriff *Europa*, dem eine universale Bedeutungskomponente anhaftete, auch nicht den realen Verhältnissen der karolingischen Herrschaft entsprochen, so sei er doch rhetorisch geeignet gewesen, zum Ruhme des karolingischen Reiches beizutragen — vor allem auf Grund des sakralen Charakters der sogenannten *Herrschaftsideologie*, die dieses Reich bzw. sein Oberhaupt als *vicarius Dei* über die päpstliche Autorität erhoben habe (53). Kurz: *Europa* habe als Begriff, der der Beschäftigung der frühmittelalterlichen Autoren mit der klassischen Rhetorik entstammte, eine auf den Kontinent und das karolingische Reich bezogene Bedeutung gehabt. Unter anderem zeige sich dies an der Tatsache, daß die karolingischen Panegyriker den Begriff *Europa* — im Vergleich zu dessen Verwendung in anderen mittelalterlichen Epochen — ungewöhnlich häufig aufgegriffen hätten (54).

Der Fall der *Europenses* ist sicherlich bedeutungsvoll. Man darf ihn allerdings nicht losgelöst vom mittelalterlichen Wissen um die geographischen Umrisse des Begriffs sehen und auch nicht, ohne dessen rhetorische Funktion in Rechnung zu stellen, die — worauf wir noch zurückkommen werden — nicht nur auf dem klassischen Vorbild beruhte, sondern vor allem auf andere Faktoren zurückging, die wesentlich tiefer im Mittelalter verwurzelt waren.

Die moderne Wissenschaft möchte indessen in der rhetorischen Verwendung des Begriffes *Europa* eine Bestätigung für die spezifischen Elemente der karolingischen *Herrschaftsideologie* sehen, wobei niemand genau angeben kann, worin diese karolingische *Herrschaftsideologie* denn eigentlich besteht. Eine politische Ideologie, wenn sie überhaupt eine ist, muß ihre Ideen klar zum Ausdruck

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(52) Ed. E. DÜMMLER, in: MGH, PLMA, I, Berlin, 1881, S. 32.

(53) Was die Politik Karls des Großen betrifft, so kann man deren theoretischen Inhalt aus den ungefähr hundert an die Karolinger gesandten Papstbriefen ableiten, die in einem einzigen Manuskript, dem sogenannten Codex Carolinus, auf uns gekommen sind. Vgl. I DEUG-SU, *Cultura e ideologia nella prima età carolingia*, Roma, 1984.

(54) Vgl. F. CHABOD, *L'idea d'Europa*, in: « La Rassegna d'Italia », 2, 1947, S. 3-17 und 25-37; Ders., *Storia dell'Idea d'Europa*, Bari, 1962; P. BREZZI, *Realtà e Mito dell'Idea dell'Europa*, Roma 1955; J. FISCHER, *Oriens — Occidens — Europa. Begriff und Gedanke "Europa" in der späten Antike und im frühen Mittelalter*, Wiebaden 1957; D. HAY, Europe. *The Emergence of an Idea*, Edinburgh, 1957.

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bringen. Was die Politik Karls des Großen betrifft, so kann man deren theoretischen Inhalt aus den ungefähr hundert an die Karolinger gesandten Papstbriefen ableiten, die in einem einzigen Manuskript, dem sogenannten Codex Carolinus, auf uns gekommen sind (55). Wer dem Begriff *Europa* im Zusammenhang mit der karolingischen *Herrschaftsideologie* nachgegangen ist, hat in jedem Falle diese Briefe, in denen ein auf *Europa* ausgerichtetes Herrschaftsverständnis der Karolinger keinerlei Rolle spielt, außer acht gelassen — und ich glaube nicht, daß die karolingischen Panegyriker in dieser Thematik besser als die Schreiber der genannten Briefe informiert waren.

Auch was die anschließenden Zeiten betrifft, so hat die Forschung die gleiche Tendenz beibehalten, nämlich dem Begriff *Europa* Bedeutungen zuzuschreiben, die aus der jeweiligen politischen Situation abgeleitet waren. So wird beispielsweise behauptet: Der Terminus *Europa* habe während der Einfälle der Barbaren, d.h. der Ungarn, Araber, Mongolen und Türken die gleiche Bedeutung angenommen wie 'Christenheit', *res publica Christiana* oder auch andere Begriffe, die die Christenheit als gemeinsamen Nenner haben. Vom 13. Jahrhundert an sei er dann zur bevorzugten Benennung geworden: Äneas Silvius Piccolomini, der spätere Papst Pius II. († 1464), stelle den Höhepunkt dieser Entwicklung dar (56). Demgegenüber muß allerdings betont werden, daß — soweit ich bisher feststellen konnte — ein ansteigender Gebrauch des Begriffs *Europa* in den genannten Jahrhunderten nicht zu beobachten ist, er scheint mir im Gegenteil deutlich abzunehmen.

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(55) Ed. W. GUNDLACH, in: MGH, Ep, III, Berlin, 1957, S. 469-657. Vgl. I DEUG-SU, *Cultura e ideologia nella prima età carolingia*, Roma, 1984 (= Studi storici, fasc. 146-147).

(56) Vgl. W. FRITZEMEYER, *Christenheit und Europa*, München-Berlin, 1931, S. 1-28; H. GOLLWITZER, *Zur Wortgeschichte und Sinndeutung von "Europa"*, in: *Saeculum*, II, 1951, S. 161-172; Ders., *Europabild und Europagedanke. Beiträge zur deutschen Geistesgeschichte des 18. und 19. Jahrhunderts*, München, 1964; D. HAY, *Europe. The Emergence of an Idea*, a.a.O., S. 16-55, 96-114; R. J. SATTLER, *Europa*, Braunschweig, 1971, S. 1-35; K. BOSL, *Europa im Mittelalter*, Bayreuth, 1992, S. 11-15; B. KARAGEROS, *Der Begriff Europa in Hoch- und Spätmittelalter*, in: *Deutsches Archiv*, XLVIII, 1991, S. 137-164; D. KURZE, *La "Respublica Christiana" et l'Europe médiévale*, in: *Imaginer l'Europe*, hrsg.v. K. MALETTKE-D.A.CANAL, Paris-Bruxelles-Berlin, 1998, S. 11-49, 228-236.

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Aus den *Europa*-Belegen, die sich bei dem Piccolomini finden, läßt sich deutlich ein neues europäisches Bewußtsein ablesen, hinter dem sich die Erkenntnis von der großen Gefahr abzeichnet, die die Türkeneinfälle für die gesamte Christenheit darstellen, vor allem aber für die griechisch-römische Kultur, die sich entsprechend der göttlichen Vorsehung in eben dieser Christenheit, wie der Piccolomini sagt, entwickelt habe (57). Auf diese Kultur bezieht er sich, wenn er den Begriff *Europa* in den Briefen verwendet, die er an Friedrich III. und andere christliche Könige richtet, um sie anzuflehen, den Türken Einhalt zu gebieten. Die Vorstellung, die Piccolomini von *Europa* gehabt hat, ist vom Humanismus seiner Zeit geprägt und hat, wenn man so will, 'ideologischen' Charakter.

In der Zeit des Humanismus hat es demnach in der Entwicklung der *Europa*-Idee einen Bruch gegeben. Auch bei Lorenzo Valla kann man dies gut sehen. In seinem *De rebus a Ferdinando Hispaniorum rege et maioribus eius gestis* (58) entwickelt er zunächst das traditionelle Bild von *Europa* als der *tertia pars orbis*, um dann hinzuzufügen: *Palmam Europae tribuimus in omni prope genere dignitatis* — Europa gebühre die Ruhmespalme, da es in allen würdigen Dingen an erster Stelle stehe. Demnach verleiht Valla Europa aufgrund der ihm eigenen Kultur den Vorrang, wobei ihm bewußt ist, daß er damit der traditionellen *Europa*-Vorstellung widerspricht. Denn er stellt hinsichtlich der *fines Europae* ausdrücklich fest, daß *Europa* am Ozean und nicht an einem Fluß beginnen dürfe (dabei denkt er natürlich an den *Tanais*) und auch nicht bei einem *mons* (das heißt dem *Taurus*); aus diesem Grunde sei die *Hispania* das *caput Europae*, was bei Valla gleichbedeutend mit *caput orbis terrarum* ist, da *illa* (das heißt *Europa*) *trium* [*partium*] *dignissima est*.

Valla sucht anschließend seine Theorie ausführlich zu untermauern. Sicher kam es ihm darauf an, die *Hispania* hervorzuheben, jedoch ist interessant zu sehen, daß er die Bedeutung erkannt haben

(57) Opera, Basel 1551 (Nachdr. 1967), S. 678-689, 702-708, 712-717, 840-855, 860-862, 865-893 (« Deus terrenus est imperator »: S. 704).

(58) O. BESOMI (ed.), *Laurentius Valla, Gesta Ferdinandi regis Aragonum*, Padova, 1973, S. 9. Vgl. F. TATEO, *Gli stereotipi letterari*, in: *Europa e Mediterraneo tra Medioevo e prima età moderna: l'osservatorio italiano*, hrsg. v. S. GENSINI, San Miniato, 1992, S. 13-34.

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muß, die das *initium Europae* (er nennt es *caput*) in der mittelalterlichen Texten gehabt hat, und daher versucht, es vom Osten in den Westen zu verschieben. Zu dieser totalen Umkehrung kommt es auf Grund einer Neubestimmung der kulturellen Werte, die den Vorrang *Europas* gegenüber den anderen Teilen des *orbis* rechtfertigen, was einem Bruch mit der mittelalterlichen *Europa*-Vorstellung gleichkommt.

In diesem Zusammenhang sind sinnbildlich die Vergegeständlichungen Europas in der Kartographie als einer Königin mit einer Krone auf dem Haupt, das die Hispania darstellt, und der Weltkugel in der Hand, wie sie sich in der zuerst 1537 von Johannes Putsch gezeichneten Karte (59), oder in der zweiten Auflage der *Cosmographia* Sebastian Münsters immer im 16. Jahrhundert findet. (60) Besonders interessant ist der Kommentar von Johannes Putsch, der in unmittelbarer Gegenüberstellung mit der im Mittelalter kanonisch geltenden Apposition für *Europa* als *tertia orbis pars* behauptet: *Europa* sei *prima pars terrae in forma virginis*.

Die weltanschauliche 'Aufladung' Bedeutung des Begriffes *Europa* durch die Humanisten steht, wie ich glaube, am Anfang aller modernen 'Europäismen', die sich durch immer wieder andere, aber eindeutig politische oder kulturelle Doktrinen auszeichnen und die zum großen Teil auf einem Eurozentrismus beruhen, der sich selbst in dagegen gerichteten Polemiken nachweisen läßt.— Kurz: es scheint offensichtlich, daß die moderne Geschichtswissenschaft bei ihrer Interpretation der mittelalterlichen *Europa*-Vorstellung von einer modernen Haltung und von modernen Gesichtspunkten ausgegangen ist.

Offensichtlich waren Termini wie *Christianitas, res publica Christiana, populus Christianus, populus Christianorum, populus Dei, societas fidelium*, durch ihre säkularisierten Bedeutungen, daran beteiligt, den Weg zur christlichen Interpretation des Begriffes *Europa* zu bahnen. Dies zeichnet sich besonders seit der Kreuz-

(59) Vgl. A. PELZ, *Reisen durch die eigene Fremde. Reiseliteratur von Frauen als autogeographische Schriften*, Köln-Weimar-Wien, 1993, S. 13. Die Karte "Europa prima pars terrae in forma virginis" wurde auch von Heinrich Bünting 1588, im Stil der barocken Emblematik (Inscriptio, Pictura, Subscriptio) (ebenda, S. 20) gezeichnet.

(60) D. HAY, *Europe. The Emergence of an Idea*, a.a.O., S. 105 und 119.

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zungszeit ab, gleichsam als Vorlaüfer humanistischer *Europa*-Konzepte, und bestätigt sich endgültig bei Gelegenheit des Falls von Konstantinopel, der europäisch-christlichen Stadt, wie die Augenzeugen dieses Ereignisses und ihr Echo bei anderen Zeitgenossen belegen (61).

Es handelt sich hierbei um eine Forschungsproblematik, mit der sich die moderne Historiographie bisher nie auseinandergesetzt hat. So ist es nötig, grundsätzlich nach dem Verhältnis der im Mittelalter herrschenden christlichen Kultur zum mittelalterlichen *Europa*-Bewußtsein zu fragen. Aber das würde an dieser Stelle zu weit führen.

Nach dem Zeitalter des Humanismus sollte diese Vorstellung weitere Brüche erleben, aus einer Reihe von Gründen, die noch zu untersuchen wären. Ich möchte hier nur auf die geographischen Entdeckungen hinweisen, die mit den Reisen der Missionare und Kaufleute um die ganze Welt einsetzten. Diese Entdeckungen sollten den phantastischen Zügen der Geographie des Mittelalters ein Ende bereiten, konnten aber nicht so leicht das mittelalterliche Bild von Europa und dessen metaphorische Funktion aus dem Wege räumen — eine Funktion, die ich mit einem weiteren Bild, dem Bild von einem aufgespannten Schirm mit deutlichen Rändern veranschaulichen möchte. Ich glaube, daß — auf Grund der Spannung durch die prophezeite *dilatatio* der von Japhet abstammenden Völker — *Europa* im Mittelalter einerseits als *tertia orbis pars* (konkret bestimmt durch *initium, fines*, *medium*, *ultimum*, *caput*, usw.) klein erscheinen konnte, auf einer anderen Verständnisebene aber auch sehr groß, denn *Europa* war der größte gemeinsame Nenner aller Pluralismen.

Dieser 'Schirm' allerdings ließ sich nur im Hintergrund wahrnehmen und erschien niemals hochgestreckt als politisches, kulturelles, religiöses oder 'ideologisches' Symbol. Bekräftigen sollte dies die Tatsache, daß sich für *Europa* keine andere Appositionen als *tertia orbis pars* finden lassen. Im Mittelalter hat sich *Europa* als *tertia orbis pars* nicht in einer deutlich hervortretenden Personifikation konkretisiert, wie es dann im 12. Jahrhundert bei Alanus ab insulis

(61) Vgl. A. PERTUSI (ed.), *La caduta di Costantinopoli. Le testimonianze dei contemporanei*, Milano, 1997 (3. Ausg.), und *La caduta di Costantinopoli. L'eco nel mondo*, Milano, 1997 (3. Ausg.).

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für die sieben Tugenden geschehen sollte, die alle zu schönen Mädchen werden, beschrieben mit ausführlichen detaillierten Begleitmerkmalen (62), oder wie die oben genannten Vergegenständlichungen Europas.

Die Vorstellungen, aus denen sich das Bedeutungsfeld des mittelalterlichen *Europa*-Begriffes, wie wir es bisher beobachten konnten, herleitet, sind im wesentlichen in den Werken Gottfrieds von Viterbo anzutreffen. Besonders deutlich zeigt sich dies an der Parallele, die er zwischen den germanischen Mythen und der mit Aeneas verbundenen römischen Gründungsgeschichte zieht.

Gottfried lebte lange Zeit in Viterbo, doch seine genaue Herkunft ist unsicher. Er hatte seine Ausbildung in Bamberg erfahren und war dann als Hofkaplan und Notar der Staufer Friedrich Barbarossa und Heinrich VI. tätig. Er kannte wohl aus eigener Erfahrung das deutsche und das italienische Volk und die komplizierten politischen Verhältnisse seiner Zeit, die in der verwickelten Problemlage bestand, die sich aus den Belangen des Imperium, des Papsttums, der Kommunen, der Kreuzzugsthematik und anderem mehr ergab (63). Ein Autor wie Gottfried — auch wenn er einen Fürstenspiegel verfaßt hatte, den notwendig eine ideelle, übersteigerte Botschaft auszeichnete — hat mit Sicherheit um die Realitäten am Hofe gewußt: Hier sammelten sich die Konflikte der Zeit wie in einem Brennpunkt und machten sich schmerzhaft bemerkbar. Vielleicht lag Gottfried, angesichts einer solchen Situation, ganz einfach die Idealisierung der staufischen Politik am Herzen, die den ottonischen Reichsgedanken am Leben erhalten wollte, wobei die Einheit zwischen der *Germania* und der *Italia* von entscheidender Bedeutung war — dies umso mehr, als die Einheit in den Urkunden der

(62) R. Bossuat (ed.), *Alain de Lille, Anticlaudianus. Texte critique avec une introduction et des tables*, Paris 1955.

(63) Vgl. L. J. Weber, *The Historical Importance of Godfrey of Viterbo*, in: *Viator*, XXV, 1994, S. 153-195; M. E. Dorninger, *Gottfried von Viterbo. Ein Autor in der Umgebung der frühen Staufer*, Stuttgart, 1997; Ders.: *Zum Bild des Judentums im heiligen römischen Reich aus dem Werk Gottfrieds von Viterbo*, in: *Jahrbuch der Universität Salzburg* 1995-1997, Salzburg, 1999, S. 173-194; *Abstammung und politische Macht. Zur 'stirps nobilis' im 12. Jahrhundert am Beispiel von Aeneas*, in: *Politische Mythen. Vorträge des Salzburger Symposions* 2001 (im Druck); *Mare Historiarum: Das Meer der Geschichte bei Gottgried von Viterbo*, in: *Medievalia Tergestina*, 2003 (im Druck).

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kaiserlichen Kanzelei oft in Form der 'Brüderlichkeit' der beiden beschworen wurde.

Jedenfalls glaube ich, mit Sicherheit sagen zu können, daß die Darstellung Gottfrieds, auch wenn sie in weiten Teilen etwas naiv und gezwungen erscheint, eine Vision von grundsätzlichen Werten enthielt, und daß nur derartige, über den augenblicklichen Nutzen hinausführende Vorstellungen, dazu dienen konnten, Personen oder Völker zu einen — und zwar mit Sicherheit wesentlich besser als dies, worauf wir zum Schluß noch eingehen wollen, einem anonymen Kommentator mit seinen Glossen zum *Speculum* gelang.

In der MGH-Edition des *Speculum* hat man auch diesen Glossen-Text veröffentlicht (64), er erweist sich als weitaus umfangreicher als das eigentliche Gedicht. Wie ich meine, läßt er sich aus verschiedenen Gründen nicht der Verfasserschaft Gottfrieds zuschreiben. Unter anderem ergibt sich das aus den Bemerkungen zur Herkunft der *Theutonici* und der *Ytalici* aus Troja. Denn nachdem der Kommentator zu wiederholten Malen bekräftigt hat, daß die beiden Völker eng verwandt seien, gibt er einen zusätzlichen Hinweis auf die unterschiedliche *nobilitas* der beiden: Die *Romani* und die *Ytalici* stammten nur in weiblicher Linie von *Magnus Priamus* ab, da Aeneas dessen Schwiegersohn sei, während die *Theutonici seu Germaniae reges* bzw. die *Germani et Alamani* auf *Priamus iunior*, den Sohn des *Magnus Priamus*, und auf *Antenor*, dessen engen Verwandten, zurückgingen. Damit korrigiert der Anonymus jedoch die Aussagen Gottfrieds, der *Priamus iunior* von einer Schwester des *Magnus Priamus* abstammen und damit — in weiblicher Linie — dessen Neffe sein liesss. Das heißt, nur um die direkte Herkunft der *Theutonici* von *Priamus Magnus* beweisen zu können — was den *Theutonici* in seinen Augen, im Vergleich zu den *Ytalici*, eine größere *nobilitas* verliehen hätte — nahm der Anonymus in Kauf, daß *Priamus iunior* infolge einer derart direkten Abstammung zur Frucht eines inzestuösen Verhältnisses zwischen *Magnus Priamus* und dessen Schwester avancierte. Der Nachweis einer absoluten Parität zwischen *Theutonici* und *Ytalici* lag also keineswegs in seinem Interesse.

(64) MGH, SS, XXXII, S. 93.

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Wenn man jedoch eine noch klarere Vostellung von Gottfrieds Anliegen bekommen möchte, erweist es sich als nützlich, das Werk eines ganz anderen Hofkaplans zu betrachten. Walter Map, um gut 20 Jahre jünger als Gottfried, vergleicht gleich zu Beginn seiner Schrift *De nugiis curialium* (65) den Hof des Plantagenets Heinrich II. von England mit der Hölle. Und zwar sei er deshalb eine Hölle, weil ihn ständig wechselnd, kurzlebige Taktiken bestimmten, die nur vom Streben nach Macht und Geld geleitet seien. Map geht mit Ironie, Sarkasmus und auch Zynismus auf die anmaßenden Mächtigen und Heuchler ein und hält ihnen den bedingungslosen Glauben an Gott und die reine Heiligkeit entgegen, die zu keinerlei Hintergedanken fähig und gefeit gegen weltliche Aufgeregtheit sei. Natürlich unterscheidet sich der Stil Gottfrieds von Viterbo erheblich von demjenigen Walter Maps: Er ist einfach und nicht von Ironie verschleiert. Vermutlich aber sieht auch Gottfried — ähnlich wie Map — in der augenblicklichen und von starken Veränderungen belasteten politischen und gesellschaftlichen Lage nur die Möglichkeit, im ideellen Bereich positive Entwicklungsanstösse zu geben.

(65) Walter MAP, *De nugis curialium. Courtiers' Trifles*, ed. and transl. by M. R. JAMES, rev. by C. N. L. BROOK and R. A. B. MYNORS, Oxford, 1983. Vgl. I DEUG-SU, *I nuovi movimenti religiosi nel « De nugis curialium » di Walter Map*, in: *Studi medievali*, 3a Ser., XXXIII, 1992, S. 537-570.

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I DEUG-SU (1938-2004). Nella notte tra l'11 e il 12 febbraio 2004 è morto I Deug-Su. Aveva 66 anni. Era nato a Pusan, nella Corea del Sud. Era il secondo di otto fratelli. Era un uomo coraggioso. Venuto a Perugia con una borsa di studio per studiare l'italiano all'Università per stranieri, si era iscritto a Lettere e aveva percorso il curriculum degli studi laureandosi in quattro anni, nel 1971, con una tesi su san Bernardo. Era molto povero ma riuscì sempre a mandare qualche somma in Corea, per la sua famiglia. Aveva un'intelligenza fuori dal comune. Per un orientale, e I Deug-Su era orientalissimo, capire l'Occidente è un'ardua impresa intellettuale. Ricordo la sua difficoltà quasi insormontabile, all'inizio, a comprendere la dimensione storica dei fenomeni culturali e spirituali. Ma arrivò a parlare un italiano perfetto e poi un tedesco vicino alla perfezione, e soprattutto riuscì a capire la nostra storia, il nostro Medioevo e le sue manifestazioni.

Era nato in un ambiente buddista, ma era cristiano protestante, mi pare metodista: era la religione della sua famiglia, da quando il suo bisnonno aveva trovato casualmente una bibbia e si era fatto cristiano leggendola. Si è poi fatto cattolico. Non ne avevo saputo la causa sino a poche settimane fa, quando mi ringraziò per avergli fatto studiare, nei suoi primi anni italiani, un episodio della tradizione medievale circa la purificazione della vergine Maria. E aggiunse: mi sono fatto cattolico quando ho compreso che Dio può veramente stare nell'utero di una donna, nel profondo dell'uomo; e sono per questo ancora cattolico.

Ha percorso tutta la carriera accademica, sino a diventare ordinario di Letteratura latina medievale nel 1985 passando da Perugia ad Arezzo, e poi a Lecce e a Siena, ed infine ancora ad Arezzo. Negli ultimi dieci anni ha avuto intensi rapporti con il mondo accademico tedesco, prima a Monaco di Baviera, poi e soprattutto a Berlino, con l'appoggio di Fritz Wagner. Non ha mai dimenticato la Corea e desiderava ora tornarvi per morire davanti al suo mare. Aveva fondato ad Arezzo un centro di studi coreani e pubblicava in Germania una serie di testi di poeti contemporanei. Aveva ricevuto nel 2003 dalla Repubblica di Corea il premio per il miglior umanista coreano all'estero. Era un uomo fiero e riservato, nobile di spirito, fedele nell'amicizia e nel rispetto. Nel panorama degli studi mediolatini la sua assenza sarà notata con rimpianto. Molto ha dato alla S.I.S.M.E.L. e alla Fondazione Ezio Franceschini. Per molti anni è stato redattore degli "Studi Medievali". La sua memoria sia nel cuore di chi lo ha conosciuto.

CLAUDIO LEONARDI

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RAFAEL DEL ÁGUILA

MACHIAVELLI AND THE TRAGEDY OF POLITICAL ACTION

« … *che gli stati non si tenevonno co' paternostri in mano* »

(*Cosimo il Vecchio*)

(N. Machiavelli: *Istorie Fiorentine*, VII, 6)

« Heaven for the climate, hell for the company »

(S. de Grazia: *Machiavelli in Hell*, p. 318)

This paper (1) deals with some elements of Machiavelli's theory of political action and its relation with tragedy and choice. In order to clarify my argument I will proceed as follows. 1. I will sketch three different interpretations of his work: the strategic, the republican, and the tragic readings of Machiavelli. 2. In second place, I will analyze how political action often involves tragic choices between common good and justice, and how this fact might develop (or not) political judgement and the virtue of compassion among citizens. 3. Afterwards, I will consider the relationship between tragedy and irony, and their dangerous connections with cruelty, with particular

(1) A first version of this paper was delivered at the Political and Social Sciences Departmental Seminar, Istituto Universitario Europeo (EUI Working Papers SPS N° 2001/3).

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attention to the work of Machiavelli. 4. Finally, I will try to summarize the argument and to answer (tentatively) the question: Was Machiavelli a tragic thinker?.

1. *The Plurality of Machiavelli.*

1.1. *Strategy: the Isolated Subject.*

There was a time in which Machiavelli was considered the main antecedent of the strategic model of political action and one of the first theorists of the current model of political choice. A model which is dominated by purposive rationality, calculation, strategy, utility and rational choice (2). To be sure, there are reasons for considering Machiavelli an antecedent of this tradition. Specially if we follow the so called "realistic interpretations". According to them, Machiavelli would be a theorist essentially concerned with the technical-political problems of action and choice.Schopenhauer employed a brilliant metaphor in regard to the Machiavellian teachings which underlined this technical character. The Florentine would teach politics in the same way that a *teacher of fencing* might impart his art: without prejudging who is the fencer (an honest man or a scoundrel) or to what ends he will dedicate the teachings (to free a princess or to murder venerable elders). Carl Schmitt preferred to refer to an *engineer* in order to personify the type of political action recommended by Machiavelli. Leonardo Olschki compared him to the *architects* of the Renaissance, concerned above all with the resolution of technical problems. Ernst Cassirer employs the image of the *chess player*, who is passionately interested in the game itself,

(2) For strategic action see J. HABERMAS: *The Theory of Communicative Action I. Reason and the Rationalization of Society*, Beacon Press, Boston, 1984. On the other hand, the current model of political choice might be understood as defined by four elements: 1. Conmensurability (everything is measurable in a single scale); 2. Aggregation (a social result is obtained by aggregating individual outcomes); 3. Maximizing (individual and social rationality are aimed at getting as much as possible of 'utility'); 4. Exogenous preferences (preferences are considered to be given). See an acute criticism in M. NUSSBAUM: *Poetic Justice. The Literary Imagination and the Public Life*, Beacon Press, Boston, 1995, pp. 14 ff. May be I should mention too the strategic readings of Machiavelli in the growing bibliography that connect his theory with management, marketing, etc..

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but who does not pay any attention to the potential cruelty of the rules of the game (why do so many pawns have to die?) or to the meaning of its goal (to checkmate) (3).

In all these examples, it is supposed that neither the fencer, nor the engineer, nor the architect, nor the chess player receive any formative impact on their character through action and choice. When action and choice are considered merely as technical devices (means to achieve ends), then the theory of political action focuses exclusively on the skill with which the ends are pursued: a good stab, a strong bridge, a functional building, a smart move. The subject of the action is either skillful or not: this is all that can be said about it. According to this, the subject maintain a merely technical relationship with means (which are of use or not to achieve ends, but should not to be judged immanently) and is completely isolated from ends (which are supposed to be self-evident or given) (4). In fact, the subject has no other link with the world but "technical reason".

Normally these readings tend to be related to the separation between ethics and politics that Benedetto Croce pointed out. (5) Ethics would be the refuge of self-identity, of values, of the character of the subject, and, essentially, it would belong to the private sphere. Politics, which one would reach through the "path of wrong doing" (6), would be an essentially technical activity based on calculation, strategy, and instrumental rationality. Nothing, or practically nothing, would connect both spheres, since they are ruled by different *logoi* (7). Fur-

(3) See E. CASSIRER: *The Myth of the State*, Doubleday, Garden City- New York, 1953; L OLSCHKI: *Machiavelli the Scientist*, The Gillick Press, Berkeley, 1945; C. SCHMITT: *Die Diktatur*, Duncker & Humboldt, Berlin, 1964; etc..

(4) Sebastian DE GRAZIA (*Machiavelli in Hell*, Vintage Books, New York, 1994, p. 306) comments that since in Machiavelli cruelty can be used well or badly, cruelty became a tool, an instrument "detachable from the person using it".

(5) See B. CROCE: *Etica e politica*, Laterza, Bari, 1981: *"... il Machiavelli scopre la necessità e l'autonomia della politica, della politica che é di là, o piutosto di qua, del bene e del male morale, che ha la sue leggi, a cui è vano ribellarsi, che non si può esorcizzare, e cacciare dal mondo con l'acqua benedetta"* (p. 205).

(6) See N. MACHIAVELLI: *Discorsi sopra la prima deca di Tito Livio*, in *Tutte le Opere*, a cura di Mario MARTELLI, Sansoni, Firenze, 1971, Book I, Chapter 9 (hereafter: *D, I, 9*). English version L. J. WALKER, Penguin Books, Harmodsworth, Middlesex, 1986.

(7) See, for instance, M. GARCÍA PELAYO: *Del mito y de la razón en la historia del pensamiento político*, Ed. Revista de Occidente, Madrid, 1968.

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thermore, the specific *logos* of politics would be defined by a typical statement which is widely considered to be Machiavelian: the attainment of the (political) end justifies the use of (immoral) means.

Despite appearances, I think that these strategic interpretations are very similar indeed to those given by Leo Strauss and his school. As a matter of fact, when they refer to Machiavelli as a "teacher of evil", this is not due to any personal evil deed the Florentine had committed. Rather he is supposed to be "teacher of evil" because: 1. He thinks that man is "the lord of everything", i.e. should do as s/he pleases; 2. He considers that man should think and act strategically in order to attain his/her goals (whatever the means, whatever the goals); 3. He affirms that in this task man is isolated (from the community, from the tradition) and unbound (from morals, from ethics, from religion) (8).

So Machiavelli would be guilty of having introduced in our tradition an idea of "choice" completely free from any linkage (with tradition, with humanitarian concerns, with a set of fixed values, with morals, etc.). Furthermore, this "free choice" would be considered by Machiavelli as a proof of the deep relationship that exists between good and evil (9). Even in republics, political virtue, and legitimate institutions might be supported through evil actions… and they often are… (10) So, according to Strauss, strategic action is

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(8) See L. STRAUSS: *Political Philosophy*, Pegasus, New York, 1975, p. 85: also H. C. MANSFIELD Jr.: *Machiavelli's New Modes and Orders*, Cornell University Press, Ithaca & London, 1979, p. 441.

(9) "... evil is so closely associated with good, and so bound up are they one with the other, that it may easily happen that he who thinks he will get one, gets the other" (*Che sempre propinquo al bene sia qualche male, il quale con el bene sí facilmente nasca che pare impossibile potere mancare del'uno volendo l'altro*", *D, III, 37*); also against Soderini: "What he failed to realice was that time waits for no man, that goodness alone does not suffice, that fortune is changeable and that malice is not to be placated by gifts" ("*... e non sapeva che il tempo non si può aspettare, la bontá no basta, la fortuna varia e la malignità non trova dono che la plachi*" *-D, III, 30);* see also: *D, I, 26; D, III, 3;* also *Il Principe* chapter 18 (en *Tutte le Opere*, M. MARTELLI ed., (Milano, Feltrinelli, 1971; English translation by G. BULL, Harmondsworth, Middlesex: Penguin Books, 1986; hereafter *P, 18)*; etc. Also *Lettere* (en *ibidem*; hereafter *Lett.*) "Niccolò Machiavelli a Francesco Guicciardini", 17 maggio 1521: *"... il vero modo ad andare in Paradiso [sarebbe] imparare la via dello Inferno per fuggirla".*

(10) See L. STRAUSS: *Thoughts on Machiavelli*, The University of Chicago Press, Chicago, 1984, p. 262; also H. C. MANSFIELD Jr: *Machiavelli's Virtue*, The University of Chicago Press, Chicago & London, 1998, p. 19.

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the root of evil in Machiavelli's writings because it "unbinds" the subject and make him/her aware of the close connection between politics and evil.

May be the best example of this type of action in Machiavelli is, I think, the new prince. Take, for instance, the case of Cesare Borgia. Being, as he is, without any traditional or transcendental legitimization for his rule, and facing all the risks of politics, he is forced (this is what Machiavelli want us to believe) to use violence, cruelty and fraud to survive and to success. In *P,18*, Machiavelli says: "You must realize this: that a prince, specially a new prince, cannot observe all these things which give men reputation for virtue, because in order to maintain his state he is often forced to act in defiance of good faith, of charity, of kindness, of religion. And so he should have a flexible disposition, varying as fortune and circumstances dictate (...) he should not deviate from what is good, if that is possible, but he should know how to do evil, if necessary" ("*sapere entrare nel male, necesitato*") (11).

Nevertheless, even the new prince is a bad example of strategic action as such. In fact, for Machiavelli the new prince is bound to some sort of common good. Commenting on Cesare Borgia he affirms that he uses cruelty to reach union, peace and loyalty, and to give his subjects in Romagna "well being" and "good government" (*P, 7, 18*). So may be the strategic model of action applies mostly to Machiavelism rather than to Machiavelli. After all, perhaps only Machiavelism would meet the requirements of an isolated and unbound subject, purely technical means and the ends being "whatever" end the subject (whoever) considers appropriate.

TABLE 1: *The strategic model of political action.*

1. Subject of political action (linked to the "world" through technical reason)	1.1. Isolated	1.1.1. From tradition 1.1.2. From community
	1.2. Unbound	1.2.1. From morality 1.2.2. From ethics 1.2.3. From religion

(11) Also: *P, 7; P, 17; P, 19;* etc..

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2. Means	2.1. In "technical" relation to subject.	2.1.1. No formative impact (except strategic impact).
	2.2. In "technical" relation to ends.	2.2.1. Efficacy (to reach the goal) 2.2.2. Efficiency (to reach the goal at lowest price)
	2.3. Transgression of morality: autonomy of politics. Ethics/politics different *Logoi*. Good and evil intertwined.	2.3.1. Means justified by ends (transgressions justified by political success)
3. Ends	3.1. Ends as given.	3.1.1. Whatever end (Machiavelism)

According to this, we may define strategic action as follows:

1. The achievement of your ends (mostly to attain, to maintain, and to increase your power)

2. Justifies and legitimates the utilization of any technically adequate mean (regardless its morality)

3. Which permits you, the subject (new prince, tyrant, or literally "whoever"), to obtain your goals.

1.2. *Republic: Means and Ends.*

Nonetheless, there are many Machiavellis in Machiavelli, and many of them do not fit the paradigm of strategic action and choice in the form suggested by these interpretations. The Machiavellian lesson goes further. It points out toward the problem of tragic choice and political action to be found at the heart of a republican community.

In order to understand the strategic model, one must relate it to a set of Machiavellian concepts in which that of corruption stands out. Corruption is identified by Machiavelli with a specific kind of political action that reflects the absence of *virtù* in citizens (12), as well as the breakdown of the internal equilibrium in the commu-

(12) See N. WOOD: *Machiavelli's Concept of Virtù Reconsidered*, *Political Studies*, XV, 2, 1967.

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nity (13). In this way, corruption is exemplified by a specific kind of action: particularistic actions intended to defend and further private interests (14). That is, corruption is associated precisely with one kind of action and one kind of subject (15): the isolated, privatized and egotistical individual. Thus, the corrupt subject would be one whose private world (the protection or furtherance thereof) turns out to be the point of reference for public action. That subject in whose private and egotistical calculations there is only room for strategic linkages justified from the perspective (absolute, undifferentiated, prior and apolitical) of his gain. In other words, there is a sense in which the corrupt subject in Machiavelli, would be, precisely, that subject who thinks and acts through the model of strategic action.

According to the republican interpretation (16), the goal of political action in the Machiavellian model consists in the protection and promotion of the virtuous community. Acting in plurality and competition, citizens try to excel, and to develop common good. Under these circumstances, the strategic model of action, in pursuit of a specific purpose (political liberty), is completely transformed. In the first place, now political action has undeniable effects on the character and identity of the citizens and on the republican political way of life. For the republican model, action is not only a logical craftiness, but a political act with immediate consequences for the citizens who engage in it and for the city in which they live. In fact, this is the way in which public education develops, because it is through participation in a *vivere civile* that

(13) See J. G. A. POCOCK: *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition*, Princenton N. J.: Princenton University Press, 1975.

(14) See Q. SKINNER: *Machiavelli on the Maintenance of Liberty, Politics*, 18, 2, December 1983.

(15) For other meanings of corruption in the work of Machiavelli, see M. VIROLI: *Machiavelli*, Oxford University Press, Oxford, 1998, pp. 131 ff. Also A. BONADEO: *Corruption, Conflict, and Power in the Works and Times of Niccolò Machiavelli*, Berkeley, Los Angeles and London: University of California Press, 1973.

(16) On participation and self-control see *D, I, 40; D, I, 53;* on competition and conflict see *D, I, 2*; *Istorie Fiorentin*i, in *Tutte le Opere*, cit., *VII, 1*; hereafter *IF, VII, 1;* on laws and political rules *D, I, 7; D, I, 18; D, I, 42; IF, III, 2;* on memory and republican liberty *P, 5; D, II, 23;* etc..

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the subject of political action learns (about politics, about him/herself, about public deliberation, about political tensions, etc.) So the subject is neither isolated from tradition and community, nor can be considered "unbound" of any political rules. Certainly, the republican citizen has to pursue common good and, at the same time, has to built that common good in terms of liberty, plurality and competition. So traditions of the political community constitute an integral part of his/her identity (though, the competent citizen should know what to use and what to discard in them).

Furthermore, because Machiavelli tries to recover (from certain republican traditions) a knowledge of political preservation, his intention, in this case, is to remember, selectively, those features of classical politics that could be useful to his political situation. According to some interpreters (17), the knowledge of preservation implies maintaining and developing political memory, whilst the knowledge of political foundation of the new requires the art of forgetting. One must know what to remember and what to silence, from what to take an ironical distance and with whom to identify in a political way. As we will see, this requires a tragic choice to the extent that such a choice occurs within the realm of insecurity, of contingency and of the contradictory impulse of alternative courses of action. For the moment, it is important to underline that Machiavelli lets the burden of this choice to fall on the shoulders of the political *virtù* of the subject. Thus, *virtù* ought to be defined as "lucid intelligence, without self-indulgent dreams", as Miguel Angel Granada puts it (18). That is, *virtù* is not only technical ability to pursue ends, but also intelligence for developing the linkage between the means and ends in the action, courage for thinking against the current, and determination to maintain certain elements of the political community (those connected to liberty). In this sense, *virtù* adopts an intersubjective slant and centers itself in the creation

(17) See B. J. SMITH: *Politics & Remembrance. Republican Themes in Machiavelli, Burke and Tocqueville*, Princeton N. J.: Princeton University Press, 1985, pp. 72-3.

(18) See M. A. GRANADA: *El umbral de la modernidad*, Herder, Barcelona, 2000, p. 181.

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and/or development of a free political order, a *vivere civile e libero*, in the midst of contingency and risk.

Concerning the "means" of political action, the republican model also transforms the strategic reading. In this case, means are not related to ends in an exclusively technical way. In fact, in the republican model of action means "mediate" ends. In this way, Machiavellian theory of political action would resemble strongly to Aristotelian teleological action (19). That is: means are conducive to the end, but they are also an integral part of the end pursued. If this were the case, means cannot be of such a nature as to destroy the public sphere, or to eliminate the conditions of liberty, or to prevent future citizens to be free, etc. Certainly it is a very important part of Machiavelli's teachings that sometimes you have "to break the rules" to reinforce the rules themselves. But what is important now is to be aware of the fact that the "breaking of rules" cannot destroy the basis of political action itself. So, means are important in themselves: they have immanent value, not only strategic value; they are to be judged by the consequences, but the consequences integrate certain principles (the defense and development of a vivere *civile e libero* under conditions of uncertainty and risk). In other words, they cannot eliminate the conditions for the flourishing of some values and institutions (in the end itself). That would be the reason why Machiavelli speaks about 1) actions in which the subject is "defeated", but nevertheless he considered him/her virtuous and 2) actions in which the subject successes, but is clearly criticized by the Florentine. The first kind of actions can be exemplified by Machiavelian concept of "glory", the second one by Machiavelli' s criticisms on tyrants.

Lets take some examples of the treatment of glory in Machiavelli' s writings: 1. You can die gloriously even if freedom of your city is lost in the battle (*D, III, 41)*. 2. You can fail gloriously (*L'Asino, VII*). 3. It is more glorious to be defeated by force than by

(19) According to J. L. ACKRILL (*Aristotle on Eudeimonia*, in A. RORTY ed.: *Essays on Aristotle' s Ethics*, University of California Press, Berkeley, 1980, pp 16 ff) the Greek statement that Aristotle use to describe his theory of action *ta pros to telos* would mean at the same time the instrumental means to reach an end and the fact that the means are also an integral part of the goal pursued.

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a failure of intelligence (*D, III, 10).* 4. Glory depends on difficulty and effort in the performed action — the more difficult to reach the end, the more glorious the enterprise — not on success (*P, 24; D, I, 10*).

In all these cases, glory is linked to virtuosity in performing the action, not to the complete attainment of the end. So it seems that there is some kind of contradiction in Machiavelli' s theory of action, because sometimes it is more important to perform the "proper action", (virtuous action) than to have success. And this is a contradiction because, as we will see, the core of his definition of political action is linked to consequences, not to virtuous performance. Nevertheless, if we explore this problem, we will find some interesting things.

In the first place, we will consider what we can call a "Quixotic" conception of *virtù* in fighting against Fortune. Had Machiavelli only take into account political consequences (success), why should he analyze actions performed virtuously but defeated in the end? Why bothering in praising, say, Bruto or, for that matter, he himself? The answer is, I think, that for Machiavelli the virtuous character of the subject of political action is also very important, and this implies that fighting fortune is as important as to win. In effect, concerning politics (thinking, acting, judging) you have to strive and to do everything in your hand. And, even if you are overwhelmed by adverse fortune, you should always fight and face with courage the circumstances. If in the end you are defeated, you can always obtain honor and glory due to your character before adversity. So, you should never surrender: "[Men] should never give up, because there is always hope, though they know not the end and move towards it along roads which cross one another and as yet are unexplored; and since there is hope, they should not despair, not matter what fortune brings or in what travail they found themselves (*sperando non si abandonare, in qualunque fortuna ed in qualunque travaglio si truovino*]" (*D, II, 29*) ([20]).

It is true that Machiavelli thinks that in victory glory is usually

([20]) This "quixotic" interpretation might also be related to existentialism. For existentialists the subject of action must confer human meaning to the universe through fighting against contingency, in spite of the fact that the "meaning" does not exist before

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attained (*D, III, 42*). But it is also true that he speaks with scorn about successful tyrants (*P, 8*). One reason for doing so has to do with a deeply rooted Machiavellian conviction: tyrant's interest always are against the common good ("for what he does in his own interest usually harms the city, and what is done in the interest of the city harms him" "*...più delle volte quello che fa per lui, offende la città e quello che fa per la città, offende lui*" -*D, II, 2*). A second and equally important reason is that those tyrants corrupt the political modes of the city, ruin the basis of communal liberty, eliminate *virtù* in citizens, do not take into account the mediation of means and ends, do not consider that means cannot destroy the very basis of political action itself, etc., and in doing so the tyrant destroy the republic. And the destruction of the republic is the destruction of the core of political action: the attainment of a common way of life that protects public liberties as well as private interests (*D, I, 16; D, II, 2; P, 21*).

Nevertheless, even if we consider from this standpoint the relationship of means and ends in Machiavelli' s thought, there is still a serious problem. Citizens perform virtuous actions pursuing the common good, but in doing so, they often break the prevalent moral framework. The tension between morality and politics seems to be installed at the core of political action, no matter whether we consider it from a strategic or from a republican point of view. This fact derives from a profound conviction in Machiavelli: the distinction between the common good and justice. This distinction has been highlighted by Quentin Skinner: "... if the promotion of the common good is genuinely your goal, you must be prepared to abandon the ideal of justice" (21). That is, we cannot claim that certain virtues, whether public or private (being true, being just or not being cruel), are always or often compatible with the pursuit of the good of the community, so that the subject of the action must bear the burden of this tension and assume that, at times, he will use

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the fight, but it is created in it. See P. CEREZO: *Las máscaras de lo trágico*, Trotta, Madrid, 1996, pp. 288 ff..

(21) See Q. SKINNER: "Machiavelli's Discorsi and the Prehumanist Origin of Republican Ideas", G. BOCK, Q. SKINNER and M. VIROLI eds: *Machiavelli and Republicanism*, Cambridge Mass: Cambridge University Press, 1990, p. 136.

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undesirable means to reach desirable ends (from the point of view of the city) (22).

Naturally, we may think that there is a mistake involved in thinking that we have to choose between these two worlds (that of justice and that of the common good). We may think that everything is possible at the same time: justice and common good. Furthermore, for many thinkers (from Cicero to Kant, from Habermas to Dworkin) justice and common good reinforce each other and we cannot consider them in any serious internal tension (23). Nevertheless, according to Machiavelli, this choice is unavoidable and at times tragic. It is true that the choice is not between private and public worlds, between, for example, ethics (personal and linked to principles) and politics (collective and linked to consequences). The choice is between a life of autonomy and security, a meaningful political life, and a life of apolitical submission in which there is not even the guarantee that cruelty and injustice will be absent (24). Furthermore, a wrong choice would have disastrous effects for the community and for the subject(s): to avoid using unjust methods we condemn ourselves to experience situations in which we will have to use more injustice and cruelty than would originally have been required (*P, 8*). That is, it seems Viroli is right when he affirms (25)that, for Machiavelli, only the institution and defense of a free political life is "worthy of a good man. Even if it requires him to do evil". Paraphrasing Pocock (26), we can say that, if this is the case, the truly subversive Machiavelli is not the strategic thinker but the good citizen and the patriot.

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(22) See, also, Q. SKINNER: *The Foudations of Modern Political Thought*, vol I, Cambridge Mass: Cambridge University Press, 1978, p. 183.

(23) For comments and criticisms on those theories see R. DEL ÁGUILA: *La senda del mal. Política y razón de Estado*, Taurus, Madrid, 2000, chapters 3 and 4.

(24) Machiavelli's texts are clear on this point: "... an evil should never be allowed to continue out of respect for a good when that good may be easily overwhelmed by that evil" ("*non si debbe mai lasciare scorrere un male, rispetto a uno bene, quando quel bene facilmente possa essere, de quel male, opressato*" - D, III, 3). So, "*chi piglia una tirannide e non ammazza a Bruto, e chi fa uno stato libero e non ammazza i figliuoli di Bruto, si mantiene poco tempo*" (ibid.).

(25) See M. VIROLI: "Machiavelli and the Republican Idea of Politics", G. BOCK, Q. SKINNER and M. VIROLI eds: *Machiavelli and Republicanism*, op.cit., p. 171.

(26) See J. G. A. POCOCK: *The Machiavellian Moment*, op.cit., p. 218.

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TABLE 2: *The republican model of political action.*

1. Subject (republican citizen)	1.1. Plurality and competition.	1.1.1. Related to (republican) tradition.
	1.2. Education through deliberation and participation.	1.2.1. Bound by civic virtue.
2. Means.	2.1. In formative relation to subject.	2.1.1. *Virtù*.
	2.2. In teleological (mediated) relation to ends.	2.2.1. Protection of *vivere civile e libero*.
	2.3. Tensions between Common Good and Justice.	2.3.1. Using undesirable means (from the perspective of morality) might be conducive to the attainment of desirable (political) ends.
3. Ends	3.1. *Vivere civile e libero*. Maintained and developed through plurality and competition, under conditions of risk and uncertainty.	3.1.1. So the ends are neither given, nor fixed, nor crystallised, and its attainment is uncertain and insecure.

So, we can define the republican model of political action as follows:

1. Republican citizens acting in plurality and competition, in the context of the tradition of the city and bound by its civic virtue…

2. Choose, with *virtù* (knowledge, courage) the means (at times morally dubious) to achieve political ends and in doing so …

3. They protect or develop a *vivere civile e libero* under conditions of uncertainty and insecurity.

1.3. *Tragedy: the Internal Tension of Action.*

I think that the internal tragic tension in Machiavelli's theory of action is well grasped by Isaiah Berlin interpretation (27). It is not, as

(27) See I. BERLIN: *The Originality of Machiavelli*, in *Against the Current. Essays in the History of Ideas*, The Viking Press, New York, 1980.

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Croce has put it, that Machiavelli emancipates politics from ethics. It is that he differentiates between two incompatible ideals of life and two different moralities. One, the political morality, is pagan and its values are courage, vigor, fortitude, public achievement, strength, and "assertion of one's proper claims and the knowledge and power needed to secure their satisfaction" (28). The other is Christian morality and its ideals are charity, mercy, sacrifice, forgiveness, contempt for the goods of this world, salvation, etc. Machiavelli affirms that those who follow this second path can neither build nor maintain a *vivere civile e libero*, that is, a free and legitimate political order. So the clash between these two ethics is unavoidable and the tension it produces can only be faced by the subject of action with *virtù*. And, for Machiavelli, only those citizens and those republics who are virtuous in this sense can be considered adequate subjects of political action.

This interpretation reminds strongly that of Max Weber's political man (29). It is well known that Weber makes a distinction between "an ethic of ultimate ends" (full of "pure intentions", and whose goal is the "salvation of the soul"), and an "ethic of responsibility", (properly political, linked to consequences and to responsibility for that consequences). In that context he wrote: "The genius or demon of politics lives in an inner tension with the god of love", and also: "… both ethics are not absolute contrasts, but rather supplements — which only in unison constitute a genuine man — a man who can have the ′calling of politics′" (30). So here, as in the case of Machiavelli, the tension between both ethics is constitutive of politics, the tragedy of choice is the more important feature of

(28) *Ibid.*, p. 45.

(29) See M. WEBER: *Politics as a Vocation*, in *From Max Weber. Essays on Sociology*, H. H. GERTH & C. WRIGHT MILLS eds., Routledge, London, 1998, pp. 120 ff..

(30) *Ibid*, pp. 126 and 127; also: "… in numerous instances the attainment of ′good′ ends is bound to the fact that one must be willing to pay the price of morally dubious means" (p. 121). Commenting on the close connection of Weber with Berlin pluralism of values, Berlin said: "Quando proposi per la prima volta l'idea del pluralismo dei valori, molto tempo fa, non avevo letto una pagina di Weber". See I. BERLIN: *Tra Filosofia e Storia delle Idee. Intervista autobiografiche di Steven Lukes*, Ponte Alle Grazie, Firenze, 1994, p. 71. On this problem see E. GARCÍA GUITIÁN: *Pluralismo y libertad en la obra de Isaiah Berlin*, CEPC, Madrid, 2001.

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politics, and the need of a virtuous subject of political action is also regarded crucial in order to face these dilemmas.

Clearly the key words of this model of action would be: *virtù* (knowledge and courage) of the subject, tragic choice among the different courses of action, and the ends linked to the common good. I think it is also very important to underline the conviction shared by the three models of action (strategic, republican or tragic): not always "good" means produce "good" results, not always evil means produce bad results, there is no harmony in the world of politics and no way to escape this dilemmas. This can be considered the main tension pointed out by Machiavelli: the inner tension of politics and action.

Nevertheless, the task of almost everyone since the Renaissance seems to have been to eliminate the "inner tension", to reconcile the "tragic choice", to substitute (institutional) rules by (citizen's) virtues. One way of doing that (31) has been to recur to the concept of necessity as the guide for choice and action. Where it is "necessary", i.e. where there is, properly speaking, "no choice", the reasons of politics (survival, maintenance and empowerment) must impose themselves. Otherwise we should tend toward moral behavior and justice. This is the typical argument of the discipline of *reason of state*. Mostly from Italy, Spain, Germany and France the theorists of the *ragione degli stati*, as Guicciardini have call them for the first time, strive to build a set of rules of necessity. A set of rules which could guide us, with certainty, in choice and action, and, for that reason, could help us to overcome the tensions and contradictions of political action (32).

(31) This is not the only way of doing it. Modernity has also tried to dissolve these contradictions through the proper use of enlightened reason. See R. DEL ÁGUILA: *La senda del mal. Política y razón de Estado*, *op. cit.*, chapters 2 and 3.

(32) The first and canonical definition of reason of State is: "*Stato è un dominio fermo sopra popoli, e ragione di Stato è notizia di mezzi atti a fondare, conservare ed ampliare un dominio così fatto*" (G. BOTERO: *Della ragion di Stato. Delle cause della grandeza della città*, Arnaldo Forni, Bologna, 1990, p. 1). It should be noted that the way in which the reconciliation of tensions proceeds here has to do with the role of religion as a political device; see D. SAAVEDRA FAJARDO: *Idea de un príncipe cristiano representada en cien empresas*, Academia Alfonso X el Sabio, Murcia, 1985, emp. 24. Also R. DEL ÁGUILA: *La senda del mal. Política y razón de Estado*, op. cit., chapter 1.

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Needless to say that this way of thinking about politics has attained security and certainty at the expense of liberty. In fact, from reasons of State spring some of the most clear examples of cruelty and criminal behavior of Western history. And not just in the sixteenth or seventeenth centuries. Following this path of necessity, the emancipatory tradition (jacobinism, leninism, etc.) as well as the radical nationalism, fascisms, etc. have shown the dark side of modernity.

But, besides the "generation" of cruelty, the appeal to necessity is also misguided in another sense. It is unable to produce any reconciliation, because it presupposes what should be demonstrated: that is, that there exists a "natural" or "objective" necessity and that such a necessity reveals itself in an evident way to reason (or to science or to the *avantgarde* of the chosen ones), and that to follow necessity means to sacrifice everything and everyone to it...

On this, Michael Walzer (33)deserves to be quoted at length. Commenting on the decision of the Athenians to destroy the city of Melos, as it was narrated by Thucydides in *The History of the Peloponesian War* (34), he writes:

Once the debate begins, all sorts of moral and strategic questions are likely to come up. And for the participants in the debate, the outcome is not going to be determined 'by the necessity of nature', but by the opinions they hold or come to hold as a result of the arguments they hear and then by the decisions they freely make, individually and collectively. Afterwards, the generals claim that a certain decision was inevitable; and that, presumably, is what Thucydides wants us to believe. But the claim can only be made afterwards, for inevitability here is mediated by a process of political deliberation, and Thucydides could not know what was inevitable until that process has been completed. *Judgments of necessity in this sense are always retrospective in character — the work of historians, not historical actors* » (my emphasis).

In a word, judgements of necessity can begin only when deliberation on them has finished and those concerned consider clear that certain course of action seems necessary and should be taken. If we

(33) See M. WALZER: *Just and Unjust Wars*, New York: Basic Books, 1992, p. 8.
(34) See, 5: 84-116.

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accept that what Walzer affirms can also be applied in the case of Machiavelli, then there is no escape from, or comfort in, political choice. Unable to base itself on any « indubitable necessity » (35), it does not offer us the certainty of getting it right, it does not give us solace or peace of mind. The choice is structured, properly speaking, in tragic terms. And, what is perhaps more important, the impact of deliberation, choice and action has penetrating and lasting consequences for the constitution of our individual and collective identities because it is the choice between *alternative courses of action*, not between separate spheres.

2. *Tragedy, Justice and the Role of Compassion.*

2.1. *Action and Uncertainty.*

To take seriously the problems of choice in the terms established by Machiavelli also means taking seriously the creation of *virtù* in the citizens. Subjected to the tension of having to decide in dilemmatic situations, the citizens form and develop their character and elaborate their capacity for judgment. But they do not do so only in the peaceful development of communicative and dialogical capacities. They do not do so exclusively in the way Jürgen Habermas or the theorists of deliberative concept of democracy suppose. They do so *also* through the experience of the tragic conflict. We can define this conflict in terms of the formulation given by Martha Nussbaum (36): in the cases of tragic conflict « we see wrong action committed without any direct physical compulsion and in full knowledge of its nature, by a person [or a community] whose ethical

(35) Of course necessity plays an important role on Machiavelli, but it is not understood in a merely technical way. See, *D, I, 32; D, I, 38; D, III, 11; P, 18; P, 25;* etc. Also F. GUICCIARDINI: *Considerazioni intorno ai Discorsi del Machiavelli*, a cura de Corrado VIVANTI, in N. MACHIAVELLI: *Discorsi sopra la prima deca di Tito Livio*, Einaudi, Torino, 1983, Book I, Chapter 1. Also, R. DEL ÁGUILA: *La senda del mal*, *op.cit.*, pp. 97 ff. Anyway, for the relation between necessity and "anthropological pessimism" in Machiavelli see *P, 18; D, I, 3; Scritti Politici* en *Tutte le Opere*, cit., p. 12; hereafter *SP*; etc..

(36) See M. NUSSBAUM: *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, Cambridge Mass: Cambridge University Press, p. 25.

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commitments would otherwise dispose him [or them] to reject the act. The constraint comes from the presence of circumstances that prevent the adequate fulfillment of two valid claims » (37).

Furthermore, as I already mention, the tragic conflict does not mean to choose between spheres or values or groups of values that are placed there, before us, at our disposal. We choose between *alternative courses of action*. Nor do we choose between static and given identities (here, a just but politically irresponsible man; there, a politically responsible but at times unjust man). We choose between *courses of action* that will make us different according to the choices we make, according to our deliberation and decision, according to the resulting action and the way in which we will experience and remember the whole process.

Therefore it is political action itself which acquires a tragic tone. In fact, Aristotle defined tragedy precisely in this way: "Tragedy is an imitation not of human beings but of *action* and *life*", its effect being to arise fear and compassion in the spectator (38). The relation between tragedy and action, found in many places in the work of the Greek thinker (39), is an integral part of a civic education in participation and politics. Hannah Arendt (40) links the tragic character of action with the courage and determination necessary to appear, speak and act in the public sphere, as well as with the uncertainty of the ultimate consequences of such appearance, speech and action. In both cases she highlights the impact that

(37) Nussbaum then quotes Socrates'belief (*Euthyphro*, 8a) that this collision is repugnant to reason. Modernity has considered the tragic conflict to be equally repugnant, as can be seen in its mechanisms to reconcile that tension: from the already mentioned concept of necessity, to the enlightened idea of the essential harmony between reason and nature, to the idea of progress or of history as justification for present contradictions, etc. In fact, as Nussbaum again shows (ibid, p. 35), "such situations might be repellent to practical logic; they are also familiar from the experience of life".

(38) See ARISTOTLE: *Poetics*, in *Aristotle Theory of Poetry and the Fine Arts*, English translation S. H. BUTCHER, New York: Dover Publications, 1955, parrs. 1450a9 and 1452a. My emphasis.

(39) See J. JONES: *On Aristotle and Greek Tragedy*, Stanford: Stanford University Press, 1980, pp. 24 ff.

(40) See H. ARENDT: *The Human Condition*, Chicago: The University of Chicago Press, 1958, pp. 184 ff..

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contingency has on action and, in turn, the impact that action has on the self-identities of the individual and of the community. In this sense, a virtuous action (guided by knowledge and courage) is above all risk and exposure to Fortune (as Machiavelli would say). (41)

Modernity always tried to minimize this risk in two ways. The first one is the attainment of "rational mastery" over human affairs (of which a good example is the application of strategy to politics, the concept of necessity and the discipline of reason of State). The second one is to grant to action a justification which, a posteriori, could give solace to the subject of action and reconcile him/her with his own self-image (that is, to avoid the tragic character of action and choice through the power of, say, Reason or Science or Progress or History — in capital letters). We can argue about the contribution of Machiavelli to the development of the first way (though I think his contribution is just indirect). But concerning the second one ("harmonization"), this is just what Machiavelli did not do.

So, if we leave aside those modern narratives of reconciliation, if we assume the impact on our identities that the tragic conflict has, and the need of "collective sharing of responsibility" when that conflict is lived in contexts of democratic participation (42), then maybe we might be able to learn something from it.

Greek tragedy offers us, in this regard, some crucial examples. Agamemnon is not reproached by the Chorus for having chosen to sacrifice Iphigenia in order to satisfy the demands of the gods and of the Trojan expedition. What the Chorus reproaches to Agamemnon is the *way* in which he lives and experiences that tragic conflict: without a single word of sorrow, without any painful memory of his decision (43). Supposing that the decision was completely justified and that nothing else could have been done, Agamemnon forgets the

(41) One of the curious coincidences between Th. Hobbes and I. Kant is the idea that what makes science or reason better than prudence is that science and reason dispel uncertainty and risks, and would give us security and truth: see Th. HOBBES: *Leviathan*, C.B. MACPHERSON ed., Penguin, Harmondsworth, Middlesex, 1968, Chapter 46; I. KANT: *Political Writings*, H. REISS ed., Cambridge University Press, Cambridge, 1991, p. 80.

(42) See J. P. EUBEN: *Introduction* and A.J. PODLECKI: Polis and Monarch in Early Attic Tragedy, in J. P. EUBEN ed: *Greek Tragedy and Political Theory*, Berkeley, Los Angeles and London: University of California Press, 1986.

(43) See M. NUSSBAUM: *The Fragility of Goodness*, op. cit., pp. 36 ff..

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reasons and justifications that inclined him towards not committing the ritual assassination. Agamemnon does not learn because he forgets and, thus, fails as a human and rational being in his confrontation with the conflict: forgetfulness silences arguments that were crucial in judgment and decision (44).

It is said that Hannah Arendt was preparing the third volume of her trilogy (*Thinking, Willing, Judging*) just before her death. A few notes were found on a sheet of paper in her typewriter (45), among which a phrase of Cato stands out as one of the last sentences of the manuscript: « *Victrix causa deis placuit, sed victa Catoni* » (« The victorious cause pleased the gods, but the defeated one pleases Cato »). To keep the defeated cause alive through memory in political judgment, to remember the costs of the decision, what was left behind in the course of action and possibly will not be recovered but nonetheless deserves to preserve its claim on us, this lies at the heart of an adequate experience of the tragic conflict. This is the form in which virtuous citizens will assume their education in participation. The exercise of political judgment in this type of situation does not only require strategy as logical craftiness, but also a proper balance before tragic choices. A balance that would make us aware of the unavoidable tensions in the world of politics. To put it in another way: to remember the defeated side of political judgment, as well as to remember and to feel concern for the victims of our actions, are both politically important in two senses. First, they make us aware of what we are doing. Second, they make us

(44) We can say it with Montaigne: "when an urgent circumstance (…) induceth a Prince for the necessity of his state, or, as they say, for state matters, to breake his worde and faith, or otherwise forceth him out of his ordinary duty, he is to ascribe this necessity (…). But if he did it sans regret, or scruple, if it greeved him not to doe it, 'tis an argument his conscience is but ill" ("*... s'il le fit sans regret, s'il ne lui greva (pesa) de la faire, c'est signe que sa coscience est en mauvais terms*"). See M. de MONTAIGNE: *Essais*, I, II, and III, P. MICHEL ed., Libraire Genéralé Française, Paris, 1972; English version J. FLORIO, Everyman Library, Dutton, New York, 1965. Book III, Chapter 1.

(45) Preparatory wrintings exists on the topic of Judgement, and some of which are published. Cfr. H. ARENDT: *Lectures on Kant Political Philosophy*, R. BEINER ed, Chicago: The University of Chicago Press, 1982; R. BEINER: *Hannah Arendt on Judging*, *ibidem*; R. BEINER: *Political Judgement*, London: Methuen, 1983. See also: R. BEINER: *What is the Matter with Liberalism?*, University of California Press, Berkeley, Los Angeles and London, 1992, pp. 99 ff..

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consider many things differently in the future. So through remembering we got knowledge and experience. But for doing so properly we need not only to remember, but to remember well, that is, to balance the imperatives of closeness and compassion with those coming from the foundation and transformation of a free political order (46).

2.2. *Compassion, Tragedy and Machiavelli.*

According to these criteria, was Machiavelli a tragic thinker? Was he sensitive to the defeated side of political judgement? Did he balance adequately compassion and detachment in political action? Did he experience the tragic choice "properly"? If one is to believe Berlin, he was not and he did not. No matter that:

1. he uncovers the fact that ultimate values often are not compatible with one another;

2. for him evil remains evil, good, good, cruelty, cruelty;

3. he never showed any intention of "transvaluing" their current meanings (as, for instance, Nietzsche, Hegel, Mussolini or Lenin tried to do);

4. he never invokes any theological sanction (god, history) to obscure this fact;

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(46) May be I should mention, in passing, an example of this kind of balance: the art of silence in transitions to democracy. I think this is a good example of tragic choice under conditions of uncertainty, which is quite usual in the real world. In this case, the tragic choice would be between: 1. to do justice and to put the victims first, prosecuting and castigating the guilty tyrants or, 2. being prudent (for reasons of political stability), to silence these moral considerations (postponing them, respecting them) setting aside justice for the maintenance and development of common good (democracy). So if we are to choose tragically and properly, in these cases we cannot apply the general rule: we always have to put justice first. Even if "*la saggezza republicana insegna* (...) *che per conservare un vivere civile* (...) *è necessaria la massima severità nel punire i cittadini che si rendono responsabili di grandi colpe, suprattuto se si tratta di cittadini importanti, ben noti, potenti*" (M. VIROLI: *Repubblicanesimo*, Laterza, Bari, 1999, pp. 90-1). No matter that Machiavelli wrote about the necessity of "*esecuzione memorabile*" (*D, III, 1*), his teachings, underlining the crucial importance of the *vivere civile*, would incline us to choose the survival and development of the common good (say, democracy) even if we have to sacrifice (to postpone) justice.

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5. no matter that he knows that to choose an ethics is to give up the other;

6. and so every choice we make, in a sense, entails a lost;

7. no matter that he elaborates the elements of the tragic choice and juxtaposes the different outlooks and, since then, nothing has been the same in European Political Theory.

8. Berlin affirms that Machiavelli can not be considered a tragic thinker because he never faces this situation (from 1 to 7) with anguish. In fact, there is no trace of agony in his writings and it seems that for him there is no deep conflict: "he chooses his side, and took little interest on the values [or the people, RdA] that this choice ignore" (47).

On the other hand Benedetto Croce thinks that Machiavelli feels deep bitterness for the cruel conditions of politics, craving for a society of pure and good men. So for him the Florentine is a tragic thinker in whom he perceives open signs of an austere and painful moral conscience (48). In a similar vein, Maurizio Viroli has recently vindicated an interesting interpretation for Machiavelli' s smile. His would be a smile that hides weeping and conceals pain, a defense before the meanness and malignity of this world. Not only a way of facing live, but also a way of living it (49).

So, Berlin considers that Machiavelli is not a tragic thinker because he sees no evidence of compassion or of moral doubt in his writings. Since compassion and doubt seems to be for Berlin unavoidable features of the proper experience of tragedy (50), and since

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(47) See I. BERLIN: *The Originality of Machiavelli*, *op.cit.*, p. 70. Also: « One chooses what one chooses because one knows what one wants, and is ready to pay the price » (p.75); « He... takes for granted the superiority of Rome *antiqua virtus* (...) over the Christian life » (p. 77).

(48) See B. CROCE: *Etica e Politica*, op.cit., pp. 205-6: Machiavelli would experience "*acre amarezza*" (...) *"l'anelito del Machiavelli va verso un'inattingibile società di uomini buoni e puri"* (...) in him is clear the existence of "*aperti segni di un'austera e dolorosa coscienza morale*".

(49) See M. VIROLI*: Il sorriso di Niccolò*, Laterza, Bari, 2000, pp. 143, 159, 169, 254, etc: « *un sorriso che nasconde il pianto* (...) *una difesa che protegge dagli sguardi, sconsolato e rassegnato di fronte alla malignità del mondo* » (...) « *Un sorriso che muore sulle labbra e nasconde il dolore* (...) » « *il suo modo di difendersi dalla vita (...) anche il suo modo di immergersi in essa* ».

(50) In that he would agree with Aristotle: see footnote 38.

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he thinks Machiavelli is too much ironical to be compassionate, he concludes that our Florentine Secretary is not a tragic thinker. On the other hand, Croce and Viroli consider him a tragic thinker precisely because they interpret Machiavelli' s irony as a way of expressing moral disgust before the cruel condition of the world. May be for Croce and Viroli, as a lawyer would say, "the absence of evidence (of compassion) is not evidence of the absence (of compassion)". Anyway, the discussion about motives and intentions in Political Theory are rarely conclusive. In fact we need a different approach to this issue. An approach that let us analyze the relationship between irony, compassion and political action.

In first place, it is plain truth that Machiavelli could not be considered a compassionate thinker. But, for that matter, there are no many thinkers that could. Neither so disparate thinkers as Nietzsche and Kant. As Aurelio Arteta has pointed out, in Western thought, compassion is a virtue under suspicion (51).

According to Kant, a rational person will not accept any favours, since mutual respect requires a certain distance and charitable compassion buries us in moral heteronomy and, like disease, spreads by contagion. In this process, compassion serves to mask the injustice and the lack of respect for the person who is suffering and is often accompanied by inaction and political and moral lethargy. This is why it can be said that if justice reigned in the world (the goal which Kant thinks we should aspire to) compassion would be unnecessary.

For Nietzsche, on the other hand, if suffering humiliates the victim, our compassion endows us with superiority. In this way, when we see someone suffering we happily seize the opportunity to "take control of him/her". Whoever is the "object" of this sentiment of compassion, s/he may well feel humiliated and rejected because the piety of others reveals his/her own prostration. By accepting it, the sufferer shows to be worthy only of disgust. That is, the pious degrade us.

If what both these authors are saying makes any sense, then we

(51) See A. ARTETA: *La compasión. Apología de una virtud bajo sospecha*, Paidós, Barcelona, 1996. For Kant's and Nietzsche's opinions on compassion see pp. 65 ff, 87 ff, 216 ff, etc..

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need to make certain changes in the conception of compassion if we are to vindicate it as an integral part of political action and tragedy. We have to convert indignation, sentimentalism and charity into commitment, empathy and solidarity.

In his *Poetics* (1452b) Aristotle states that the compassion which tragedy provokes in us was due to the fact that the person who was suffering was doing so unjustly, as well as because s/he was someone "like us". From this perspective, compassion is, therefore, a bridge towards others, a form of understanding them as fellow human beings. In the same way, Jean Jacques Rousseau observed in *Emile* how reflection on the misfortunes of others exposes our own vulnerability. This is what Aurelio Arteta called the "nutritive soil of piety": our own human vulnerability. Compassion, therefore, is the piety and fear derived from reflection on our similarities with the sufferer (52).

But similarity (with the sufferer) is not equality. In the empathy which comes from compassion there is always a sharp sense of separation and difference with respect to the situation of the sufferer. Adopting the perspective of a reflexive observer, compassion seeks to understand the conditions, causes, etc., of suffering. As Martha Nussbaum notes (53), the misfortunes of others can only be appreciated and judged through reflection which relates them to what we already understand. Aurelio Arteta, in turn, observes that piety "enters into the order of virtue when it is the product of reflexive knowledge and practice". And this reflexive practice makes compassion a tragic virtue in two senses. Firstly, because it springs from a knowledge of human tragedy. Secondly, because it must renounce to formalism and neutralism and always remains conscious of the possibility of error (54).

Thus if we want to overcome Kantian and Nietzschean critiques, then direct experience of tragedy in action must be accompanied by reflection and rationality. And this could mean that

(52) *Ibid.*, pp. 40 and 42.

(53) See M. NUSSBAUM, "Compassion: The Basic Social Emotion", in *Social Philosophy and Practice*, 13, 1 (Winter 1996), pp. 34 ff.

(54) See, ARTETA, *La compasión*, op.cit., pp. 138-39. Arteta only refers to the first tragic component of the virtue of compassion, and only very indirectly to the second (pp. 258 ff.).

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commitment, empathy and solidarity should be understood as part of a civic education capable of teaching us to choose between alternative courses of political action without being guided exclusively neither by our "immediate" sentiments and feelings nor by an "objective rule", that make for us unnecessary to choose.

But, whatever our re-reading of compassion, we will not be able to find it in Machiavelli's writings. It is true that part of Machiavelli' s teachings have to do with "cooling down immediate sentiments" in political action, but this does not incline him toward commitment, empathy and solidarity with the victims, except in an indirect way (for instance: in order to get a reasonable just political order that decreases the prevalent amount of cruelty, you have to act cruelly). I think Isaiah Berlin is right in this. Furthermore, Berlin argument is not exactly that Machiavelli shows no compassion for the possible victims created by choosing a political morality instead of a Christian one. What Berlin says is that Machiavelli forgets completely the defeated side of the political judgement (that is, the reasons that would incline us to choose the opposite course of action). But Berlin, in turn, forgets the possible reasons why Machiavelli thinks he should set aside compassion and the defeated side of political judgement. These Machiavellian reasons could be related to the necessity to act. Perhaps, in order to decide on a position which identifies the political problems which are at stake, which considers alternative courses of action to remedy the situation (defined by insecurity, cruelty, and injustice), we need to postpone compassionate considerations. Because compassion can be paralysing of political action since it implies the identification with everybody (55) (at least in the Christian reading Machiavelli wants to escape). To put it in a nutshell: if compassion is defined through "our common human vulnerability", then it is directed equally at both the just and the unjust person, at those who create the cruel condition of the world and at those who suffer it. If you want your action to produce (good) political consequences you have to detach yourself from this universal identification with everybody. You should distance yourself from the concrete pain you create intervening in the world in order to change it. So, several tragic facts are underlined by Machiavelli: to

(55) See A. ARTETA: *La compasión...*, op. cit., pp. 140 ff, 192 ff, etc.

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act is to take side, to take side is to be partial and to set aside (partially, temporally) compassionate (and universal) considerations, thanks to political action we can decrease the prevalent cruelty (56)... etc. And it is from these "tragic facts" that would arise Machiavelli's ironical solution. That is, Machiavelli chooses irony, rather than compassion, as the key concept of political action.

Thus, I think that, though it is useless to try to make Machiavelli a compassionate thinker, it is very important not to forget the reasons for considering Machiavelli the founder of a particular way of tragic thinking, which is clearly connected with irony and detachment.

3. *Tragedy and the Risks of Irony.*

3.1. *Irony and Cruelty: the Case of Machiavelli.*

Machiavelli tries to establish a political knowledge which will break with tradition assuming an ironical and critical distance with respect to the current political modes. In this sense to forget and to detach oneself seems to be an integral part of politics: forgetfulness of conventions, forgetfulness of the prevalent links between morality and politics, detachment from the current discourses about power and legitimacy (57). To gain ironical distance respect the given structures of politics means something similar to what Socrates did in Athens, but with a very different intention. In Machiavelli's case, the intention is structured not by the philosophical question "Know yourself!", but by the political problem "How to found and main-

(56) Nowhere in Machiavelli' s works does one find any precept to inflict "unnecessary" or gratuitous cruelty. So one should refer in this context to the principle of an economy of violence as guiding principle of Machiavelli's teaching. (See S. WOLIN: *Politics and Vision. Continuity and Innovation in Western Political Thought*, Boston: Little, Brown and Co., 1960; also IF, II, 36, 37, etc.) Conversely, if cruelty is linked in Machiavelli to necessity, we already know that the concept of necessity is open and, therefore, allows one to redefine it constantly. What may appear to be necessary to the Florentine, might not be so for us. But it is equally difficult to think politically without reference to "what is necessary", no matter how flexibly we construe its limits. The key point here is that necessity does not provide comfort or solace, but force us to think and to act with courage in a world of uncertainty.

(57) For instance, *D, I, pr; P, 15;* etc..

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tain a *vivero civile e libero*". The difference is clear. As Federico Chabod says, Machiavelli' s demon is his "*furor politico*", (58) not any transcendental moral, god or religion who could help the individual to "care of himself". Machiavelli puts politics first.

But, for doing so, the first thing we need, so he thinks, is to gain distance from the usual answers (behave morally, never break the rules, comply with principles), and to think in a new way. That is, to think from the point of view of a kind of "forbidden knowledge": at times you have to behave immorally, to break the rules and to forget principles if you want to be free (and to be politically free is, for Machiavelli, the basis of any other personal liberty). But to take this path, the path of evil, is to take the path of distance (from the — concrete-community), of forgetfulness (from the — given-tradition), and of amnesia (from — current moral-principles). (59) And what is odd is that the "forbidden knowledge" is extremely imprudent (you can not speak about it openly, as Leo Strauss would say), and at the same time requires a lot of prudence (that which is needed for establishing the foundation of a free political order). And prudence, precisely, is the key for knowing what to "forget".

The virtuous subject of political action must be a subject capable of deciding what to "forget" (that is, to silence) and what to remember (and to elaborate). S/he should be able of assuming risks and consequences, capable of avoiding the complacent self-deception involved in adopting some peculiar mechanism of reconciliation ("it's not me who chooses, but god, or reason, or science, or necessity or ethnic authenticity, etc) It is clear, that this double-edge function (to silence and to elaborate) is meant to create political liberty. In this sense, this kind of *virtù* is what a republican community needs in order to deliberate collectively and adequately over the alternative courses of action, over the common good and justice, over tragic choices. So, according to this, political judgment must combine both distance and experience, memory and forgetfulness, criticism and silence, political

(58) See F. CHABOD: *Scritti sul Machiavelli*, Giulio Enaudi, Torino, 1964, p. 383.

(59) Amnesia is, in fact, silence. So the art of political amnesia is, at least in part, the art of silence. The art of silence, because to forget or not to forget, is not at subject's disposal, but to silence some facts or moral principles in the public sphere in order to protect liberty is always an open possibility, as I already mention commenting on transitions from authoritarian rule.

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distance and closeness, detachment and sympathy (60), and this seems to be possible through the adequate experience of the tragic conflict: compassion to foster our solidarity and our commitment but also the proper use of irony, criticism and detachment.

Irony is needed to change the world. Nevertheless, the main attraction of irony is at the same time its defect. Indeed, irony may be defined by its abrasive character, by its "enthusiasm for destroying", its "divine madness" that "does not leave stone upon stone" (61). This aspect of irony produces within it a movement of detachment from actuality and hence from the community in which it originates (62). Nothing supports irony, and this allows it to do with great efficacy its critical and destructive function. But, precisely because of this, irony tends: 1. to suspend "what is constitutive of actuality, that which orders and supports it: that is, morality and ethics" (63); and 2. to distance itself from the concrete community of human beings. (As with Socrates that through his teachings defied the current morality in Athens and Athenian democracy).

So irony is also a double-edged sword. On the one hand, it grants us the critical distance which we need in order to avoid being dragged by the current. It allows us to transform ourselves and to transform politically those aspects of reality which we find intolerable even though the prevailing values and vocabularies do not consider them so. It allows us to ironically recapitulate the costs of the tragic choices we face, and, in this way, to experience the limits and shortcomings of our ways of life. But, in order to do that, irony submits the existing cultural codes to such a destructive process that it may impede sympathy for the community of concrete persons in which it originates. It is as if irony remains perpetually encapsulated, isolated, "outside" the context of the shared. This is what it means to say that irony and common sense are opposites (64).

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(60) See R. BEINER: *Political Judgement*, op. cit., pp. 102 ff..

(61) See KIERKEGAARD: *The Concept of Irony with Continual Reference to Socrates*, Princeton, NJ, Princeton University Press, 1989, pp. 261-2.

(62) Kierkegaard writes: « Irony is free, free from the sorrows of actuality, but also free from its joys » (ibidem, p. 264).

(63) *Ibid*, p. 283.

(64) See R. RORTY: *Contingency, Irony and Solidarity*, Cambridge: Cambridge University Press, 1989, p. 74.

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The political risk of public irony vis-à-vis the tragic choice is, therefore, the distance that the ironic judgment maintains with from its "object". This risk is evident in some of the Machiavellian solutions to the different problems produced by the tension between common good and justice. The ironical distance gained by Machiavelli with respect to the prevailing vocabularies of justice in his world (Christian morality), permits him to counsel political actions of extreme cruelty and charged with injustice for their victims (65).

The insecurity, uncertainty and cruel laws of the goddess Fortune define, for Machiavelli, a political context characterized by an absence of trust in which the unexpected is also dangerous. Irony presents itself, in this case, as a weapon against dependency and servitude, against heteronomy and slavery. By escaping the prevailing vocabularies that tried to account for, and reconcile, this situation, Machiavellian irony must confront the fact that the use of cruelty may be (and often is) a recourse against the prevailing and menacing cruelty and injustice. The model which is chosen to give form to this kind of reflection is that of consequentialist judgment, that is, judgment in accordance with the results of the action.

For Machiavellism as well as for strategic thinking, the Machiavellian lesson is summed up in the idea that "the end justifies the means". The obligatory quote is the following: "It is a sound maxim that reprehensible actions may be justified by their effects, and that when the effect is good (...) it always *justifies* the action" (*D, I, 9*, my emphasis). Here one should note the urgency with which the English translator makes Machiavelli say that such an action is justified. Yet, in fact, the term used by the Florentine writer is not "justify", but, in moral terms, the more tragic and less comforting one of "excuse": « *accussandolo il fatto, lo effetto lo scusi; e quando sia buono* (...) *sempre lo scuserà* » (66).

Similarly, another crucial quote on this topic says: « For when the safety of one's country wholly depends on the decision to be

(65) See, for instance, *P, 7; P, 15; P, 18;* etc.. On appearances and fraud, that is, on what has been called "*l'illusionnisme politique*" of Machiavelli, see L. VISSING: *Machiavel et la politique de l'apparence*, PUF, Paris, 1986. Also *D, I, 35; D, III, 3; D, III, 17; D, III, 21;* etc..

(66) See the similar comment made by Q. SKINNER: *The Foundations of Modern Political Thought*, I, op. cit., p. 184.

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taken, no attention should be paid either to justice or injustice, to kindness or cruelty, or to its being praiseworthy or ignominious. On the contrary, *every other consideration being set aside*, that alternative should be wholeheartedly adopted which will save the life and preserve the freedom of one's country » (*D, III, 41*, my emphasis). Here again, the Italian words corresponding to the emphasized phrase are: « *postposto ogni altro respeto* ». That is, the terms used by Machiavelli are "postponed" and "respect". There doesn't seem to be much solace or comfort in this. Whereas to postpone something means to recover it afterwards, to respect something means that is compulsory to pay attention to it. So, a certain tragic tension is maintained in the words "postponed" and "respect", in spite of the force with which Machiavelli recommends the alternative course of action derived from ethics of responsibility, to put it in Weberian terms.

But, in spite of the tragic nuance that one may want to introduce here, the Machiavellian solution has its price. And that price is, again, the silence about the victims that are sacrificed for the sake of the political end that is pursued. In fact, consequentialist judgment (when it occurs in connection with an ironical subject) counsels setting aside the voice of the victims and their suffering. It is as if irony turned against itself and argued, for example, that the subject who makes use of it should avoid any empathy with the victims that constitute the "cost" or the defeated side of the ironical judgment (67).

It seems to me that this price or, rather, the risk of having to pay this price, is more pertinent to the Machiavellian theory than the famous Straussian thesis on Machiavelli as the teacher of evil. As we already know, what is tragic in the teaching of Machiavelli is not that it turns evil into goodness, but rather in that it tries to make us aware of the *political* limits of goodness, of the deep relationship between good and evil, of the good (political) outcomes that evil may produce.

The tragic Machiavelli, Machiavelli in his best moments, is

(67) It is this what Kafka tries to tell us: « He found the Archimedian point, but he used it against himself; it seems he was permitted to find it only under this condition ».

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acutely aware of the necessity of action as well as of the tension between common good and justice, and he does not attempt to reconcile them or to invoke a theological 'justification'so as to find solace and comfort. For Machiavelli the real problem is not the reconciliation of this tension, but what type of subject can bear this situation and survive. That is, what type of *virtù* would be preferable in a republican community in order to allow for both the exercise of irony and the survival of political bond.

But all of this, no doubt, does nothing to change the fact that the terms of the problem, as they are set out in Machiavelli's teaching, connect cruelty and injustice we do to others with nothing less than what happens to be *necessary* to obtain political autonomy and freedom. And the problem is, as I already mention, that a certain later revolutionary tradition has found in these teachings a fertile ground for connecting the cruel exercise of irony with the transformation of political conditions in an allegedly emancipatory sense. For a certain discourse of modernity, the point was to exercise cruelty and injustice on the concrete community, justifying these actions through the concepts of necessity or of the irresistible progress of peoples or of our search for (ethnic) authenticity or of the infallible march of history, whilst it usually scorned the tragic conflict (68). The political consequences of this focus on the problem are well-known and do not require further explanation.

But even if we abandon this tradition of thought, we still have to handle with much care Machiavelian teaching, because it is rather true that, if one is to believe him, very often the foundation or maintenance of a free political order could have a moral cost: to do evil under certain circumstances. Furthermore, together with the connection between good and evil, autonomy and cruelty there is the link between liberty, discipline, and power. To say it with

(68) In Hegel one can see some of these traits. Thus, with respect to tragic conflict: « The self-consciousness of heroes (like that of Oedipus and others in Greek tragedy) has not advanced out of its primitive simplicity either to reflection on the distinction between act [*Tat*] and action [*Handlung*], between the external event and the purpose and knowledge of circumstances, or to the subdivision of consequences. On the contrary, they accepted responsibility for the whole compass of the deed ». (G.W.F. HEGEL: *Hegel's Philosophy of Right*, English translation by T.M. KNOX, London: Oxford University Press, 1967, par. 118, my emphasis).

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Gennaro Sasso: « *Dove infatti c'è libertà... ivi conviene che sia anche potenza...* [and, on the other hand,] *la condizione della potenza è... la libertà* » (69). Everything seems to be internally connected and, so to speak, there is no innocent political position. There is no escape from the deep seated interrelationships that often exist between good and evil, irony, autonomy, and cruelty, liberty and disciplines, power and justice.

3.2. *Domesticated Irony?*

It is probably because of these dangerous connections that the pragmatic liberalism of Richard Rorty opts for a solution to this dilemma which consists, literally, in *domesticating irony*. The Rortyian ironist knows that her permanent doubts about the inherited vocabulary constantly induce her to redescribe herself and everything that surrounds her in new terms. She also knows that "redescription often humiliates" and that this fact is incompatible with our liberal democratic *ethos* which defines itself by considering the cruelty inflicted on others "as the worst thing we do". (70)Therefore Rorty argues for the need to use irony in a limited and specific territory, namely, in the private sphere: only private irony leaves a space for liberal hope.

Thus, the continuous doubts of the ironist with respect to the prevailing liberal vocabulary, her conviction about the contingency of the liberal community and its language, her knowledge of the

(69) See G. SASSO: *Niccolò Machiavelli*, Il Mulino, Bologna, 1980, pp. 553-5. Also*, D, II, 2*. Against this see M. VATTER: *The Machiavellian Legacy: Origin and Outcomes of the Conflict Between Politics and Morality in Modernity*, European University Institute, *Working Papers*, SPS 99/2.

(70) See R. RORTY: *Contingency, Irony and Solidarity*, op. cit., p. 90, also pp.xv and 146, etc. The definition of the liberal as a person who "put[s] cruelty first" comes from J. SHKLAR: *Ordinary Vices*, Cambridge and London: The Belknap Press of Harvard University Press, p.44: « It seems to me that liberal and humane people (...) if they were asked to rank the vices, put cruelty first. Intuitively they would choose cruelty as the worst thing we do ». Also p. 2: cruelty is « intolerable for liberals, because fear destroys freedom ». Also A. ARTETA: *La compasión. Apología de una virtud bajo sospecha*, op. cit.. And, of course, the source of all that: M. De MONTAIGNE: *Essais*, op.cit..

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power of redescription (71), must not contaminate the principles of solidarity that have to support the functioning of the public sphere. In this sphere the goal is no other than the increase of our solidarity, of our sensibility towards humiliation, of our identification with the strange and the alien, of our sympathy and closeness with the victims, in short, of our liberal-democratic culture and values. On the other hand, the private sphere is the sphere of ironical self-creation, of the search for the sublime, of the transformation of the self and the constant recreation of our individual identities. In short: the liberal-ironist believes in liberal common sense for the public and in irony and recreation for the private.

It has been pointed out that this distinction is problematic, among other reasons because of the impossibility of distinguishing clearly between the public and the private (72). Although I still think that this is correct, it is not the main difficulty with the Rortyian strategy. The main problem is not that such a distinction is impossible, but rather that it is not even desirable.

In the first place, it seems that nowadays the risk does not lie with irony. The risk is not that we may all turn into Machiavellistic, cruel ironists in the style of O'Brien in Orwell's 1984. Certainly cruelty plays a very important role today in political alternatives such as radical nationalism, or fundamentalism of several kinds, or neo-fascism, racism, xenophobia, etc (73). So it is not that Rorty is

(71) See RORTY: *Contingency, Irony and Solidarity*, op. cit., pp.73-74: « I call people of this sort 'ironists' because their realization that anything can be made to look good or bad by being redescribed, and their renunciation of the attempt to formulate criteria of choice between final vocabularies, puts them in the position Sartre called 'meta-stable': never quite able to take themselves seriously because always aware that the terms in which they describe themselves are subject to change, always aware of the contingency and fragility of their final vocabularies, and thus of their selves ».

(72) See, for example, R. DEL ÁGUILA: "Emancipation, Resistance and Cosmopolitanism", in *New School for Social Research. Graduate Faculty Philosophy Journal*, vol. 18, n. 1, 1995.

(73) No doubt, there is also a lot of cruelty in real liberal democracies (inequalities, poverty, domination, etc.). That is the reason why, as we will see soon, we can not eliminate irony and criticism from the public sphere. But the normative ideals of liberal-democracies are, precisely, that cruelty should be eliminated, whereas normative ideals of the rest of alternatives I have mention put first some other value (authenticity, "salvation of the soul", etc.).

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completely wrong in fearing some kind of 1984 if we let irony and detachment to "circulate freely" in the public sphere. I think, nevertheless, that all these alternatives have lost the normative battle with the values and beliefs of liberal-democracy. Normatively speaking, when they want to justify themselves, they use (and abuse) certain key values that belong to democracy. When they want to justify exclusion, racism, xenophobia, or whatever, they refers to values such as "self-determination", or "the right to be different", etc. That is the reason why I think that in our apathetic democracies, the main risk of irony lies elsewhere.

When tragic political judgment is deactivated, when it is reconciled or hidden from the population, when the prevailing vocabulary steels itself against irony, when the tensions and limits of our collective identity vanish through a sleight of hand, that is, when the ironical distance disappears from the public world and we are left with the conventions of common sense, then the risk is that the citizens of our liberal democracies will become characters of another negative utopia, no less famous than the one cited above. The risk is that they will become inhabitants of the *Brave New World* of Aldous Huxley, shielded against tragic tensions and their political consequences thanks to generous doses of *soma*.

So to keep the public sphere free of irony, and to routinize the vocabulary in terms of the existing liberal codes is also risky. Namely, no political order, no vocabulary, no matter how open and flexible (and thus not even our liberal-democratic vocabulary), permits the description in adequate terms of *any possible* cruel, unjust and humiliating trait in communitarian practices. In other words, « no order can enable everything to flower in the same garden: this is a 'necessary injustice', as Nietzsche would put it, within the practices of justice » (74). Or, « no political system can satisfy the discontents and differences the social condition creates within and between us » (75).

That is, if every collective identity (if our liberal-democratic identity) generates differences, tensions, divisions and limits by the mere

(74) See W. E. CONNOLLY: *Identity/Difference. Democratic Negotiations of Political Paradox*, Ithaca and London: Cornell University Press, 1991, pp. 159-160.

(75) See J. SHKLAR: *Faces of Injustice*, New York and London: Yale University Press, 1990.

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fact of its constitution, may be irony will allow us to have access to a dimension of the contingency of our community capable of politicizing these differences and tensions and open a space where we can give them public expression. It may be the case that public irony and the admission of the contingency of our liberal democratic community and its vocabulary has no better breeding-ground than the consequent experience of tragic conflict and tragic choice properly combined.

In other words, this problem has two different aspects: 1. autonomy and liberty entails risks (if we were to fully and blindly assume its attainment at any cost it would lead us towards some form of tyranny (76)); but 2. abandoning its search would leave us helpless before slavery and dependency. Paraphrasing Michel Foucault, we could say that any course of action is dangerous, but that does not exempt us from the necessity of deciding and acting (77). Machiavelli' s words on this are well known: « I believe, believed, and always shall believe that what Boccacio says is true: that it is better to act and regret, than not to act and regret anyway » (« *è meglio fare et pentirsi, che non fare et pentirsi* » -*Lett*., Francesco Vettori, 25/2/1514).

4. *Final Remarks: Was Machiaveli a Tragic Thinker?*

Machiavelli's theory of political action cannot be understood exclusively in strategical terms. This sort of interpretation would force us to understand Machiavelli' s theory as the story of an isolated and unbound subject pursuing whatever ends at whatever moral cost. Or of a tyrant who tries to create, to maintain, and to develop his/her power at any price. Or of whoever is capable of

(76) The Bacchae of Euripides « (...) takes some of our fondest, noblest aspirations, such as liberation and objectivity, shows their power, attractiveness, and necessity, but also their powerlessness, partiality, and fictiveness. Against and with Foucault, it implies that liberation, like false consciousness, can be given up at the risk of becoming a slave and only embraced at the risk of being a tyrant ». (P. EUBEN: *The Tragedy of Political Theory. The Road not Taken*, Princeton NJ, Princeton University Press, 1990, p. 48).

(77) The words of Foucault are: « My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous then we always have something to do. So my position leads not to apathy, but to a hyper- and pessimistic activism ». ("On Genealogy of Ethics: An Overview of Work in Progress", in: *The Foucault Reader*, edited by P. RABINOW, New York: Pantheon Books, 1984, p. 343).

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thinking and acting setting aside any moral considerations and focusing him/herself on the technical problems for reaching whatever goal s/he considers appropriate. I have suggested that the main source of this kind of political action in Machiavelli' s writings is to be found in his profile of the new prince. Nevertheless, it is undeniable that some texts do not support this interpretation since they link the new prince with a specific political end: the common good of the subjects. Thus, though merely strategic thinking can learn a lot reading Machiavelli, it would impoverish our understanding of the Florentine to read him in exclusively strategical terms.

This is the reason why I have analyzed the transformation that "strategy" experiences when it is understood "inside" the republican reading of Machiavelli. In this case, the goal of action is strongly political: the creation and development of a free political order. The attainment of this political goal is considered to be shared by virtuous citizens acting in plurality and competition. So the subject(s) of political action cannot be neither "isolated" nor "unbound", but rather closely related to the fellow citizens and deeply concerned about republican traditions. Furthermore, they should be virtuous and capable of learning through participation about the joys and the costs of the art of creating, maintaining, and developing their common liberty. Thus, the attainment of a *vivere civile e libero* is not the "technical outcome" of the functional choice of proper means. In the republican reading, means mediate ends, that is, they are conducive to the end but part of the end themselves. So means are to be considered not only from a technical perspective, but also from an immanent one: they should never eliminate the conditions for the flourishing of some values and institutions (virtuous citizens, free institutions, good laws...) Precisely because of that, wherever you fight, and fight well, to reach the proper political goal through the proper means, you will be praised, even if you are defeated. You should never surrender, despite misfortunes and even "despite consequences"(!) (for your comfort, for your life, for your immediate interests). Because virtuosity in action is so crucial in this reading, I have called it a Quixotic conception of *virtù*. Nevertheless, we soon discover that still those republican citizens have to perform actions against current morality to protect the common good (that is, to protect the attainment of the supreme political

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goal). So we have to re-read the republican interpretation of Machiavelli' s theory of political action from a tragic point of view: that of the collision between justice and common good.

Both justice and common good embody a different ethical standpoint. So the problem should not be understood in terms of static spheres or realms (clearly separated, self-referentially ordered, etc.), but rather in terms of choosing between alternative courses of action from different perspectives. A virtuous subject of action who identifies properly the common good is also aware of the fact that in pursuing a particular course of action at times s/he has to perform actions which may be considered to be against current morality. If s/he is to put common good first, then may be s/he has to "postpone" justice and to "excuse" some moral transgressions. The use of moral dubious means is not justified, but only excused, by the attainment of certain consequences (consequences which integrate principles: the creation, maintenance, development of a legitimate political order). Good and evil, power and justice, common good and morality, disciplines and liberties, autonomy and cruelty, etc., are so deeply intertwined as to prevent any attempt to separate them neatly. This is the internal tension which is at the core of Machiavelli' s theory of political action. An internal tension which has produced a "wound" in Western political thought.

TABLE 3. *The tragic model of political action*

1. Subject (Republican Citizen)	1.1. Education Through Tragic Choices	1.1.1. Proper Balance Between Compassion and Irony
		1.1.2. Proper Balance Between Remembering (Defeated Side of Political Judgement & the Victims) and Silence.
2. Means	2.1. Transgression of Current Morality	2.1.1. Alternative Courses of Action
		2.1.2. Common Good and Justice.
	2.2. Consequentialist Judgement.	2.2.1. "*Scusare*" and "*Postponere*"

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		2.2.2. Good and Evil Intertwined
3. Ends	3.1. *Vivere civile e libero.* Maintained and developed through plurality and competition, under conditions of risk and uncertainty.	3.1.1. So the ends are neither given, nor fixed, nor crystallised, and its attainment is uncertain and insecure.

To summarize, according with the tragic model of political action:

1. A virtuous subject of action (republican citizen)…

2. is capable of identifying properly the common good and the needs of the political community and…

3. is also capable of identifying and choosing among the alternative courses of action (which are tragically in conflict with morals and with one another) that, in the midst of contingency and risk, may be conducive to the ends pursued.

4. Besides, s/he is aware of the close and disturbing connections that exist between justice and power, good and evil, autonomy and cruelty, etc. and of the fact that these deep seated connections produce an unavoidable wound in political thought and action.

In fact, many efforts have been made to heal that wound. The discipline of reason of State, the concept of necessity, etc. are but some of them. Also different attempts have been made from concepts such as "scientific certainty", "rational mastery", "unavoidable progress of humanity", etc. All of them may be considered working in the same direction: to avoid the tragic conflicts and to substitute them by an indubitable rule coming from the perfect harmony of the world.

This is completely anti-Machiavelian. For him action is linked to uncertainty and risk, and the proper question is not how could we dispel them, but what kind of political subject and what type of political *virtù* are needed to face this situation. We are installed in a world of tragic choices that can be neither ordered nor justified by any theological sanction (neither by god, nor by reason, nor by necessity, science, progress or history). So the concrete experience of tragic conflict appears to be crucial. The experience of tragic conflict shows the limits and fragility of our ways of life, of the vocabularies in which we express them, of the political space in which we order

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them. And this remains true even in our times, that is, even in the times of hegemony of liberal democracy. It is the experience of tragic conflict which permits us to combine compassion and irony, to empathize with victims and to criticize the prevalent political arrangements.

But, after all we have been saying, could we consider Machiavelli as a tragic thinker? Does he think in tragic terms? Does he experience and learn from tragedy in the way we are vindicating? It seems to me that we can now answer these questions directly. We can find in his works the following reasons to consider him so:

1. Good and evil are intertwined; goodness has political limits; evil may produce good political outcomes; even a free political order has a moral cost; individual and collective autonomy may need moral transgressions to be created, maintained and developed.

2. Ultimate values are often not compatible with one another. There are circumstances that prevent the adequate fulfilment of two valid claims. To choose is tragic because we cannot guarantee that what we are choosing is self-evident or perfect (right, just, true, necessary, etc.). Nevertheless, we can offer arguments and reasons that support the tragic choice we have made (to offer this sort of arguments and reasons is precisely what Machiavelli did in his works).

3. Machiavelli never tries to "transvaluate" values: evil remains evil; good, good; cruelty, cruelty. He invents no "theological" sanction (god's will, unavoidable historical necessity, etc.) to hide this fact. He does not try to give us solace saying that is someone else who choose or that the choice would have no moral or political costs for us.

4. In choosing a course of action (under uncertainty, contingency and risk) we have to give up the other. Every tragic choice entails a loss. Nonetheless we have to choose. Choice is unavoidably linked to human political condition (this is what liberty is about).

5. Ends do not justify means. At most, ends "excuse" the use of certain means under certain circumstances. Besides, moral considerations about means are not eliminated, but "postponed".

For all these five important reasons Machiavelli is clearly a tragic thinker. Nevertheless we can find also two reasons to deny him that title:

1. He did not face this situation with anguish. He never showed compassion for the possible victims the (tragic) choice might create.

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2. He took little interest on the reasons which would incline us to choose differently, that is, he took little interest on the "defeated side of political judgement".

It seems to me clear that these two reasons "against" considering Machiavelli a tragic thinker do not really answer the question we are posed, but rather this other one: "how does Machiavelli experience the tragic choice? Does he experience it in the 'proper way'?". If we think the 'proper way' is to be understood following Aristotle (compassion) and Arendt (defeated side of political judgement), then it seems that he does not experience it properly. He does not seem to fit the aristotelian-arendtian theories of tragedy. Or, better, he does not show clearly those emotions needed to be consider as experiencing properly tragic choices (if we are to follow that tradition of thought).

Of course, we can turn to Nietzsche looking for an alternative in experiencing tragedy and trying to establish if Machiavelli might be interpreted in a Nietzschean way.

As is well known, Nietzsche considers a mistake to link tragedy, as Aristotle does, to "two depressive effects", namely, compassion and fear. In his view, the proper way of facing tragedy would be that we become heroes and "in the midst of tragic horror say to [ourselves] 'yes', [since we are] hard enough to feel suffering as pleasure" (78). This idea (this transvaluation of emotions) is connected with *amor fati*, love of fate, that is, with seeing "as beautiful what is necessary in things" (79). It is also related to another basic assumption: « what does not destroy me, makes me stronger » (80), and, possibly, with what has been called a « secret alliance between joy and pain » (81).

I do not see any possibility of interpreting Machiavelli following

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(78) See F. NIETZSCHE: *The Will to Power*, english version W. KAUFMANN & R. J. HOLLINGDALE, Random House, New York, 1967, pars. 851-2.

(79) See F. NIETZSCHE: *The Gay Science*, english version W. KAUFMANN, Random House, New York, 1974, par. 276.

(80) See F. NIETZSCHE: *Twilight of Idols*, in *Portable Nietzsche*, english version W. KAUFMANN, Penguin Books, New York, 1954, par. 465.

(81) See C. ROSSET: *Joyful Cruelty*, english version D.F. BELL, Oxford University Press, Oxford & New York, 1993, p. 30. Also M. HEIDEGGER: "Tragedy, Satyr-Play, and Telling Silence" in *Nietzsche' s Thought of Eternal Recurrence*, in *Why Nietzsche Now?*,

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this track. None of these ideas is relevant in Machiavelli' s work. Unless we get rid of some of the metaphysical flavor they have (fate, etc.) and we consider Nietzsche as saying, more or less, the following: any experience involves pain, suffering, change, death, etc.; but to reject this is to deny existence as such, so our task is to make that suffering active and turn it into a way of "organizing power as agency" (82). In this case, Machiavelli could agree on making suffering active, on considering power as the basis of human agency, and also on the need of a certain detachment of compassion in order to build that agency. We already know that the route Machiavelli chooses to make this possible is that of irony. It is through irony, detachment and criticism that the Florentine thinks we can transform the world. And this is the reason why some (i.e., Berlin) denies him the title of "tragic thinker". He would be too much ironic and critic with the prevailing political arrangements to be compassionate. After all, if compassion is directed to everybody, since it is based in our common human vulnerability, what we need is not that, but to take side and to fight in order to transform the given situation. It is true that this links irony to cruelty and both to the transformation of the world. But, what could be consider more tragic than that? What could be more tragic that the tension that springs from the relation of compassion, irony and transformation of the world ? It is not tragic to state that irony and detachment from compassion are needed in order to act properly and to transform the given? It is not tragic to affirm that moral transgressions are here to stay and that no matter what we feel about them, they will remain with us? It is not all these the best examples of Machiavelli being a tragic thinker? True, once posed the problem Machiavelli does not solve it. But, Should he? It is it a *conditio sine qua non* for tragedy to know in advance that there is a "solution" to it? Quite the contrary.

And precisely because he does not solve the problem he can be consider properly speaking, a tragic thinker, that leave us the responsibility for choosing, for the quantity and quality of transgres-

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D. O'HARA ed., English version D. FARREL KRELL, Indiana University Press, Bloomington, 1985, pp. 25 ff..

(82) See M. WARREN: *Nietzsche and Political Thought*, The MIT Press, Cambridge Mass., 1988, pp. 190 ff..

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sions, for the balance between irony and compassion, etc. So, like Odiseus we sail between Carydbis and Scylla. We have to avoid the world of irony unbound, the world of cruelty represented by Orwell's negative utopia, *1984* and some contemporary implacable political alternatives (from communism to fascism and radical nationalism). But we ought also to avoid the complacent, impeccable and self-indulgent world of Brave New World, with enough *soma* to make citizens "happy" and slaves at the same time. Machiavelli' s theory tries to work inside this tension and, at his best, might help us to do the same. Wary as we should be of a certain European form of doing politics that has made our continent the "daughter of excess" ([83]), may be we need to create a proper balance through the combination of compassion and irony to breed our political judgement. Because it is through judgement, prudence and practical knowledge that we have to face the main tragic choices in our political world.

([83]) The expression is Albert CAMUS' in the following context: « Greek thought always takes its stands upon the idea of limit (...) Our Europe, on the contrary, is the daughter of excess (...). [But] Nemesis is watching, goddess of moderation, not of vengeance. All those who go beyond the limit are by her pitilessly chastised ». (*Selected Essays and Notebooks*, edited and translated by P. THODY, Harmondsworth, Middlesex: Penguin Books, p. 136).

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La dimensione giuridica

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PAULO FERREIRA DA CUNHA

AS LIBERDADES TRADICIONAIS E O GOVERNO DE D. JOÃO VI NO BRASIL. ENSAIO HISTÓRICO-JURÍDICO PRELIMINAR (*)

I. Pressupostos e itinerário de uma investigação. — II. Sentido geral da legislação e administração de D. João no Brasil. — III. Das liberdades e direitos. — 1. Protecção de grupos sociais. — 2. Os Índios e a questão racial. — 3. Os Escravos. — 4. Os infractores e os sediciosos. — 5. Conclusão.

I. *Pressupostos e itinerário de uma investigação*

> "Foram esses portugueses, os que se não resignaram ao que tinham em volta e sobretudo em cima (...) que abandonaram um Portugal que lhes não servia nem se deixava servir por eles e partiram para o Brasil, para as terras novas de gente nova, e tudo fizeram aí, longe dos monopólios, dos reis e dos tridentinos, a fim de instaurar uma grande nação que conservasse as liberdades populares (...)"
>
> Agostinho da Silva (1)

(*) Estudo realizado no âmbito da Linha de Investigação e Gabinete de Estudos do *Pensamento Jurídico Lusófono*, do Instituto Jurídico Interdisciplinar da Faculdade de Direito da Universidade do Porto, para o qual contribuíram várias estadas de estudo no Brasil. De entre as muitas entidades (sobretudo Bibliotecas) e pessoas a quem deveríamos agradecer, permitimo-nos destacar a Universidade de São Paulo, e em especial o Prof. Dr. Jean Lauand, a Universidade Paulista e o Tribunal de Alçada Criminal de São Paulo, e em especial o Prof. Dr. Juiz Ricardo Dip, a Editora Millennium e em especial o Dr. Alfredo Abe, a Biblioteca Mário de Andrade e os seus prestabilíssimos Funcionários, a Fundação Tobias Barreto e o Dr. Luís António Barreto, o Instituto de Filosofia Luso-Brasileira e os Profs. Doutores José Esteves Pereira e António Braz Teixeira, e o Prof. Dr. Jacy Mendonça, Director do Curso de Direito da Unicapital e Professor da Pontifícia Universidade Católica de São Paulo, que leu todo este trabalho e deu sugestões bibliográficas para uma sua possível continuação. Além de — *last but not the least* — a Faculdade de Direito da Universidade do Porto, na pessoa do Presidente dos seus Conselhos Científico e Directivo, Prof. Doutor Cândido da Agra.

(1) Agostinho da Silva, "Portugal e Brasil", in *Ensaios sobre Cultura e Literatura Portuguesa e Brasileira*, vol. II, Lx., Círculo de Leitores, 2002, p. 91.

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As manifestações do génio jurídico de um povo ou de um conjunto de povos com afinidades e laços civilizacionais particularmente comuns são múltiplas, e as pistas a seguir para captar tal originalidade comportam, assim, diversos trajectos.

A hipótese de um espírito jurídico nacional português, inserido no contexto de um génio jurídico hispânico ou ibérico (pelo menos derivado de um fundo comum desses tempos anteriores à formação da nacionalidade) foi-nos sugerida por diversíssimas fontes, umas mais ortodoxas, outras — por enquanto, ao menos, apesar da ruptura epistemológica fundamental "pós-moderna"— mais heterodoxa.

Foram, por um lado as sínteses iluminadoras de Teixeira de Pascoaes (2), e, mais perto de nós, de Agostinho da Silva, chamando a atenção de forma breve e concisa, mas bastante poder evocativo e prático, para esse *quid specificum* do direito português, ancorado, evidentemente, num modo-de-ser português, essência,

(2) Teixeira DE PASCOAES, *Arte de ser Português*, cit., pp. 78-79: "É certo que a nossa jurisprudência deriva das leis godas e romanas, e a dos últimos tempos não é mais que uma cópia inferioríssima das leis estrangeiras que desnaturaram por completo o corpo jurídico do Estado.

Mas há leis na nossa antiga legislação, como as primeiras leis proteccionistas do comércio marítimo (Cortes de Atouguia) e do desenvolvimento da agricultura, que nasceram directamente do instinto que teve Portugal, depois de se fixar como Pátria, de se defender e consolidar. Ele começou por criar a família rural, ligando-a à posse duradoura da terra. Assim, entre nós, o morgadio teve como origem uma lei (lei avoenga, da 1.ª Dinastia).

Temos ainda os forais e os princípios de direito político estabelecidos nas antigas cortes, revelando o espírito de independência e liberdade que animou sempre a alma popular. Intervinha no governo do País, na sucessão do trono, em todos os actos de interesse geral que o Rei praticasse: a guerra e a paz, lançamento de impostos, etc. E exercia ainda uma esperta vigilância sobre o procedimento dos homens de Estado, alguns dos quais foram acusados e condenados!

Em plena Idade Média, enquanto outros Povos gemiam sob o peso do poder absoluto, impúnhamos à nossa Monarquia a forma condicional: o Rei governará se for digno de governar, e governará de acordo com a nossa vontade, expressa em cortes gerais reunidas anualmente.

Temos ainda várias leis antigas emanadas do Costume, as quais receberam dele uma nuance original que também caracteriza o génio português". Cfr. o nosso *Amor Iuris. Filosofia Contemporânea do Direito e da Política*, Lisboa, Cosmos, 1995, p. 199 ss..

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ou "alma portuguesa" (3). Foram ainda trabalhos mais especializados sobre as especificidades do constitucionalismo português, apesar da sua influência francesa encoberta pela evocação espanhola (4), e, mais longinquamente ainda, no tempo, estudos comos de Jaime Cortesão (5), ou os trabalhos de Bernardino Bravo Lira (6), em que essa especificidade ganha contornos de carácter precursor. Porquanto as grandes conquistas de liberdade, igualdade e justiça, que a voz corrente sói hoje em dia sediar algures numa das três revoluções modernas e burguesas — inglesa, americana e/ ou francesa (7) — já se encontram, afinal, pelo menos em estado potencial ou embrionário, em recuados tempos da formação da nacionalidade portuguesa, ou mesmo antes, sendo marco assinalável neste processo os concílios toledanos e Santo Isidoro de

(3) Agostinho DA SILVA, *Ir à Índia sem abandonar Portugal*, Lx., Assírio & Alvim, 1994, máx. pp. 32-34: "Mas os Portugueses é que, realmente, levaram o Império Romano até aos seus confins, o Império Romano que ainda hoje dura! Porque aquela história do Império Romano *ter* acabado quando entraram os Bárbaros, quando entrou o Cristo… coisa nenhuma! O Império veio por aí fora. Hoje, tudo é governado pelo Direito Romano! […] Claro que Portugal tinha o seu próprio Direito! É o drama da Península ! O Carlos V, que é um Imperador Alemão, veio para Espanha cheio de Direito Romano. … As coisas que ele traz para Espanha, traz para a Península. Mas a Península nem era do Direito Romano, nem do mercantilismo capitalista, nem da Contra-Reforma. Também não era da Reforma, era ela, era a Península … Porque o que os Espanhóis queriam era manter os 'fueros y costumbres', não era a porcaria do Direito Romano, sobretudo do fim do Império, não é ?"

(4) Cfr. o nosso *Para uma História Constitucional do Direito Português*, Coimbra, Almedina, 1995, pp. 273 ss..

(5) Jaime CORTESÃO, *O Humanismo Universalista dos Portugueses: a Síntese Histórica e Literária*, Lx., Portugália, 1965 (vol. VI das Obras Completas); e especialmente Idem, *Os Factores democráticos na Formação de Portugal*, 4.ª ed., Lx., Livros Horizonte, 1984, p. 176 ss..

(6) Cfr., *inter alia*, Bernardino BRAVO LIRA, *Poder y Respeto a las Personas en Iberoamerica. Siglos XVI a XX*, Valparaíso, EDUVAL, 1989; Idem, *Mello Freire y la Ilustracion Catolica Nacional en el mundo de habla castellana y portuguesa. Apuntes para una Historia por hacer*, Separata da "Revista de Derecho", Universidad Catolica de Valparaiso, EDUVAL, VIII, 1984; Idem, *Entre dos Constituciones. Historica y Escrita. Scheinkonstitutionalismus en España, Portugal y Hispanoamérica*, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", n. º 27, Florença, 1998, p. 151 ss..

(7) Para a nossa interpretação destas três revoluções modernas "canónicas", cfr. o nosso *Teoria da Constituição*, vol. I. *Mitos, Memórias, Conceitos*, Lx./ São Paulo, 2002, pp. 127-248.

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Sevilha (8) (obviamente não portugueses, mas património iniludível desse fundo histórico comum) (9).

Uma das linhas de investigação mais fecundas atinentes a esta hipótese, centrada mais especificamente no campo jurídico-político, máxime constitucional, teve a sua floração num congresso internacional, em Santiago do Chile, onde dezenas de investigadores, sobretudo provenientes da América Latina de língua Castelhana, passaram em revista a transposição e metamorfoses das velhas liberdades ibéricas para o Novo Mundo. E tal teria sido o desabrochar dessas ideias nas Índias Ocidentais que bem poderíamos sintetizá-las nessa divisa conhecida "*extra-ultra*", sobretudo pela extensão e mais ainda pela superação, pelo levar mais além.

Mas se a presença internacional dos estudiosos de língua castelhana parece mais activa, não podemos descurar que já excelentes investigadores do Brasil haviam chamado a atenção para essa particularidade, ora falando mais da singularidade dos Portugueses, como Gilberto Freyre (10), ora associando Portugueses e Espanhóis, como Sérgio Buarque de Holanda (11).

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(8) Sobre o papel jurídico de S. Isidoro de Sevilha, Cfr. o nosso *Para uma História Constitucional do Direito Português*, p. 93 ss..

(9) Cfr. uma súmula da questão no nosso o *Teoria da Constituição*, vol. I. *Mitos, Memórias, Conceitos*, pp. 112-126. Do ponto de vista metodológico, importa distinguir esta liberdade ibérica tradicional da liberdade dos antigos. Enquanto esta é mais politicamente interventiva, a hispânica é sobretudo concretamente protectiva, mas compaginável também naquela ideia de Luis de Gôngora que manda "*traten otros del gobierno, del mundo y sus monarquias*". Quanto à distinção entre liberdade dos Antigos e dos Modernos, a bibliografia seria enorme. Retomemos uma fonte clássica, e pioneira, Benjamin CONSTANT, "De la liberté des anciens comparée a celle des modernes" in *Cours de politique constitutionnelle*, ed. por Éduard LABOULAYE, 2.ª ed., Paris, Guillaumin, 1872, vol. II, p. 548: « Le but des anciens était le partage du pouvoir social entre tous les citoyens d'une même patrie. C'était là qu' ils nommaient liberté. Le but des modernes est la sécurité dans les jouissances privées; et ils nomment liberté les garanties accordées par les institutions à ces jouissances ». Cfr., por exemplo, Celso LAFER, *Ensaio sobre a liberdade*, São Paulo, Editora Perspectiva, 1980 (que aliás cita este passo canónico). Sobre liberdades "antigas", Cfr., por todos, H. VAN GOETHEM, L. WAELKENS, K. BREUGELMANS (dir.), *Libertés, Pluralisme et Droit. Une approche historique*, Bruxelas, Bruylant, 1995. Revelado é Tambéin *v.g.* Quentin SKINNER, *Liberty before Liberalism*, trad. bras. de RAUL FIKER, Liberade antes do Liberalismo, Sa Paulo, UNESP, 1999.

(10) Gilberto FREYRE, *Casa Grande & Senzala. Formação da Família Brasileira sob o Regime de Economia Patriarcal*, Lx., Livros do Brasil, s.d., *passim*, *v.g.*: p. 17 (realismo

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Já vários e excelentes estudos linguísticos e mitológicos nos tinham advertido para uma espécie de regra da conservação de fórmulas culturais (nesse caso as linguísticas e as míticas) nas periferias dos impérios e civilizações. Assim, depois da revoada constitucionalista moderna de saber afrancesado, e das transformações que as duas guerras mundiais deram à luz, será certamente mais difícil, muito árduo mesmo, reconhecer no actual direito público e especificamente constitucional dos estados português e espanhol (embora, neste caso, se trate mais de constitucional no sentido que tem em "História Constitucional do Direito" e não em "Direito Constitucional" *tout court"*) (12) a marca distintiva dessas velhas liberdades, prerrogativas, privilégios, etc. Não que se tenha operado uma ruptura irremediável.. As constituições de ambos os países são, pelo contrário, desde que lidas hoje serenamente, e depurada sobretudo a portuguesa do casulo da linguagem (mais até que de conteúdo) marxista que a envolvia, muito consentâneas, em termos gerais, com tais velhas liberdades — pelo menos tanto quanto a nossa cosmovisão hodierna nos permite *hic et nunc* pensá-las. O que se não reconhece hoje é o estilo, é a linguagem. Mudou-se irreme-

económico e jurídico dos Portugueses na formação do Brasil e liberdade de expressão "falaram sempre grosso aos representantes de El-Rei"), p. 30 (sistema leve e irregular da administração do Brasil, pelo menos até ao séc. XVIII, e citando Leroy Beaulieu), p. 198 (alusão aos "privilégios" de mouros e judeus, logo, tratamento não discriminatório das minorias), etc.. O autor não deixa de referir esse momento fundador das liberdades ibéricas que terá sido o dos concílios de Toledo. E comenta: "(...) em Toledo, no concílio celebrado em 633, os bispos tiveram o gosto de ver o rei prostrado a seus pés". Contudo, o mais importante terão sido mesmo os resultados para o povo em geral, e não uma questão entre realeza e clero. O clero, aí, terá liderado a vanguarda dos direitos.

(11) Limitamo-nos a citar dois trechos, que nos parecem muitíssimo significativos, de Sérgio Buarque de Holanda, *Raízes do Brasil*, 4.ª ed. (1.ª portuguesa), Lx., Gradiva, 2000: "(...) pela importância particular que atribuem ao valor próprio da pessoa humana, à autonomia de cada um dos homens em relação aos semelhantes no tempo e no espaço, devem os espanhóis e os portugueses muito da sua originalidade nacional (p. 14); "E a verdade é que, bem antes de triunfarem no mundo as chamadas ideias revolucionárias, portugueses e espanhóis parecem ter sentido vivamente a irracionalidade específica, a injustiça social de certos privilégios, sobretudo os privilégios hereditários. O prestígio pessoal, independente do nome herdado, manteve-se continuamente nas épocas mais gloriosas da história das nações ibéricas" (p. 17).

(12) Cfr., sobre a questão Otto Brunner, *Neue Wege der Verfassungs- und Sozialgeschichte*, Göttingen, Vandenhoeck und Ruprecht, reimp., 1980.

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diavelmente de paradigma — isso sim. Acreditamos que as preocupações são ainda idênticas. Afinal, partilhamos (no fio da navalha das teorizações modernas, mas ainda assim) da ideia de que haverá um comum traço-de-união entre os homens — algo como uma "natureza humana" (13) — de que as preocupações constitucionais *latissimo sensu* são manifestação na esfera juspolítica em que tal humanidade não deixa de se manifestar.

Mas voltemos à permanência de traços civilizacionais nas periferias de forma mais durável, mais perene, do que nas águas agitadas dos centros das civilizações respectivas. Esta "lei" ou verificação em múltiplos casos, aliada ao exemplo prático que nos foi dado presenciar, em Santiago do Chile — da consonância de um modelo protectivo das Pessoas no velho e sobretudo no Novo Mundo, a partir do legado jurídico-político espanhol (mas com explícita abertura, designadamente no pensamento de Bernardino Bravo Lira, para o português) — poderia ter no caso português o seu desenvolvimento.

Não se podendo receber acriticamente a extensão da originalidade verificada pelos autores da língua castelhana, nem tampouco as evocações poético-proféticas da *Arte de ser Português*, de Pascoaes, haveria, a nosso ver, que estabelecer um programa de estudos que permitisse pôr à prova dos factos a hipótese de que, "nas velhas liberdades ibéricas", haveria não só consistência autónoma, como ainda uma especificidade portuguesa, a qual, dada a referida lei da permanência nas periferias, muito provavelmente poderia com maior recorte detectar-se nos lugares de expansão lusa, designadamente naqueles em que a cultura escrita terá conseguido melhor sobreviver: designadamente no Brasil e no que foram os territórios portugueses da Índia e em Macau. Sem descurar, claro está, possíveis sobrevivências nos chamados Países Africanos de Língua Oficial Portuguesa, e em Timor — todavia à primeira vista de menos provável colheita, atento o drama bélico das respectivas descolonizações e subsequentes conflitos, nalguns casos tragicamente devastadores.

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(13) Sobre o problema filosófico da natureza humana, *prius* do problema jusfilosófico do Direito Natural, o nosso *O Ponto de Arquimedes. Natureza Humana, Direito Natural, Direitos Humanos*, Coimbra, Almedina, 2001, máx. pp. 19-85.

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Metodologicamente, afigura-se-nos que a primeira *démarche*, sobre a autonomia das "velhas liberdades", poderá ser posta como hipótese, e empreendida a sua verificação *pari passu* com as demais, ficando presente como pano de fundo de "um espírito" de liberdade (e subsidiariamente justiça e igualdade) que parece só ganhar em, nesta fase, se não determinar muito pormenorizadamente.

Assim, dois eixos parecem orientar as pesquisas: um "logicamente" primeiro, mas não necessariamente o primeiro a empreender, sobre a formação de uma originalidade do Direito Constitucional (*latissimo sensu*) português no seio das liberdades ibéricas tradicionais; e um segundo (mas tão adjuvante e ilustrativo do primeiro que lhe pode ser prévio) erguendo-se em torno da lei de permanência nas periferias: de indagação, nos caminhos da diáspora portuguesa, da presença e desenvolvimento dessa original forma de configurar o juspolítico.

A lógica abstracta, de braço dado com a cronologia, levaria certamente a que se começasse a investigação pelos tempos mais antigos. Não será todavia necessário, nem para a lógica, explicar que a primeira área a desbravar teria de ser o Brasil. Para além de razões mais óbvias, um trecho de Agostinho da Silva no-lo aconselhava:

"(...) o Portugal da Idade Média se transportou quanto e como pôde às costas da América e galgou os planaltos, em marcha que nunca se deteve até marcar o ponto máximo de Brasília. E, se a resposta à pergunta feita fosse que a verdadeira tradição de Portugal é aquela que apoiaram Herculano, Oliveira Martins e Antero, surgiria como corolário, não como paradoxo, que mais a teríamos no Brasil que no Portugal europeu; porquanto Orientes e Áfricas é outra história" (14).

Mas se a opção pelo Brasil nos parecia evidente, por todas as razões, já a cronologia nos deixava algumas dúvidas.

E sem prejuízo, obviamente, de muitos futuros estudos e face à dificuldade — que confessamos— em encontrar significativa documentação dos primeiros tempos da descoberta, resolvemos tirar partido dos obstáculos com que deparávamos. Súbito, uma nova luz esclareceu as nossas andanças por bibliotecas e arquivos. E a hipó-

(14) Agostinho DA SILVA, "O Baldio do Povo", in *Ensaios sobre Cultura e Literatura Portuguesa e Brasileira*, vol. II, p. 275.

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tese de trabalho ganhou forma: e se — perguntamo-nos — em vez de mecanicamente, rotineiramente, procurarmos de forma sistemática, antes de mais, os papéis dos primeiros tempos da presença portuguesa em terras de Vera Cruz, necessariamente buscando as raízes, ou as primeiras sementes, dessas "velhas liberdades ibéricas", ao invés operássemos precisamente ao contrário (de algum modo fazendo das fraquezas forças)? Ou seja: procuraríamos, antes de mais, não os dispersos documentos de múltiplos operadores jurídicos supostamente isolados mas agindo em consonância com o paradigma "velhas liberdades ibéricas", a partir de Pedro Álvares Cabral, mas, precisamente ao contrário do que seria "normal" ou "esperável", buscaríamos outrossim os documentos provenientes da própria Coroa, quer de índole legislativa e afim, quer de feição administrativa ou decisória, mas concentrando-nos no período final da presença institucional lusitana no Brasil. Ou seja: trata-se de avaliar a sobrevivência de eventuais *resíduos* dessas velhas liberdades (e do seu espírito) na legislação e administração dos finais de directa influência portuguesa no Brasil.

Ocorre um facto de algum modo perturbador para a análise, mas sem dúvida fasto. É que, como é sabido, precisamente os últimos tempos da presença portuguesa à frente dos destinos do Brasil coincidiram com um sucesso único na história das Américas: a presença no Novo Mundo de um *Rei*. E D. João tinha essa percepção. Um dia, instado por um ministro sobre que resposta das aos países europeus, que pressionavam a uma devolução de Montevideu à Espanha, atalhou, com esta resposta de Príncipe, e de Príncipe americano:

" — Diga que já não estou na Europa" (15).

Os tempos que medeiam entre a chegada ao Brasil de D. João (16), ainda regente, mas futuro D. João VI, e o seu regresso a

(15) (A. J. de) MELLO MORAES, *História do Brasil-Reino e do Brasil-Império*, Belo Horizonte, Ed. Itatiaia, São Paulo, Ed. da Universidade de São Paulo, 1982, 2 vols., vol. I, p. 153.

(16) Como é sabido, num acto de grande habilidade política, a família real, acompanhada de um séquito de cerca de dez mil pessoas, partiu de Lisboa para o Brasil a 29 de Novembro de 1807, escoltada por uma esquadra inglesa, pouco antes da chegada da primeira invasão napoleónica, que não encontraria resistência. Uma tempestade forçaria a uma escala em Salvador, na Bahia de Todos os Santos, onde D. João aportaria

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Portugal (17) (a que se seguiria o processo de desvinculação a culminar com a independência (18)) parecem ser, assim, um momento privilegiado.

Porquanto a presença régia, para mais na iminência de perder o território europeu, ocupado pelas tropas de Napoleão, deveria fazer-se sentir com uma maior vitalidade e *élan* governativo, mostrando certamente com mais clareza a face própria do génio jurídico português. O Brasil deixava, pelo menos na prática, de ser verdadeira colónia, para adquirir a centralidade de metrópole. E assim nessa época (estudada não como prova real de uma teoria, mas como primeiro passo na investigação, qual teste liminar) curiosamente buscaríamos quer os elementos arcaicos, aí sedimentados e preservados pela periferia do "Império", quer os elementos resultantes do voluntarismo do poder central. Não alargamos a investigação para além do regresso de D. João a Portugal, na sequência da revolução de 1820, tratando até o material nas datas mais próximas deste

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a 22 de Janeiro de 1808, uma sexta-feira. Em 26 de Fevereiro, refeito da borrasca marítima, e após ter tomado as primeiras providências governativas, parte D. João para o Rio de Janeiro, onde chega, em 27 de Março. Será sobretudo a partir da sua instalação no Rio que o príncipe desenvolverá a sua activa acção governativa, designadamente procurando reerguer no Brasil o Estado-aparelho que deixara em Lisboa. Note-se ainda que a ideia da transferência da capital para o Brasil era velha, recuando pelo memosao séc. XVI, e vinha sendo renovada em sucessivos momentos de crise. Cfr., *v.g.*, Therezinha DE CASTRO, *História da Civilização Brasileira*, vol. I, Rio de Janeiro / São Paulo, s/d, p. 110 ss.. Um circunstanciado relato da chegada, ilustrado com testemunhos coevos, pode colher-se in Lilia MORITZ SCHWARCZ, com Paulo CÉSAR DE AZEVEDO e Angela MARQUES DA COSTA, *A Longa Viagem da Biblioteca dos Reis. Do terremoto de Lisboa à Independência do Brasil*, 1.ª reimp., São Paulo, Companhia das Letras, 2002, p. 225 ss..

(17) Como se sabe, D. João regressa a Portugal, no seguimento das convulsões constitucionalistas e anti-britânicas aqui ocorridas, e que levariam à revolução de 1820 e à reunião das Cortes Constituintes (1821-1822) no dia 26 de Abril de 1821, deixando no Brasil o seu filho mais velho, D. Pedro, como regente.

(18) Como é igualmente sabido, e constitui já de algum modo uma narrativa mítica, as Cortes Constituintes assumiram face ao Brasil uma atitude bastante negativa, a qual culminou com a publicação, a 1 de Outubro de 1821 de medidas que restringiam seriamente a autonomia brasileira e impunham o regresso do príncipe regente. A partir daí, o processo acelera-se, tendo o clamor popular levado D. Pedro a declarar a sua permanência desobedecendo às Cortes (em 9 de Janeiro de 1822), e a 7 de Setembro, tendo recebido notícias de Lisboa de novas desautorizações e imposições, num gesto solene e histórico, libertou-se do tope azul e branco português pronunciando o que passaria para a a História como o grito do Ipiranga: "Independência ou morte".

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evento com maior cautela e distanciamento, porquanto se parecem mesclar racionalidades e paradigmas diversos com a vizinhança cronológica da revolução liberal. É que, como tem aliás ocorrido na interpretação de alguns actores principais do nosso século XVIII, pelo vaivém e imprecisão dos conceitos — pois pode taxar-se de tradicionalista um utopista absolutista como Pombal, e de liberal um adepto das velhas liberdades como Ribeiro dos Santos (19) — correríamos sempre o risco de confundir o liberalismo nascente com manifestações daquelas velhas liberdades. E não estamos completamente livres disso.

A tarefa não se revelou fácil. Há preconceitos (ou idiossincrasias...) do nosso tempo que influem poderosamente sobre uma tal avaliação. Sobretudo, como pensar numa idílica terra de liberdades quando se vivia (pelo menos na base de) um sistema colonial, assente na mais escandalosa e gritante das ausências de liberdade — a escravatura? Ou quando, sobretudo com o aproximar do tempo de revolução, começamos a ver medidas totalmente contrárias, a nossos olhos, à liberdade — desde logo a essa forma de liberdade tão essencial que é a liberdade de expressão, com a proibição de livros e periódicos?

Uma grande dúvida, um enorme cepticismo, se apoderou da nossa investigação ao vermos acumularem-se os já sabidos e consabidos dados dessa época e lugar. Afinal a nossa visão idílica é que era excepcional. Pois não sabíamos todos já que desde o Marquês de Pombal se vivia num absolutismo, cópia aportuguesada dos despotismos esclarecidos, agora mais esmaecida desde a queda do Marquês, mas mesmo assim ainda tributária dessa monarquia de direito divino sem apelo nem agravo?

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(19) Sobre esta última questão designatória, o nosso *Para uma História Constitucional do Direito Português*, p. 268; sobre as influências experimentadas por Ribeiro dos Santos, o nosso *Temas e Perfis da Filosofia do Direito Luso-Brasileira*, Lx., Imprensa Nacional — Casa da Moeda, 2001, máx. p. 200 ss.. V. ainda o profundo estudo de José Esteves PEREIRA, *O Pensamento Político em Portugal no Século XVIII. António Ribeiro dos Santos*, Imprensa Nacional-Casa da Moeda, Lisboa, 1983, máx. p. 337: "(Ribeiro dos Santos)… conflui com o 'tradicionalismo' voltado para a superação do absolutismo existente e com a esquerda jusnaturalista. Conflui — não coincide, porém, seja pela problematização ou seja pela tematização, com a escola liberal, mesmo nas suas correntes mais moderna". Mas é in Leberal *Lats sensu...*

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Começou a ganhar força a ideia de que essas liberdades ibéricas, mesmo em terras brasílicas, mesmo na periferia do Estado, não iriam surgir-nos em grande, ao sol dos trópicos, mas necessariamente também como nichos, incrustrações, sobrevivências, numa sociedade que não deixara de acompanhar o todo, à sua maneira.

Evidentemente que Pombal não fora para o Brasil, como o não foi para Portugal, senão uma espécie de "salto qualitativo", mas é de sublinhar que na maior pressão ou não do poder de Lisboa vai muito da diferença.

Uma interessante síntese de uma visão algo canónica já da evolução político-administrativa no Brasil (não coincidente, aliás, com o tempo da respectiva economia) é a que nos propicia Francisco Calazano Falcon. E notemos que descentralização "rima" com "velhas liberdades": "os ritmos político-administrativos seriam assim descritos: uma reacção centralizadora, típica do inicio do reinado de D. João V, de 1707 a 1720, como contraponto à política pouco eficaz da Coroa, em termos da sua presença na colónia, nas décadas finais do século XVII; um progressivo enfraquecimento da autoridade régia na Colónia, entre 1720 e 1750, que propicia o fortalecimento de poderes locais em várias regiões coloniais, a tal ponto que suas resistências forçam os agentes da Coroa a retrocessos e compromissos, ampliando-se assim a participação, por delegação de poderes, dos "colonos" nas administrações locais; a seguir, entre 1750 e 1770, sobre esse quadro da "descentralização" projecta-se a "vontade férrea" de Pombal no sentido da "centralização" a qual novamente se enfraquece e perde consistência após a *queda* do poderoso "ministro" (20).

Mas, evidentemente, nem sequer a tendencial descentralização de base, interrompida pelo interregno pombalino, nos provaria alguma coisa de muito significativo, pois compatível com caciquismos e poderes oligárquicos locais e/ou corporativos, enquanto também as velhas "liberdades" se poderiam compatibilizar com o velho paradigma da aliança entre o Rei e o Povo, sem compromissos ou mediação de significativos corpos intermédios, especialmente sem o peso de uma nobreza excessivamente poderosa. E não nos

(20) Francisco CALAZANO FALCON, *Pombal e o Brasil*, *in História de Portugal*, org. José Tengarrinha, 2.ª ed., Bauru, SP, Univ. Sagrado Coração, 2001, pp. 230, 231.

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lembramos todos de que, mau grado não bater certo nos repetidos esquemas do materialismo histórico, afinal, parece não ter havido vero feudalismo em Portugal, mas antes um regime senhorial com profundo protagonismo da Coroa (21)?

Não se pode generalizar facilmente, porém. Já que ao menor peso da nobreza correspondeu a alforria dos municípios, o que de novo faz girar o problema das velhas liberdades em Portugal em torno não (só) da Coroa, mas também das "comunas". A questão, porém, vem já de longe: a Península teve, desde tempos remotos, municípios mais livres, e, dentro dela, nas terras que são hoje Portugal, nasceram municípios governados de forma ainda mais democrática (22).

E, por outro lado, não podemos ainda olvidar que outro clássico desta matéria, Antero de Quental, assinala a profusão de nobres em Portugal (e Espanha) devido ao facto da nobilitação derivada da reconquista (23). Só que, certamente, tratar-se-ia de uma pequena nobreza, que serviu mais para nobilitar o povo (dando-lhe consciên-

(21) O estudo clássico é o de Paulo MERÊA, *Introdução ao problema do Feudalismo em Portugal*, Coimbra, 1912. V. ainda Torquato DE SOUSA SOARES, *Feudalismo em Portugal*, *in Dicionário de História de Portugal*, dir. de Joel SERRÃO, ed. Porto, Figueirinhas, 1981, II, p. 572 ss. Haveria que cotejá-los com os clássicos do feudalismo geral, *v.g*, F. L. GANSHOF, *Qu' est-ce que la féodalité*, Bruxelas, l'Ofice de Publicité, trad. port. de Jorge BORGES DE MACEDO, *O que é o Feudalismo?*; 3.ª ed., Mem Martins, Europa-América, 1974; Marc BLOCH, *La société féodale*, 5.ª ed., Paris, Albin Michel, 1968. Não estão em causa, nesta exclusão aspectos culturais, sem dúvida muito comuns na Europa. Cfr. Georges DUBY, *As três ordens ou o imaginário do feudalismo*, trad. port., Lisboa, Estampa, 1982.

(22) Cfr. Alexandre HERCULANO, *História de Portugal*, máx. Liv. VIII, parte II; Xavier CORDEIRO, *O Direito e as Instituições*, in *A Questão Ibérica*, LX., 1916, máx. pp. 238, 245. E a excelente síntese de José Pedro GALVÃO DE SOUSA, *Política e Teoria do Estado*, São Paulo, Saraiva, 1957, 19 ss., 215 ss., *et passim*..

(23) Antero DE QUENTAL, *Causas da decadência dos povos peninsulares*, 6.ª ed., Ulmeiro, 1994, pp. 15-16: "Existia, certamente, a nobreza, como uma ordem distinta. Mas o foro nobiliárquico generalizara-se tanto, e tornara-se de tão fácil acesso, naqueles séculos heróicos de guerra incessante, que não é exagerada a expressão daquele poeta que nos chamou, a nós Espanhóis, um povo de nobres. Nobres e populares uniam-se por interesses e sentimentos, e diante deles a coroa dos reis era mais um símbolo brilhante que uma realidade poderosa. Se nessas idades ignorantes a ideia do Direito era obscura e mal definida, o instinto do Direito agitava-se enérgico nas consciências, e as acções surgiam viris como os caracteres".

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cia da dignidade e liberdade) do que para o oprimir. Confluindo com esta ordem de ideias, um Sérgio Buarque de Holanda assinala que os privilégios de índole hereditártia nunca tiveram grande relevo nos países de estirpe ibérica, dizendo, nomeadamente algo que vagamente lembra a própria ideia dos Romanos sobre os Lusitanos, incapazes de se governarem mas não deixando também que os governem: "Em terra em que todos são barões não é possível acordo colectivo durável a não ser por uma força exterior respeitável e temida" (24).

Mas esta democratização do estado nobiliárquico acabaria por corromper-se, sobretudo pelo endinheiramento e a febre de canela provinda das Descobertas, ao ponto de Nicolau Clenardo ter assinalado que em Portugal todos quererem parecer nobres — ainda que a sua alimentação diária sejam rabanetes, ou "nada, por não haver rabanetes no mercado" (25).

E é assim em toda esta investigação. Um torna-viagem de freios e contrapesos que arredam as grandes e unilaterais conclusões para convidarem, ao invés de épicas meta-narrativas, ao cauteloso *pensamento débil* (26).

Ora estando a reflectir sobre como se compensam nos diversos problemas em análise as regras e as excepções, procurei desfastio n'*A Folha de São Paulo*, que jazia à espera dos meus ócios. E eis que numa providencial entrevista do grande historiador italiano Carlo Ginzburg, conhecido especialista da micro-história, encontro lenimento para a minha *malaise* teórica presente:

"(…) o estudo dos desvios ou dos casos anómalos, é, para mim, mais rico do ponto de vista cognitivo, do que o estudo das normas, pois, por definição, os desvios incluem as normas (estatística, legal,

(24) Sérgio Buarque de Holanda, *Raízes do Brasil*, p. 15.

(25) Gonçalves Cerejeira, *O Renascimento em Portugal. I. Clenardo e a Sociedade Portuguesa*, 4.ª ed. revista, Coimbra Editora, Coimbra, 1974; *II. Clenardo, o Humanismo e a Reforma*, nova ed., Coimbra, Coimbra Editora, 1975.

(26) Gianni Vattimo, *Dialettica, differenza, pensiero debole* in AA.VV., *Il pensiero debole*, org. G. Vattimo e P. A. Rovatti, Milan, Feltrinelli, 1983, pp. 12-28; Idem, *Perché "debole"*, in AA.VV., *Dove va la filosofia italiana?* Org. J. Jacobelli, Roma-Bari, Laterza, 1986, pp. 186-193; Idem, *Nuova fenomenologia critica e pensiero debole*, in AA.VV., *L. Anceschi tra filosofia e letteratura*, org. R. Barilli, F. Curi, E. Mattioli, L. Rossi, Bologna, Clueb, 1997, pp. 19-28.

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etc.) que transgridem. As normas, ao contrário, nunca incluem a imprevisível variedade de suas transgressões, actuais ou potenciais. Observe, porém, que essa assimetria cognitiva não tem nada a ver com um fascínio, que não compartilho, pela transgressão *per se* " (27).

Poderia então pensar-se que, nos tempos em análise, as *velhas liberdades* seriam já um desvio, face a uma mesma norma do poder absoluto (abalado por ideias liberais que o vão começar a guerrear e antes, pela ocupação do território luso europeu), escravocrata, colonial, etc? Outra hipótese seria a da coexistência entre tais velhas liberdades e o poder real absoluto, como que constituindo depósitos ou camadas sedimentares de diferentes estádios jurídicos sem (grande) comunicação ou diálogo entre si.

Todavia, se a entrevista de Ginzburg lançou luz no nosso espírito no sentido de que não esmorecesse ante o carácter aparentemente lateral das "velhas liberdades", não cremos poder tratá-las realmente como desvios a uma norma. É que elas, em termos axiológico-jurídicos (que inevitavelmente não podemos deixar de fazer intervir na nossa análise pessoal) são a norma, e o absolutismo, o esclavagismo, e todas as formas de opressão, esses sim, constituem o verdadeiro *desvio*.

Mas não só nos afastamos da classificação norma/desvio por este motivo valorativo, que alguns acharão menos "ob-jectivo". Milita ainda uma outra ordem de razões: é que a relação entre a ordem geral absolutista (mesmo com as referidas modulações) e a ordem das velhas liberdades (que incluem, pelo menos numa possível versão — que terá sido a real, a objectiva, a vigente — a autonomia local) não é de regra para excepção. Dir-se-ia, numa primeira aproximação, que o que sobretudo se vê da legislação e administração da época considerada é uma suavização da ordem absolutista por (talvez) algumas reminiscências das velhas liberdades, ou, quiçá melhor, pelo seu espírito.

Por isso é que do mesmo modo também se não trata de mera sobreposição, de justaposição ou de vectores paralelos.

O que torna a análise deste período ainda mais fascinante é que parece haver na governação da época uma sensibilidade ao espírito

(27) Carlo GINZBURG, *Entrevista* à "Folha de S. Paulo", 1 de Setembro de 2002, "Caderno Mais" p. 6.

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das velhas liberdades, sem todavia prescindir do programa de desenvolvimento e modernização iniciado nas *Luzes*, e sem abrir mão dos amplíssimos poderes do soberano absoluto, salvo aqui e ali, por sua graça e mercê.

Em suma: ao invés de irmos encontrar, isoladas e em estado puro, essas velhas liberdades, vamos, neste período, deparar com um reino do Brasil em franca marcha de progresso e modernização ao nível da civilização material, em que a coisa pública é governada muito em função desses apelos do desenvolvimento, da educação, da reorganização administratva permanente, da própria colonização, ainda, e em que parece subsistir, isso sim, uma demofilia, certamente também iluminista, mas que aqui e ali poderá quiçá radicar noutra cepa, mais antiga e mais genuinamente portuguesa.

Claro que é difícil, muito difícil mesmo, desentranhar dos factos nus as motivações com origem no fundo mais ancestral ou de proveniência demofílica das Luzes (as quais por vezes somos levados a olvidar pela marca traumática deixada nos espíritos pela ferocidade prática do pombalismo) (28).

Seja como for, e deixando o levantamento, lacunoso e assumidamente ilustrativo, a interpretações futuras, aqui fica um *flash* impressionista da legislação e decisões do governo da regência e reinado de D. João VI no Brasil, analisadas na perspectiva da procura de traços das referidas "velhas liberdades ibéricas", e especialmente portuguesas.

Insistimos: não encontrámos factos tão puros e tão evidentes que nos consolidassem a hipótese, que indecisamente oscila e hesita na ponte que a levaria à outra margem, a da teoria. Mas também não a infirmámos. Pelo contrário até: mesclado quiçá com o aludido demofilismo iluminista, pareceu-nos ver um rasto do nosso por enquanto "metodologicamente mítico" amor à liberdade.

Longe de ser um estudo global sobre a produção jurídica deste período, procuram as páginas seguintes apenas constituir apontamentos que testemunhem o (nem sempre desprovido de sinuosida-

(28) Sobre as imagens do Marquês de Pombal na nossa historiografia mais divulgada, e especialmente nos manuais escolares, enciclopédias, etc., Cfr. o nosso "O Marquês de Pombal. Estado *vs.* Liberdade" in *Faces da Justiça*, Coimbra, Almedina, 2002, pp. 75-134.

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des) caminho para a Liberdade, quiçá uma liberdade já pensada ou sonhada e parcialmente realizada num outro tempo, um tempo perdido de que temos andado à procura...

II. *Sentido geral da legislação e administração de D. João no Brasil*

> "Portugal, por meados do século XVIII, é muito mais colónia do Brasil que sua metrópole; (...) e poderia dizer-se que, na altura em que D. João, depois VI, parte para o Brasil, não deixa ele um trono que era, em Portugal, fantasma: vai ao encontro de um que era, no Brasil, concreto e, com o(u) sem jogo de palavras, mesmo real"
>
> Agostinho da Silva (29)

Se nos deixarmos impressionar pelo peso estatístico da legislação e decisões governamentais deste período, não captaremos senão a rotina do *ad manus trahere*, a governação enquanto administração corrente a que hoje se dá normalmente o nome de "gestão". É apenas elevando-nos do fundo dessa rotina, dessa modorra formal e ritual, que poderemos colher o que buscamos (30).

Dos milhares e milhares de actos produzidos, impressionam alguma regularidades, à vista desarmada. Se não há razão para estranhar as minúcias de nomeações, promoções, criações e (algumas) fusões e extinções de cargos, as referidas re-organizações de organismos e sobretudo de instituições locais, especialmente de índole organizativa territorial, se não há espanto em terem ocorrido muitas decisões de âmbito económico-fiscal, especialmente alfande-

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(29) Agostinho DA SILVA, "Acusações à Metrópole", in *Ensaios sobre Cultura e Literatura Portuguesa e Brasileira*, vol. II, p. 137.

(30) Um enorme manancial de factos e de documentos se pode colher, *v.g.*, *in* (A. J. de) MELLO MORAES, *História do Brasil-Reino e do Brasil-Império*, 2 vols.. Especialmente sobre essa verdadeira construção do Brasil moderno, José DA SILVA LISBOA, *Memória dos benefícios políticos do Governo d'El Rei Nosso Senhor Dom João VI*, 1.ª ed., Rio de Janeiro, Na Impressão Régia, 1818, 2.ª ed., Rio de Janeiro, 1940. Cf. aiuda OLIVEIRA LIMA, *D. Jovas VI Brasil*, 2ª ed., Rio de Jameiro/San Paolo, José Olympis, 1945, 3 vols. Em todos os estudos, se descontado o panegírico, e se submetidos os factos a um olhar crítico, se encontrará ainda muito que admirar. Mais recentemente, cf. AA.VV., *D. Jaos VI e o su tempo*, exposisar, Lx., Commissar Nacional da Des colinimentas Portigueses, 1999.

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gário, mas também financeiro (sendo de notar, desde logo, a fundação do Banco do Brasil), já sobressai com algo de bizarria o grande afã em, por exemplo, estabelecer uniformes para *tutti quanti*, o que é sintoma típico de absolutismo.

De qualquer forma, para além de providências avulsas isoladas (algumas significativas, como o decreto de luto de uma ano pelo falecimento de D. Maria I, de 20.III.1816, ou várias medidas atinentes à revolta de Pernambuco, por exemplo, Decretos de 8. VIII.1817 e de 6.II.1818) não poderá passar em claro um enorme esforço de instrução, com a criação contínua de inúmeras aulas de "primeiras letras", e o provimento dos respectivos mestres. E não só de primeiras letras. Parecem multiplicar-se os estabelecimentos de ensino em geral: aulas de gramática, e de latim, certamente. Mas também de ciências naturais e físico-quimicas, de comércio, curso de agricultura e finalmente até uma verdadeira faculdade de Belas Artes, com cursos de Pintura, Desenho, Gravura, etc. (para o que se mandariam vir modelos em gesso da Europa — ainda hoje patentes ao público em lugar nobre no Museu de Belas Artes do Rio de Janeiro), pelo Decreto de 23.XI.1820. Todas estas aulas superiores conjugadas não constituiriam uma verdadeira proto-Universidade? (31).

Atente-se ainda no papel de desenvolvimento cultural geral, com apreço por diversas acções de criação de infra-estruturas nesse domínio. Pelo seu simbolismo, sublinhe-se a autorização para a criação de um teatro condigno no Rio de Janeiro, por Decreto de 28.X.1810, e a concessão de pensões a vários artistas que se tinham estabelecido no país, por Decreto de 12.VIII.1816.

A par da preocupação com a educação, é notório o interesse pelo desenvolvimento económico, assistencial, e pelo povoamento. De entre múltiplas medidas, ganham especial carácter ilustrativo, no âmbito da primeira, uma que contém em si já elementos que poderão interpretar-se num sentido de participação democrática.

(31) Uma das críticas que por vezes se faz à colonização portuguesa do Brasil compreende a da falta de implantação de uma Universidade. O nosso texto de alguma forma responde à questão. Numa outra clave (negando até que existisse vera universidade em Portugal europeu), Agostinho DA SILVA, "Sobre Opressão", in *Ensaios sobre Cultura e Literatura Portuguesa e Brasileira*, II, cit., pp. 19-20.

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Foi o Decreto de 2.VI.1816, que mandou convocar conferências (lideradas ao mais alto nível) sobre relações comerciais, solicitando a presença, além dos altos funcionários do Estado, de pessoas versadas em Economia e Comércio, e prescrevendo que as Secretarias de Estado e arquivos se lhes abrissem e facultassem os seus documentos pertinentes. Neste contexto, é também notória a tendência liberalizadora. Já sendo Príncipe Regente D. Fernando José de Portugal, por alvará de 1.IV.1806 se tinha determinado o livre estabelecimento de fábricas e manufacturas no Estado do Brasil. Depois, com D. João aí sediado, múltiplos diplomas e providências procurarão esclarecer e reforçar essa tendência, que, pelo menos à primeira vista, é liberalizante.

Assim, por exemplo, avultam o Decreto de 18.VI.1814 que liberaliza a entrada de embarcações de quaisquer países nos portos dos "Estados Portugueses" e a saída dos nacionais para portos estrangeiros, e a Provisão do Conselho de Fazenda de 14.1.1819, sobre o despacho livre dos direitos de entrada de mercadorias importadas de outros portos do reino. Note-se ainda — por ter impacte de relevo na cultura — a decisão de 23.1.1819, que isenta de direitos de importação os livros impressos. A "liberalização" não é apenas manifesta em matérias aduaneiras e afins, mas igualmente ao nível interno. O que motivará reacções corporativas. E logo nos perguntamos sobre onde estará o partido dos velhos direitos. Aliás, tal é um teste mesmo à questão valorativa nos mesmos. Porquanto, se a nossa presente mentalidade demo-liberal latente exulta com o que neles há de precursor, de democracia *avant-la-lettre*, neste caso, a confirmar-se a sua ligação com "peias" corporativas, já em nós suscitariam mais resistência.

Assim, se um Alvará de 27.III.1810 autoriza a venda pela ruas e casas de todas as mercadorias cujos respectivos direitos hajam sido pagos, já em 2.IV.1813 se cede ao clamor da corporação dos sapateiros do Rio de Janeiro, os quais expressamente alegavam que tal alvará se deve aplicar a mercadorias de fora, proibindo-se, pois, a venda nas ruas daquela capital de calçado nela feito.

Muito importante no domínio económico, mas de relevo em todo o processo comunicativo, é o fortalecimento das redes de circulação. Menciona-se, ilustrativamente sempre, o estabelecimento

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de correios marítimos entre os principais portos do Reino Unido, por uma decisão da "pasta" da Marinha, de 20.XI.1818.

De realçar também múltiplas providências de índole assistencial. Somente a título exemplificativo, um Alvará de 24.X.1814 determina múltiplas providências em prol dos órfãos desamparados, além da instituição de vários hospitais, como a criação, pelo Decreto de 23.XII.1817, do Hospital da Vila da Vitória, em Espírito Santo, expressamente consagrado ao tratamento de enfermos pobres.

No domínio do povoamento, por um lado, há a preocupação colonizadora, que se liga à questão índia, a qual veremos no lugar próprio, *infra*, mas também a solicitação ou aceitação do concurso europeu em tal tarefa. Assim, por exemplo, vários diplomas e medidas, sobretudo a partir de 6 de Maio de 1818, vão pôr-se em marcha no sentido de permitir o estabelecimento de uma colónia de cem famílias suiças católicas de Friburg em Cantagalo, a vinte e quatro léguas da capital. Evidentemente, tais famílias tornar-se-ão portuguesas, e virão já acompanhadas de sacerdotes, médico e boticário, custeando o governo português as despesas da sua deslocação, fornecendo-lhes terras, etc.. O texto das condições postas para tal estabelecimento é aprovado por Decreto de 16.V.1818. Já por Decreto de 25.XI.1808 se havia permitido a concessão de sesmarias aos estrangeiros residentes no Brasil, mas aquela outra medida é ainda mais sugestiva por ser uma empresa concreta, e com laivos de utopia.

Por este brevíssimo panorama se pode já aquilatar do sentido do governo de D. João no Brasil. Ainda que enredado por questões pontuais administrativas (e até pelo ressurgimento de uma questão de precedências protocolares entre a magistratura e as forças armadas) pelo levantamento de Pernambuco, pela guerra com alguns índios, nomeadamente os Botocudos, despachando muitas nomeações, promoções, e aumentos de vencimentos sobressai a vontade de fazer obra: na educação, cultura, assistência, e fomento económico, e na assimilação dos índios, como veremos melhor.

Não pode ainda esquecer-se que é neste período que são dados os primeiros passos para a autonomização (que conduzirá, pela mão de D. Pedro, à independência).

Assim, recordemos que uma carta de lei de 13.V.1816, ainda com fito de incorporar num escudo real todas as armas dos reinos

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governados por D. João, dá armas ao Reino do Brasil, que as não tinha ainda. Tal atribuição de armas tem, assim, um sentido qualitativamente diverso da que virá a ser feita pelo Decreto de 18.IX.1822 — como é óbvio. Aliás, o primeiro procedimento em muito se assemelha ao que seria utilizado, no ano seguinte, por Alvará de 3.I.1817, atribuindo aos filhos primogénitos da Coroa o título de Príncipe Real do Reino Unido de Portugal, Brasil e Algarves, mas — na mesma óptica inclusiva e dualista — conservando-lhes o título (português) de Duque de Bragança.

No processo de corte de vínculos institucional, no período que medeia entre 1820 e 1822, são de assinalar para além de outros actos mais conhecidos, outros que se encontram menos referidos.

Assim, antes de mais, o Decreto de 1.XII.1820, que "manda desligar do exército de Portugal a divisão de voluntários reais de El-Rei, que fica a pertencer ao Exército do Brasil" e o Decreto que institui passaporte para os que entram e saem do Reino do Brasil (Decreto de 2.XII.1820).

Um facto que não é especificamente brasileiro constitui o marco (ao menos formal) decisivo a cortar com qualquer forma de velha constituição tradicional ou histórica: pelo Decreto de 10.III.1821 se dão as bases da Constituição Política da Monarquia Portuguesa, que na verdade incluem já todo o programa ideológico de uma nova ordem, remetendo-nos para um novo paradigma.

Logo em 25.VI.1822, um decreto cria um Governo Provisório de eleição popular na Província de S. Paulo, e outro de 1.VIII.1822 declara inimigas as tropas mandadas de Portugal. No dia 18 do mês seguinte, novo decreto declara a amnistia geral para delitos políticos, estabelece a divisa "Independência ou morte" e ordena a saída dos dissidentes. O decreto de 12.XI.1822 declara de nenhum efeito as graças e ofícios pertencentes a pessoas residentes em Portugal. E numa proclamação de 21.X.1822 D. Pedro dá um *ultimatum* de quatro meses para o reconhecimento pelo governo português da independência do Brasil.

Estes são, em linhas gerais, alguns dos marcos da ruptura institucional. Mas já não são, como é evidente, obra de D. João. De D. João é a autonomia, o Brasil-Reino, no contexto do Reino Unido. A Independência é de D. Pedro.

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Daí o sentido totalmente diverso de dar armas ao Brasil na carta de Lei de 13.V.1816 e no Decreto de 18.IX.1822.

III. *Das liberdades e direitos*

"(...) o suave jugo de nossas leis"
D. João

1. *Protecção de grupos sociais*

Uma das características típicas do tipo-ideal das liberdades ibéricas tradicionais é que, ao contrário dos futuros constitucionalismos modernos, esta forma de protecção das pessoas, decerto por constituir uma síntese do legado romano (muito realista e objectivo), do pensamento cristão (preocupado com a Pessoa e os humildes) e do génio germânico (quiçá mais voluntarista e também prático como o romano), não se fica por proclamações gerais e abstractas de direitos. Nem sequer as faz. Não é a política e o direito realista assim surgidos como aquela "política silogística" criticada por Joaquim Nabuco:

"uma pura arte da construção no vácuo: a base são as teses, não os factos; o material, ideais e não homens; a situação, o mundo e não o país; os habitantes, as gerações futuras e não as actuais" (32).

Ao invés, preocupa-se com a protecção concreta das pessoas, por regra adoptando a forma de concessão ou reconhecimento de liberdades e direitos a certos grupos sociais que, por uma razão ou por outra, mais carecem de protecção.

Não se trata, assim, de proclamar no papel a igualdade geral entre todos, mas de procurar, nos diferentes casos concretos, assegurar o Bem Comum pela cura de cada um dos grupos.

É assim que a amálgama das diferentes medidas protectivas só adquiriu uma verdadeira organização quando fizemos intervir esse elemento dos grupos sociais. Veremos assim adiante, e sucessivamente, questões dos índios, dos escravos, dos infractores (criminosos, presos, desertores), dos sediciosos (revoltosos e agitadores), e

(32) Joaquim NABUCO, *apud* Oliveira VIANNA, *O Idealismo da Constituição*, Rio de Janeiro, Terra do Sol, 1927, p.11.

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das mulheres, das crianças (máxime os expostos), dos proprietários, e ainda um caso isolado, muito curioso, que poderá começar a configurar um moderníssimo "direito dos transeuntes", ou, numa opção mais objectiva, um "direito da circulação viária".

Importa assinalar previamente que a ideologia que parece presidir a todas estas medidas protectivas ou moderadoras é a de um rei paternal (fala-se em "suave jugo" das nossas leis), pai por igual de todos os seus vassalos, mas que, evidentemente, não procura cortes revolucionários com o sistema instituído, antes a sua gradual reforma (nisso a posição quanto à escravatura é paradigmática).

Há ainda como pano de fundo o não racismo intrínseco dos portugueses, que os levaria a uma miscigenação ímpar e a um colonialismo também ele paternalista, sobretudo desde que se foi conseguindo livrar da férrea lei da escravatura (33). Mas desde cedo que no português se manifestou essa propensão contrária ao etnocentrismo típico de tantos europeus (e euro-americanos e outros…), a que se chamou já perspectiva etnocentrífuga.

A carta de Pêro Vaz de Caminha ao Rei, onde se pedem favores para o genro, e que teria assim sido a carta de fundação do clientelismo (34) (especificamente, do nepotismo) brasileiro, fruto do português, é a mesma em que se olham os indígenas com olhos que se pretendem objectivos, mas manifestando uma simpatia assimiladora para com eles.

Assim diz o escrivão de Álvares Cabral:

"Segundo o que a mim e a todos pareceu, esta gente não lhes

(33) Será pioneira a legislação para a abolição da escravatura em Portgal. Cfr. Alvará, porque Vossa Magestade, obviando ao impio, // e desumano abuso, com que no Reino do Algarve, e //em algumas Provincias de Portugal se procuráram perpetuar // os Captiveiros: He servido, que estes, quanto ao preterito, // se não possam extender além das Avós: Quanto ao futuro, // que todos os que nasceram depois da publicação desta Lei, // fiquem por beneficio della inteiramente livres: // E que os li- // bertados por effeito della, fiquem habeis para todos os Offi- // cios, honras, e Dignidades; na fórma assima declarada. Dado no Palacio de Nossa Senhora da Ajuda, em dezaseis de janeiro de mil setecentos e setenta e três, Lx., Na Regia Officina Typografica.

(34) Na clave do clientelismo e do parasitismo, Mary DEL PRIORE, *Prefácio* a *Revisão do Paraíso. Os Brasileiros e o Estado em 500 anos de História*, org. de Mary del Priore, Rio de Janeiro, Campus, 2000, máx. p. 8 ss..

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falece outra coisa para ser toda cristã, senão entender-nos" (35). Como é diferente a perspectiva mesmo do liberal e tolerante inglês John Locke, referindo-se aos mesmos índios do Brasil:

"amongst whom there was not to be found no notion of God, nor religion" (36).

Comenta desta forma o etnólogo Herbert Baldus aquela propensão portuguesa, atestada pelo referido texto:

"Formar tal conceito acerca de representantes de uma cultura completamente alheia à sua, revela uma tendência que podemos chamar de "etnocentrífuga" (37).

E prossegue Baldus, de novo citando o escrivão da armada descobridora:

"Igual falta de preconceitos determinados pelos valores morais do seu próprio povo demonstra também o autor da carta quando escreve que uma índia tinha 'suas vergonhas tão nuas, e com tanta inocência descobertas, que nisso não havia vergonha alguma'" (38).

Esta capacidade de ver o outro como *pessoa*, e de aceitar a sua diferença como uma forma de um mesmo fundo comum, parece essencial para o próprio triunfo da presença portuguesa nos trópicos, ao contrário de outros europeus — e tal como já foi abundante e documentadamente referido por um Gilberto Freyre. Na verdade, e confluindo com o que este renomado sociólogo em várias ocasiões expôs, os portugueses tinham uma dupla preparação para a tarefa: por um lado, no plano étnico, já em si fruto de miscigenação (pense-se nas várias vagas de invasores peninsulares), mas, por outro lado, ao contrário dos espanhóis, imbuídos de uma mística conquistadora, afeiçoados outrossim a uma expansão que, numa fórmula feliz, buscava "cristãos e pimenta", ou "almas e especiarias". Ou seja, não só os predispunha a raça já mesclada a aceitar os demais,

(35) Pero Vaz de Caminha, Carta ao Rei (D. Manuel I sobre o achamento do Brasil) *http://vbookstore.uol.com.br/nacional/perovazcaminha/acarta.shtml.*

(36) John Locke, *Essay*, I, cap. 2, § 8.

(37) Herbert Baldus, *Etnologia*, *in Manual Bibliográfico de Estudos Brasileiros*, coord. Rubens Borba de Moraes, William Berrien, Rio de Janeiro, Gráfica Editora Souza, 1949, p. 199.

(38) Herbert Baldus, *ibidem*.

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com eles conviver, e a eles se unir, como no seu imaginário a índia se identificaria com o arquétipo da moura encantada (39).

Esta realidade de base criou assim uma infra-estrutura social muito consentânea com o exercício de um poder paternalista, sobre os índios especialmente. Deve aqui recordar-se que um dos elementos míticos (mas decerto também factuais) da época de oiro da formação jurídica peninsular é precisamente a equilibrada e harmoniosa convivência entre cristãos, muçulmanos e judeus, a qual teve na Córdova da Maimónides e Avicena um alto exemplo (40), mas também na Saragoça de longevo domínio islâmico e que já depois da reconquista, tinha ainda "curso legal" nas disposições (de algum *apartheid*, é certo, mas visando eficaz protecção também) sobre mouros e judeus das *Ordenações Afonsinas*.

O caso brasileiro é diverso, até certo ponto, principalmente porque diversos são os tempos. Mas não há dúvida de que o hábito de respeitar diferente religião (associado parcialmente a diversa "raça") terá sido indutor de um clima mais aberto em terras americanas.

Além disso, como é sabido, não chegaria a haver Inquisição instalada no Brasil, não sendo líquido se a intolerância religiosa dos holandeses, por exemplo, (que nomeadamente incendiaram todas menos uma das muitas igrejas do Recife quando de lá expulsos) não terá excedido a do Santo Ofício. Há, por via da invasão holandesa, um desvio no que seria normal achar, passando estes por tolerantes para com os judeus, e não os portugueses. Havendo também quem afirme — embora suspeito de integralismo — haver sido a invasão holandesa financiada pelo capital judaico. Mas seja como for, não há dúvida de que é caso para investigar, por exemplo, os cento e dezasseis casos de acusações a judeus pela inquisição relatados por

(39) De entre múltiplos estudos, Cfr., *v.g.*, Gilberto FREYRE, *Interpretação do Brasil. Aspectos da formação social brasileira como processo de amalgamento de raças e culturas*, trad. de Olívio MONTENEGRO, organização de Omar RIBEIRO THOMAZ, São Paulo, Companhia das Letras, 2001, p. 70 ss., máx. p. 84; Idem, *Casa Grande & Senzala. Formação da Família Brasileira sob o Regime Patriarcal*, nova ed., LX., Livros do Brasil, 2001, p. 22 *et passim*..

(40) Cfr., um exemplo em romance dessa relação: Herbert LE PORRIER, *Le Médecin de Cordoue*, Paris, Seuil, 1974, trad. port. de Clara ALVAREZ, *O Médico de Córdova*, Lx., Bizâncio, 1998.

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João Lúcio e Azevedo (41). Parece demais, comparado, por exemplo, com a excepcionalidade dos autos-de-fé no Norte de Portugal, onde apenas se condenou um judeu, sob a pressão do terrível Frei Baltazar Limpo, e com clamor geral e tão eficaz que não mais houve tal a norte do Mondego.

Ao lado da relativa "tolerância", outro factor importante no modelo das liberdades ibéricas tradicionais, é a honra e dignidade do vassalo, que, como aflorámos já, Antero de Quental, nas *Causas da Decadência dos Povos Peninsulares*, muito bem sediou nos facto de, por virtude da reconquista, a nobreza ser em grande número. Ora um povo com uma nobreza numerosa e assim não necessariamente toda privilegiada ou opulenta, como que possui (dizemos agora a nosso modo) aquela sólida classe média que é cimento social, dinamismo comunitário e, neste caso, em especial — barreira contra o arbítrio. Por isso, não vemos dificuldade em explicar com o facto de a primeira emigração para o Brasil haver sido não de vis criminosos, sacrílegos ou sequer tarados genesíacos (como eufemisticamente os trata Gilberto Freyre) mas precisamente de nobres aventureiros (42) — responsáveis pela futura pujança do poder municipal,

(41) João Lúcio de Azevedo, *Notas sobre o Judaísmo e a Inquisição no Brasil*, *in* "Revista do Instituto Histórico Geográfico Brasileiro", t. 31, Rio de Janeiro, pp. 677-97. V. ainda Silidónio Leite (filho), *Os Judeus no Brasil*, Rio de Janeiro, J. Leite, 1923; Afrânio Peixoto *et al*. *Os Judeus na História do Brasil*, Rio de Janeiro, Uri Zwerling, 1936. Recentemente, Joseph Eskenazi Pernidji, *Das Fogueiras da Inquisição às Terras do Brasil. A Viagem de 500 anos de uma família judaica*, Rio de Janeiro, Imago, 2002. Uma das teses deste livro é a de que a maioria da população brasileira tem "uma gota de sangue judaico". Será que o sangue persegue o mesmo sangue? Ou antes que esta miscigenação precisamente favoreceu a integração e a "tolerância"?

(42) Assim os caracteriza Oliveira Vianna, *Evolução do Povo Brasileiro*, 4.ª ed., Rio de Janeiro, José Olímpio, 1956: "(…) os primeiros colonizadores, que chegam a essas nossas terras da América, não são propriamente homens do povo ou, pelo menos, os elementos mais importantes entre eles, não são propriamente homens do povo, pertencentes à plebe peninsular; mas sim aventureiros à caça de fortuna rápida, homens da pequena nobreza e, mesmo da grande nobreza, que emigram para restaurar (…) o brilho dos seus brazões esmaecidos (…). O grande afluxo europeu vem depois" (p. 58). E prossegue, mais adiante, desfazendo o mito-mentira: "Nos primórdios, os elementos preponderantes da sociedade colonial não são, com efeito, de modo algum, como se há dito, essa escorralha de criminosos e degredados, varridos das masmorras peninsulares para o vazadouro americano" (p. 59). Também Agostinho da Silva, "Portugal e Brasil", in *Ensaios sobre Cultura e Literatura Portuguesa e Brasileira*, cit., II, p. 91, vai num

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em que as câmaras municipais da colónia exerciam poderes muito vastos (43).

É possível que, como afirma Oliveira Vianna (44), esses nobres aventureiros pensassem desde logo os seus sonhos em grande, contrariando a pequena propriedade e visando o latifúndio. Mas no que não concordamos é que tal tenha tido necessariamente uma consequência não democrática. Sendo certo que a pulverização da propriedade pode coincidir com a democracia dos pequenos proprietários, a verdade é que, dada até a lei de bronze das oligarquias, por vezes é difícil distinguir (desde logo na Grécia Antiga) a aristocracia e a democracia, se puras e benévolas. Um Sant'Anna Dionísio, por exemplo, entre nós, nisso nos faz meditar.

Sem a presença de elites, elemento aristocrático que é sal e fermento das aspirações e instituições democráticas, é realmente difícil existir uma democracia que não redunde em anarquia, populismo, demagogia, e logo se volva em tirania.

Por isso é que estamos em crer que os sentimentos aristocráticos desses primeiros colonos foram essenciais para a instituição de poderes que, depois, iriam fazer valer as liberdades locais contra as pretensões centralizadoras.

Claro que a concepção de democracia de Oliveira Vianna e a nossa diferem. O autor parece não ter visto que, ao não aperceber elementos democráticos na alma aristocrática, acabava por colocar também ele erroneamente o problema da democracia no Brasil. Com efeito, numa obra com algumas observações argutas, *O Idealismo da Constituição*, afirma:

"(…) se ontem como agora, o problema da democracia no Brasil tem sido mal esclarecido, é porque tem sido posto à maneira inglesa, à maneira francesa, à maneira americana; mas nunca, à maneira brasileira (45).

Não seria a maneira brasileira mais próxima do paradigma tradicional? É que, precisamente aquilo que este autor diz faltar na

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sentido idêntico, ao afirmar: "Não há, portanto, uma emigração portuguesa para o Brasil nos séculos XVI e XVII: há o transporte para outra terra do Portugal que valia".

(43) Especificamente sobre os municípios brasileiros, é imprescindível a consulta de José Pedro GALVÃO DE SOUSA, *Política e Teoria do Estado*, máx. pp. 19-52.

(44) Oliveira VIANNA, *Evolução do Povo Brasileiro*, p. 61.

(45) Oliveira VIANNA, *O Idealismo da Constituição*, p. 13.

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democracia brasileira é algo que só pode conseguir-se com elites. Só elas podem produzir aquilo a que chama "opinião organizada" (46).

É precisamente a falta dessa elite, no fundo dessa "nobreza" (chame-se-lhe como se lhe queira chamar— e tendo presente que muitas e muitas nobrezas decaem no mais banal plebeísmo e no mais repugnante snobismo) que é responsável pela passividade do todo social, que muito eloquentemente o autor retrata:

"Toda a Nação *espera* na omnisciência do governo, na omnisciência do presidente; do presidente que, em regra, é apenas um excelente e honrado bacharel" (47)!

Fazendo depois o contraste, precisamente com a Inglaterra — na verdade referindo-se certamente bem mais à Inglaterra dos *dignos* súbditos de S.M. (onde talvez nunca tenha sequer havido Estado (48)) que a uma Inglaterra monárquica *tout court*:

"Na Inglaterra é o contrário disto. Lá ninguém confia na omnisciência do governo. Pode-se dizer mesmo que ninguém cultiva ali a crença tão generalizada entre nós, no patriotismo espontâneo do governo. Cada classe organiza-se e defende os seus interesses da melhor maneira, movimenta-se, reclama, protesta e, se for preciso, revolta-se e luta" (49).

Ora algo deste espírito deveria imbuir as Câmaras Municipais do Brasil colonial, de composição mista entre juízes ordinários, procurador, escrivão e um ou dois almotacés, por um lado, e dois ou mais vereadores eleitos anualmente. Além, evidentemente, de funções judiciais, de polícia, inspecção económica (desde logo de pesos e medidas) chegavam estas Câmaras a nomear procuradores às cortes, exercendo funções políticas (50). É vasta a cobertura territorial das Câmaras, até porque uma lei de 1.X.1828 suprirá as lacunas no mapa, criando câmaras municipais em cada cidade e vila do Império.

Essas Câmaras brasileiras, em que, aliás, a partir de certa altura

(46) *Ibidem*, pp. 14-15 *et passim*..

(47) *Ibidem*, p. 56.

(48) António Carlos Pereira MENAUT, *El Ejemplo Constitucional de Inglaterra*, Madrid, Universidad Complutense, 1992.

(49) Oliveira VIANNA, *O Idealismo da Constituição*, p. 57.

(50) Cfr., por todos, Silvio PORTUGAL, *Direito. 1500-1943*, *in Manual Bibliográfico de Estudos Brasileiros*, cit. p. 106.

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começam a estar presentes índios, são um eco do outro lado do Atlântico das velhas liberdades portuguesas, que desde D. João II haviam começado na metrópole a ceder passo ao maquiavelismo cosmopolita e à centralização real do poder. Significativamente afirma Agostinho da Silva:

"Quando os do Brasil reclamam os direitos das Câmaras, sobretudo os da Câmara do Porto, que era a mais livre das repúblicas portuguesas; quando organizam os mutirões de trabalho, ainda hoje vivos no Brasil; quando acolhem e assimilam os homens e, sobretudo, as mulheres, que eram desterrados de Portugal por heresia religiosa, nada mais estão a fazer do que, sendo fiéis ao Portugal de que tinham saído, eles ou seus avós" (51).

2. *Os Índios e a questão racial*

Logo uma das primeiras medidas de entre as tomadas aquando do estabelecimento do governo geral da Bahia ("cujo regimento constitui a magna-carta da nacionalidade nascente — afirma Silvio Portugal (52)), foi a proibição da escravização de índios (53).

Também do dealbar do governo joanino no Brasil é a Carta Régia de 2.XI.1808 a Pedro Maria Xavier de Ataíde e Mello, que constitui todo um programa (e reflexão) sobre os índios do Brasil. Se, por um lado, se faz eco do lugar comum da "natural indolência e pouco amor deles ao trabalho" — que também, valha a verdade, podia funcionar como alibi desobrigador —, não deixa de estar advertida para a ambição e cobiça "das pessoas que com o título de Directores ou outro qualquer, só têm em vista tirar partido de gente grosseira, rústica e pouco civilizada, para absorverem à sua sombra os socorros dados pela minha Real Fazenda, que tendo sido muito consideráveis, têm sido em parte infrutíferos". Os índios são assim

(51) Agostinho DA SILVA, "Portugal e Brasil", in *Ensaios sobre Cultura e Literatura Portuguesa e Brasileira*, cit., II, p. 91 (v. ainda p. 90).

(52) *Ibidem*, 104.

(53) Sobre o estatuto legal dos índios, especialmente no período imediatamente anterior àquele de que curamos, cfr. Francisco Ribeiro DA SILVA, *Os Índios do Brasil à luz das leis portuguesas*, in AA. VV., *Estudos em homenagem a João Francisco Marques*, Porto, Faculdade de Letras da Universidade do Porto, separata, s.d., pp. 421-438.

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vistos sobretudo como vítimas desses habilidosos e exploradores, e, em consequência, um grupo social a proteger.

É nesse sentido que se mandam várias providências para aglomerados populacionais vultuosos, mas é quanto aos pequenos grupos de índios que é mais interessante o programa, porquanto, sem qualquer utopismo, e atendendo ao espírito de ganho dos fazendeiros, procura conciliar os interesses destes com a aculturação dos indígenas.

Vale a pena transcrever as principais passagens destes textos, que falam por si bem melhor do que nós hoje faríamos:

"(…) sou servido ordenar-vos (…) que sendo pequeno o número de Índios que se vierem oferecer, procurareis que os fazendeiros se encarreguem de os instruir, e possam também aproveitar-se do útil do seu trabalho, como compensação do ensino e educação que se encarreguem de dar-lhes: primeiro, que possam os sobreditos fazendeiros servir-se gratuitamente do trabalho de todos os Índios que receberem em suas fazendas, tendo somente o ónus de os sustentarem, vestirem e instruírem na nossa Santa Religião, e isto pelo espaço de doze anos de idade, e de vinte, quanto aos que tiverem menos de doze, podendo deste modo indemnizar-se das despesas que hão-de fazer com o seu tratamento, educação e curativo nas enfermidades (…) segundo, que havendo os mesmos fazendeiros satisfeito a estas condições, nada mais lhes possa ser pedido pelos mesmos índios, e que seja proibido a qualquer pessoa desencaminhar Índios assim estabelecidos, e acolhê-los em qualquer fazenda antes do prazo estabelecido, findo o qual poderão ajustá-los pelo jornal que lhes convier, tendo sempre a preferência o fazendeiro que os civilizou, em igualdade de jornal (…) terceiro, ordenovos que atendais mui particularmente e me façais propostas para os postos de oficiais de Ordenança ou Milícias, àqueles fazendeiros que mais se distinguirem no bom tratamento e progresso da civilização dos Índios, preferindo os que mostrarem em igual intervalo de tempo um maior número de casamentos e nascimentos de Índios em suas fazendas. Quarto (…) tendes ordem minha para me dar conta de todo e qualquer fazendeiro, ou pessoa rica que à sua custa formar alguma povoação de índios, e cuidar na sua civilização, e instruções na Religião, bons costumes, e trabalho em agricultura, ou em qualquer ramo de indústria (…) porque é minha real intenção em

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semelhante caso criar o fazendeiro ou indivíduo rico (…) senhor e donatário da sobredita povoação que em tal caso criarei Vila com todas as prerrogativas anexas a semelhantes estabelecimentos (…) também sou servido ordenar-vos que quanto aos [índios] que vierem em maior número, e forem aldeiados que procureis que no meio deles se estabeleçam famílias morigeradas e industriosas de portugueses que possam viver com eles, empregando-os em trabalhos, e chamando-os assim ao conhecimento das utilidades que lhes hão de resultar de viver em uma regular sociedade, e de gozarem dos socorros que os homens se podem mutuamente auxiliar, e procurar um maior grau de comodidade que fazem a felicidade da vida humana(…)".

Não desejamos cortar o fôlego de um tamanho projecto. Sem o repetir, sublinha-se apenas que em caso nenhum se visou o genocídio dos índios, antes, como esta carta demonstra, se pretendeu a sua integração, "civilização" no falar da época, e a promoção do seu casamento e natalidade. Por outro lado, seria ingénuo pensar-se que tal integração pudesse fazer-se, numa tal extensão de terras e homens, apenas com os contributos filantrópicos. Mesmo a filantropia se procura de antemão premiar, para que se promova.

Não dizendo apenas respeito aos índios, um caso concreto nos permite aquilatar do princípio geral da não-discriminação que se pretenderia impor, obviamente modulado pelas circunstâncias e pelos "preconceitos civilizacionais" que obviamente também desconheciam as teses do nosso actual multiculturalismo — aliás com resultados práticos nem sempre menos discriminatórios (54). O caso passou-se em Mariana, Ouro Preto, e irritou o Rei.

O melhor é de novo dar a voz a D. João VI:

" D. João por Graça de Deus (…) faço saber a vós, ouvidor da Comarca de Ouro Preto que representando-me a Câmara da cidade de Mariana sobre os provimentos dados por vós a respeito da criação dos enjeitados, nos quais, deferindo ao requerimento do

(54) Cfr., para os nossos dias, os nossos estudos *Igualdade, Minorias e Discriminações*, in "O Direito", ano 131.º, 1999, III-IV, p. 289 ss.; *Em Defesa dos Cânones*, in *Estudos em Homenagem ao Professor Doutor Pedro Soares Martínez*, vol. I, Coimbra, Almedina, 2000, p. 89 ss. emerge in *miragens du Direito*, campionas, San Paolo, Millenium, 2003, p. 111 ss. e 157 ss..

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Procurador dela, mandastes matricular um que era branco, ordenando-lhe, quanto ao outro que era pardo, que indagasse quem era seu pai, para se lhe entregar por termo: fui servido ordenar-lhe que recebesse, matriculasse e mandasse criar todas as crianças que lhe fossem expostas, sem diferença ou atenção à diversidade de cor, porque todas elas têm direito à minha real protecção; e que nunca entrasse na indagação dos pais das crianças expostas, porque, além de ser essa indagação muito incoerente e absurda, é também contrária aos fins do estabelecimento da criação dos expostos. O que mando participar-vos para vossa inteligência (55)".

Claro que as ideologias da suspeita logo se apressarão a dizer que o problema era evitar a indagação dos pais dos enjeitados, procedimento que poderia embaraçar altos dignitários com indesejáveis bastardias. Mas, sem prejuízo dessa razão, não pode esquecer-se que é proclamado um *direito*, e expressamente, de todas as crianças, independentemente da cor da pele, à protecção real. E daqui muito mais se pode deduzir. Porquê só as crianças enjeitadas? Na realidade, facilmente se poderá generalizar a todos os vassalos. E tal igualdade de base se vai manifestar na atribuição de graças e mercês aos índios que ajudaram o Rei a sufocar a revolta do Recife (Decreto de 25.II.1819) (56).

3. *Os Escravos*

Questão anexa é a dos escravos, que são sobretudo negros, dada a abolição da escravatura para os índios. O caso é mais complexo. Não se ousa ainda, evidentemente, apontar totalmente os poderosos interesses dos traficantes e dos fazendeiros. A abolição total teria de

(55) Provisão da Mesa do Desembargo do Paço, de 26. VI. 1815.

(56) Não esqueçamos, porém, que a total liberdade dos índios só seria decretada no Império, em 27.X.1831. Múltiplos actos legislativos a prepararam, além dos referidos: diplomas datados de 20.III.1570; 15.XI.1595; 30.VII.1609; 10.IX.16II; 10.X1.1647; 1.IV.1680; 6 e 7. VI.1755; 8,V.1758, etc. Pode encontrar-se abundantes referências legislativas *in* Agostinho Marques Perdigão Malheiros, *A Escravidão no Brasil: Ensaio histórico, jurídico e social*, Rio de Janeiro, Tipografia Nacional, 1866, 1867. Cfr. ainda, por todos, Gentil de Assis Moura, *A Primeira Lei de Liberdade dos Indios do Brasil*, *in* "Revista do Instituto Histórico Geográfico de São Paulo", vol. 14, São Paulo, 1909, pp. 333-345.

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esperar pelo Imperador D. Pedro II e pelo ano de 1888 (13 de Maio), tendo sido, segundo alguns, uma das causas do golpe que levaria à República, fortemente apoiado pela oligarquia do café, objectivamente prejudicada.

Todavia, nota-se desde logo uma desafeição à escravatura, mesclada quiçá com o dogma do direito de propriedade do senhor ao escravo.

A desafeição portuguesa (ou pelo menos de sectores mais esclarecidos entre nós) era antiga. Já no próprio século XV, quando começou a corrente de escravatura africana, surgiram protestos. Na *Crónica da Guiné*, Zurara refere-se com tintas pesadas ao tráfico de negros (57). Já no século seguinte, o padre Fernão de Oliveira é ainda mais explícito na condenação (58), e outras manifestações se lhe vão seguir (59).

No Brasil, tornou-se comum o estabelecimento de confrarias ou irmandades de "pretos e mulatos", e foi em festividades religiosas por elas organizadas que o padre António Vieira muitas vezes subiu ao púlpito. O Arcebispo da Bahia, D. Frei João da Madre de Deus, chegou a enviar ao Vaticano um negro, Pascoal Dias, com o intuito de em pessoa defender os direitos dos negros. E Roma a tal não ficaria insensível, oficiando para Lisboa, pelo punho do próprio Secretário de Estado. Fernando Cristóvão, que relata estes casos, considera ainda uma fase mais intelectual anti-esclavagista, em que teria tido um especial papel o conceito de Direito Natural, "segundo o qual todos os homens são livres" (60). E é obviamente verdade: desde a segunda escolástica, a hispânica, que isso aconteceu.

No período que consideramos agora, as razões contrárias à escravatura são múltiplas, e nem todas filantrópicas ou humanitárias. Por exemplo, o professor Luís dos Santos Vilhena e o secretário da Câmara de inspecção da Bahia, José da Silva Lisboa duvidavam de alguma forma da utilidade económica do comércio de escravos ao

(57) Gomes Eanes de Zurara, *Crónica da Guiné*, cap. XXV.

(58) Fernão de Oliveira, *A Arte da Guerra e do Mar*, Lisboa, ed. de Quirino da Fonseca, 1957.

(59) Cfr. estes exemplos e outras considerações in Fernando Cristóvão, "A Abolição da Escravatura e a Obra Precursora do P.e Manuel Ribeiro Rocha", in *Diálogos da Casa e do Sobrado, ensaios luso-brasileiros e outros*, Lisboa, Cosmos, 1994.

(60) *Ibidem*, máx. p. 188 ss..

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Brasil, e consideravam que os negros lhe eram nocivos. Silva Lisboa parecia ser anti-esclavagista por, de algum modo, professar ideias a que hoje chamaríamos racistas (61).

Um longo e complexo caminho levará à total emancipação. Este nosso período vai paulatinamente endireitando as veredas.

Claro que as decisões mais conhecidas e mais significativas não datam deste período: Em 7.XI.1831 e em 4.IX.1850 proíbe-se o tráfico; em 28.IX.1871 são declarados livres os nascituros; em 28.IX.1885 libertam-se os sexagenários, até que se declara extinta a escravidão, como dissemos, em 13.V.1888.

Entretanto já tinham sido dados outros passos.

Logo no início deste período, por um Alvará de 20.IX.1808 (nalguns lugares qualificado também como "Decreto") se suavizam as penas a aplicar aos escravos encontrados com instrumentos de mineração. Era duríssima a pena estabelecida anteriormente, pelo Alvará de 2.VIII. 1771, no seu § 9.º: nada menos que 10 anos nas galés. A nova pena — trezentos açoites para a primeira vez e seiscentos para a reincidência, dados embora interpoladamente, ainda que "ao arbítrio dos Intendentes" também nos choca hoje: mas parece apesar de tudo inferior.

A *ratio* da norma parece ser o de suavizar a pena, humanizá-la e torná-la mais justa mas também não prejudicar os donos dos escravos, que com a aplicação da pena anterior se veriam privados deles. Mais uma vez, voltemos ao texto:

" (…) e tendo consideração que esta pena é desproporcionada ao delito, e de maior gravidade do que exige a imputação de trazer instrumentos próprios de mineração, não se verificando efectivo trabalho nas lavras defesas, e havendo dentro da demarcação diamantina algumas desimpedidas, e recaindo este castigo excessivo nos senhores

(61) Sobre toda esta questão, Cfr. Luís dos Santos Vilhena, *Cartas*, I, p. 136 ss..; Azeredo Coutinho, *Analyse sobre a justiça do commercio do resgate dos escravos na costa d'Africa*, 1798; José da Silva Lisboa, *Memória dos benefícios políticos do Governo d'El Rei Nosso Senhor Dom João VI*, máx. p. 156 ss.. V. uma síntese da questão *in* Kenneth Maxwell, "Condicionalismos da Independência do Brasil", in *Nova História da Expansão Portuguesa*, dir. de Joel Serrão e A H. de Oliveira Marques, vol. VIII. *O Império Luso-Brasileiro*, coordenação de Maria Beatriz Nizza da Silva, LX., Estampa, 1986, pp. 370-373. Main especi ficamente, cf. Lemine Nequete, *O Escavo sia Jurisprudência Brasileira*, Porto slegre, RS, Revista se jurisprudência, 1988.

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dos referidos escravos que podem por este meio procurar subtrairem-se (*sic*) ao serviço deles com manifesta ofensa do direito de propriedade; para conciliar a justiça e humanidade com o bem do meu real serviço e utilidade do Estado: hei por bem revogar a disposição (…) e ordenar que no caso (…) sejam punidos com a mesma pena que estabeleci no § 8º. do alvará do primeiro do corrente para os escravos que levarem ouro falso às casas de permuta; o que se entenderá, não constando do mandato de seus senhores, porque se constar, serão os escravos absolvidos e castigados os senhores com as penas impostas aos que extraviam diamantes (…)".

Esta preocupação em minorar os males dos escravos, sempre de par com o escrúpulo em não prejudicar os seus senhores, além de neste alvará, encontra-se também presente, por exemplo, em diploma de 17.VIII.1815, versando sobre o pagamento das perdas sofridas pela captura de navios negreiros.

Passemos a outro aspecto, também ele ambivalente, susceptível de diferentes interpretações. Com o fito velado de aumentar a população escrava — dirão certamente alguns —, e com o propósito expresso da preservação de males físicos e morais, é cometida aos governadores e capitães generais das capitanias de Minas Gerais e São Paulo, e aos ouvidores das comarcas de Ouro Preto, São Paulo, Itú, Paranaguá e Curitiba, Serro do Frio, Rio das Velhas e Rio das Mortes, a promoção do casamento de escravos, nestes termos:

" D. João (…) Faço saber a vós, Ouvidor desta comarca, que sendo-me presentes os males físicos e morais que aos povos resultam de se conservarem os escravos na vida libertina, que quase todos têm, em consequência do estado celibatário em que vivem (…) sou servido ordenar-vos que promovais eficazmente o casamento dos escravos desta comarca com o zelo e prudência que de vós confio" (Provisão da Mesa do Desembargo do Paço, de 27.X.1817).

A máquina legislativa não pára quanto ao problema da escravatura. Em Alvará com força de lei de 26.I.1818, através de um longo e circunstanciado texto, cominavam-se penas para o comércio proibido de escravos. Em Agosto do mesmo ano (por Decreto de 18.VIII. 1818), a cidade do Rio de Janeiro é feita sede da comissão mista sobre o comércio ilícito de escravos.

A captação dos rumos da História (e da Justiça, neste caso seguindo no mesmo sentido) é já clara numa observação constante

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de uma decisão da "pasta" do Reino, datada de 28.XI.1816, em que se sublinha a necessidade do cumprimento do "providente Alvará de 14.XI.1751, que nestes últimos tempos tem sido muito relaxado, e deve ser agora tanto mais exacto, *quanto mais restrito está e gradualmente há-de ir sendo o comércio de escravos* (…)" (grifámos).

Esta percepção compatibiliza-se perfeitamente com os tempos de transição assumidos nesta matéria neste período histórico.

Também assim se compreende o pragmatismo da proibição no Brasil, por aí existirem muitos escravos, do folheto *O Preto e o Bugio no mato*, entretanto publicado em Lisboa — como veremos mais pormenorizadamente *infra* (Decisão da "pasta" do Reino, assinada pelo Marquês de Aguiar, em 14.XI.1816).

4. *Os infractores e os sediciosos*

Uma das características assacadas ao génio jurídico português, e já nem sequer apenas à Constituição tradicional ou histórica, pois se teria prolongado no tempo e chegado até aos nossos dias, é a suavidade penal, que, por vezes, se liga aos proverbiais (mas em mutação) "brandos costumes".

Não é assim de estranhar que várias classes de infracção, e até a própria revolta militar acabem, cedo ou tarde, por encontrar alguma forma de perdão, ou, pelo menos alívio.

Abundantíssimos são os perdões a desertores e presos em geral. É praticamente um ritual anual: Decretos de 28.II.1810; 22.X.1810; 9.IV.1813; 5.VII.1814; 7.V.1816; 4.VI.1817; 19.VIII.1817; 15.X.1817; 6.II.1818; 7.VI.1819; 6.II.1820, entre outros. Um Decreto de 19.I.1820 exige a exacta observância da lei sobre desertores.

A própria condição dos reclusos não é descurada. Por exemplo, um Decreto de 17.VII.1816 manda abonar uma diária de quarenta reis para sustento dos presos "que se encontrem trabalhando na Fortaleza de Santa Cruz".

Certamente no sentido de proscrever abusos e desleixos nocivos aos direitos dos absolvidos (ou que já cumpriram pena), um Decreto de 12.II. 1813 reza assim numa espécie de preâmbulo justificativo:

"Exigindo a tranquilidade pública que se facilitem as prisões dos réus, nos casos em que determinam as leis; e que não durem mais tempo do que o preciso para a averiguação dos crimes perpe-

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trados, e para a formação do processo e final sentença: e não querendo, por este justo motivo, que por modo algum se retardem nas cadeias os presos, quando se julgarem livres e se mandarem soltar pelas autoridades competentes; o que é conforme aos verdadeiros princípios do direito criminal (…)".

E manda a soltura imediata dos presos quando forem julgados livres.

Uma manifestação ainda da suavidade penal (embora com a manutenção de penas hoje chocantíssimas) é o decreto que ligeiramente procura moderar a execução da "pena última", datado de 30.VII.1818:

" Atendendo a que os dias que são permitidos aos réus de pena última, não têm o intervalo necessário para se decidir a consulta, a que por piedade mando proceder no Desembargo do Paço: sou servido que as execuções se não façam no dia imediato à última decisão dos embargos da Casa da Suplicação, mas que se façam no outro dia seguinte, para que haja um dia livre para este último recurso".

Afinal, um único dia livre, mais aproveitando aos juristas que ao réu. Mas *quand-même* …

No ambiente absolutista de fundo, não pode pensar-se na existência de liberdade de expressão ou de associação. Com o crescendo das actividades propagandísticas liberais, a proibição de livros e periódicos passará de subtil e discreta a declarada, assim como serão proibidas todas as sociedades secretas.

No já brevemente aludido caso do folheto *O Preto e o Bugio no Mato*, há ainda a precupação em proibir sem alarde, cautelosamente. Assim se dirige o Marquês de Aguiar aos Governadores e Capitães Generais de várias capitanias:

"Il.m.º e Exm.º Senhor. Tendo-se reimpresso na Impressão Regia desta Corte, por se ter publicado em Lisboa, o folheto intitulado — *O Preto e o Bugio no Mato* —, cujos discursos em forma de diálogo são mui pouco próprios para serem divulgados neste Reino, onde há muitos escravos: é Sua Majestade servido que V. Ex.ª pela maneira que lhe parecer mais conveniente faça recolher os exemplares que aparecerem nessa Capitania, *evitando todavia* a publicidade desta cautelosa medida. O que participo a V. Exa.ª e para que assim se execute" (14.XI.1816).

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Já dois anos mais tarde deixa completamente de haver qualquer precaução de sigilo. Uma decisão de 25.VI.1818 e outra de 14.X.1819 o atestam. Os termos utilizados são enfáticos.

A primeira visa "O Portuguez", e começa assim:

"Sendo constante o quanto são sediciosos e incendiários os discursos publicados no periódico intitulado — O Portuguez —, pelos quais mostra o seu autor não ser o seu principal objecto propagar no povo conhecimentos úteis e verdadeiras ideias, mas concitá-lo para perturbar a harmonia estabelecida em todas as ordens do Estado e introduzir a anarquia (…)".

A segunda assim reza, visando o "Campeão ou o Amigo do Rei e do Povo", de José Liberato Freire de Carvalho (62) e curiosamente já alude, ainda que não *expressis verbis*, ao temor da opinião pública:

"Tendo aparecido um novo periódico escrito em português, e publicado em Londres, como o título de "Campeão ou Amigo do Rei e do Povo", cujos discursos visivelmente mostram o danado projecto de destruir a confiança que os vassalos de Sua Majestade têm no seu governo e nos seus Ministros: é o mesmo Senhor servido que seja proibida a entrada e publicação de tão perigoso e perverso escrito (…)".

Ambas estas manifestações de censura eram já ulteriores à proibição das sociedades secretas, a que se procedeu pelo Alvará de 30.III.1818:

" Eu El-Rei (…) tendo-se verificado pelos acontecimentos que são bem notórios, o excesso de abuso a que têm chegado as Sociedades secretas, que, com diversos nomes de ordens ou associações, se têm convertido em conventículos e conspirações contra o Estado; não sendo bastantes os meios correccionais com que se tem até agora procedido segundo as leis do Reino (…) sou servido declarar por criminosas e proibidas todas e quaisquer sociedades secretas de qualquer denominação que elas sejam (…) pois que todas e quaisquer poderão ser consideradas, de agora em diante,

(62) Sobre este periódico, Cfr. o clássico Innocencio Francisco da Silva, *Diccionario Bibliographico Portuguez*, t. IV, LX., Na Imprensa Nacional, MDCCCLX, pp. 418-419. Sobre o seu director, por todos as interessantíssimas *Memórias da Vida de José Liberato Freire de Carvalho*, 2.ª ed., Lisboa, Assírio Alvim, 1982 [1ª ed., 1855].

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como feitas para conselho e confederação contra o Rei e contra o Estado (…)".

E mais adiante, uma prescrição curiosa, tanto mais que D. Pedro viria a ser grão-mestre da Maçonaria — (viria a ser iniciado em 13.7.1819).

"Ordeno outrossim, que neste crime, como excepto, não se admita privilégio, isenção ou concessão alguma, ou seja de foro ou de pessoa (…)".

A mesma cautela para que não pudessem os réus prevalecer-se de privilégios face a normas gerais, abstractas e de aplicação universal vamos também encontrá-la por ocasião da punição do levantamento pernambucano. No fundo, é o Absolutismo e a Modernidade a lutarem ainda contra essas "leis privadas" conferidas a certos grupos, típicas da protecção realista tradicional.

Assim, de entre múltiplas providências, destaca-se, neste sentido, a expulsão das ordens militares dos condenados que a elas pertencessem, por Decreto de 8.VIII.1817.

Mas logo no ano seguinte se cobre a sedição com um manto de clemência. Em 6.II.1818, o rei "manda que cessem e se fechem todas as devassas a que se estava procedendo pela rebelião de Pernambuco e concede perdão aos que ainda não se acharem presos não sendo dos cabeças da mesma rebelião". No ano seguinte, como referimos já, é a vez dos índios serem premiados pelo auxílio na revolta de Recife (Decreto de 25.II.1819).

5. *Conclusão*

Várias provisões avulsas procuram atender a este ou àquele grupo, a esta ou àquela situação. Não poucas há que, como vimos, configuram protecções múltiplas e até equilibradas. A protecção dos fazendeiros e proprietários está muito presente nas providências em favor de índios e escravos, e não discriminação em função da raça no caso dos enjeitados é simultaneamente manifestação de protecção às crianças, etc.

Dois casos avulsos, pelo significado simbólico que possam ter, merecem as honras de referência final. Um poderia ter sido tomado como precursor de direitos da mulher, se não estivesse muito simplesmente mesclado com preocupações de puro e simples po-

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voamento (aliás já presentes noutras medidas referidas) e o outro manifesta um *fumus* de preocupação com a vida quotidiana e a circulação urbana (trânsito) dos vassalos, numa perspectiva que parece tratá-los já como cidadãos.

A primeira das medidas consta da Carta Régia de 13.VIII.1817, dirigida a Luiz do Rego Barreto, e revoga a proibição de residência na Ilha de Fernando de Noronha, em que havia um presídio, até então imposta às mulheres. Os termos em que tal é feito não deixam margem para dúvida:

"(…). Não sendo fundada em princípio algum plausível de interesse para a causa pública, e bom regime económico, a proibição de residirem mulheres na Ilha de Fernando de Noronha, que até ao presente tem sido reduzida a um mero presídio para guarda de degradados (*sic*) (…) hei por bem revogar a mencionada proibição, declarando aberta a referida ilha, para nela poderem residir e viver quaisquer pessoas sem diferença de sexo. E vos ordeno que promovais pelos meios que vos parecerem melhores e mais próprios, a sua povoação com casais, que para ali hajam de ir estabelecer-se, conservando-se todavia a guarnição na forma que até agora se tem praticado (…) Rei".

Embora a intenção seja demográfica, a verdade é que, tal como no caso da não discriminação das crianças expostas, também aqui — quiçá pelos ares dos tempos — se formula um princípio geral, na fórmula "quaisquer pessoas sem diferença de sexo".

Em ambos os casos se estará quiçá no processo de génese colectiva dos valores, nessa longa marcha da Humanidade para captar e ir adoptando ética e juridicamente aqueles princípios de Justiça (ou de Direito Natural) que por luzes progressivas mas irreversíveis vão aprimorando a sua *Civilização*.

Já em 1815, um insólito documento, do punho do Marquês de Aguiar, e dirigido ao Senhor Vicente António de Oliveira (23.XII.1815) nos faz perguntar quão absoluto era então o absolutismo real:

"Il.m.º e Exm.º Sr. — O Príncipe Regente meu Senhor é servido ordenar que, V.Ex.ª faça declarar ao Coronel do 1º Regimento de Cavalaria do Exército, que os soldados batedores que vão adiante da carruagem do mesmo Senhor [e] de Suas Altezas Reais, são destinados meramente a desembaraçar o caminho por onde hão de

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passar, sem que devam dirigir-se às pessoas que encontrarem ou em carruagens ou a cavalo, obrigando-as a ficarem, e a se apearem, a fim de se evitarem para futuro os acontecimentos desagradáveis, semelhantes aos que já tem havido, até com alguns ministros das Cortes Estrangeiras; pois não sendo de esperar, que algum vassalo haja de faltar àquele respeito e acatamento devido ao soberano e a toda a sua augusta família; quando o contrário se verificar que Sua Alteza Real dará imediatamente a providência que o caso pedir".

Subtil e até irónico discurso legitimador de alguma desculpação face ao que poderiam ter sido incidentes diplomáticos? Talvez. Mas a verdade é que de novo se recorda o princípio. Desta feita, o de que os batedores servem só para abrir caminho e não para molestar os demais circulantes. Princípio aliás de total actualidade e que em alguns tempos e lugares da contemporaneidade ainda não se tiraram as devidas consequências práticas.

No termo desta passagem em revista da governação de D. João no Brasil, através dos seus diplomas e medidas, recordemos o escopo com que o empreendemos: aquilatar da sobrevivência das velhas liberdades ibéricas.

Uma conclusão se impõe: como tais, com a sua veste e sentido próprio, elas não mais são detectáveis na maioria dos casos, a este nível central. O poder absolutista moderado e paternal não as acarinhou na sua especificidade e completa grandeza. Embora a figura de D. João e da sua obra tenha deixado em espíritos superiores uma memória de especial simpatia. A propósito da partida do soberano do Rio de Janeiro, devido à revolução que estalara em Lisboa, Mello Moraes escreve um par de páginas muito significativo. Transcrevamos um par de pequenos trechos, que atestam precisamente esse paternalismo que, em rigor, não pode ser considerado puro absolutismo:

"O Rei D. João VI era geralmente amado pelos brasileiros, porque era ele naturalmente bom e compassivo; desvelava-se em assegurar a sorte das famílias quando elas tinham a desgraça de perder o seu chefe.

Era ele mesmo que previa o modo de socorrer à viúva do empregado público, e de empregar o filho, quando ele se achava na circunstância de o ser, no lugar vago que ficava pela morte do pai.

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Tudo isto fazia sem ostentação, e de um modo tão agradável e compassivo, que parecia mais o pai de uma família do que o rei de uma nação. Quando salvava uma vida ou fazia um benefício era para ele um dia de satisfação (...).

D. João VI não tinha grande ilustração, mas tinha muito talento e feliz memória para os negócios, e muito amor pelo trabalho. Amava a justiça. E se alguma vez avantajava nos seus despachos a predilecção pessoal era quando esses despachos não prejudicavam a terceiro, porque, se prejudicavam, esse terceiro era infalivelmente indemnizado antes mesmo de o requerer" (63).

Assim, poderá certamente identificar-se a manifestação de algum espírito comum ao "jugo suave" de D. João e a tais velhas liberdades. Mas quanto a liberdades proto-liberais, desenganemo-nos: porque nem as tradicionais tinham tal timbre, nem vigoram, no limite, as liberdades liberais: veja-se a proibição das sociedades secretas, livros e periódicos.

A própria ambivalência possível das medidas presta-se a contraditórias interpretações. Sina normal da ponderação de interesses antagónicos (ainda que uns legítimos e outros ilegítimos— como no caso da escravatura). E mesmo quanto às medidas mais claramente positivas, sempre se poderá perguntar se não terão passado de votos piedosos, *aleluias* jurídicos — se, realmente o *law in action* terá acompanhado o *law in the books*.

Mesmo sem suspeita metódica já pouco nos fica do que procurávamos. Doravante as investigações terão de ser conduzidas para outros actores jurídicos e políticos, outros pólos do poder, e épocas mais recuadas.

Mas há pelo menos uma coisa que para nós ficou clara: se as velhas liberdades podem ter ficado na sombra, ou perdidas pelo caminho, este período revela da parte do poder real, mesmo em ambiente absolutista, uma demofilia prudente que é por completo consentânea com o *ethos* jurídico nacional geral.

(63) (A. J. de) Mello Moraes, *História do Brasil-Reino e do Brasil-Império*, vol. I, pp. 152-153.

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BARTOLOMÉ CLAVERO

MINORITY-MAKING: INDIGENOUS PEOPLE AND NON-INDIGENOUS LAW BETWEEN MEXICO AND THE UNITED STATES (1785-2003)

Se tsontlixiuitl in techmachte tlen kineni koyotl.
Nahuatl Lyrics (*)

(*) "Four hundred years have taught us what the coyote wants" (Gordon BROTHERSTON, *Book of the Fourth World: Reading the Native Americas through their Literature*, Cambridge University Press, 1992, 312, quoting from Joel Martínez Hernández). Nahuatl is the *Mexican* language (the today mother tongue of *Nahuas* or *Mexicas*, also named in the past *Aztecs*, the people stemming from a lost town called Aztlan); even in colonial times under Spanish rule, Nahuatl was the Mesoamerican lingua franca, expanding as such from Nicaragua to the present United States Southwest, where Aztlan perhaps settled. As for the time, 1785 (Christian calendar) was the year of the failed confederacy between the Cherokee Nation and the United States, as we shall see; 2003 is just today, when I end, yet history does not. Nonetheless, 2003 is the year of the Fundamental Laws of the Diné — the Navaho polity — that we will reach, to be sure.

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9.2. Born citizens and native rights. — 10. The Arizona Territory and Arizonan polity. — 11. Indian Territory and American State: Oklahoma and New Mexico-Arizona likened. — 12. Arizona federated: Union powers over Indian reservations. — 13. Reservations and states' constitutions contrasted. — 14. Among histories and rights: legal domesticity and constitutional legality. — 15. Toward a post-colonial world: out of primitive law of nations and far away. — 16. Beyond minority: current human rights. — 17. Non-indigenous constitutions and indigenous entitlements. — 18. Epilogue: from (American) freedom's law to (Human) freedom's rights.

1. *Trompe-l'œil in both history and law: majority as minority.*

My point is as easy to formulate as it is hard to tackle, or so it seems in the light of current academic literature. In fact, both historiography and constitutionalism (I mean the present research and imaginary about the past, and the present thinking and discussion about rights to human freedom and consequent framing and functioning of powers) notice the point as often as they neglect it. In these fields (historiographical, constitutional, and both together) almost everybody appears to be at once sighted and blind. They see, yet do not see. They know there is a point, but they do not know how to address it. They give things names, but they hardly utter anything else besides their own, not alien words. So if you want to learn about the issue, you cannot ordinarily trust either historians or constitutionalists, but must resort to involved, isolated experts. Usually, concerning the subject matter, the former, the academic masters of history and law, hold no dialogue with the latter, with those strange specialists in a question that appears to interest their kin and folks, together with empathizing queer people, but by no means leading intellectuals and average faculty. As an ordinary scholar, I try to link up and move on. First of all let us name, locate and call into question the point.

The name is indigenous; the place, the Americas; and mainly, for the present discussion, the United States of Mexico and its neighboring partner, the so-called United States of America. The point emerges in the constitutional settings on which Euro-American States, both Latin and Anglo, were founded, as the majority of the population through the continent, by then indigenous, had to assume the role of legal minority from the beginning. How has it turned out that current American *States* are *Euro*, either Latin or Anglo, but not *Indian*, regardless of the presence of indigenous

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peoples as majority groups in their own territories or, in some glaring cases such as Guatemala or Bolivia, even today, in relation to the State as a whole? When the acts of independence took place and constituencies were framed, the latter was the general case. Furthermore, in the Americas, even in our constitutional and democratic age, social majorities may be legal minorities if they happen to be indigenous. This is the name and the point, both past and present. Here the question lay and may still lie.

Therefore I intend to face constituent challenges common to the United States and Mexico, to Anglo and Latin America, as regards legal making of constitutional minorities out of indigenous peoples. Now I am not concerned with devices such as harassment, deprivation, removal, confinement, and exhaustion by strong politics or bare violence leading to straight subjugation or even to brutal slaughter. Here I am dealing with no other power and force than those of the law, namely constitutional law founded on the authority of rights — the today so-called freedom's law so as to distinguish itself from constitutionalism committed to powers. Both are closely related, to be sure, yet the emphasis can make a difference when human freedom is at stake.

People "are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries". Together with both continuation — to some extent — of distinctiveness and self-identification, this is the qualification we shall learn at the end, when arriving at present international law, as actually conveyed by the International Labor Organization. It may be our working definition. Thus, we are referring to some million people in the Americas yesterday and today (over thirty at present). At odds with mainstream approaches by constitutionalism and *indigenism* (I mean the involved, lonesome experts together with empathizing, queer people), divergent and unrelated as these fields are, let me proceed. Purposely I have retained the rhythm and mood of oral presentation (1).

(1) The present paper comes from a two-day seminar that I taught in the spring of 2003 at the University of Arizona James E. Rogers College of Law, *Indigenous Peoples*

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Let me offer advice for readings rather than support from authorities since current constitutional and historical expertise, regarding indigenous point, is faulty or at least does not help. Therefore, I am not complying with any standard citation practice but interspersing discussions to spur criticism beyond what is usual or even deemed correct in the academic milieu. Despite some bibliography that I trust, my support is quite textual. My argument will mostly depend on documents extensively quoted. Besides supporting my presentation, the collection is also aimed at reflective reading for further discussion. Purposively, sources and references are built in the body of my text and I am not exhausting comment. I would rather rely on the reader's intelligence so as to make sense in common facing the *white man*'s legal common sense. This is what we are heading for.

For an opening reading, begin with Timothy E. Anna, *Forging Mexico, 1821-1835*, University of Nebraska Press, 1998 (paperback, Bison Books Corporation, 2001), an interesting essay on the early political and legal making of Mexico as a plural State through a federalist form of government according to its own conditions and needs, rather than being a copycat of either the United States neighbor or any European intended prototype. The author is a Canadian scholar, apparently aware of the present indigenous constitutional challenge in the case of Canada. As a researcher on Mexico-making who is concerned with Mexican pluralism, he observes the presence of an indigenous majority in both society and citizenship. However, he never wonders why Mexico did not become an Indian Confederacy, or even why there has not been any Indian state within the Mexican Federation, or by itself and recognized by others, considering that indigenous people were then an overwhelming majority in most areas, and a majority entitled to

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Law and Policy Program (*www.law.arizona.edu/depts/triballaw/iplp/index.htm*). For encouragement, attendance, queries, and suggestions, I am indebted to its faculty and students, and most grateful to professor James Anaya. Moira Bryson in Seville and Marina Hadjioannou in Tucson helped with the language. As usual, the overall cooperation from Luis Rodríguez-Piñero, at that time there, at the University of Arizona as research assistant, has been pretty useful. The mere visit to Navajo and Hopi reservations held no lesser import than the academic job. José María Portillo, visiting professor by then at the University of Reno, Nevada, lent a hand with the search for texts. Magdalena Gómez advised on peoples in Mexico. *Imagineros Brothers* took care over the illustrations. Besides the specific grant from the University of Arizona, the research is included in a project on constitutional history funded by the Spanish Government Department of Science and Technology (BJU 2000-1378, HICOES working group) as well as in a program on *Legal Multiculturalism and Indigenous Peoples* of the International University of Andalusia. Moreover, I deal with the matter, unusual as it is, in regular courses on *History of Public Law* at the University of Seville that I devote to comparative, intercultural constitutionalism, as well as in seasonal lectures on *Indigenous Peoples' Rights* at other Universities, namely *La Cordillera* (La Paz, Bolivia) and *Deusto* (Bilbao, Basque Country). The teaching challenge before diverse audiences helps a good deal by itself and especially through feedback. I love to tie research options with both concerns as a citizen and duties as a professor so that unilateral text may be authorized by dialogic test and thus lend itself to the ongoing discussion.

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constitutional rights on the part of Mexico. As if conjuring, the point is seen and not seen. Often, as in the Mexican historiography or also in the mainstream constitutional history of the United States, it is unseen. For telling evidence, focusing on rights (and the author having dealt in the past with some topics of Indian legal history), see John Phillip Reid, *Constitutional History of the American Revolution*, University of Wisconsin Press, 1987-1993.

2. *Opening challenge: indigenous citizenship from European Spain to Hispanic Mexico.*

In Mexican history, the crucial point is the citizenship of indigenous people rather than their simple being there. The backdrop of Mexican constitutional history, established in 1821 at the very moment of independence, is the common polity of indigenous and non-indigenous people, the former being the majority and the latter the minority (under twenty per cent). At that time, a Spanish constitutional system had just been established, where both indigenous and non-indigenous men were citizens while women and African-Americans were excluded from constitutional rights. That early Spanish constitutionalism kept slavery alive and denied citizenship to emancipated male African-American slaves, unless they demonstrated extraordinary individual merits. They were however declared Spaniards. Regarding the definition of constituency or polity and citizenship (I mean the human support and agency of constitutional fabric and policy), the main provisions of the 1812 Spanish Constitution were the following.

Spanish Constitution (1812). Title I. *On the Spanish Nation and Spaniards*. Chapter I. *On the Spanish Nation*. Art. 1. The Spanish Nation consists of all Spaniards of both hemispheres. Chapter II. *On Spaniards*. Art. 5. Are Spaniards: 1. All free men, born and dwelling in the Spanish dominions, and their children; 2. Foreigners who may have obtained from the *Cortes* [Congress] letters of naturalization; 3. Those who, without them, reside ten years in any village or town of the monarchy, according to the law; 4. Manumitted freedmen, as soon as they obtain their liberty in Spanish territory. Title II. *On the Territory of Spain, its Religion and Government, and on Spanish Citizens*. Chapter IV. *On Spanish Citizens*. Art. 18. Those are Spanish citizens who descent from parents both of the Spanish territories of either hemisphere, and are settled in any town or district of the same. Art. 22. The *Cortes* leaves open the channels of virtue and merit to Spaniards reputed of African origin on either side to become citizens; accordingly, the *Cortes* will grant letters of citizenship to those who may perform reasonable service to the country, or to those who distinguish themselves by their

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talents, diligence, and good conduct, on condition that they are the children, in lawful marriage, of fathers naturally free, that they are married to a woman also naturally free, and settle in the Spanish dominions, exercising any profession, office, or useful branch of industry, with an adequate capital. Art. 24. The condition or quality of a Spanish citizen is lost: 1. By obtaining letters of naturalization in a foreign country; 2. Accepting employment under any other government; 3. By any sentence imposing severe or infamous penalties, as long as it remains unrevoked; 4. By residing four years following out of the Spanish territory, without a commission or leave of government. Art. 25. The exercise of the said rights is suspended: 1. In virtue of any judicial prohibition from physical or moral incapacity; 2. In cases of bankruptcy, or of debtor to the public; 3. In the state of domestic servitude; 4. From not holding any employment, office, or known means of life; 5. From having undergone a criminal prosecution; 6. From the year one thousand eight hundred and thirty, all those who claim the right of citizenship must know how to read and write.

2.1. *Imperial Constitution and indigenous people.*

Let us address at once the starting point on the American side. The first Mexican constitutional system was the Spanish one, in which indigenous people shared citizenship with non-indigenous. This rule resulted from a settlement among American and European representatives, during the founding Spanish Congress in Cadiz (1810-1813). The aim was to balance parliamentary seats between America and Spain, or rather then American Spain and European Spain. The 1812 Spanish Constitution, framed by this Cadiz assembly, explicitly addressed the European, American and Asian *Spains* (in the plural), and thus the entire colonial empire from Mexico (*New Spain*) to the Philippines. Empire was the constitutional set. The Constitution did not call imperialism, or rather colonialism, into question. Then, on these partially new grounds, the arguments for a balance between European and non-European constituencies and even for the definition of the constituency itself were most critical.

Because the elections for the founding Congress had partially allocated and the definitive Constitution would fully allocate parliamentary seats in proportion to the population, a great imbalance was produced as long as indigenous people were not counted. Then, in accordance with demography, American representatives would constitute a definitive minority in the imperial Spanish Congress, what they blatantly rejected. But by taking into account both indigenous and non-indigenous male individuals as Spaniards and citizens, and

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their entire families as the former, these parliamentary constituencies, the European and the non-European, were to be quite balanced in the common Congress according to contemporaneous reckoning (about ten million people, or *souls* in Cadiz constitutional language, and one hundred and fifty representatives, on each part, the European and the American, at that time). To this end, so that an inter-continental, Euro-American equilibrium could be reached in the imperial Congress, indigenous people became citizens. Indigenous citizenship was granted on the grounds of balance regarding political representation between continents, not of equality regarding constitutional entitlement between peoples.

At any rate, indigenous people were therefore entitled to civil and even political rights, and so to be called to constitutional elections for the imperial Spanish Congress, for the Provincial Deputations and for local Municipalities (*Province* meant inner polity somehow like in Canada or Argentina today). For this constitutional approach, which engineered the *Spanish Nation* through upward representation rather than downward administration, the Municipalities could be either indigenous or non-indigenous, while Congress and Deputations were intended to be non-indigenous as for agency. Constituency meant both. A complex electoral system based upon widespread suffrage and going through a variety of stages was aimed at and implemented to achieve this discriminating purpose. The procedures fostered cooptation amongst the establishment, rather than election from the people. The constitutional inclusion of the Catholic religion for the latter and the Catholic Church for the former — the establishment — helped. In the cast of this European and American constitutionalism thus common, bishoprics, parishes, and even missionary orders had a regular ruling and disciplining role to play, the importance of which, especially of the latter, increased out of Europe as regards indigenous people (in fact, it is the only moment of explicit mention of them, namely of *Indian infidels*, in this at once European and American Constitution).

> *Spanish Constitution* (1812). Title II. *On the Territory of Spain, its Religion and Government, and on Spanish Citizens*. Chapter II. *On Religion*. Art. 12. The Religion of the Spanish Nation is and shall be perpetually Catholic, Apostolic, and Roman, the only true religion (...). Title III. *On the Cortes*. Chapter VII. *On the assembly of the* Cortes. Art. 117 (...). [A]ll the deputies shall take the following oaths on the holy Evangelists: "I swear to

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defend and preserve the Catholic, Apostolic, and Roman religion, without admitting any other into the kingdom (...)". Title V. *On the Civil and Criminal Courts of Justice, and the Administration thereof.* Chapter I. *On the Courts of Law*. Art. 275. *Alcaldes* shall be established in all settlements; and the laws shall define the extent of their powers, both in matters of litigation, and of economy. Title VI. *On the Political Government of the Provinces and Towns*. Chapter I. *On the* Ayuntamientos [Municipalities]. Art. 310. An *Ayuntamiento* shall be established in those settlements that are without it, and in which it is desirable; all those which possess, either in themselves or in their territories, a population of a thousand souls, being required to have it, and a proportional district shall be assigned it. Chapter II. *On the Political Government of the Provinces, and the Provincial Deputations.* Art. 325. There shall be in every province a deputation, styled provincial, for the purpose of promoting its prosperity (...). Art. 335. It will be the duty of these deputations. 3. To take care that *Ayuntamientos* are established in proper places, conformable to the 310th article. 10. The deputations of the provinces beyond sea will vigilantly observe the management, order, and progress of the missions for the conversion of the Indian infidels, whose ministers will give them an account of their proceeding therein, for the purpose of avoiding abuses; all which the deputations will submit to government. Title IX. *On the Public Education*. Art. 366. Preparatory schools shall be established in all the towns of the monarchy, in which children shall be taught to read, write, cast accounts, and the catechism of the Roman, Catholic religion, which shall also contain a brief explanation of their civil duties.

2.2. *Cultural approach and family affairs.*

Add cultural assumptions. The Constitution was produced in Spanish; as would politics work. Spanish-speaking people were deemed to be the natural representatives of the indigenous party on behalf of the American common constituency. Furthermore, in this early constitutionalism, a watershed operated between economics and politics, the former meaning private affairs and the latter public affairs. Local Municipalities were considered mostly *economic* bodies together with families and corporations such as commercial or even religious ones. *Politic* body was the Congress. Provincial Deputations were somehow mixed entities, both economic and politic. As sole Municipalities' constituents and actors, the proper place for indigenous peoples, manners and languages was deemed to be provided and fixed by the economy or rather *oeconomy* (that is, in the old sense implying domestic or private status, not public or constitutional standing for a lot of people — women, hired worker, slaves, and so on; *oeconomy* meaning literarily home rule), as an additional or even preceding order to that represented by constitu-

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tionalism. Public space entailed constitutional freedom while the private level resulted in human subjugation. On these grounds, indigenous citizenship, overall in textual theory and just local in contextual practice, was a real challenge.

The 1810-1813 founding imperial Congress collected its regulations when concluding the task. Both the 1812 Constitution and a prior 1810 provision establishing the shared equal condition between Europeans and Americans were of course included. In the 1810 language, "Spanish dominions of both hemispheres form a sole and only Monarchy, a sole and only Nation, and a sole Family". In the index of this authoritative collection, the corresponding entry reads as follows: "*America*, its Native, primary people form a sole family together with the Spanish Europeans". *Family*, neither Monarchy nor Nation, apparently was the relevant classification as for indigenous people. In fact, from start to finish, even after the Constitution, this founding Congress usually referred to them as the minors of the family in need of either *oeconomical* guardianship (for *Indian infidels*) or political representation (for *civilized Indians*) on the part of big brothers or mommas (Europeans together with Euro-Americans or Creoles; the Catholic Church alongside the Spanish Monarchy). Coming from pre-constitutional into constitutional times, it was the *oeconomy* — the private order previous to the public fabric. Remember this if you want to get the picture of the indigenous peoples' standing throughout the constitutional history.

James F. King, "The Colored Castes and American Representation in the Cortes of Cadiz", *The Hispanic American Historical Review*, 33, 1953, 33-64, brought to light the motives for the extension of citizenship and so put a break point on speculations about constitutional equality between Spaniards and Indians. Later, on the occasion of 1992 neo-colonial celebrations, the topic has been widely addressed by historiography mostly in Spanish, both in Spain and Latin America, often unaware of the caveat. Time and again, the presence of indigenous people is not even taken into account. Let me register Marie-Laure Rieu-Millán, *Los diputados americanos en las Cortes de Cádiz*, Consejo Superior de Investigaciones Científicas, 1990, adding a subtitle inside: *Igualdad o Independencia*. Mark the latter. You can bet that the announced dilemma between *equality* and *independence* really implies the attention, as counterpart of Spaniards, to only Euro-American minority and not indigenous majority, as the latter is not thought as entitled to either equality or independence by contemporaneous politician and present historian. This is still the usual pattern. Trying to keep within dates as much as possible, the translation of the 1812 Spanish Constitution I am

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relying on (correcting the minimum) is the one published by *The Pamphleteer*, vol. XXII, nº XLIII (London 1823), 62-87 (2).

2.3. *Indigenous citizenship and colonial rule.*

Municipality incorporation was construed as a constitutional right to local polity. It was not dependent on further enactment in most cases. Local communities with over one thousand *souls* or inhabitants were constitutionally entitled to self-administration as municipal corporations. The rest could be given a franchise to incorporate as such together with others or by themselves. Indigenous communities were deemed to be included as for both right and grant. Indians converted by missionaries — so considered to shift from *infidels* into *civilized* people — would join. Indigenous people could participate in local as well as in other elections for constitutional bodies, even Congress. Indians were real citizens entitled to political, not only civil rights. African-American freedmen were not so, and slaves were not even Spaniards. As for the overwhelming majority in America, the non-European indigenous people, they were considered to be citizens before 1821 Mexican independence, whatever the motivation. Indigenous citizenship existed or rather indigenous people had a share in a Euro-American citizenry. This was taken for granted by Mexican independent constitutionalism.

In 1810, a first effort at independence might have turned out differently regarding indigenous standing. In this failed attempt,

(2) The anonymous *Translator* added some notes, but only one on the non-translated, here quoted terms: "*Ayuntamiento*. No single word or expression in English will give the proper signification of this word. It embraces the terms and duties of Corporations, Town Halls, Court Leets, Courts of Conservancy, of Lieutenancies of Counties, and, in short, all descriptions of Courts for municipal, internal regulations". Stemming from the Latin, the meaning of *Cortes*, as parliament besides judiciary, was instead taken for granted (originally being the same word, as *Court* had been the place where the king or queen — head of the highest bodies both political and judicial — stayed or was supposed to be present; through the separation of powers, *Cortes* today means in Spain parliament and in Latin America judiciary bodies). *Alcalde*, the main local overall authority, meant judge from the Arabic. As for the contemporaneous translations of Mexican texts, I will also add brief definitions in square brackets just when needed.

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slavery was abolished, as well as *castas*, meaning indigenous legally subjugated position, and a widespread common citizenship was proclaimed. However, Spanish law, including its acceptance of slavery, was soon reestablished. In 1821, when the separation finally took place, the 1812 Spanish Constitution was transitorily in force as the Constitution of *New Spain* (Mexico and Central America). Eventually, on the way from Spain to Mesoamerica, because of the independence, there was no discontinuity of constitutionalism, nor a termination of colonialism, this is, true colonialism, that which submits non-European people to people either stemming from or remaining in Europe. Here I am not concerned with the relationship between European and Euro-American people that was also deemed colonial for the sake of American independence conducted by the latter.

This independence put an end to Spanish imperialism, but not to Hispanic colonialism. The latter raises the key question to this Euro-American constitutionalism. In the matter of fact or rather of law, from imperial Spain to independent Mexico, there was a continuity of colonial constitutionalism or rather constitutional colonialism. Constitutionalism itself was established without indigenous consent and on the unequal footing stemming from prior colonial times. How could this occur in a constitutional setting and through constitutional procedures? That is the question.

The next recommended reading may be Nancy M. Farriss, *Maya Society and Colonial Rule: The Collective Enterprise of Survival*, Princeton University Press, 1984, discussing the situation previous to Anna' s *Forging Mexico*. She studies the history of the Yucatan people throughout colonial times under the Spanish rule extending to the first Hispanic constitutionalism, namely the one launched by the Cadiz Congress. Every single step in the course of this history is extremely interesting. However, for our present purposes, the final section should be noted. It analyses the indigenous strategies operating under the novel constitutional framework, which, through their own agency, brought benefits to them even beyond the regulations of the Constitution. There we may observe some actual performances of indigenous citizenship. As the initial experience demonstrated that constitutionalism could operate through the exercise of rights beyond its aim, the upholding of shared citizenship after independence therefore becomes even more significant. Matthew Restall, *The Maya World: Yucatec Culture and Society, 1550-1850*, Stanford University Press, 1997, relying on indigenous sources, yet less concerned with constitutional polities, takes the point. Further evidence on the extent of active indigenous citizenship is available: Antonio Annino, "Cádiz y la revolución territorial de los pueblos mexicanos, 1812-1821", A.

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Annino (ed.), *Historia de las elecciones en Iberoamérica, Siglo XIX. De la formación del espacio político nacional*, Fondo de Cultura Económica, 1995, 177-226; add now Karen D. Caplan, "The Legal Revolution in Town Politics: Oaxaca and Yucatan, 1812-1825", *Hispanic American Historical Review*, 83, 2003, 255-293. Unfortunately, the most interesting studies regarding indigenous background do not reach the constitutional moment — the last stage of the Spanish dominance: James Lockhart, *The Nahuas After the Conquest: A Social and Cultural History of the Indians of Central Mexico, Sixteenth Through Eighteenth Century*, Stanford University Press, 1992; Kevin Terraciano, *The Mixtecs of Colonial Oaxaca: Ñudzahui History, Sixteenth through Eighteenth Centuries*, Stanford University Press, 2001. Disregarding this literature, Tamar Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America*, Yale University Press, 2003, addresses colonial township belonging as if it could explain indigenous citizenship. The usual legal approach does not contemplate by any means *Indian* peoples as human active participant, as if only Europeans and Euro-Americans held the capacity to define both themselves and others on the way (3).

3. *Constitutional strategies: the location of the individuals.*

The federal Mexican Constitution of 1824 was framed from the launching set of the Spanish Constitution of 1812. Establishment of religion was not discontinued, neither were other cultural and social assumptions. Provincial Deputations might become constitutional states now contributing to the founding of the Mexican United States. Indigenous people held citizenship. Here is the point. If indigenous people were a full majority in both the federated states and in the United States of Mexico, and they shared citizenship with non-indigenous people, why did they not become the ruling people through their own languages and cultures, customs and ways? The Spanish language was not even a second tongue or lingua franca for many indigenous peoples (Nahuatl still prevailed as such). Neither were ways of life. How was it that Mexico and all its inner states, besides other Latin American States, were finally constituted as Hispanic polities, just as the ones in the North would be Anglo?

As the question is constitutional, the answer must be constitutional as well. Here I am not concerned with unconstitutional or

(3) Currently, HICOES — the mentioned research working group to which I belong — cope with Spanish imperial policy and constitutionalism between European, Hispanic and indigenous people; particularly, José María Portillo, Marta Lorente and Carlos Garriga are studying the American issue.

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illegal procedures such as direct harassment and pure deprivation by strong politics or bare force leading to subjugation or even slaughter. Here we are not dealing with force other than that of the law, as we know. Culture must be added as a legal task force. In short, this is the question: What were the constitutional devices required to shift the social basis of indigenous character into the political outcome of the European kind, either Latin or Anglo? Let us take a look at the constitutions themselves, as the question is constitutional. Regarding indigenous people, there may be a hidden agenda, a kind of overlapped constitutionalism, or rather internal un-constitutionalism, which might easily go unnoticed. Let us pay attention. If we keep watch, the constitutional agenda for indigenous people proves not so hidden.

At first glance, we find two different brands of legal devices that may affect indigenous people in an excluding or impairing trend — the individual and the collective. On the one hand, the 1812 Spanish Constitution contained rules excluding individuals from the exercise of political rights that may feasibly apply to indigenous peoples (for instance, the exclusion of those illiterate in Spanish, to become effective in 1830, providing for the estimated time of a single generation, the first to be subjected to mandatory education). The 1824 Mexican federal Constitution had no say regarding these qualifications for citizenship because of the decentralizing assumption that the matter of political and civil rights was one of states' concerns, not the Federation's. Next, the Mexican state constitutions directly followed the lead of the Spanish 1812 Constitution and reinstated or rather continued provisions for suspension of citizenship on an individual basis. The 1827 Constitution of Texas and Coahuila, which purported to establish a *Coahuiltexian* polity, is one of them.

> *Constitution of Mexico* (1824). Art. 9. The qualifications of the electors shall be constitutionally prescribed by the legislatures of the states, to which it also belongs to regulate the elections conformably to the principles established by this Constitution.
>
> *Constitution of the State of Coahuila and Texas* (1827). *Preliminary Provisions*. Art. 22. The exercise of the said rights [of a citizen] shall be suspended. First: For moral or physical disability, after judicial investigation. Second: For not having attained the age of twenty one years, except married persons, who shall enjoy the said rights from the time they marry, whatever be their age. Third: For being debtor to the public funds, the time of

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payment having expired, and payment having been demanded. Fourth: For being under criminal prosecution, until acquitted or sentenced to a punishment not corporal or disgraceful. Fifth: For having no employment, trade, or know way of support. Sixth: For not being able to read and write, but this provision shall not take effect until after the year 1850, and with respect to those who shall enter on the exercise of the rights of citizens after that time.

Following likewise Spanish patterns regarding rights, other state constitutions included clauses providing for suspension of citizenship on such an additional basis as "status of domestic servant" (meaning hired worker in the general, except in some cases that qualified the category by "personal service"), or as "the conducting of an immoral way of life" (meaning being neither sedentary nor industrious or even being "customarily unclothed"). This provision was usually phrased without the Texan (and former Spanish) caveat for judicial investigation. All of these deprivations of citizenship on an individual basis might have had a severe effect on indigenous people. Nevertheless, they were not enough to make the constitutional majority be a legal minority. In fact, they were not even intended for this major purpose.

There were further devices, the collective ones, as will be discussed below. Working together, these devices could produce the massive effect of making the indigenous majority a constitutional kind of minority. Minority making through legal procedures is the point. As I have already reiterated, I am not concerned here with clearly unconstitutional or illegal past or present procedures or performances.

Further suggested readings in English could be two that I authored, namely "Culture versus Rights: Indian Law and *Derecho Indiano*", Julius Kirshner and Laurent Mayali (eds.), *Privileges and Rights of Citizenship: Law and the Juridical Construction of Civil Society*, Robbins Collection Publications, University of California at Berkeley, 2002, 277-297, and "Freedom's Law and Oeconomical Status: The Euroamerican Constitutional Moment in the 18th Century", *Quaderni Fiorentini*, 30, 2001, 81-135. As the former sets forth the comparison between Mexico and the neighbor United States and takes into consideration cultural pre-juridical factors rather than the constitutional ones, it addresses the main point, namely the challenging question on indigenous citizenship as a majority constituency (later, I will return to some of the remaining issues, as they actually contribute to the constitutional exclusion of indigenous people or legal discrimination against them). The latter, *Freedom's Law*, introduces historical *oeconomy*, this is, the home rule or *domestic* order concerning women, hired workers, slaves, and indigenous people too, which, as indicated a propos of the 1812 Spanish Constitution,

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we have to take into account so to understand constitutional or rather unconstitutional standings. The English edition of the whole volume being planned, I may also direct you to Pietro Costa and Danilo Zolo (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Feltrinelli, 2002, 537-565: "Stato di diritto, diritti collettivi e presenza indigena in America".

4. *Accommodation through allocation of powers.*

As for the Mexican constitutionalism, let us now focus on the collective side. The devices affecting whole groups and not just individuals are at least fourfold: first, the municipal incorporation or rather local downgrading and even confining; second, the federal territorial regime as opposed to state self-government; third, the institution of trial by jury and its involvement of the issue of customary law; and, last but not least, the communal form of ownership with the respective implication of a specific, indigenous form of government. All of these are also constitutional devices, some relating to governmental powers and others to plain rights. Let us consider each of them separately in order to arrive at an overall reflection. In the final analysis, in the case of independent Mexico and throughout the Americas, we will have to take necessarily into account culture in the singular and cultures in the plural so as to be able to realize and explain the very historical working of the constitutional devices. But every item must wait its due turn. Be patient. Let us move on step by step.

In a Spanish language book (although its title is in Quechua, *Ama Llunku*, and Kuna, *Abya Yala*, meaning Indian pride throughout the Americas), I have dealt with the municipal incorporation as a collective device for the constitutional location of indigenous peoples: *Ama Llunku, Abya Yala. Constituyencia indígena y código ladino por América*, Centro de Estudios Políticos y Constitucionales, 2000, in the last comparative chapter between the Basque people in Europe and the Quiché people, a Mesoamerican people, the former not being restricted to the local layer and the latter tellingly otherwise, even obliged to this institutional confinement into municipal communities. Here, in *Ama Llunku*, I name the trompe-l'œil *O'Reilly's Theorem* after a Mexican lawyer and politician (Justo Sierra O'Reilly) who witnessed the active use of the Spanish Constitution by Tzotzil and Tzeltal peoples, the majority in Yucatan, and proposed to counterattack the indigenous intent in legal terms, not through warfare. As for the early Mexican states' constitutions, they were edited by Mariano Galván Rivera, *Colección de Constituciones de los Estados Unidos Mexicanos* (1828), Ediciones Purrúa, 1988. The translations of the Mexican and the Coahuiltexian constitutions that I am quoting were published and disseminated, together

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with federal and state colonization laws, in that time in both the United States and Great Britain, with a view to attracting Anglo, this is most white, people, *whitening* being the explicit name of this policy. You may find the texts on the internet browsing through *Nineteenth-Century Texas Law Online*, University of North Texas (*texinfo.library.unt.edu/lawsoftexas/default.html*). Most of the documents I refer to are available through searchers on the widening web.

4.1. *Municipal incorporation as reservation.*

The Mexican state constitutions under the 1824 federal Constitution retained the Spanish approach regarding indigenous municipality, but also embraced another trend towards an important shift. Through similar provisions and with significant nuances, these Mexican constitutions cease to stress community entitlement in order to empower the state executives and legislatures, that is, the non-indigenous institutions, instead. From that point on, municipal incorporation was no longer a collective right but a political grant. Significantly, in the constitutional design revealed in the indices of these constitutional texts, the municipalities or *Ayuntamientos* are in one case, the Spanish, representative institutions along with the Provincial Deputations and the Congress itself, while in others, the Texan and other Mexican constitutions, they fall under the section establishing the *Executive Power of the State* as its local facilities.

Given all this, you can even suspect that one of the main motives for independence was the Euro-American determination to lead and keep control of the conversion of indigenous communities into municipal bodies. This might be a true key for *Nation* building, meaning State founding, framing, and empowering. Thus, the constitutional accommodation would definitively become social downgrading and cultural confinement. Textual changes in the fundamental norms implied this evolution or rather regression to colonial settings that were not alien to the Spanish 1812 Constitution, but that would be more feasible under the Mexican counterparts. With this purpose, some Mexican states bluntly recovered for the indigenous communities the so-called castes or *castas* regime as contained in the *Leyes de Indias* or colonial Spanish legal consolidation (we shall find it in force in the United States Southwest as well). Colonial acts could be then constitutional regulations as regards indigenous people.

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> *Constitution of the State of Coahuila and Texas* (1827). Title II. *Executive Power of the State*. Sec. VII. *Ayuntamientos*. Art. 156. *Ayuntamientos* shall be established in towns where there are none, wherein it is proper they should exist, and they shall be established without fail in the district capitals, whatever be the population thereof, and in towns which, of themselves or with the territory they embrace contain a population to the amount of one thousand souls, unless said towns should be annexed to another municipality, in which case, since from other considerations it may not be proper for them to separate, in order that they may have an *Ayuntamiento*, it shall be so declared by congress, after receiving the report of the governor, and the dispatch that shall be formed, assigning the limits that are to embrace the new municipality. Art. 157. Towns that should not possess the population assigned, and which find it practicable being advantageously annexed to another or others, shall constitute a municipality, and the *Ayuntamiento* shall be established at the place most convenient in the opinion of the executive. Art. 158. In towns wherein *Ayuntamientos* cannot be established, and which are so distant from the other municipalities that the latter cannot attend to the internal administration thereof, the electoral *juntas* [boards] of that to which they belong shall choose a commissary of police and a *síndico procurador* [local ombudsman] to discharge the duties assigned them in the regulations for the political administration of the towns.

4.2. *Territory versus state regime.*

Founding a Federation, the 1824 Constitution of Mexico contemplated both states and territories, *states* entitled to their own constitutions and powers, and *territories* submitted to the federal institutions. This difference between *territory* and *state* was motivated by a single aim, that is, non-indigenous domination over indigenous peoples. The distribution of powers between center and periphery was actually conceived not just to integrate non-indigenous polities, but also to subdue indigenous peoples. Where the former could keep control, there were states. Otherwise, it was the hour for territories. The territory regime fell short of fully recognizing political or civil rights, so that the federal powers in this regard could be far-reaching and capable of imposing non-indigenous forms of local entitlement and empowerment. The aim shared with states was to foster whitening immigration at the expense of indigenous presence.

With regard to this discrimination between state and territory, the United States represented a truly appreciated example then. By the time of the framing of the federal Constitution (1787), the United States had drawn up through ordinance that temporary kind

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of *territorial* regime characterized by the shortage of constitutional autonomy as long as the population to be empowered became whitened enough. In the meantime, only colonizers were entitled to some rights. The invention was genuinely American, not European. In explicit defense of the *white race* against the indigenous control of most parts of the peninsula, for the sake of conquest, Yucatan tried in 1848 to withdraw from Mexico requesting in vain from the United States to be admitted as a *Territory*, not as a *State* like Texas but as New Mexico then. The point of discriminating between inner autonomous states and federal dependent territories was well known in Mexico. We shall deal with the question of these other territorial transferences, those of New Mexico that included, as part of the territory, Arizona, and, as a state, California.

At this point, an enlightening reading may be Florencia E. Mallon, *Peasant and Nation: The Making of Postcolonial Mexico and Peru*, University of California Press, 1994. The author is concerned with indigenous political participation rather than constitutional location and the history she takes into account deals with social conflicts and not legal constructs and procedures. However, she offers a fascinating narrative of the making of Mexico about mid-19th century. This reading may also broaden historical perspectives through the comparison between the quite diverse, as for Nation-making or rather State-framing, Mexican and Peruvian cases with the peasant, meaning indigenous, social and political agency always in mind. The use or misuse of names matters, because the non-indigenous or *peasant* wording implies relegation of the cultural differentiating factors that may imply a diversity of polities. Nation meaning exclusively State holds by itself an implication adverse to indigenous peoples, downgrading them as no-nations even in the cultural sense. On these assumptions, issues such as how territory regime operated specifically in Mexico, as a constitutional alternative against indigenous peoples, are bluntly ignored. Regarding the case of Yucatan, direct old sources are more telling than current historiographical treatment. In 1938, Héctor Pérez Martínez edited the diary of the lawyer, politician, and ambassador I have referred to: Justo Sierra O'Reilly, *Diario de nuestro viaje a los Estados Unidos. La pretendida anexión de Yucatán (1847-1848).*

5. *Accommodation through rights.*

There was no real accommodation through powers. Indigenous peoples did not fit in with the social downgrading and cultural confinement of local incorporation. First of all, indigenous communities were not successfully reduced to municipal bodies, as they adapted the new forms of local elections and authorities to maintain

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and even strengthen the functioning and organization of their own jurisdictions, distinct customs, and effective home rule. While the non-indigenous aim was that diverse indigenous law and jurisdiction were bound to disappear with the announcement and arrival of *national* — meaning State — code and justice, beginning with the very constitution, this expectation was not accomplished at all. Instead, the indigenous communities tended to survive and even become reinforced as such under the constitutional umbrella offered by municipal incorporation. They did not comply with non-indigenous planning and engineering.

Constitutions were adopted by non-European peoples just as a subsidiary device on their own behalf. By and large, indigenous performance exceeded constitutional forecast. Indigenous presence and influence in Mexican politics were realized through initiative and conflict as much as adaptation and participation, although the latter under the restrictive ways of Spanish language and Hispanic manners. Nevertheless, Mexico was not Spain. Mexican policy could not be Spanish policy. At home, indigenous voices and actions could rather be heard and seen.

Indigenous people resorted to constitutional rights. Rights were effectively exercised. Even from the constitutional field, rights could be aimed at indigenous accommodation. There were approaches to constitutional entitlement of rights on behalf of indigenous people, namely to the right to trial by jury as a method of allowing and accommodating indigenous ways of justice and law, and also to the right of collective property as a device to assure the whole fabric of indigenous community, self-government included. The latter rather than the former constituted a genuine indigenous claim. Then, indigenous justice and law did not experience as much jeopardy from constitutional pressure as communal property. The private property policy arrived before the community prior to all the rest of state or federal judiciary and law. As a constitutional demand, right to trial by jury was expressed in Spanish. Constitutional right to communal property was also claimed in indigenous languages.

Mexican federalism, in fact broken down since the mid thirties, was reframed or rather re-founded and rebuilt by the 1857 Constitution that granted the Federation, and not the states, primary jurisdiction over recognition and guarantee of fundamental rights.

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Thus, inasmuch as a matter of rights, indigenous peoples now fell under federal powers. In fact, beforehand, the Federation had intervened in the realm of constitutional rights. In 1829 slavery had been abolished by federal enactment, though some states could still resist on the constitutional grounds of state powers over rights. From 1857, the shoe could be on the other foot. Let us focus on the placement of indigenous peoples within the new constitutional scheme, either through rights or through want of rights. In the 1856-1857 re-founding Congress, both trial by jury and communal property were most controversial topics concerning indigenous people.

> As we are moving to the frontier between Mexico and the United States and, in addition, as I presented my paper first hand at the University of Arizona, perhaps I may suppose that you, attendant then, can read Spanish, as readers may. I know that, though addressing a multilingual society with the English as the latecomer, the Arizona Constitution requires only proficiency in the latter to be a good citizen and furthermore that this also is from the very beginning the implicit assumption of the United States constitutionalism facing few European and many indigenous languages, yet fortunately people go beyond law. Nevertheless, the reading of constitutions is worth the effort. The standard collection of Mexican central, federal or not, Constitutions (not the ones of the states) is edited and updated by Felipe Tena Ramírez (ed.), *Las Leyes Fundamentales de México*, Editorial Porrúa, 2002, where you can find more than strict constitutional texts; *cervantesvirtual.com/portal/constituciones/pais.formato?pais=Mexico* leads to a growing collection on the web. Let us keep drawing on old documents rather than present experts.

5.1. *Trial by jury and customary law.*

Sure enough, the right to jury trial was one of the most controversial topics in the 1856-1857 constituent Congress, precisely because it could imply a means of accommodation of indigenous jurisdiction and law in the constitutional fabric. By recognizing such a right as to be judged by peers through jury, the Constitution would provide cover for something else than a form of trial.

At first hand, the constitutional approach was that non-indigenous judges would assume their positions presiding juries and applying non-indigenous law after verdicts, but Mexican people and even Congress knew better. Neither the Federation nor the states had the resources to deploy judicial powers over all of Mexico.

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Additionally, contrary to the 1812 and 1824 constitutional regimes, through 1857 Constitution Mexico was no longer a Catholic country in legal terms. Neither the Federation nor states could any longer rely on friars and priests for more or less constitutional purposes (there would be some exceptions). Therefore, local government would be overall in the hands of indigenous communities. People knew the secret. So did the framers.

As a constitutional and communal right, trial by jury could mean indigenous justice and indigenous law. Conceivably for those Mexican framers, indigenous jurisdiction could be an institution *de jure* as well as *de facto* and so would the jury there. In the given set, juries might hold the power to seek, find, consider, and therefore determine the communal, customary law. The recognition and establishment of the indigenous jury entailed the adoption and accommodation of indigenous law as well.

The 1857 Congress recognized the right to jury — jury as a constitutional right and not only as judicial procedure —, but it eventually disappeared from the parliamentary agreements and the published Constitution. In fact, the jury as a constitutional right accommodating indigenous justice and law, not just as a judicial institution for the matter of fact, has never been implemented in Mexico. Nevertheless, indigenous jurisdiction — customary law and adjudication — have not disappeared, maintaining communities' inner consent and use. They have managed to survive throughout precarious accommodation and no constitutional direct support at all.

Indigenous jurisdiction entails indigenous law, traditional customary law, which colonialism and, afterward, constitutionalism had deprived of tools to live and develop, such as legislative, judicial or administrative branches of their own. No indigenous self-rule or self-government was directly considered by Mexican constitutionalism. But it existed and could even be accommodated by indirect devices, such as the right to jury trial. The indigenous jury, constituted as a body competent to decide issues of law, based on that constitutional right, could have stood for an effective recognition of indigenous self-rule, yet we cannot know for sure. As far as I know, no Latin American State has ever tried the formula of the right to a

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trial by jury in order to affirm indigenous jurisdiction and customary law. As for the Anglo side, we shall see.

> We know that there may be access to the indigenous side of constitutional rights through historical sources rather than current studies. Concerning the discussion on the parliamentary floor that refers to items such as the right to jury and the related one about indigenous jurisdictions which might be benefited, you may resort to the records of a journalist and representative in the constituent Congress, Francisco Zarco, *Crónica del Congreso Extraordinario Constituyente (1856-1857)*, edited by Catalina Sierra, Colegio de México, 1957, rather than on the official and less eloquent proceedings: *Actas Oficiales y Minutario de Decretos del Congreso Extraordinario Constituyente de 1856-1857*, same editor, Colegio de México, 1957 (these not published at the time). Francisco Zarco was concerned with constitutional rights, not with indigenous accommodation. He is more reliable regarding the former. If you, just like me, cannot understand any of the indigenous languages, it is truly hard or even unfeasible to become further acquainted. Anyway, I make an effort to deal with the question in "Jurisdicciones veteranas y Estados novicios: México y Texas, 1824-1866", Feliciano Barrios (ed.), *El Gobierno de un Mundo. Virreinatos y Audiencias en la América Hispana*, forthcoming.

5.1.1. *The Mexico-Texas confrontation on rights.*

The right to trial by jury, the jury as a constitutional right, had been one of the main matters of concern and complaint by Texas against Mexico as it made its way to independence out of Coahuila and eventual incorporation into northern neighboring United States. However, let us not get confused. It had nothing to do with indigenous accommodation and empowerment. On the contrary, it implied unconcern and exclusion. Texas separated from Mexico based on a defense of the federal system under the 1824 Mexican Constitution, a system that empowered states to maintain slavery and subdue indigenous peoples. By sacrificing in fact everybody's rights for the sake of centralized control, this federalism had overtly gone on the blink in the mid thirties.

Prior to the Civil War (1861-1865), the United States of America did not guarantee rights against states, just like first Mexican federalism had not done. However, until then, both African-American slavery and Indian plain exclusion were allowed by the United States and not by Mexico (since 1829 for the former issue, but we shall find that there were still forms of enslaving indigenous people, such as *peonage*). The Texan leading polity (meaning its

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Anglo minority, a minority in regard then not to Hispanics, but to Indians, a Euro minority that appealed to and that was welcomed by early Mexican politics for whitening immigration) longed for a *free white* constituency with only *free white* people entitled to rights. According to this indigenous context and non-indigenous intent, a series of Texas's constitutional provisions and grievances in the course of its flight out of Mexico must be construed. We must look at the constituent polity so as to understand the constitutional rights. The former rules the latter. Right to jury in Texas would not entail the same meaning as right to jury in Mexico. For indigenous people, it could even mean somehow the opposite.

> *Constitution of Texas* (1833). *General Provisions.* Art. 4. The right of trial by jury, and the privilege of the writ of habeas corpus shall be established by law, and shall remain inviolable. Art. 23. All persons residing in Texas, at the date of this Constitution, except bonded servants, and other persons not liable to taxation by virtue of laws enacted under this Constitution, shall be regarded as citizens, and as being entitled to all the benefits of persons who emigrated to the country under the Colonization Law of 1825, and shall be acknowledged and admitted to all the rights and privileges of such immigrants.
>
> *Declaration of Independence* (1836). (...). It [Mexico] has failed and refused to secure, on a firm basis, the right of trial by jury, that palladium of civil liberty and only safe guarantee for the life, liberty, and property of the citizen (...).
>
> *Constitution of Texas* (1836). Sec. 6. All free white persons who shall emigrate to this Republic, and who shall, after a residence of six months, make oath before some competent authority that he intends to reside permanently in the same, and shall swear to support this Constitution, and that he will bear true allegiance to the Republic of Texas, shall be entitled to all the privileges of citizenship. Sec. 9. All persons of color who were slaves for life previous to their emigration to Texas, and who are now held in bondage, shall remain in the like state of servitude (...). No free person of African descent, either in whole or in part, shall be permitted to reside permanently in the Republic, without the consent of Congress (...). Sec. 10. All persons, Africans, the descendants of Africans, and Indians excepted, who were residing in Texas on the day of the Declaration of Independence, shall be considered citizens of the Republic, and entitled to all the privileges of such (...). *Declaration of Rights*. Ninth: No person, for the same offence, shall be twice put in jeopardy of life or limbs. And the right of trial by jury shall remain inviolate.

5.1.2. *The Mexican and Texan polities compared.*

We are in Texas. *Person*, as an individual entitled to rights, is the *free white person*. No need to repeat the qualification when the

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Constitution proceeds to a *Declaration of Rights*. Thus, *Africans, the descendants of Africans*, even the *free person of African descent*, and *Indians* were *excepted*. Some confusion among *persons* in the constitutional (people entitled to rights) and colloquial (human beings) usages could arise. The 1836 Texan Declaration of Rights began with the following statement: "All men, when they form a social compact, have equal rights, and no man or set of men are entitled to exclusive public privileges or emoluments from the community". Do not doubt that *all men* were not all men. Not only women were excluded.

The Bill of Rights of the 1845 Constitution, replicating the pronouncement, took care over the wording and phrasing: "All freemen, when they form a social compact, have equal rights; and no man or set of men is entitled to exclusive, separate public emoluments or privileges, but in consideration of public services". Mark the word — *man* is *freeman*. Freedom was not an overall outcome from constitutional law but an exclusive prerequisite for constitutional rights. Indians and Africans were excluded in Texas, as by and large, to take the case in point, in the United States of America.

In Texas, the constitutional set of rights, such as the right to jury trial, could hardly be a device for indigenous accommodation. Indians did not share citizenship. They did not belong to this American, meaning Anglo, polity. For the State of Texas, indigenous people were by no means entitled to rights of the constitutional kind. In colonial terms, if there was something that made a difference with Mexico, it was the increasing of downgrading through outsourcing. According to the Anglo approach, State constitutions are not directly concerned with indigenous peoples. It is another way of framing the colonial constitutionalism or rather constitutional colonialism.

It is the time to resolutely suggest reading beyond the indigenous question. At this point, I recommend Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*, Yale University Press, 1998, about the inexistence of federally recognized rights in the United States, in spite of the early constitutional Amendments, before the abolition of slavery. As in the 1824 Mexican Constitution and just as Texas most wanted, freedom was in states' hands. On slave law as the deterrent against rights all throughout the United States, add Robert J. Kaczorowski, "The Inverted Constitution: Enforcing Constitutional Rights in the Nineteenth Century", Sandra F. Vanburkleo, Kermit L. Hall, and R. J. Kaczorowski (eds.), *Constitutionalism and Ameri-*

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can Culture: Writing the New Constitutional History, University Press of Kansas, 2002, 29-63 (a *new constitutional history* where an important topic is missing as the editors themselves confess; *Introduction*, xvii: "The essays that follow provide a panorama of rapidly changing subfields and methodological controversies. The essays do not, however, cover every possible perspective. We have not included an essay, for example, about the role of judicial policy in shaping American Indian-white relations"). As slavery interferes, the immediate recommendation must go to Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice. With a New Appendix for Classroom Discussion*, Basic Books, 1989, who does tellingly expose the deep-rooted handicaps of a racist system that was amended, yet not refounded nor regenerated, when abolition took place. Maybe, another *We Are Not Saved*, the toughest one, could also be written on behalf of Indians, rather by indigenous people and not by a male, *free white person* and *descendant* (old Texan Constitution's wording) as I am. James Anaya recommended this last reading to me. I hope not to be making strange bedfellows through my advising and quoting.

5.2. *Communal property and local government.*

Let us return to Mexico for the moment, as we shall come back to the north. There is a decisive point that remains. At last but not least, we arrive at the main historical device in Mexico for constitutional accommodation of indigenous people: the commons as a collective form of ownership. It was the last one to be taken into constitutional consideration. The suggestion was made in the 1857 Congress without success or even much echo. Clamor came instead from indigenous communities. Throughout the 19th century constitutionalism assumed private property as a fundamental right, specified or not by constitutions, pre-empting the formal acceptance of other forms of ownership. However, the subsequent policy of individual allotment of collective lands achieved a limited and uneven implementation in Mexico. Indigenous communities strongly resisted here as well. They had their voice outside the Congress.

The 1917 Constitution of Mexico, the one arising from the Mexican Revolution, made the difference. Under the eminent domain of the Mexican Nation, it conveyed recognition and guarantee of communal property and, through this precise way, constitutional cover and accommodation for the indigenous community itself. The new approach aimed only at recognizing collective property but ended up sheltering a form of local government — indigenous

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home-rule. Under that umbrella, indigenous communities could even evolve, if not flourish. In this context, communal property could result in communitarian ways, not only for agrarian purposes. Customary law remained and could be developed as local law. There were indigenous communities who conserved their own organization together with municipal incorporation. Based on the recognition of communal property, others could come to identify themselves plainly with the respective municipality. Municipal incorporation itself was strengthened, albeit unevenly, beyond constitutional intent. Customary law could remain even in those cases in which indigenous forms of justice disappeared.

Although with amendments in wording, the 1917 constitutional accommodation of indigenous local government through recognition of communal property has lasted for nearly the entirety of the 20th century. In 1992, an in-depth Amendment terminated the constitutional effective guarantee of communal property by empowering the statutory law to regulate it so to ease and prompt an allotment policy. The subsidiary enactment followed at once. At the very same time that this constitutional shelter of indigenous community was thus dismantled, the Constitution was also amended to recognize multiculturality: *La Nación mexicana tiene una composición pluricultural sustentada originalmente en sus pueblos indígenas*; "the Mexican Nation has a multicultural composition, originally founded in its indigenous peoples" (so, a historical assertion, not a legal commitment, on the *Nation* in the singular through the plural of *peoples* and with an antiquarian and possessive stress — *sus*, "its", Nation's — as for the decisive reference, that to indigenous peoples). It is no joke. Some reforms have been serious. The amendment on property proves to be deeper than the one on identity.

> *Constitution of Mexico* (1917). Title I. Chapter I. *Guaranties for Individuals*. Art. 27. Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property (...). Legal capacity to acquire ownership of lands and waters of the Nation shall be governed by the following provisions: VI. The *condueñazgos, rancherías, pueblos, congregaciones, tribus y demás corporaciones de población* [rural condominiums and communities, villages, customary associations, tribes, and others corporate local groups] that, either by law or in fact, hold a communitarian status shall have capacity to enjoy common

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possession of lands, forests, and waters belonging to them or which have been or may be restored to them (...).

Constitution of Mexico (amended in 1934). Title I. Chapter I. *Guaranties for Individuals*. Art. 27.VII The centers of population which, by law or in fact, possess a communal status shall have legal capacity to enjoy common possession of the lands, forests, and waters belonging to them or which have been or may be restored to them. All questions, regardless of their origin, concerning the boundaries of communal lands, which are now pending or that may arise hereafter between two or more centers of population, are matters of federal jurisdiction. The Federal Executive shall take cognizance of such controversies and propose a solution to the interested parties. If the latter agree thereto, the proposal of the Executive shall take full effect as a final decision and shall be irrevocable; should they not be in conformity, the party or parties may appeal to the Supreme Court of Justice of the Nation, without prejudice to immediate enforcement of the presidential proposal. The law shall specify the brief procedure to which the settling of such controversies shall conform. X. Centers of population which lack communal lands or which are unable to have them restored to them due to lack of titles, impossibility of identification, or because they had been legally transferred, shall be granted sufficient lands and waters to constitute them, in accordance with the needs of the population; but in no case shall they fail to be granted the area needed, and for this purpose the land needed shall be expropriated, at the expense of the Federal Government, to be taken from lands adjoining the villages in question.

Constitution of Mexico (amended in 1992). Title I. Chapter I. *Guaranties for Individuals*. Art. 4. The Mexican Nation has a multicultural composition originally founded in its indigenous peoples. The law protects and promotes the development of their languages, uses, customs, resources, and specific forms of social organization and guarantees their members' effective access to the full range of the State' s jurisdictions. In the agrarian trials and proceedings the law will take into account their practices and customs (...). Art. 27.VII (...). Provided that the will and convenience of *ejidatarios y comuneros* [communitarian co-owners and neighbors] are respected so as they benefit from the productive common resources, it will be regulated through statutory law the communal rights over the lands and the individual rights to the single shares. Likewise, the statutes will arrange the procedures for the community members to associate among them, with the state, or with other people, in order to transfer the use of their lands (...).

6. *Oaxaca versus Mexico on indigenous self-determination: ways and means backwards and forwards.*

In 2001, a seemingly major amendment of the Mexican federal Constitution, and a most controversial one, takes place. It literally recognizes "the right of indigenous peoples to self-determination" and shows some criterion to identify them, yet does not provide any means through which they might constitute themselves beyond their

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present forms of existence as peoples who have so far resisted without any constitutional help but the communal property that have just been cancelled as such an enabling device.

Thus, the federal Constitution returns to the approach of affirming indigenous collectivities under the shelter of the municipalities, thus intending to confine communities and peoples into local corporations either by themselves or associated, yet subordinated at any rate to the federation and the states. Again, the main empowerment in the face of indigenous presence goes back to the latter, the one that does not take into account peoples but localities. State legislatures and executives are now assigned by the federal Constitution the competence to rule and monitor the indigenous local government as the form of implementation of the so-said rule of self-determination.

Much like the beginning of this constitutional history, communities may be incorporated, but peoples instead, though now acknowledged by the Constitution, cannot reach any legal existence by themselves. As *pueblo* means in Spanish both the town as municipality on the one hand and the people as polity on the other, some ambiguity is ever possible, nonetheless the Mexican constitutional intent is clear. The people' s right is framed into the municipal law. Moreover, the recipe is strongly dressed with welfare policy in order to further empower non-indigenous institutions. It is too soon to know what difference the mixing of old policy with renewed wording, phrasing, and dressing will make, yet it is not so hard to figure out. Given the current claim for indigenous self-determination, a constitutional recognition that strengthens municipal incorporation and political subordination, as well as economical dependence, may be pre-emptive. We shall return to this point later, a propos of international law. The right to self-determination exceeds state and even federal spheres.

Inside Mexico, there are indications that the federal approach to indigenous peoples does not match the actual state of affairs. Oaxaca is a Mexican southern state where the specific law in this regard has gone far beyond the general one, at least prior to the 2001 federal constitutional amendment. In 1998, the Oaxacan Constitution was amended in order to further accommodate indigenous peoples through municipal incorporation. The municipalities were

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allowed to rule according to their own customary law in both local and state elections, thus pre-empting the political representation through non-indigenous parties and procedures. Most of them, an overwhelming majority of the Oaxacan municipalities, have decided to do so. The state constitution does not empower local institutions for self-determination and self-government any further. No indigenous legislatures, judiciaries or executives are constitutionally allowed as such. Indigenous jurisdictions continue, to be sure. Customary law may now stand for the Indian reservation (I mean both the municipal variety and the kind we shall see in the United States). This Oaxacan set — custom and tradition before enactment and government — is a position that downgrades too. Nevertheless, indigenous law is recognized and even fostered in constitutional Oaxaca.

The interesting result is that the Oaxaca State does not welcome the 2001 federal Amendment and, furthermore, that a large branch of indigenous Oaxacan municipalities together with other ones in diverse states have challenged it through judicial actions. The Mexican Supreme Court has just ruled that constitutional reforms are political decisions not suitable to judicial review, but the very fact that a significant indigenous party rejected the 2001 Amendment constitutes an appealing symptom. Oaxacan municipalities are not alone in this open opposition to a federal recognition of the right to self-determination together with municipal framing and patronizing policies. It is easy to say, as usually alleged by the federal party, that indigenous peoples do not appreciate the benefit, yet they do know the shortcoming through their own experience. Self-determination means self-assessment. Supremacist prejudices apart, everybody is the best referee for the respective interest. In constitutional collective terms, all peoples ought to be entitled on an equal footing to the same rights and powers, beginning with the capacity to reach and share founding and framing agreements by themselves and with others. After all, in international legal terms, on human rights law, this seems to be the meaning of the right to self-determination. We better come to the question later on.

Constitution of Mexico (amended in 2001). Title I. Chapter I. *Guarantees for Individuals*. Art. 2. The Mexican Nation is unique and indivisible. The Nation has a multicultural composition, originating in its indigenous

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peoples, who are descended from people who lived in the current territory of the country, who live in it now, and who keep their own social, economic, cultural, and political institutions or parts of these. The awareness of their indigenous identity shall be the fundamental criterion to determine to whom applies the disposition on indigenous peoples. Communities of indigenous people are those that form a social, economic, and cultural unit, situated in a territory, and recognize authorities in agreement with their traditions and customs. The right of indigenous peoples to self-determination will be exercised in a constitutional way that assures national unity. The recognition of indigenous peoples and communities will be made in the Constitutions and laws of the federated States, which will take them into account, besides the general principles established in the previous paragraphs of this article, ethno-linguistic criteria, and physical location.

A. This Constitution recognizes and guarantees the right of indigenous peoples and communities to self-determination, and, in consequence, autonomy to: I. Decide their internal forms of living and social, economic, political, and cultural organization. II. Apply their own standards in regulation and solution of their internal conflicts, subject to the general principles of this Constitution, respecting individual guarantees, human rights, and, in a relevant manner, the dignity and completeness of women. The law will establish the cases and procedures of validation by the appropriate judges or courts. III. Elect, in accord with their traditional standards, procedures, and practices, authorities or representatives for the exercise of their own forms of internal government, guaranteeing the participation of women in conditions of equality to those of men, in a way that respects the Federal Pact and the sovereignty of the States. IV. Preserve and enrich their languages, awareness of their heritage, and all the elements that constitute their culture and identity. V. Conserve and improve their habitat, and preserve their lands in the terms established in this Constitution. VI. Enjoy, with respect to the forms and means of property and land use established in this Constitution and the laws about these, as well as to the rights acquired by third parties or by members of the community, the preferential use of natural resources of the places that these communities occupy and live, except for those that correspond to strategic areas in terms of this Constitution. For these effects, communities may act in terms of the law. VII. Elect, in municipalities with indigenous people, representatives to municipal governments. The Constitutions and laws of the federated States will recognize and regulate these rights in municipalities, with the objective of strengthening indigenous participation and political representation, in conformity with the peoples'traditions and internal standards. VIII. Accede fully to the jurisdiction of the State to guarantee those rights, in all trials and proceedings in which it takes part, individually or collectively. The State will take into account their customs and cultural specifics, respecting the precepts of this Constitution. Indigenous people have at all times the right to be assisted by interpreters and defenders who are acquainted with their language and culture. The constitutions and laws of the federated States will establish the characteristics of self-determination and autonomy that best express the situations and aspirations of the indigenous peoples in each State, as well as the standards for recognition of their indigenous communities of public interest.

B. The Federation, States, and municipalities, to promote equal oppor-

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tunity for indigenous people and eliminate any discriminatory practice, will establish the institutions and determine the necessary policies to guarantee the rights of indigenous peoples and the complete development of their people and communities. These will be designed and operated together with them. To eliminate the scarcities and leftovers that affect indigenous peoples and communities, these authorities have the obligation to: I. Stimulate the regional development of indigenous zones, with the objective of strengthening their local economies and bettering the conditions of life of their peoples, by means of actions coordinated among the three levels of government, with the participation of the communities. Municipal authorities will fairly determine budget allocations that the communities will directly administer for specific ends. II. Guarantee and increment the levels of education, favoring bilingual and bicultural education, literacy, completion of basic education, vocational training, and mid-superior and superior education. Establish a system of grants for indigenous students at all levels. Define and develop educational programs of regional level that recognize the cultural heritage of their peoples, in agreement with the laws about the matter and in consultation with indigenous communities. Stimulate the respect and knowledge of the diverse cultures that exist in the nation. III. Assure effective access to health services by means of the expansion of the coverage of the national system, also using traditional medicine, as well as support good nutrition for indigenous peoples by means of programs of food, especially for their children. IV. Improve the conditions of indigenous communities and their spaces for common living and recreation, by means of actions that facilitate access to public and private financing for the construction and improvement of housing, as well as expand the coverage of basic social services. V. Aid the incorporation of indigenous women into the development of the community, by means of support for productive projects, the protection of their health, the granting of stipends to aid their education, and the promotion of their participation in decisions relating to community life. VI. Extend the network of communications that permits the integration of communities into the larger society, by means of construction and expansion of ways of communication and telecommunication. Establish conditions by which indigenous peoples and communities may acquire, operate, and administer means of communication, in the terms that the laws on the matter determine. VII. Support productive activities and sustainable development of indigenous communities, by means of actions that permit them to be economically self-sufficient, the application of stimuli for public and private investments for the creation of jobs, the incorporation of technologies to increase their own productive capacity, as well as to assure equal access to the systems of supply and trade. VIII. Establish social policies to protect migrants who are indigenous people, within national as well as foreign territory, by means of actions to guarantee the rights of laborers and day agricultural workers, improve health conditions of women, support families of migrants with children and youth with special programs of education and nutrition, watch for the respect of their human rights, and promote the knowledge of their cultures. IX. Consult indigenous peoples in the making of the national plan of development and those of states and municipalities, and, in their case, incorporate the recommendations and proposals that result. To guarantee the fulfillment of the obligations given in this part, the Chamber of Deputies of the Congress of the Union, the

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> legislatures of the federated States, and municipal councils, in the area of their respective jurisdictions, will establish the specific parts earmarked to the fulfillment of these obligations in the budgets of spending they approve, as well as the forms and procedures for communities to participate in the exercise and watching over of these, without endangering the rights established in favor of indigenous peoples and their communities, all people in their communities will have the same rights, as the law establishes.
>
> Title V. *On the States of the Federation*. Art. 115.III. (…) Within the municipal sphere, the indigenous communities will be able to associate and co-ordinate amongst themselves in the terms and for the effects sanctioned by laws.

The moral of the Oaxacan experience is not unprecedented but is a very well known and maybe crucial one. Perhaps it is a key for the future not yet properly recognized in any of the Mexican — state or federal — constitutions, nor provided by any American — Latin or Anglo — constitution today. Indigenous consent to the making up of a common constituency is always missing. Many indigenous peoples have come to accommodation and even participation without ever explicitly surrendering their sovereignty, a title more clearly held when they openly resist, to be sure. Whatever the case, constitutions — at least States constitutions — cannot suffice. The Mexico and Oaxaca of today may offer a mirror for the Americas in the plural, as we shall verify.

Sovereignty is an old word for the right to self-determination to be taken seriously in the constitutional times. May it depend on constitutional grants and grounds? I consider this decisive question later. We shall return to the Mexican constitutional present twice more, when discussing on the one hand the practice of treaties between States to foster a free trade international policy, and on the other, the development of the human rights international law from the United Nations and the International Labor Organization. Both moments will affect the United States too. There we head following the shared path of the so-called law of nations.

> Up to this point, I have not discussed literature dealing with indigenous accommodation on constitutional grounds throughout the 20th century in Mexico — from the Mexican Revolution until the dismantling of the resultant PRI (Institutional Revolutionary Party) regime — because, to my knowledge, there is none. There is not even anything comparable to Anna' s *Forging Mexico* or Mallon's *Peasant and Nation*, as if a Mexican Nation were definitively forged. Politics may rule. The historiographical blind spot proves to be a blatant effect of the political myth of a Mexican Nation arising

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from the Mexican Revolution. On the legal point after the 2001 constitutional reform, encompassing Oaxaca alongside other Mexican states, you may resort to Francisco López Bárcenas, *Legislación y Derechos Indígenas en México*, Ediciones Casa Vieja, 2002. For a Latin American panorama on indigenous peoples' standing according to constitutional pronouncements, there are accurate surveys on hand, in Spanish too: Marco Aparicio, *Los pueblos indígenas y el Estado. El reconocimiento constitucional de los derechos indígenas en América*, Centro de Estudios de Derecho, Economía y Ciencias Sociales, 2002; Cletus Gregor Barié, *Pueblos indígenas y derechos constitucionales en América Latina. Un panorama*, Comisión Nacional para el Desarrollo de los Pueblos Indígenas, 2003. Nevertheless, we need to read not just constitutional words, but constitutional silences too. Silence may be most meaningful.

In fact, silence is the regular stance in the constitutional history of the Americas. It is even the usual rule in an American past bearing constituent effects for the American present. Imagine a lot of blank pages as extensive constitutional quotations in this essay. What would it mean? How could we make silence speak out? How could the sense of stillness become apparent? How could we heed the sounds of silence? Is there some real meaning inside the constitutional impassiveness concerning indigenous people? Are all the constitutions in the Americas through their entire development and performance referring silently to them? If it is so, what does the hush mean? For indigenous people, what is better or rather, if neither is good, what is worse, constitutional silence or explicit guardianship? As the latter means blatant colonial continuity, does the former imply somehow discontinuity or rather concealment? And what would it hide from constitutional view? This depends on policy of course, on the policy that makes sense as linked to constitutional assumptions and not any other that could be implemented. This may be the zero point in case. Can we address it? One has to become further informed, no doubt. Moreover, one needs local knowledge, the kind of information you do not get through either the media or the academy. To become aware of existing law, one mainly needs to succeed in listening to silenced voices. Established intent and practice do not convey the only and excluding view to understand legal mandates, whether loud or mute. As long as they are there, peoples may give renewed meaning to State law or even establish a new constitutional sense on their own behalf at the expense of non-indigenous assumptions. Fortunately, actual constitutionalism may go far beyond texts and presumptions that are in force through State enactment, policy, and expediency. Constitutionless peoples challenge given constitutionalism even reading unreadable signs and between the lines of constitutions themselves. In brief, to read both black and white in constitutional texts, one has to know better than texts themselves.

Even so, for reading silence and understanding sound, there may be a primary significant factor such as the normative value of the constitutions, either wordy or quiet. What do constitutions mean in the legal field itself? Constitutions may wield a derogatory force against unmentioned issues, or otherwise they may be construed as directive norms leaving room for unstated standings and even rights. Do we need examples? As for the latter, you may have liberties not specified by constitutional declarations; on the other side, as for the former, it may be the case of indigenous customary law when, as usual, it is not accepted by the constitutional party as a constituent

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right of the concerned peoples, but rather suffered. The very first construing question may lie just there. What is the meaning of each single constitution throughout American history, both Latin and Anglo? Wondering must extend to the whole range of constitutional rules, including vacuums, shortcomings, and outsourcings. And like text, like silence, since the latter is an offspring of the former. Silence only means question pitting, just the same as pronouncements. Even affirmative insertion of indigenous rights in constitutional declarations may involve question marks. In the Latin kind of legal system at least, if such a thing exists, the judiciary is often placed under statutory law. Look at Mexico. Neither judges nor juries are empowered to directly decide on constitutional grounds, as they are supposed to rely on subsidiary legislation. Therefore, rights, especially collective rights, even if recognized by constitutions, may need the mediation of political will and parliamentary enactment to be guaranteed and enforced. As for indigenous rights, when there is constitutional recognition together with statutory silence (legislation not complying with higher mandate), the binding effect may easily be none at all, even today (other intents apart, such as propaganda or even pre-emption of indigenous claims). Even when they try to do their best, current special jurisdictions guaranteeing constitutional rights are not very sensitive to the indigenous kind alien for State judges and colleges. Look at Mexico. Constitutions may still be easily curtailed by statutory and judicial action or stillness. There is a moral: one has to question legal systems before questioning specific rules. Wondering is always the method. When current constitutions mention indigenous people so as to entrust rights such as communal property to State legislative, judiciary, executive, or the whole trinity, are constitutions recognizing peoples' rights or empowering alien bodies? Today, you may even find constitutions approaching indigenous collective self-government through State and states legislative regulation added to constitutional grant. Look at Mexico. In fact, currently, indigenous people are usual guests in declarations of rights. Keep wondering always. Remember that, in the course of a history such as the all-American one implying in fact no break between colonialism and constitutionalism, colonized peoples do not cease to exist so to patiently wait for colonial license or constitutional grant. If they are there, when constitutions register rights of indigenous people and forward for implementation to law meaning State enactment and administration, policy and even expediency, or so it is construed anyhow, are rights really what constitutions recognize? If not, what is actually there in non-indigenous constitutions as for indigenous peoples? The answer lies at once inside and outside of the constitutional texts, no doubt.

7. *Back to a constituent moment: the law of nations and treaty-making.*

Among collective devices, we have contemplated four of a constitutional character, but we also know that there remains another device of a pre-constitutional nature, a device regarding culture in the singular or rather cultures in the plural. In 1992, the

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Mexican Constitution recognized the latter, although in fact still assumed the former, the singular and not the plural in the cultural field. The extreme difficulty for the constitutional accommodation of indigenous peoples, even when they are recognized as such in the plural, may derive from the deep-rooted assumption that there is one single culture able to rule and govern and that it is the non-indigenous one in America, the one received from Europe. Thus, for constitutional purposes, inside the constitutional paradigm, the indigenous location may always be a subsidiary position. Notwithstanding all the observable differences between Mexico and the United States (we shall check much further and could do, of course, for other cases), such a kind of cultural prejudice is the common ground for American — Latin and Anglo — constitutionalism, both practical or institutional and theoretical or doctrinal. This cultural handicap, pre-empting equal standing, can greatly affect constitutional fabric.

In legal terms, the handicap had a specific name, the *law of nations*, also historically deemed *law of nature*, law in force by itself, by normative virtue of human nature, not needing any kind of enactment or political backing and responsibility to function and prevail. When American — Latin and Anglo — States were born and their constitutional working and thinking were brought into being, the discourse with such a name, the so-called law of nations, assumed that only European culture provided the human skill and social authority to found and frame. Other peoples were expected to surrender their territories and polities — themselves in brief — under this cultural construct of alien supremacy and dominance. They were reputed to lack culture for self-sustained constituent purposes. Europe pretended and Euro-America assumed.

When relationships were established or contentions arose, the law of nations conveyed two paths depending on the actual position of the indigenous party and on the religious background, Catholic or Protestant, of the colonizers. The paths were on the one hand settlement through treaties and on the other hand, a more advantageous device coming from the Dark Ages (European time); this is Catholic downgrading of non-Christian people into wards under Christian guardianship. The latter was the older approach, the specific assumption of the *ius gentium* (*gentes* in Latin as peoples)

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that preceded the *law of nations*, the English (and Protestant) version. Thus, the hour of old Europe came upon America unless treaties avoided it, which was not an easy task at all.

As treaty agreement may imply equal footing, the two paths seem divergent at face value, but this was not the assumption from the all-Christian viewpoint for the indigenous party. They were not alternative or incompatible ways. *Law of nations* did not discontinue *ius gentium*. Non-indigenous people could sign treaties with indigenous peoples and construe them unilaterally, according to the law of nations, because the guardian (non-indigenous party) could always pretend to hold the knowledge of what is in the best interest of the ward (indigenous party). Then, in the case of non-compliance from the non-indigenous party, a breach of a contract was not deemed to occur. Respect for the agreement might be convenient only to begin with, as it allowed and even legitimated (in addition to the own presumptions) the occupancy of new land or as it conveyed peace as well. The maintenance of treaties might help to establish disparaged obligations, outlawing the resort to defensive war for indigenous people and legitimizing offensive warfare from the non-indigenous party. At any rate, according to the law of nations, treaties with indigenous peoples could not be exactly the same as treaties between States, between polities recognized by each other on equal terms. Warfare could match as it turned out to be unlawful for indigenous self-defense and lawful for non-indigenous invasion. Even the resort to genocide was legally accepted.

> Emer de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758). Book I. *Of Nations conceived in themselves*. Chapter VII. *Of the cultivation of the soil*. § 81. *The cultivation of the soil a natural obligation.* The cultivation of the soil deserves the attention of the government, not only on account of the invaluable advantages that flow from it, but from its being an obligation imposed by nature on mankind. The whole earth is destined to feed its inhabitants; but this it would be incapable of doing if it were uncultivated. Every nation is then obliged by the law of nature to cultivate the land that has fallen to its share; and it has no right to enlarge its boundaries, or have recourse to the assistance of other nations, but in proportion as the land in its possession is incapable of furnishing it with necessaries. Those nations (such as the ancient Germans, and some modern Tartars) who inhabit fertile countries, but disdain to cultivate their lands and choose rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be extirpated as savage and pernicious beasts. There are others, who, to avoid labour, choose to live only by hunting, and their flocks. This

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> might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations were disposed to live in that manner. Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands. Thus, though the conquest of the civilized empires of Peru and Mexico was a notorious usurpation, the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them. Chapter XVIII. *Of the Establishment of a Nation in a Country*. § 203. *Possession of a Country by a Nation*. Hitherto we have considered the nation merely with respect to itself, without any regard to the country it possesses. Let us now see it established in a country which becomes its own property and habitation. The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and derive from it whatever is necessary for their subsistence, and suitable to their wants. But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously, and without culture, sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should fix themselves somewhere, and appropriate to themselves portions of land, in order that they might, without being disturbed in their labour, or disappointed of the fruits of their industry, apply themselves to render those lands fertile, and thence derive their subsistence. Such must have been the origin of the rights of property and dominion: and it was a sufficient ground to justify their establishment. Since their introduction, the right which was common to all mankind is individually restricted to what each lawfully possesses. The country which a nation inhabits, whether that nation has emigrated thither in a body, or the different families of which it consists were previously scattered over the country, and, there uniting, formed themselves into a political society, that country, I say, is the settlement of the nation, and it has a peculiar and exclusive right to it.

Mexico signed treaties with some indigenous peoples despite considering them citizens, according mainly to the federal powers in the territories. The neighboring United States resorted most systematically and consistently to this practice, even through judiciary support and jurisprudence, as the indigenous peoples did not share citizenship, as we know for Texas and shall see further. However, in both cases, the cultural presumption operated in a manner that enabled the agreements to be easily overruled or, from indigenous vision, misconstrued. Guardians knew better than wards.

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In the early United States this supremacy policy through treaties was even construed as constitutional jurisprudence by the federal Supreme Court. Since indigenous people were citizens on some downgrading institutional accommodation, Mexico was not so much in need of such a construction in constitutional times and legal terms. In both cases, treaties could be subsidiaries to the colonial constitutionalism or rather the constitutional colonialism that we already know. We shall return to all of this more than once, mainly as for the United States, to be sure.

> *Johnson versus McIntosh* (1823). Opinion of the [United States Supreme] Court. Mr. Chief Justice Marshall (...). According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators (...). In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired (...). Their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.
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> *Cherokee People versus Georgia* (1831). Opinion of the [United States Supreme] Court. Mr. Chief Justice Marshall (...). The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned, right to the lands they occupy until that right shall be extinguished by a voluntary cession to our Government. It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases; meanwhile, they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father.
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> *Worcester versus Georgia* (1832). Opinion of the [United States Supreme] Court. Mr. Chief Justice Marshall (...). America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied, or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the preexisting rights of its ancient possessors. After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous

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> sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing. Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific, or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers? But power, war, conquest, give rights, which, after possession, are conceded by the world, and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions. The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole, and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession. This principle, acknowledged by all Europeans because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it, not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political, but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

8. *Indigenous Peoples after the Treaty of Guadalupe-Hidalgo.*

As Spain earlier, Mexico waged wars against and signed treaties with indigenous peoples according to *ius gentium*. As we know,

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colonialist practice was not discontinued by either constitution or independence. Chief Justice Marshall has just explained to us that it could also be the case from Great Britain to the United States. Good manners among States — which began then to be named international law — were not terminated either. As for their lofty interests, they convened by themselves and did not mix with simple people. States' treaties were settled in this way, disregarding peoples. Good manners for the former could mean bad manners for the latter.

Mexico did not imagine that there could be any need or benefit to attain any consent from indigenous peoples when the 1848 Treaty of Guadalupe-Hidalgo was signed with the United States transferring extensive territories mostly inhabited by them. Likewise, the United States did not consider that the Indian consent made any sense for a treaty between sovereign independent States, the so-recognized by each other, even if the deed harshly affected indigenous peoples yet in fact independent, and thus sovereign themselves. The Treaty of Guadalupe-Hidalgo had effective, severe consequences for these peoples who did not participate, concerning their position in the transference as well as their location in the United States, both explicitly and implicitly, as indigenous people were citizens from the Mexican point of view. Thus, the very rules about citizenship contained without their consent in the treaty could strike them.

> *Treaty of Guadalupe-Hidalgo* (1848). Art. 8. Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present Treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds wherever they please; without their being subjected, on this account, to any contribution, tax or charge whatever. Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But, they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty: and those who shall remain in the said territories, after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States. In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if the same belonged to citizens of the United States.
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> Art. 9. The Mexicans who, in the territories aforesaid, shall not preserve

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the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding Article, shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights of citizens of the United States. In the mean time, they shall be maintained and protected in the enjoyment of their liberty, their property, and the civil rights now vested in them according to the Mexican laws. With respect to political rights, their condition shall be on an equality with that of the inhabitants of the other territories of the United States; and at least equally good as that of the inhabitants of Louisiana and the Floridas, when these provinces, by transfer from the French Republic and the Crown of Spain, became territories of the United States. The same most ample guaranty shall be enjoyed by all ecclesiastics and religious corporations or communities, as well in the discharge of the offices of their ministry, as in the enjoyment of their property of every kind, whether individuals or corporate (...).

Art. 11. Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the Government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme; it is solemnly agreed that all such incursions shall be forcibly restrained by the Government of the United States, whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said Government, and satisfaction for the same shall be exacted: all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory against its own citizens. It shall not be lawful, under any pretext whatever, for any inhabitant of the United States, to purchase or acquire any Mexican or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two Republics; nor to purchase or acquire horses, mules, cattle or property of any kind, stolen within Mexican territory by such Indians. And, in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the Government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them, and return them to their country, or deliver them to the agent or representative of the Mexican Government. The Mexican Authorities will, as far as practicable, give to the Government of the United States notice of such captures; and its agent shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the mean time, shall be treated with the utmost hospitality by the American Authorities at the place where they may be. But if the Government of the United States, before receiving such notice from Mexico, should obtain intelligence through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated. For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the Government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of

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> the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for it's being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

In short, Mexican citizens could remain as such or become citizens of the United States if they so chose, with the exception of non-sedentary peoples, that is, the so-called *savage tribes*, which did not necessarily include all indigenous people. Rights and lands, even *corporate property*, were guaranteed to Mexican people while they did not actually become citizens of the United States or even if they did choose to maintain their citizenship, but in no case did this apply to *Indians* belonging to *savage tribes*. According to the treaty and thus the law in-between the United States and Mexico, the latter could be the target of warfare, removal and confinement into reservations. Anyway, there was a gap regarding citizenship. Indians living in sedentary communities were unquestionably citizens for Mexico and on the contrary, they could not share citizenship with non-indigenous people in the United States at that time.

When in 1846, before Guadalupe-Hidalgo, a bill of rights had been proclaimed for the just conquered New Mexico Territory (Arizona and California then included) by general Kearny, commander in chief of the annexing army, nobody considered that this commitment to constitutional freedom might be applied to indigenous people or could benefit them in any way. At the same time and unaware of any contradiction, the chief promised to protect "all quiet and peaceable inhabitants within its boundaries [the United States'] against their enemies", Indians to be sure: "the Navajoes and others".

> *Bill of Rights for the Territory of New Mexico* (1846). Art. 1. That all political power is vested in and belongs to the people. Art. 2. That the people have the right peaceably to assemble for their common good, and to apply to those in power for redress of grievances by petition or remonstrance. Art. 3. That (…) no person can ever be hurt, molested or restrained in his religious professions if he do not disturb others in their religious worship; and that all Christian churches shall be protected and none oppressed, and that no person on account of his religious opinions shall be rendered ineligible to any office of honor, trust or profit. Art. 4. That courts of justice shall be open to every person, just remedy given for every injury to person

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> or property, and that right and justice shall be administered without sale, denial or delay, and that no private property shall be taken for public use without just compensation. Art. 5. That the right of trial by jury shall remain inviolate. Art. 11. That the people shall be secure in their persons, papers, houses and effects from unreasonable searches and seizures (...). Done at the government house, in the city of Santa Fe, in the territory of New Mexico, by Brigadier General Stephen W. Kearny, by virtue of the authority conferred upon him by the government of the United States.
>
> *Letter of General Kearny* (1846). I enclose herewith a copy of the laws prepared for the government of the territory of New Mexico (...). These laws are taken, part from the laws of Mexico, retained as in the original, a part with such modifications as our lives and constitution made necessary; a part are from the laws of the Missouri territory; a part from the laws of Texas, and also of Texas and Coahuila; a part from the statues of Missouri; and the remainder from the Livingston code [Louisiana].
>
> *Organic Law for the Territory of New Mexico* (1846). *Executive Power.* Sec. 1. The executive power shall be vested in a governor (...). He shall be the commander-in-chief of the militia of the said territory, except when called into the service of the United States, and *ex officio* superintendent of Indian affairs. *Miscellaneous.* Sec. 2. The governor, secretary of the territory, marshal, and United States district attorney, shall be appointed by the President of the United States

8.1. *The awkward constitutional compliance in California.*

Something phony happened on the way from the Treaty of Guadalupe-Hidalgo to the establishment in continental California (the Peninsula remained in Mexico) of a formal state, not a federal territory. Some discrimination was introduced by the first Constitution. For the moment, the granting of United States citizenship was deemed to invest only the non-indigenous Mexican people. Yet, the 1849 California Constitution could seem to abide willingly by the Treaty of Guadalupe-Hidalgo also as regards indigenous people. With both the requirement of qualified voting for the eventual decision and the criterion of convenient proportion for future incorporation, an act to fix the political participation of indigenous people as Californian citizens was forecast by this brand-new Constitution. Such a specific enactment never took place.

In 1879, the following Constitution forgot all about the concern with the Treaty of Guadalupe-Hidalgo except for the behalf of Euro-American citizenship including *white* Hispanics. However, from then on, the Californian polity was construed as mainly Anglo. After this year, the California Constitution, which had up to this

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point considered the use of the Spanish language as a right for the people of Mexican background, also forgot about this tongue. The constitutions of California have always overlooked the indigenous languages. No special wonder within the United States (in fact, only an oversea Constitution, the one of Hawaii, would proceed otherwise).

> *Constitution of California* (1849). Art. I. *Declaration of Rights*. Sec. 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property: and pursuing and obtaining safety and happiness. Sec. 3. The right of trial by jury shall be secured to all, and remain inviolate for ever (...). Sec. 11. All laws of a general nature shall have a uniform operation. Art. II. *Right of Suffrage*. Sec. 1. Every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States, under the treaty of peace exchanged and ratified at Queretaro (4), on the 30th day of May, 1848 (...), shall be entitled to vote at all elections which are now or hereafter may be authorized by law. Provided that nothing herein contained shall be construed to prevent the Legislature, by a two-thirds concurrent votes, from admitting to the right of suffrage Indians, or the descendants of Indians, in such special cases as such a proportion of the legislative body may deem just and proper. Sec. 5. No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector. Art. XI. *Miscellaneous Provisions*. Sec. 21. All laws, decrees, regulations, and provisions, which for their nature require publication, shall be published in English and Spanish.
>
> *California Act for the Government and Protection of Indians* (1850). Sec. 9. It shall be the duty of the Justices of the Peace, in their respective townships, as well as all other peace officers in this State, to instruct the Indians in their neighborhood in the laws which relate to them, giving them such advice as they may deem necessary and proper; and if any tribe or village of Indians refuse or neglect to obey the laws, the Justice of the Peace may punish the guilty chiefs or principal men by reprimand or fine, or otherwise reasonably chastise them.
>
> *Constitution of California* (1879). Art. I. *Declaration of Rights*. Sec. 7. The right of trial by jury shall be secured to all, and remain inviolate (...). Sec. 21. No special privileges or immunities shall ever be granted which may not

(4) The Treaty of Queretaro is the same Treaty of Guadalupe-Hidalgo, agreed and signed here, on February 2, and ratified by Mexico and exchanged with the United States there, at Queretaro, on May 30 (*Tratados ratificados y convenios ejecutivos celebrados por México*, Senado de la República de los Estados Unidos Mexicanos, vol. I, *1823-1883*, 1972, 203-223, which is an official collection including no treaty with indigenous peoples, such as the one with the Navajos that I will show in English — an alien language for this people until the 20th century — not just for the reader's sake, as I have not found the Spanish version).

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be altered, revoked, or repealed by the Legislature (...). Art. II. *Right of Suffrage*. Sec. 1 (as amended in 1894). Every white male citizen of the United States, every male citizen who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro, and every male naturalized citizen thereof (...), shall be entitled to vote at all elections which are now or may hereafter be authorized by law; provided no native of China, no idiot, insane person, or person convicted of any infamous crime (...), shall ever exercise the privilege of an elector in this State.

Amendment to the Constitution of California (1989). *Art. III. State of California*. Sec. 6. (a) *Purpose*. English is the common language of the people of the United States of America and the State of California. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by this Constitution. (b) *English as the Official Language of California*. English is the official language of the State of California. (c) Enforcement. The Legislature shall enforce this section by appropriate legislation. The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced. The Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California. (d) *Personal Right of Action and Jurisdiction of Courts*. Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section, and the Courts of record of the State of California shall have jurisdiction to hear cases brought to enforce this section. The Legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this section.

8.2. *The Apache polity and non-sedentary peoples.*

The 1848 Treaty between Mexico and the United States was not enough for the transference and entitlement of powers. Nobody can give what is not held. Treaties with indigenous peoples, and not only Mexico, were badly needed. Indian polities existed. Thus, for instance, the United States had to sign successive treaties with the Apache people, alone or together with other Indian peoples, in 1852, 1853, 1854, 1858, 1865 and 1867 (some others were not ratified either by the United States or by the Indian party). Mexico (both the Federation and, less formally, states such as Sonora and Chihuahua), and Texas during the independent period (1836-1845), had also needed to sign treaties with Apache and other Indian peoples. The Apache series with the United States may offer illustration particularly as regards non-sedentary, so-said by Guadalupe-Hidalgo *savage tribes*. Apache was not a way of self-naming but a Zuni word for enemy that Spaniards adopted. So they were also

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deemed by the conquering United States, being undoubtedly encompassed by the chief Kearny's hostile reference: "the Navajoes and others".

In the Southwest, after 1848, there was a crucial need for the United States, precisely the overcoming of Indian warfare by achieving their consent to its presence. The primary means was conveyed by treaty offer and making, to be sure, the main objective being the Indian withdrawal from their lands and confinement into reservations, so or otherwise, either willingly or unwillingly. The federal powers grounded on the impairing rule of collective guardianship could work out under military duress. Today, there are seven reservations with Apache names in Oklahoma (Apache Tribe, Fort Sill Apache Tribe), Arizona (San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe), and New Mexico (Jicarilla Apache Nation, Mercalero Apache Tribe).

In the end, as for the perspective of the United States, Indian reservations meant a kind of consolidation of the *territory* regime. As for the indigenous party, they gained the grant of relative self-rule inside definite, impoverished territory under federal guardianship. All this characterized especially the treatment of non-sedentary Indian people by the United States after the Treaty of Guadalupe-Hidalgo.

> *Treaty between the United States and the Apache Nation of Indians* (1852). Art. 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid [Cuentas, Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado] do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit. Art. 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.
>
> *Treaty between the United States and the Kiowa, Comanche, and Apache Indians* (1867). Art. 1. The said Apache tribe of Indians agree to confederate and become incorporated with the said Kiowa and Comanche Indians, and to accept as their permanent home the reservation described in the aforesaid treaty with said Kiowa and Comanche tribes, concluded as aforesaid at this place [Medicine Lodge Creek, and in the same day, October 21], and they pledge themselves to make no permanent settlement at any place, nor on any lands, outside of said reservation. Art. 4. In consideration of the advantages

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> conferred by this supplementary treaty upon the Apache tribe of Indians, they agree to observe and faithfully comply with all the stipulations and agreements entered into by the Kiowas and Comanches in said original treaty. They agree, in the same manner, to keep the peace toward the whites and all other persons under the jurisdiction of the United States, and to do and perform all other things enjoined upon said tribes by the provisions of said treaty; and they hereby give up and forever relinquish to the United States all rights, privileges, and grants now vested in them, or intended to be transferred to them, by the treaty between the United States and the Cheyenne and Arapahoe tribes of Indians, concluded at the camp on the Little Arkansas River, in the State of Kansas, on the fourteenth day of October, one thousand eight hundred and sixty-five, and also by the supplementary treaty, concluded at the same place on the seventeenth day of the same month, between the United States, of the one part, and the Cheyenne, Arapahoe, and Apache tribes, of the other part.

8.3. Diné Bikeyá*, Navajo Reservation, and the last display of Indian treaties from the United States.*

The Navajos, these "enemies" together with the kindred Apaches and other Indian peoples according to chief Kearny, were they to be United States citizens or rather associates through treaties after Guadalupe-Hidalgo? Maybe you already have a negative answer to both options in mind, but the denial is not enough. Particulars matter. The Navajos showed that they constituted also a treaty making people, as the whole or in groups. How did they relate to the United States then, warfare aside? Every polity of indigenous peoples has their own voice and thus their own history, as well as their own law, to be sure. They are not interchangeable with each other.

In 1822, 1823, 1824, 1839, and 1844, Mexico signed treaties with the so-called *Navajo* people (*Diné Bikeyá* as they call themselves in their own language, Navajo being a Tewa word referring to their cultivated lands that Spaniards misunderstood), treaties as agreements between two different *nations*, not placing at all these indigenous peoples in a subordinated position. After 1848, the United States assumed another approach in their treaties with the Navajos, as if these people had been politically located within Mexican rule and could be transferred in a treaty between States, such as Guadalupe-Hidalgo did, void of indigenous participation or consent.

Indigenous and non-indigenous Mexican people were treated

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by both Mexico and the United States as if they were cattle subsidiary to land, albeit entitled to an option between owners. Nevertheless, the former (non-indigenous people) rather than the latter (indigenous people) had the choice of United States citizenship after the Treaty of Guadalupe-Hidalgo. Of course, the indigenous stock was not less human, forming peoples with the capacity of voice and action, law and force. The United States was in the need to sign treaties with them, as did with the Navajo people in 1849, 1851, 1855, 1858, 1861, and 1868, although only the first and the last were ratified by the United States Senate. Essentially, one served to recognize the non-indigenous presence by this indigenous people and the other to confine the latter in an Indian reservation.

> *Treaty between the Mexican Republic and the Navajo Nation* (1839). Art. 1. There will be peace and commerce to carry out what those of the Navajo Tribe have promised with the citizens of the Department of New Mexico; with those of the Department of Chihuahua; and with those of Sonora as well as with all the citizens belonging to the Mexican Republic as well as with all the other citizens of the potential friends of the Mexican Republic. Art. 2. In fulfillment of this agreement and in order to carry out the good faith which animates the agreeing parties the Navajo chieftains have agreed to surrender our captives which are in their Nation who were seized from the fields in which they were caring for their flocks without protection and have agreed also those of their own remain among us as a just reprisal, acquired through an honorable war, without betrayal. Art. 7. In any case whatsoever, that the enemies of both nations attempt to invade, it shall be the obligation of the contracting parties to stop the aggression and give immediate notice so that they may free themselves from the insult which is being prepared for them (...).
>
> *Treaty between the United States and the Navajo Nation* (1849). Art. 1. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl. Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection. Art. 2. That from and after the signing of this treaty, hostilities between the contracting parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States,

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> or by other persons or powers in amity with the said States, shall be referred to the Government of said States for adjustment and settlement.

For the specific purpose of subordinating people, the United States complied with the Treaty of Guadalupe-Hidalgo as regards indigenous peoples. The settlement that provided for the definitive reservation of the Navajos as a vanquished people, albeit in the location they claimed for, came in 1868. Sure enough, this was the last of the series of treaties. It represented the ultimate step of a crucial shift in formal language and material perspective, evincing a growing and bottomless gap between the minds and hearts of the two parties, non indigenous and indigenous. There was left no trace whatsoever of equal terms between nations as contracting parties. The very agreement was practically obliged for the Navajo people given their final situation of material want. During the negotiation, they manifested their concern with the literal enslavement of many Navajos in New Mexico through the Mexican *peonage* (enduring indentured servitude or bondage through debts, the practice having been explicitly discontinued in 1867 by federal enactment as a corollary of the abolition of slavery), but the United States representative, general William T. Sherman, replied that the question was not proper for an overall resolution by treaty, even after the abolition of slavery, *peonage* so explicitly included, as the latter ought to be submitted to the judiciary or to federal officers, case by case, in order to scrutinize the respective hiring contract. So, regarding indigenous people, slavery could be yet, after the abolition, a matter of *oeconomy* — the private, domestic law prior to constitutionalism (5).

(5) *Barboncito* [Hastiin Dághaa] *said*: (...). After we get back to our country it will brighten up again and the Navajos will be as happy as the land, black clouds will rise, and there will be plenty of rain. Corn will grow in abundance and everything looks happy. Today is a day that anything black or red does not look right, everything should be white or yellow representing the flower and the corn. I want to drop this conversation now and talk about Navajo children held as prisoners by Mexicans. Some of those presents have lost a brother or a sister and I Know that they are in the hands of the Mexicans. I have seen some myself. *General Sherman said*: About their children being held as Peons by Mexicans, you ought to know that there is an Act of Congress against it. About four years ago we had slaves and there was a great war about it, now there are none. Congress our great council passed a law prohibiting peonage in New Mexico. So that if any Mexican holds a Navajo in peonage, he is liable to be put in the penitentiary.

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As regards the Guadalupe-Hidalgo Treaty, it was the final turn of the screw by the United States. In fact, the clauses that implied rights were restrictively construed, while the ones relating to *savage tribes* were construed broadly. Eventually, the set of treaties between Mexico and the United States advanced the dispossession and disempowerment of indigenous peoples, not the affirmation of their rights at all.

Regarding the treaties themselves with indigenous peoples, as soon as they were militarily controlled and economically dependent, there was no longer a need for their consent to non-indigenous presence and entitlement. Consent had not been given in any case to shared constituency, neither was it there any polity in common. In fact, indigenous peoples have never given up their sovereignty as distinct polities.

> *Treaty between the United States and the Navajo Tribe* (1868). Art. 1. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it (...). Art. 2. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109 30' west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canyon is to be all included in this reservation, shall be, and the same hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers agents, and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations In discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article. Art. 6. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this

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We do not know that there are any Navajos held by Mexicans as Peons, but if there are, you can apply to the judges of the Civil Courts and the Land Commissioners. They are the proper persons and they will decide whether the Navajo is to go back to his own people or remain with the Mexican. That is a matter with which we have nothing to do (*Treaty between the United States of America and the Navajo Tribe of Indians. With a record of the discussions that led to its signing*, KC Publications, 1968, 9).

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> reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. Art. 9. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation (...). Art. 11. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble. Art. 13. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein describe their permanent home (...).
>
> *Act Making Appropriations for the Current and Contingent Expenses of the Indian Department* (1871) (…). Provided that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty. Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretobefore lawfully made and ratified with any such Indian nation or tribe (...).

So far, after the Civil War in the United States and the consequent federal empowerment, the clauses included in the final treaty with the Navajos, that of 1868, were not unusual in comparison with contemporaneous settlements with other indigenous peoples. In the same year, treaties of similar content were signed with the Sioux, the Crows, the Cheyennes, the Arapahoes, the Shoshones, the Bannocks, and the Nez Percé. Owing to my ignorance, I make regular use of the names that have gained currency, regardless of their coining either by colonial invaders or, also derogatorily, by other indigenous peoples.

As for treaties with indigenous peoples as *independent nations*, in 1871, after the set of 1868, the practice was formally terminated by the United States, at the same time declaring the determination to uphold the contracted commitments and hereafter maintaining a practice of mere agreements, if needed, rather than unilateral decisions. There might still be formal, binding treaties from indigenous vision and construction. Let us never forget that there is more than a single party. Nevertheless, altogether, over three hundred and fifty

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strict Indian treaties (through the same constitutional procedures than the treaties with foreign States) have been signed and ratified by the United States.

> If you are looking for extended information on treaties between indigenous peoples and the United States, see Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly*, University of California Press, 1994. Mark the subtitle, coming as matter of course from the non-indigenous point of view. As for the last deployment, you may add the comparative essay by Jill St. Germain, *Indian Treaty-Making Policy in the United States and Canada, 1867-1877*, University of Nebraska Press, 2001; or you may rather resort to the very texts, so as for the United States through the register of Vine Deloria, Jr. and Raymond J. DeMallie (eds.), *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775-1979*, University of Oklahoma Press, 1999. If you are longing for a concerned and insightful exposition of background and development, you are really lucky, because you will find it: V. Deloria, Jr. and David E. Wilkins, *Tribe, Treaties, and Constitutional Tribulations*, University of Texas Press, 1999. Pay heed to the title to go beyond the traditional overlapping and avoid the actual masking together with the same incisive authors: V. Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (1974), University of Texas Press, 1984; D.E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*, University of Texas Press, 1997. The electronic site of the University of Colorado at Boulder conveys links into *Native American Treaties and Information*: *www-libraries.colorado.edu/ps/gov/us/native.htm#Treaties*. Add the list on *Indian Nations and Tribes* at the Internet Law Library: *www.lectlaw.com/inll/31.htm*.

As for the Navajos, they officially constitute the *Navajo Nation* within the United States since 1988. They have changed their name from *Navajo Tribe* by a shift in the wording on their former tribal and now national seal, not through any constitutional provision. We will see that the Indian reservations have adopted subsidiary and patronized constitutions, except the Navajo and few others, these objecting on the grounds of title to a higher law from treaty or history — or both as expressions of sovereignty and self-determination previous to and independent of any grant from the United States.

Currently, as for the Navajo polity, the approach does not call their belonging to the United States into question. Without a shadow of either doubt or irony, the *Great Seal of the Navajo Nation* depicts their own stylized world (cattle, plant life, the sun, and mountains, yet not just any mountains, but the four peaks deemed to mark the Diné Bikeyá boundaries beyond the present Navajo Reservation) within a double ring, the inner one displaying, like a rainbow, some pristine

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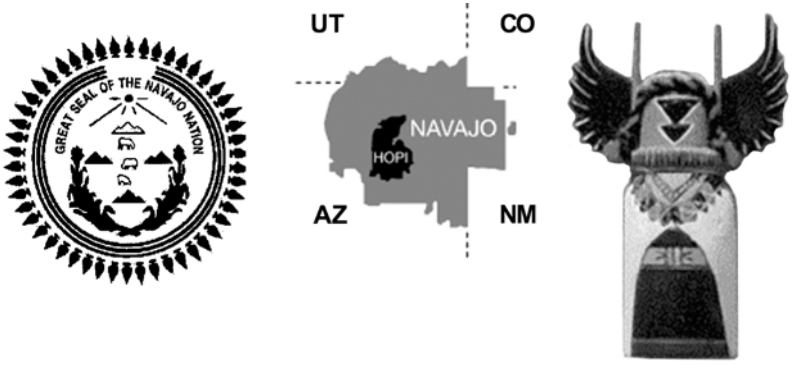
colors — red, yellow, and blue, from inside to outside — as a representation of Indian primary diversity, and the outer ring shaped by the parade of fifty arrowheads or projectile points so as to symbolize the fifty States of the Union, Alaska and Hawaii being the last included, at the same time that the shift from Tribe to Nation. The new points seal the circle left open by the rainbow. The 2003 Fundamental Laws of the Diné, which may be considered a kind of constitution, put into legal words that Navajo world.

For want of a Navajo constitution at least before these recent Fundamental Laws of the Diné, the seal does really stand for Navajo wishful constituent law at the expense of both the United States and Hopi Tribe as long as the latter is an actual double enclave, inside the Navajo reservation and the United States of America. There is also a Tewa enclosure inside the Hopi polity. It is not a game of Russian dolls or rather, in Hopi language, *kachinas* (in fact, more than toys, as they embody and display distinctive, constituent culture). Law is not always enclosed in written records and at times even it cannot be articulate in this specific way, especially if self-determination is lacking and needed. The *kachina* here may serve as a sphinx showing the harsh flaw of legal knowledge due to cultural ignorance. I am ignorant about Hopi ways.

Navajo and Hopi Polities among Arizona, New Mexico, Utah, and Colorado States.



The Fundamental Laws of the Diné (2003). § 1. *Diné Bi Beehhaz'aanii Bitse Silei — Declaration of the Foundation of Diné Law*. We, the Diné, the people of the Great Covenant, are the image of our ancestors and we are

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> created in connection with all creation (...). Earth and universe embody thinking; water and the sacred mountains embody planning; air and variegated vegetation embody life; fire, light, and offering sites of variegated sacred stones embody wisdom (...). Accordingly, we are identified by our Diné name, our clan, our language, our life way, our shadow, our footprints. Therefore, we were called the Holy Earth-Surface-People. From here growth began and the journey proceeds. Different thinking, planning, life ways, languages, beliefs, and laws appear among us, but the fundamental laws placed by the Holy People remain unchanged. Hence, as we were created with living soul, we remain Diné forever.
>
> *Draft Constitution of the Hopi Tribe* (2003). *Preamble*. The Constitution is adopted by the self-governing Hopi and Tewa Peoples of the Hopi Tribe to provide a way of working together for peace and agreement between Villages (...). Art. 1. *Territory and Jurisdiction*. Sec. 2. *Jurisdiction*. The Tribe shall posses inherent Sovereignty. The Jurisdiction of the Tribe shall extend to all persons, activities, and property based upon inherent territorial or popular Sovereignty (...).

8.4. *Pueblo Peoples, Tohono O'odham Nation, and the constitutional limbo within the United States.*

The Hopi is one of the Pueblo polities, an undoubtedly sedentary people (whence the Spanish name *Pueblo*, in the sense of town, comes). They may be the oldest known continuous human presence in the area, a circumstance usually disregarded because of the scholarly style of multiplying names, inventing peoples, and making them disappear, such as the *Anasazi* and *Sinagua* who really were ancient Pueblos (*Anasazi* being a Navajo word for former enemy, and *Sinagua* a Spanish wording for water shortage, sometimes given by anthropologists even to people who settled by a river). Anyway, as the so-called Pueblo peoples are most sedentary, it may be contended that they benefited from the Treaty of Guadalupe-Hidalgo.

Were they Mexican citizens who could become citizens of the United States and be therefore entitled to rights and guarantees on an equal footing? So in fact it has been contended on the grounds of Guadalupe-Hidalgo. Nevertheless, although the access to citizenship could be true, the equal footing would turn out to be false. Citizenship and entitlement were not the same things for indigenous peoples, nor were they for women or for African-American before and even after the emancipation from African slavery in the United States. And for Indians, even citizenship could be most controver-

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sial. Additionally, no formal, articulated treaty was ever signed by the United States with Pueblo peoples (in 1848 and 1850, some drafts were not ratified by the United States Senate; in 1858 a "treaty of peace and friendship", not containing any further provisions, was signed with the Taos Pueblo together with Arapahoes, Cheyennes, Muahuache Utahs, and Jicarilla Apaches). As for Pueblos, there was neither indigenous consent nor non-indigenous grant through treaty. Today, there are about twenty Pueblo reservations in New Mexico and Arizona, plus a single one in Texas.

> *United States versus Sandoval* (1913). United States Supreme Court. (...) The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people. Upon the termination of the Spanish sovereignty they were given enlarged political and civil rights by Mexico, but it remains an open question whether they have become citizens of the United States. See treaty of Guadalupe Hidalgo, arts. 8 and 9 (...). During the Spanish dominion the Indians of the pueblos were treated as wards requiring special protection (...). Laws of the Indies, Bk. 6, title 1, laws 27 and 36, title 2, law 1; Bk. 5, title 2, law 7; Bk. 4, title 12, laws 7, 9, 16-20 (6) (...). After the Mexican secession they were elevated to citizenship and civil rights not before enjoyed, but whether the prior tutelage and restrictions were wholly terminated has been the subject of differing opinions (...). Be this as it may, they have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities (...). Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.

In general, as the access to constitutional citizenship was construed in individual rather than collective terms and no exception

(6) *Recopilacion de las Leyes de los Reynos de las Indias*, 1681, Libro IV, Titulo Doze, *De la venta, composicion y repartimiento de tierras, solares y aguas*. Leyes 7, *Que las tierras se repartan sin accepcion de personas, y agravio de los Indios*; 9, *Que no se den tierras en perjuicio de los Indios, y las dadas se debuelvan a sus dueños*; 18, *Que a los Indios se les dexen tierras*; etc. Libro 6, Titulo Primero, *De los Indios*. Leyes 27, *Que los Indios puedan vender sus haziendas con autoridad de justicia*; 36, *Que no se pueda vender vino a los Indios*; etc..

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was made for the sake of people handed over by Mexico, indigenous or not, the indigenous entitlement could not come easily from Guadalupe-Hidalgo by itself. Then, the United States did not imagine citizenship shared with indigenous peoples as long as the latter maintained their own communal customs or did not adopt the non-indigenous way of life by allotting property and so on. Let alone racism, cultural assumptions or rather prejudices could be pre-emptive. In fact, sedentary indigenous peoples' rights were not guaranteed by the United States. Is there any need of evidence? The Hopi people were to some extent dispossessed after the 1868 Navajo Treaty, as the reservations overlapped, through further agreements between the Diné Bikeyá and the United States granting new lands for the Navajo polity in the Arizona Territory; later, in the 20th century, a substantial number of Navajo families would be on the contrary deprived of title to land through federal enactment on behalf of the Hopi people not allowing for any judicial remedy either.

Guadalupe-Hidalgo was framed under the assumption that Mexican citizens, as they had not been consulted, could prefer to remain as such and therefore they were granted the option. As for indigenous peoples, besides the lack of their consent to the great deal, there was the hidden problem of their self-identification. Had they actually identified themselves as Mexican citizens, thus endorsing a constitutionalism alien to them? In fact, they had never supplied consent to the former Mexican citizenship. Guadalupe-Hidalgo assumed otherwise. They were supposed to have the choice between two alien citizenships. However, if the option for Mexican citizenship was not filed in one year after the treaty, access to the United States citizenship was by no means automatic. Please, reread the text quoted above. Add that indigenous peoples did not take into account such a strange offer between two alien positions. Notice that, sedentary or not, passing from Mexico into the United States, they could only arrive at some kind of a legal limbo, a constitutional nowhere land, a most vulnerable place.

The milestone publication by Felix S. Cohen, *Handbook of Federal Indian Law* (1942), William S. Hein and Company, 1992, which dedicated a whole chapter to *Pueblos of New Mexico*, provides a good piece of both law and history, although somehow biased by the advocacy on behalf of indigenous people from the United States coordinates. He contends that Pueblo

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Indians gained citizenship in Mexico and did not lose it in the United States. Perhaps the best historical science does not come from dedicated advocacy, as, in turn, best advocacy does not come from historical research and knowledge. In this regard, Cohen's *Handbook* shared the background of a movement for indigenous recovery that discontinued, as an Indian New Deal (the Indian Reorganization I shall refer to), the United States termination policy against Indian polities in the West after 1871 as in the East virtually since the beginning. It also contributed to the distorted extension of such current categories and practices as Indian constitutions and tribal sovereignty regardless of the sustained dependency from the United States, not challenging in its whole extent the plenary federal powers upon reason of trusteeship, the usual consequent euphemism for guardianship. On the Navajo-Hopi legal or rather political case, documents are available on a Navajo site, *Navajo-Hopi Land Dispute*: *www.lapahie.com/Treaties.cfm*; a mapping: *lcweb2.loc.gov/ammem/amlaw/lwss-ilc.html*. The conflict projects onto history along with law: Hopi historiography, for instance, dates Navajo arrival from the 17th century, after the Spaniards, Diné people claiming otherwise.

Limbo is literal. Like the Pueblo, the O'odham people, also called Papagos and Pimas, have been object rather than party in the practice of treaties. Only one was signed by the Tohono O'odham with the United States (1863, together with the Mohave, Maricopa, Yuma — including maybe Havasupai —, Chemehuevi, Hualapai, and kindred Akimel O'odham, equally called Pimas and Papagos, as an alliance between them all and with the United States against the Apaches). Pima identified the language.

By the so-called Gadsden Purchase — an additional treaty to Guadalupe-Hidalgo setting in 1853 the frontier further southwards (James Gadsden was the United States ambassador to Mexico who made this real estate bargain) — the Papagos-O'odham were split between Mexico and the United States. Today, Tohono O'odham people born in the north of the frontier with family located on both sides do not succeed in qualifying for United States citizenship (which will be granted to Indian people in 1924, as we shall see). Furthermore, they suffer harsh encroachment of freedom of communication, movement, and interchange inside their own territory across alien, States' boundaries. Since the 1980s, a barbed wire fence has been laid and entry is illegal. Official checkpoints are placed around one hundred miles away from the reservation.

Against this policy, O'odham people unsuccessfully claim both the rights recognized by the Treaty of Guadalupe-Hidalgo and the

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posterior granting by the United States of tribal membership — as for federal assistance such as health care — to Mexican Papagos alongside fellow American citizens. Through the guardianship powers, not by treaties, the United States has set up within its frontiers four non-contiguous reservations belonging to Papago people: Tohono O'odham, Gila Bend, San Xavier, and Florence Village. The first ones call themselves — officially through a new constitution since 1986 — the *Tohono O'Odham Nation*, as if standing for all the Papago people though being a part — a major part. The said grant from the United States has pre-empted American citizenship of the whole people, Papagos in Mexico included. In short, the United States recognizes the union of the Papago people and divides the Papago nation through exclusive citizenship, diverse reservations, and wired frontier.

The Papago people are disempowered as for their own belonging as a nation among nations, though few people among a great many. "d'ac 'O'odham c 'ia c ñenda gju:ki", "we are the desert people and sit here and wait for the rain". I am ignorant of American languages, but it seems like a Papago way to name limbo. *Tohono-O'odham*, meaning *Desert People*, is a case of final self-naming. At least, they are not deprived of the power to self-denomination. They possess a desert culture.

There are several electronic pages from the lobby for the United States citizenship to all the O'odham or Papago people. Currently (108th Congress, 1st Session) there is a bill introduced in the House of Representatives, available at the official site: *thomas.loc.gov/cgi-bin/query/z?c108:H.R.731*. Beyond the peoples we have met, you may get information on *Southwest Indian People* on the sites of the Council of Indian Nations (*www.cinprograms.org/people/index.html*) and the Inter Tribal Council of Arizona (*www.itcaonline.com/Home.htm*). It is advisable to add a visit to the site of the *Unidad de Información y Documentación de los Pueblos Nativos del Noroeste de México*: *www.geocities.com/pueblosnativos/index.htm*. On peoples affected by Guadalupe-Hidalgo, Edward H. Spicer, *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1530-1960*, University of Arizona Press, 1962, still furnishes a helpful introduction. *D'ac 'O'odham*, "We are Papago", a poem by Ofelia Zepeda, professor of linguistics at the University of Arizona, former director of its *American Indian Studies Program*, author of the first grammar of the Tohono O'odham language, is on the web too: *www.banksville.org/storytellers/zepeda/poems/rain2.html*.

Take a look at the location of the *Tohono O'odham Nation* by the frontier between the States of Arizona and Sonora, the United States and Mexico. In the map below, pay heed to the tracing of the borderline as if it

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were definitive, as if there were no longer Papago people beyond the United States Tohono O'odham reservation, or as if there could be no more peoples beyond the States. It is the way in which the whole world is presently mapped. In the usual map of the United States, you do not find the Diné Bikeyá or Navajo Nation rooming all along the Northeast of Arizona and further into some part of Utah and New Mexico over the states lines. Neither do you meet the Hopi polity as an enclave surrounded by the Navajo reservation. There are official sites of both Navajo Nation and Hopi Tribe: *www.navajo.org*; *www.hopi.nsn.us*.

Source: *www.laruta.org/borderlands.htm*. A warning is added when an involved site, *www.hrusa.org/indig/reports/Tohono.pdf*, reproduces the map: "There is no designated Tohono O'odham reserve on the Mexico side of the Tohono O'odham Nation. However there are many Tohono O'odham communities in Sonora, up to some 90 miles south of Arizona into Mexico, as well as in the area of Sierra el Pinacate" (in fact, there are Pima-speaking people even further southwards. *Reserve* for reservation is Canadian wording).

8.5. *Indigenous rights and the treaties between Mexico and the United States.*

Let us note that there is no reference to the treaty of Guadalupe-Hidalgo among the settlement pieces investing Indians with rights through the United States grant. The purpose was subjection, not entitlement. The very treaty was not deemed as an agreement positively interesting to indigenous peoples as such. Furthermore, with the guiding principle of guardianship, the relationship between the United States and the Indian peoples remained essentially, all in all, outside the scope of any treaty, even when agreed with indigenous peoples. It even fell outside any written rule of law, agreed or not. This was what we may call overlapped constitutionalism, or

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rather hidden unconstitutionalism, as the evidence demonstrates that indigenous rights also remained outside of both the United States and inner states constitutions and constitutional approaches, amended or not. As the treaties had effects on rights and thus entailed constitutional implications as well, indigenous standing was even out of agreements either between States or with the Indian peoples themselves.

When the United States and Mexico signed a treaty on extraditions in 1861, no provision was made referring to indigenous peoples who did not respect, as a matter of course, an alien frontier. Guadalupe-Hidalgo had provided for this purpose with expediency far from rule of law or any other constitutional pattern. No need to explain what is apparent in the very text of the treaty and implied by the guardianship rule.

In 1853, the additional treaty to Guadalupe-Hidalgo, the so-called Gadsden Purchase, had been signed by the United States and Mexico. It read thus: "In the Name of Almighty God. The Republic of Mexico and the United States of America desiring to remove every cause of disagreement which might interfere in any manner with the better friendship and intercourse between the two countries, and especially in respect to the true limits which should be established, when, notwithstanding what was covenanted in the treaty of Guadalupe Hidalgo in the year 1848, opposite interpretations have been urged, which might give occasion to questions of serious moment: to avoid these, and to strengthen and more firmly maintain the peace which happily prevails between the two republics (...)", etc.. No mention of Indians was made but an implicit one in order to release the United States "from all liability on account of the obligations contained in the eleventh article of the treaty of Guadalupe-Hidalgo".

If we give credit to the parties in those treaties, there was no pending problem on the relations with indigenous peoples for any of them, neither for Mexico nor for the United States. As a matter of fact, there was an understood agreement for subjection through policies of dispossession, removal, confining, and even cleansing up to killing fields (this especially in Texas and California on the United States side, such as in Chihuahua, Sonora, and Sinaloa on the other side). Somehow all of this was entailed, reflected, or implied by

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Guadalupe-Hidalgo' s provisions on *tribes* deemed *savage*. Notice that this treaty took into account no other explicit indigenous classification. Others kept silent. You cannot say that the United States did not keep the word given to Mexico or vice versa, as the latter did its best too as for land dispossession and people cleansing. Both broke instead other commitments, those contracted with peoples.

Although frontier studies do not address the constitutional dimension, some reading is advisable: David J. Weber, *The Mexican Frontier, 1821-1846: The American Southwest under Mexico*, University of New Mexico Press, 1982, and *The Spanish Frontier in North America*, Yale University Press, 1992; Cynthia Radding, *Wandering Peoples: Colonialism, Ethnic Spaces, and Ecological Frontiers in Northwestern Mexico, 1700-1850*, Duke University Press, 1997; Donna J. Guy and Thomas E. Sheridan (eds.), *Contested Ground: Comparative Frontiers on the Northern and Southern Edges of the Spanish Empire*, University of Arizona Press, 1998. Add Kieran McCarty (ed.), *A Frontier Documentary: Sonora and Tucson, 1821-1848*, University of Arizona Press, 1997. D.J. Weber's concern with indigenous presence extends to the practice of treaties: *Spaniards and their Savages in the Age of Enlightenment*, forthcoming (see an advance in Christine Daniels and Michael V. Kennedy, eds., *Negotiated Empires: Centers and Peripheries in the Americas, 1500-1820*, Routledge, 2002, 79-103). On the contrary, you do not meet indigenous peoples in the mood and along the lines of Charles R. Cutter, *The Legal Culture of Northern New Spain, 1700-1810*, University of New Mexico Press, 1995, or David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846*, University of Oklahoma Press, 1987. The clash is deemed to be exclusively between Latin and Anglo legal cultures as if indigenous peoples could not inherit, develop, and stand up for their own cultures regarding history, law, and beyond. For discussion of the Guadalupe-Hidalgo factor, you may now resort to Martha Menchaca, *Recovering History, Constructing Race: The Indian, Black, and White Roots of Mexican Americans*, University of Texas Press, 2001 (focused on ethnic rather than cultural heritage and dealing mainly with land grants and dispossession policy). Oscar J. Martínez (ed.), *U.S.-Mexico Borderlands: Historical and Comparative Perspectives*, Jaguar Books on Latin America, 1996, suggests further readings as well as movie watching (I would additionally include Salt of the Earth, 1954, written and directed by blacklisted Michael Wilson and Herbert Biberman respectively, starring New-Mexican trade unionist Juan Chacón and Mexican actress Rosaura Revueltas, who faced immigration problems because of her participation).

At the end of 1992 a treaty was signed by Mexico, Canada and the United States coming into force at the beginning of 1994. It is the well-known North American Free Trade Agreement (NAFTA or TLCAN, *Tratado de Libre Comercio de América del Norte*). It is not

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so apparent that this treaty is pervasively, though unevenly, affecting indigenous peoples in those countries. No wonder that the latter were not consulted. We know it is bad manners for international legal standards to mix with simple people. States negotiate, come to terms, and try to implement treaties between themselves as if indigenous peoples did not exist even in those cases where their presence was explicitly acknowledged and some of their rights recognized by prior treaties between those very States and those very Indigenous Peoples. The concern may always be there.

Mark the date. The 1992 Mexican constitutional reform terminating communal property policy (which we contemplated as a way of accommodating indigenous polity) may be actually linked to the free trade policy. In fact, the 1994 Zapatista uprising in Chiapas, Southern Mexico, claimed to fight both TLCAN and 1992 Amendment. Through international media cover, non-indigenous people remember ski masks in the rain forest better than indigenous motivations. Thus, let us pay heed. When facing past and present States treaties, it is advisable to read even the silence between the lines.

> *North American Free Trade Agreement* (1994). *Preamble*. The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: strengthen the special bonds of friendship and cooperation among their nations; contribute to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation; create an expanded and secure market for the goods and services produced in their territories; reduce distortions to trade; establish clear and mutually advantageous rules governing their trade; ensure a predictable commercial framework for business planning and investment; build on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation; enhance the competitiveness of their firms in global markets; foster creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights; create new employment opportunities and improve working conditions and living standards in their respective territories; undertake each of the preceding in a manner consistent with environmental protection and conservation; preserve their flexibility to safeguard the public welfare; promote sustainable development; strengthen the development and enforcement of environmental laws and regulations; and protect, enhance and enforce basic workers'rights; have agreed as follows (…).
>
> *Joint Declaration from the Free Trade Summit of the Americas* (1995). 1. We, the Ministers responsible for trade representing the 34 nations which participated in the Summit of the Americas [Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia,

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> Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Vincent and the Grenadines, St. Lucia, St. Kitts and Nevis, Suriname, Trinidad and Tobago, Uruguay, the United States of America, and Venezuela] met in Denver for the first Trade Ministerial meeting mandated by our Heads of State and Government. We agreed to begin immediately al work program to prepare for the initiation of negotiations of the Free Trade Area of the Americas (…). 11. We are committed to transparency in the FTAA process. As economic integration in the Hemisphere proceeds, we welcome the contribution of the private sector and appropriate processes to address the protection of the environment and the further observance and promotion of worker rights, through our respective governments.

9. *American citizenship and indigenous standing.*

As stated earlier, citizenship and entitlement must be differentiated. They do not ever match. In 1924, after a series of particular grants, United States citizenship for all indigenous people born within the United States frontiers was established legislatively, not constitutionally, through enactment enabling the executive "to issue certificates of citizenship to Indians". No constitutional amendment has ever been accomplished on behalf of indigenous peoples in the United States. Anyway, some hindrance seemed to be overcome. Before 1924, there had been a close link between United States citizenship and the withdrawal from communal life. From then onwards, it could be otherwise. Statutory intent apart, given Indian resistance, the *tribal* way of life might no longer be considered an impediment for United States citizenship. The compatibility was seemingly accepted since the 1924 act referred to *tribal property* as an extant indigenous position. However, all in all, no plurality of citizenship itself, as for Indian and United States belonging, was taken into either constitutional or legal consideration.

Eventually, for the United States the Indians had not been citizens of their own nations but people either without any citizenship or stemming from another Euro-American one, like the Mexican. Furthermore, indigenous background represented by no means a letter of recommendation for the United States. On the grounds of both the Treaty of Guadalupe-Hidalgo and the Amendment XIV of the federal Constitution (1868, sec. 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

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citizens of the United States and of the state wherein they reside... Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed…)", throughout the Southwest during the last decades of the 19th century, Indians who, willingly or not, had given up tribal life, unsuccessfully claimed for the United States citizenship. Even being wealthy and hiring legal advice did not qualify if you were indigenous. *Indians*, even taxed, were seriously excepted. From 1887, they could become *American* citizens if they agreed to dissolve the tribe, and the communal lands were allotted. In short, born in a reservation did not mean born in the U.S.A. Somehow, reservations were neither States nor states nor United States.

Moreover, before the abolition of slavery and the subsequent constitutional amendments, you became a United States citizen through state citizenship or, otherwise, if you belonged to a federal territory and were a Euro-American colonizer. Furthermore, as for Indians, although eventually citizens, they might continue as legally incompetent wards. After the 1924 federal grant, the States of Arizona and New Mexico did openly challenge the enfranchisement of reservation Indians on the grounds that they were wards under the guardianship of the federal government. In the mid-19th century and afterward, was there any United States citizenship suitable for Indigenous Peoples as such and even for indigenous people on an individual basis? Even after 1924, the constitutional limbo — people in the desert waiting for the rain — could last.

> *Indian Allotment Act* (1887). An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations, and to Extend the Protection of the Laws of the United States and the Territories over the Indians, and for Other Purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon (…). Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every number of the

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> respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner affecting the right of any such Indian to tribal or other property.
>
> *United States Indian Citizenship Act* (1924). An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

9.1. *Indian polities and the United States: from the constitutional limbo to a so-called self-determination policy.*

So far, for Euro-American and European people, Nation meant State, either in the singular or in the federal plural, and only State stood seriously for Nation. Prior to the 1924 grant of citizenship, *Hodenosaunee*, that is, the Iroquois Confederacy (Seneca, Cayuga, Onondaga, Oneida, Mohawk, and Tuscarora peoples; *iroquois* being a French nickname) that extended between Canada and the United States, and existed from times earlier to both, had filed a claim for nationhood, as a distinct polity, with the League of Nations at Geneva. The application did not succeed, but it was received and discussed.

Facing this advent of modern international organization from 1919, the 1924 United States' grant of citizenship to indigenous peoples may be seen as pre-emptive. They were like a pain in the Nation that could try to become a peer among Nations. Moreover, as far as Indian people were a definitive minority from coast to coast, there was no trouble for the United States with a common citizen-

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ship. Between immigration and reservation policies, there was here no need for trompe-l'œil any longer but for the constitutional limbo of the reservations themselves as pieces now constituting the common body politic and never constituent of it. On these grounds, Indian citizenship has not disrupted the United States constitutionalism. No amendment was needed.

There is no indigenous consent to the sharing of citizenship. Neither is there a participatory revision of the constitutional fabric underlying this measure, nor even a unilateral constitutional amendment or any other significant rectification from Congress or from the judiciary. In the mid-20th century, the framing and working of an Indian Claims Commission aimed only at pecuniary indemnity for definitive political legitimization of the United States powers and takings did not make any constitutional difference. Neither did the 1934 Indian Reorganization Act, the New Deal policy authorizing subordinate self-administration — *home rule* in the enacting language — by the Indian reservations through inner constitutions without any noteworthy constitutional restriction or real disempowerment on the part of the United States, just as in previous times. Here, home rule may imply municipal regime like the one we have seen in Mexico. Things will even worsen on constitutional grounds as for the reservations' standing. The 1968 Civil Rights Act, although referring to Indian *self-government*, further empowered the federal judiciary and by no means the indigenous jurisdictions. The 1974 so-called Indian *Self-Determination* Act did not restrain federal powers; neither has the later shift in official language to *Self-Governance* since the federal launch of the self-styled Tribal Self-Governance Demonstration Project in 1988.

So far, the United States has adopted a rich set of idioms seemingly respectful toward indigenous peoples: *Indian inherent sovereignty*, *self-determination*, *self-governance*, *government-to-government relationship* (between the United States and the reservations' bodies)... Indeed, the series is always failing. The federal guardianship, now styled *trust responsibility*, is not discontinued. Just as in Mexico, before peoples, social policy substitutes recognition and respect. In the United States present practice, self-governance means Indian capacity and responsibility for negotiating and managing developments projects and assistance contracts with or

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through the federal administration. The standing minor gains a growing say.

Shifts are real, yet they do not affect the constitutional core even when they appear to be constitutionalist as if seriously concerned with Indian rights. However important all these policies may be (we will see that in Arizona twenty reservations out of twenty-one — the largest one is the exception — complied with the Reorganization Act, under which, throughout the United States, over one hundred and fifty Indian constitutions were adopted), there has not been any remodeling nor even any rethinking of the overall constitutionalism, just as there had not been any reshaping of constitution itself in accordance with the reframing of citizenship, despite the enactment of amendments and although it was proposed, when the abolition of slavery took place.

> *Indian Reorganization Act* (1934). An Act to conserve and develop Indians lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes. Sec. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws. In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: to employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal counsel of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and Congress. Sec. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, that such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description,

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real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Civil Rights Act (1964). Tit. VII. Equal Employment Opportunity. Sec. 703. Discrimination because of race, color, religion, sex, or national origin. (i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Civil Rights Act (1968). Tit. II. Rights of Indians. Art. 201 (1) For purposes of this title, the term "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government; (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses. Tit. III. Model Code Governing Courts Of Indian Offenses. Sec. 301. The Secretary of the Interior is authorized and directed to recommend to the Congress (…) a model code to govern the administration of justice by courts of Indian offenses on Indian reservations. Such code shall include provisions which will (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense, (2) assure that any individual being tried by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual, (3) establish proper qualifications for the office of judge of the courts on Indian offenses, and (4) provide for the establishment of educational classes for the training of judges of courts of Indian offenses. In carrying out the provisions of this title, the Secretary of the Interior shall consult with the Indians, Indian tribes, and interested agencies of the United States.

Indian Self-Determination and Education Assistance Act (1975). An Act to provide maximum Indian participation in the government and education of Indian people; to provide for the full participation of Indian tribes in program and services conducted by the Federal Government for Indians, and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes. Tit. I. Indian Self-Determination Act. Sec. 101. This title may be cited as "Indian Self-Determination Act". Sec. 102 (a). The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934 [An Act authorizing the Secretary of the Interior to arrange with States or Territories for the education, medical attention,

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relief of distress, and social welfare of Indians, and for other purposes], as amended by this Act (…). Tit. II. The Indian Education Assistance Act. Sec. 450 (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities; (f) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof.

Act to Regulate Gaming in Indian Lands (1988). Sec. 2. The Congress finds that (1) numerous Indian tribes have become engaged in or have licensed gaming activities as a means of generating tribal governmental revenues; (3) existing Federal law does not provide clear standards or regulation for the conduct of gaming on Indian lands; (5) Indians tribes have the exclusive right to regulate gaming activities on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

Indian Self-Determination Act Amendment (1994). Tit. II. Tribal Self-Governance Act. Sec. 202. Congress finds that (1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations; (2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes; (3) although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs; (5) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that (A) transferring control to tribal governments, upon tribal request, over funding and decision making for Federal programs, services, functions, and activities, or portions thereof, is an effective way to implement the Federal policy of government-to-government relations with Indian tribes; and (B) transferring control to tribal governments, upon tribal request, over funding and decision making for Federal programs, services, functions, and activities strengthens the Federal policy of Indian self-determination. Sec. 203. It is the policy of this title to permanently establish and implement tribal self-governance (1) to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes; (2) to permit each Indian tribe to choose the extent of the participation of such tribe in self-governance; (4) to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals.

9.2. *Born citizens and native rights.*

Let us look back again at the Amendment XIV (1868: "All persons born… in the United States… are citizens of the United

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States and of the state wherein they reside... excluding Indians not taxed…)", and yet further backwards at the very Constitution (1787, art. I, sec. 2: "... Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indian non taxed, three fifths of all other persons"). Here you can find both indigenous exclusion and overrepresentation of slave-owners as signs ever-present, though nullified by amendment, in the constitutional text. The document is untouched. Take a look at any current edition of the United States Constitution and you will find such derogatory allusions to both Indians and African-Americans ("other persons" in colloquial sense).

In the United States, contrary, say, to Mexico, when constitutional law is amended, the constitutional document is not changed nor touched but just added to. Something more than text may continue. No revision of the constitutional fabric itself since the abolition of slavery took place. All the same, citizenship was granted in 1924 (not in 1868 as usually asserted) to "all persons born in the United States" and lastly to the first people in America — "all Indians born within the territorial limits of the United States". In the indigenous case, citizenship could be unwanted and peculiar, the former because of the latter. The grant did not help to discontinue the guardianship rule nor recover rights of indigenous peoples as such. At most, in the constitutional realm some language will change, wording *trusteeship* or the like instead of *guardianship* or phrasing definitively *federal responsibility* in the place of *Great Father*. Language always helps, sometimes to cover up misdeeds.

Remember Chief Justice Marshall, the constitutional oracle regarding Indian affairs: "They [the Indians] look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father". It always represents a way to endorse putative prejudices at the expense of others. According to the non-indigenous viewpoint, indigenous people would be the ones who trust either expansive powers or great fathers. We shall return to the consideration of federal authority over Indian affairs on these cultural grounds.

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Thus far, we know well that common citizenship in the singular — either the United States or the Mexican citizenship — does not mean equal footing as regards rights. We are aware of this for both Anglo and Latin, for both *outsourcing* and *insourcing* unconstitutional devices in the constitutional fabric. Both approaches share the background of colonial assumption of Euro-American supremacy that establishes guardianship, the heavy burden of the white man. After the grant of United States citizenship, Anglo and Latin overlapping constitutional fabrics clearly evinced their sharing of a same exclusion of constituent pluralism. Regarding indigenous peoples, there may be legal plurality but not the constitutional kind at all. The subjugation stemming from colonial times continues to make the difference. Now on the pretended behalf of Indian rights, federal guardianship, whatsoever names it takes, endures.

On the not so shared citizenship regarding rights' entitlement, together with the non-indigenous distrust towards indigenous jurisdictions and the post civil war assumption of federal empowerment also against them, you may resort to John R. Wunder, *"Retained by the People": A History of American Indians and the Bill of Rights*, Oxford University Press, 1994. If so far you prefer the test and taste of a more telling presentation, this is your reading: Chief Oren Lyons and John Mohawk (eds.), *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution*, Clear Lights Publishers, 1992. As we are people of the scholarly kind, let us add some recommendations beyond the legal and even political field but regarding our cultural ways and professional manners: V. Deloria, Jr., *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact*, Fulcrum Publishing, 1997; Devon A. Mihesuah, *Natives and Academics: Researching and Writing about American Indians*, University of Nebraska Press, 1998. Insofar as even scholarly people' s knowledge may unwittingly rely on pop fiction, add Peter C. Rollins y John E. O'Connor (eds.), *Hollywood's Indian: The Portrayal of the Native American in Film*, University Press of Kentucky, 1998.

As we are interested in the legal aspect, keep on adding: Sharon O'Brien, *American Indian Tribal Governments*, University of Oklahoma Press, 1989; D. E. Wilkins, *The Navajo Political Experience*, Diné College Press, 1999, on the main case; contrast — although containing no section on government — Scott Rushforth and Steadman Upham, *A Hopi Social History: Anthropological Perspectives on Sociocultural Persistence and Change*, University of Texas Press, 1992. On the missed opportunity for the United States constitutional re-founding at the great moment of the abolition of slavery, Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869*, University Press of Kansas 1990; Bruce Ackerman, *We the People*, II, *Transformations*, Harvard University Press, 1998. The constitutional materials from the Indian New Deal are available on the *Native American Constitution and Law Digitization Project* at the University of Oklahoma Law Library and the National Indian Law Library of the Native

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American Rights Fund: *thorpe.ou.edu/IRA.html* (*Indian Reorganization Act Era Constitutions and Charters*). We already know electronic addresses on indigenous issues in the Southwest, where we are turning to at this point as regards new states.

10. *The Arizona Territory and Arizonan polity.*

When the Arizona Territory was planned in 1862, a "memoir signed by more than five hundred resident voters", non-indigenous to be sure, depicted how they figured their opening challenge: "At the time of its acquisition [of the whole of New Mexico by the United States] there was scarcely [in Arizona] any population except a few scattering Mexicans in the Mesilla valley, and at the old town of Tucson, in the center of the territory. The Apache Indian, superior in strength to the Mexican, had gradually extirpated every trace of civilization, and roamed uninterrupted and unmolested, sole possessor of what was once a thriving and populous Spanish province (...). The Indians at length thoroughly aroused by the cruelties of the Spaniards, by whom they were deprived of their liberty (...). A superior civilization disappeared before their [Indians'] devastating career (...). The Apache Indian regards the soil as his own, and having expelled the Spanish and Mexican invader, he feels little inclination to submit to the American (...). Indians are the only persons who can successfully traverse these mountains and hunt up their hiding places. If this is not done, they [Indians] will surely break up our settlements here". The memoir ended with resolutions and claims addressed to the United States Congress: "The undersigned, your humble petitioners, citizens of the United States, and residents of the Territory known as the Gadsden Purchase [Southern Arizona], respectfully represent: That since the annexation of their [non-Indians'] Territory to the United States, they have been totally unprotected from Indian depredations and civil crimes (...)".

Between my brackets and in their lines, there are mixed evidences and prejudices. It is an eloquent manifesto loaded both by the recognition of the Indianness of the territory and the presumption of existence of non-Indian rights over this very territory. The non-Indian minority even realized that they needed Indians to expropriate and expel the Indians. Together with warfare, treaties were badly needed.

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The 1863 *Act to Provide a Temporary Government for the Territory of Arizona*, "until such time as the people residing in said Territory shall, with the consent of Congress, form a State government", is concerned with African-Americans ("there shall neither be slavery nor involuntary servitude in the said Territory"), but had no say regarding Indians. None of them, African or Indian people, were deemed to be citizens. *People residing in said Territory*, the coming polity of the State of Arizona, as a matter of course in the United States, was to be non-Indian and non-African-American. For the former, treaties helped; for the whole, what worked was cultural prejudice. Additional racism aided too, to be sure.

Arizona Territory was severed from New Mexico Territory. The 1850 *Act to Establish a Territorial Government for New Mexico* had founded a government that encompassed Arizona and which rules could be kept here to some extent after the separation. New Mexican laws "not inconsistent with the provisions of this act [1863], are hereby extended to and continued in force in the said Territory of Arizona, until repealed or amended by future legislation". The same 1863 Act, by excluding slavery, discontinued something most significant from the 1850 Act: "When admitted as a State, the said Territory [New Mexico-Arizona], or any portion of the same, shall be received into the Union, with or without slavery, as their Constitution may prescribe at the time", but none was revised on behalf of indigenous people between 1850 to 1863: "An apportionment shall be made, as nearly equal as practicable, among the [Arizona' s] several counties or districts, for the election of the Council and House of Representatives, giving to each section of the Territory representation in the ratio of its population, Indian excepted".

At all events, for the States of New Mexico and Arizona, either together or divorced, the polity was to be the same that we have found for Texas and eventually for California too. According to the 1850 Act common to both territories (New Mexico and Arizona first coupled), the individual entitled to political and civil rights was *every free white man*, the man so qualified by sex, race, and freedom as non-servitude, so far as slavery existed and even beyond on the grounds of prejudice, supremacy and racism. Nevertheless, this Act complied even with Guadalupe-Hidalgo: "The right of suffrage, and

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of holding office, shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the republic of Mexico". No constitutional guarantee, jury trial included, was established to the benefit of other people than *free white man*, this is the citizen: "That no citizen of the United States shall be deprived of his life, liberty, or property, in said Territory, except by the judgment of their peers and the laws of the land".

Let us resolutely recommend another reading on non-indigenous subject, albeit straight constitutional, namely from a treatise just cited, *We the People* by B. Ackerman, the first volume, *Foundations*, 1991, which poses for the United States a serious constituent predicament. It was founded literally by fathers, thus excluding women, slaves, and Indians in the moment of conception and naissance. Hence, the United States lacks the constituent consent of a social unequivocal majority and thus any truly democratic authority. But Ackerman considers a renaissance: the constitutional system would be regenerated by gender equality and civil rights, although the abolition of slavery did not lead to a new constitution and the constitutional amendment for non-discrimination based on sex never succeeded, other than for a single political right (Amendment XIX, 1920: "1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex"). However, as for the regenerating momentum, some people are forgotten. Guess who. You are right. *We the People* names Indians for the question but not for the answer. Who cares? Scholarly folks are actually shortsighted, if not really blinded. Here, in *We the people*, at least the raw nerve is shown. Light rather than sight is missing in the American constitutional and historiographical laboratory, American meaning both the United States and the whole continent from Alaska to Patagonia, from Inuit people to Che people. Let us recall again and again that indigenous people, slaves, and women could share in common, under fathers' freedoms and powers, *oeconomical* standing excluded from *constitutional* rights, so there might actually be legal, uneven links between their cases.

Inner states' constitutional history is quite neglected in relation to the federal, so-called *American* one. As for the documents leading to the State of Arizona, they are available together with other constitutional and non-constitutional texts on the *Avalon Proyect* of the Yale Law School: *www.yale.edu/lawweb/avalon/avalon.htm*, containing a special section on *New Mexico Documents*. You may also browse through the *Core Documents of Arizona' s History* at the Arizona State Library online as well: *www.dlapr.lib.az.us/links/AZcoredocs.htm#American*.

11. *Indian Territory and American State: Oklahoma and New Mexico-Arizona likened.*

In 1906, all four territories including Arizona Territory, New Mexico Territory, Oklahoma Territory, and the Indian Territory,

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shared the address of a federal *Act to enable the people* of each polity *to form a Constitution and State government* in pairs and in tandem, Arizona and New Mexico forming the State of Arizona; Oklahoma and the Indian Territory integrating the State of Oklahoma. The former failed and the latter succeeded. Here we are concerned with states insofar as peoples are affected. The former not just interfere but even substitute for the latter. They pretend to identify with and stand for peoples. What about indigenous peoples then?

In that legal encounter through federal enactment among four territories, one of them was singular indeed, that of the Indian Territory, a true indigenous polity where various peoples had converged with the expectation of forming a common polity as a state of their own according to the formal promises of the United States itself. The Indian Territory was the place where the Cherokees that had been expelled from Georgia were located, together with other peoples, for indigenous self-government. It was not a *territory* in the federal sense. The Cherokee removal took place just after the *Cherokee People v Georgia* and *Worcester v Georgia* cases quoted above and to which we shall return below because of its crucial importance for the somehow constitutional supporting of federal powers over Indian peoples. As for the Cherokee people, let us also recall that in their first treaty with the United States, before the 1787 Constitution, *the Indians* were offered incorporation into a common Confederacy at their choice. The definitive federal Constitution did not take this option into account, to be sure.

> *Treaty between the United States and the Cherokees* (1785). Art. 12. That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress.
>
> *Treaty between the United States and the Cherokees* (1835). Art. 1. The Cherokee nation hereby cede, relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river (…). Art. 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation (…) shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse

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with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

Constitution of the Cherokee Nation (1839). The Eastern and Western Cherokees having again re-united, and become one body politic, under the style and title of the Cherokee Nation: Therefore, We, the people of the Cherokee Nation, in National Convention assembled, in order to establish justice, insure tranquility, promote the common welfare, and secure to ourselves and our posterity the blessings of freedom acknowledging, with humility and gratitude, the goodness of the Sovereign Ruler of the Universe in permitting us so to do, and imploring His aid and guidance in its accomplishment, do ordain and establish this Constitution for the government of the Cherokee Nation.

The territory grant embraced Indian self-government and so it was during the early decades. The Indian polity in Oklahoma complied through constitutional framing with the federal requirements to become a state by itself (the "Republican Form of Government" demanded by the United States Constitution in art. IV, sec. 9), but Indians turned out to be excepted from a shared constitutionalism to further purposes than explicitly recognized. What is worse, the United States finally excepted the indigenous peoples even as for their own, inner constitutionalism, since it was discontinued. Eventually, in 1906, the United States broke its word and proposed a unique state through the gathering of Indian Territory with the non-indigenous Territory of Oklahoma. The proposal was the same for Arizona and New Mexico. It seemed equal for both couples, but it was not so. Through federal decision, one relied on equality between spouses and the other did not. No need to have a guess about who was who.

For the sake of final decision making, each territory had a citizenry that had to coincide with its partner citizenry in common statehood, Arizona with New Mexico, Oklahoma with Indian Territory, and vice versa. Just as the rules that applied to the first coupling (Arizona and New Mexico) were even, the rules applying to the second (the one forming the state of Oklahoma) were uneven. In the proceedings leading to statehood, an unbalance ran against the Indian Territory, where the law of the non-indigenous party was extended and federal commissioners intervened, acting under the guardianship policy. It was only in the case of Arizona and New

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Mexico, unlike that of Oklahoma and the Indian Territory, that a referendum was held with the question: "Shall Arizona and New Mexico be united to form one State? □ Yes □ No".

It was no great surprise that an agreement was reached between the coupling members with an impaired party, Oklahoma on the one hand and the Indian Territory under guardianship on the other, while Arizona and New Mexico, the coupling of equals, failed to reach such an agreement. In fact, the absorption of the Indian Territory by the State of Oklahoma was part of a broader policy of allotment of communal lands, subjugation of peoples' jurisdictions and the ruin of indigenous heritages, the latter primarily through biased non-indigenous education with regular help from missionaries despite the constitutional disestablishment of religion in the United States. Indians were out and in. The Euro-American setting of non-indigenous states was intended to subdue indigenous polities, not to coexist with them.

The 1906 Act dealt with Indian affairs a smaller amount for the case of the Arizona and New Mexico Territories, of the common State of Arizona that they failed to create. Yet something was said. There was a principle: "The Constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indian not taxed". Indians remained under the federal powers of the United States. A cultural provision could also affect Indians, as well as Hispanics: "Ability to read, write, and speak the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a necessary qualification for all State officers", representatives included. As a good non-indigenous state, these rules appear in the 1912 and current Constitution of the State of Arizona.

> Let me recommend Jeffrey Burton, *Indian Territory and the United States, 1866-1906: Courts, Government, and the Movement for Oklahoma Statehood*, University of Oklahoma Press, 1995, for the history of an indigenous polity complying even with the republican form required by the United States Constitution to be finally dissolved into a non-indigenous state, the actual aim of the *territory* regime. The author stresses federal responsibility via judiciary and not just through bare policy or pure expediency. Wonder and no wonder, at the same time, that there is no Indian *State* in America. The judicial harassment and legal siege which had a bearing on the Indian Territory blackout are also well attended by Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and*

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United States Law in the Nineteenth Century, Cambridge University Press, 1994, and Blue Clark, *Lone Wolf v Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century*, University of Nebraska Press, 1999. On earlier moments interesting to the Indian Oklahoma case, Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics*, McGraw-Hill Case Studies in Constitutional History, 1995; William G. McLoughlin, *After the Trail of Tears: The Cherokees' Struggle for Sovereignty, 1839-1880*, University of North Carolina Press, 1994.

12. *Arizona federated: Union powers over Indian reservations.*

We have arrived at Arizona as a test of indigenous treatment in the frontier both between territory and state forms of government and between Mexican and United States, Latin and Anglo, polities. We are moving through a double, twice significant overlapping among regimes and constitutions. This is the time to take a look at the 1912 Constitution of Arizona, the first and only one, never amended regarding indigenous peoples. Here we find a reference to them as people alien to the state, because of the federal power over *Indian tribes*, as expressly recognized by the constitutional text itself. Thus, it must be eventually construed in the context of the so-called Federal Indian Law rather than the Treaty of Guadalupe-Hidalgo or any other agreement with Mexico, let alone the treaties with indigenous peoples.

As is well known, the remote equivocal support of the assignment of competence is the Commerce Clause of the Federal Constitution of 1787 (art. 1, sec. 8: "The Congress shall have power... to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes"), construed by the Supreme Court's jurisprudence derived from the European law of nations, thanks mainly to Chief Justice Marshall, John Marshall (tenure, 1801-1835). As long as *Indian tribes* under the Constitution were neither *foreign Nations* nor inner *States*, the Marshall Court squared the circle by deducing that they were *domestic dependent Nations in a state of pupilage* under the federal powers. Cited above is the paragraph from the case of *Cherokee People v Georgia* where the rule was so worded. It still remains the rationale for federal power versus the states and over the indigenous peoples. The *Indian tribes* are thus not located somewhere in the middle or in the vicinity of

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Nations and *States*, as in the constitutional text, but well under both of them, either nations or states.

In the case of Arizona, federal power over Indian affairs was a further strict condition posed by the enabling enactment for the statehood, by the failed one in 1906 and by the definitive one following in 1910. The phrasing is rather telling. It was an obligation imposed by the United States on the *people inhabiting this State*, Arizona, regarding *Indian tribes*. Thus, legally, the indigenous peoples were not inhabitants of the state and, consequently, their territories were not state lands either. Indigenous people were entitled to own estate property if granted by *the United States or any prior sovereignty*, either Spanish or any other European one, but not on the basis of their own original, inherent titles. *Sovereignty* was in no case indigenous for either the enabling enactment or the Constitution of Arizona. No Indian property law or any indigenous law as such was constitutionally recognized. Termination of Indian entitlement either by federal enactment or the Constitution of Arizona was considered a feasible possibility. Spanish title could be construed as a benefit stemming from Guadalupe-Hidalgo, and yet it depended on the federal powers of the United States, irrespective of any international commitment.

The federal powers over Indian people were based on doctrine of domestic dependence or rather the Commerce Clause of the Constitution as it is so awkwardly construed. They were the ultimate tools for the extension of alien law to Indian Territory and for the termination of indigenous sovereignty, whatever the achievements. Yet, when citizenship of the United States was granted to indigenous people in 1924, all true *oklahomas* (the very word meaning *Indian Home* in the Muskogee or Creek language) dissipated among non-indigenous statehoods, allotment of lands, invasions of powers, harassment for alien education, and impoverishment of communities. Alaska and Hawaii as states and other overseas cases as territories would follow.

If you look for constitutional support of the entire history, there is no other than the Marshall Court's un-constitutional construction on pre-constitutional assumptions. It was borrowed from the colonial law of nations as *law of nature*. Somehow overlapped under wordings such as *trust responsibility* and the like, it is a jurisprudential ruling that remains in force. It is the heart, mind and soul of the

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Federal Indian Law, law placed by the United States upon indigenous people and not law generated by the indigenous peoples for themselves, albeit inside the United States.

> *Act to Provide a Temporary Government for the Territory of Arizona* (1863). Sec. 3. That there shall never be slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted; and all acts or part of acts, either of Congress or of the Territory of New Mexico, establishing, regulating or in any way recognizing the relation of master and slave in said Territory, are hereby repealed.
>
> *Enabling Act for Oklahoma and Arizona* (1906). Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided that nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed. Sec. 2. That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nationality or tribe in said Indian Territory and Oklahoma, and who have resided within the limits of said proposed State for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed State (…). That the election laws of the Territory of Oklahoma now in force, as far as applicable and not in conflict with this Act, including the penal laws of said Territory of Oklahoma relating to elections and illegal voting, are hereby extended to and put in force in said Indian Territory until the legislature of said proposed State shall otherwise provide, and until all persons offending against said laws in the election aforesaid shall have been dealt with in the manner therein provided. And the United States courts of said Indian Territory shall have the same power to enforce the laws of the Territory of Oklahoma, hereby extended to and put in force in said Territory, as have the courts of the Territory of Oklahoma (…).
>
> *Enabling Act* (1910; sec. 20.2) and *Constitution of Arizona* (1912). Art. 20.4 (in force). The following ordinance shall be irrevocable without the consent of the United States and the people of this State: (…). *Public Lands and Indian Lands*. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the

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disposition and under the absolute jurisdiction and control of the Congress of the United States.

Indian Reservations in Arizona Framework (mid-2000).

Tribe, Community, or Nation	*Organization process*	*Year constitution, incorporation, enactment, or treaty*	*Year(s) amendment(s) or new constitution(s)*
Ak-Chin Indian Community — Maricopa Reservation	IRA	Constitution, 1961	1966, 1969, 1971, 1973
Cocopah Tribe	IRA	Constitution, 1964	1964
Colorado River Indian Tribes (Arizona-California)	IRA	Constitution, 1937	1975
Fort McDowell Yavapai Nation (formerly Fort McDowell Mohave-Apache Community)	IRA	Constitution, 1936 Incorporation, 1938	— 1999
Fort Mohave Indian Tribe (Arizona-California-Nevada)	IRA	Constitution, 1977 Incorporation, 1988	No amendment
Fort Yuma — Quechan Tribe (Arizona-California)	IRA	Constitution, 1936	No amendment
Gila River Indian Community	IRA	Constitution, 1936 Incorporation, 1938	1960, 1974 —
Havasupai Tribe	IRA	Constitution, 1939 Incorporation, 1946	1967, 1968, 1972, 1991 —
Hopi Tribe	IRA	Constitution, 1936	1969, 1980, 1993
Hualapai Tribe	IRA	Constitution, 1938 Incorporation, 1943	1955, 1990 1955, 1998
Kaibab Band of Paiute Indians	IRA	Incorporation, 1934	1987
Navajo Nation (Arizona-Utah-New Mexico)	Treaty	Treaty, 1868	Neither constitution nor incorporation
Pascua Yaqui Tribe	IRA	Constitution, 1988	No amendment
Salt River — Pima-Maricopa Community	IRA	Constitution, 1940	1971, 1990, 1996

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Tribe, Community, or Nation	*Organization process*	*Year constitution, incorporation, enactment, or treaty*	*Year(s) amendment(s) or new constitution(s)*
San Carlos Apache Tribe	IRA	Constitution, 1936 Incorporation, 1940	1954, 1984 1955
San Juan Southern Paiute Tribe	IRA	Constitution, 1996	No amendment
Tohono O'odham Nation	IRA	Constitution, 1937	1986
Tonto Apache Tribe	IRA	Federal enactment, 1972	Total revision 1995
White Mountain Apache Tribe	IRA	Constitution, 1938	Last amended 1993
Yavapai-Apache Nation — Camp Verde Reservation	IRA	Incorporation, 1948	Total revision 1991
Yavapai-Prescott Tribe	IRA	Incorporation, 1962	1970, 1975

Source: *www.indianaffairs.state.az.us/townhall/22nd%20ITH%20Report.pdf*, home of the Arizona Commission of Indian Affairs, report of the 22nd Arizona Indian Town Hall, 2002 (fifteen reservations participating — Navajo, Tohono O'odham, and Hopi included — out of the recognized twenty-one, together with the federal Bureau of Indian Affairs). IRA stands for the 1934 Indian Reorganization Act that provided for both constitution and business charter, this is incorporation (sections 16 and 17, quoted above). As we know, *Indian Reorganization Act Era Constitutions and Charters* are available on the web: *thorpe.ou.edu/IRA.html*; as it is here the *Federal Register* of *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*: *www.census.gov/pubinfo/www/FRN02.pdf* (mid-2002, no reservation either added or terminated in Arizona). I have made some additions and corrections on the table from the Arizona Commission of Indian Affairs with the help of the other two sites.

13. *Reservations and states' constitutions contrasted.*

I am not dealing here with the entire history of Mexican, Texan, United States or Arizonan constitutionalism, neither of Inuit, all Apaches, Navajo, Comanche, Kiowa, Cheyenne, Arapahoe, Sioux, Crow, Utah, Shoshone, Bannock, Nez Percé, Cherokee, Shawnee, Muskogee, Seneca, Cayuga, Onondaga, Oneida, Mohawk, Tuscarora, Mohave, Maricopa, Yuma, Havasupai, Chemehuevi, Hualapai,

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Tohono O'odham, Pima, or Pueblos (Tao, Zuni, Hopi, Tewa…) polities, to name only the peoples within the present United States borders who have appeared so far throughout this paper (add others from the Arizonan table). I am not following the whole course of this handful of histories, either separated or merged, and not even complying with any chronological itinerary or systematic inquiry, nor proceeding to any thick local description. I am not dotting every 'i' nor crossing every 't', either constitutional or historical or anthropological or just legal with the necessary, concurrent aid of history and anthropology. I lack both experience and knowledge, both world and time for such an extensive and exhausting task. All I am trying to do is to assess the legal position of indigenous peoples through a set of more or less constitutional happenings within some American States, American in the broader sense both Latin and Anglo, namely through the United States Southwest and Northern Mexico with their telling overlapped histories up to the present.

In the United States, indigenous people are eventually federal and state citizens, and indigenous peoples may hold their own polities downgraded into reservations under unchecked and unbalanced federal powers. Is this the framework of Indian Law? Signs such as the compatibility between United States citizenship and communal life that we have rather found in the 1924 Act — despite the very statutory intent — might signify that federal powers are not the only or even main background for Indian law. It might also imply continuity of indigenous titles despite States presumptions. After the grant of citizenship and in spite of numerous and severe episodes of intended termination, the reservation system itself managed to endure with the gradual recovery of Indian communities, the framing of Indian constitutions, the practice of Indian governments, and the claims for Indian sovereignty, this latter as the prime and eventual, historical and inherent title to all the rest.

Throughout Indian reservations today, there is a good array of quasi-constitutions, quasi-governments, and semi-independent quasi-sovereignties — so to mark a difference. The credit for the quasi and semi expressive qualifying goes to the United States judiciary as intent to retain the full kinds out of Indians' reach. Let us not become confused. There are always two parties. One matter is the sovereignty that has never been legally surrendered by indig-

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enous peoples; another quite different matter is the quasi and semi proxy, the so-called tribal inherent sovereignty that is granted by federal law and that one can find in the so-styled constitutions of Indian reservations. Things merge, to be sure. Reservations' constitutions from the Indian New Deal required federal approval. Today, by either amendments or practice, they are instead coming to indigenous determination. Tribes change their names into Nations. The alleged title is sovereignty, the inherent sovereignty even recognized, albeit nominally, by the United States. The very meaning of reservation may finally change once more.

At the beginning of this American constitutional history, reservations could be the territories reserved by the indigenous peoples for themselves through treaties granting lands to the United States. Later in time, the contrary may be the case, reservations becoming very alike territories in the constitutional sense, lands granted by and subjected to federal powers which go unchecked or hardly checked by the non-indigenous judiciary and by the indigenous peoples themselves. Reservations currently are quasi-states claiming and performing self-rule on the basis of superior principles of their own, such as the said Indian sovereignty, yet in fact doing so under federal powers on standards inferior to those of the states of the Union themselves.

> *Oliphant versus Suquamish Indian Tribe* (1978). Supreme Court of the United States. [A]n examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government (...). Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status". Indian reservations are "a part of the territory of the United States" (...). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority" (...). Under incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.
>
> *White Mountain Apache Tribe versus Bracker* (1980). Supreme Court of the United States. Congress has broad powers to regulate tribal affairs under the Indian Commerce Clause (...). This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority

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> over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law (...). Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them" (...). Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination of whether the exercise of state authority has been pre-empted by operation of federal law (...). [T]his tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

Maybe there are three parties or rather many, as Indians are not a single people, yet forming two teams, the Indian on the one hand and together federal and state on the other. The United States is not the neutral arbitrator in between. It is the first part of the second party, no joke. As people being there before, you know who the first party — the first sovereignty — is, or should be. Let us put together and check constitutions.

Let me encourage you, attendant or reader, to make by yourself the comparison between texts from, say, the Cherokee, Navajo, Apache, Muskogee, or Pueblos and kindred peoples on the one hand, and on the other, the states of Texas, California, Arizona, New Mexico, or Oklahoma, along with the United States of course. Please, remember quoted instruments and keep on adding treaties and constitutions, both states and Indians'. Reservations and states' constitutions are available on the web. Search also for *Indian treaties*, *Indian nations*, or still more specific items. For sure, you will additionally find comments more interesting than mine, as actually involved. Look always at printed material too. Watch maps. Do you know any non-domestic mapping of the reservations together with the states? Internationally, the former are invisible except for folklore and tourism, gaming included.

Do you know about any collection of constitutions, either past or present, including Indian instruments? No wonder that the latter are not taken into account by standard research and thinking in the constitutional field. Watch filmed adverse pieces — the western kind — for further understanding of the extended blackout. Sometimes,

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even scholarly people know through pop fiction what they pretend to master by true science. They cannot even imagine that there are constitutional polities other than States sovereign or federated. At least, as a remedy, let us take a look at a set of texts.

Treaty between the United States and the Cherokee Nation (1866). Art. 9. The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an Act of the National Council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees (…). Art. 15. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country (…). Should any such tribe or band of Indians settling in said country abandon their tribal organization (…), they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district (…).

Act of the Cherokee Nation (1868). Be it enacted by the National Council that the phrase *all the rights of Native Cherokees*, as used in the 9th and 15th Articles of the Treaty of July 19, 1866, between the United States and this Nation, is hereby construed to mean the individual rights, privileges and benefits enjoyed by white adopted citizens of this Nation, before and at the making of said Treaty, and who had been by law admitted to *all the rights of Native Cherokees*, civil, political, and personal.

Treaty between the Shawnees and the Cherokees (1869). Whereas it is provided by the fifteenth article of the treaty between the United States and the Cherokee Indians, concluded July 19th, 1866, that the United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval on the President of the United States (…).

Constitution of San Carlos Apache Tribe (1936). Art. 1. *Statement of Purpose*. We want the United States Government to continue among us for some time such establishments as health and educational service, a superintendent, advisory officers, and other such connecting links with the Federal Government. In our relation to it, a relation similar to that which a town or a county has to State and Federal Governments, our own internal affairs shall be managed, in so far as such management does not conflict with the laws of the United States, by a governing body which shall be known as the Council of the San Carlos Apache Tribe. Art. 5. *Law and Order*. Sec. 5. The judges of this [tribal] court shall be appointed by the tribal council, subject to the approval by the Secretary of the Interior. Art. 9. *Adoption*. After the

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constitution has been thoroughly discussed in group meetings and a representative general meeting, it shall be made public by being posted for thirty days at the proposed voting places and other convenient public places on the reservation, with the notice that on the day terminating this said period a general election shall be held for the purpose of the proposed adoption of this constitution and by-laws. If this constitution and by-laws shall be approved by a majority of the qualified voters of the San Carlos Apache Tribe voting at this election, and if at least thirty percent of the qualified voters of the tribe vote therein, the constitution and by-laws so adopted shall be forwarded to the Secretary of the Interior for approval and shall be effective from and after the date of such approval.

Constitution of the Hopi Tribe (1936). *Preamble*. This Constitution, to be known as the Constitution and By-laws of the Hopi Tribe, is adopted by the self-governing Hopi and Tewa villages of Arizona to provide a way of working together for peace and agreement between the villages, and of preserving the good things of Hopi life, and to provide a way of organizing to deal with modern problems, with the United States government and with the outside world generally. Art. 1. *Jurisdiction*. The authority of the Tribe under this Constitution shall cover the Hopi villages and such land as shall be determined by the Hopi Tribal Council in agreement with the United States Government and the Navajo Tribe, and such lands as may be added thereto in the future. The Hopi Tribal Council is hereby authorized to negotiate with the proper officials to reach such agreement, and to accept it by a majority vote. Art. 6. *Adoption of Constitution and By-Laws*. This Constitution and By-laws, when ratified by a majority vote of the adult members of the Hopi Tribe voting at a referendum called for the purpose by the Secretary of the Interior, provided that at least thirty percent of those entitled to vote shall vote at such referendum, shall be submitted to the Secretary of the Interior, and if approved, shall take effect from the date of approval.

Constitution of the Havasupai Tribe (1939). *Preamble*. We, the Havasupai Tribe of the Havasupai Reservation, Arizona, in order to build up an independent and self-directing community life; to secure to ourselves and our children all rights guaranteed to us by treaties and by the Statutes of the United States; and to encourage and promote all movements and efforts for the best interests and welfare of our people, do establish this Constitution and By-laws.

Corporate Charter of the Havasupai Tribe (1946). Art. 1. *Corporate Existence and Purposes*. In order to further the economic development of the Havasupai Tribe of the Havasupai Reservation in Arizona by conferring upon the said Tribe certain corporate rights, powers, privileges, and immunities; to secure for the members of the Tribe an assured economic independence; and to provide for the proper exercise by the Tribe of various functions heretofore performed by the Department of the Interior the aforesaid Tribe is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Havasupai Tribe of the Havasupai Reservation". Art. 5. *Corporate Powers*. The Tribe, subject to any restrictions contained in the Constitution and laws of the United States, or in the constitution and by-laws of the said Tribe shall have the following corporate powers in addition to all powers already conferred or guaranteed by the tribal constitution and by-laws (...).

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Cherokee Nation Constitution (1975). *Preamble*. We, the people of the Cherokee Nation, in order to preserve and enrich our tribal culture, achieve and maintain a desirable measure of prosperity, insure tranquility and to secure to ourselves and our posterity the blessings of freedom, acknowledging, with humility and gratitude, the goodness of the Sovereign Ruler of the Universe in permitting us so to do, and imploring his aid and guidance in its accomplishment do ordain and establish this Constitution for the government of the Cherokee Nation. The term "Nation" as used in this Constitution is the same as "Tribe". Art. I. *Federal Regulations*. The Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law.

Constitution of the Muskogee-Creek Nation (1979). Art. 6. Sec. 6. (a) Every bill which shall have passed the Muscogee National Council, before it becomes ordinance, shall be presented to the Principal Chief of the Muscogee Nation. If he approves, he shall sign it; but, if not, he shall return it with his objections to the Muscogee National Council, who shall enter the objections at large on their journal and proceed to reconsider it if, after such reconsiderations, two-thirds (2/3) of the full membership of the Muscogee National Council shall pass the bill, it shall become an ordinance in such cases, the votes shall be determined by yeas and nays, and the names of the person voting for and against shall be entered on the journal of The Muscogee National Council. If any bill shall not be returned by the Principal Chief within ten (10) days, Sundays and holidays excepted, after it shall have been presented to him the same shall be an ordinance as if he had signed it. Art. 9. Sec.1.c. Amendments ratified shall be submitted to the Secretary of the Interior or his agent for his approval and shall have full force and effect from the date of approval.

Amendments to the Muskogee-Creek Constitution (1991). *Approval*. I. The Principal Chief of the Muscogee Nation, hereby affix my signature this 6th day of May, 1991, to the above Ordinance, authorizing it to become an Ordinance under Article VI, Section VI, of the Constitution.

Cherokee Nation Constitution (1999). *Preamble*. We, the People of the Cherokee Nation, in order to preserve our sovereignty, enrich our culture, achieve and maintain a desirable measure of prosperity and the blessings of freedom, acknowledging with humility and gratitude the goodness, aid and guidance of the Sovereign Ruler of the Universe in permitting us to do so, do ordain and establish this Constitution for the government of the Cherokee Nation. Art. 1. *Federal Relationship*. The Cherokee Nation reaffirms its sovereignty and mutually beneficial relationship with the United States of America.

The Fundamental Laws of the Diné (2003). (...) § 2. *Diné Bi Beenahaz'aanii* (Diné Law). The Diné bi beenahaz'aanii embodies Diyin bitsaadee beehaz'aanii (Traditional Law), Diyin Dine'e bitsaadee beehaz'aanii (Customary Law), Nahasdzaan doo Yadilhil bitsaadee beehaz'aanii (Natural Law), and Diyin Nohookaa Diné bi beehaz'aanii (Common Law) (...). These laws provide the foundation of Diné bi nahat'a (providing leadership through developing and administering policies and plans utilizing these laws as guiding principles) and Diné sovereignty. In turn, Diné bi nahat'a is the foundation of the Diné bi nahat'a (government). Hence, the respect for honor, belief and trust in the Diné bi beenahaz'aanii preserves, protects and enhances the following inher-

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ent rights, beliefs, practices and freedoms: A. The individual rights and freedoms of each Diné (from the beautiful child who will be born tonight to the dear elder who will pass on tonight from old age) as they are declared in these laws; and B. The collective rights and freedoms of the Diyin Nihookaa Diné as a distinct people as they are declared in these laws; and C. The fundamental values and principles of Diné Life Way as declared in these laws; and D. Self-governance (...).

14. *Among histories and rights: legal domesticity and constitutional legality.*

We are coping with constitutional questions but cannot confine ourselves to constitutional tokens. Regarding indigenous people, constitutional law leads back to law of nations and thus to an exclusive, even racist culture. This is a clue. You cannot understand nor can anybody explain this strange constitutionalism, the overlapping and the embedding, if you do not look face to face at its double life. As long as they are normative too, you have to take into account all the prejudices of non-indigenous minds to make any sense of the whole legal mess. You have to face all the working imaginaries of constitutionalism itself.

Mark again the words quoted from Chief Justice Marshall on "domestic dependent nations", "in a state of pupilage", in a relationship with the United States just like "that of a ward to his guardian", with "the President as their [Indians'] Great Father", moreover assuming that this is the spontaneous approach of the indigenous peoples themselves. It is not hollow rhetoric but effective rationale with deep historical background. It was a set of juridical categories coming to America from Europe through Spain in order to locate indigenous people in a position not of legality but of domesticity and so under unrestricted alien authority. No checks, no balances, no rights, no freedoms, no constitutional achievements provided by the State party, not even the checks stemming from the law of nations between unbalanced nations.

Emer de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758). Book I. *Of Nations conceived in themselves*. Chapter I. *Of Nations or Sovereign States*. § 1. *Of the State, and Sovereignty*. A Nation or a State is (…) a body politic, or a society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength (…). § 4. *What are Sovereign States*. Every Nation that governs itself, under what form

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> soever, without dependence on any foreign power, is a Sovereign State (…). § 5. *States bound by unequal alliance*. We ought, therefore, to account as sovereign states those which have united themselves to another more powerful, by an unequal alliance, in which, as Aristotle says, to the more powerful is given more honour, and to the weaker, more assistance. The conditions of those unequal alliances may be infinitely varied, but whatever they are, provided the inferior ally reserve to itself the sovereignty, or the right of governing its own body, it ought to be considered as an independent state, that keeps up an intercourse with others under the authority of the law of nations. § 6. *Or by treaties of protection*. Consequently a weak state, which, in order to provide for its safety, places itself under the protection of a more powerful one, and engages, in return, to perform several offices equivalent to that protection, without however divesting itself of the right of government and sovereignty, that state, I say, does not, on this account, cease to rank among the sovereigns who acknowledge no other law than that of nations.

Nevertheless, indigenous peoples were disempowered through private law rather than by the public or political law. Reread both the first quoted passage from Vattel and the Marshall Court's rulings in compliance with the law of nations: "According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity". Evidence was not even necessary to make this statement on property and infer the consequences as for polity. *Every theory* (*every* meaning non-indigenous, as if indigenous thinking could not exist) was a sufficient proof for all this, including the principle that private property was the only kind of property right, and that its lack may therefore legally deprive of political capacity. It was private, domestic law; this is *oeconomy* prior to constitutionalism. Private property and appropriation might rule. Bias did. The last resort, the actual title as we saw in Marshall's discourse, was the *doctrine of discovery*, the discourse of finding and taking, arriving and conquering by European people, not by others. "Discovery gave title" to the following occupancy and all the aftermath, Marshall stated in compliance with the law of nations as law of nature. As indigenous people did not exist as human, thinking actors by themselves, they could easily be the objects of discovery by others.

You may find all this normative discourse in the United States jurisprudence as if it were a legal construction by the Supreme Court on the federal Constitution, and not rather a colonial heritage from a more distant time and place. True enough, though constitutional, it was both pre-constitutional and un-constitutional. So far, we

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know that this is not playing on words but ruling over human beings. The entire construct had a European genealogy and no constitutional rationale. It stems both from ages older and assumptions stranger than the times and reasons of the straight constitutional kind. Constitutionalism properly means rights and the powers subsidiary to rights.

Domesticity status was a pre-constitutional device also in the chronological sense. It was brought to America by Hispanic colonialism, whose Catholic doctrine assimilated indigenous people — all indigenous people — to the status of minors in need of guardianship that would be provided by both the Spanish Monarchy and the Roman Church. Of course, Catholics did not repute Protestants as good guardians. On their part, Justice Marshall and the United States jurisprudence would think otherwise. This was how majority become minority, or so it was deemed and engineered by the dominant party. In the 18th century, the *law of nations* as a modern version of the *ius gentium*, one version that was less Catholic, albeit ever Christian, preferred to resolve the indigenous question through apartheid, by treaty-making or otherwise, and hence escape responsibility as for their status, but the United States jurisprudence, facing troubles and wishing powers, turned to a minority framework in the early 19th century.

It was *oeconomy*, we know. It is a colonial approach that has never disappeared completely, even when the indigenous people came to be considered citizens, such as the Latin American States, including Mexico of course, did by and large since early times. We know that, all over the Americas, in the perspective of constitutional States, equal citizenship and degrading minority are compatible status for indigenous peoples. According to all American constitutional culture and practice, including reservations' constitutionalism, they may be citizens and wards at once and during their whole lives.

It may be the right time to warmly recommend two complementary readings by the same author: R.A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, Oxford University Press, 1990; *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*, Oxford University Press, 1997. The former contains the most enthralling presentation of the culture medium of *ius gentium*, *derecho de gentes*, *droit des gens*, or *law of nations* from the European

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medieval narrow-mindedness until the 19th century constitutionalizing of the unconstitutionalizable in the United States. *Linking Arms Together* shows the other side of the coin, the indigenous point of view on relations among free and equal peoples for mutual profit and well-being. You may add, if you can read Spanish, for information rather than approach, Abelardo Levaggi, *Diplomacia hispano-indígena en las fronteras de América. Historia de los tratados entre la Monarquía española y las comunidades aborígenes*, Centros de Estudios Políticos y Constitucionales, 2002. The outlook is the characteristic of the *Derecho Indiano*, the Hispanic construct somehow equivalent to the *Federal Indian Law*, a round set of law intended to legitimately come just from the European or Euro-American party and not from the American peoples themselves in the first place, as being in their own lands and facing invasion. Neither do you get a proper and accurate sight of non-indigenous law in colonial, even constitutional, environment if not taking into account the indigenous own vision restraining, counteracting and, above all, ruling by itself, on grounds of independence, competition, or concurrence. Nevertheless, as we are aware up thus far, mainstream historiographical and constitutional research is simply blind. And anthropologists hardly supply the needed kind of constitutionalist research and thinking. Usually, they patronize indigenous people and thus block the point, too.

Trying to help with the solving of the legal deadlock, I have borrowed some wording and thinking from James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge University Press, 1995, and Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press, 2000. This recent branch of literature dealing with constituent diversity (with constitutional arrangements of diverse polities beyond federalism because of the constituent right which each one is entitled to, first including indigenous peoples) takes into account Anglo America (Canada and the United States), other Anglo States outside Europe (such as New Zealand and Australia), and even European cases, but not Latin America: Alain-G. Gagnon and J. Tully (eds.), *Multinational Democracies*, Cambridge University Press, 2001. For our comparative Anglo-Latin American purpose, this genre turns out to be of little help or even helpless, as it is not advisable to extrapolate. Comparison must rely on research. Mexico not excluded, we are badly in need of studies from Latin America or rather Indo-Latin America about the constitutional standing of indigenous peoples. The problem with this approach to constituent diversity is not that it does not address the Latin American challenge, but that it has no clear awareness of the gap. Anyway, as you may appreciate through the set of reading recommendations made and to be added, it is not precisely for want of literature that shortsightedness and even blindness occur in both the constitutional and historical field as they are closely related. More often than not, Anglo scholars, first including the United States to be sure, are simply unaware of their own ignorance of non-Anglo matters even despite current curricula on cultural, so-called subaltern studies, and the like at Anglo universities.

Constitutional standing of peoples may mean unconstitutional policy from States. Unconstitutional history matters to constitutional regimes. By linking with the not so constitutional present, the past of unconstitutional handling of indigenous peoples by non-indigenous States may still be most important both to catch sight and gain an insight. However, observation

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does not ever match understanding. Specific research may turn out to reproduce mainstream stance. See Manuel Ferrer Muñoz and María Bono López, *Pueblos indígenas y Estado nacional en México en el siglo XIX*, Universidad Nacional Autónoma de México, 1998; M. Ferrer Muñoz (ed.), *Los pueblos indios y el parteaguas de la independencia de México*, Universidad Nacional Autónoma de México, 1999. In fact, the sequence of peoples and State goes in reverse, so that indigenous polities are not addressed. Notice the working presumption that *Mexico*, just like other American States, and not indigenous peoples, pre-existed in history and pre-exists in law as a body politic. All the rest, implying derogation of indigenous standing, can follow even when you feel and apply empathy and diligence. Thus, there is no constitutional challenge of *multinational democracy* to be faced. As cited, Timothy E. Anna, *Forging Mexico, 1821-1835*, contends the evidence that *Mexico* did not exist before cultural and institutional construction following independence, but, as usual, despite the clarifying, he does not therefore realize that indigenous *peoples* were instead there. Then, the Floridas delivered thus far, Mexico encompassed Texas, future New Mexico and Arizona, both (today Mexican and United States) Californias, not to say part of Nevada, Utah, Colorado and Oklahoma, and so Navajo, Apache, Papago, diverse Pueblo such as Hopi, and many other indigenous polities there. What could really be then *Mexico* and *the United States* as for the present extent and identity from Rio Grande to Chiapas and from Coast to Coast and beyond, respectively? What would they turn out to appear if indigenous polities are duly taken into account? History or rather historiography shuts its eyes to evidence. Historians help with minority making when, at worst, nullification is not what they instead render. Do not forget that legal or even plain historiography may bear a performative effect on constitutionalism itself through social imaginary. We know how both historians and anthropologists create and eliminate peoples in history and the present while the same peoples do not always succeed in achieving even self-naming. Remember *Anasazis*, *Sinaguas*, and remaining *Pueblos*.

One may see (as a matter of policy and law), yet not see (as a matter of polity and rights), all at once. Let us take a look at the impressive survey of American (meaning as usual the United States) last century legal history by Lawrence M. Friedman, *American Law in the 20th Century*, Yale University Press, 2002, *Introduction*, 9: "Once the United States grabbed Puerto Rico and the Philippines [from Spain in 1898], it became a true empire; for the first time, it held territories that it did not intend to groom for statehood. Those regions were something truly new and different; they were not *territories* in the classical sense; they were colonial possessions". Through this narrative, the experiences of Indian reservations are further ostracized; including the case of *Indian* Oklahoma "intended to groom for statehood" till the turn of the century. Between past *oeconomical* issues (in the *domestic* sense we know), both women and African-Americans are not disregarded as much, related as they are even by the 1964 Civil Rights Act, indigenous people not being included except through the more restrained and controversial sections on Indians of the 1968 Civil Rights Act. Constitutional integration does not represent such a challenge as constituent autonomy or the so-said Indian sovereignty, considered though it is (as a matter of index) by L.M. Friedman. Reservations "were (are) not *territories* in the classical sense; they were (are) colonial possessions", were (are) not they? On the

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continuity between continental and overseas colonialism, including cases "groomed for statehood" such as Hawaii, you may resort to Ward Churchill, *Perversions of Justice: Indigenous Peoples and Angloamerican Law*, City Lights Books, 2003. Furthermore, let us notice that the seemingly complete index of L.M. Friedman's *American Law American Law* does not encompass international law *in the 20th Century* (7), which we are coming back to or rather, from mid-century, first arriving at.

15. *Toward a post-colonial world: out of primitive law of nations and far away.*

International law was there, first the law of nations standing for European and Euro-American supremacy; later the international organization challenging — not deeply — some established assumptions — not many — about who is a nation and how nations ought to behave themselves. Good manners were about to change apparently for the better. Maybe an international set would be arranged providing the indigenous nations with decent room in a human condominium freely shared with other peoples in the Americas and everywhere. Remember *Hodenosaunee*. What constitutionalism did

(7) Out of the index (582: "This [international branch] is a bulky body of law that might rival in size the federal code of laws. We have not examined it in this book..."), towards the end, together with bilateral treaties and globalization, international law takes up few pages containing no mention — needless to say — to Indian nations. Let me check a single, sensitive question. A brief reference is made to international child law (586, on custody disputes). Elsewhere (444-446), something has been added: "Children were taken from their homes and given to strangers... Native American adoptions were condemned as a form of genocide", never spelling out that the genocidal construction even for mandatory education in an alien culture through abduction is not an anonymous opinion, but a classification by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948). Regarding international further concern with indigenous childhood, we are going to take shortly into consideration the Convention on the Rights of the Child (1989), an instrument signed by all United Nations Member States apart from Somalia and the United States. A given policy conveys no sound explanation (586-587: "The United States has not, in fact, signed the International Custody Treaty. In many regards, the United States is a classic nonsigner"), as the United States approach is not characterized by inhibition. Actually, as a sort of alternative to the United Nations Convention, the United States advocates the lower profile policy on child rights, unconcerned with indigenous childhood, of the Hague Conference on Private International Law. Really, leave aside peremptory misidentification and misconstruction of international instruments, there is no place for the issue in *American Law in the 20th Century*. Comparatively, Mexico is a cooperative and yea-signer United Nations Member.

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not render — Indian coming of age from the non-Indian standpoint — was expected from international law, as if this had the capacity. Is it the case?

It is at least a chance. Given the historical coordinates of the unequal and impaired standing of indigenous people (through both openly and overlapped constitutional devices and under the weight and force of the pre-constitutional culture which the law of nations inserted in constitutional times), development towards equality and fairness is more unlikely to come from constitutionalism than from the international realm. As a matter of fact, the States law, as we have observed both in Mexico and the United States, is arriving at a tour-of-force that seems a cul-de-sac, while the international system may instead develop in the direction of equal terms among both individuals and peoples concerning rights, all in the plural. You may compare the meanings of the right to self-determination in both the Constitution of Mexico and the legislation of the United States on the one hand and in international law on the other.

No doubt that constitutional law, as State law, is in a good position to recognize and guarantee individuals' freedoms but not peoples' rights to the same extent. It is even at odds with the accommodation of indigenous communities, let alone indigenous peoples. We have contemplated a constitutional history of hiding and failing, a constituent past of smoke and mirrors. Constitutionalism was not born as a self-sustainable creature. As long as it encapsulated and encrypted colonialism, constitutionalism, both Anglo and Latin, has relied on the law of nations. Law of nations determines polities on colonial grounds. Constitutions follow. To overcome the foundation on colonialism, can constitutionalism become self-sustained? Nonetheless, the very law of nations is shifting to a different class of international law, this is, the human rights constituent kind.

Indigenous peoples are involved. If constitutionalism may result in a present of effective accommodation and even active participation for them, this will not be on constitutional credit. According to the old law of nations, constitutionalism has assumed that indigenous peoples ought to give up their own means of individual existence and collective reproduction, such as languages, communities and cultures, or their entire sovereignty in brief, to be recog-

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nized as people entitled to civil and political rights and to participate as full citizens on an equal footing. International law, if it is finally the law of human rights, must consider otherwise. Constitutionalism was born colonial between Europe and America and did not go native in the Americas. Yet something of this sort also happened with the birth of human rights international law in the mid-20th century (the Universal Declaration still assumed that you could hold individual freedom under alien political subjection or unnamed colonialism), but times have changed since then through the ongoing, not yet accomplished decolonization.

> *Universal Declaration of Human Rights* (1948). Art.2.1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Art. 29.1 Everyone has duties to the community in which alone the free and full development of his personality is possible.
>
> *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960). Art. 1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation. Art. 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Let us go international to be inter-native. Suggesting this change of character and direction, I am not contending that the actual ground of indigenous rights must currently be international law. No doubt that the standing must be properly rooted and activated at home by the indigenous communities and peoples themselves. What I am about to argue is that maybe, as we live so far (since the mid-20th century) in a common legal humankind, the necessary additional reliance on non-indigenous law should be on international rather than on State law, let alone constitutional. History is not a decisive argument, but thus far it may show what constitutionalism is able to render. As we have clearly seen in the very case of the United States, even the colonial law of nations together with the older *ius gentium* may be yet overlapped inside the constitutional

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system and amid Indian quasi-self-governments. In fact, this pre-constitutional kind of international law is still somehow obscurely in force all throughout America, Latin and Anglo. Thus, given all that, let us make the turn. Maybe we shall find a more promising scenario in the present international law.

At this level, after the introduction of human rights, the law of nations or international law is evolving into something different and far from the cultural prejudice or even racism that once sustained non-indigenous colonizing supremacy. International law no longer reflects what it used to be in the 19th century and before, since European medieval times, concerning non-European or non-Christian peoples. Today, the so-called international law is also constitutional law in the good sense that it is primarily based on rights, not on powers. It is committed to the entitlement of freedoms rather than the empowerment of States. The latter depends on the former.

Constitutionalism, State constitutionalism is never standing by itself. Yesterday it was backed and shadowed by the law of nations, and today it is framed and enlightened by the international law of human rights, whence both the current Mexican constitutional language and the United States Indian Law present phrasing come. Yet, the "right of indigenous peoples to self-determination" has been adopted by them and not yet by international law, which only takes its possibility into consideration. We know that States do not provide the way to implement such a principle. Perhaps they are pre-empting international legal evolution as well as indigenous claims.

The implementation may be an unfeasible task for State constitutionalism by itself and a hard one for international law as a supplementary form of constitutional order also based on rights, not on powers, the order finally in common among peoples, both non-indigenous and indigenous on an equal footing. The very right to self-determination for indigenous peoples or, to put it another way, the Indian sovereignty itself can be taken quite more seriously to its fullest extent by international law than through and amid State constitutions. Of course, this verification does not justify Mexican fake, neither does it excuse false sovereignty in the quasi-constitutions of Indian reservations within the United States, but it may help to explain actual problems and face present challenges. The defini-

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tive accommodation of Indian peoples exclusively under non-international constitutionalism does not seem a good recipe.

International Covenant on Civil and Political Rights (1966). Art. 1.1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. Art. 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

International Covenant on Economic, Social, and Cultural Rights (1966). Art. 1.1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989). Art. 1. This Convention applies to: (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. 3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Convention on the Rights of the Child (1989). Art. 30. In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992). Art. 1.1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. Art. 2.1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of

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> discrimination. Art. 3.1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination. Art. 8.3. Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.

At this point, we may be mostly interested in the broad definition of self-determination not just political but economic, social, and cultural too, all as a human right that might come to enable indigenous together with other peoples, no longer thus minorities. Anyhow, let us highlight that the definition is provided not by a particular author or political theory, but by legal instruments that are today in force generally as development of human rights law and especially, in the case of conventions, through optional ratification by Member States of the United Nations. Mexico usually signs to a greater extent than the United States.

Mexico has ratified the Convention Concerning Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization that grants no right to self-determination (and cannot do so, as this body is only a specialized agency of the United Nations), yet, on a lower profile, requires the indigenous peoples to be consulted by respective States when taking any normative or administrative decision affecting them. This is one of the grounds on which, as we saw, indigenous peoples fight the 2001 Mexican constitutional reform bearing the fake, maybe pre-emptive grant of self-determination. Thus, they have a legal point, although the Mexican Supreme Court, as we also saw, did not uphold the claim. Maybe, the International Labor Organization is also pre-empting proper acknowledgment of the right to self-determination as for indigenous peoples.

> *Draft United Nations Declaration of the Rights of Indigenous Peoples* (1994). Art. 1. Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. Art. 2. Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity. Art. 3. Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their

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economic, social and cultural development. Art. 4. Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

16. *Beyond minority: current human rights.*

Today, for both indigenous and non-indigenous people, the international law of human rights, as represented by the United Nations, takes into consideration rights beyond the individuals' entitlement to freedom, but discriminating group categories such as peoples and minorities. Still we find the word *minority*. Is it the old colonial construction? Let us notice that, according to the international law in force today, indigenous peoples are not *peoples* but *minorities*. Sometimes they are called peoples in international practice and proceedings, yet they are treated as minorities all the same. Rights make the difference. Peoples are entitled to freedom, to collective freedom by themselves, while minorities are located under protection by States alien to them. Yet we find the guardianship that does not dare to show its face nowadays. So far, it is a power with no name.

For international law, minority is still a qualitative, not a quantitative category. On behalf on the United Nations, nobody travels to Guatemala, Bolivia, Oaxaca, other Southern States of Mexico, or all along the Americas, counting people, defining who are indigenous, and resolving whether they are minority or not in accordance with statistics. Basically, nobody wonders if the yardstick must be the States or the indigenous territories and communities themselves. And who is to be the definer of people as polity by themselves? For international law, minority is a category prior to and irrespective of any experience, evidence, definition, or determination. In fact, a minority today happens to be for international law the group with a culture alien to that of the respective State even if they are an actual majority on the spot, even if they have not been superseded in their own territory by the non-indigenous people who constitute or dominate the very State polity, by the people stemming from Europe in the case of America. Minority is minority even if it is majority. Thus, indigenous peoples are indigenous minorities and that is

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deemed the end of the question pretending to be the end of history — colonial history.

It is not so, we know it. History is far from over, happily alive in the present time and for the long future. Today is also history and so will be tomorrow, the same and a different story. Freedom, everybody's freedom, can make the difference. Things are changing between past and present. In the very light of current law, there are rules that may now turn out to be misrules. If the legal category of political minority stems from current either reality or legality, it is through the European colonialism that assimilated non-Europeans with non-adults, regardless of their age. Constitutional minority comes from domestic *minority*. There still is *oeconomy* in the old sense inside constitutionalism. Yet there may be an overlapped thread from Hispanic colonialism to interamerican and international law through both the United States jurisprudence and all American legal culture and practice as regards indigenous people. However, the margin of historical continuity does not properly characterize the current legal situation. Thanks precisely to the evolution of human rights, the category of minority is today a problematic and controversial construction. It is actually in the process of being deconstructed as a kind of both collective and individual legal status. International law may be on the threshold of recognizing that peoples are by no means minorities and furthermore, that none, either person or group, deserves the downgrading designation of minority.

First of all, the basic category of individual minor is being revised. For the 1959 United Nations Declaration on the Rights of the Child, children and teenagers, the proper minors, were people entitled to rights only in relation with their future as adult individuals; meanwhile, for the time being, they were only credited protection — family or domestic care as a general rule or formal guardianship if needed. Four decades later, this is not the approach assumed by the 1989 United Nations Convention on Rights of the Child, whose vision is that children and, especially, teenagers are entitled to present and not only future rights to actual human freedom. Their upbringing must be developed on rights, and not only for rights, or better it should be performed for rights through rights at a gradual extent in accordance with their actual age. After

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the Convention, teenagers, as legally minors, are now entitled to real exercise of freedoms.

The Convention repeats for children and teenagers the same basic set of rights to personal freedom given for adult people in international law. When it arrives at minorities' rights, there comes an innovation. Contrary to the 1966 International Covenant on Civil and Political Rights, where the collective minority classification was adopted as a development of human rights, the 1989 Convention on Rights of the Child considers indigenous background as establishing a position different from that condition — the minority. The effect and extent of the divergence is not specified, but the mere eloquent suggestion of the difference may be far-reaching in its future result. Precisely when the subordinating category of minor people in the individual sense is being superseded by the international law of human rights, it is thus insinuated that peoples such as the indigenous are not exactly minorities.

At their best, most constitutional regimes, including both Mexico and the United States — as the good guardians they consider themselves to be — treat indigenous people in just that way, as legal minorities without proper entitlement to their own rights to human freedom. In front of this, tomorrow or even today international law can make the difference. Constitutions may follow.

S. James Anaya, *Indigenous Peoples in International Law*, Oxford University Press, 1996 (updated edition and Spanish translation forthcoming), *Introduction*: "Half a millennium ago, people living on the continent now called North and South America began to have encounters of a kind they had not experienced before. Europeans arrived and started to lay claim to their lands, overpowering their political institutions and disrupting the integrity of their economies and cultures. The European encroachments frequently were accompanied by the slaughter of the children, women, and men who stood in the way (...)".

David H. Getches, Charles F. Wilkinson and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 4th ed., West Group, 1998, 904: "(...) [I]t is clear that a global transformation in legal consciousness about the rights of indigenous peoples in the modern world is occurring, and the voices of indigenous peoples are a vital part of that movement. How those voices will continue to shape the domestic and international law of their colonizers represents one of the most important issues raised by the comparative study of indigenous peoples' rights".

Felix Cohen's *Handbook of Federal Indian Law*, chap. I, sec. 1, *The Field of Indian Law*: "Indians are human beings, and like other human beings become involved in lawsuits (...)". So reads the beginning of this classis handbook. Let us imagine a new, natural, genuine start: "Indians are

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human beings, and like other human beings are entitled to human rights as both individuals and peoples (...)". Imagine there were no suspension points. John Lennon's tune may help.

Definitively, I am making strange bedfellows. To add another one, let me recommend Luís Rodríguez-Piñero, *Between Policy and Rights: The International Labour Organisation and Indigenous Peoples*, forthcoming.

17. *Non-indigenous constitutions and indigenous entitlements.*

We, both constitutional historians and constitutionalist lawyers, are accustomed to look at constitutions and consequent jurisprudence for rights. It is a good practice for the benefit of individuals, but not necessarily for the benefit of peoples, as the same constitutional — and constituent — rule of law does not always apply to people and peoples alike. People and peoples are not two different kinds of subjects entitled to freedom's rights. They are the same stuff. Peoples are made by people. Individuals' rights are currently recognized and guaranteed by peoples' rights through constitutional instruments even irrespective of collective self-identification. However, there are basic rights of the individual human being, such as all cultural rights, that cannot be properly enforced by other peoples' polities. Not even individuals' rights are strictly non-collective. Collective warrant and social exercise make sense out of individual's freedom. As a constitutional concern, all rights are collective.

There is logic and method in the 1967 International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights — the main instruments developing human rights law — when they both begin with listing the single peoples' right to economic, social, cultural, and political self-determination in order to deploy individuals' freedoms immediately after. The former may be the condition for the latter. When you are an individual identifying yourself with a people or nation that holds the capacity to have a polity on its own, there is no constitutional hindrance for your individual freedom. When you are not, then the problem arises. Further, paying attention, we realize that States and peoples are not, as usually assumed, coterminous. As a matter of fact, there are unconstitutionalized peoples and thus unconstitutionalized people, human individuals not entitled to an equal entitlement of rights. Overlapped constitutionalism, or rather hidden unconstitutionalism,

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does the dirty work. We are badly in need of an integrated constitutionalism for the sake of everybody, and not only for actual constitutionalized people.

Is the task feasible in exclusive constitutional terms? History does not give a definitive answer, but indeed poses the doubt. In times of human rights and subsequent democracy, answering is up to people, not to masters of law and history. If we continue assuming that States and peoples are coterminous and thus that rights may be sufficiently accommodated by constitutions and State democracy, and if we do not turn to the constitutional dimension of international law regarding rights, then there is no way out of a history of dispossession and subjugation for some peoples, such as the indigenous, on the part of others, such as the ones from the European branch. Anyway, the whole of humanity in the singular is not a good polity. We need — duly integrated — both States' or rather peoples' Constitutions, and United Nations' Declarations and Covenants, both constitutional and international freedom's law.

International human rights law is not a replication that backs constitutional rights or assists in their construction. It adds something basic to both individuals' and peoples' rights. Today, most of the Latin American Constitutions recognize indigenous rights, if only, such as Mexico with the right to self-determination, under the legislative and judicial State and even inner states' powers. State conveys however a deficient ground and a defective authority for non-exclusively individuals' freedoms — all constitutional rights. Proper integral recognition and guarantee of indigenous titles may instead come, on the one hand, from the peoples themselves and, on the other, from international law. Contrary to the United States of America, some of these Latin American Constitutions also recognize the superior legal force of United Nations instruments on human rights and usually sign the international conventions.

As implying an international standing, treaties matter — the treaty-making device rather than the past contents of specific settlements. Between non-indigenous States and indigenous Peoples, treaties might be better constitutions than the constitutions themselves as long as the latter entitle and empower States over Peoples, while in the former, even in the most downgrading historical settlements, both are parties retaining bare title at least. On their part, still

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in the case of upgrading contents, Indian quasi-constitutions do not match treaties, to be sure. All in all, for indigenous peoples, a friendly future may be better offered by international law than constitutional grant. Or maybe the approaching times belong to both of them in this precise order, beginning with the equal and fair recognition of rights, of human rights of course.

On the actual difference made by indigenous peoples in the international legal field, there are other updated advisable readings besides James Anaya' s *Indigenous Peoples in International Law*, mainly Patrick Thornberry, *Indigenous Peoples and Human Rights*, Manchester University Press, 2002, for information, and, for perspective, Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity*, University of California Press, 2003. For a Latin American constitutional panorama on indigenous peoples in English, Donna Lee van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*, University of Pittsburg Press, 2000, focuses on Colombia and Bolivia, yet contains a comparative chapter about *Constitutional Multiculturalism* all through the region. For further fresh information (fresh when I prepare the paper for the seminar), David Maybury-Lewis (ed.), *The Politics of Ethnicity: Indigenous Peoples in Latin American States*, Harvard University Press, 2002; Kay B. Warren and Jean E. Jackson (eds.), *Indigenous Movements, Self-Representation, and the State in Latin America*, University of Texas Press, 2002. The specific constituent challenge of *multinational democracy* is not faced by this branch of Latin American studies. The proceedings of a workshop on *Indigenous Peoples, State Constitutions, and Treaties and Other Constructive Agreements between Peoples and States* (International University of Andalusia, mid-September, 2001), are to be published in *Law and Anthropology: International Yearbook for Legal Anthropology*.

Let me end these inserted notes with some reflection on sources and authorities. So far, we know that most of our supportive documents, the constitutional and the unconstitutional, are easily found on the internet. Today, you are supposed to rely on the computer screen even if it does not deserve as much credit as the long lasting standardized criteria of editions on paper. On this not so obsolete support, for the United States I have mainly resorted to Francis Newton Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, and Colonies Now or Hereafter Forming the United States of America, Compiled and Edited Under the Act of Congress of June 20, 1906* (1909), William S. Hein and Company, 1993 (however, on the internet, *129.2.168.174/constitution*, the *NBER/Maryland States Constitutions Project* is currently proceeding to amend Thorpe' s edition). This collection happened to end precisely with the establishing of the State of Oklahoma: vol. 5, 2960-2981 (Enabling Act, the one together with Arizona and New Mexico), and, in extremis, vol. 7, 4269-4344 (Admission and Constitution, 1907), a most significant outcome in the historical formation of the United States and the actual termination of *Oklahoma* itself, this very word meaning Indian home as we know. You may also find on the internet, on the site of the Oklahoma State University Library (*digital.library.okstate.edu/kappler*), the equally official

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collection of Indian treaties by Charles J. Kappler, *Indian Affairs: Laws and Treaties, 1778-1883* (1903-1941), vol. 2, *Indian Treaties*, reprint, Amereon House, 1972. It is worth taking a look between the lines at the 1907 Oklahoman constitutional document (as with every American constitution, past and present, Anglo and Latin), searching for the Indian presence as if it were on the negative of a photograph. It is up to you, kind attendant or attentive reader. Learned people do not always help. F.N. Thorpe, the editor of the state constitutions, was a concerned author and citizen of the constitutional kind, an insufficient qualification for the indigenous issue nowadays and yesterday if you belong or are related to a colonialist environment that fails to identify colonialism. Ignorance from expertise is most relevant for practice. Actually, minority making is a fait accompli by both careful institutional and careless intellectual devices. The latter is up to constitutionalism and historiography. Thinking and wording, teaching and writing, articulating and publishing, all are social and political actions bearing even legal effects. Any performance may be performative. Make-believe also engenders bare reality, or at least helps. We know that peoples are cleansed by virtual science prior to actual policy. Anthropologists may behave like conjurers making peoples appear in the past and disappear for the present. Historians follow. Historiography rather than history — fiction rather than fact — bears constituent effect on constitutional agency. It is the constitutions' turn (as for polities, they are definitively derivative). Genocide goes in between. I hope not to be overstating for the sake of the present argument (let me resort to *Genocidio y Justicia: La Destrucción de Las Indias Ayer y Hoy*, Marcial Pons, 2002). We were not to deal with brute force, yet we have found out that even killing fields could be covered by concurrent authorities: farsighted treaties, silent constitutions, unconcerned constitutionalism, outspoken law of nations...

Regarding ourselves — I mean academic people —, does language — I mean the English language I am now using first for a presentation and next in writing — make a difference as for authority? "Writing in Spanish means, at this time, to remain at the margin of contemporary theoretical discussions" (Walter D. Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization*, University of Michigan Press, 1995, *Preface*, viii). I do not dare to argue over such an overstatement and its aftermath (as the book links Hispanic culture to colonial venture along with indigenous articulation and multicultural outcome, it prompted controversy likewise Latin American and definitively in English; check Jorge Cañizares-Esguerra, *How to Write the History of the New World: Histories, Epistemologies, and Identities in the Eighteenth-Century Atlantic World*, Stanford University Press, 2002), but I stress linguistic interfaces through recommendations and references. We cannot chase our own shadows. Medium's authority is a colonial mechanism and no language is neutral, yet it makes no sense to lay the blame on English on behalf of Spanish. They share in common their enormous strength in front of stateless languages, the indigenous American languages. "The authority of the historian derives from the privilege of the historian — to do research, read, reflect, organize and present authoritative historical accounts. It is a privilege — and an authority — granted by the community, academic and non-academic, and at the same time taken and maintained by the historian through a process of claim (assertion, proposition) and dialogue in which s/he needs continuously to persuade the

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community (primarily academic but, to a certain extent and at certain times, non-academic too) of her/his authority and expertise. The assent of the reader is a crucial part of the authority of a text" (Gyanendra Pandey, "Voices from the Edge: The Struggle to Write Subaltern Histories", Vinayak Chaturvedi (ed.), *Mapping Subaltern Studies and the Postcolonial*, New Left Review — Verso, 2000, 281-299, 298). *Reader* is supposed to mean *lector* scanning beyond Spanish, *tlamatinime* perusing more than Nahuatl, *reader* reading not just English, and a long both non-academic and academic — thus democratic — etcetera, ending the discrimination between silenced and silencing languages and peoples.

18. *Epilogue: from (American) freedom's law to (Human) freedom's rights.*

Nihighí yá'ádahoot' eéh.
Nihinagóó yá'adahoot'ééh.
Nihighan bich'ii 'atiingóó néiikah.
Diné Lyrics (8).

Once upon a time, over a pair of centuries ago, a creature was born and nicknamed rather than Christianized, even though it was undoubtedly a Christian offspring. Its name was and still is (happily alive) Constitution with the capital letter, thus designed to signify the basic and necessary legal and political structure of societies bound and eager to recognize and guarantee some basic human freedoms. Now grown up or even aged, it, she, or he bears other related names always embracing the specific commitment to some kind of actual liberty. Constitutionalism means, when words are not distorted or perverted, legal and political practice and thinking with the aim of rendering rights to freedom. Freedom's law is a fresher name for the same meaning, that is, law intended to provide freedom by recognizing and guaranteeing rights.

Human freedom is not the same creature as what today we academic people call freedom's law and the like, as long as the latter

(8) "Our hearts are good. All around us is good. We ride along on the home trail" (Peter IVERSON, *Diné: A History of the Navajos*, University of New Mexico Press, 2002, 172, quoting from Ann Nolan Clark). Remember the words of Hastiin Dághaa (alias *Barboncito* in the colonial, derogatory language) in 1868: "Today is a day that anything black or red does not look right, everything should be white or yellow representing the flower and the corn" (so the translation reads as Hastiin Dághaa spoke in Diné and Spanish during the talks leading to the last treaty).

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was actually born as a biased venture and thence may bear the inheritance of social supremacy or even legal dominance by some people over others. As an accomplished Christian construct, American constitutionalism deployed the paradise of freedom, the purgatory of dependency, the hell of slavery, and the limbo — a nowhere place. Indigenous people were granted a shared site, the purgatory together with children, women, and workers, and an exclusive club, no other than the limbo.

European conquering people were the inventors of constitutionalism for their own benefit, not for everybody's sake, to be sure. As it entailed freedom just for male proprietors over women, workers (slaves included), and non-European people, it may still inspire and imply subjugation and inequality even on non-racist and egalitarian grounds. Being originally aimed and framed on such other assumptions, the challenge of universal freedom is for constitutionalism neither a fulfilled easy evolution nor an ever-feasible present. The bleeding crux is that in the very assertion of freedom's law subjugation's order may be embedded. The point is most disturbing, I know.

Remember the first statement of the first Declaration of Rights of the first proper Constitution in American and even human history: "All men are by nature equally free and independent and have certain inherent rights". This was stated in Virginia in 1776. Then and there, not everybody was the *man* so entitled to freedom and independence by the very nature. Women did not count. Hired labor was dependent. Slavery existed. Indigenous peoples were impaired and dispossessed on the constitutional way to the limbo. The statement referred to *men*'s rights and therefore, in such a context, powers. Freedom and subjection were at once established and guaranteed. Constitutionalism encompassed the two elements at the same time — rights' entitlement for the happy few and downgraded standings for the unlucky many. The former implied the latter. First of all, prior to anything else (including constitutionalism) law was a family affair with the *man* as paterfamilias entitled to both freedom as an individual and power as the head of the extended household, freedom and power indoors as well as elsewhere. The name of the game was strict minority-making out of an overwhelming and diverse majority.

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On those impairing and unequal assumptions, European and American present States were constituted in the past, once upon a time (remember El Alamo: "All persons, Africans, the descendants of Africans, and Indians excepted", and women excluded from scratch). From then on, as the benefit and extent of freedom have really widened, as people other than the male European or Euro-American proprietor and paterfamilias are being incorporated, assumptions have changed and so are States themselves changing for the sake of everybody but indigenous people. As far as they represent peoples besides individuals, human cultures besides human beings, the pending question is not the same as, say, for women's and workers' sake, that of expanding, sharing, and especially reframing common rights to freedom.

As concerns Indigenous Peoples and maybe even African-Americans, social polity and political constituency matter (this is, as we know, human support and agency of law and constitution). Every State cannot give surety to every right of every human being. If so, what do we need the plurality of polities and constituencies for? And more of them are sure needed. Indigenous peoples are people invaded and dominated who therefore have not enjoyed the chance to determine the whole set of their constituency and law on behalf of their rights. The ensuing claims for their own polities appear to make sense, does it not?

"Our [United States'] Indians are a tiny though now a growing minority. But south of the Rio Grande, the Indians number not hundreds of thousands, but millions. Pure-blooded Indians are the major population in Mexico, Guatemala, Honduras, Peru, Ecuador. There are thirty million Indians — one growing race, and one of the world's great races. And that race is marching toward power. It may be that the most dependable guarantee of the survival and triumph of real democracy in our hemisphere, south of the Rio Grande, is this advance towards power of the Indians", so spoke John Collier, the second most prominent politician on Indian affairs maybe in all-American modern history. (Guess who deserves to be acknowledged as the first one. Bravo. You are right. He is, to be sure, the Chief Justice Marshall, the one who decided the Cherokee cases' trilogy on political rather than legal grounds and so the guy who set the still standing rule of indigenous minority relative to the United

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States in spite of then present and future constitutions, treaties, and even New Deal, Civil Rights, and Self-Governance Project). As for the Collier's discourse, apart from the *race* language — apartheiding and amalgamating indigenous peoples — and the United States supposed difference, it has still a point. You make minorities even out of recognized majorities. *Race* wording turns out to also derogate from rights of African-American and Asian-American people. Thus, only Euro-Americans together with Europeans still manage to get themselves to constitutional safety. This way, all in all, what is at stake may actually be democracy, the *multinational* or multi-polities democracy instead needed, what is beyond Collier's point as well as the United States and Mexican federalism (9).

Human freedom is at stake indeed. The question involves a matter of law, of indigenous law, and not only a matter of rights, of human rights, if the latter would only mean individuals' together with collective but non-constituent rights. In fact, if we take human rights seriously, the universal title and particular claims to different human polities must be faced as collective and constituent freedom conve-

(9) John COLLIER, "American Handling of the Indigenous Indian Minority", a 1939 speech, quoted and commented by F.S. Cohen, *Handbook of Federal Indian Law*, reprint 1992, *Introduction*, VII. J. Collier — an anthropologist — was the Indian New Deal man as the Commissioner of Indian Affairs from 1936 to 1945. F.S. Cohen served in the Solicitor's Office of the Interior Department from 1933 through 1947, becoming in 1939 the Chief of the Indian Law Survey and thus Collier's legal stuntman. The impressive *Handbook*, actually a collective work (1941, other editions following since the definitive issue in 1942, some of them distorted; an updated one is scheduled for 2004), was a key weapon of the task force for the Indian Reorganization through constitutions and incorporations of the reservations, as we have seen (the *Handbook* is available on internet: *thorpe.ou.edu/cohen.html*, as well as the catalog of Cohen's files: *webtext.library.yale.edu/xml2html/beinecke.cohen.nav.html*). Over thirty million Indian people in the Americas is the present estimate, being a clear majority at least in Guatemala and Bolivia relative to States, and everywhere (included the United States) relative to themselves. If you begin by saying *our* Indians, you cannot observe the latter. Thus, you make minority out of peoples from the start: *The Indigenous Indian Minority* (peoples of Alaska, Hawaii, and other then and today overseas *territories* such as Guam, although likewise *minorities*, are not misnamed *Indians*). We know the current constitutional Mexican reference to *its* — Mexican Nation's — indigenous peoples. I cope with the stake on *national* democracy through "Virtual Citizenship, Electoral Observation, Indigenous Peoples, and Human Rights between Europe and America, Sweden and Peru", *Quaderni Fiorentini*, 31, 2002, 653-779.

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nient or even necessary for individuals' rights. Why are there some peoples and not others entitled to cultural, social, economic, and political self-determination, to their own polities in a word? Why are there peoples empowered to make constitutions and others can only produce quasi-constitutions or no constitutions at all? Why are there only some peoples' histories and cultures relevant to polity-self-making and why are added for a rest of them — the indigenous kind — anthropologies adversely significant as alien constructs, what worsens it all? Why are there self-made and non-self-made polities?

Wording matters. Meaning does. Why today do words exist, words such as constitution, nation, polity, self-determination, self-rule, self-government, home-rule, self-administration, autonomy or also sovereignty, which hold a meaning for some peoples, State-makers or self-made-polities, and another different sense for the rest, that is, reservations, tribes, bands, communities, minorities, or groups' constituents? Remember *home rule*, *self-government*, *self-determination*, and *self-governance*, not to mention *Indian inherent sovereignty* and *government-to-government relationship*, all according to the seemingly constitutional approach from a set of the United States Acts (1934 Indian Reorganization, 1968 Civil Rights, 1975 Self-Determination, 1994 Tribal Self-Governance), and all regarding alien-made-polities in spite of the repeated self with hyphen. Despite so much *selfism*, meaning turns out to be inconstant and inconsistent.

Why do words, such as Indian or tribal, indigenous or communitarian, make such a difference? In the United States as well as in Mexico this wording does at least imply some intended kind of local confinement for Indian polities along with economical dependency through social policy not very far away from old *oeconomical*, *domestic* regime. *Oeconomy* meant home rule, a rule severely dependent on non-oeconomical law and policy. Home rule stood for both local sphere and indigenous standing, the former for municipalities in Europe and America, and the latter for colonized polities in Africa and Asia. As for the indigenous peoples' standing in the Americas, there has not been much actual discontinuity between colonial and constitutional times. To put it another way, there has been in the Americas no real decolonization, the unambiguous one that emancipates intruded from intruder, invaded people from the invader stock. Independent British Rhodesia and Anglo-Dutch South Africa were not

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decolonized countries on the grounds of human rights. Do the Americas meet the terms? What about Mexico and the United States? Both do nominally recognize the right of indigenous peoples to self-determination. Yet colonialism is still in the balance.

At this point, sovereignty, as distinct from home rule, *selfism*, and all the like, does still matter. Do not credit the current scholarly commonplace that it is an obsolete category. Sovereignty means self-determination, the right to self-determination today according to human rights as listed by international instruments. Reread definitions, those of 1960, 1967, and 1994. Sovereignty entails political and also economic, social and cultural self-determination. It is not a lot to be taken or left. Peoples may even distinguish and prefer effective self-rule as for some of those realms — say culture and society — rather than others — say policy and economy —, or vice versa of course, but it is up to them, not at the choice of States either severally or jointly through the United Nations. Do usual home rule and the like fulfill the requirements of cultural, social, economic, and political self-determination? Remember municipalities and reservations. The United Nations is finally facing the real question. Nevertheless, so far, given the cultural backdrop, it is not an exclusive matter of law, either constitutional or international.

Language itself can be normative beyond the law, international or not, or rather prior to it. Both tribal and indigenous are also usual downgrading idioms as for Africa and Asia. Pejorative discrimination works even when (Indian or African pride aside) the appellation is adopted and used by the people concerned, the indigenous peoples or Indian tribes by themselves. Language always matters. It may go and stay colonial. Remedies can follow. We know that some indigenous peoples are changing their identification from tribes into nations or even recuperating their English second names now for self-dignifying purposes (we are acquainted, for instance, with the 1839 constitution of the Cherokee Nation and the subsequent constitutional policy of the Indian polity in Oklahoma, or the set of treaties of the Navajo Nation with Mexico and the United States). To go constitutional and international, you need even nicknames (10).

(10) *Constitutional* means constitutional exactly the same for the Cherokee Nation as for the United States (for both, say, slavery was legal in mid-19th century, but for the

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Law may begin with wording and naming. So do rights. And nation means Nation. Equal acceptation implies equal capacity, not same results, such as new States. If the outcome were pre-determined, there would not be an actual right to self-determination. Maybe, international-constitutional law is in need of more nation-polities and less States-Nations or even no State pretending to be Nation with the capital letter. Law may begin with spelling. Actually, so do rights. Let us learn to spell the constituent right to one' s own first culture — the culture thanks to which you have not just socialized, but even become a human individual — together with the rich diversity of cultures. We all are in need of both our own spell and overall lower-case spelling.

Here you meet a collective right which is so fundamental that it may be decisive to individuals' rights. If you are lucky enough to identify through mother culture and tongue with the State polity you belong to, the one that determines your public nationality or citizenship, maybe the controversial question is far away and out of your mind and even hardly conceivable for you. On the contrary, if you are not so lucky, the issue is in sight and even comes to the fore as an actual matter of human rights, whatsoever the wording. If, as usual in both historiographical and constitutional fields, communi-

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former freedmen would be full citizens in Indian Territory together with other indigenous and *white* naturalized people). I do not contend that a kind of polity could be per se better — or worse — than the other. It is unfair to compare on the part of historians, anthropologists, or, if they would concern, constitutionalists, as long as respective past and present are so deeply uneven. Cherokee constitutionalism was discontinued by the establishment of the State of Oklahoma and has been at all times encroached by federal policy. In short, what makes the difference is the non-indigenous double negative to indigenous polity and history as freedom's right and rule. By ignoring it, you produce bad historiography, worse anthropology, and worst constitutionalism. The trouble with usual Nation-State making and unmaking studies (more normative than they think) is really twofold, as regards both *nation* and *state*, categories that share in common an extreme excluding capacity. Add the devastating strength of Euro languages, not only English. Thus, *Diné Bikeyá* and even Navajo Nation do not suffice to qualify. Check further literature on nation making and polity framing. As it is a genre unconcerned with indigenous cultural nations and legal polities, whatever either on the one hand their own names and nicknames or on the other alien ignorance or recognition, let me spare additional references. I suggest a strategy alternative or rather supplementary to the scholarly library, that of internet, through which peoples may offer their self-descriptions world-widely. Today it is feasible.

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cation keeps on failing between the blessed and the damned, the empowered and the disempowered, the happy few and the unlucky many, then we have the hard problem. The predicament may stem from the lack of communication rather than the issue itself.

Present constitutional authors and authorities are not concerned with indigenous data or literature. The same goes for indigenism as usually unaware of the convenience of going constitutional. We are all, both indigenous and non-indigenous, either Latin or Anglo, badly in need of integrated perceptions and explorations, of visions and studies at the same time and also on the same grounds, indigenous and constitutional, Latin or Anglo. To some extent, integration has made a start. International law has gone constitutional on the very grounds of human rights and is therefore moving toward taking into consideration the possibility of indigenous standing as peoples and no longer minorities. United Nations does at least know the difference. Mexico and the United States say *peoples* and do definitely mean *minorities*. From indigenous people, given their experience facing this and other non-indigenous both State and international practice, there are distrust and defiance, to be sure. Remember law of nations. *Se tsontlixiuitl in techmachte tlen kineni koyotl*. After so many years of colonial and constitutional history without a break, they have learnt what Euro polities want.

History can be neutralized only through overcoming the after-effects. Is that the case? White male owners' constituencies were the inventors of both constitutional and international law in days gone by. Today, are they really aware how handicapped the legacy is? At best, they are well settled and most satisfied in the wonderland of their own constitutional freedoms as the core of universal human rights. At worst, they do not even realize that there is not enough room left for all the others' freedoms, let alone how and where the depriving effect has appeared and is still at work. Ignorance by bliss is the case especially when rights to polity are concerned. If we pay heed, it is easy to check. Any average law school library or course will do. Let me encourage you, attendant or reader, to scrutinize current constitutionalism by yourself.

Currently, constitutionalism does not wonder whether given constituencies are suitable for the overall achievements of rights to freedom. The constitutionalist persuasion fails to do so in both

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practice and theory. Nevertheless, a first matter of rights is the very rightness of backdrops and procedures for recognition, entitlement, and guarantee. As for law and constitution, for the legal system and the constitutional regime, if we do indeed take rights seriously, unconcern and unawareness convey an unfair alibi deserving no credit at all, however much it is actually held. As far as human polities are disregarded, freedom's law does not encompass everybody's freedoms. For the sake of freedom, let us not make definitive authorities from scholars and powers preaching and serving rights as well as ignoring a whole set of them, impairing people (11).

(11) Any need of evidence concerning unawareness? It is at hand. Start reading the 2003 Draft Treaty Establishing a Constitution for Europe (*european-convention.eu.int/docs/Treaty/cv00850.en03.pdf*) from the very beginning: "Conscious that Europe is a continent that has brought forth civilization; that its inhabitants, arriving in successive waves from earlier times, have developed the values underlying humanism: equality of persons, freedom, respect for reason — Drawing inspiration from the cultural, religious, and humanist inheritance of Europe, the values of it, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law — Believing that reunited Europe intends to continue along the path of civilisation…", etcetera. Comment is up to you, European or other. Let me only point out that the old and new Europe' s *civilisation* with an 's' is the new and old America's *civilization* with a 'z', no doubt. As regards freedom's [American] law, I have obviously borrowed both term and concept from Ronald DWORKIN, *Freedom's Law: The Moral Reading of the American Constitution*, Oxford University Press, 1996. As long as his characteristic approach on behalf of liberties must draw on texts dating from the 18th century (the United States Constitution and main Amendments, the so-called *Bill of Rights* later incorporated from federal to state law, and related jurisprudence), the key point of past meanings and present implications is badly lacking. Even the *moral reading of the American Constitution* thus misses the specific challenge of the indigenous standing between treaties and constitutions. For further comment on my part, let me resort to "Constituyencia de Derechos entre América y Europa (Bill of Rights, We the People, Freedom's Law, American Constitution, Constitution of Europe)", *Quaderni Fiorentini*, 29, 2000, 87-171; on the constituent right to culture, to your own culture along with other cultures: "Multiculturalismo constitutional, con perdón, de veras y en frío", *Revista Internacional de Estudios Vascos*, 47, 2002, 35-62. At this point, for brevity's sake, let me quote Clifford GEERTZ, *Available Lights: Anthropological Reflections on Philosophical Topics*, Princeton University Press, 2000, 256 (ellipsis not indicated): "By rights, political theory should be a school for judgment, not a replacement for it — not a matter of laying down the law for the less reflective to follow (Ronald Dworkin's judges, John Rawls's policy makers, Robert Nozick's utility seekers), but a way of participat[ing] in the construction of what is most needed, a practical politics of cultural conciliation". I warned that we were going to face the *white man*'s legal common sense. Let us close with a quotation from the colonized party,

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There are indeed peoples exiled even in their own lands. Hence, let us not deal with given constitutionalism as if entailing the universal capacity that it pretends. Let us put awareness and commitment in the very field of law and constitution. To begin with, let us attach and integrate human rights arising from international law, constitutional rights coming from State law, and, last but not least by any means, peoples and people' s rights stemming from peoples and people themselves. Maybe only in this way, by starting over from due rights rather than actual law — even tribal or communitarian, either enacted or customary — and through rebuilding on proper constitutional standards, the future will not necessarily be the past for damned, disempowered, unlucky people and peoples, individuals and groups, in Mexico, the United States, and elsewhere.

Nihighan bich'ii 'atiingóó néiikah. Maybe there is a way to real, unprecedented *oklahomas* among and along with a rich diversity of polities sharing in common, without exception, the lower-case spelling. There will be no legal minority by any means when there is no longer any majority rule. *Nihinagóó yá'adahoot'ééh*, then.

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namely Dipesh CHAKRABARTY, "Radical Histories and Question of Enlightenment Rationalism", V. CHATURVEDI (ed.), *Mapping Subaltern Studies and the Postcolonial*, 256-289 (268): "Does it now become clear as to why it might be useful for us, intellectuals of a colonial formation, to maintain a critical watch on the history of (European) reason?" (Chakrabarty's clarifying brackets). I contend that such a (non-European) stance turns out be for the benefit of everybody — American or Asian Indian, African or Wasp, Maori or Anglo New Zealander, Creole or European, child or adult, woman or man, hired worker or idle proprietor...

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ERIC GILARDEAU

UNE AFFILIATION EUROPÉENNE A L'ECOLE DOCTRINAIRE: LE SVOD ET LES ANNALES GENEVOISES

1. La genèse d'une restauration européenne du droit. — 2. Une réception politique de la philosophie des Doctrinaires européens.

« L'influence d'un temps où toutes les opinions sont en désordre, chancelantes, incomplètes, où rien n'est encore devenu principe, parce que la vérité n'a pas encore pris sa place entre les préjugés anciens tombant en ruines et les idées nouvelles » (1), tel est selon Guizot l'état politique, juridique et social d'un temps de transition que l'on a appelé la Restauration (2). Réaction (3) ou table rase (4), c'est précisément l'alternative que se sont refusé à suivre une revue genevoise, *Les Annales de Législation et de Jurisprudence* et un législateur, la commission impériale russe, pour proposer une voie médiane qui se situe au-delà et en deçà du poids des traditions et de la négation du passé. Nous avons donc été conduits à nous intéresser au rôle important joué par les *Annales de Législation et de Jurispru-*

(1) *Annales de l'Education, De l'éducation en général et des difficultés qu'elle présente aujourd'hui*, Paris, 1811, Tome I, p. 8.

(2) *Infra*. p. 311 note 139.

(3) Alain Rey, *Dictionnaire historique de la langue française*, Le Robert, Paris, 2000, Tome III, p. 3105, "Pendant la Révolution, il désigne un mouvement d'opinion qui agit dans le sens inverse de celui qui l'a précédé (1790); *réaction* s'applique à tout mouvement d'idées qui s'oppose aux modifications radicales issues des principes de la Révolution et vise à rétablir des institutions ou des principes antérieurs (1792 chez Marat)".

(4) A. Rey, *op. cit.*, Tome III, p. 3737, "Depuis l'emploi ancien du pluriel *tables* au sens du latin *tabellae* « tablettes pour écrire », le mot a aussi le sens de « surface plane sur laquelle on peut graver, écrire » (1770). La locution *table rase* (1314) calque le latin *tabula rasa* et d'autres locutions le latin ecclésiastique ou scolastique (*Tables de la Loi, loi des Douzes Tables*)".

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dence dans la réflexion juridique européenne (5) dont la publication s'étend de 1820 à 1823 (6), c'est-à-dire dans la période qui précède de peu la promulgation du *Svod zakonov* en 1832 et à étudier tout particulièrement la présentation des travaux préparatoires du *Svod* intitulés l'*Exposé systématique des Lois de l'Empire russe* paru au premier volume de cette revue en 1820.

Or cet article des *Annales de Législation et de Jurisprudence* consacré aux travaux de la commission législative de Saint Pétersbourg a pour auteur, Pellegrino Rossi, qui était non seulement l'un des principaux fondateurs de la revue genevoise (7), mais également son "*Spiritus Rector*" (8). Par son esprit libéral, par sa philosophie de l'histoire du droit et sa foi dans le progrès, l'"*avvocatino pallido* de Bologne" (9) qui connaîtra une destinée exceptionnelle à la hauteur

(5) C'est à l'occasion d'une intervention de Monsieur Alfred DUFOUR Professeur à l'Université de Genève sur "*Les Annales de Législation. Une revue juridique interdisciplinaire sous la Restauration genevoise* " que nous avons pu prendre la mesure de la fonction essentielle jouée par cette revue dans la législation et la science juridique européennes. Mais surtout, nous tenons à remercier et exprimer toute notre gratitude à Monsieur Alfred Dufour qui nous a permis de mener à bien cette étude par ses conseils, sa disponibilité et sa grande bienveillance à notre égard".

(6) Alfred DUFOUR, *Genève et la science juridique européenne du début du XIXème siècle: la fonction médiatrice des Annales de Législation (1820-1823)* in *Influences et réceptions mutuelles du droit et de la philosophie en France et en Allemagne*, *Drittes deutsch-französisches Symposion vom 16. Bis 18. September 1999*, *Herausgegeben von* Jean-François KERVÉGAN *und* Heinz MOHNHAUPT, Vittorio Klostermann Frankfurt am Main, 2001, p. 289, "Si les *Annales de Législation et de Jurisprudence*, puis d'*Economie politique*, font bien modeste figure auprès des illustres revues françaises (...) c'est d'abord qu'elles ne paraissent guère que de 1820 à 1823 (...) c'est ensuite que ces *Annales de Législation* ne comprendront en fait que quatre volumes, à savoir les trois volumes des *Annales de Législation et de Jurisprudence* de 1820 à 1822 et le volume unique des *Annales de Législation et d'Economie politique* de 1822-1823".

(7) A. DUFOUR, *op. cit.*, p. 302, "Ces figures fondatrices de stature et de dimension européennes, c'est d'abord Pellegrino Rossi (1787-1848), l'*Européen* par excellence, le pénaliste, le romaniste, le publiciste, l'économiste et l'historien, tout à la fois professeur et homme politique, successivement bolonais, genevois, français et romain".

(8) A. DUFOUR, *op. cit.*, p. 309, "Maintenant, si du foisonnement d'articles et de recensions se dégagent bien un certain nombre de force thématiques illustrant les objectifs définis, force est de constater aussi que du cénacle des fondateurs et des animateurs, voire des collaborateurs, une figure se détache, de stature européenne, comme le *Spiritus Rector* de toute l'entreprise".

(9) A. DUFOUR, *Hommage à Pellegrino Rossi (1787-1848) Genevois et Suisse à*

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de son esprit et de sa vocation européenne (10) trouvera dans l'*Exposé systématique des Lois de l'Empire russe* l'écho de ses propres réflexions.

Conformément aux voeux de son fondateur, les *Annales de Législation et de Jurisprudence* ont exercé une fonction médiatrice entre l'Allemagne, l'Angleterre et la France dans la communication des nouvelles doctrines de la science juridique européenne et une fonction réformatrice dans des matières aussi diverses que l'enseignement juridique, la législation et l'économie politique (11). Aussi

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vocation européenne, Les grands jurisconsultes, Collection genevoise, Helbing et Lichtenhahn, Faculté de droit de Genève, Bâle, Genève, Munich, 1998, p. 11, " *L'avvocatino pallido* de Bologne qui trouve refuge dans la Rome protestante après avoir été Commissaire général civil pour les provinces conquises du Roi Joachim l'Italique (1815) et qui parvient, grâce à certains des descendants du Refuge italien à Genève, la famille Calandrini en tête, à être le premier professeur catholique de l'Académie de Calvin (1819) ".

(10) William E. RAPPARD, *Economistes genevois du XIXème siècle*, nº 43, Droz, Genève, 1966, p. 355, "Né à Carrare en 1787, sujet du Duché de Modène, docteur en droit à dix-neuf ans, il fut tour à tout professeur de droit à Bologne, en 1814, peut-être carbonaro, commissaire civil du roi Joachim Murat en 1815 et réfugié politique à Genève en la même année, puis premier professeur catholique à l'Académie de Calvin en 1819, citoyen de Genève, époux d'une Genevoise et membre du Conseil Représentatif en 1820, député de Genève à la Diète fédérale en 1832 et 1833, chargé de missions diplomatiques par le Vorort à Paris en 1833, professeur au Collège de France en la même année, citoyen et professeur à la Faculté de Droit de Paris en 1834, membre de l'Institut en 1836, pair de France en 1839, ministre plénipotentiaire, puis ambassadeur de Louis-Philippe auprès du Saint-Siège de 1845 à 1848. Finalement, après avoir, au lendemain de la révolution de février, refusé un siège de député à la Chambre toscane et de hautes dignités à Turin, il se laissa élire par Bologne à la Chambre romaine et mourut assassiné, chef de gouvernement papal de Pie IX en 1848".

(11) A. DUFOUR, *op. cit.*, pp. 312-313, "A l'examen des textes des principales contributions à cette revue genevoise, il nous paraît que les *Annales de Législation* ont exercé une double fonction. Il s'agit d'une part, d'une fonction médiatrice dans les domaines de la science du droit comme de la théorie du droit — et c'est ce qui nous semble ressortir des contributions de philosophie du droit et de méthodologie juridique de Pellegrino Rossi et de Louis Meynier ainsi que des articles et des recensions d'histoire du droit et de législation comparée d'Arnold Heeren, de Louis Meynier et de Pellegrino Rossi. Mais d'autre part, les *Annales de Législation* nous semblent avoir exercé aussi une fonction réformatrice: 1º) dans le domaine de la science du droit — la jurisprudence précisément -, en visant à la réforme de l'enseignement juridique; 2º) dans le domaine de la législation, en visant à des réformes de la justice pénale et pénitentiaire surtout; 3º) dans le domaine de l'économie politique, en tendant à des réformes économiques (...).

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précise Alfred Dufour, "Il n'est pas enfin jusqu'au domaine de la législation comparée où les *Annales de législation* genevoises ne révèlent leur fonction médiatrice en général et leur rôle privilégié dans la diffusion des principes et des thèses de l'Ecole historique allemande en particulier. C'est ce qui ressort de la publication dans le premier tome en 1820 de l'« Exposé systématique des lois de l'Empire russe » édité par la « Commission Législative de Saint Pétersbourg »" (12).

Le *Svod zakonov* ne sera diffusé en France qu'en 1834 après la publication du manifeste du tsar Nicolas Ier dans la revue *Foelix* qui n'avait elle-même que quelques semaines d'existence. Mais une autre revue juridique française, la revue *Themis* publiée de 1819 à 1831 avait annoncé en 1821 que la commission impériale russe présidée par le ministre de la justice du tsar Nicolas Ier, le Prince Lopoukhine, travaillait à un projet de Pandectes pour l'empire de Russie (13). Cependant, c'est aux *Annales de Législation et de Jurisprudence* que revient le mérite d'avoir publié pour la première fois en Europe les travaux de la commission impériale russe; la *Thémis* ne faisant que reprendre directement l'*Exposé systématique des lois de l'Empire russe* et quelques extraits de l'article de Rossi consacré à ces travaux (14).

Les *Annales de Législation et de Jurisprudence,* puis, dans leur sillage, la *Thémis* se faisaient l'écho de la pensée de Friedrich, Carl von Savigny (1779-1861). Héritier de Herder, Savigny considérait que le droit à l'instar de la langue et des moeurs procédait directe-

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Quels que soient donc les impératifs facultaires ou les options doctrinales personnelles des principaux animateurs des *Annales de Législation*, ces dernières vont, bon gré mal gré, exercer une véritable fonction médiatrice, d'une part, entre l'Allemagne et la France, d'autre part, entre l'Angleterre et la France, voire le monde de culture française et latine en général. Et les *Annales genevoise de Législation* exerceront effectivement cette fonction par la diffusion et la propagation des thèses les plus récentes de la science juridique européenne, allemande et anglaise en particulier".

(12) A. DUFOUR, *op.cit.*, p. 323.

(13) *Thémis ou Bibliothèque du Jurisconsulte*, Tome III, Paris 1821, pp. 403-424.

(14) *Thémis op. cit.*, Tome III, p. 403, n. 1, "L'article qu'on va lire a été publié en français à Saint-Pétersbourg, et il paraît avoir un caractère semi-officiel; nous l'avons extrait des *Annales de législation et de jurisprudence* qui se publient à Genève sous la direction d'un jeune et savant professeur, M. Rossi, ci-devant attaché à l'Université de Bologne".

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ment du génie propre à chaque peuple, dans une construction faite au fil du temps. Il s'opposait en conséquence à l'idée de codification, tout particulièrement en ce qui concerne son pays, l'Allemagne. Ces raisons expliquaient son hostilité aux idées d'uniformité juridique, d'égalité et de liberté civile qu'incarnait à ses yeux le Code civil français. Savigny était cependant, favorable à l'unité du droit. Le professeur de Berlin, chef de l'Ecole historique, considérait seulement que la codification ne pouvait parvenir à ce résultat. Selon Savigny, seul un droit commun fruit de l'histoire des peuples pouvait conduire naturellement à la réalisation de l'unité du droit.

Savigny et les auteurs de la revue juridique genevoise (15) étaient de farouches opposants aux enseignements de l'Ecole philosophique qui plaçait la codification sous le principe de la rationalisation. Pour les tenants de cette école, le code incarnait un droit idéal, universel et intemporel. L'oeuvre de codification permettait de réunir l'ensemble des principes aisément accessibles à toute la population et applicables à tous les cas particuliers.

Le Code civil que Savigny identifiait, non sans quelques abus, à l'école philosophique, relevait en réalité d'une troisième école

(15) A. Dufour, *op. cit.*, p. 302-303, "Parlant des auteurs des *Annales de Législation et de Jurisprudence* comme des initiateurs de l'élargissement de leurs objectifs et de ces publicistes distingués prêts à coopérer à leur entreprise, nous abordons la question des figures fondatrices des *Annales* qui sont aussi révélatrices de la fonction de cette revue dans l'histoire intellectuelle européenne du début du XIXème siècle. Ces figures fondatrices (...) c'est ensuite Etienne Dumont (1759-1829), le pasteur genevois de Saint-Pétersbourg devenu précepteur des fils de Lord Landsdowne à Londres, puis collaborateur de Mirabeau à Paris, enfin collaborateur intime et traducteur des oeuvres de Jeremy Bentham (1748-1832), avant de revenir dans sa patrie (1814) tout à la fois en réformateur pénal et pénitentiaire et en auteur du Règlement du Parlement genevois. Mais ces figures fondatrices de dimension européenne qui sont à l'origine des *Annales de Législation*, c'est aussi par ailleurs Jean-Charles-Léonard de Sismondi (1773-1842), tout à la fois l'économiste critique du libéralisme anglais, l'auteur des *Nouveaux Principes d'économie politique* (1819) (...). C'est enfin Pierre-François Bellot (1776-1836), le savant jurisconsulte genevois, véritable *alter ego* de Rossi à la Faculté de Droit comme au Conseil Représentatif de Genève, l'éminence grise du régime genevois du 'progrès graduel', l'auteur du Code de procédure civile genevois de 1821 et le principal réformateur du droit civil genevois (...). le juriste franco-allemand Louis Meynier (1791-1867) (...) il fait figure, en même temps que de cheville ouvrière des *Annales de Législation*, de premier pionnier de la traduction des oeuvres de Savigny et de premier artisan de la traduction de l'*Histoire du Droit romain au Moyen-Age*".

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connue sous le nom d'Ecole pragmatique (16). Tenant le juste milieu entre les deux précédentes écoles doctrinales, l'Ecole pragmatique, selon la définition donnée par la *Revue Foelix* naît "de l'alliance de l'élément historique et de l'élément philosophique, elle n'est ni irréligieuse envers le passé ni rebelle aux sollicitations de l'avenir" (17). Dans cet esprit, le Code civil s'était efforcé de réaliser un compromis entre le droit écrit et les coutumes.

Le débat ouvert entre les partisans de ces trois écoles n'avait pas été sans répercussion sur les travaux préparatoires de la commission de législation impériale russe. Tandis qu'une minorité, dont Spéransky allait bientôt constituer la figure emblématique, était séduite par les Codes napoléoniens, spécialement le Code civil, et ouverte aux idées de Bentham, la majorité donnait sa préférence au Code prussien de 1794 plutôt qu'au Code autrichien de 1811. Il est à relever que comme toutes les commissions législatives russes depuis des décennies, elle était peuplée de juristes allemands originaires d'Allemagne du Nord et que la plupart des professeurs de droit russe avait étudié dans les universités prussiennes. Le conseiller d'Etat du tsar de This avait montré son attachement à la doctrine de l'Ecole historique et trouvait dans les dispositions du *Svod zakonov* une juste application de ses enseignements. Le *Svod* aurait donc consacré non seulement la méthode mais également la doctrine de l'Ecole historique.

Pour la *Revue Foelix* le *Svod* était assimilé à une compilation, un Digeste et plus encore à une coordination; une coordination, c'est-à-dire la réunion dans un seul corps de législation de toutes les lois russes en vigueur assortie d'un travail d'additions ou de changements de certaines dispositions pour leur distribution par matières et par thèmes. A l'inverse du Code civil français, le *Svod* serait la traduction d'un Code de concordance plus qu'un Code nouveau.

Cependant, si le *Svod* était une coordination, il ne pouvait pas être dans le même temps un code historique et un code nouveau. Il était le fruit de ces deux méthodes. Il appliquait la méthode et la

(16) *Infra*. p. 307, note 122.

(17) *Revue étrangère de Législation et d'Economie politique*, tome VIII, Paris, 1841, p. 506.

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doctrine de l'Ecole pragmatique. Or ce constat conduisait à nuancer l'influence de l'Ecole historique sur l'oeuvre du législateur russe.

Cette considération conduisait également à revenir sur le rôle de l'Ecole du droit historique à l'égard du travail de la commission de législation impériale russe. Cette Ecole du droit historique aurait bien influencé le législateur russe mais pas dans le sens que l'on se plaît à lui reconnaître aujourd'hui.

Les *Annales de Législation et de Jurisprudence* publiées de 1820 à 1823 à Genève se trouvaient précisément à la croisée des chemins. Non seulement cette revue juridique avait une large diffusion en Europe notamment dans les pays allemands, en Angleterre et en France où elle exerçait une influence directe sur les rédacteurs de la *Thémis* (18). Elle faisait un compte rendu très précis des travaux préparatoires du *Svod*. Or si les *Annales de Législation et de Jurisprudence* se prononçaient pour l'Ecole du droit historique, elles proposaient une méthode originale qui était identique à celle que le législateur russe avait adoptée. La revue juridique de Genève préconisait pour doctrine de codification une combinaison des méthodes proposées par les écoles historique et analytique (19).

Dès lors une question se posait. Les *Annales de législation et de jurisprudence* n'avaient-elles pas proposé une conception originale de la doctrine de l'Ecole du droit historique dont la Commission impériale de Saint Pétersbourg aurait concomitamment découvert le principe? La réaction contre les Codes *a priori* n'avait-elle pas incité le législateur russe à mettre en oeuvre la méthode de codification de

(18) A. Dufour, *Genève et la science juridique européenne*, *op. cit.*, p. 290, "Ni entièrement sombrée dans l'oubli, ni totalement inconnue aujourd'hui, l'entreprise genevoise des *Annales de Législation* ne passe pas non plus tout à fait inaperçue en son temps. Ainsi la *Thémis* ou *Bibliothèque du Jurisconsulte* renvoie-t-elle explicitement à deux reprises au moins aux *Annales de Législation* genevoises ".

(19) Bruno Schmidlin, *L'éclectisme philosophique de Rossi dans sa conception d'une nouvelle étude du droit*, in *Des libertés et des peines*, Actes du Colloque Pellegrino Rossi organisé à Genève, les 23 et 24 novembre 1979, Genève 1980, p. 65, "Porté par l'élan du début, plein d'espoir et de fort de son succès à Genève, Rossi tente une esquisse de l'état actuel de la science en dessinant un grand horizon rétrospectif sur les idées de Cujas, Montesquieu, Beccaria et Rousseau, il entre ensuite dans le débat actuel des nouvelles théories de l'école historique de Savigny et de Niebuhr et de l'école de Bentham qu'il dénomme analytique en y présentant sa propre conception de synthèse à laquelle il ajoute une critique sévère de l'école désuète du droit naturel".

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l'Ecole pragmatique dont la revue de Genève faisait corrélativement la théorie ? Le *Svod zakonov* avait en effet appliqué cette méthode. La coordination russe ne péchait pas par esprit de système. Les inégalités politiques et sociales n'avaient pas été abolies par le *Svod zakonov* qui leur donnait seulement un cadre plus précis. Le législateur russe avait consulté les moeurs, la situation politique et religieuse de l'Empire tout en introduisant dans la coordination des lois l'esprit rationnel du droit naturel classique. C'était bien la solution préconisée par les *Annales de législation et de jurisprudence* qui avait été parallèlement appliquée par la Commission impériale de législation de Russie. Ce courant européen ne traduisait-il pas une aspiration spontanée à la restauration (20) du droit contre l'esprit de système que pouvaient incarner certaines législations telles que le Code civil autrichien de 1811? (I).

Ce mouvement juridique en Europe ne trouvait-il pas un prolongement politique parce qu'il tendait à substituer l'empire du droit à celui de la force, la règle à l'arbitraire, la raison publique au caprice individuel? N'était-il pas l'expression du véritable sens de la Restauration loin de la nostalgie du passé des "ultras" (21) comme de l'agitation stérile des zélateurs de la Révolution et de l'Empire français? Il ne s'agissait plus d'abattre mais de restaurer, ce qui avait été le principe même du projet fondateur de 1789, un état légal et institutionnel qui instaurerait une égalité de droits entre les hommes? N'était-ce pas l'enseignement des Doctrinaires (22) européens dont la Commission de Saint Pétersbourg reprenait dans ses travaux la théorie et même jusqu'à la terminologie? (23) Dès lors, la vocation

(20) *Infra* p. 311 note 139.

(21) A. REY, *op. cit.*, Tome III, p. 3963, "Ultra n. Représente (1794) une ellipse de *ultra-révolutionnaire*. Le nom a désigné une personne qui pousse à l'extrême ses opinions politiques, puis un partisan intransigeant de l'Ancien Régime sous la Restauration (1820)".

(22) A. REY, *op. cit.*, Tome I, p. 1113, "Doctrinaire adj. et n. (XVème-XVIème siècle) a d'abord été remployé avec le sens réservé depuis à *doctrinal*. Il a été substantivé (1652) pour désigner les Pères de la doctrine chrétienne; plus généralement, il est appliqué en politique à un homme strictement attaché à ses opinions comme nom (av.1787) et comme adjectif (1836). Sous la Restauration, il concernait en particulier (1816) un homme politique dont les idées semi-libérales et semi-conservatrices relevaient d'un système de doctrines, appelé Doctrinarisme n.m. (v.1830)".

(23) Nous tenons à préciser ici que des réserves peuvent certainement être

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historique de la Russie n'était-elle pas d'incarner le modèle des nations modernes, qui, par une progression modérée, dépasseraient les excès et les violences de la Révolution pour réconcilier liberté et conscience morale. La revue juridique de Genève croyait le découvrir dans les travaux de la commission de Saint Pétersbourg (II).

1. *La genèse d'une restauration* (24) *européenne du droit.*

Dès l'article second de son *Exposé systématique des lois civiles*, la Commission de Saint Pétersbourg se faisait l'interprète des principes de l'Ecole du droit historique non seulement pour affirmer sa conviction dans la méthode juridique préconisée par ce courant de pensée mais faire acte de foi dans la philosophie de son enseignement: "L'exposition de la législation d'un peuple n'est autre chose que le tableau fidèle de sa vie politique et civile, en commençant même à la première page de son histoire. Aussi les lois existantes ne peuvent-elles être bien comprises qu'au moyen des lois qui les ont précédées, et qui ont été abolies ou modifiées par elles" (25). C'est

soulevées à l'égard de la traduction française du texte russe mais le co-fondateur des *Annales* tout en faisant état des réserves et des objections que pourrait soulever la traduction du texte souligne le souci de précision qui a guidé la Revue dans la relation de *l'Exposé* de la Commission de Saint Pétersbourg, Pellegrino Rossi, *op. cit.*, pp. 288-289, "Nous voudrions être à même de parler à nos lecteurs du Digeste russe, avec connaissance de cause. Mais vraisemblablement il serait impossible de le trouver nulle part hors de Russie; d'ailleurs, notre ignorance de la langue russe nous mettrait hors d'état de le juger. Nous avons heureusement entre les mains un écrit de quelques pages publié en français à Pétersbourg; au moyen duquel nous pouvons donner à nos lecteurs une idée du travail exécuté par la Commission législative de Russie, de ce qu'elle appelle *Exposé systématique des Lois russes*. Cet écrit ne présente, il est vrai, ni toute la clarté possible dans la méthode, ni un style aussi correct qu'on pourrait le désirer; mais tel qu'il est, il suffit pour donner une idée des travaux de la Commission des Lois, et surtout de la marche qu'elle a suivie pour arriver plus tard à la confection d'un Code. Son exemple peut être de quelque utilité pour les jurisconsultes appelés dans d'autres pays à travailler à la législation civile. Comme cette publication paraît avoir un caractère semi-officiel, et qu'on n'avait aucune connaissance de l'ouvrage qu'elle sert à annoncer, on ne s'est permis de toucher au style qu'avec une extrême réserve. L'intérêt du sujet engagera le lecteur à être indulgent pour les défauts qui tiennent à la forme, et qu'il n'était pas en notre pouvoir de faire entièrement disparaître".

(24) *Infra* p. 311 note 139.

(25) Pellegrino Rossi, *Exposé systématique des Lois de l'Empire Russe, publié par*

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précisément l'esprit de cette réforme législative que salue le co-fondateur des *Annales* en guise de conclusion à son analyse des travaux de la commission: "Ce travail nous paraît extrêmement utile, soit en lui-même, soit comme un acheminement à la confection d'un code, c'est-à-dire à la rédaction d'un système méthodique de lois écrites, soit enfin comme un moyen *historique* pour connaître si l'on possède réellement les forces et les matériaux pour entreprendre ce grand ouvrage" (26).

Ainsi pour la commission impériale russe comme pour Pellegrino Rossi, l'histoire jouait un rôle déterminant dans l'intelligence du droit et des institutions. C'est pourquoi, la lecture du compte-rendu de Rossi ne peut avoir lieu indépendamment de la pensée juridique et politique qui inspire la première contribution de cet auteur au même tome des *Annales*. En effet, les commentaires du jurisconsulte genevois sur *l'Exposé systématique des Lois de l'Empire russe* illustrent de manière concrète les principes définis à l'article programmatique des *Annales* intitulé "*De l'étude du droit dans ses rapports avec la civilisation et l'état actuel de la science*" (27). Dans cette "étude", Rossi se livrait à une critique sans concession de l'Ecole philosophique et prononçait un plaidoyer en faveur de l'Ecole analytique et de l'Ecole historique (28). En conséquence, nous adopterons pour grille de lecture du commentaire de Rossi sur l'*Exposé systématique des Lois* les critères retenus par ce dernier dans l'article programmatique du même volume des *Annales*.

La commission de Saint Pétersbourg ouvre l'article premier de son exposé par un constat: "Nous possédions jusqu'ici en fait de sources dont les tribunaux et les particuliers pussent tirer quelque parti (...). Mais personne n'ignore, que considérés comme recueils, ils ne sont ni complets ni exacts, et que, sous le rapport de la méthode et des définitions, ils sont au-dessous du médiocre, qu'ils manquent d'ailleurs de tables suffisamment bien faites, ce qui constitue cependant le mérite principal d'une compilation où l'on ne

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la Commission Législative de St. Pétersbourg in *Annales de Législation et de Jurisprudence*, Tome I, Genève 1820, p. 299.

(26) Pellegrino ROSSI, *op. cit.*, p. 288.

(27) Pellegrino ROSSI, *De l'étude du droit dans ses rapports avec la civilisation et l'état actuel de la science*, *op. cit.*, pp. 1-69 et pp. 357-428.

(28) A. DUFOUR, *Genève et la science juridique européenne*, *op. cit.*, pp. 314-315.

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cherche pas des analyses ou éclaircissement scientifiques, mais seulement un fil pour se retrouver au milieu d'une masse confuse de dispositions légales émanées à des époques et dans des circonstances très différentes, qu'on connaît si peu et qu'il est si essentiel de bien connaître" (29). Indigence de la science du droit (30) et profusion des lois (31) tel est le paradoxe que la commission impériale était appelée à surmonter. Mais loin d'être un handicap, cette situation, pour le co-fondateur des *Annales*, est un avantage. Ce jugement de Rossi pour surprenant qu'il puisse paraître traduit une conception originale du rôle de l'histoire au regard de l'enseignement traditionnel de l'école de Savigny.

En effet, à la différence de la Russie, les pays d'Europe occidentale subissent, selon le co-fondateur des *Annales*, le poids du passé. Des courants de pensée discordants, une science juridique imbue de ses principes, des essais de codification hasardeux sont, pour le jurisconsulte genevois, autant d'obstacles au perfectionnement du droit des nations occidentales; le jugement de Rossi est alors sans appel, "... les enfans de notre vieille Europe, qui, fatigués de leurs vains tâtonnements, gênés par mille entrâves, sont tentés quelquefois de renoncer à toute espérance d'un mieux possible, et

(29) Pellegrino Rossi, *Exposé systématique des Lois*, op. cit., p. 291, "Nous possédions jusqu'ici en fait de sources dont les tribunaux et les particuliers pussent tirer quelque parti, les ouvrages de Tchulkof, Pravikof et Maximovitsch. Mais personne n'ignore, que considérés comme recueils, ils ne sont ni complets ni exacts, et que, sous le rapport de la méthode et des définitions, ils sont au-dessous du médiocre, qu'ils manquent d'ailleurs de tables suffisamment bien faites, ce qui constitue cependant le mérite principal d'une compilation où l'on ne cherche pas des analyses ou éclaircissement scientifiques, mais seulement un fil pour se retrouver au milieu d'une masse confuse de dispositions légales émanées à des époques et dans des circonstances très différentes, qu'on connaît si peu et qu'il est si essentiel de bien connaître".

(30) Par un jurisconsulte anonyme russe, *Essai sur la rédaction des lois*, *Revue étrangère de Législation*, op. cit., Tome VI, Paris, p. 901,"En Russie, où il n'y a ni barreau, ni publicité des débats, peu de science, peu de jurisconsulte, point de doctrine, aucune jurisprudence".

(31) Par un jurisconsulte anonyme russe, *Notice historique et analytique sur le code pénal de Russie*, *Revue de droit français et étranger*, Tome III, Paris, 1846, p .253 rappelait à propos du nombre des lois réunies par la codification russe, "elle est à la fois une pasinomie et une pasicratie. Sous le premier aspect, elle résume en 32 codes distincts, répartis en quinze volumes, les 56 volumes in-4° de la collection et les 36 000 oukases qui la composent".

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d'abandonner l'avenir aux caprices de la destinée? Héritiers des institutions, des erreurs et des abus que tant de siècles et tant de générations ont accumulés pour nous les transmettre, nous éprouvons l'embarras attaché à la possession de fausses richesses " (32). A l'inverse, le co-fondateur des *Annales* se prend à regretter que cette "vieille Europe" ne puisse comme la Russie inscrire sa réforme législative sur une page blanche, libre du legs des générations passées. Le poids de la tradition est un obstacle dirimant au "génie créateur" (33) des pays d'Europe de l'Ouest. Certes, Rossi donne une image idyllique de la législation russe très éloignée de la réalité (34), mais le parti pris de l'auteur vise avant tout à préparer une critique à venir des systèmes juridiques des pays occidentaux soumis à l'emprise de l'Ecole philosophique. La réserve de Rossi à l'égard des principes de l'Ecole du droit historique n'est donc pas la manifestation d'une opposition radicale mais seulement une nouvelle interprétation de ce mouvement de pensée auquel le co-fondateur des *Annales* se rattache clairement comme le montre la suite de son analyse.

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(32) Pellegrino ROSSI, *op. cit.*, Tome I, p. 283, "Qui sait si quelque jour cette nation jeune et vigoureuse, dirigeant son activité vers ce noble but, ne laissera pas loin derrière elle les enfans de notre vielle Europe, qui, fatigués de leurs vains tâtonnements, gênés par mille entrâves, sont tentés quelquefois de renoncer à toute espérance d'un mieux possible, et d'abandonner l'avenir aux caprices de la destinée ? Héritiers des institutions, des erreurs et des abus que tant de siècles et tant de générations ont accumulés pour nous les transmettre, nous éprouvons l'embarras attaché à la possession de fausses richesses".

(33) Pellegrino ROSSI, *op. cit.*, Tome I, pp. 283-284, "Si nos ancêtres nous eussent légué des terres en friche, des constructions encore informes, des matériaux bruts pour nous loger et nous vêtir; si par une supposition impossible à réaliser, nous fussions arrivés brusquement et sans interruption au point de civilisation où nous sommes, nous obtiendrions aujourd'hui avec moins de peine, des institutions appropriées à ce qui nous paraît l'état actuel de l'esprit humain. Mais tout ce qui nous entoure porte l'empreinte du passé et les traces ineffaçables d'une civilisation antérieure: à chaque pas, le génie créateur est arrêté par la crainte d'avoir trop à renverser pour construire".

(34) Anatole LEROY-BEAULIEU, *L'empire des Tsars et les russes*, Paris, 1990, pp. 656-657, écrit à propos de la Russie "Aucun Etat, nous l'avons dit n'a fait un plus grand abus de la législation. La raison est simple. La loi écrite, selon la remarque d'un penseur contemporain, est l'autorité qu'emploient habituellement les modernes pour modifier l'impulsion imprimée par les coutumes et les moeurs. Le gouvernement russe, qui durant près de deux siècles, s'est laborieusement employé à transformer les moeurs de ses sujets n'a pas manqué de se servir de cet instrument, en usant à tort et à travers".

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En effet, après avoir rappelé que l'héritage du passé est un frein à la progression du droit en Occident, Rossi va s'attacher à démontrer qu'il est plus utile de restaurer cet édifice que de l'abattre. A ce titre, l'image du temple gothique, auquel se réfère l'auteur, est topique de l'attachement de la pensée rossienne aux thèses essentielles de Savigny. "L'aspect d'un temple gothique peut choquer les yeux du spectateur, écrit Rossi; tout y blesse nos idées d'ordre, de symétrie, de convenance; mais il y a dans l'ensemble de cet édifice un caractère de majesté qui imprime le respect; et lorsqu'on vient à réfléchir à l'immensité du travail et de la dépense qu'a entraînée cette construction gigantesque, ouvrage des années et quelquefois des siècles, une sorte de sentiment religieux intéresse à sa conservation, et l'on hésiterait à ordonner sa démolition pour élever à sa place une façade corinthienne" (35). Si Rossi refuse d'abattre le temple gothique, symbole de l'héritage du passé, ce n'est pas seulement pour des raisons tenant au respect absolu dû aux dispositions traditionnelles mais plutôt à une interprétation purement positive des institutions et du droit parce "qu'il y aurait de la folie à abandonner: des parties dont il nous est absolument impossible de nous dépouiller, parce que nous les portons pour ainsi dire, en nous-mêmes, et qu'elles sont devenues un élément constitutif de notre vie sociale" (36). Cependant, l'édifice n'est pas intangible. Aussi Rossi propose-t-il la réformation "du fonds légué par les générations antérieures" (37).

Or, cette réformation doit être progressive pour éviter les secousses qui risquent de jeter à bas le monument des siècles passés donc les parties précieuses de la législation, véritable ciment de l'édifice social. Cette méthode n'est que l'illustration des principes exposés par Pellegrino Rossi dans l'article programmatique du

(35) Pellegrino Rossi, *op. cit.*, Tome I, p. 284; à rapprocher Alfred Dufour, *Hommage à Pellegrino Rossi, op. cit.*, p. 58.

(36) Pellegrino Rossi, *ibid.*,"Il existe d'ailleurs, on n'en saurait douter, dans l'héritage que nous ont transmis nos pères, des parties précieuses qu'il y aurait de la folie à abandonner: des parties dont il nous est absolument impossible de dépouiller, parce que nous les portons pour ainsi dire, en nous-mêmes, et qu'elles sont devenues un élément constitutif de notre vie sociale".

(37) Pellegrino Rossi, *ibid.*, "Notre tâche se réduit donc à choisir et à améliorer dans ce fonds légué par les générations antérieures".

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même volume des *Annales de Législation et de Jurisprudence* (38). A la lecture des travaux de la commission de Saint Pétersbourg, Pellegrino Rossi se félicite de voir le législateur russe adopter "les principes que nous avons nommé ailleurs l'école historique" (39).

Mais cette référence de l'auteur à l'Ecole du droit historique est un renvoi à sa propre interprétation des principes de Savigny exposée dans l'article programmatique des *Annales*. Pellegrino Rossi ne partage pas la révérence absolue affichée par l'Ecole du droit historique à l'égard du passé. Comme nous l'avons vu son approche du *Svod* est une longue critique adressée aux institutions héritées des anciens. Rossi ne rejoint donc pas les deux grands courants de pensée de l'Ecole du droit historique (40), l'un favorable au système féodal des pays germaniques, l'autre aux institutions du droit romain et qui ont pour point commun "leur mépris du droit moderne" (41). Or précisément, Pellegrino Rossi se distingue de ces deux mouve-

(38) Pellegrino ROSSI, *op. cit.*, Tome I, p. 39, "Selon les principes de l'Ecole historique, il faut respecter même les préjugés. Ecoutons ces paroles: conserver en corrigeant, étudier les circonstances, ménager les préjugés dominants, même déraisonnables, préparer les innovations de loin, de manière qu'elles ne semblent plus être des innovations, éviter les déplacements, les secousses, soit de propriété, soit de pouvoirs, ne pas troubler le cours des espérances et des habitudes, réformer les abus sans blesser les intérêts actuels; tel est l'esprit constant de l'ouvrage".

(39) Pellegrino ROSSI, *op. cit.*, p. 287.

(40) Zdenek KRYSTUFEK, *La querelle entre Savigny et Thibault et son influence sur la pensée juridique européenne*, *Revue Historique de Droit français et étranger*, 44, 1966, p. 61 note 6, rappelle que selon les auteurs polonais Opalek et Wroblewski l'Ecole du Droit historique sera appelée à se diversifier en quatre courants principaux puisque ces auteurs "distinguent quatre courants de la fin du XIXème et du commencement du XXème siècle qui étaient marqués par « le droit naturel et son déclin relativement rapide ». Ils énumèrent: le courant spécifique découlant de la philosophie de Kant; le courant historique revenant au passé et lié au siècle des lumières allemand; le courant progressiste exigeant la codification; et enfin la réaction féodale dévoilée".

(41) Z. KRYSTUFEK, *op. cit.*, p. 70, "Dès ses débuts l'école historique comprenait deux courants bien distincts qui n'étaient lés que par leur mépris du droit moderne. L'un de ces courants a eu recours aux droits féodaux de la Germanie ancienne, l'autre aux institutions romaines. Le courant germaniste était, à vrai dire, plus conséquent avec lui-même, parce qu'il voulait stabiliser les conditions et les survivances féodales par des règles et des institutions juridiques purement féodales. C'est pourquoi ce courant germanique qui ne pouvait espérer trouver une application pratique. Il ne faut pas s'étonner que ce courant se soit séparé du courant romaniste du vivant même de Savigny et malgré ses regrets répétés".

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ments de l'Ecole du droit historique par son attachement au droit moderne et son positivisme (42). Son commentaire des travaux de la commission de Saint Pétersbourg est à ce titre significatif.

Tout d'abord, Pellegrino Rossi salue dans l'oeuvre de la commission de législation impériale russe "des travaux législatifs propres à amener insensiblement les institutions de la Russie au degré de perfectionnement que réclame l'état général des lumières" (43). Pour le co-fondateur des *Annales*, l'histoire ne doit pas être coupée du présent car elle est "la clé du présent" (44). Le présent c'est, comme le précise Rossi, l'état général des lumières, c'est-à-dire l'oeuvre juridique et sociale issue du siècle des Lumières et de la Révolution. Nous serons appelés à voir plus loin le contenu exact de la pensée de Rossi dans son rapport avec la Révolution et combien la pensée rossienne loin de rejeter les acquis de 1789 en revendiquait l'héritage. En outre, comme le montre le commentaire de l'auteur, la commission de Saint Pétersbourg n'avait pas le choix. Une fois entreprise, "la grande réformation législative" (45) devait parvenir au degré de perfectionnement exigé par l'état des Lumières. Nous sommes loin de la conception purement historique du droit prônée par le courant germaniste et le courant romaniste. Le positivisme de Rossi est sans ambages: "La Russie n'est pas demeurée étrangère à la grande réformation législative qui paraît destinée à embrasser tous

(42) A rapprocher Pellegrino Rossi, *op. cit.*, p. 389, "A la vérité notre système n'offre rien d'abstrait; on n'y vise pas à la profondeur, il ramène sans cesse aux faits et aux choses positives. Ce système pourrait servir à prouver que le droit féodal a été, dans un temps, aussi convenable que l'est aujourd'hui le système représentatif. Mais il ne prouvera pas moins que le système représentatif est aujourd'hui aussi nécessaire et aussi inévitable que l'a été jadis le droit féodal. Nous nous contentons de ce résultat".; pour plus de développement sur cette question Cfr. Alfred Dufour, *Droits de l'Homme, Droit naturel et Droit public dans la pensée de Pellegrino Rossi, op.cit.*, p. 198 et s..

(43) Pellegrino Rossi, *op. cit.*, Tome I, pp. 282-283.

(44) A. Dufour, *op.cit.*, p. 58, "La perspective historique qui commande l'approche rossienne des institutions politiques de la Suisse tient d'abord à une raison de principe: elle procède de la conviction historiciste que l'histoire est la clé du présent qui anime la pensée juridique et politique de Pellegrino Rossi, de sa première contribution aux *Annales de Législation et de Jurisprudence* de 1820 à Genève "*Sur l'étude du Droit dans ses rapports avec la civilisation*" à sa leçon d'ouverture du Cours de Droit constitutionnel de 1835 à Paris".

(45) Pellegrino Rossi, *op. cit.*, Tome I, p. 282.

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les Etats compris dans la sphère de la civilisation européenne. Ce grand Etat qui ne touche que par les extrémités à notre système politique, n'a cependant pas été le dernier à éprouver l'influence de notre développement social (...). Ce n'est donc point un frivole désir de copier les autres peuples, mais un sentiment réfléchi du progrès intellectuel de la nation, un amour éclairé du bien public » (46).

La commission de Saint Pétersbourg poursuit le but même que doit se proposer, selon Rossi, tout législateur, "parvenir à la véritable connaissance de notre état actuel" (47) par une référence formelle à l'histoire du droit. Cette tâche incombe à l'Etat qui, comme le précise la commission de Saint Pétersbourg, prend désormais le relai des initiatives privées (48). Réunir histoire et droit positif dans une oeuvre législative confiée à l'Etat, tels sont *brevitatis causa* les principes exposés par la commission impériale russe et préconisés par Rossi. Peut-on parler d'originalité de la législation russe et de la pensée rossienne? En apparence, la singularité de la méthode choisie par la commission de Saint Pétersbourg et l'interprétation de l'enseignement de l'Ecole du droit historique par Pellegrino Rossi est indéniable. Mais il faut se défier d'un jugement par trop hâtif. La

(46) Pellegrino ROSSI, *op. cit.*, p. 282, "La Russie n'est pas demeurée étrangère à la grande réformation législative qui paraît destinée à embrasser tous les Etats compris dans la sphère de la civilisation européenne. Ce grand Etat qui ne touche que par les extrémités à notre système politique, n'a cependant pas été le dernier a éprouver l'influence de notre développement social. Le gouvernement russe s'est empressé d'en profiter, quoiqu'il eût pu, à la faveur de l'éloignement et de l'ignorance où nous sommes de son administration intérieure, s'abandonner impunément à l'apathie et à l'empire de la routine. Ce n'est donc point un frivole désir de copier les autres peuples, mais un sentiment réfléchi du progrès intellectuel de la nation, un amour éclairé du bien public, qui ont fait entreprendre dans la capitale des Czars des travaux législatifs propres à amener insensiblement les institutions de la Russie au degré de perfection que réclame l'état général des lumières".

(47) Pellegrino ROSSI, *op. cit.*, p. 310, rappelle l'état de la pensée de Savigny à ce sujet, "l'histoire n'est pas seulement un recueil d'exemples; elle est la seule voie qui nous soit ouverte pour parvenir à la véritable connaissance de notre état actuel".

(48) *Supra*. p. 2825; Pellegrino ROSSI, *Exposé systématique op. cit.*, p. 291, "Toutefois, on doit apprécier le mérite d'un premier essai, et les grandes difficultés que les auteurs que nous venons de citer avaient à vaincre pour extraire d'archives, la plupart aussi incomplètes qu'inaccessibles, les matériaux dont ils avaient besoin pour ces compilations. On était en droit d'attendre de la Commission impériale des lois, qu'elle publierait des recueils plus complets et en même temps plus systématiques".

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réalité est, en effet, beaucoup plus complexe. Tout bien considéré, la commission de Saint Pétersbourg et Rossi se rattachent à une conception véritablement historique non pas exclusivement au sens de l'Ecole du même nom mais par référence également à une tradition, celle du droit naturel classique. C'est en effet dans le droit fil de l'enseignement d'Aristote que s'inscrivent l'analyse de la commission impériale russe et les réflexions de Rossi (49).

Le droit naturel classique est avant tout une méthode faite de prudence (50), au sens premier de jurisprudence (51), c'est-à-dire l'art de découvrir les solutions juridiques les plus adaptées à partir d'une observation de l'état de la société objectivement ordonnée, selon le co-fondateur des *Annales*, au développement et à la perfection de l'homme. Aussi constate Pellegrino Rossi, "Il faut donc étudier (...) l'homme historique: en d'autres termes il faut étudier l'histoire du droit selon la méthode de la nouvelle école allemande. Il faut cultiver ce qu'ils appellent la jurisprudence lettrée" (52). Tel est l'objet de l'intitulé même des *Annales*. Alfred Dufour montre à ce titre que Pellegrino Rossi avait tenu à préciser, dès les premières lignes de l'article programmatique de cette revue, la signification du mot juris-

(49) A. Dufour, *Pellegrino Rossi Publiciste* in *Des libertés et des peines*, Actes du Colloque Pellegrino Rossi organisé à Genève, les 23 et 24 novembre 1979, Genève 1980, p. 231, "... c'est qu'il s'en tient tout simplement à l'antique leçon du droit naturel classique d'Aristote et de Cicéron, point de référence traditionnel de toute une littérature critique du jusnaturalisme moderne. A cet égard, on pourrait même se demander si l'anti-individualisme constant de Rossi n'est pas fonction de son enracinement dans la tradition du droit naturel classique".

(50) A. Rey, *op. cit.*, Tome III, p. 2993, "Prudence, n. f. est emprunté (v.1200) au latin *prudentia*, tiré de *prudens* et désignant la prévision, la prévoyance et, par suite, la sagesse, la sagacité, concrètement le savoir-faire"; A. Rey, *ibid.*, "Prudent, ente, adj. Et n. Emprunté (1090 au latin *prudens, - entis*, « qui prévoit, qui sait d'avance » d'où « réfléchi, sagace, avisé, dérivé de *providens*, littéralement « prévoyant », d'où « sage, précautionné », participe présent adjectivé de *providere* (pourvoir) qui a donné le moyen français *provident* (providence)".

(51) A. Rey, *op. cit.*, Tome II, p. 1937, "Jurisprudence, n. f. est emprunté (1562), avec maintien du — s — étymologique (à la différence de juridiction), au bas latin *jurisprudentia* « science du droit », de *jus, juris* « droit » et *prudentia* « connaissance, compétence » après que les deux mots eurent été souvent associés à l'époque classique".

(52) Pellegrino Rossi, *Annales de Législation et de Jurisprudence*, op. cit., pp. 415-416

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prudence afin d'écarter toute ambiguïté à ce sujet (53). Ce faisant, les *Annales de Législation et de Jurisprudence* se rattachent directement à l'Ecole du droit historique par "l'analogie existant avec le titre du Manifeste de l'Ecole du Droit historique « *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenchaft* » (54) (De la vocation de notre temps pour la législation et la science du droit" (55).

Cependant, les *Annales de Législation et de Jurisprudence* ne limitent pas leur correspondance avec l'oeuvre de Savigny à la seule similitude de leurs titres. Elles tendent au même but. Découvrir les "principes dirigeants" (56), concepts qui constituent le pendant de la notion savignienne de "*leitende Grundsätze*" (57). Alfred Dufour souligne que l'étude de ces principes par Pellegrino Rossi a largement contribué à "l'oeuvre de diffusion de la doctrine de l'Ecole historique dans le monde de culture française" (58) dont "de Gérando avait donné en 1819 le premier dans la *Themis* une formulation française — celle de « principe générateur »" (59). La tâche assignée à la jurisprudence consiste donc à mettre en exergue ces fameux principes. Mais que faut-il entendre par principe dirigeant ? Rossi répond à cette question par une définition: "Le principe dirigeant n'est que la conséquence bien circonscrite et nettement exprimée de toutes les considérations politiques et morales qui ont servi de guide au législateur" (60).

Nous sommes frappés par la similitude des méthodes de recherche de Rossi et celles mises en oeuvre par les jurisconsultes d'Ancien

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(53) A. DUFOUR, *Genève et la science juridique européenne du début du XIXème siècle: la fonction médiatrice des Annales de Législation (1820-1823)*, op. cit., p. 294, "Car le terme peut désigner en français aussi bien « l'interprétation de la loi par les tribunaux » ou « l'ensemble des décisions des tribunaux » sur une matière que la « science du droit » la *Jurisprudenz* allemande".

(54) SAVIGNY, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenchaft*, Heidelberg, 1814.

(55) A. DUFOUR, *ibid.*

(56) Pellegrino ROSSI, *Annales de Législation et de Jurisprudence*, 1821, Tome II, pp. 170-193.

(57) SAVIGNY, *op. cit.*, Kap. 3, p. 84.

(58) A. DUFOUR, *op. cit.*, p. 319.

(59) A. DUFOUR, *ibid.*

(60) Pellegrino ROSSI, *Annales de Législation et de Jurisprudence, op. cit.*, 1821, pp.181-182.

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Régime. Le principe dirigeant chez Rossi nous semble s'apparenter très étroitement, en effet, à la *summa aequitas* du droit romain dont Jean-Louis Thireau souligne l'importance sur la pensée de Du Moulin (61). L'équité sous l'Ancien Régime n'est pas "une équité nue, subjective" (62), mais une équité tirée "de toutes les circonstances de toutes les lois positives (...) et des nécessités supérieures de l'intérêt public" (63). Comme le principe dirigeant "L'équité réside donc bien dans la législation positive (...). C'est rechercher (...). les véritables intentions qui animaient le législateur (...) Et ce n'est pas seulement le sens profond d'une disposition qu'il convient d'atteindre, mais celui de toutes les lois traitant du même sujet, et considérées comme un ensemble homogène. Plus encore que dans la *ratio* d'une prescription déterminée, c'est dans la synthèse de tout un faisceau de règles juridiques, censées concourir au même but, que réside cette équité légale. Elle conduit bien davantage à la consécration, au plein accomplissement de la législation positive" (64).

Pour Rossi, le principe dirigeant est également le lien qui unit

(61) Jean-Louis Thireau, *Charles Du Moulin (1500-1566): Etude sur les sources, la méthode, les idées politiques et économiques d'un juriste de la Renaissance*, Genève 1980, p. 89

(62) J.-L. Thireau, *op. cit.*, p. 88.

(63) J.-L. Thireau, *op. cit.*, p. 89.

(64) J.-L. Thireau, *op. cit.*, p. 90, "L'équité réside donc bien, écrit Jean-Louis Thireau, dans la législation positive. Mais cette affirmation appelle des nuances: Du Moulin ne soutient nullement que toute disposition législative réalisé dans ses moindres détails cet idéal et ne nécessite aucune correction; il n'ignore rien de l'imperfection résultant résultant de la généralité des lois, ce n'est pas appliquer celles-ci à la lettre, en s'attachant servilement au texte; bien au contraire, une telle méthode se révèle radicalement opposée à la véritable *aequitas*. C'est rechercher, au-delà des mots qui les traduisent imparfaitement, les véritables intentions qui animaient le législateur la *mens* ou la *ratio legis*, si importante aux yeux des bartolistes: l'équité d'une loi, ou même d'un acte juridique quelconque, c'est la raison, c'est l'esprit qui dirigeait son auteur, conforme par principe au bien naturel, et que tout interprète doit savoir retrouver en se détachant de l'exégèse littérale, indispensable certes, mais insuffisante. Et ce n'est pas seulement le sens profond d'une disposition qu'il convient d'atteindre, mais celui de toutes les lois traitant du même sujet, et considérées comme un ensemble homogène. Plus encore que dans la *ratio* d'une prescription déterminée, c'est dans la synthèse de tout un faisceau de règles juridiques, censées concourir au même but, que réside cette équité légale. Elle conduit bien davantage à la consécration, au plein accomplissement de la législation positive, qu'à sa correction ou à sa limitation".

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"les principes philosophiques et les détails des dispositions légales positives" (65), c'est-à-dire, le fil ténu qui relie à travers le temps l'essence d'une disposition au dernier état de son évolution dans le droit positif. Rossi écrit en effet "La distance qui sépare les principes philosophiques des détails du droit positif nous indique assez qu'il doit exister entr'eux des anneaux qui les rattachent les uns aux autres" (66). Dans l'*Exposé systématique des Lois*, la commission législative de Saint Pétersbourg reprend à son compte la théorie du principe dirigeant dans des termes fort similaires à ceux de Rossi: "Les lois civiles de chaque pays présentent une filiation continue, une chaîne dont les anneaux se suivent, et souvent ne sont interrompus que pour se rattacher à un premier principe" (67). Le principe dirigeant ne consiste donc pas à faire revivre dans le droit positif des dispositions abrogées. Il est au contraire un instrument pour déterminer la cause de l'évolution du droit qui permet d'expliquer l'état actuel d'une législation. "Le plus grand nombre des dispositions du dernier Code de 1649, écrit la commission impériale russe, ont cessé d'être en vigueur; cependant, à moins d'avoir étudié l'*Oulogénié*, on ne saurait saisir le principe qui a été la base des changemens qui ont eu lieu postérieurement" (68). Passant de l'énoncé du principe à son application, le législateur russe cite un peu plus loin un exemple précis à l'appui de sa démonstration: "L'Impératrice Anne, en réformant en 1731 l'ordonnance de 1714 sur la monohérédité, rattacha la nouvelle loi aux dispositions de l'*Oulogénié*, et ce Code, quoique des milliers de lois postérieures y aient dérogé, continue encore à être le fondement de nos lois sur la nature des biens immeubles, sur les successions et nombre d'objets" (69).

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(65) A. DUFOUR, *Genève et la science juridique européenne*, *op. cit.*, p. 319.

(66) Pellegrino ROSSI, *op. cit.*, 1821, Tome II, p. 174.

(67) Pellegrino ROSSI, *op. cit.*, pp. 299-300.

(68) Pellegrino ROSSI, *Exposé systématique des Lois* op. cit., p. 299.

(69) Pellegrino ROSSI, *Exposé systématique des Lois*, op. cit., p. 300; rapp. Pellegrino Rossi, *ibid.*, p. 298 qui montre comment le législateur en vertu de cette méthode avait dû adapter la structure du *Svod*, "Le *Droit des choses* a été commencé. Le premier volume que nous avons sous les yeux contient la classification des différentes espèces de biens et des caractères que la loi assigne à chacune. Ces dispositions constituent un des objets les plus importans dans tous les Codes, et surtout dans celui de l'Empire Russe, parce qu'elles sont fondées sur les élémens particuliers de sa législation. Cette catégorie

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Pour la commission de Saint Pétersbourg, le droit positif est donc le produit nécessaire de toutes les lois qui l'ont précédé. "Indépendamment, écrit le législateur russe, de l'utilité directe qu'un pareil ouvrage doit avoir pour les Juges, ainsi que pour les personnes qui sont dans le cas de consulter les nombreuses dispositions des lois existantes, il offre encore un intérêt particulier à ceux qui aiment à suivre dans les annales de la législation la marche de l'esprit humain, parce que, comme l'a dit un auteur classique, les lois, mieux que tout autre monument ou tradition historique, portent l'empreinte de la civilisation du siècle, ainsi que de tous les rapports sociaux dont elles sont le résultat nécessaire. Il ne s'agit que de savoir les lire" (70). Aussi, pour Pellegrino Rossi, le droit positif est-il le fruit d'une évolution objective et non d'une volonté arbitraire (71). Issu des mutations législatives le principe dirigeant détermine lui-même la voie que doit emprunter la méthode de codification. A ce titre, le co-fondateur des *Annales* apprécie que le travail législatif entrepris en Russie s'assimile moins à une compilation qu'à une coordination, c'est-à-dire un Code de concordance (72). Cette harmonisation des "productions nouvelles (73)" "avec les parties conservées de l'ancien ordre social (74)" est conforme aux principes préconisés par Rossi pour parvenir à une oeuvre durable, utile et juste.

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de droits a subi depuis un siècle de grands changemens, surtout par l'effet de l'abolition définitive des bénéfices (*pomiestia*) sous le règne de l'Impératrice Anne. Dès-lors, on doit regarder la plupart des lois antérieures comme n'appartenant plus qu'à l'histoire de l'ancien droit. Cependant, pour mieux faire saisir l'esprit et la liaison de ces dispositions qui, sous d'autres rapports, ont conservé quelque application dans la pratique, on a jugé nécessaire d'ajouter dans un supplément à ce premier volume, les textes du Code de 1649 et des lois postérieures qui s'y rapportent".

(70) Pellegrino Rossi, *Exposé systématique des Lois*, op. cit., pp. 293-294

(71) *Infra*. p.p. 300-301

(72) Pellegrino Rossi, *ibid.*, "En effet, la Commission des Lois a commencé par travailler à une exposition systématique des Lois de l'Empire russe. Elle s'est proposée de donner à la Russie un Digeste dans lequel elle saura éviter, il faut espérer du moins, plusieurs des défauts qui se rencontrent dans les pandectes de Justinien. Ce travail nous paraît extrêmement utile, soit en lui-même, soit comme un acheminement à la confection d'un code, c'est-à-dire à la rédaction d'un système méthodique de lois écrites".

(73) Pellegrino Rossi, *op. cit.*, p. 358.

(74) Pellegrino Rossi, *ibid.*

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Mais surtout, pour Pellegrino Rossi, l'enseignement de l'Ecole du droit historique est synonyme de liberté. Un tel qualificatif appliqué à l'Ecole historique ne manque pas de surprendre lorsqu'on se souvient des griefs formulés à l'égard de ce mouvement de pensée. Le *Svod zakonov* est lui-même le motif de ces critiques notamment pour avoir, sous le couvert de cette école, maintenu au sein de ses dispositions le statut du servage. Les auteurs français n'ont pas hésité à affubler l'Ecole du droit historique du vocable d'"école du fatalisme historique" (75).

Ces critiques ne doivent cependant pas occulter l'enthousiasme et le sentiment de liberté qui ont prévalu au début du XIXème siècle à la naissance de ce courant de pensée. Ainsi Jean Carbonnier retrace-t-il parfaitement les conséquences de la découverte de Niebuhr en 1817 sur la pensée juridique du XIXème siècle. Il nous semble que cette invention de l'homme d'Etat prussien ait également exercé ses effets sur la pensée de Pellegrino Rossi. Niebuhr avait mis la main sur un palimpseste qui recelait les *Institutes* de

(75) Emile JAY, *Législation russe*, Paris, 1857, (*extrait de la Revue de Paris des 1er, 15 août et 1er septembre 1857)*; tenants et opposants de l'Ecole du Droit historique s'étaient livré à un débat sans merci. De This, conseiller d'Etat du tsar, fidèle aux principes de cette école de pensée avait tenté de justifier le maintien du servage en tant qu'élément social naturel de la société russe et par esprit de provocation avait ajouté qu'il fallait plaindre "les malheureux prolétaires de l'Occident qui ne connaissaient pas ou qui ne connaissent plus les douceurs de ce noble état!!" Emile Jay répliquait avec indignation que "le malheureux serf russe n'existe que dans l'imagination des prôneurs de l'esclavage sur cette question du servage; Eugène GAUDEMET, *L'interprétation du Code civil en France depuis 1804*, La Mémoire du Droit, Paris, 2002, p. 24. Messieurs Christophe Jamin et Philippe Jestaz font également référence aujourd'hui encore à cette qualification pour désigner l'Ecole du droit historique et préciser que le fondateur de "La Thémis" Athanase Jourdan n'avait pas succombé à cette "fatalité", "Car Jourdan, pas plus d'ailleurs que ceux qui l'accompagnent dans cette courte aventure éditoriale (1819-1826), ne s'oppose nullement à l'idée de codification ni ne cède à la fatalité de l'histoire"; Eugène GAUDEMET, *op. cit.*, pp. 77-78, reprend également cette qualification, "On a voulu voir dans Jourdan un disciple de Savigny, et dans la *Thémis* l'instrument de pénétration en France des principes de l'école historique allemande: la présence de Warkönig parmi les collaborateurs les plus actifs n'a peut être pas été sans contribuer à cette erreur. En fait Jourdan a parfaitement conscience des insuffisances de l'école historique. Il voit bien que le droit risque avec elle de s'immobiliser dans le respect hiératique des formes du passé, il aperçoit le dangereux fatalisme juridique auquel elle doit conduire ses adeptes".

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Gaïus. Or, cette oeuvre jetait une lumière nouvelle sur la conception traditionnelle que l'on se faisait alors du droit romain. Les *Institutes* contredisaient sur bien des points la législation impériale, c'est-à-dire les dispositions impératives du droit romain. La science des romanistes ne se borna plus à une stricte exégèse des textes et s'enhardit à les critiquer et les interpoler. Jean Carbonnier observe que cette approche s'étendit à d'autres domaines de la pensée juridique. Les lois n'étaient plus des "commandements, mais des documents historiques (76)" laissés à la libre interprétation des jurisconsultes dont les tenants de l'Ecole historique (77). En effet, Maurice Auguste Bethman-Hollweg, disciple de Savigny, était l'un des membres de l'équipe allemande qui travaillait à Vérone et la*Thémis* fut la première revue à se faire l'écho en 1819 du rapport des savants allemands sur cette découverte (78). Jean Carbonnier assimile l'article de la*Thémis* à un véritable "scoop" (79). L'approche

(76) Jean CARBONNIER, *En l'année 1817*, in *Mélanges offerts à Pierre Raynaud*, Dalloz-Sirey, 1985, pp. 94-95, "Niebuhr, pour lors envoyé de la Prusse auprès du Saint-Siège, avait mis la main, dans la bibliothèque du chapitre de Vérone, sur un manuscrit qu'il soupçonnait d'être palimpseste, donc riche de secret. Au fil de 1817, sous l'effet des grattages et des réactions chimiques, le secret se dévoila: apparurent les *Institutes* de Gaïus, Cher Gaïus, *Gaïus noster*: il révélait un autre droit; il prenait en défaut les lois impériales, les lois impérieuses. La science des romanistes en fut bouleversée: de dogmatique elle se fit archéologique. La chasse aux interpolations reçut une impulsion inouïe. La critique des textes, l'hypercritique s'excitèrent. Et ne croyons que de ce mouvement l'effet se confina au droit romain: à la longue, il n'ait pas de juriste qui n'ait pris le pli, sans savoir d'où il lui venait, de lire les lois non plus comme des commandements, mais comme des documents historiques. D'un fait un autre décroche; à une idée une autre s'accroche. L'équipe allemande qui était au travail à Vérone était dirigée par Goeschen, lequel rendit compte de la trouvaille à l'Académie de Berlin. Il avait à ses côtés un bénévole de 22 ans, élève de Savigny, Maurice Auguste Bethman-Hollweg, sans lequel, déclare-t-il la tâche n'aurait pu être menée à bien".

(77) E. GAUDEMET, *op. cit.*, p. 73, rappelle à ce sujet "Quant à l'histoire, les romanistes de la *Thémis* reprocheront sévèrement à Toullier de n'avoir tenu aucun compte, dans ses éditions successives, d'un événement tel que la découverte des *Institutes* de Gaïus qui vient de renouveler les études du droit romain".

(78) Athanase JOURDAN, *Thémis ou Bibliothèque du Jurisconsulte*, Tome II, Paris, 1819, p. 74 "*Coup d'oeil sur l'histoire de la science du droit en France suivi de quelques réflexions sur la découverte d'un manuscrit de Gaïus.*

(79) J. CARBONNIER, *op. cit.*, p. 95 note 55, "La publication, en traduction, de ce rapport du 6 novembre 1817 fut un *scoop* de la jeune revue *La Thémis* (1819, p. 287 et s.).

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rossienne semble s'inscrire dans ce sentiment de liberté consécutif à la découverte de Niebuhr.

Le co-fondateur des *Annales* privilégie en effet cette idée de liberté contre les codifications influencées par la doctrine de l'Ecole du droit naturel moderne. Pellegrino Rossi dénonce l'esprit d'abstraction des codifications de ce début du XIXème siècle qui ne tiennent, selon lui, aucun compte des aspirations des populations et des nécessités du moment. Son opposition s'inscrit, comme nous l'avons vu en marge des principaux courants de l'Ecole du droit historique caractérisés par une exaltation systématique du passé et un mépris de principe à l'encontre du droit moderne. Pellegrino Rossi ne peut encourir le grief formulé par Carl Schmitt à l'encontre de Savigny qui reproche au fondateur de l'Ecole du droit historique de faire montre exclusivement d'"une érudition archéologique, philologique et papyrologique" (80). Tout au contraire, Pellegrino Rossi veut répondre aux besoins de la vie juridique de son époque. Mais il préconise dans le même temps une large indépendance à l'égard d'une codification *a priori* fondée sur des principes rigides et abstraits coupés de toute réalité juridique et sociale.

Après s'être un instant étonné que les principes de l'Ecole du droit historique n'aient pas conduit la Russie à se persuader que son peuple était "trop jeune encore pour tenter avec succès l'entreprise d'un Code" (81), Rossi constate avec un contentement non dissimulé que ces mêmes principes semblent "leur avoir fait sentir le danger de faire des Codes *a priori* " (82). Comme en écho à cette interrogation, la commission de législation impériale russe rappelle qu'elle a dû suivre une voie similaire à celle qui avait conduit à l'élaboration du *Corpus Juris Civilis* et souligne combien "En rapprochant les marches différentes que la législation a prises dans les différens pays pour se perfectionner, nous voyons que les mêmes causes ont produit les mêmes effets. Dans l'Empire Romain, la législation se

(80) Carl SCHMITT, *La situation de la science européenne du droit*, Droits, n°14, 1991, p. 134, "une érudition archéologique, philologique et papyrologique que l'on considéra comme un grand anachronisme et dont le rapport à l'esprit toujours vivant et croissant du peuple ne pouvait être évoqué que très indirectement".

(81) Pellegrino ROSSI, *op. cit.*, p. 288.

(82) Pellegrino ROSSI, *ibid.*

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forma comme en Russie, quoique les principes et les éléments de chacune diffèrent essentiellement" (83).

Cette critique des codes issus de l'Ecole philosophique est topique de la pensée rossienne. Alfred Dufour rappelle très précisément que Pellegrino Rossi a vivement critiqué l'oeuvre de Franz von Zeiller maître d'oeuvre de l'*Allgemeines Bürgerliches Gesetzbuch* autrichien de 1811 (84). C'est en effet à l'occasion d'une lecture du traité d'inspiration kantienne de Zeiller, que Pellegrino Rossi parvient à la conclusion que "ces docteurs (...) deviennent par leurs principes vagues et arbitraires, des apôtres de l'anarchie, ou des suppôts du despotisme" (85). Comme le fait très justement remarquer Alfred Dufour, Pellegrino Rossi se trompe lorsqu'il assimile la philosophie juridique kantienne de Zeiller à la doctrine jusnaturaliste de la philosophie du droit (86). Mais nous nous interrogeons sur

(83) Pellegrino Rossi, *Exposé systématique des Lois*, op. cit., p. 294; Pellegrino Rossi, *op. cit.*, pp. 294-295, "Les premiers Codes étant devenus insuffisans, on y suppléa pendant des siècles par des lois et des décrets partiels dont le nombre s'accrut à un tel point, qui selon l'expression de l'Empereur Justinen, un troupeau de chameaux n'aurait pas suffi pour porter toute la masse des lois existantes. On conçoit que la difficulté de connaître le droit existant était parvenue à son comble. Aussi les jurisconsultes de Justinien, pour réduire en système deux mille volumes de manuscrits contenant plus de cent mille textes de lois, se décidèrent-ils à faire le recueil en cinquante livres, connu sous le nom de *Pandectes*, mot équivalent à celui de *Svod* en russe, et qui en précédant et préparant le *Code*, fut suivi de la rédaction des *Institutes*, lesquelles répondent également à l'exposition des Institutes du Droit Russe (...) qui dans l'ouvrage de la Commission des lois sont placées à la tête de chaque titre, mais qui forment un ensemble à part".

(84) A. Dufour, *Droits de l'Homme*, *op. cit.*, p. 200.

(85) Pellegrino Rossi, *op. cit.*, pp. 377-378, "J'ouvre un traité récent de Droit naturel. L'auteur n'est pas suspect de vouloir, comme on le disait chez les Romains, *moliri res novas*. (...). C'est de ces doctrines vagues et hasardées que sont dérivées les erreurs les plus funestes au maintien des sociétés civiles. Loin de nous la pensée d'insulter des écrivains dont nous ne suspectons en aucune manière les motifs. C'est de bonne foi que ces docteurs nous parlant sans cesse de Divinité, de raison, de morale, de droits et de devoirs, deviennent par leurs principes vagues et arbitraires des apôtres de l'anarchie, ou des suppôts du despotisme".

(86) A. Dufour, *op. cit.*, p. 201, "De toute évidence, Pellegrino Rossi, en prenant pour cible représentative de la doctrine jusnaturaliste la philosophie du droit de Franz von Zeiller, directement inspirée de la philosophie juridique kantienne, n'a pas saisi ce qui différencie la philosophie du droit de Kant de celle de l'Ecole du droit naturel moderne, de Hobbes et de Pufendorf à Christian Wolff; pire, il paraît n'avoir compris ni l'originalité des fondements métaphysiques de la philosophie juridique kantienne, de

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la volonté réelle de Pellegrino Rossi. Etait-ce bien l'auteur du *Das natürliche Privat-Recht* (87)que vise seulement Rossi? Ne serait-ce pas également le père de l'*Allgemeines Bürgerliches Gesetzbuch für die gesamten deutschen Erbländer der Österreicishen Monarchie* à qui s'adresse cette critique et plus précisément, à travers la personne de Zeiller, ne s'agit-il pas plutôt d'une mise en cause indirecte du Code autrichien de 1811? Ce "danger de faire des Codes *a priori* " (88) que dénonce le co-fondateur des *Annales* ne vise-t-elle pas la critique que l'on adresse habituellement à la codification autrichienne alors que Rossi dénonce dans l'article programmatique des *Annales* la pensée de Franz von Zeiller?

Emmanuel Tilsch a bien montré en effet que le Code de 1811, très largement inspiré par les principes d'un droit naturel idéal, pouvait apparaître comme le symbole des spéculations et de l'esprit d'abstraction de l'Ecole du droit naturel moderne (89). Bien que Zdenek Krystufek constate que la réaction de l'Autriche à la Révolution française et la survivance des conditions sociales traditionnelles se retrouvent dans l'*Allgemeines Bürgerliches Gesetzbuch*, il rappelle dans le même temps que le code de 1811 apparaissait aux yeux des contemporains comme une oeuvre représentative de l'esprit systématique de Zeiller et du siècle des Lumières (90). Pellegrino

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la spécificité de la raison pratique au principe de l'autonomie de la volonté, au coeur de la notion de droit originaire — sur laquelle il ironise un peu facilement, mais totalement hors de propos — ni les fondements philosophiques de la doctrine jusnaturaliste, de la fiction méthodologique de l'état de nature à la figure-clef du contrat social, seule à même de rendre raison de l'état politique dans une perspective philosophique individualiste subjectiviste".

(87) Franz VON ZEILLER, *Das natürliche Privat-Recht*, Vienne, 1802.

(88) *Supra* note 82.

(89) Emmanuel TILSCH, *Le Code Civil général autrichien, son origine et son développement (à l'occasion de son centenaire en 1911)*, Revue de droit international et de législation comparée, XIII, 1911, p. 122, "... l'esprit du temps, le concept d'un droit idéal, d'une équité naturelle, l'amour des idées simples et générales qui ont fortement influencé les rédacteurs du code. Ceux-ci, comme hommes intelligents du XVIIIème siècle, étaient imbus des idées du « siècle philosophique » et les derniers collaborateurs principaux, Martini et Zeiller, étaient professeurs de droit naturel".

(90) Z. KRYSTUFEK, *op. cit.*, p. 73, "La situation dans les autres Etats allemands diffère dans une certaine mesure de celle de l'Autriche où la bourgeoisie était particulièrement satisfaite de la législation qui dérivait du courant culturel du siècle des lumières. Néanmoins, même en Autriche la réaction à la Révolution française paralysa

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Rossi n'est d'ailleurs pas un précurseur en la matière. Il ne fait que suivre l'exemple de Savigny. Zdenek Krystufek montre en effet que le chef de file de l'Ecole du droit historique s'est montré très critique à l'égard du Code civil autrichien qu'il met sur le même pied que le Code civil français (91) et qu'il préfère à ces deux législations l'*Allgemeines Gesetzbuch für die preussischen Staaten* de 1791 en raison de sa proximité avec le droit romain (92). Il ne faudrait cependant pas exagérer cette prédilection de Savigny pour le Code prussien. Selon Fritz Sturm, le *Landrecht* serait comparable pour le chef de l'école historique à "une fleur déracinée, une fleur dépérissante" (93) voire à un "gribouillage, un barbouillage" (94). Mais une

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presque l'influence de la doctrine éclairée. On ne put totalement arrêter l'évolution historique, cependant on l'essaya et on y réussit du moins partiellement. Toute la création juridique a perdu, par crainte de la Révolution et sous la pression du gouvernement, l'ampleur qu'elle avait à l'époque de Joseph II. Il est vrai qu'elle a gardé l'apparence de cette époque, mais derrière cette apparence se manifestait sa dépendance féodale tranchante et sa méfiance envers toutes les réformes. Ces traits ont naturellement marqué sous la législation autrichienne au commencement du siècle passé. Bien que ce soit Zeiller, dont l'esprit systématique et le sens des réalités sociales n'ont rien à devoir aux qualités de Portalis, qui a imposé au Code civil autrichien de 1811 sa forme définitive, ce Code n'atteignit pas la perfection du Code Napoléon parce que les possibilités de Zeiller étaient limitées par les conditions sociales autrichiennes".

(91) E. GAUDEMET, *op. cit.*, p. 62, nuance cependant les préventions de Savigny à l'encontre du Code civil, "Savigny qui n'est pas suspect d'indulgence à l'égard des législations codifiées, reconnaissait que de tous les codes promulgués de son temps, le Code civil était celui qui opposait la moindre résistance au libre progrès du droit. Mais pour qu'une interprétation large pût s'introduire, en dépit des obstacles extérieurs que nous venons de signaler, il aurait fallu que le code à sa naissance se trouvât en présence d'une école juridique déjà constituée, en possession de sa méthode, et consciente des dangers d'une interprétation trop étroite".

(92) Z. KRYSTUFEK, *op. cit.*, p. 68, "C'est le "Preussisches Landrecht" mal tourné que Savigny critique le moins parce que la rédaction de ce Code est la plus fidèle au droit romain. En effet, la critique de Savigny ne vise que son aspect formel. Le Code civil autrichien est beaucoup plus mal traité. Sur le plan des comparaisons avec les institutions du droit romain, Savigny le trouve à peine meilleur que le Code civil français".

(93) Fritz STURM, *Le code prussien*, Tome XXVI, *R.H.D.*, 1998, p. 429, "En tout cas, c'est Savigny, et nul autre, qui assène au code prussien le coup le plus dur. Dans sa diatribe « De la vocation de notre temps pour la législation des sciences juridiques », un pamphlet fort superficiel, il mène une guerre acharnée au code. Il le ridiculise tout autant que le code civil autrichien et le code civil français. Il s'en prend surtout à l'esprit dont s'inspire le code prussien, l'école du droit naturel dont les rédacteurs sont issus. Leurs maîtres, un Darjes ou un Nettelbladt, manquent selon lui de profondeur. Faute d'une

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fois encore, comme c'est le cas chez Pellegrino Rossi c'est une "argumentation superficielle" (95) et, nous serions tenté d'ajouter une explication erronée (96) qui masque les raisons profondes de la critique dirigée contre les codifications *a priori* et tout particulièrement contre le Code civil de 1811.

C'est dans l'article programmatique du premier volume des *Annales*, qu'il faut rechercher les motifs du rejet des codifications *a priori* par Pellegrino Rossi, "l'école historique reconnaît que la matière du droit résulte de l'ensemble de tous les précédents, écrit le co-fondateur des *Annales*; elle n'est pas le produit d'une volonté

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analyse minutieuse des sources, leurs élèves n'ont pas été capables de distinguer ce qui est digne d'être conservé et ce qui est le produit du pur hasard historique. Le code prussien n'est donc pour Savigny qu'une fleur déracinée, une fleur dépérissante".

(94) F. STURM, *op. cit.*, p. 429, "Savigny dédaigne cette oeuvre législative. Aucun de ses travaux, aucune monographie, aucun article ne lui est consacré. A peine est-il nommé à Berlin qu'il empêche l'organisation d'un cours portant sur ce sujet (...). Une lettre adressée à son beau-frère Achim von Arnim, permet de deviner dans quel esprit son cours est donné. Savigny y qualifie le code de gribouillage, de barbouillage, voire de cochonnerie, et cela aussi bien dans le fond que dans la forme".

(95) Z. KRYSTUFEK, *op. cit.*, p. 68, « Quand K. E. Schmidt adresse à ce Code un éloge, Savigny répond par une argumentation superficielle qui, il est vrai, ne fait pas honneur à l'homme qui a gagné une gloire si méritée par son 'Histoire du droit romain au moyen âge'. Il déclare d'une façon démagogique: « ... s'il était vrai que le Code Napoléon fût excellent et dût après de petites corrections un bienfait que le Code autrichien qui est très différent fût aussi excellent, même meilleur et pleinement applicable, on devrait admettre que l'excellence des codes est chose courante (*fabrikmässige*) et on ne pourrait pas prendre pour de grandes choses, celles qui sont les plus désirables ».

(96) E. TILSCH, *op. cit.*, pp. 119-120, cet auteur classe en effet au nombre des éléments historiques du Code de 1811, le droit romain et explique très clairement l'importance de cette source dans la codification autrichienne ce qu'a totalement négligé Savigny, "La base du code civil général est formée par le droit romain (...). Le droit romain, qui avait, dès longtemps, envahi le 'droit des villes', avait eu une forte influence (notamment dans les pays de bohèmes) sur le 'droit de pays' et, comme les études juridiques étaient basées sur le droit romain, on en usait subsidiairement quand il n'y avait pas de disposition claire, même dans les cas où cette application subsidiaire du droit romain n'était pas formellement ordonnée. L'esprit du temps, lors de la codification, n'était, il est vrai, pas favorable au droit romain; on lui reprochait des subtilités sans raison apparente, son traditionalisme et son formalisme; on lui opposait l'équité naturelle; mais en fin de compte, on n'a pas pu ni su s'en émanciper quant aux notions fondamentales. Les principes généraux et beaucoup de détails ont été fournis par le droit romain".

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arbitraire, de manière à pouvoir être établie soit d'une façon, soit d'une autre; elle découle nécessairement de la nature intime de la nation et de l'ensemble de son histoire" (97). De la même manière et en digne disciple d'Herder, Pellegrino Rossi affirme que le droit ne se réduit pas à un état de choses normativement posé, mais se définie dans la progression dynamique de normes en devenir.

Pellegrino Rossi précise un peu plus loin dans le même article sa conception du droit et de l'histoire et plus particulièrement des liens qui devaient sous tendre leur relation. Sa condamnation des compilations et des codifications *a priori* reprend très exactement son analyse des travaux de la Commission de législation impériale russe. "Ce qui manque essentiellement c'est une jurisprudence nationale; c'est une jurisprudence nationale qu'il faut s'efforcer de faire revivre; c'est vers une jurisprudence nationale que tendent les efforts de ceux-là mêmes qui ne sont pas en état de se rendre un compte exact de leurs voeux. Par jurisprudence nationale, nous n'entendons ici ni des compilations nouvelles ni des législations inventées *a priori*; nous entendons un système de droit indigène qui soit la fidèle expression des besoins nationaux qui se forme peu à peu, qui vive dans la conscience des citoyens, s'aide de tous leurs sentiments et ne se trouve jamais en guerre avec eux" (98). C'est donc une histoire en prise sur le réel, sur les besoins du moment que Pellegrino Rossi appelle de ses voeux à travers une jurisprudence — il faut entendre ce mot dans son sens antique — qui réponde très précisément à l'état précis et actuel d'une nation.

La nation, selon le co-fondateur des *Annales* n'est rien d'autre que la représentation de la société dans un système juridique qui lui est propre. La nation c'est au fond la nature d'une société (99) en

(97) Pellegrino Rossi, *op. cit.*, pp. 310-311.

(98) Pellegrino Rossi, *op. cit.*, p. 380.

(99) Pellegrino Rossi, *op. cit.*, pp. 69-70, "Si, au contraire, nous partons d'une autre idée, si nous partons de l'idée que la société est un fait général et nécessaire, qui a son fondement dans la nature humaine, si nous partons de l'idée que l'ordre social nous est nécessaire pour le développement de nos facultés et que le développement de ces facultés est pour l'homme, être intelligent et moral, une obligation, un devoir, nous en tirerons la conséquence que la société et l'ordre social sont des moyens indispensables à l'accomplissement du devoir humain, et qu'en conséquence ils sont aussi pour l'homme un devoir, une obligation morale, car celui qui a l'obligation morale du but a aussi

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constante et permanente évolution à travers ses règles de droit (100). Aussi Rossi envisage-t-il la codification *a priori* comme une atteinte à l'identité même de la société qui doit s'épanouir en-dehors de toute intervention intempestive, injuste et irrationnelle de l'Etat (101). C'est d'ailleurs l'une des raisons pour lesquelles Rossi juge que la Russie dispose d'un avantage certain sur les pays d'Europe occidentale. L'immixtion arbitraire et impromptue des gouvernements a "défiguré le plan primitif et encombré l'édifice social" (102). Le danger des codifications *a priori* est dès lors d'opposer la nation à l'Etat. L'Etat coupé de la nation devient une abstraction et le droit qu'il construit le fruit de son arbitraire (103). Les codifications *a priori* ne seraient plus dès lors que de vastes

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l'obligation morale des moyens nécessaires pour atteindre ce but; si dis-je, nous partons de cette idée, qui revient à dire que la société n'est pas une chose de choix, mais qu'elle est la loi naturelle de l'espèce humaine.

(100) *Supra* note 98.

(101) Pellegrino ROSSI, *op. cit.*, p. 380, "Nous avons fait sentir en même temps que la décadence du droit était dû à ce que le droit avait perdu dès longtemps tout caractère national et qu'il été entièrement livré à l'érudition sans philosophie, à la pratique routinière et à l'action irrégulière des gouvernements absolus".

(102) Pellegrino ROSSI, *op. cit.*, pp. 284 et 285, dénonce précisément cette intervention extérieure à la nation dans la construction du droit qui rend impossible l'oeuvre réformatrice de la législation à la différence de la Russie qui, n'a pas subi de tels errements et qui peut entreprendre en toute sérénité ce travail législatif, "Mais le caprice y a tant ajouté, on y a déjà fait tant de réparations provisoires et qui ont déjà vieilli à leur tour, le despotisme, la superstition, l'ignorance, la précipitation et la manie d'innover ont tellement défiguré le plan primitif et encombré l'édifice social d'une si grande quantité de hors-d'oeuvres, que si les hommes parviennent aujourd'hui à y substituer quelque construction tout à la fois élégante et solide, ils devront en faire plus d'honneur à la fortune et à la force des choses qu'à la sagesse humaine".

(103) Pellegrino ROSSI, *op. cit.*, pp. 68-69, "Quand on part de l'idée que la société civile n'est au fond qu'un fait, un fait que les hommes ont trouvé bon, qui n'a pas plus son fondement dans les profondeurs de la nature humaine que n'en aurait une société en commandite ou anonyme, pour telle ou telle exploitation, lorsqu'on imagine, en conséquence, que l'homme pouvait également se soumettre ou ne pas se soumettre aux lois sociales, qu'en ne s'y soumettant pas il aurait fait sans doute, un mauvais calcul, mais pas autre chose, lorsqu'on trouve que la société est purement et simplement une affaire de convention, oh ! alors, pour peu qu'on soit logique, on arrive en ligne droite à cette conclusion, que l'individu pouvait faire tout ce qu'il voulait, que son droit était illimité et qu'en conséquence, lorsqu'il a bien voulu reconnaître un corps social qui est son oeuvre arbitraire, il lui a fait un sacrifice, une cession de ce qui lui appartenait".

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artifices face aux lois naturelles de la société, comme le serait un parasite sur un corps vivant (104).

Certes, le Code autrichien de 1811 fait la part de l'histoire (105). Mais cette part se réduit à une portion congrue si l'on s'en tient aux critères généralement retenus par Pellegrino Rossi pour juger la perfection d'un système juridique. Lorsque le co-fondateur des *Annales* invoque "un système de droit indigène" (106), il ne s'agit pas de règles dont l'histoire justifierait seule l'existence mais d'un ensemble de dispositions qui répondraient aux aspirations de la nation de telle manière qu'elles soient "la fidèle expression des besoins nationaux qui se forme peu à peu, qui vive dans la conscience des citoyens, s'aide de tous leurs sentiments et ne se trouve jamais en guerre avec eux" (107). Aussi, selon Zdenek Krystufek, le Code civil autrichien ne correspondait-il pas aux "besoins nationaux". Krystufek établissait à ce titre un parallèle entre le Code civil français de 1804 et le Code civil autrichien de 1811 pour constater l'inadaptation du second aux besoins nationaux et la parfaite adéquation du premier à l'état juridique du pays: "Tandis que le Code français exprimait tout à fait, et en apparence pour toujours, les desiderata de la bourgeoisie, le Code civil autrichien n'a satisfait que quelques-unes de ses prétentions. La bourgeoisie autrichienne a dû chercher à satisfaire le reste de ses exigences en-dehors du code" (108).

Or précisément, c'est dans une jurisprudence nationale que l'Autriche dut rechercher l'adaptation de son système juridique aux besoins nationaux; l'exégèse autrichienne n'ayant ni l'autorité ni la

(104) Pellegrino ROSSI, *op. cit.*, p. 287 c'est la conclusion à laquelle parvient cet auteur à l'issue de sa réflexion sur Rome par opposition avec l'Etat et la nation russe qui ont su se préserver de ce fléau.

(105) E. TILSCH, *op. cit.*, pp. 120-121, "Le droit du code est une synthèse des droits qui, avant le code, étaient en vigueur dans les pays de bohèmes, d'une part, et dans les pays autrichiens proprement dits, de l'autre; le droit romain était déjà auparavant le droit commun subsidiaire. Les principaux éléments indigènes (autres que la source romaine ou celle du droit canon) sont donc tirés de l'ancien droit bohème ou autrichien. Il y a cependant aussi quelques traces d'origine italienne ou polonaise".; voir *infra* p. 17, note 109 Zdenek KRYSTUFEK, *op. cit.*, pp. 73-74 qui fait état des traits féodaux de ce code.

(106) *Supra* p. 301

(107) *Supra* p. 301

(108) Z. KRYSTUFEK, *op. cit.* , p. 73.

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longévité de son homologue française (109). Cette évolution rejoignait les conclusions de la pensée rossienne. Il fallait se défier d'une codification *a priori* qui séparait la nation de son droit. La commission de Saint Pétersbourg avait su éviter cet écueil. Pour Rossi la maturité du législateur russe trouvait appui non seulement dans l'élite du peuple russe mais dans la nation tout entière (110). Il s'agissait moins dans la pensée du co-fondateur des *Annales* de constater la supériorité des travaux de la commission de législation russe sur l'*Allgemeines Bürgerliches Gesetzbuch*, tout d'abord, parce qu'il était trop tôt pour en juger, l'*Exposition systématique des Lois de l'Empire russe* n'était pas encore le *Svod zakonov*, ensuite parce que Pellegrino Rossi ne disposait pas des informations suffisantes pour apprécier cet ouvrage (111), mais il était important d'insister sur la méthode suivie par la commission impériale de Saint Pétersbourg

(109) Z. KRYSTUFEK, *op. cit.*, pp. 73-74, "De ces prémisses découle aussi la différence entre l'exégèse française et l'exégèse autrichienne. L'exégèse française interprétait le Code Napoléon issu de la pensée du libéralisme, et son épanouissement n'a pas dépassé l'école du capitalisme de libre concurrence. L'exégèse autrichienne a eu la vie beaucoup plus courte. Interprétant un Code marqué par des traits féodaux, elle a dû céder, au moment où la bourgeoisie autrichienne s'emparait à son tour du pouvoir, à une interprétation beaucoup plus étendue. L'évolution économique et politique en Autriche a forcé la génération juridique de 1848 à aborder une 'application créatrice' des normes juridiques désuètes en face du progrès social. La science autrichienne, suivant l'exemple de l'Allemagne, a cherché du secours dans la méthode soi-disant historique".

(110) Pellegrino ROSSI, *op. cit.*, p. 285, "Osons-le dire, les peuples de l'Occident de l'Europe sont des sociétés de vieillard, susceptibles, peut-être, d'être rappelés à la jeunesse et certes, nous ne désespérons pas de les voir parvenir à cet heureux résultat, malgré les obstacles et les dangers dont ils sont environnés. Mais les Russes (et ceci doit s'entendre de la masse de la nation, plus encore que de la population de la capitale) marchent à pas rapides d'une adolescence pleine de vie à l'âge de la force et de la vigueur. C'est un fait que personne ne se dissimule et qu'on prend fréquemment en considération, quand il est question de l'influence extérieure exercée par la Russie".

(111) Pellegrino ROSSI, *op. cit.*, pp. 288-289, "Nous voudrions être à même de parler à nos lecteurs du Digeste russe, avec connaissance de cause. Mais vraisemblablement il serait impossible de le trouver nulle part hors de la Russie; d'ailleurs, notre ignorance de la langue russe nous mettrait hors d'état de le juger. Nous avons heureusement entre les mains un écrit de quelques pages publié en français à Petersbourg, au moyen duquel nous pouvons donner à nos lecteurs une idée du travail exécuté par la Commission législative de Russie, de ce qu'elle appelle *Exposé systématique des Lois russes*. Cet écrit ne présente, il est vrai, ni toute la clarté possible dans la méthode, ni un style aussi correct qu'on pourrait le désirer; mais tel qu'il est, il suffit pour donner

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puisque cette voie n'avait pas été explorée par les "Codes *a priori*".

Pellegrino Rossi ne s'oppose pas à l'idée de codification mais à la méthode suivie par les "Codes *a priori*" pour y parvenir. Le co-fondateur des *Annales* assimilait, il est vrai avec quelque arbitraire, la pensée juridique du père de l'*Allgemeines Bürgerliches Gesetzbuch* aux conceptions de l'Ecole moderne du droit naturel. Mais cette critique caractérisait son refus des systèmes juridiques uniquement fondés sur les principes informes du droit naturel, élaborés selon un point de vue partiel, donc partial. Conformément à l'enseignement de l'école du droit naturel classique, Rossi considérait que l'histoire était "la seule voie qui nous soit ouverte pour parvenir à la connaissance de notre état actuel" (112), c'est-à-dire un moyen de construire le droit en fonction des faits, des besoins particuliers d'une société donnée, et surtout des lois existantes qui ne contredisent pas les enseignements de la raison naturelle mais les expriment au contraire clairement, les précisent, les accordent aux réalités, en bref les rendent applicables à la vie juridique de la nation (113).

N'était-ce pas là, la démarche qu'avaient entreprise les rédacteurs du Code civil français ? *Mutatis mutandis* la pensée rossienne en ce domaine ne se rapprocherait-elle pas de la voie suivie par Portalis lors de la rédaction du Code civil français ? L'auteur du *Discours préliminaire au projet de Code civil* n'écrivait-il pas en effet, "Comment enchaîner l'action du temps ? Comment s'opposer au cours des événements ou à la pente insensible des moeurs ? comment connaître et calculer d'avance ce que seule l'expérience peut nous révéler ? (114) (...). Les codes des peuples se font avec le temps;

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une idée des travaux de la Commission des Lois, et surtout de la marche qu'elle a suivie pour arriver plus tard à la confection d'un Code".

(112) *Supra* p. 288

(113) A. DUFOUR, *Hommage à Pellegrino Rossi*, op. cit., p. 34, "C'est alors dans les pays où les lois sont précisément en harmonie avec « les besoins nationaux », où « se trouvera résolu le problème le plus difficile de la législation, savoir: quel est le point de contact de l'expérience du passé et des créations nouvelles »".

(114) PORTALIS, *Discours préliminaire prononcé lors de la présentation du projet de Code civil de la Commission du gouvernement*, *Motifs et discours prononcés lors de la publication du Code civil* chez Firmin Didot, Paris, 1841 in "Voix de la cité ", Confluences, 1998, p. 18.

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mais à proprement parler, on ne les fait pas (115). Il est utile de conserver ce qu'il n'est pas nécessaire de détruire: les lois doivent ménager, les habitudes quand ces habitudes ne sont pas des vices" (116). Ne partageait-il pas l'opinion exprimée par Rossi dans son commentaire des travaux de la Commission de législation impériale russe (117) lorsqu'il déclarait: " Un législateur isolerait ses institutions de tout ce qui peut les naturlaiser sur la terre, s'il n'observait avec soin les rapports naturaliser qui lient toujours, plus ou moins, le présent au passé, et l'avenir au présent (...). Nous avons trop aimé dans nos temps modernes les changements et les réformes: si, en matière d'institutions et de lois, les siècles d'ignorance sont le théâtre des abus, les siècles de philosophie et de lumière ne sont que trop souvent le théâtre des excès (...). L'essentiel est d'inspirer aux institutions nouvelles le caractère de permanence et de stabilité qui puisse leur garantir le droit de devenir anciennes" (118). La pensée de Rossi nous paraît inaugurer dans l'Ecole du droit historique une nouvelle voie à côté des courants germaniste et romaniste. Comme ces derniers, elle s'oppose aux excès de l'école philosophique mais à leur différence, elle ne méprise pas le présent, tout au contraire, elle le privilégie.

Or, la démarche de Rossi ne restera pas isolée. La *Revue Foelix* opposera également la législation russe aux Codes *a priori* de la même manière que l'a fait Rossi, "le svod n'est pas une codification

(115) PORTALIS, *op. cit.*, p. 24.

(116) PORTALIS, *Discours préliminaire*, op. cit., p. 28.

(117) *Supra* p. 298

(118) PORTALIS, *op. cit.*, p. 28, "Il est utile de conserver tout ce qu'il n'est pas nécessaire de détruire: les lois doivent ménager les habitudes, quand ces habitudes ne sont pas des vices. On raisonne trop souvent comme sgenre humain finissait et commençait à chaque instant, sans aucune sorte communication entre une génération et celle qui la remplace. Les générations, en se succédant, se mêlent, s'entrelacent et se confondent. Un législateur isolerait ses institutions de tout ce qui peut les naturlaiser sur la terre, s'il n'observait avec soin les rapports naturels qui lient toujours, plus ou moins, le présent au passé, et l'avenir au présent, et qui font qu'un peuple, à moins qu'il ne soit exterminé, ou qu'il ne tombe dans une dégradation pire que l'anéantissement, ne cesse jamais, jusqu'à un certain point, de se ressembler à lui-même. Nous avons trop aimé, dans nos temps modernes, les changements et les réformes; si en matière d'institutions et de lois, les siècles d'ignorance sont le théâtre des abus, les siècles de philosophie et de lumières ne sont que trop souvent le théâtre des excès".

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a priori, une de ces conceptions hâtives et fougueuse", assemblage de formules abstraites, qui pour avoir devancé les besoins restent sans influence sur les moeurs, dans lesquelles elles ne trouvent point de racines" (119). La conclusion à laquelle est parvenu le co-fondateur des *Annales* qui fait d'une législation conforme aux besoins nationaux "le point de contact de l'expérience du passé et des créations nouvelles" (120) correspond à l'idée même que les collaborateurs russes de la *Revue Foelix* se font de la méthode de codification, "elle recherche et fixe le point d'intersection qui les confondent dans l'unité synthétique (...). Née de l'alliance de l'élément historique et de l'élément philosophique, elle n'est ni irréligieuse envers le passé ni rebelle aux sollicitations de l'avenir" (121).

Pellegrino Rossi aurait-il été, parallèlement à Portalis, le précurseur d'une nouvelle école de codification, celle-là même que les jurisconsultes russes de la *Revue Foelix* désigneront du nom "d'école pragmatique" (122) située à mi-chemin entre l'Ecole du droit historique et l'Ecole philosophique: "La science élève une école mitoyenne et modératrice: l'école pragmatique, elle les juge, elle est la résultante des deux principes dont ces écoles sont l'exagération" (123) ? Il est permis de se poser la question à la lecture de l'exposé de Rossi sur les principes dirigeants: "Nous pensons qu'il est surtout nécessaire de ne pas perdre de vue les trois diverses

(119) Foelix, *Notice historique et critique sur le digeste de l'empire de Russie*, *Revue étrangère de Législation*, op. cit., Tome II, Paris, 1835, p. 385; *supra* rapp. p. 15 note 96.

(120) *Supra* note 112.

(121) Un jurisconsulte anonyme russe, *Des codifications et des coordinations, Revue de droit*, op. cit., Tome VIII, 1846, pp. 505-506.

(122) A. Rey, *op. cit.*, Tome II p. 2894, "Pragmatique adj. est emprunté (1440) au latin *pragmaticus* 'relatif aux affaires politiques', 'habile ou expérimenté en droit' (...). Le mot a été introduit en français dans l'expression juridique calquée du latin pragmatique sanction, désignant l'acte (rédigé en latin) par lequel Charles VII statua le 7 juillet 1438 sur différents points concernant l'Eglise catholique et les ecclésiastiques à la suite du concile de Bâle. Les autres emplois sont postérieurs et réempruntés. Avec la valeur de 'directement orienté vers le réel, la vie pratique' (1842), le mot emprunté à l'allemand *pragmatisch* dans *pragmatische Geschichte*, qui transcrit l'expression grecque *historia pragmatikê* de l'historien Polybe. En français, *histoire pragmatique* s'est dit à propos d'une histoire qui se propos d'éclairer l'avenir par les faits du passé".

(123) Un jurisconsulte anonyme russe, *ibid.*.

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écoles de jurisprudence qui règnent actuellement en Europe, c'est-à-dire l'école exégétique, l'école historique, et l'école philosophique. Leur réunion seule peut amener la fusion du véritable esprit philosophique avec le positif du droit" (124). Il est vrai que Pellegrino Rossi semble faire preuve ici "d'éclectisme méthodologique" (125). Cependant, nous pensons que l'éclectisme de Rossi n'est en l'occurrence qu'une apparence. Il ne faut pas oublier, en effet, que le co-fondateur des *Annales* soumet la réunion de ces trois écoles à la théorie des principes dirigeants dont Alfred Dufour a montré l'importance dans la pensée rossienne. Nous avons vu que la définition du principe dirigeant par Rossi s'apparentait à la *summa aequitas* du droit romain (126). Or cette notion, appelée à régir sous son égide les écoles de jurisprudence, se rattache elle-même très étroitement aux enseignements de l'Ecole du droit historique (127) et du droit naturel classique (128). Pellegrino Rossi privilégie en conséquence non pas

(124) Pellegrino ROSSI, *op. cit.*, 1821, Tome II, pp. 188-189, "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 exégétique, 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 dirigeants et de l'aptitude qu'acquerront les jurisconsultes pour l'application de ces principes et le développement progressif et régulier de la jurisprudence nationale. 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 des règles et méprise ce qu'elle ne connaît pas. C'est un malheur très-réel que l'éloignement actuel de ces diverses écoles. Chaque pays se trouve ainsi privé des avantages qui résulteraient de leur réunion et exposé aux exagérations qui sont le résultat nécessaire de l'influence presque exclusive de l'une de ces sectes. Que de faits sont là pour attester cette déplorable vérité".

(125) A. DUFOUR, *Influences*, op. cit., p. 321.

(126) *Supra* p. 291.

(127) DE GERANDO, *Discours d'ouverture du Cours de droit public et administratif*, *Thémis*, 1819, Tome I, p. 82, "Recueillir et mettre en ordre, sur chacune de ces matières, les nombreuses dispositions éparses dans une suite de lois et de règlements; en tracer l'histoire sommaire, en démontrer le principe générateur".

(128) Pellegrino ROSSI, *op. cit.*, p. 174 et pp. 179-180, "La distance qui sépare les principes philosophiques des détails du droit positif nous indique assez qu'il doit exister entr'eux des anneaux qui les rattachent les uns aux autres. Si l'on parvient à saisir ces vérités intermédiaires, on tiendra quelque chose de plus positif, de plus applicable que les principes généraux et de moins dangereux, de moins fugitif que les détails minutieux.

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tant l'histoire elle-même que la tradition d'une méthode d'interprétation et de création du droit héritée de l'histoire. Tout comme Pellegrino Rossi, Portalis se réfère à la théorie classique du droit naturel et plus particulièrement au concept d'équité naturelle (129). L'influence de Montesquieu sur ces deux auteurs est indiscutablement prégnante (130).

Certes, Portalis à la différence de Rossi (131) ne nourrit pas les mêmes préventions à l'égard de Rousseau et de l'Ecole du droit naturel moderne. Mais, comme le rappelle Zdenek Krystufek, le

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(...). Or ce sont ces principes positifs que nous appelons principes pratiques ou dirigeants. (...). Cependant si l'on y réfléchit, on trouvera que tout consiste à parvenir par l'analyse à découvrir un fait dont l'énonciation, en sens de permission ou de défense, renferme le principe dirigeant. Mais ce fait doit être aussi général que le permet le but que le législateur veut atteindre; et en même temps si positif et tellement circonscrit qu'on ne puisse l'appliquer à une catégorie différente d'actes et de dispositions."

(129) PORTALIS, premier projet de code civil, Livre Préliminaire, FENET, *Recueil complet des travaux préparatoires du Code civil*, Videcoq Librairie, 1836, 15 vol., p. 85, "Les lois en général sont des règles acquises dans la raison naturelle ou convenues entre les nations ou établies par un pacte social ou solennellement émanées de l'autorité revêtue d'un pouvoir suffisant et légitime (...). Il n'est que la raison naturelle en tant qu'elle gouverne les hommes (...). Les règles prescrites par la raison naturelles forment le droit naturel: ces règles sont la base de toutes les lois écrites qui ne doivent présenter que des conséquences plus ou moins directes des principes d'équité naturelle".

(130) PORTALIS, *Discours préliminaire*, op. cit., p. 16, "Les lois ne sont pas de purs actes de puissance; ce sont des actes de sagesse, de justice et de raison. Le législateur exerce moins une autorité qu'un sacerdoce. Il ne doit pas perdre de vue que les lois sont faites pour les hommes et non les hommes pour les lois; qu'elles doivent être adaptées au caractère, aux habitudes, à la situation du peuple pour lesquelles elles sont faites..."; *Supra* p.15 rapp. Pellegrino ROSSI.

(131) Pellegrino ROSSI, *op. cit.*, Tome II, pp. 375-377, "On abonde en professeurs de mathématiques. Cependant, quand je vois un jeune homme étudier, sans directeur, un ouvrage de calcul, je ne suis pas en peine de lui. Rêvât-il à la quadrature du cercle et à la trisection de l'angle, il ne bouleverserait pas le monde pour cela. Mais en le voyant dévorer le *Contrat social*, tout admirateur que je suis du génie de Rousseau, je tremble pour ce jeune homme et pour ses contemporains. Peut-être, me dis-je, va-t-il se persuader, non seulement que toute souveraineté émane du peuple, mais qu'elle n'est pas transmissible; les conséquences de cette erreur sont faciles à tirer; bientôt, il sera convaincu qu'on ne peut sans injustice faire du monde entier autre chose qu'une vaste démocratie. Or, comment ramener ce jeune homme ? sera-ce en lui parlant de droit divin, de droits de famille, de longue possession, de l'acquiescement respectueux de plusieurs générations à un tel ou tel ordre de choses ? Ce serait vouloir convertir un athée en posant l'autorité de l'Evangile pour première base du raisonnement".

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rationalisme de Rousseau chez Portalis se mêle étroitement à "l'empirisme de Montesquieu" (132). Portalis soumet l'esprit de système à la raison pragmatique de la *jurisprudentia* (133). De la même manière mais en sens inverse, l'éclectisme que l'on se plaît à reconnaître chez Rossi constituerait-il une pierre d'achoppement avec les principes de l'Ecole pragmatique? Les collaborateurs russes de la *Revue Foelix* déclarent à juste titre que "L'école pragmatique ne repose pas sur l'éclectisme" (134). Nous avons déjà indiqué combien la pensée rossienne était, selon nous, étrangère à l'éclectisme (135). Tout bien considéré, nous serions tenté de dire que la doctrine de Rossi serait l'antithèse de l'éclectisme. En effet, conformément à la *summa aequitas* du droit naturel classique, Pellegrino Rossi faisait du principe dirigeant la conséquence circonscrite et précise de toutes les dispositions juridiques et morales propres à un seul et même système juridique. A l'inverse, l'éclectisme se caractérise par une juxtaposition voire une synthèse de dispositions éparses issues de droits différents et réunies artificiellement sous la forme d'une somme législative. Léon Baratz prétendait avoir découvert l'application de cette dernière méthode dans le cadre des dispositions du *Svod zakonov* (136). Si le jugement de Léon Baratz est pour le moins

(132) Zdenek KRYSTUFEK, *op. cit.*, p. 72, "Portalis se rendait compte du fait que le nouveau code devait être adapté au caractère, aux coutumes, et à la situation du peuple, au service duquel il devait être mis. Son oeuvre ne puise pas seulement dans le rationalisme de Rousseau, mais aussi dans l'empirisme de Montesquieu. Portalis a su réagir avec la même sensibilité tant à la vie actuelle qu'aux idées du droit romain. Son rationalisme n'était pour lui qu'un chemin vers l'enchaînement et l'achévement des données empiriques".

(133) PORTALIS, *Discours Préliminaire*, op. cit., "il faut être sobre de nouveautés en matière législative parce qu'il est possible, dans une institution nouvelle, de calculer les avantages que la théorie nous offre, il ne l'est pas de connaître tous les inconvénients que la pratique seule peut découvrir (...) en corrigeant un abus, il faut encore voir les dangers de la correction même (...) il serait absurde de se livrer à des idées absolues de perfection dans des choses qui ne sont susceptibles que d'une bonté relative".

(134) Un jurisconsulte russe, *op. cit.*, p. 505.

(135) *Supra* p. 308.

(136) Léon BARATZ, *Sur les origines étrangères de la plupart des lois russes*, Institut de l'université de droit comparé de l'université de Paris, Paris, 1937, p. 14, "Ces paragraphes étaient rédigés à la manière éclectique, (...) parfois une partie du même paragraphe portait des traces de l'influence française et l'autre partie de celle du code prussien, etc... les lois du Svod étaient souvent confectionnées au moyen d'opérations

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sommaire, voire injuste avec les normes du Code russe, il n'en présente pas moins le mérite de montrer très précisément ce que rejette Pellegrino Rossi lorsqu'il s'oppose à l'idée d'une nouvelle compilation de lois (137). Pour le co-fondateur des *Annales*, le droit ne peut pas être la simple articulation de dispositions légales issues de différentes nations ou simplement des normes accolées les unes aux autres mais un système juridique cohérent fidèle reflet des besoins nationaux. Un tel résultat ne peut découler que d'un travail législatif exécuté dans le cadre strict et précis des lois, des coutumes, des moeurs et des traditions particulières à un pays, à une nation. D'ailleurs, la référence de Rossi à l'école analytique et à la doctrine de Bentham ne nous semble pas être non plus la manifestation d'un esprit éclectique. Tout au contraire, Rossi ne soumet pas sa pensée à l'influence de Bentham mais cherche à éclairer ses lecteurs sur sa propre conception de l'Ecole du droit historique. L'histoire, selon Rossi, est en prise directe avec le présent et pour mieux traduire sa pensée le co-fondateur des *Annales* n'hésite pas à reprendre des formules de l'Ecole analytique (138).

Pellegrino Rossi dans sa philosophie du droit et dans sa méthodologie juridique est profondément un homme de la restauration; expression qu'il faut entendre au sens premier de ce terme et non dans son acception politique (139). Son compte-rendu du "Digeste"

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algébriques, arrangements, permutations et comparaisons et étaient empruntés, non seulement aux lois contenues dans les codes occidentaux contemporains du Svod (prussien, français, autrichien, suédois) mais aussi aux principes généraux de la jurisprudence ou à la synthèse de la pensée juridique ou enfin aux maximes du droit exposées dans les traités théoriques et manuels pratiques de droit, très en vogue à l'époque du Svod, et même la Bible".

(137) *Supra* p. 301.

(138) Pellegrino ROSSI, *op. cit.*, Tome I, p. 39, "Et lorsque Bentham disait aux gouvernements: Rendez vos législations conformes aux besoins et aux lumières de votre siècle, et lorsqu'on entend répéter par mille bouches : c'est la force des choses qui exige des changements; ne pourrait-on pas traduire ce langage dans celui de l'Ecole historique ? C'est dire: ne mettez pas d'obstacles au développement graduel du caractère national; contentez-vous de le diriger; ce n'est pas notre faute, si l'action du passé, si la succession des phases nationales nous a amenés à cet état politique et moral".

(139) A. REY, *op. cit.*, Tome III p. 3213, "Restauration n. f. est emprunté (fin XIIIème s.) au dérivé bas latin *restauratio, -onis* 'renouvellement'. L'ancien français a eu le doublet populaire *restoreson* (1252) 'rétablissement de la santé, guérison'. Le mot a le

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russe traduit sous ses différents aspects l'état précis de sa pensée. Il s'agit pour le co-fondateur des *Annales* de restaurer en Europe une conception du droit et une législation qui avait cours depuis des siècles et qui était fondée sur la mesure objective que donne l'ordre naturel aux besoins nationaux de chaque pays. C'est pourquoi, Rossi se refuse à suivre les deux grands courants germaniste et romaniste de l'Ecole du droit historique, qui cherchent à restaurer le passé contre le présent. Sa philosophie, sa méthode sont une restauration du droit naturel classique et non une réaction. Il prône une conception du droit naturel adaptée aux progrès de l'évolution sociale, digne de réaliser en fonction d'un contexte précis — droit, moeurs, tradition, ordre social — les fins naturelles de conservation de la société. Parallèlement, le droit naturel classique ne consiste pas à dresser une liste de droits prétendus immuables et absolus. "Adversaire résolu du jusnaturalisme de son temps, Rossi en récusera dès lors toujours les thèses individualistes sur le fondement de la société politique comme l'état de nature, le contrat social et les droits naturels, innés éternels et imprescriptibles des individus" (140). L'opposition de Rossi à Franz von Zeiller père de l'*Allgemeines Bürgerliches Gesetzbuch* est la manifestation d'un sursaut contre les codifications *a priori* qui semblaient restaurer dans leurs dispositions l'enseignement de l'Ecole du droit naturel moderne. Pour le co-fondateur des *Annales*, l'Ecole du droit historique ouvrait un espace de liberté face à des Codes *a priori* qui formulent "sous forme de système l'ensemble des règles de l'ordre juridique positif" (141) et

même sémantisme que le verbe: il désigne l'action de remettre une chose en état, et spécialement le rétablissement d'un édifice ancien (1560), d'un objet d'art. (...). Le mot s'est spécialisé en politique pour le retour à la tête du pays d'un souverain d'une dynastie écartée, d'abord en parlant de la dynastie des Stuarts en Angleterre au XVIIème s. (1677). Il s'agit alors aussi, dans le vocabulaire de l'époque, d'une *révolution*. Le mot est repris à propos du retour de la dynastie des Bourbons en France après l'Empire en 1815 (sens attesté en 1829): avec une majuscule, il désigne la période historique pendant laquelle, de 1815 à 1830, la monarchie fut restaurée (attesté 1827), se prêtant à un emploi en apposition comme terme d'arts décoratifs".

(140) A. DUFOUR, *Pellegrino Rossi publiciste*, op. cit., p. 228.

(141) A. DUFOUR, *L'idée de codification et sa critique dans la pensée juridique allemande des XVIIIème-XIXème siècles*, Droits, nº 24, 1996, p. 49, "C'est qu'il appartiendra à Christian Wolff (1679-1754), d'un côté, de réaliser dans toute son ampleur, par la rigueur logique de sa méthode démonstrative et dans un retour à la

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qui, "profondément tributaire du mode de pensée mathématique" (142), comme semblait l'être le Code civil autrichien de 1811, interdisent toute forme de contradiction. C'est pourquoi la pensée rossienne dans sa philosophie du droit et sa méthode juridique s'apparente à la démarche suivie par Portalis pour l'élaboration du Code civil. L'un et l'autre restaurent une conception équilibrée, objective et pondérée du droit, libre de toutes les rigueurs de l'esprit de système qui caractérisent tant l'Ecole du droit historique que l'Ecole philosophique. Mais l'article consacré par le co-fondateur des *Annales* aux travaux de la Commission de législation impériale russe montre également que la philosophie du droit et la méthode juridique de Pellegrino Rossi trouvent leurs prolongements dans une conception politique.

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grande tradition réaliste-intellectualiste condamnant toute espèce de volontarisme, le vaste système juridique ambitionné par Grotius et Pufendorf pour rendre raison de toutes les règles du droit naturel. Le propre de la méthode wolffienne tiendra en effet dans la mise en évidence par des chaînes ininterrompues de syllogismes d'une parfaite rigueur, comment les obligations élémentaires de l'homme et les droits qui en sont les corollaires découlent de l'essence et de la nature de l'homme. Mais il y a plus: ce sera, en effet, d'un autre côté, le mérite singulier de Wolff que d'élucider, dans sa *théorie naturelle des lois civiles* qui forme la matière de l'avant-dernier chapitre du VIIIème volume de son *Jus Naturae methodo scientifica pertractatum* de 1748, les mécanismes de transformation des lois naturelles en lois civiles qui permettent de rattacher tout le droit positif au système du droit naturel. Et ce sera enfin et surtout le mérite tout particulier de Wolff que de transposer au droit civil la méthode démonstrative appliquée au droit naturel pour amorcer l'entreprise de systématisation de tous les domaines du droit positif qu'il appartiendra à J. J. Schierschmidt (1707-1778) et surtout à D. Nettelbladt (1719-1791) de mener à chef. C'est ainsi dans la mouvance de l'Ecole wolffienne que prendra définitivement forme le grand dessein constitutif de l'idée de codification moderne de formuler sous forme de système l'ensemble des règles de l'ordre juridique positif".

(142) A. DUFOUR, *ibid.*, "Profondément tributaire du mode de pensée mathématique, ce courant wolffien, d'un côté se caractérisera par l'élaboration d'une partie générale du droit, correspondant aux définitions générales et aux axiomes des mathématiques et où seront formulées les notions de sujet de droit, de capacité, d'acte juridique ou de bien, que l'on retrouvera dans les parties générales ou les titres préliminaires des grandes codifications modernes; d'un autre côté, ce même courant wolffien se distinguera par sa conception du système de l'ordre juridique comme un ensemble de propositions juridiques attribuant, les unes, comme des prédicats, droits ou obligations aux sujets, les autres, des caractéristiques spécifiques aux droits ou obligations des sujets, mode de procéder que l'on retrouvera également dans les grandes codifications modernes".

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2. *Une réception politique de la philosophie des Doctrinaires européens*

En effet, sans oublier de prendre les précautions d'usage, Rossi se lance dans un jugement non plus seulement juridique mais politique des travaux de la commission de Saint Pétersbourg. "Il n'entre pas dans notre plan de nous occuper de la politique du jour. Mais sans sortir des bornes que nous nous sommes prescrites, nous observerons qu'il est heureux qu'une nation pleine d'activité et d'énergie fasse servir, avant toute chose, ces précieuses facultés au perfectionnement de ses institutions intérieures" (143).

Le regard favorable que jette Rossi sur l'oeuvre législative entreprise par la commission de Saint Pétersbourg ne s'explique pas seulement parce que la Russie applique une philosophie du droit et une méthode juridique que le co-fondateur des *Annales* juge conforme à ses vues mais parce que ce pays fait jouer à l'Etat le rôle qui lui est précisément imparti. En effet, selon la pensée rossienne, "L'Etat est une loi naturelle de l'humanité" (144). Rossi fait de l'Etat un *corpus mysticum* (145), une *universitas* (146) fruit de la nécessité naturelle pour l'homme de vivre en société (147). Le droit naturel n'est donc que l'ensemble empiriquement déterminé des conditions d'existence et de bon fonctionnement des sociétés humaines. Il existe au-dessus des volontés individuelles un droit public et privé qui s'impose aux hommes en vertu du simple fait de leur solidarité naturelle et qui exprime

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(143) Pellegrino ROSSI, *op. cit.*, p. 285.

(144) Pellegrino ROSSI, *Cours de Droit constitutionnel professé à la Faculté de Droit de Paris*, 4 vol., in *Oeuvres de Pellegrino Rossi*, Paris, 1866-1867, Tome I, p. 2.

(145) A. DUFOUR, *op. cit.*, p. 233, "L'Etat paraît donc bien avoir dans la pensée de Rossi une finalité quasi-métaphysique: le développement et le perfectionnement de l'homme".

(146) A. REY, *op. cit.*, Tome III, p. 3971, "latin classique *universitas*, *-atis*, « totalité, ensemble », en emploi concret et en logique, repris en latin juridique pour désigner une communauté humaine"; ce concept d'*universitas* s'oppose à la *societas*,qui concerne des organisations formées par accord entre leurs membres; A. REY, *op. cit.*, Tome III, p.3529, "Société n. f. est emprunté (v.1165) au latin classique *societas* « association, réunion, communauté », spécialement « association commerciale ou industrielle, compagnie », « union politique, alliance »".

(147) Pellegrino ROSSI, *Annales de Législation et de Jurisprudence*, op. cit., p. 2, "L'Etat est une loi naturelle de l'humanité".

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les rapports nécessaires issus de la vie sociale. Ainsi, comme le rappelle Alfred Dufour cette référence de Rossi au droit naturel n'est pas un ralliement du co-fondateur des *Annales* à l'Ecole du droit naturel moderne mais le retour "à l'antique leçon du droit naturel classique d'Aristote et de Cicéron" (148). Le terme de "perfectionnement" revient fréquemment sous la plume de Pellegrino Rossi lorsque cet auteur invoque le rôle de l'Etat dans le développement de l'individu (149). Ainsi la cause effective de cette institution est-elle marquée par la réalisation d'un équilibre naturel entre tous les membres du corps social à l'aune des principes de justice commutative et de justice distributive pour permettre l'accomplissement de sa cause finale, le perfectionnement de la nature humaine (150).

Dans ces conditions, "La loi de l'humanité" (151) ne peut être

(148) A. Dufour, *Pellegrino Rossi publiciste*, op. cit., p. 231, "Contrairement à ce qui a pu être avancé (...), il n'y a nulle contradiction interne dans sa pensée, nulle volte-face dans son évolution, nulle opposition entre Rossi, professeur de droit constitutionnel de la Monarchie de Juillet, et Rossi, disciple genevois de l'Ecole historique, pourfendeur des droits naturels. Si le constitutionnaliste officiel de la Monarchie de Juillet n'hésite pas à soutenir la conformité de la société politique et des libertés publiques à la nature humaine, s'il en arrive à affirmer que c'est « par les principes mêmes de notre nature que nous sommes soumis au même devoir, revêtus du même droit, devoir d'employer notre liberté (...) au développement de notre nature, droit de ne pas être empêchés dans cet exercice légitime de nos facultés », ce n'est pas qu'il revienne à « ces doctrines vagues et hasardées » de l'Ecole du droit naturel moderne qu'il a dénoncées quinze ans plus tôt; c'est qu'il s'en tient tout simplement à l'antique leçon du droit naturel classique d'Aristote et de Cicéron, point de référence traditionnel de toute une littérature critique du jusnaturalisme moderne".

(149) Pellegrino Rossi, *op. cit.*, Tome I, p. 15,: "L'Etat, moyen essentiel de développement et de perfectionnement pour l'espèce humaine".

(150) Pellegrino Rossi, *Cours de Droit constitutionnel professé à la Faculté de Droit de Paris*, recueilli par M. A. Porée, 4 volumes in *Oeuvres complètes de P. Rossi*, Paris 1866-1867, Tome I, p. 251, "C'est dans l'organisation sociale que l'homme trouve les moyens d'accomplir son devoir. Et où trouvons-nous la garantie pratique du droit correspondant ? Nous la trouvons dans la puissance publique qui protège tout le monde, qui secourt le faible et maintient le droit de chacun. Aussi toute organisation sociale, conclut-il, est plus ou moins conforme au but de l'association humaine, selon qu'elle offre plus ou moins de moyens de secours, de facilités au développement individuel, au développement légitime de nos facultés. Et la puissance publique à son tour ne satisfait d'une manière complète aux conditions premières de sa légitimité, qu'autant qu'elle fait ses efforts pour accorder une égale protection au droit de chaque individu".

(151) *Cours d'Histoire moderne par Mr. Le Prof. Rossi, Genève, 1833*, Ms. 3411,

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que le progrès. Comme en écho à la pensée de Rossi, la commission impériale russe justifie ainsi la lente évolution vers l'oeuvre entreprise par "La marche toujours progressive de l'esprit humain, le contact avec d'autres nations et plus que toute autre chose, les lumières du Christianisme et l'établissement du pouvoir hiérarchique, amenèrent la nécessité de rédiger par écrit les anciennes coutumes pour les adapter au nouveau régime" (152). Le co-fondateur des *Annales* se félicite d'autant plus de l'orientation prise par la commission de Saint Pétersbourg qu'elle suit par le perfectionnement de ses institutions, l'exemple de l'Angleterre, qui constitue pour Rossi, le modèle européen du progrès et des libertés en Europe (153). Il est vrai que Pellegrino Rossi inscrit ses réflexions dans un cadre traditionnel, l'anglophilie genevoise (154). L'Angleterre offre alors l'image d'une nation qui par des efforts constants et de prudentes transactions a réussi non seulement à définir un gouvernement libre mais surtout à le conserver. En digne disciple de Montesquieu, le co-fondateur des *Annales* fait de l'Angleterre un modèle où les structures sociales, juridiques, les institutions politiques et les idées morales se sont harmonisées. Rossi considère que c'est par le perfectionnement continuel et progressif de ses institutions que la Russie pourrait parvenir au même résultat. Droits individuels et liberté politique pourraient ainsi se développer au même rythme et favoriser le progrès spirituel de la nation.

Face à ces deux exemples érigés par Rossi au rang d'archétypes

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Bibliothèque Sainte-Geneviève, Réserve, Paris (Genève 1833, 7 Cahiers paginés par feuillet de 1 à 58, dus à C. A. Messala, suivis de 2 Cahiers d'*Histoire moderne, 1832-1833*, f. 159 à 206 de la plume même de P.Rossi), p. 4vo, "La loi de l'humanité est le progrès; les grandes transformations sociales ne sont que des phases de progrès".

(152) Pellegrino ROSSI, *Exposé systématique des Lois de l'Empire Russe, publié par la Commission Législative de St. Pétersbourg*, op. cit., Tome I, p. 308.

(153) Pellegrino ROSSI, *op. cit.*, pp. 285-286, "C'est par ce moyen que l'Angleterre a su se placer au premier rang parmi les peuples civilisés de l'Europe".

(154) C. Et M.A. PICTET et F. G. MAURICE, *La Bibiliothèque Britannique*, Genève, 1796, *Prospectus*, Tome I, p. 5, célébraient l'Angleterre de la manière suivante, "les opinions religieuses et la morale privée n'ont souffert aucune altération; l'amour de l'ordre et des lois s'est maintenu dans son intégrité; les sciences ont continué à fleurir; les Arts, le Commerce, la Navigation ont paru éprouver des développements proportionnés aux efforts qu'exigeaient les circonstances de la guerre; les ressorts de la Constitution ont acquis une force nouvelle".

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pour l'Europe, le co-fondateur des *Annales* oppose une contre-épreuve avec l'empire romain. Avouons-le, ce parallèle est pour le moins surprenant. D'un comparatiste tel que Rossi, le lecteur n'est-il pas en droit d'attendre un exemple vivant pris parmi les nations existantes? L'attachement de Pellegrino Rossi à l'histoire expliquerait-il cet anachronisme? Il ne nous semble pas. En effet, comme nous l'avons vu, Rossi ne se soucie pas de confronter le passé au présent mais simplement d'adapter le droit aux moeurs et aux traditions. Tel n'est pas ici le propos du co-fondateur des *Annales* qui fait du passé le repoussoir du présent. S'agirait-il alors d'une prévention de Rossi contre l'empire romain? S'il est vrai que Pellegrino Rossi porte un regard critique sur l'histoire de Rome (155), il ne fait pas moins de celle-ci "le principe civilisateur" (156) de l'Occident. A regarder de plus près, le commentaire même du co-fondateur des *Annales* donne l'explication de cette surprenante comparaison entre Rome d'une part, et la Russie et l'Angleterre, d'autre part. Insensiblement en effet, Rossi fait poindre, sous l'exemple

(155) Pellegrino Rossi, *Cours d'Histoire de la Suisse (CHS)*,(M. R. Pr., Genève, 1832), Ms. Cours Univ. 412, BPU Genève (Genève 1831-1832), 18 Cahiers numérotés de I à XVIII et paginés en continu, pp. 1 à 673, Cahier n. II, pp. 41-43, "Dans ce temps-là, la civilisation avait quelque chose d'inexorable, de terrible et de sanglant, elle se présentait au peuple civilisé et au peuple civilisateur, non sous la forme de progrès, mais sous celle de puissance. Au fond nul souci n'était entré dans le coeur de l'homme d'améliorer l'espèce humaine, on avait soin de civiliser ou de détruire l'un ou l'autre pour affermir sa puissance. C'était pour prévenir un danger, ou éloigner un obstacle, ou acquérir un plus grand pouvoir. Remarquez que la civilisation des peuples pouvait être un moyen, un résultat, mais jamais un but; jamais rien de moral dans l'intention (...). C'est ainsi que les Romains détruisaient sans regret, sans pitié, sans soupçons de regrets et de pitié les Gaulois, les Helvétiens, les Cimbres et tant d'autres. C'était en foulant aux pieds des monceaux de cadavres et en marchant dans le sang, que la civilisation romaine imprégnait son cachet à la face du monde. Epouvantable catastrophe! Et pourtant qu'eût été le monde, l'Europe sans ces catastrophes?".

(156) Pellegrino Rossi, *op. cit.*, Cahier n. I, p. 22, "Laissons à d'autres toute vaine déclamation sur l'ambition et l'avidité des Romains, sur la tyrannie du Capitole ! Essayez par la pensée d'effacer Rome du théâtre du monde. Où serions-nous ? Où seraient ces idées d'ordre, de régularité politique, d'obéissance aux lois, qui ont sauvé la civilisation européenne? Rome était pour l'Occident un principe d'ordre politique, un principe civilisateur, elle fit de sanglants holocaustes, mais c'était sur l'autel de la civilisation. Plus tard les Turcs n'ont trouvé que le Bas-Empire, impuissant et faible. Qu'est devenu le Bas-Empire? que serions-nous devenu sans cette Rome dont l'influence a jeté de profondes racines?".

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romain, une critique de la Révolution française. La métaphore est une précaution de l'auteur sur un sujet, qui, au temps de la Restauration européenne, est encore la cause de nombreuses et importantes polémiques. Mais, le lecteur ne peut manquer d'être frappé par la précision de l'analogie avec les conquêtes de la Révolution et de l'Empire. "Rome, au contraire, écrit Rossi, qui n'exista, pour ainsi dire, jamais qu'hors d'elle-même, qui en fut réduite à chercher sans cesse dans ses triomphes sur les autres peuples un palliatif à ses maux intérieurs, Rome qui ne souffrit jamais plus cruellement dans son organisation civile qu'à ces époques de gloire militaire que des pédans proposent encore aujourd'hui à notre admiration et peut-être à notre imitation, Rome, dirons-nous, ne put mettre qu'un court intervalle entre le moment où elle cessa de croître et celui où commença son déclin" (157).

Derrière cette apparente critique de l'exemple romain, Pellegrino Rossi montre la plus grande sévérité pour les "maux intérieurs" de la Révolution. Le co-fondateur des *Annales*, dans le prolongement de sa critique du jusnaturalisme, impute aux auteurs de l'Ecole du droit naturel moderne une large part de responsabilité dans les errements qui ont suivi la Révolution de 1789 faisant de l'homme un être abstrait, isolé, sans racines et traditions, soumis exclusivement à l'empire de sa sensualité au mépris de sa nature morale. Alfred Dufour montre à ce titre combien le co-fondateur des *Annales* fait grief à l'Ecole philosophique de ne considérer que "« l'homme en lui-même », « l'homme abstrait »" (158) et le danger d'une telle utopie (159). Pour Rossi l'erreur de l'Ecole philosophique

(157) Pellegrino ROSSI, *op.cit.*, Tome I, p. 286.

(158) A. DUFOUR, *op. cit.* p. 196.

(159) Pellegrino ROSSI, *Annales de Législation et de Jurisprudence*, *op. cit.*, p. 380, "Nos docteurs commencent par donner à l'homme des droits, c'est-à-dire l'attribut le plus complexe possible. Car qu'est-ce pour un jurisconsulte qu'un droit, sans autorisation ? Qu'est-ce que la simple autorisation de sa propre raison, c'est-à-dire qu'est-ce que l'autorisation que l'homme se donne à lui-même pour se créer un droit ? Qu'est-ce qu'un droit sans garantie ? Qu'est-ce qu'un droit sans obligation corrélative ? Qu'est-ce qu'une obligation sans sanction, ou du moins sans puissance coactive supérieure ? Ce sont ces questions et mille autres semblables qu'il fallait nettement résoudre, non par des abstractions, des phrases vagues, et des idées encore plus complexes, mais à l'aide de données bien positives et bien simple, avant de vouloir appliquer l'idée de droit, et plus encore l'idée de droit naturel".

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tient principalement à la substitution du concept de liberté naturelle à celui de loi naturelle. Une liberté qui ferait de l'individu un être absolu, autonome, un "Robinson" qu'aucune volonté supérieure ne commanderait n'est que la négation de la sociabilité naturelle de l'homme (160). Privé de toute conscience et de tout principe, l'individu trouve une justification intellectuelle à ses violences, ses excès et ses "crimes" (161). Au milieu "de cet égarement de l'intelligence humaine" (162), la Révolution aurait poursuivi des chimères et la France aurait découvert que "le monde se trouve autre qu'il n'était" (163). En réalité, selon Rossi, le bouleversement des idées dû à l'Ecole du droit naturel moderne n'a fait qu'anticiper les maux

(160) Pellegrino Rossi, *Annales de Législation et de Jurisprudence*, *op. cit.*, pp. 386-388, "L'homme dans l'état de nature n'est pas la règle, mais l'exception. C'est à l'homme social à remplir les hautes destinées auxquelles le Créateur l'a réservé (...). C'est parce qu'il y a des besoins communs à tous les corps sociaux, et qui tiennent à l'essence même de ces corps (...). Le système de droit, l'ensemble des principes qui sont les fondements nécessaires de tout corps social peut s'appeler le droit social universel. Le système de droit propre à chaque société d'après les caractères spéciaux de cette société peut s'appeler le droit social particulier".

(161) Pellegrino Rossi, *op. cit. Cours*, Cahier n. XVII, pp. 643-644, "En attendant le ciel s'obscurcissait pour l'Europe entière, les plus sombres nuages s'amoncelaient et bientôt le temps était là où nul ne verrait plus sa route, ni celle du juste, ni celle de l'utilité, où pendant plusieurs années on devait marcher au travers d'une épaisse obscurité ne sachant ni d'où on venait, ni où on devait s'arrêter, on savait d'une manière vague et confuse, les uns qu'ils voulaient rétrograder, les autres qu'ils voulaient avancer. Il y a quelque chose d'effrayant dans cette perturbation, dans cet égarement de l'intelligence humaine au milieu des grandes crises sociales. Alors le plus hardi est n'est qu'un fou, le plus habile n'est qu'un sot, le plus prudent n'est qu'un lâche et le plus honnête n'est pas sans reproches; nul ne fait ce qu'il veut, nul ne fait ce qu'il devrait, nul n'est plus le maître de ses actions, tous se laissent emporter en aveugles par une force invincible, tous suivent, nul ne guide, nul ne conduit; on dirait une puissance surnaturelle qui se jouant de l'homme lui crie: de quoi te mêles-tu ? les grandes rénovations sociales n'appartiennent qu'à moi, cours, débats-toi, agite-toi, ajoute aux grandes oeuvres ta folie et tes crimes, mais le résultat n'est point de ton ressort, il m'appartient".

(162) *Supra* note 161

(163) Pellegrino Rossi, *op.cit.*, Cahier n.XVII, p. 644, "Aussi au milieu de ces grandes catastrophes on n'arrive jamais là où on avait rêvé d'arriver, le monde se trouve autre qu'il n'était, mais il n'est pas ce qu'on voulait, c'est le problème tout à fait général qui se trouve résolu bon gré mal gré, mais les problèmes partiels et tous les systèmes de l'homme sont des niaiseries".

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intérieurs de la Révolution (164). Il fallait donc pour les oublier que la Révolution trouva un palliatif par son expansion militaire. Mais les conquêtes extérieures ne purent compenser le désarroi intérieur. A l'instar de Rome, la fin des conquêtes territoriales sonna pour la Révolution et l'Empire le glas des espérances de 1789 (165).

En détournant l'Etat de sa mission primordiale, la France révolutionnaire l'avait frappé d'"un principe d'affaiblissement et de mort" (166). A la différence de la Russie et de l'Angleterre qui cultivaient leurs institutions nationales et les perfectionnaient, la France a perdu, selon Rossi, ce pour quoi elle s'était soulevée, "l'empreinte du caractère national" (167). Toujours sous le masque de la civilisation romaine, Rossi montre combien une société dissoute dans la satisfaction des intérêts personnels et des autonomies individuelles ne peut qu'aboutir à "Une civilisation factice, exotique, toute superficielle" (168). Mais fort heureusement pour elle, la Russie s'est sagement attachée à la réformation de ses institutions intérieures (169).

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(164) C. Et M. A. PICTET et F. G. MAURICE, *op. cit.*, *Prospectus*, Tome I, pp. 6 et 7, "les ouvrages des Moralistes anglais et écossais: la morale de ces écrivains est lumineuse et pure (...) jamais peut-être les erreurs d'une fausse philosophie et les maux dont l'humanité est affligée, n'auront rendu ce contrepoison plus nécessaire".

(165) *Supra* p. 318

(166) Pellegrino ROSSI, *Annales*, op. cit., Tome I, p. 286, "Elle ne sut pas se ménager un lieu de repos, une position heureuse et respectée là où l'avait élevée le développement des forces de sa jeunesse. En se répandant imprudemment au dehors, elle contracta des maladies morales inconnues aux anciens Romains, qui portèrent dans l'Etat un principe d'affaiblissement et de mort".

(167) Pellegrino ROSSI, *ibid.*, "Qui eût pu prévoir que l'empreinte du caractère national des Romains, cette empreinte si profonde, finirait par s'effacer pour faire place à des formes étrangères?".

(168) Pellegrino ROSSI, *op. cit.*, pp. 286-287, "Qui n'est pas surpris d'apprendre par l'histoire que ces Romains, serviles imitateurs d'un peuple conquis, en vinrent au point de mépriser leurs propres antiquités et de ne plus entendre le sens ni l'esprit de leurs institutions primitives? (…). Une civilisation factice, exotique, toute superficielle, ne tarda pas à faire de Rome le jouet des peuples barbares. Peu de siècles s'étaient écoulés, et déjà sur la terre classique de l'Italie un Lombard osait écrire que l'insulte la plus sanglante dont on pût flétrir un homme, était de l'appeler Romain!".

(169) Pellegrino ROSSI, *op. cit.*, p. 287, "Tel ne paraît pas être le sort réservé à la nation russe. Dès long-tems l'attention de ses Souverains s'est portée sur les institutions de cet Empire et en particulier sur la réforme de sa législation".

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Est-ce à dire que Pellegrino Rossi rejoint ici la pensée contre-révolutionnaire? Dans un climat de paix retrouvée, la Restauration provoque en effet partout en Europe d'énergiques débats sur la légitimité de la Révolution de 1789. Cet événement a-t-il été simplement une parenthèse, voire un accident, dans l'histoire (170)? La pensée rossienne rejette une telle interrogation. La diatribe du co-fondateur des *Annales* contre la Rome antique, qui correspond si étrangement aux traits de la France révolutionnaire, n'a aucunement pour objet de remettre en cause le projet fondateur de 1789. Tout au contraire, Rossi veut seulement dénoncer les excès de la Révolution mais non les principes de 1789. A ce titre, Pellegrino Rossi reconnaît dans l'égalité civile la grande conquête de la Révolution et il se plaît à la célébrer avec beaucoup d'empressement (171). D'ailleurs, Rossi n'a-t-il pas affirmé que "les grandes transformations ne sont que des phases de progrès" (172). Loin d'être régressive ou immobile l'Histoire a un sens pour le co-fondateur des *Annales* et, comme le rappelle Alfred Dufour, Rossi manifeste "une profession de foi conjointe dans la continuité du progrès et dans sa conformité aux vues de la Providence" (173).

(170) Stéphane RIALS, *Essai sur le concept de monarchie limitée (autour de la Charte de 1814)*, *Droit prospectif*, Aix, 1982, p. 280, la décision de Louis XVIII de dater la Charte de la dix-neuvième année de son règne avait provoqué d'importants débats en France.

(171) Pellegrino ROSSI, *op.cit.*, Tome I, p. 253, "Là où le privilège caractéristique de l'ordre juridique et politique des sociétés anciennes, prescrivait ou prohibait aux hommes réunis en société telle ou telle activité, l'usage de telle ou telle faculté à raison de leur appartenance « à une religion, à une race, à une famille, à une classe donnée », le principe fondamental du droit public nouveau — celui de l'égalité civile — dit à tous indistinctement: « Si tu es membre d'une société civile, quelles que soient ton origine, ta demeure, ta croyance, ta fortune, voilà le droit, voilà le droit pour tous ». Dans le cercle du droit privé et dans le cercle du droit public, les mêmes possibilités pour tous. Chacun peut se mouvoir selon l'énergie de ses moyens".

(172) Pellegrino ROSSI, *Cours d'histoire moderne*, op. cit., p. 4vo, "La loi de l'humanité est le progrès; les grandes transformations sociales ne sont que des phases de progrès; celles qui nous paraissent rétrogrades ne sont que des phases préparatoires au progrès. Les siècles de ténèbres étaient nécessaires pour engloutir l'antique civilisation et céder le pas à une nouvelle".

(173) A. DUFOUR, *Rossi historien*, op.cit., p. 18; Pellegrino ROSSI, *Revue des Deux-Mondes*, 1840, Tome XXIII, p. 889, "Les voies de l'humanité sont lentes; l'homme dans sa liberté et sa faiblesse, ne les parcourt pas sans haltes ni détours. Mais s'il est

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Une fois encore la commission de législation impériale russe se fait l'écho de Rossi dans cette conviction d'une marche insensible et irrésistible de l'humanité vers le progrès malgré les soubresauts et les inévitables retours en arrière qu'est immanquablement appelée à connaître la civilisation (174).

La Révolution a mis au grand jour les principes dirigeants du droit public européen, la liberté, l'égalité et l'unité nationale, qui par leur combinaison et leur contrepoids respectifs, doivent assurer l'ordre et l'harmonie de l'Etat de droit (175). La pensée rossienne s'oppose totalement aux conceptions des contre-révolutionnaires. Rien ne lui est plus étranger que les réflexions de Louis de Bonald "contre les novateurs qui ont bouleversé la France" (176). La Révolution a été un bouleversement nécessaire et salutaire qui a entraîné

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donné aux individus de retarder leur marche, de s'écarter du but et de rehausser ainsi, par la comparaison, le mérite de ceux qui atteignent les premiers, il n'est pas donné à l'humanité de trahir ses destinées, de ne pas accomplir la carrière que le doigt de la Providence lui a tracée".

(174) Pellegrino ROSSI, *Exposé systématique des Lois de l'Empire Russe, publié par la Commission Législative de St. Pétersbourg*, op. cit., Tome I, p. 307, "En général, il n'existe pas de transition subite dans les rapports sociaux. C'est le temps qui prépare et développe les changemens, soit que les hommes avancent ou rétrogradent en lumières; et la simplicité qui se manifeste dans les premiers Codes écrits, dont Montesquieu dit avec tant de raison qu'on y trouve une rudesse originale et un esprit qui n'a pas été affaibli par un autre esprit, ne doit pas être mise en parallèle avec les lumières ou les opinions de nos jours".

(175) Pellegrino ROSSI, *op. cit.*, Tome II, p. 11, "Je finirai par un exemple pris dans le droit que nous expliquons. Nous avons parlé du principe de l'unité nationale. Eh bien ! prenez ce principe seul, considérez-le comme puissance unique, absorbant tous les autres, vous arriverez à la plus déplorable tyrannie (...). Il faut donc que d'autres principes arrivent, que les principes de liberté et d'égalité viennent à leur tour et le système rationnel se trouvera non dans un principe unique, mais au point d'intersection de ces principes divers, et quand le pouvoir absolu invoquera l'unité, c'est au nom de la liberté et de l'égalité que nous poserons les limites dans lesquelles il doit se tenir...".

(176) Louis DE BONALD, *Théorie du pouvoir politique et religieux*, 1798, Paris, 1966, p. 144, "Les hommes n'ont pas de nouvelles lois à faire dans une société constituée. Ils sentaient bien cette vérité, les novateurs qui ont bouleversé la France, lorsque, pour créer le besoin d'un pouvoir législatif qu'ils pussent eux-mêmes exercer, ils supposaient à la France le besoin de lois politiques, le besoin de lois civiles, le besoin même de lois religieuses: comme si une société politique ou une société religieuse eussent pu se conserver, même un seul instant sans les lois, et sans toutes les lois nécessaires à leur conservation".

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dans son sillage le progrès et la liberté (177). La Restauration ne peut être un rétablissement, ne serait-ce que partiel, de l'ordre ancien. La Révolution est née d'une profonde aspiration de la nation à la liberté que le co-fondateur des *Annales* assimile à l'égalité civile, c'est-à-dire à la conception objective de la justice commutative (178) et de la justice distributive du droit naturel classique (179). "C'est que pour Rossi, si la finalité de l'Etat est le libre développement de chacun, ce ne peut être en même temps la redistribution des acquis de chacun. Bien plus, ce serait là une restauration du principe de privilège" (180). En effet, si les circonstances historiques ont pu justifier l'émergence d'une société fondée sur les privilèges, l'évolution du contexte politique, économique et juridique a rendu légitime leur abolition dès lors qu'ils ne convenaient plus au nouvel ordre social. L'histoire n'est pas un attachement au passé mais une explication du présent (181). La commission de législation impériale russe fait la

(177) Pellegrino Rossi, *op.cit.*, Tome I, p. 57, "Quand on songe à la place que le peuple français occupe depuis des siècles dans l'histoire de l'humanité, quand on songe que c'est le travail lent et successif de plusieurs générations de cette grande famille qui est venu en 1789 se résumer dans les irrésistibles efforts de la nation française vers une meilleure organisations sociale et politique".

(178) *Supra* p. 312.

(179) Pellegrino Rossi, *op.cit.*, Tome I, pp. 255-256, "Egaliser au contraire arbitrairement les résultats des diverses activités individuelles, ce ne serait pas fonder ni sanctionner l'égalité civile; ce serait précisément le contraire, ce serait détruire l'égalité, ce serait fonder le privilège en faveur de ceux qui se trouveraient moins richement dotés sous le rapport de l'énergie de leurs forces individuelles, ce serait attribuer arbitrairement aux uns une portion de ce qui aurait été le résultat de l'activité individuelle des autres (...). Le ressort de l'activité individuelle se trouverait brisé, par cela même que les résultats ne seraient pas garantis à celui qui les aurait obtenus. Et alors, privée ainsi de son principe d'énergie, privée de toute garantie, l'espèce humaine, au lieu d'avancer dans la carrière de son développement et de son perfectionnement, tomberait dans l'apathie, dans la misère la plus profonde (...). Ce ne serait pas là l'égalité civile, ce serait l'inégalité au profit des moins actifs, des moins énergiques".

(180) A. Dufour, *Pellegrino Rossi publiciste*, op. cit., p. 236.

(181) Pellegrino Rossi, *op. cit.*, Tome I, p. 389, "A la vérité notre système n'offre rien d'abstrait; on n'y vise pas à la profondeur, il ramène sans cesse aux faits et aux choses positives. Ce système pourrait servir à prouver que le droit féodal a été, dans un temps, aussi convenable que l'est aujourd'hui le système représentatif. Mais il ne prouvera pas moins que le système représentatif. Mais il ne prouvera pas moins que le système représentatif est aujourd'hui aussi nécessaire et aussi inévitable que l'a été jadis le droit féodal".

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même analyse à propos des premières lois en Russie. "Les lois étaient simples, parce qu'elles étaient strictement appropriées aux besoins du temps; elles conservèrent ce caractère, tant que les circonstances qui les avaient produites restèrent les mêmes" (182). Dans ces conditions, restaurer l'ancienne société, comme le proposait les contre-révolutionnaires, c'était rétablir la source même du désordre et par voie de conséquence, la nécessité d'une révolution.

La commission de Saint Pétersbourg dans son *Exposé systématique des Lois de l'Empire russe* rejoint la philosophie de l'histoire du droit et la méthode juridique des Doctrinaires européens. Prendre en considération toutes les périodes, les établir d'après toutes les sources du droit, dûment répertoriées, analysées et citées, tels sont les principes qui doivent guider le législateur. Conformément à ces préceptes, le législateur russe précise qu'il a strictement suivi cette démarche: "Le recueil systématique publié par la Commission des lois, ne devant embrasser que le Droit existant, c'est par le Code d'Alexeï Mikhaïlowitsch qu'il a fallu commencer. Le praticien doit s'arrêter au dix-septième siècle, mais il n'en est pas de même du Jurisconsulte qui veut approfondir l'histoire de la législation. Pour connaître les principes qui étaient en vigueur en 1649 et pour en suivre l'application, il a besoin de les comparer avec les lois qui les ont précédés. Il en est de même du Code du Tsar Iwan-Wassiljewitsch (le *Soudebnik* de 1540), qui ne peut être bien compris que par l'étude des lois qui lui sont antérieures. Il faut à cet égard puiser, non seulement dans les ordonnances proprement dites, mais encore dans les traités, les transactions, et en général dans tous les actes qui nous ont été conservés, malgré l'invasion des Tatares, les troubles antérieurs, la ruine de Novogorod et l'insouciance des hommes; il faut enfin remonter jusqu'au Code de Iaroslaf de 1020 connu sous le nom de *Loi Russe* (*rouskaia pravda*), auquel se rattachent les premiers souvenirs de notre législation" (183).

Puis, Louis Meynier (184), un autre collaborateur des *Annales de Législation et de Jurisprudence*, précise que "Lorsqu'on veut connaî-

(182) Pellegrino ROSSI, *Exposé systématique des Lois*, op. cit., Tome I, p. 308.

(183) Pellegrino ROSSI, *Exposé systématique des Lois*, op. cit., pp. 300-301.

(184) Louis Meynier (1791-1867) l'un des fondateurs avec Pellegrino Rossi des *Annales de Législation et de Jurisprudence.*

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tre quel est l'état actuel d'un peuple par rapport aux droits dont il jouit, ou dont il peut jouir, il faut donc nécessairement connaître les différents états par lesquels a passé le peuple" (185). De la même façon, par l'étude des sources, la commission de Saint Pétersbourg a cherché à reconstituer l'état précis du droit pour chaque période et partant les différentes étapes suivies par la législation. Ainsi, à l'occasion de ses commentaires sur le Code de *Iaroslaf*, le législateur russe rappelle les conditions de sa démarche: "Ce Code éclaircit des points essentiels de notre histoire, car en général les lois font connaître plus fidèlement que les chroniques, les degrés de civilisation par lesquels une nation a passé dans les différentes époques de son histoire. Ce sont les témoignages les plus incorruptibles que chaque siècle puisse léguer aux générations futures" (186).

Dès lors, l'histoire évolue selon une progression marquée à la fois par la nécessité et l'esprit de liberté. Tel est, selon Pellegrino Rossi, ce que doit être "une philosophie de l'histoire fondamentalement libérale, tout à la fois progressiste et providentialiste. C'est, en effet, une philosophie de l'histoire qui fait de l'histoire de l'humanité un incessant combat pour la liberté et pour la justice, pour l'amélioration de la condition des hommes, en un mot, pour la civilisation" (187). Forte de cette conviction, la commission de Saint Pétersbourg affirme sa foi dans "la marche toujours progressive de l'esprit humain" (188). L'histoire a donc un sens et conformément au principe de nécessité qui anime le progrès de l'humanité vers la civilisation, chaque étape de la législation correspond au remplacement d'un ordre ancien par un ordre nouveau. Or, le législateur russe fait ressortir que l'antériorité d'une révolution morale, en l'occurrence "les lumières du Christianisme" (189), a fondé et orienté la place de la Russie dans la civilisation européenne elle-même: "Aussi aucun des Codes du moyen âge n'est-il antérieur à cette époque. C'est d'elle que datent les progrès rapides que firent ces peuples, et c'est cet ordre de choses aux éléments d'une civilisation

(185) Louis MEYNIER, *Annales de Législation et de Jurisprudence*, 1821, Tome II, p. 28.

(186) Pellegrino ROSSI, *Exposé systématique des Lois*, op. cit., p. 302.

(187) Alfred DUFOUR, *Rossi historien*, op. cit., p. 21.

(188) *Supra* p. 316.

(189) *Supra* p. 316.

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antérieure du Nord, qui, au commencement du XIe siècle assigna à la Russie une place honorable sous tous les rapports parmi les Etats civilisés de ce temps-là" (190).

Puis la commission de Saint Pétersbourg souligne l'influence du christianisme sur le lien entre chaque législation et l'état de la société qu'elle était appelée à régir. La religion chrétienne a permis aux hommes de modifier le cours de la législation dans le sens du progrès, dès lors qu'elle les a inspirés à changer les dispositions de leurs coutumes. Sous l'emprise de la nécessité, les individus ont peu à peu pris conscience du sens de leur destin. Progression lente mais irréversible, car la commission de législation croit à la longue gestation des différents droits coutumiers à l'aune des principes chrétiens, "Par cette raison aussi on ne changea dans les lois civiles que les dispositions qui étaient contraires à la doctrine et au régime du Christianisme" (191).

Il est saisissant de voir combien l'*Exposé systématique des Lois* développe une philosophie de l'histoire du droit qui était également celle des Doctrinaires européens. A la suite de Guizot (192), Pellegrino Rossi fait du christianisme et des invasions germaniques les fondements de l'Europe moderne. L'individualité du chrétien est venue se fondre dans la liberté inhérente aux institutions issues des droits germaniques (193). Or, le législateur russe reprend à son

(190) Pellegrino ROSSI, *Exposé systématique des Lois*, op. cit., p. 308.

(191) Pellegrino ROSSI, *Exposé systématique des Loi*, op. cit., p. 308.

(192) A. DUFOUR, *Rossi historien*, op. cit., pp. 23-24, "Concernant par ailleurs les facteurs principaux de la formation de la civilisation en Europe, Rossi, s'inspirant visiblement dans ses cours d'histoire comme dans ses cours de droit constitutionnel, parfois jusque dans sa terminologie, du fameux *Cours* de Guizot, met particulièrement en évidence (...) le rôle du christianisme avec son sens de la responsabilité personnelle, facteur d'individualité, enfin, le rôle des Germains, facteur d'indépendance et de liberté individuelle".

(193) Pellegrino ROSSI, *Cours d'histoire moderne par Mr. le Prof. Rossi Genève 1833*, Ms. 3411, Bibliothèque Sainte-Geneviève, Réserve, Paris (Genève 1833, 7 Cahiers paginés par feuillet de 1 à 158, p. 5, "L'histoire moderne commence à l'entrée dans le monde européen des principes modernes. On pourrait affirmer que l'histoire moderne commence à l'invasion des Barbares, parce que c'est de la Germanie qu'a été introduite en Europe un des principes vitaux du monde actuel (...). Le christianisme fut un principe nouveau, rendit l'homme à l'individualité qui lui fit sentir une responsabilité personnelle. (...). L'invasion des peuples du Nord amena un second élément de liberté individuelle.

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compte cette évolution, avec une inflexion par rapport à l'analyse des Doctrinaires européens, en faveur du *Code de Iaroslaf* parce qu'il fait de la liberté un principe absolu s'adressant aussi bien aux russes qu'aux slaves à la différence des droits germaniques des pays occidentaux qui établissent une discrimination entre francs et romains: "Enfin, cette loi qui nous retrace les institutions et les usages de ces temps-là, devint pour l'histoire de la Russie et du Nord en général, non seulement un monument précieux d'un âge qui en compte si peu, mais encore un point de départ pour y rattacher les développements de la législation qui commençait à se former avec ce Code. On y voit le Russe et le Slave, non dans les rapports de domination et de servitude qui existaient entre le Franc et le Romain, mais libres et égaux, jouissant des mêmes prérogatives" (194).

La communauté de vues entre la commission de Saint Pétersbourg et les Doctrinaires européens est également remarquable lorsqu'on s'attache à examiner l'évolution historique des législations. L'*Exposé systématique des Lois* insiste sur l'idée que les différentes législations ont leur originalité et qu'elles évoluent selon des conditions historiques qui leur sont propres mais qu'elles forment, par un fonds commun de dispositions, un tout organique en Europe. Ainsi contrairement à l'universalisme des Lumières qui postule une évolution unitaire vers le progrès, le législateur russe oppose la coexistence de législations différentes qui progressent selon des voies similaires (195). Les Doctrinaires ne soulignent pas moins que la

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Ces peuples du Nord avaient la liberté individuelle de fait et les martyrs ne la possédaient que de principe (...). Cette individualité de l'homme, principe nouveau, pénétrant dans le monde romain corrompu, fut un dissolvant qui le fit bientôt tomber en ruines. Ce principe, émanant du christianisme, n'était pas contraire à l'ordre, mais provenait de l'irruption des peuples septentrionaux, il donnait à la force personnelle une influence, source de désordres. Ces deux éléments du même principe furent admirablement combinés, et la tendance du christianisme vers la douceur et la civilisation neutralisa la tendance destructive de l'individualité brutale des peuples du Nord".

(194) Pellegrino Rossi, *Exposé systématique des Lois*, op. cit., p. 310.

(195) Pellegrino Rossi, *Exposé systématique des Lois*, op. cit., pp. 311-312, "L'esprit du droit germanique se manifeste de même dans la vente et l'achat, la revendication de la propriété, la nature allodiale des biens, l'ordre des successions, la préférence accordée aux mâles, le droit exclusif d'un des fils à la possession du manoir paternel (la *terre salique*), la dot des filles, la distinction des biens paternels et maternels, la tutelle des

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reconnaissance de la diversité et de la relativité des législations ne saurait conduire en aucune façon à une mise en cause de l'unité et du progrès de l'humanité, "les peuples ne sont (pour le genre humain) que les individus de l'espèce sociale" (196).

Certes, la commission de Saint Pétersbourg reconnaît la spécificité de l'histoire législative russe par rapport à l'évolution du droit dans les pays occidentaux (197). Cependant, de la même manière que les Doctrinaires européens (198), qui distinguent trois périodes "où les divers éléments de notre société se dégagent du chaos, prennent l'être, et se montrent sous leurs formes natives avec les principes qui

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mineurs, la jouissance des biens accordées après la mort du père et de la mère qui ne se remarie pas, le classement des hommes en libres et en esclaves, avec les différentes manières de tomber en servitude, le droit d'être jugé par ses pairs, la preuve par le serment judiciaire, le fer ardent et l'eau bouillante; enfin dans mille autres points que nous ne pourrions qu'indiquer ici, et qui prouvent suffisamment l'identité des dispositions qu'on retrouve dans les anciennes lois et coutumes de l'Allemagne, de la France, de l'Angleterre, de l'Italie ainsi que dans le *Soudebnik* et dans l'*Oulogénié*. Il est digne de remarque, que ces mêmes principes sont communs aux anciennes lois et statuts des Slaves polonais. Qu'ils les ayent tirés de la même source normande, ou empruntés des autres peuples germaniques leurs voisins, il n'en est pas moins vrai qu'on rencontre un accord parfait entre les institutions de ces deux branches d'une même nation si long-temps séparées et réunies aujourd'hui sous le sceptre du même Souverain".

(196) François GUIZOT, *Tableau philosophique et littéraire*, 1807, Tome XV, pp. 372-373 in *Archives littéraires de l'Europe*, mélanges de littérature d'histoire et de philosophie (1804-1808).

(197) Pellegrino ROSSI, *Exposé systématique des Lois civiles op. cit.*, p. 316, "Nous nous bornerons à indiquer les sources principales de l'ancienne législation, dont l'étude doit, pour ainsi dire, servir d'introduction à la connaissance des lois actuelles. Cet aperçu suffira pour faire concevoir comment dans un Empire aussi vaste, qui tient à l'Asie autant qu'à l'Europe, qui a reçu ses premières institutions en partie des peuples germaniques, en partie du Bas-Empire, qui a eu à lutter contre mille obstacles opposés à l'action de ses forces intérieures, et dont les habitans se trouvent placés à divers degrés dans l'échelle de la civilisation; comment, disons-nous, dans un Etat tel que celui-là la législation a dû se former sur d'autres bases que dans le reste de l'Europe".

(198) Pellegrino ROSSI, *Histoire de la République romaine par M. Le Professeur Rossi*, 1830, Ms. Cours Univ. 410, Bibliothèque Publique et Universitaire (BPU) Genève 1830, 1er Cahier, pp. 14-15, "Plusieurs grands peuples ont passé par trois âges..."; Alfred DUFOUR, *Rossi, historien op. cit.*, p. 19, qui rattache cette théorie chez Rossi à l'influence de Michelet, "Quant à la théorie des trois âges des peuples — visiblement inspirée de Michelet, sinon de Vico, dont Michelet vient de traduire et de présenter la *Scienza Nuova* en France (1827).

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les animent" (199), celle où "les éléments divers de l'ordre social, se rapprochent, se combinent (...) sans pouvoir rien enfanter de général, de régulier, de durable" (200), et enfin celle "du développement proprement dit, où la société humaine prend en Europe une forme définitive, suit une direction déterminée" (201), le législateur russe propose également une division du temps historique en trois époques: "Pour suivre une marche systématique dans cette exposition, la Commission des lois classera les matériaux de l'ancienne législation qui sont à sa portée, sous trois périodes. La première commence au siècle de Iaroslaf et de ses successeurs, et finit aux temps de l'invasion des Tatares qui, en détruisant la liberté politique et civile arrêtèrent la marche de la civilisation sans cependant changer essentiellement les élémens du droit privé. La seconde commence à l'avènement du Grand-Duc Iwan-Wassiljewitsch III, qui ayant rétabli l'action centrale du gouvernement, fit rédiger le premier Code général (le *Soudebnik* de 1498), elle se termine à l'époque de la publication des lois du premier Souverain de la Dynastie des Romanofs. La troisième période comprend la législation du Tsar Alexeï-Mikhaïlowitsch et de l'Empereur Pierre I.er qui, comme l'a dit l'Impératrice Catherine II, *en introduisant des moeurs et des coutumes européennes chez une nation d'Europe, trouva à civiliser ses sujets une facilité qu'il n'attendait pas lui-même*. Ce que ces deux Souverains avaient commencé, a été continué par leurs Augustes Successeurs" (202). La conséquence de cette longue description de l'*Exposé systématique des Lois* est de montrer que la société russe a suivi l'évolution des autres pays européens selon un double mouvement d'unification, tout d'abord, dans son propre espace national, puis, dans un cadre européen, par le rapprochement et la coexistence avec les autres nations, et partant une progression vers une communauté de législation. C'est tout le sens de l'analyse de Rossi

(199) F. Guizot, *Cours d'histoire moderne, Histoire générale de la Civilisation en Europe, depuis la chute de l'Empire romain jusqu'à la Révolution Française*, 1 Volume, 1828, L. VIII

(200) F. Guizot, *Cours d'histoire moderne, Histoire générale de la Civilisation en Europe, ibid.*

(201) F. Guizot, *Cours d'histoire moderne, Histoire générale de la Civilisation en Europe, ibid.*

(202) Pellegrino Rossi, *Exposé systématique des Lois*, op. cit., p. 317.

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lorsqu'il écrivait que "les Russes (et ceci doit s'entendre de la masse de la nation, plus encore que de la population de la capitale) marchent à pas rapides d'une adolescence pleine de vie à l'âge de la force et de la vigueur" (203). Les russes bénéficient d'un avantage par rapport à la "vieille Europe" (204) ils n'ont pas eu à subir la tourmente des excès de la Révolution qui ont brouillé les esprits (205). Ils peuvent profiter donc du fruit des Lumières sans les affres des errements de l'Ecole philosophique (206).

La Russie à travers son *Exposé systématique des Lois* répond par son étude historique de la législation à l'article programmatique de Rossi qui en présence des théories contradictoires de "l'Ecole philosophique du droit naturel, qui s'en tient à l'homme abstrait en soi, l'Ecole historique de Savigny, qui part de l'homme historique, et l'Ecole analytique fondée sur l'utilitarisme de Bentham, qui se focalise sur l'homme actuel" (207). cherche à identifier les conclusions de l'Ecole du Droit historique et de l'Ecole analytique, l'homme actuel n'étant que le prolongement de l'homme historique (208).

Par ces conclusions, la commission de Saint Pétersbourg rejoint la pensée de Rossi et des Doctrinaires français (209) et tout particu-

(203) *Supra* p. 304, note 110.

(204) *Supra* p. 28.

(205) *Supra* p. 316.

(206) *Supra* p. 296.

(207) A. DUFOUR, *op. cit.*, p. 314.

(208) Pellegrino ROSSI, *Annales de Législation et de Jurisprudence*, op. cit., Tome I, p. 39 "Et lorsque Bentham disait aux gouvernements: Rendez vos législations conformes aux besoins et aux lumières de votre siècle, et lorsqu'on entend répéter par mille bouches: c'est la force des choses qui exige des changements; ne pourrait-on pas traduire ce langage dans celui de l'Ecole historique? C'est dire: ne mettez pas d'obstacles au développement graduel du caractère national; contentez-vous de le diriger; ce n'est pas notre faute, si l'action du passé, si la succession des phases nationales nous a amenés à cet état politique et moral".

(209) Georges BURDEAU, *Traité de science politique*, Paris, 1966-1967, 10 volumes, Tome I, nº 329, p. 200, "pour encadrer sans violence les aspirations du libéralisme naissant, rien ne pouvait mieux convenir que cet empirisme respectueux des données de fait; pour en fixer les objectifs, nulle attitude n'était plus adéquate que ce rationalisme modéré, à mi-chemin entre l'utopie et le déterminisme, qui légitimait par les enseignements de l'histoire et la connaissance de la nature humaine, l'idéal politique de la classe dominante".

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lièrement les réflexions de leur chef de file, François Guizot, qui a largement influencé les conceptions philosophiques, historiques et politiques du jurisconsulte genevois (210) "avec lequel il se trouve en correspondance" (211). Pellegrino Rossi s'inscrit "en effet dans l'orbite du groupe des doctrinaires, qui prennent (...) acte de la Révolution française dans ses principes et ses résultats, mais n'en partageant pas pour autant l'esprit révolutionnaire" (212). Issu de la vieille noblesse française, le Duc de Broglie, Doctrinaire convaincu, résume admirablement les aspirations et les préventions que lui inspire la Révolution dans une communion de pensée avec son homologue genevois "j'appartenais de coeur et de conviction à la société nouvelle, je croyais très sincèrement à ses progrès indéfinis; tout en détestant l'état révolutionnaire, les désordres qu'ils entraînent et les crimes qui les souillent, je regardais la Révolution française prise *in globo* comme une crise inévitable et salutaire" (213). De la même manière, dans un discours à la Chambre du 14 janvier 1817, Royer-Collard rejette toute possibilité de s'interroger sur la légitimité même de la Révolution (214). Pour Guizot, la Révolution incarne l'étape ultime du christianisme qui consacre le principe

(210) A. DUFOUR, *Rossi, historien et ou philosophe de l'histoire*, op. cit., p. 31, "Mais Pellegrino Rossi n'apparaît pas seulement tributaire de l'historiographie libérale des doctrinaires; il fait encore figure d'adepte de leur philosophie de l'histoire européenne, tout à la fois progressiste et providentialiste, repérant dans l'histoire de l'Europe aussi bien les jalons du progrès de la liberté que les marques de la Providence divine".

(211) A. DUFOUR, *op. cit.*, p. 10, "Pour ce qui est de son inspiration, nul doute que ces propos sur les conditions de l'histoire ne procèdent directement ou indirectement de son contemporain et ami de François Guizot (1787-1874), avec lequel il se trouve en correspondance (...). Guizot assigne à l'historien une triple tâche, à savoir celle de constater les faits en établissant avec exactitude tout ce qui s'est passé, celle de montrer ensuite les lois régissant l'évolution de la société en dégageant l'interdépendance des faits et les causes de leur apparition, celle enfin de reconstituer leur forme et leur mouvement".

(212) A. DUFOUR, *Hommage à Pellegrino Rossi op. cit.*, p. 53, "Pellegrino Rossi si représentatif du libéralisme de culture française. Ne gravite-t-il pas d'abord en effet dans l'orbite du groupe des doctrinaires, qui prennent (...) acte de la Révolution française dans ses principes et ses résultats, mais n'en partageant pas pour autant l'esprit révolutionnaire".

(213) Victor de Broglie, *Souvenirs*, Paris, 1886, 4 volumes, Tome I, nº 92, p. 262

(214) Ch. DE RÉMUSAT, *Mémoires de ma vie*, Paris, 1958-1962, 5 volumes, éd. C. H. POUTHAS, Tome I, p. 314, "la nation, dont je parle, innocente de la révolution dont elle

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chrétien d'égalité (215). De la même manière la commission de Saint Pétersbourg faisait du christianisme le principe et l'origine du progrès du droit et de la civilisation.

Pour Pellegrino Rossi, comme pour les Doctrinaires français, la nouvelle situation historique européenne favorise la restauration de la liberté. Tenants de l'Ecole du droit historique, ils incarnent la volonté de construire un ordre politique et civile conforme au projet fondateur de la Révolution de 1789. Rejetant la pensée contre-révolutionnaire et l'esprit philosophique dans le passé, Pellegrino Rossi conçoit la Restauration comme le rétablissement du droit.

On ne saurait comprendre l'intérêt de Pellegrino Rossi pour les travaux de la Commission de législation impériale russe si l'on ne voit pas combien la consécration par un régime autoritaire de principes longtemps contenus en Europe occidentale pendant la Révolution et l'Empire français était pour le co-fondateur des *Annales* riche d'avenir. C'était à la penser et à la préparer qu'avait travaillé Pellegrino Rossi. Convaincu de la perfectibilité des nations, favorable aux mutations de la Révolution, le jurisconsulte genevois pensait que la philosophie de l'histoire du droit et de la méthode juridique héritées de l'Ecole du droit historique garantirait en Russie le progrès des libertés civiles et l'émergence d'un droit conforme aux besoins nationaux éloigné des principes abstraits et artificiels de l'Ecole du droit naturel moderne repris dans les codifications *a priori*. Pour le co-fondateur des *Annales*, les travaux du législateur russe, semblaient annoncer le temps de la fondation. N'était-ce pas le rêve d'une génération, celle de la Restauration, que de fonder un

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est née, mais qui n'est point son ouvrage, ne se condamne point à l'admettre ou à la rejeter tout entière, ses résultats seuls lui appartiennent".

(215) F. GUIZOT, *Archives philosophiques, politiques et littéraires, De la monarchie française depuis la deuxième Restauration jusqu'à la fin de la session de 1816, avec un supplément sur la session actuelle du Montlosier*, Tome III, n°12, Paris, juin 1818, p.403 et p. 405, "le christianisme a proclamé l'égalité des hommes devant la justice divine (...) notre siècle proclame l'égalité des hommes devant la justice humaine (...) l'égalité des charges publiques, l'égale admissibilité de tous à tous les emplois, la liberté de conscience, voilà des émanations du principe de Justice appliqué aux individus; les formes représentatives, la liberté de la presse, le jury, voilà des instruments destinés à extraire du sein de la société toutes les notions de Justice qu'elle possède pour les appliquer à son gouvernement".

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droit commun européen sur un acte de foi: la démocratie ? (216). Doit-on considérer avec Pellegrino Rossi que pour la Russie "le temps du monde fini commence?".

(216) Pellegrino Rossi, *Revue des Deux-Mondes*, 1840, Tome XXIII, p. 886, "De tous les faits généraux de notre époque, il n'en est pas de plus puissant et de plus fécond que l'envahissement général de la démocratie. Si elle ne coule à pleins bords qu'en Amérique, en France, en Suisse, elle s'infiltre dans le monde entier; partout elle mine le privilège dans ses bases, partout elle dissout les fondements de la vieille société et prépare les éléments d'une société nouvelle".

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BERNARDO SORDI

IL TEMPO E LO SPAZIO DELL'ATTIVITÀ AMMINISTRATIVA NELLA PROSPETTIVA STORICA (*)

« Sarà fatta una nuova divisione del Regno in dipartimenti… »; « ogni dipartimento sarà diviso in distretti… »; « ogni distretto sarà diviso … in cantoni » (1). Sono passati pochi mesi dalla frattura rivoluzionaria: nel dicembre del 1789 l'Assemblea Nazionale è già in grado di sostituire una nuova organizzazione amministrativa all'antico patchwork istituzionale, di disegnare sulla gotica sovrapposizione di diocesi, baliati, governi, generalità, feudi, comunità, corpi, che ancora popolavano il territorio della monarchia classica, una « superficie tutta uguale ». Siamo di fronte all'esempio più celebre dell'intera storia moderna di disciplina politica dello spazio. Il territorio da elemento storico, carico di peculiarità, di elementi specifici e non omologabili, di giuridicità originarie, diventa concetto geometrico, interamente plasmabile, esattamente divisibile, se non proprio nei quadrati di 18, 6 e 2 leghe per lato previsti nel progetto iniziale di Thouret-Sieyès rispettivamente per dipartimenti, distretti e cantoni, in circoscrizioni ugualmente proporzionate e non

(*) Pubblico qui il testo della relazione tenuta il 19 settembre 2002 al 48° Convegno di studi amministrativi di Varenna, *Tempo, spazio e certezza dell'azione amministrativa*. Queste pagine sono dedicate a Giorgio Berti e destinate ad essere ospitate anche negli *Scritti* in suo onore, a testimonianza di un affetto e di una stima che datano da ormai lontane lezioni fiorentine, di cui continuo a serbare, con gratitudine, un forte ricordo.

(1) Così gli artt. 1-3 del *Décret relatif à la constitution des assemblées primaires et des assemblées administratives* del 22 dicembre 1789, da leggersi in J.-B. DUVERGIER, *Collection complète des lois*, Paris, Guyot, 1824-1831, vol. I, p. 86. Una contestualizzazione del provvedimento che disegna la Francia geometrica del Costituente, in L. MANNORI-B. SORDI, *Storia del diritto amministrativo*, Roma-Bari, Laterza, 2001, pp. 201 e ss., con la bibliografia ivi richiamata.

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troppo dissimili per territorio, popolazione, contribuzione fiscale, ed ovunque identiche per organizzazione e funzioni.

Il territorio, nella contraddittoria sovrapposizione di circoscrizioni, di privilegi provinciali, cittadini, comunitativi, nella sua storica disomogeneità, nella sua intrinseca politicità, viene azzerato: è un nuovo politico, la sovranità dell'interesse generale, che determina, ordina e crea lo spazio. Uno spazio nuovo e sinora incognito, liscio, uniforme, indifferenziato, che diventa il metro comune, anch'esso inedito, della rappresentanza politica, dell'esercizio delle funzioni giurisdizionali ed appunto di quelle funzioni amministrative finalmente emerse nella loro individualità.

La frattura rivoluzionaria è così profonda da comportare anche una nuova scansione politica del tempo. Lo impongono l'archiviazione delle istituzioni esistenti e l'introduzione della *costituzione nuova*. *Status*, *privilegia*, *jura quaesita* vengono cancellati d'un colpo: « L'Assemblea Nazionale » — si dirà nel proemio della costituzione del 1791 — « abolisce irrevocabilmente le istituzioni che ferivano la libertà e l'uguaglianza dei diritti. Non vi è né nobiltà, né paria, né distinzioni ereditarie, né distinzioni di ordini, né regime feudale, né giustizie patrimoniali … Non vi è più né venalità, né eredità di alcun ufficio pubblico. Non vi è più, per nessuna parte della Nazione, né per nessuno individuo alcun privilegio o eccezione al diritto comune di tutti i francesi. Non vi sono più né giurande, né corporazioni di professionisti arti e mestieri. La legge non riconosce più né voti religiosi, né alcun altro legame che sia contrario ai diritti naturali, o alla Costituzione ».

La metafora linguistico-temporale dell'*ancien régime*, di un regime 'precedente', di un ordine antico interamente superato dal nuovo ordine individuale viene inventata in questo preciso momento in cui i rivoluzionari cancellano il vecchio sistema e ne costruiscono un altro interamente nuovo (2).

Dobbiamo attendere la radicalizzazione giacobina per una eclatante testimonianza di questa nuova scansione politica del tempo. Il legislatore del 1793 procede a suo modo verso l'obiettivo di promulgare un codice di leggi civili, semplice, chiaro ed adeguato alla

(2) W. DOYLE, *L'Ancien Régime*, trad. ital. a cura di Cesare MOZZARELLI, Firenze, Sansoni, 1986, pp. 5 e ss..

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costituzione. Scardina le regole sedimentate nelle consuetudini e nel diritto scritto su filiazione e successione, introduce la completa uguaglianza tra figli legittimi e naturali, parifica gli eredi secondo la linea naturale della filiazione. Non solo: proietta all'indietro, retroattivamente, la nuova normativa, con il preciso intento di assoggettarvi tutte le successioni apertesi all'indomani del 14 luglio del 1789, divenuto così non solo spartiacque politico-istituzionale, ma momento di frattura tra le generazioni (3).

È l'acme del momento rivoluzionario: le *lois de combat* giacobine scardinano persino il corso ordinato del tempo, vi si impongono con prepotenza, sull'onda di un volontarismo politico che tutto sembra travolgere e che evita di stabilizzarsi in una decisione fondamentale di una qualche rigidità. « Un popolo ha sempre il diritto di rivedere, riformare e cambiare la propria costituzione. Una generazione non può assoggettare alle sue leggi le generazioni future » (4): neppure il testo costituzionale presenta margini di immodificabilità; la stabilità, il valore della manifestazione giuridica nel tempo sono minime.

La divaricazione con il modello costituzionale inglese è giunta al suo punto più alto. Niente di più lontano di questo motore costituente sempre in azione al massimo della potenza dalla quieta immagine familiare del vecchio vestito continuamente rimodellato da abili sarti che Walter Bagehot utilizza per descrivere la costituzione inglese: "una Costituzione carica di storia …; una Costituzione antica, ma in perenne mutamento" (5). Oltre la Manica, frammenti importanti del modello medievale, che sul continente si pretende di cancellare integralmente, sono stati conservati: la durata si oppone al volontarismo; il "tempo come durata", come "fenomeno colmo di normatività" (6), fronteggia la decisione; il vero diritto è ancora, per molti versi, il diritto antico: il diritto che esiste ma che non è posto. Per questo, l'onnipotenza del Parlamento, che pure contrassegna

(3) La vicenda è ben ricostruita da J.-L. HALPERIN, *L'impossible Code civil*, Paris, PUF, 1992, pp. 143 e ss..

(4) Così il celebre articolo 28 della Dichiarazione dei diritti dell'uomo e del cittadino del 24 giugno 1793.

(5) W. BAGEHOT, *The English Constitution*, 1867, trad. ital. a cura di Giorgio REBUFFA, *La costituzione inglese*, Bologna, Il Mulino, 1995, p. 45.

(6) P. GROSSI, *L'ordine giuridico medievale*, Roma-Bari, Laterza, 1995, pp. 74-75.

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anche la modernità inglese continua ad attutirsi nella sostanziale intangibilità della *common law of the land*. Qui, più che altrove, l'ordinamento assume le sembianze di "una specie di corrente di fiume che si ingrossa per via" (7), grazie al lavoro di interpretazione casistica affidato ad una giurisprudenza che conserva il ruolo di essenziale formante del sistema, e che ha il compito specifico di rendere l'ordinamento vitale e mobile, adeguandolo alle novità del divenire.

La stabilizzazione napoleonica, anche sul continente, pone fine alle *lois hostiles*, *partiales*, *eversives*, del periodo giacobino, che Portalis stesso, il padre del *Code civil*, definisce antigiuridiche.

Storicità e descrizione geometrica del territorio trovano un punto di mediazione, da una parte, nella conservazione delle municipalità, dall'altra, nel ruolo strategico assegnato al dipartimento, mera circoscrizione di amministrazione statale nella quale « il prefetto solo sarà incaricato dell'amministrazione » (8). Terminata la Rivoluzione ed archiviato il Terrore, viene pure dimenticata la lotta del legislatore contro il tempo. Il codice diventa possibile e la statualizzazione delle fonti del diritto può agevolmente completarsi. L'art. 2 del *Code civil* può ora affermare il principio che "la loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif".

Il codice civile italiano del 1865 ne riporterà una traduzione letterale (9): "la legge non dispone che per l'avvenire; essa non ha effetto retroattivo". Le armi del legislatore contro il tempo si sono un poco spuntate: quella norma costituisce un principio generale di

(7) 'Rubiamo' l'immagine a Norberto Bobbio, che la utilizza, nel bel saggio dedicato a Tullio Ascarelli ed in particolare alla sua teoria dell'interpretazione, per raffigurare l'ordinamento giuridico come « processo continuato nel tempo », come « un sistema in divenire, un tutto mobile e moventesi nel tempo »: N. BOBBIO, *L'itinerario di Tullio Ascarelli*, in *Studi in memoria di Tullio Ascarelli*, vol. I, Milano, Giuffrè, 1969, ora con il titolo *Tullio Ascarelli* in Id., *Dalla struttura alla funzione. Nuovi studi di teoria del diritto*, Milano, Comunità, 1977, p. 259.

(8) Citiamo dall'art. 3 del pilastro legislativo dell'amministrazione napoleonica, la legge 28 piovoso anno VIII (17 febbraio 1800) *concernant la division du terrritoire français et l'administration*.

(9) Nell'art. 2 delle "Disposizioni sulla pubblicazione, interpretazione ed applicazione delle leggi in generale", premesse al testo del codice.

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diritto, ma non costituisce un limite giuridico per il legislatore (10). Lo Stato liberale, fissandolo, autolimita la propria sovranità, riconosce che la retroattività corre il rischio del perturbamento sociale. "Il nuovo diritto non s'impadronisce dei fatti ad esso anteriori, esso non ha forza retroattiva. Presupposto che esso non si attribuisca forza retroattiva; poiché è intuitivo che il diritto (la legge) ha il potere formale di farlo" (11). Solo per i regolamenti il principio di retroattività è un limite giuridico; per le leggi è soltanto un criterio di interpretazione: esattamente quel "canone di interpretazione" cui allude la Relazione del Guardasigilli al progetto del codice civile del 1942, illustrando l'art.11 delle preleggi. Irretroattività della legge penale e retroattività della legge più favorevole al reo sono principi già proclamati nell'art. 2 del codice Zanardelli, ma bisogna attendere lo Stato costituzionale, dopo il silenzio dello Statuto, per trovare il principio di irretroattività sancito in modo intangibile almeno per il legislatore penale ed iniziare a vedere all'opera il giudice delle leggi ad esercitare anche nel rapporto tra norma e tempo un sindacato di ragionevolezza sull'esercizio del potere legislativo, ispirato alla salvaguardia della "certezza dei rapporti preteriti", al "canone di razionalità normativa", ed al riconosciuto valore costituzionale dell'"affidamento del cittadino nella sicurezza giuridica" (12).

Sotto questo profilo, come conclude un'attenta analisi di Cammeo, l'applicazione del diritto amministrativo nel tempo non segnala particolari tratti di specialità rispetto agli altri rami del diritto (13). Esaurita la fase ottocentesca di fondazione, le norme amministrative si contraddistinguono anzi per una notevole stabilità. Per molti settori dell'universo normativo dell'amministrazione, bisogna arrivare al decennio scorso per vedere significativamente trasformato l'originario impianto ottocentesco.

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(10) F. CAMMEO, *Corso di diritto amministrativo*, Padova, Milano, 1911, tm. I, par. 103 (citiamo dalla ristampa anastatica, Padova, Cedam, 1992, pp. 530 e ss.).

(11) B. WINDSCHEID, *Diritto delle Pandette*, trad. ital. a cura di Carlo Fadda e Paolo Emilio Bensa, vol. I, pt. I, Torino, Unione tipografico-editrice, 1902, p. 89.

(12) Cfr., rispettivamente, Corte cost. 4 aprile 1990, n. 155; Corte cost. 2 luglio 1997, n. 211; Corte cost. 4 novembre 1999, n. 416.

(13) CAMMEO, *Corso*, t. I, cit., par. 107, p. 553.

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Su di un altro fronte, ancora una volta sul crinale più delicato, quello tra giustizia e amministrazione, tempo ed attività amministrativa tornano a fronteggiarsi, creando possibili zone di frizione e conflitto.

La giurisdizione vive all'insegna della certezza dei rapporti giuridici e dell'intangibilità dei casi esauriti e dei fatti preteriti: come tecnica dell'ultimo tempo e come funzione tipicamente retrospettiva è naturalmente proiettata ad evitare il perturbamento sociale. Il decorso del tempo è fatto giuridico per eccellenza. Prescrizione e decadenza arginano aspettative e pretese; la cosa giudicata sanziona con il crisma della immutabilità l'attribuzione giurisdizionale di diritti ed obblighi. Stabilità, certezza, irrevocabilità scandiscono il ritmo dei rapporti giuridici privati.

Il potere amministrativo contrappone subito il carattere inesauribile della sovranità, la perennità dell'interesse pubblico. Già il codice civile isola dal fluire del tempo le forme di appropriazione pubblica dei beni. La prescrizione non ha luogo per le cose che non sono in commercio; il possesso delle cose di cui non si può acquistare la proprietà non ha effetto giuridico (14).

Sul versante della giurisdizione, un celebre passo di Tocqueville ci ricorda il lungo permanere ottocentesco dei modelli di giustizia ritenuta: "ogni volta che un cittadino dovrà difendere un diritto contro un altro cittadino suo uguale, gli si permetterà di adire i tribunali ordinari e i giudici inamovibili; ma se si tratta di difendere questo stesso diritto contro l'amministrazione? Egli dovrà accettare dei giudici che rappresentano l'amministrazione stessa. Non solo, non potrà neppure fidarsi della sentenza di questi giudici, perché qui la giustizia è ritenuta… Il vero giudice è il principe, e dopo essere stati assolti dagli agenti del sovrano, si può sempre essere condannati dal sovrano stesso" (15). In realtà, nella Monarchia di Luglio come nel Secondo Impero la decisione sovrana è poco più che una fictio, tralatiziamente conservata; i casi in cui il governo si discosta dall'av-

(14) Lo dispongono, rispettivamente, gli art. 2113 e 690 del codice civile del 1865.

(15) A. DE TOCQUEVILLE, *Relazione sull'opera di Macarel intitolata « Corso di diritto amministrativo »*, in ID., *Scritti politici*, a cura di Nicola MATTEUCCI, vol. I, Torino, Utet, 1969, p. 240.

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viso del Conseil sono rarissimi (16). Il contenzioso sui diritti prende anzi a prestito dalle immagini giurisdizionali i tratti tipici della doverosità e della necessità, contrapponendosi proprio per questo all'universo discrezionale dell'amministrazione pura. A lungo, l'antico patrimonio giustiziale offre alle prime formalizzazioni delle decisioni amministrative il suo serbatoio di soluzioni: si pensi solo alla teoria del ministro-giudice, veicolo attraverso il quale il Conseil d'Etat costruisce la propria giurisdizione generale, ma pure indice di una persistente identità funzionale con il mondo antico della *iurisdictio*, scandita da un'attività materiale di accertamento di diritti che copre una parte rilevante dell'azione amministrativa e per la quale evidenti sono le esigenze di stabilità e di *sécurité juridique* (17).

Quando, con il 1872, la giustizia ritenuta cadrà definitivamente ed il Conseil d'Etat conquisterà il potere di "statuire sovranamente sui ricorsi in materia contenziosa e sulle domande in annullamento per eccesso di potere", il riconoscimento dell'autorità di *chose jugée* sarà immediata anche per la decisione che pronuncia sul ricorso per eccesso di potere e l'art. 1351 del *Code civil* sugli effetti ed i limiti del giudicato (norma identica con identica numerazione troviamo nel Codice Pisanelli) protenderà la sua portata su di un contenzioso ormai ascritto alla funzione giurisdizionale (18).

Così, quando, sempre nel corso degli anni Settanta dell'Ottocento, si impiantano anche in terra tedesca i primi sistemi di giustizia amministrativa, logica vuole che anche per le decisioni che definiscono il contenzioso si inizi a predicare l'immutabilità, e questo indipendentemente dalla controversia sulla natura giurisdizionale o meno dei rispettivi organi e dalle difficoltà che in genere si frappongono ad una meccanica trasposizione al giudizio amministrativo dei principii del processo civile.

Minghetti, nel 1881, saluta con favore le novità del modello austriaco e l'obbligo di ottemperanza dell'autorità alla decisione del *Verwaltungsgerichtshof* perché qui "i principii della sentenza

(16) F. Burdeau, *Histoire du droit administratif (de la Révolution au début des années 1970)*, Paris, PUF, 1995, p. 93.

(17) Sia consentito rinviare ancora a Mannori-Sordi, *Storia del diritto amministrativo*, cit., pp. 292 e ss..

(18) Emblematico E. Laferrière, *Traité de la juridiction et des recours contentieux*, Paris, Berger, 1896^2, vol. II, pp. 571-74.

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addivengono norma dell'azione futura dell'autorità amministrativa" (19).

Proprio sul versante austriaco della pubblicistica di lingua tedesca fanno la loro comparsa i primi significativi contributi dogmatici, a partire dalla monografia di Bernatzik del 1886: la prima ad aprire un campo alla *Rechtskraft*, alla forza di diritto, alla cosa giudicata, sul terreno amministrativo (20). Le definizioni già correnti per le sentenze dei giudici ordinari trovano applicazione anche per le decisioni dei giudici amministrativi (ascritte al novero delle *Entscheidungen*, delle decisioni a contenuto vincolato). Si inizia così a distinguere tra cosa giudicata formale (indisponibilità per le parti di ulteriori mezzi di impugnazione) e cosa giudicata materiale (vincolo degli organi amministrativi al contenuto decisorio della statuizione del giudice amministrativo) (21). Lo stesso Otto Mayer, contrario — com'è noto — ad imperniare sulla giustizia amministrativa il fulcro dei processi di giuridicizzazione del potere amministrativo ("das Verwaltungsrecht kann bestehen auch ohne Rechtspflege"), individua in un diverso grado di stabilità, nella idoneità ad assumere la immutabilità del giudicato, la principale differenza tra sentenza ed atto amministrativo (22).

Né l'immutabilità della decisione della IV Sezione del Consiglio di Stato, la sua irrevocabilità da parte dell'organo che l'ha emanata, sono in discussione neppure negli anni che precedono la legge del 1907, che ne riconosce a posteriori la natura giurisdizionale, e nei quali più evidente è il carattere collaterale dell'organo all'ammini-

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(19) M. MINGHETTI, *I partiti politici e l'ingerenza loro nella giustizia e nell'amministrazione*, Bologna, Zanichelli, 1881, p. 269. Il riferimento è ai §§ 6 e 7 della legge austriaca del 22 ottobre 1875 istitutiva del *Verwaltungsgerichtshof* nei quali si compendiava una delle peculiarità del modello austriaco: il rimettere "in corso il dovere dell'amministrazione e il diritto del cittadino verso un procedimento legale e giusto" (F. BENVENUTI, *Giustizia amministrativa*, in *Enciclopedia del diritto*, vol. XIX, Milano, Giuffrè, 1970, p. 598).

(20) E. BERNATZIK, *Rechtsprechung und materielle Rechtskraft. Verwaltungsrechtliche Studien*, Wien, 1886, rist.anast., Aalen, Scientia, 1964, pp. 8 e ss.; passim.

(21) J. ULBRICH, *Lehrbuch des österreichischen Verwaltungsrechts*, Wien, Manz, 1904, pp. 298-301.

(22) O. MAYER, *Deutsches Verwaltungsrecht*, Leipzig, Duncker & Humblot, 1895, vol. I, p. 175. La celebre affermazione secondo la quale "il diritto amministrativo può esistere anche senza giurisdizione e senza particolari meccanismi di tutela" è, *ivi*, p. 162.

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strazione attiva. Cammeo, con frasario affatto moderno, può sostenere che la cosa giudicata — il termine si generalizza proprio all'indomani della legge del 1907 — "non ha efficacia soltanto nei rapporti dell'atto impugnato", ma "cade sul rapporto giuridico in diritto ed in fatto" (23), sia pur con tutti i limiti che la peculiarità di una pronuncia che interviene su di una vicenda di potere continua ad opporre agli effetti conformativi del giudicato. Le problematiche più suggestive si apriranno, col tempo, proprio in quest'ultima direzione, verso gli effetti del giudicato ulteriori a quelli immediatamente costitutivi, di eliminazione del provvedimento impugnato, in funzione in particolare dell'attività amministrativa successiva alla sentenza, di quel potere amministrativo che la sentenza non è in grado di esaurire ma per il cui esercizio fissa regole vincolanti di azione (24).

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Il vero *punctum controversiae* riguarda però l'atto amministrativo in senso stretto, la *Verfügung*. Qui il valore della manifestazione giuridica nel tempo si fa più delicato. Qui la immodificabilità degli atti dello Stato da parte di atti dello stesso tipo — utilizzo la terminologia di Adolf Merkl — appare più discutibile, meno probabile. Le esigenze di immutabilità, emerse senza grandi contrasti per le decisioni di natura contenziosa, sono sparite. La trasformazione degli istituti civilistici si arena rapidamente di fronte alla ricca e molteplice complessità dei rapporti pubblicistici: il sistema chiuso elaborato dalla processualcivilistica non è trasponibile ai rapporti amministrativi. La stabilità delle decisioni amministrative è difficile da conquistare; non è scontata negli approdi ottocenteschi al sistema (25).

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(23) CAMMEO, *Corso*, par. 432, vol. III, cit., pp. 1779-80.

(24) Mi limito a ricordare le pagine ancora oggi freschissime di M. NIGRO, *Giustizia amministrativa*, Bologna, Il Mulino, 1979^2, pp. 279 e ss., dense di esiti giurisprudenziali (A. TRAVI, *Lezioni di giustizia amministrativa*, Torino, Giappichelli, 1999^3, pp. 271-74).

(25) Problema diverso — ma pure lontano dalle preoccupazioni ottocentesche ed a lungo sfumato nella discrezionalità sul *quando*; cfr. G. D. CONFORTI, *Tempus regit actionem. Contributo allo studio del diritto intertemporale dei procedimenti amministra-*

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La stabilità è travolta dalla libertà, dalla mutevolezza delle circostanze e delle forme in cui il potere amministrativo è chiamato ad apprezzare e a valutare un interesse pubblico che si rinnova continuamente nella sua attualità. L'immutabilità cozza con l'"energia persistente e sempre rinnovantesi" tipica del potere amministrativo (26). Tra la stabilità propria dell'accertamento di natura materialmente giurisdizionale ed il provvedimento si interpone il nodo della "inesauribilità ed identità del potere". Il « potere » — scrive Santi Romano nei *Frammenti di un dizionario giuridico* — « preesiste e deve necessariamente preesistere al suo esercizio e rimanere sempre il medesimo attraverso i vari casi in cui si esplica » (27). Il potere preesiste e trascende il singolo momento del suo esercizio; è il contrario della immutabilità: evoca inesauribilità di apprezzamento, libertà di valutazione, plasticità ed adattamento al mutevole variare di condizioni e circostanze. Il potere mima lo scorrere del tempo: non si sedimenta, fluisce e si rinnova con il suo stesso divenire. Giannini farà di questo incessante divenire un elemento cardine della nozione di imperatività: « ciò che caratterizza effettivamente il provvedimento amministrativo è la mutabilità ». L'autoritarietà del provvedimento tutela « la volontà in quanto disposizione non in quanto decisione » (28). L'atto formalizza la volontà amministrativa; la precisa nel tempo e nel contenuto, ma non esaurisce il potere. Il potere amministrativo — scrive oggi icasticamente Guido Corso — « è un potere che sopravvive al suo esercizio » (29).

Per gli atti discrezionali la revoca è « principio generale » e « può sempre farsi dalla medesima autorità che li ha emanati e nella medesima forma con cui li ha emanati » (30). Così « tutti gli organi

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tivi, Torino, Giappichelli, 2001, pp. 11-41 — è quello della certezza temporale e della tempestività dell'azione amministrativa, su cui si soffermano, in questo convegno, le relazioni di Fabio Merusi e Marco Lipari.

(26) NIGRO, *Giustizia amministrativa*, cit., p. 284.

(27) S. ROMANO, *Frammenti di un dizionario giuridico*, Milano, Giuffrè, 1947, voce *Poteri, Potestà*, p. 186.

(28) M. S. GIANNINI, *Atto amministrativo*, in *Enciclopedia del diritto*, vol. IV, Milano, Giuffrè, 1959, p. 193; p. 187.

(29) G. CORSO, *L'attività amministrativa*, Torino, Giappichelli, 1999, p. 185.

(30) S. ROMANO, *Principii di diritto amministrativo*, Milano, Società Editrice Libraria, 1906^2, p. 58.

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amministrativi possono revocare i loro atti per motivi di nullità. L'annullamento ha luogo per gli stessi motivi per parte di un organo superiore »; « può avvenire per qualsiasi vizio di invalidità », ma deve « aver causa in un pubblico interesse » (31). Sono i motivi per i quali la scienza giuridica italiana neppure importa nel proprio lessico i termini di *Rechtskraft* e di cosa giudicata dell'atto amministrativo, correnti invece — come termini e come problemi, beninteso, non come istituti generali — nelle riflessioni della giuspubblicistica di lingua tedesca a cavallo tra Otto e Novecento. Così, quando nell'ordinamento italiano si parla di definitività degli atti amministrativi, si fa riferimento ad una vicenda assai più circoscritta: l'esaurimento dei ricorsi amministrativi ordinari e l'apertura della via giurisdizionale (32). L'atto è definitivo solo per questo, non certo per una sua, non predicabile, irrevocabilità. Non si può « irrigidire l'azione amministrativa in una serie interminabile di atti irrevocabili » (33). Ed è inutile ricordare che ostracismo verso il contratto e assimilazione della concessione al provvedimento dipendono in gran parte dalla necessità di contrapporre revocabilità e retrattabilità alla ferma stabilità del vincolo contrattuale.

L'insistenza della letteratura di lingua tedesca sul punto è però rivelatrice del fatto che nel rapporto tra tempo ed attività amministrativa si incentra un profilo fondamentale del sistema delle garanzie dello Stato di diritto. Negli ordinamenti di antico regime i poteri pubblici sono tutti avviluppati in una rete di vincoli sostanziali. Ove la società corporata è più forte e persistente, gli *jura quaesita* si oppongono validamente anche allo stesso potere legislativo, circoscrivendone contenuti e potenzialità, al punto che ancora nel 1794 il codice territoriale generale prussiano li colloca al vertice dei meccanismi di sussidiarietà, secondo una scala di precedenze che li antepone agli statuti particolari, alle leggi provinciali, ed infine, buone ultime, alle disposizioni delle leggi generali ed alle stesse

(31) CAMMEO, *Corso*, par. 343, vol. III, cit., pp. 1450-52.

(32) F. CAMMEO, *La definitività degli atti amministrativi. A proposito di ricorsi contro atti confermativi o modificativi*, in *Giur. it.*, LXIII (1911), III, 1 e ss..

(33) F. CAMMEO, *Commentario delle leggi sulla giustizia amministrativa*, Milano, Vallardi, s. d., p. 165.

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norme del codice (34). Le cose mutano sensibilmente dal momento in cui, ormai alle spalle frattura rivoluzionaria e società corporata ed avviata la costruzione dello Stato giuridico, le garanzie acquistano natura prevalentemente formale e si incanalano nel solco della legittimità. Nel sistema di Mayer il provvedimento è un baluardo dello Stato di diritto e lo è proprio perché opera una definizione giuridica del rapporto tra amministrazione e cittadino: il rapporto di sudditanza si distilla nella forma di un comando giuridico. Questo compito di statuizione del diritto nel caso concreto lo assimila ai compiti di accertamento della sentenza giurisdizionale, mettendo implicitamente sul tappeto un profilo, se non di immutabilità, almeno di stabilità, di certezza e validità giuridica nel tempo (35).

È cosa nota che non sarà la giuspubblicistica tedesca, troppo astretta alla radicale contrapposizione di *Justiz* e *Verwaltung*, a portare a compimento questo itinerario. La invocata stabilità del provvedimento trova una prima breccia in Austria, nel pionieristico manuale di Tezner sul procedimento amministrativo (36). Conoscerà una sua fortuna, movendo dalla affermata identità giuridica di giustizia e amministrazione, nelle elaborazioni della nomodinamica della Scuola di Vienna, ove la "forza di diritto" assurge ad istituto generale degli atti propri delle funzioni subordinate sulla base di principi che discendono dai modi di concretizzazione della norma generale al caso concreto, dalla formazione della norma individuale, dalla comune appartenenza di atto amministrativo e sentenza alla famiglia delle *Rechtserscheinungen*, alla famiglia dei fenomeni giuridici. Adolf Merkl ne tenterà una applicazione specifica al provvedimento, con l'obiettivo di elaborare una teoria unitaria degli atti di

(34) *Allgemeines Landrecht für die preussischen Staaten* — ALR, *Einleitung*, § 21, da leggere nella edizione a cura di H. HATTENAUER, Frankfurt am Main-Berlin, Metzner, 1970.

(35) MAYER, *Deutsches Verwaltungsrecht*, vol. I, cit., pp. 64-65; ID., *Zur Lehre von der materiellen Rechtskraft in Verwaltungssachen*, in *Archiv für öffentliches Recht*, 1907, ora in ID., *Kleine Schriften zum öffentlichen Recht*, hrsg. von E. V. HEYEN, Bd. I, *Verwaltungsrecht*, Berlin, Duncker & Humblot, 1981, pp. 78 e ss.; vedi anche *retro* nota 22.

(36) F. TEZNER, *Handbuch des österreichischen Administrativverfahrens*, Wien, Manz, 1896, pp. 295 e ss..

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potere pubblico (37). Applicazione controversa, nel solco di una integrale riduzione giuridica dell'interesse pubblico, che conquista un proprio seguito quasi esclusivamente nella giuspubblicistica austriaca, anche perché proiettata a ribaltare un tratto tipico della specialità amministrativa: la prevalenza dell'atto successivo di esercizio del potere sull'atto precedente e con questa il principio stesso di inesauribilità, smentito dal *Vorrang* assegnato alla proposizione giuridica posta per prima. Profili di teoria della proposizione giuridica che sono al di fuori del nostro interesse di oggi, salvo che per un punto. È in questo contesto, in questa cornice culturale, fatta di quella tradizione giurisprudenziale, in cui prendono forma le prime discipline procedimentali, e di declinazioni di teoria generale, che il provvedimento incontra una sua stabilità, formando una prima diga giuridica contro l'immagine impetuosa ed inarrestabile di un potere amministrativo continuamente rinnovantesi.

I principi racchiusi nella legge austriaca del 21 luglio 1925 sul procedimento amministrativo rappresentano, da questo angolo visuale, una fonte cui l'intero diritto amministrativo continentale finirà col tempo per abbeverarsi. Al principio di una generale retrattabilità dell'atto amministrativo si sostituisce la sottoposizione del provvedimento, della *Verfügung*, agli effetti della « entschiedene Sache », della res iudicata, che in nome della certezza e dell'affidamento si proiettano indifferentemente nei confronti degli interessati come della stessa autorità, cui è consentita soltanto una parziale modificabilità nelle condizioni e nelle forme stabilite dalla legge, sulla base di interessi pubblici qualificati (la vita, la salute, l'economia pubblica) e comunque procedendo "con il più grande rispetto possibile nei confronti dei diritti acquisiti" (38). Un altro tassello di quelle garanzie formali che l'onda lunga della legittimità amministrativa

(37) A. MERKL, *Zum Problem der Rechtskraft in Justiz und Verwaltung*, in *Zeitschrift für öffentliches Recht*, 1919, ora in *Die Wiener Rechtstheoretische Schule*, hrsg. von H. KLECATSKY, R. MARCIC, H. SCHAMBECK, Wien, Europa, 1986, Bd.2, pp. 1203 e ss.; ID., *Die Lehre von der Rechtskraft entwickelt aus dem Rechtsbegriff. Eine rechtstheoretische Untersuchung*, Leipzig, Deuticke, 1923; ID., *Allgemeines Verwaltungsrecht*, Wien und Berlin, Springer, 1927, pp. 201 e ss..

(38) Citiamo dal § 68, Abs. 3 della legge 21 luglio 1925. Un commento contemporaneo in R.H. HERRNRITT, *Österreichisches Verwaltungsrecht. Ein Grundriß der Rechtstheorie und Gesetzgebung der inneren Verwaltung*, Tübingen, Mohr, 1925, pp. 34 e ss.

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aveva progressivamente sostituito ai limiti materiali tipici della mentalità giuridica pre-rivoluzionaria.

Altrove — è il caso tedesco — la nozione di cosa giudicata non riuscirà a varcare l'universo delle sentenze giurisdizionali e la stabilità non diventerà un attributo naturale del provvedimento ma un risultato della ponderazione tra l'interesse pubblico all'annullamento d'ufficio o alla revoca e l'affidamento suscitato nella stabilità dell'atto, sulla base delle minute griglie normative fissate dai §§ 48-49 della legge del 1976 sul procedimento (39). Così, nel nostro ordinamento dove quello stesso vincolo dell'amministrazione ai propri provvedimenti, in assenza di analoghe griglie normative e a fronte di un riconosciuto principio generale di retrattabilità del potere amministrativo, si è inseguito coniugando, con una certa fatica, l'attualità dell'interesse pubblico alla revoca o all'annullamento con i principi di buona fede, correttezza, tutela dell'affidamento, sulla base di quel principio non scritto di ragionevolezza che si è cercato di radicare anche all'interno dell'ordinamento amministrativo (40).

Un cenno a parte merita la vicenda francese, abbastanza tiepida nei confronti degli istituti procedimentali, eppure giunta a fissare un sistema particolarmente rigoroso in ordine alla stabilità delle decisioni amministrative. Il punto di partenza è identico agli altri modelli continentali: « la décision exécutoire — scrive Hauriou — est en soi essentiellement révocable »; gli eventuali benefici che l'amministrato trae dalla decisione non sono mai « droits acquis au sens du commerce juridique » ma semplici vantaggi privati stabiliti per « la bonne administration ou pour la bonne utilisation de la chose publique » (41).

La giurisprudenza muove invece in altra direzione e fa dei principii di *sécurité juridique* e della garanzia dei *droits acquis* una

(39) Che distinguono, com'è noto, tra annullamento di atto illegittimo e revoca di atto legittimo.

(40) F. MERUSI, *L'affidamento del cittadino*, Milano, 1970, da vedersi nella ristampa, dal titolo *Buona fede e affidamento nel diritto pubblico. Dagli anni 'trenta' all''alternanza'*, Milano, Giuffrè, 2001, pp. 79 e ss.; pp. 146 e ss.; con le considerazioni di aggiornamento, *ivi*, pp. 1 e ss..

(41) M. HAURIOU, *Précis de droit administratif et de droit public*, Paris, Sirey, 1921, 10 éd., pp. 402-3.

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parte integrante del regime giuridico degli atti amministrativi. Una celebre decisione del Conseil d'Etat (*Dame Cachet*) (42) pone un termine breve e rigido — lo stesso entro il quale può proporsi ricorso contenzioso — per l'esercizio da parte dell'amministrazione del potere di annullamento di ufficio (*retrait*) di atti amministrativi — illegittimi — che abbiano creato diritti.

Le *nuances* casistiche della giurisprudenza successiva — è ben noto — sono tantissime e non occorre qui seguirle. Basti dire che si distingue tra *retrait* (con efficacia *ex tunc*) ed *abrogation* (*ex nunc*); si distingue tra regolamenti ed atti individuali; ed ancora tra atti che creano e non creano diritti; si combatte una dura battaglia definitoria per stabilire i confini del *droit acquis*. Casistiche che mediano con attenzione stabilità dei provvedimenti ed interesse pubblico alla *bonne administration*. Alla base si colloca però una affermazione di principio di tutto rispetto e che circoscrive l'immagine tralatizia di un potere amministrativo impetuoso ed inarrestabile: nell'interesse della sicurezza giuridica, gli atti che creano diritti devono considerarsi definitivi. Una definitività, certo assai più fievole della cosa giudicata, che non ha impedito però ad un parte della letteratura (43) d'isolare una « autorité de 'chose décidée' » per le *décisions exécutoires*. In conclusione, la certezza è un elemento imprescindibile anche per l'universo amministrativo. Questo, certo, non significa che la preoccupazione così bene espressa da Cammeo — l'azione amministrativa non può irrigidirsi in una serie interminabile di atti irrevocabili — sia venuta meno. Quella preoccupazione si scontra però con le esigenze opposte di sicurezza, certezza, stabilità, che non possono essere confinate al solo ordinamento civilistico. La *mutabilité* degli atti persiste, ma deve essere continuamente bilanciata con l'interesse opposto alla stabilità delle situazioni giuridiche da quegli stessi atti create. Non è un caso che una delle palestre più signifi-

(42) C. E. 3 novembre 1922, *Dame Cachet*, ora in *Les grands arrêts de la jurisprudence administrative*, Paris, Dalloz, 12e éd., 1999, pp. 235-244. Il principio è rimasto intatto sino all'ottobre 2001 (C. E. 26 ottobre 2001, *Ternon*), quando il *Conseil d'Etat* ha scisso i due termini portando a 4 mesi il termine per l'annullamento d'ufficio (c.d. *période de repentir*): sulla recente innovazione giurisprudenziale, D. CHABANOL, *La pratique du contentieux administratif*, Paris, Litec, 2002[4], pp. 453-55.

(43) Penso in particolare a Georges Vedel: cfr. G. VEDEL-P. DEVOLVÉ, *Droit administratif*, Paris, PUF, 1990[11], pp. 302 e ss.; spec. pp. 319-22.

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cative di questo bilanciamento avvenga all'interno dei *contrats administratifs*: penso al tema delle modifiche unilaterali delle condizioni contrattuali della concessione di pubblico servizio: un cavallo di battaglia, intorno agli anni Trenta, della Scuola del *service public* e di Gaston Jèze in particolare (44). Specialità, certo; regole 'esorbitanti', in nome della prima delle *lois de Rolland* — la *mutabilité* del *service* -, qui però addirittura calate in una logica di sinallagmaticità, nella logica del contratto, che è anche la logica della stabilità e della durevolezza del vincolo negoziale. Altrove, è ovvio, questo non accade: più semplicemente è la sicurezza giuridica degli amministrati e l'intangibilità, in via di principio, delle decisioni creatrici di diritti che tornano in primo piano, instradando su binari che anche la nostra giurisprudenza ben conosce, i presupposti che autorizzano il *contrarius actus*.

* * *

Il tempo rappresenta dunque un fattore che pesantemente condiziona la costruzione del sistema giuridico del potere amministrativo.

Si potrebbe pensare che speculare e simmetrica sia l'importanza che il fattore spazio gioca in quella costruzione. Ma non è così. Intendiamoci, la simmetria esiste e precisa sul piano della teoria generale. "Le norme sono valide per un dato tempo e per un dato spazio", proclama per esempio il Kelsen della *Teoria generale del diritto e dello Stato* (45), recuperando in chiave ordinamentale il tema generale della "sfera d'azione del diritto" (46). Sfera territoriale e

(44) G. SALON, *Gaston Jèze et la théorie générale des contrats administratifs*, in *Revue d'histoire des facultés de droit et de la science juridique*, 12 (1991), pp. 71 e ss..

(45) H. KELSEN, *General Theory of Law and State*, Cambridge (Mass.), 1945, trad. ital. a cura di S. COTTA e G. TREVES, *Teoria generale del diritto e dello Stato*, Milano, Comunità, 1959^3, p. 42; vedi anche pp. 211 e ss., sul territorio non più 'cosa', oggetto del potere dominativo statale, ma 'spazio' , sfera di validità spaziale dell'ordinamento. *Ivi*, pp. 223 e ss., sul tempo come analoga sfera di validità temporale. Si comprende perché questa prospettiva, che distaccandosi dalla tradizione, "si affranca dai vincoli naturali" e "dalla fisicità terrestre", possa apparire al giurista di oggi, di fronte ai nuovi spazi, perfettamente "in grado di seguire la latitudine dell'economia" (N. IRTI, *Norma e luoghi. Problemi di geo-diritto*, Roma-Bari, Laterza, 2001, pp. 59-60).

(46) WINDSCHEID, *Diritto delle Pandette*, vol. I, pt. I, cit., pp. 86 e ss..

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sfera temporale segnano i limiti di validità dell'ordinamento giuridico statale. Lo Stato non è spazialmente infinito così come non è neppure temporalmente eterno. È il diritto internazionale che offre le coordinate essenziali per gli equilibri interni al sistema degli Stati, delimitando con riferimento allo spazio i confini tra terra e mare e quelli delle terre, dell'aria, del sottosuolo, disciplinandone i mutamenti, i modi di acquisto e di derelizione, il regime delle colonie (47) e, con riferimento al tempo, la successione di Stati e governi.

Nel campo teorico del diritto internazionale dello *jus publicum europaeum*, lo spazio occupa un ruolo assolutamente strategico. Quando Schmitt definisce cosa debba intendersi per *Nomos der Erde*, fa appunto riferimento ad un principio fondamentale di suddivisione dello spazio, alla misura che distribuisce il terreno e il suolo della terra, collocandolo in un determinato ordinamento e creando una concreta unità spaziale (48).

Il frutto corposo e tangibile di questa suddivisione dello spazio è rappresentato sul suolo europeo, da Westfalia in poi, da una struttura *zwischenstaatlich*, un sistema degli Stati, che occupa e delimita capillarmente il territorio, cui in parallelo, dall'esterno, dallo spazio conteso del *mare liberum* (49), si affianca l'universale economico del libero commercio. Sin dall'inizio, infatti, il capitalismo sollecita la formazione di una 'economia-mondo' (50) e già a partire dalla fine del Settecento lo spazio del mercato non può dirsi del tutto coincidente con il territorio dei singoli Stati. Ma l'unità

(47) Ma vedi S. ROMANO, *Corso di diritto coloniale*, Roma, Atheneum, 1918, p. 35, secondo il quale la potestà che lo Stato esercita sulle colonie « è sempre di diritto pubblico interno », mentre l'autonomia delle colonie « dà luogo ad una figura simile a quella che si riscontra specialmente nel campo del diritto amministrativo e che va sotto il nome di autarchia » (p. 102).

(48) C. SCHMITT, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Berlin, 1950, trad. ital. a cura di E. CASTRUCCI, *Il Nomos della terra nel diritto internazionale dello Jus Publicum Europaeum*, Milano, Adelphi, 1991, p. 59.

(49) Dove, confortate dalle tesi del *Mare clausum* e dell'*Oceanus britannicus* di John Selden (S. CARUSO, *La miglior legge del regno. Consuetudine, diritto naturale e contratto nel pensiero e nell'epoca di John Selden (1584-1654)*, tm. II, Milano, Giuffrè, 2001, pp. 616-20), si proiettano verso ovest le mire espansionistiche della sovranità britannica sull'Atlantico.

(50) Secondo la celebre immagine di I. WALLERSTEIN, *Il sistema mondiale dell'economia moderna*, 3 voll., Bologna, Il Mulino, 1978, 1982, 1995.

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territoriale che sullo spazio politico internazionale imprime lo Stato continentale (o l'impero marittimo inglese) è ancora largamente predominante (51) e dalla lotta per il territorio si delineano le egemonie e quel tanto di ordine che il precario equilibrio tra il ristrettissimo novero degli Stati sovrani rende possibile (52).

Nella sua proiezione interna il territorio ha invece definitivamente perso, con la frattura rivoluzionaria cui accennavamo all'inizio, ogni sua articolazione. La stereometria di antico regime, il patchwork antico sono stati dimenticati in tutta fretta. L'*administration générale de l'Etat* è calata come un sipario destinato a non più riaprirsi sulla pluralità di corpi e comunità, sulle *tante* amministrazioni di antico regime. Lo spazio, nel momento stesso in cui ha abbandonato le sue differenze e le sue articolazioni, la sua intrinseca politicità, ha perso improvvisamente di rilevanza. È diventato liscio, indeterminato, non differenziato, ha eliminato ogni traccia di originarietà. Ha assunto le sembianze di un territorio perfettamente suddivisibile, con geometrica precisione, in circoscrizioni di un "medesimo tutto".

Il potere amministrativo, che è nato in quel preciso frangente storico archiviando il primato giustiziale antico, lo registra puntualmente. Non solo spariscono le aggregazioni comunitarie, originarie e diverse dallo Stato — è lo Stato "che dà esistenza ai comuni" (53) —; ma il territorio, da elemento esterno, talvolta ostile, più spesso incognito ed indifferente per il Principe, diventa un momento essenziale della stessa raffigurazione del soggetto: "il territorio è un elemento costitutivo dello Stato"; rappresenta un "diritto sulla propria persona" (54).

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(51) G. GALLI, *Spazi politici. L'età moderna e l'età globale*, Bologna, Il Mulino, 2001, pp. 82-86.

(52) Una recente, efficace, sintesi in S. MANNONI, *Relazioni internazionali*, in *Lo Stato moderno in Europa. Istituzioni e diritto*, a cura di Maurizio FIORAVANTI, Roma-Bari, Laterza, 2002, pp. 206 e ss..

(53) S. ROMANO, *L'ordinamento giuridico*, Firenze, Sansoni, 1946^2, p. 122.

(54) S. ROMANO, *Osservazioni sulla natura giuridica del territorio dello Stato*, in *Archivio del diritto pubblico*, 1902, ora in ID., *Scritti minori*, vol. I, *Diritto costituzionale*, a cura di G. ZANOBINI, Milano, Giuffrè, 1950, p. 210; p. 214. Sostiene invece la tesi del "diritto di dominio" dello Stato sul territorio, D. DONATI, *Stato e territorio*, Roma, Athenaeum, 1924, p. 65.

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Schiacciato dall'incorporazione all'interno della stessa persona giuridica, divenuto "elemento costitutivo della propria persona" (55), lo spazio perde di autonomia e di soggettività, diventa un limite meramente geografico della potestà territoriale, semplice misura di distribuzione della sovranità. La problematica giuridica dello spazio è correlativamente ridotta, incanalata nelle relazioni soggettive dei rapporti autarchici tra Stato ed enti territoriali minori o negli stretti sentieri lungo i quali avviene la suddivisione della competenza per territorio. Può riemergere solo qua e là in esercitazioni di taglio accademico, come quella di Miele che spigola elegantemente tra i pochi casi in cui l'attività amministrativa riesce a conquistare una limitata efficacia extra-territoriale al di fuori del proprio territorio. Casi — isolati — di extra-territorialità, appunto: di norme, di atti, di servizi, che riescono a produrre un qualche effetto al di là degli intangibili confini all'interno dei quali persona e territorio, soggetto e spazio, perfettamente si identificano. Il diritto amministrativo, profondamente impregnato di statualità, è diritto eminentemente territoriale ed è dunque chiamato ad operare in uno spazio teoricamente e praticamente chiuso.

Bisognerà attendere le trasformazioni di questo ultimo cinquantennio perché quello spazio chiuso inizi lentamente ad aprirsi. Saranno appunto queste trasformazioni — il crescente carattere multiorganizzativo e pluralistico della galassia delle amministrazioni pubbliche; il riesplodere delle comunità intermedie enfatizzato ora dall'imporsi dei principi di sussidiarietà orizzontale; oppure su altri fronti la formazione della cornice europea a partire dalla creazione giuridica di uno spazio economico europeo, e più di recente la necessità di dare una prima risposta regolativa alla crescente globalizzazione economica — a dischiudere nuove dimensioni (e nuove dialettiche) rispetto agli spazi propri della modernità.

Quella metamorfosi incombente della statualità che più volte nel corso del Novecento i giuristi avevano avvertito sull'onda di vicende che rimescolavano drasticamente gli equilibri territoriali tra gli Stati (penso ad *Oltre lo Stato* di Santi Romano, un discorso inaugurale del

(55) G. Miele, *I poteri degli enti autarchici territoriali fuori dal loro territorio*, in *Archivio di studi corporativi*, 1931, ora in Id., *Scritti giuridici*, Milano, Giuffrè, 1987, vol. I, p. 3.

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Cesare Alfieri pronunciato nel novembre 1917 poche settimane dopo Caporetto o alla relazione sulla *Großraumordung* che Schmitt tiene a Kiel il 1 aprile 1939, due settimane dopo l'invasione tedesca della Cecoslovacchia (56)) non è giunta dal territorio, dall'unità politica evidente dello spazio e del diritto, di ordinamento e localizzazione, ma dall'unità indistinta e pervasiva del mare dell'economico e del sociale.

Non è un caso che 'oltre lo Stato', in quell'inedito spazio globale nel quale sempre più tendono a dislocarsi, secondo equilibri diversi da quelli tipici della modernità, i nuovi, grandi, poteri e le nuove dimensioni ordinamentali, anche il potere amministrativo sia destinato a perdere tratti importanti dei propri territori e della propria specialità.

(56) Leggili rispettivamente in ROMANO, *Scritti minori*, vol. I, cit., pp. 345-56; SCHMITT, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht*, trad ital., *Il concetto imperiale di spazio*, in *Lo Stato*, 1941, ora in ID., *L'unità del mondo e altri saggi*, a cura di A. CAMPI, Roma, Pellicani, 1994, pp. 203 e ss..

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PAOLO GROSSI

DIRITTO CANONICO E CULTURA GIURIDICA (*)

1. Un recupero per il diritto canonico. — 2. L'esilio moderno del diritto canonico. — 3. Il diritto canonico come mentalità giuridica. — 4. I tratti distintivi della mentalità canonistica. — 5. Il diritto canonico come mentalità e la sua rilevanza storico-giuridica: alle radici del *common law*. — 6. Il diritto canonico come mentalità giuridica e il suo messaggio metodologico: un contrappunto comparativo per il giurista di *civil law*.

1. *Un recupero per il diritto canonico.*

Perché questo problema? Che cosa pretende sul piano culturale questo diritto canonico? Un diritto che parla di eucaristia, di battesimo, di penitenza, un diritto da preti; un diritto, per giunta, che non riguarda la società civile come società plurale, e soprattutto ideologicamente plurale. Ma, principalmente, perché continuiamo a parlare di diritto canonico in una Facoltà universitaria, che dovrebbe esprimere i valori della intiera società civile, come questa nostra di Urbino, come la mia di Firenze? Non si incide anche sulla libertà religiosa degli studenti? Non è una forma di unilateralità eccessiva?

Io mi sono segnato qui il punto centrale di una illuminante pronuncia della Corte Costituzionale spagnola, del 'Tribunal Constitucional', di qualche anno fa. Una studentessa universitaria (in Spagna era obbligatoria la disciplina 'diritto canonico') aveva protestato sostenendo che una siffatta imposizione violava le regole più elementari della libertà religiosa, non avendo per lei (forse atea, forse

(*) Pubblico qui, con il consenso dell'organizzatore, Prof. Carlo Fantappié, il testo della lezione tenuta presso l'Università di Urbino nell'àmbito di un ciclo di appuntamenti con gli studenti, ciclo che — nella sua interezza — sarà testimoniato dal volume "Itinerari culturali del diritto canonico nel Novecento" di prossima pubblicazione presso l'editore Giappichelli.

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agnostica, o appartenente a religione diversa dalla cattolica) alcun interesse lo studio del diritto della Chiesa Romana quale diritto proprio e tipico di una specifica confessione religiosa.

Vi leggo, tradotto in italiano, il punto centrale della motivazione, in base alla quale il ricorso fu respinto dalla Corte Costituzionale spagnola: "La conoscenza del diritto canonico per gli studenti delle Facoltà di Giurisprudenza è imprescindibile in rapporto all'evoluzione storica delle istituzioni giuridiche, alcune delle quali non si capiscono facilmente senza di esso. Il diritto canonico, in quanto materia basata sull'informazione ed interpretazione di un *corpus iuris* come quello del Codice di diritto canonico, non è per sua stessa natura una materia di contenuto ideologico, indipendentemente dal fatto che si basa su un *substratum* ideologico o confessionale… In effetti, molte discipline giuridiche si fondano sullo studio di testi legali e di teorie giuridiche il cui sostrato ideologico è identificabile" (1).

In altre parole, la Corte costituzionale spagnola sollevava il diritto canonico dal ristretto cono d'ombra di una semplice ideologia religiosa, cioè da una sua stringente particolarizzazione, e lo immetteva nel paesaggio apertissimo della storia della cultura giuridica occidentale. Recupero sacrosanto, perché recupero obbiettivo, corrispondente alla stessa realtà storica dell'Occidente nel suo bimillenario divenire; ma anche recupero tardivo e coraggioso, a fronte di un diffuso atteggiamento plurisecolare che aveva inflitto al diritto canonico, o una condanna senza appello, o l'esilio del silenzio, o la relegazione nel cantuccio più oscuro.

Lo storico, e in guisa peculiare lo storico del diritto, può individuare le ragioni profonde che, attraverso tutta l'età moderna, hanno pesato su un simile atteggiamento. Certamente, dal Cinquecento in poi, sono avvenuti grossi fatti storici, che ci hanno impedito di cogliere il diritto canonico per quello che veramente è stato, cioè al centro di una civiltà giuridica, concreatore di una civiltà giuridica.

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(1) Il testo è riportato da R. NAVARRO VALLS, *Diritto canonico e cultura giuridica spagnola*, in *Scienza giuridica e diritto canonico*, a cura di R. BERTOLINO, Torino, Giappichelli, 1991, p. 91.

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2. *L'esilio moderno del diritto canonico.*

Che cosa è successo, dunque, di tanto incisivo?

Intanto, un grosso fatto all'interno della Chiesa, ed è la Controriforma: nel suo tentativo di autodifesa rispetto alla vincente protesta religiosa, ha insinuato un sentimento di paura nell'àmbito della società ecclesiale, con il conseguente innalzamento di una infinità di barriere e di chiusure. La Chiesa si è rinserrata in una struttura severamente disciplinare, e il diritto canonico ha assunto la funzione di cemento primo di questa struttura. La Chiesa è divenuta una sorta di cittadella circondata e protetta da grandi muraglie, muraglie di chiusura verso l'esterno e soprattutto muraglie giuridiche: essa affida al suo esser *societas iuridica* la garanzia della propria sopravvivenza storica. Il diritto canonico è il tessuto legante di questo bozzolo conchiuso. Ecco un primo dato che, dal nostro angolo di osservazione, contraddistingue il moderno e che è meritevole di considerazione.

Ma 'moderno' significa anche secolarizzazione, e secolarizzazione vuol dire affrancazione da precedenti servaggi. La società medievale era una società fideistica, che aveva delle precise piattaforme ideologiche e, di più, metafisiche; contro di essa, dal Cinquecento in poi, c'è un grande movimento liberatorio (o preteso tale): la secolarizzazione. L'uomo è chiamato a fare i conti soltanto con i dati offerti dalla natura e dalla storia, insomma dall'immanenza, grazie a quella taumaturgica chiave omnivalente costituita, per l'età nuova, dalle scienze matematiche e naturali in progresso vistosissimo. La secolarizzazione non è soltanto affrancazione dal sacro immedesimàtosi in una soffocante teologia, ma è comprensibile che assuma in primo luogo il significato storico di contraccolpo verso il sacro, di attacco acre verso il sacro a causa della sua incarnazione — durata troppi secoli — nella incombente Chiesa Romana, realtà che per la società secolarizzata sei-settecentesca costituisce ancora una rappresentazione tentacolare e minacciosa.

E poi, lo statalismo. Il protagonista del 'moderno' è lo Stato. E Stato vuol dire monismo giuridico, vuol dire che il vecchio pluralismo giuridico medievale e postmedievale viene eliminato, mentre si consolida una idea forte e sempre più dominante, che prende quasi l'aspetto di una articolazione sillogistica: il diritto deve essere espres-

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sione della volontà generale, e volontà generale è soltanto quella che ci viene offerta dalla legge, unica fonte di qualità superiore; ma poiché la legge è la volontà del soggetto detentore del potere sovrano, il risultato è un rigido statalismo o, in termini culturali, un rigido monismo giuridico.

Questi tre fatti storici — controriforma, secolarizzazione, statalismo —, i tre fatti determinanti che inàugurano e contrasségnano il moderno, hanno causato una incomprensione totale verso il diritto canonico: un po' per responsabilità della Chiesa, che ne faceva un assetto interiore a carattere soprattutto disciplinare e cemento delle chiuse mura della società ecclesiale; un po' perché la società secolarizzata diffidava di un diritto maleodorante di preti, di sacristia, di vecchiume, di medioevo; e infine perché lo Stato, che si ergeva a produttore unico di diritto, volutamente lo ignorava.

Questo, dal Cinquecento in poi. Ed è bastato a creare una barriera di incomprensioni e di travisamenti fra noi moderni e il diritto canonico. Ci sono, come abbiam detto più sopra, responsabilità della Chiesa, responsabilità di una società civile ormai percorsa da mentalità tendenziosamente contrarie, ma indubbiamente una barriera c'è stata.

3. *Il diritto canonico come mentalità giuridica.*

Però — cari studenti — il secolo XVI° arriva dopo millecinquecento anni di vita giuridica della Chiesa, e anche del diritto canonico, posto che la Chiesa Romana ha súbito creduto di doversi costituire e costruire fin dai suoi primordii quale ordinamento giuridico originario e pertanto primario. Se pensiamo che nel primo e nel secondo medioevo la Chiesa era al centro dell'intiera società civile, se si pone mente a un dato tanto elementare quanto sottovalutato, e cioè che questo periodo storico copre assai più della durata di un millennio, si capisce facilmente che in questo periodo lunghissimo il diritto canonico sia stato un lièvito per tutta la civiltà occidentale. E sarebbe agévole proseguire la mia lezione cercando di disegnare quali sono i contenuti sparsi che, nei varii settori, il diritto canonico ha fornito all'intiera cultura giuridica incidendo a fondo sul suo itinerario e sul suo sviluppo futuro.

Potrei dirvi che l'attuale processo civile è per buona parte

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modellato sul processo canonico, facendo tesoro delle analisi dei canonisti e della prassi processuale canonica all'interno della Chiesa. Potrei dirvi che il diritto penale è per buona parte diritto canonico, perché è soltanto grazie allo scavo che i canonisti hanno fatto nella psicologia del delinquente, alla ricerca delle graduazioni nella responsabilità morale del fatto illecito, che il penalista moderno si è trovato nelle mani un prezioso ordito di differenziazioni psicologiche quale conveniente basamento per l'edificazione di un appropriato sistema criminale. E, tacendo sulle materie ovviamente più sensibili come famiglia e matrimonio, si potrebbe, non senza ragione, parlare delle penetranti influenze sul diritto delle obbligazioni e dei contratti. Cioè si potrebbe andare a ricercare nella più gran parte degli istituti precise fibre desunte da tessuti canonici e canonistici, o addirittura le tante sagomazioni su modelli di là derivati, ma questo porterebbe la lezione a trasformarsi in una specie di inventario, una sorta di bilancio analitico che deluderebbe probabilmente gli amici studenti.

Io, viceversa, vorrei insistere su un altro punto, che mi sembra trascurato e che è invece storicamente rilevantissimo: il diritto canonico come contributo cospicuo alla creazione di una mentalità giuridica. La proposizione centrale è la seguente: il diritto canonico non è solo un ammasso di regole e di cànoni; è, innanzi tutto, una certa mentalità giuridica che, in quanto tipicissima e peculiarissima, in quanto provvedutamente costruita da scienza e prassi, in quanto capillarmente assorbita nella lunga durata, gènera incisivi influssi proprio a livello di mentalità ben oltre i confini della comunità ecclesiale.

Cerchiamo di disegnare con tratto il più possibile preciso i lineamenti di questa mentalità.

4. *I tratti distintivi della mentalità canonistica.*

Non dimentichiamoci che il diritto canonico è l'ordine giuridico di una società sacra, di una società proiettata verso la meta-storia, sorretta e indirizzata da un unico fine pastorale secondo il mandato del suo divino Fondatore: la *salus aeterna animarum.*Una domanda preliminarmente si impone: rispetto a questo fine il diritto canonico è una forzatura? Cioè, la società sacra se lo inventa spregiudicata-

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mente per suo comodo, per un esercizio più efficace dei suoi poteri? Lutero non èsita ad affermarlo con durezza: il diritto è il grande tradimento storico della Chiesa Romana; la scelta per il diritto dà l'avvìo a una vera e propria *captivitas babylonica* nell'abbraccio delle temporalità. Il giudizio dovrebbe, però, a mio avviso, essere più rispettoso della complessità delle forze storiche che quella scelta hanno motivato e generato; altrimenti, il rischio è la unilateralità.

Io direi che è una scelta intrisa di concretezza mediterranea. La Chiesa Romana sa che è nel mondo, nel vòrtice dei rapporti sociali, che il singolo fedele trova la sua salvezza o la sua condanna eterna. La scelta per il diritto è semplicemente la valorizzazione del 'temporale' quale terreno in cui la salvezza si gioca. Il 'temporale' è il mondo del peccato e delle umane caducità, ma è lì che la vicenda dei singoli fedeli si matura e si compie; si matura e si compie non all'interno di un microcosmo isolato, bensì di un intrecciarsi di rapporti sociali del singolo con gli altri, del singolo con la stessa *societas* sacra. È da questa puntuale consapevolezza di ìndole antropologica, oltre che da ovvie motivazioni potestative, che si orígina una attenzione particolare della confessione religiosa Chiesa Romana, l'unica che ha sempre pervicacemente voluto, ininterrottamente dall'età primitiva agli ultimi decennii postconciliari, costruire un proprio diritto.

Ma lo fa non imitando interamente il diritto romano, grande modello di sapere tecnico, che alla Chiesa nascente offriva già consolidato il suo edificio classico; al contrario, pur approfittando largamente del sapere tecnico dei romani, costruisce lentamente, secolo dopo secolo, un diritto che ha delle caratteristiche peculiarissime, cioè congeniali all'essere la Chiesa Romana una società sacra, con un marchio fondamentale imprèssogli dal sottostante scopo pastorale. Il diritto canonico, o serve alla salvezza delle anime, o è una clamorosa aberrazione. E se deve contribuire a questa salvezza, è ovvio che il suo carattere centrale sarà uno soltanto, e cioè la strumentalità.

Spieghiàmoci meglio, giacché si tratta di un punto meritevole di molta attenzione. La Chiesa, edificando il diritto canonico, non lo considera affatto il fine della comunità sacra, alla stessa stregua dello Stato che può annoverare tranquillamente fra i suoi fini il mantenimento della civile convivenza per il tramite del diritto. Il fine

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dell'ordinamento Chiesa è al di là della storia, è consegnato nelle altitudini metafisiche, è nell'eternità, è e resta indefettibilmente la salvezza dell'*homo viator*, del peccatore che, all'èsito della sua vicenda terrena, si appresta a incontrare il Giudice supremo. La Chiesa è una ben strana società, che ha per suo confine il cielo. È per la conquista di questo cielo che il diritto, se vuole dimostrarsi efficace, deve essere fino in fondo strumento e mai assurgere al rango di fine.

Quindi, strumentalità a uno scopo essenziale, uno scopo trascendente. Ciò non è innocuo. Da questo fulcro centrale,che io vi sottolineo, scaturisce una mentalità tutta tipica del diritto canonico.

Strumentalità. È da essa e per essa che il diritto, nella Chiesa, si inaugura all'insegna di due diffidenze: la diffidenza verso la dimensione giuridica come pura orditura logica; la diffidenza verso il gusto delle costruzioni sistematiche, verso edificazioni giuridiche che si cristallizzano in un sistema. Quante volte noi ci innamoriamo dei nostri concetti giuridici come se fossero dei cristalli da lucidare e conservare intatti, quante volte ci innamoriamo delle costruzioni logiche con cui riusciamo a immobilizzare certi istituti del vivere quotidiano! Oppure, quando ci intestardiamo nel costruire dei sistemi (sistema vuol dire riduzione ad unità), dando una artificiosa compattezza a ciò che, viceversa, era, ed è e deve restare, plurale e frammentario.

Altra diffidenza: la diffidenza per il diritto come legge. I vostri docenti del primo anno vi hanno insegnato i caratteri della legge condensabili nella generalità, nella astrattezza, nella rigidità. Caratteri tutti che, di fronte a un diritto essenzialmente strumentale, rivelano la propria inadeguatezza (vedremo in qual senso). Ecco perché la Chiesa è la prima a diffidare del Codice, che è per noi moderni la legge generale, la legge madre di tutte le leggi. Non so se vi siate mai resi conto che, dei grandi ordinamenti giuridici protagonisti del 'moderno', la Chiesa Romana è l'ultima a codificare il proprio diritto e, se avessimo tempo, sarebbe interessante di segnare tutte le perplessità, tutte le opposizioni, tutti i moti di sfiducia affiorati dal 1870, da quando, in seno al Concilio Vaticano Primo, comincia ad emergere tra i Padri raccolti in Roma l'idea di una codificazione. Il *Codex* — voi lo sapete bene — sarà varato nel 1917, dopo quasi cinquanta anni di discussioni, di dubbii e anche di rifiuti.

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Perché? Perché il Codice, legge fra le leggi, è innanzi tutto un sistema, un'opera armoniosamente logica. Ed urge un quesito: il Codice, la legge, la logica, il sistema tengono adeguato conto di quel 'particulare' che è il singolo fedele con il suo fardello irripetibile di umanità e che la società sacra ha il dovere assoluto di fronte a Dio di guidare verso la vita eterna?

Questo spiega anche perché la Chiesa Romana dà vita a un Codice ben strano, se comparato con i tanti modelli laici. Il *Codex* piano-benedettino del 1917, che altra volta io ho definito — non a torto — per parecchi versi tridentino (2), è codificazione singolarissima: ha delle aperture verso il passato, riconoscendo nel can. 6 l'insopprimibile valore di quanto si era fatto prima nel cosiddetto *ius vetus*; nel can. 20, per colmare le lacune della legge positiva, si apre non solo alle consuete forme di interpretazione estensiva ed analogica, ma addirittura ai principii generali, all'equità canonica, allo stile e alla prassi della Curia Romana, alla opinione comune dei maestri. Nella eventualità che l'applicatore verifichi delle lacune formali, quell'applicatore ha di fronte un Codice non sigillato nelle mura della sua cittadella testuale, ma anzi recante nel suo tessuto vistose brecce previste e volute.

Antinomia di una Chiesa, che costruisce un Codice ma che si premura di apportarvi finestre aperte verso l'esterno. La Chiesa codifica un po' per imitazione di quanto hanno fatto e stanno tuttora facendo gli Stati, un po' per quella esigenza di certezza e uniformità fatte valere nel 1870 da molti Padri conciliari provenienti da terre remote, ma resta ferma la coscienza dell'insufficienza della legge, della inadeguatezza della norma generale per i fini dell'ordinamento sacro.

La dialettica particolare/universale è fortissima nel diritto canonico, e fortissima la valorizzazione del particolare: il peccato non può non essere il singolo peccato del singolo soggetto, e il diritto non può non consistere nel rimedio efficiente vòlto a evitare,attenuare, sanzionare quello specifico peccato. Nel diritto della Chiesa, proprio per il suo carattere strumentale, non è il primato della norma generale che viene affermato, ma esattamente il contrario; la consi-

(2) Cfr. P. GROSSI, *Novità e tradizione nel diritto sacro*, in *Il Foro Italiano*, luglio-agosto 1983, V.

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derazione del particolare significa considerazione del reo/peccatore che cerca la propria salvezza e in questa ricerca va aiutato. Non ci si può arrestare al peccato/reato come fattispecie generale; quel che conta, in un'ottica pastorale, è il peccato/reato commesso da un determinato soggetto in determinate circostanze.

Il problema delle circostanze, cioè del contesto in cui un determinato atto viene compiuto, è sotteso alla mentalità teologico/canonica. Lo esprime molto bene quel corifeo della cultura medievale che è Tommaso d'Aquino. Nella 'Somma Teologica', dopo aver parlato della Divinità, trattando dell'uomo (*de homine*), nella *Quaestio* VI (l'opera è divisa in tante *quaestiones*), si occupa del volontario e dell'involontario, degli atti compiuti volitivamente e di quelli che non trovano un contributo nella volontà. Non basta! Nella *Quaestio* VII, ecco un titolo indicativo: *De circumstantiis humanorum actuum* (3); verte sulle circostanze degli atti umani, età, stato, ignoranza, povertà, luogo, tempo, gravità del danno, conseguenze dell'atto. In altre parole, non basta che cosa si è compiuto e con quale volontà; è rilevante indagare chi sia l'agente, come l'abbia compiuto, dove, quando, in quali circostanze. È quel contesto che il teologo/canonista deve approfondire, se si vuol conseguire pienamente l'ideale del giusto; che, in un ordinamento sacro, non è al di là del diritto, ma anzi vi si méscola e con esso si fonde.

Ecco perché al centro dell'ordinamento canonico v'è quel principio di equità che i canonisti chiamano canonica. *Aequitas canonica*: quasi per sottolineare una forma di equità che serve ai canonisti, di cui essi hanno bisogno, che hanno contribuito a creare. Leggiamo una delle sue molteplici definizioni dove si punta il dito proprio sul suo particolarismo: "iustitia pensatis omnibus circumstantiis particularibus dulcore misericordia temperata", quella giustizia che si riesce a raggiungere dopo aver soppesato minuziosamente tutte le circostanze, sempre tenendo conto di quel soggetto singolo carico di fragilità umane e quindi meritevole di misericordia in forza della sua debolezza.

E si profila una ulteriore diffidenza. Oltre che per la riduzione del giuridico in un castello logico o in un sistema, oltre che per il diritto innaturalmente immobilizzato in una legge generale, diffi-

(3) *Summa Theologica*, Prima Secundae, q. 7, artt. 1 e 2.

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denza per il formalismo. Noi giuristi laici siamo ancora oggi malati di formalismo. Certo, abbiamo bisogno di categorie formali perché il sapere giuridico è scienza ordinante, ma non ci rendiamo sempre conto che talvolta queste tendono a separarci da una realtà che è mobilissima. La legge, la logica, il sistema, l'insieme delle forme talvolta tendono a distaccàrsene. E allora si verifica tragicamente il declino del diritto, perché abbiamo una corteccia separata dalla sua sottostante linfa sociale economica culturale. Questo rischio il diritto canonico non lo può correre, perché sarebbe il totale discredito — e il collasso — dell'ordinamento della Chiesa: un ordinamento giuridico ridotto a una vera mostruosità storica. In questo caso l'accusa luterana avrebbe veramente un grosso senso.

Due parole conclusive su questa mentalità, cui prassi e riflessione canoniche dànno vita. È una mentalità empirica, che privilegia il particolare, che privilegia le circostanze di un atto, le circostanze umane in primo luogo ma anche quelle contestuali; che, consequenzialmente, concepisce la regola giuridica come naturalmente elastica; che, concretandosi precisamente in un'analisi minuta di tante individualità, èleva a un ruolo centrale e propulsivo dell'ordinamento il giudice assai più del legislatore. Chi vi parla esercita la funzione di giudice canonico nel Tribunale Regionale Etrusco di Firenze e ha la possibilità di constatare quotidianamente nella esperienza pratica la centralità che il giudice ha ancora oggi nel diritto della Chiesa.

5. *Il diritto canonico come mentalità e la sua rilevanza storico-giuridica: alle radici del* common law.

È giunto però il momento di domandarci se questa mentalità, al di là delle influenze sui singoli istituti, ha avuto qualche riscontro sulla cultura giuridica generale.

Un influsso non smentibile è sulla formazione del *common law*.

Voi sapete che *common law* significa un pianeta giuridico che è dapprima inglese e poi anche nordamericano e di tante colonie inglesi. Ma è un pianeta che ha un suo percorso e una sua storia abbastanza separati da quelli dei paesi dell'Europa continentale e dell'America Latina.

Noi abbiamo vissuto una storia discontinua. Vi ho puntualizzato il Cinquecento come l'inizio di una frattura nella storia giuridica

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occidentale; da quel momento corre, per così dire, una seconda storia che non si pone in rapporto di continuità con l'esperienza giuridica medievale, anzi in polemica, in rottura, nel disperato impegno a sbarazzarsi dei valori del medioevo giuridico come di una zavorra di pesi morti, di disvalori. Noi siamo gli eredi di quella frattura. In un paesaggio ormai secolarizzato, con le metafisiche medievali ridotte a favolette per infanti, ci siamo costruiti un regno di garanzie formali: divisione dei poteri, principio di stretta legalità, certezza del diritto, e così via. Grandi valori da rispettare sempre e comunque, ma di cui dobbiamo anche cogliere i limiti, derivanti dall'essere puramente formali.

Il mondo del *common law* ignora questa discontinuità, questo iato profondo che si è verificato nell'Europa continentale, nell'area che i comparatisti chiamano di *civil law*. Il fenomeno del *common law* ha una storia giuridica perfettamente continua dal medioevo all'età contemporanea, non smentendo in alcun modo le proprie origini medievali. Che sono origini forgiate soprattutto da ecclesiastici e necessariamente impregnate di diritto canonico. Ogni tanto, fra gli storici inglesi del diritto, si delinea una volontà di ripulsa o il tentativo di attenuare una simile ipotesi, rivendicando il tratto di fondo del *common law* a pretese valenze originarie del costume anglosassone; patriottismo comprensibile ma dalla ispirazione bassamente sciovinistica. Se si esamina minuziosamente le trame degli istituti e del processo e tutto il progetto giuridico sottostante, come è stato anche recentissimamente fatto, l'ipotesi ne esce confermata e avvalorata (4).

La *Court of Chancery*, questo elemento evolutivo del *common law* , è un tribunale che, addirittura fino alla scissione di Enrico VIII, ossia fino al quarto decennio del secolo XVI, maneggia principii e nozioni di diritto canonico, è portatrice di una mentalità canonistica, esprimendola in regole precise. In forza dei trapianti che dall'Inghilterra si effettueranno nel Nordamerica, abbiamo un vastissimo universo giuridico il quale trova nel diritto canonico un marchio di costruzione e un preciso contributo di mentalità: concretezza, ela-

(4) Si veda, recentissimamente, J. MARTINEZ TORRON, *Anglo-american Law and Canon Law-Canonical Roots of the Common Law Tradition*, Berlin, Duncker u. Humblot, 1998.

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sticità della regola, attenzione per il particolare, attenzione per le circostanze singole, individue, valorizzazione piena del giudice al centro dell'ordinamento come cognitore eccellente delle vicende particolari. Il diritto canonico medievale deve essere annoverato fra i geni della nuova creatura giuridica.

6. *Il diritto canonico come mentalità giuridica e il suo messaggio metodologico: un contrappunto comparativo per il giurista di* civil law.

Ecco già una prospettiva che io vi disegno: il diritto canonico ha un figlio insospettato, il *common law.*E in un momento in cui l'intiero universo giuridico a livello mondiale subisce sempre di più il modello anglosassone, sia pure indirettamente attraverso questo canale, è la mentalità canonica e canonistica che, inaspettatamente, ha una qualche reviviscenza. Ma v'è ben di più: su un piano metodologico e di approccio generale, è una mentalità che sembra oggi meritevole di attenzione. Dal diritto canonico possiamo ricevere una benvenuta lezione di metodo. Il diritto canonico può oggi, culturalmente, fungere per noi giuristi di *civil law* da prezioso momento comparativo.

Dopo cinque secoli di statalismo giuridico, di culto della legge, di culto del Codice, di fiducia nelle virtù taumaturgiche del legislatore, tocchiamo con mano i difetti e i limiti enormi di una siffatta impostazione. E ci rendiamo conto che, acquisendo la convinzione della strumentalità del diritto — strumento prezioso, anzi necessario, ma strumento —, siamo sempre più insoddisfatti dei sistemi geometrici, siamo sempre più persuasi della inidoneità della legge a fungere da ordinatrice monocratica di una società socialmente economicamente tecnicamente assai complessa, arrivando a due risultati innovativi, l'uno in stretta correlazione con l'altro: la necessaria elasticità della regola giuridica, la valorizzazione dell'interprete/applicatore.

Prendiamo ad esempio un movimento che è tipico dell'oggi e ancor più lo sarà del domani: la cosiddetta globalizzazione. Se ne parla troppo e spesso a vuoto, e se ne parla soprattutto sotto il profilo politico ed economico, rispetto al quale scoppiano anche episodii di violenza e di ripulsa, trattandosi di fenomeno che tende

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a imporre a livello mondiale la supremazia di una superpotenza e di grosse centrali economiche multinazionali a quella superpotenza legatissime.

Ma globalizzazione vuol dire anche, a livello giuridico, un'altra cosa: vuol dire il crollo dello statalismo giuridico e un mondo degli affari che ha preso strade sue, ha rifiutato il diritto degli Stati immobilizzato in un coacervo di leggi, ha rifiutato i Tribunali statali, le loro lentezze, i loro burocratismi e formalismi, ha cominciato a costruire al di là delle leggi, al di là dei Codici, un proprio diritto. Un proprio diritto all'insegna di un rifiuto netto del formalismo e di un altrettanto netto rifiuto di un rigido legalismo. Globalizzazione significa oggi anche riscoperta di un pluralismo giuridico.È il mondo della prassi economica che inventa figure appropriate alla realtà degli affari contemporanei, grezze fattuali plastiche, senza che abbia rilievo alcuno la loro assenza nel Codice civile o di Commercio,o nelle leggi speciali. Ormai, siamo di fronte a un diritto *extra legem*, che corre parallelo a quello ufficiale e legale, Un diritto elastico affidato alla scienza per quanto attiene al conio, affidato a giudici privati per quanto attiene alla sua applicazione (5).

Non facciàmoci illusioni. Non è che l'odierno uomo di affari riscopra l'elasticità della regola giuridica assumendo a modello il diritto canonico. La riscopre perché gli giova o — se mai — perché scorre nelle sue vene il sangue dei giuristi empirici di *common law*. Ma è un fatto che la attuale globalizzazione significa crisi dei nostri vecchi modelli giuridici, urgenza di confezionarne di nuovi. In questo affaccendato laboratorio la metodologia canonica può essere utilmente riesumata dalla soffitta dove gli illuministi la gettarono. Il canonista osa dire che, in questo movimentato quadrivio degli odierni giuristi, può esserci posto anche per lui; il suo diritto può — ripetiàmolo ancora — fungere da prezioso momento comparativo.

Bisognerebbe, però, che ogni giurista — ed è,da parte mia, in tal senso una raccomandazione vivissima a voi studenti e quindi giuristi in formazione — avesse il coraggio di operare un benefico lavacro

(5) Chi avesse voglia di saperne di più può leggere il testo di una nostra conferenza che, essendo destinata a un pubblico cólto ma eterogeneo, è facilmente comprensibile anche da studenti novizii: *Globalizzazione, diritto. scienza giuridica*, in *Il Foro Italiano*, maggio 2002, V.

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interiore. Il nostro laicismo di moderni ci insospettisce su tutto ciò che porta l'emblema del sacro e, figli di ben duecento anni di sottile propaganda illuministica, diffidiamo di un fenomeno giuridico che sa di comunità clericale e parla e prescrive in tema di sacramenti, di poteri sacerdotali, di interdetti e di scomuniche. Cose, tutte queste, che a stento possono interessare il solo fideista e non il moderno cittadino definitivamente affrancato. Un simile atteggiamento, che è purtroppo comune, ottiene, da un punto di vista strettamente culturale, lo stesso risultato che recare perennemente sul proprio naso degli occhiali affumicati che àlterano il paesaggio e non consentono di percepirlo nella sua obbiettività e multiformità. È infatti la multiformità del paesaggio offerta dal diritto della Chiesa che va recuperata; le tante incrostazioni teologico-liturgico-pastorali non devono impedirci di afferrare il suo vivace messaggio metodologico.

Il nostro è sicuramente un momento di crisi, momento in cui il giurista consapevole è percorso da un sentimento di disagio e non può non mettersi alla ricerca di nuove soluzioni. Io e la collega Chiara Tenella eravamo a Pisa, ai primi di marzo di quest'anno, per partecipare a un grande Congresso scientifico promosso con benemerita iniziativa dalla Facoltà di Giurisprudenza dell'Ateneo pisano. Tema: Il problema delle fonti del diritto. E vi è convenuto un folto numero di giuristi, soprattutto privatisti, che sentivano impellente il problema delle fonti, nella lucida persuasione che non lo si potesse più risolvere semplicisticamente trincerandosi nella finora dominante certezza legolatrica e rinviando i perplessi e gli scontenti al nostro sistema durissimo di legge vigenti e cogenti.

Amici studenti, noi dobbiamo tener conto — lo diceva nel Convegno pisano Stefano Rodotà — di un fenomeno sempre più diffuso e che sempre più si ingigantisce: la privatizzazione delle fonti, la loro moltiplicazione e frammentazione. Nessuno si sentirebbe — io credo — di esorcizzare i tanti problemi, e fondamentali, che gravano sulle spalle del giurista ripetendo spicciativamente 'dura lex sed lex'. Oggi si ripete più volentieri l'affermazione dell'antica sapienza che il diritto, tutto il diritto, è costituito *hominum causa*, ha una ineliminabile dimensione strumentale, è strumento per l'uomo e alle sue esigenze deve piegarsi ed elasticizzarsi. E ritorna l'atteggiamento metodico e il motivo di fondo caratteristici dello *ius Ecclesiae*.

Desidero chiudere la lezione leggendovi un testo che mi sono

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fotocopiato; proviene dalla penna di un grande canonista italiano moderno, Francesco Ruffini. Nei manuali di storia si ricorda Ruffini come il personaggio che studia egregiamente la libertà religiosa nei difficili anni Venti, come l'amico e il sodale di Piero Gobetti, come uno dei pochissimi professori universitarii che rifiutarono il giuramento al regime fascista mentre tanti docenti — anche futuri protagonisti della nostra sinistra parlamentare — non esitarono a giurare. Per noi giuristi è un agguerrito cultore del diritto costituzionale, ecclesiastico e canonico, nonché della storia del diritto, ed è a lui come scienziato che in questo momento io ricorro. Con una aggiunta di carattere ideologico, che ci sarà utile per valutare appieno il frammento ruffiniano: lo scrittore non è certo un apologista cattolico, al contrario è un agnostico con un atteggiamento sostanzialmente laicista.

Il frammento è tratto da un saggio che Ruffini scrive nel 1905 sul problema allora scottante e discusso della codificazione del diritto canonico appena avviata, un saggio vecchio ma non invecchiato, che vi raccomando, sia per l'acutezza della diagnosi giuridica, sia per la comprensione che dimostra — lui laicista — verso il diritto della Chiesa Romana e, in primo luogo, verso quella mentalità di cui abbiamo tanto discorso nella nostra lezione e che a Ruffini appare degna di attenta considerazione (6).

Lasciamo a lui la parola: « Stretta fra la rigidezza medievale delle sue linee direttive e l'incalzare e il premere dei tempi sempre mutabili e delle genti più diverse che mai ordinamento umano abbia in sé raccolte, essa [la Chiesa Romana] ha saputo fin qui uscirne in un modo in cui si è addimostrata tutta la virtuosità del versatile spirito romano. Noi saremmo anche disposti a parlare addirittura alla romana di virtù, perché è stato certo un grande esperimento di abilità e di forza. Dove il protestantesimo ha provveduto ai mutabili indirizzi dei tempi e ai diversi umori degli uomini con la infinità delle sue variazioni, il cattolicesimo ha posto l'infinita varietà dei suoi provvedimenti od anche dei suoi espedienti. La Curia Romana ha portato ad un'eccellenza insuperabile l'arte di dire e di non dire, di proibire insieme e di concedere, di badare a tutti e di dissimulare

(6) F. RUFFINI, *La codificazione del diritto ecclesiastico*, ora in *Scritti giuridici minori*, vol. primo, Milano, Giuffrè, 1936.

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temporum ratione habita [tenuto conto dei singoli momenti in cui l'azione viene concepita od attuata]. Che capolavoro di adattabilità pratica non è l'istituto delle dispense, una creazione tutta quanta ecclesiastica che consente alla Chiesa di tener ferma la legge unica di fronte al cozzo dei casi diametralmente opposti, di lasciar scritta la legge arcaica mentre la disciplina vigente la contraddice in tutto. E che portento di diplomazia giuridica quel più moderno accorgimento del *tolerari posse* [cioè la tolleranza di un illecito per evitare un illecito maggiore], che è venuto anch'esso assumendo, poco alla volta, consistenza di vero istituto di diritto canonico e che ha permesso che la Chiesa potesse ad un tempo scomunicare come invasori dei suoi beni i sovrani del Piemonte e sciogliere i soldati che militarono in quell'impresa, fulminare le leggi sul divorzio e togliere gli scrupoli ai giudici cattolici francesi che lo pronunciano, imporre l'istruzione religiosa nelle scuole e approvare le scuole miste aconfessionistiche di Svizzera e di America, lasciare che al di là delle Alpi si tratti in ogni occorrenza con gli eretici e condannare in Roma, come favoreggiatori dell'eresia, i tipografi che stampassero biglietti di invito per le adunanze evangeliche » (7).

Alla domanda, che Ruffini si pone e che è chiaramente retorica dopo un siffatto elogio, e cioè se veramente la codificazione possa, per un ordinamento giuridico come la Chiesa, essere il mezzo idoneo a disciplinare la plasticità naturale e irrinunciabile della *regula iuris* canonica, sappiamo che la Sacra Gerarchia rispose attuando il Codice, anche se — come è noto — di Codice singolarissimo si tratta. Resta — ed è quel che qui ci preme — la cifra identificata con acutezza dal grande giureconsulto piemontese in un testo che è splendida testimonianza di comprensione storico-giuridica. In quella cifra, lo si voglia o non, si codifichi o si mantenga il pluralismo di fonti dello *ius vetus*, sta, per così dire, il 'segreto' del diritto canonico, la sua mentalità specifica; la quale è connaturata a un diritto squisitamente strumentale.

Anche oggi che il legislatore del Codice giovanneo vigente del 1983 sembra aver preferito una folta previsione di norme locali, e quindi sotto molti aspetti un mosaico normativo, l'idea di una norma generale, che può e deve piegarsi ad esigenze particolari quando lo

(7) F. RUFFINI, *La codificazione del diritto ecclesiastico*, cit., p. 94.

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richiedano i due imperativi in stretta congiunzione della *ratio peccati vitandi* e della *salus aeterna animarum*, rappresenta un principio che laicamente mi sentirei di qualificare come costituzionale, inerente cioè alla istituzione divina e alla costituzione intima della Chiesa. Un principio che, anche se non dichiarato, è da leggersi scritto a inchiostro simpatico al di sotto di ogni canone.

Lì sta il 'segreto' del diritto canonico, da lì deriva a questo ordinamento giuridico di potersi erigere e trasformarsi in mentalità giuridica, da lì discende anche il nostro odierno interesse culturale di giuristi (qualunque sia la nostra scelta sul piano religioso).

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Figure dell'esperienza

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DANIELA GIACONI

DALL'INCHIESTA AGRARIA AGLI STUDI SULLA PROPRIETÀ. LE RADICI DEL PENSIERO DI GHINO VALENTI E L'AFFERMAZIONE DI UN METODO DI INDAGINE (*)

1. *Premessa.*

Questo scritto intende ricostruire, con il sostegno di numerosi materiali nuovi e di alcuni documenti d'archivio, il percorso compiuto da Ghino Valenti dagli anni della sua formazione culturale alla sua completa maturazione intellettuale. L'immagine dell'economista che scaturisce da questo lavoro, pur non completamente dissimile da quella ereditata dalla bibliografia post mortem, è rafforzata nei suoi tratti più marcati ed originali. La scelta di valorizzare i contributi che non erano mai entrati a far parte della lista delle sue opere, permet-

(*) Ringrazio il prof. Riccardo Faucci per la paziente lettura. Egli non ha alcuna responsabilità per eventuali errori ed omissioni. I temi di questo saggio sono svolti anche nei seguenti lavori di prossima pubblicazione: D. GIACONI, *L'associazionismo agrario nelle Marche settentrionali*; ID., *"Lezioni sulla teoria economica della proprietà". Note sull'esordio accademico di Ghino Valenti*; ID., *Storia di un pregiudizio. L'Università di Macerata dall'unità alla riforma Gentile*; ID., *Un economista della Mitteleuropa. Giovanni Lorenzoni (1877-1944)*. I primi tre scritti saranno inclusi nel seguente volume: P. BINI (a cura di), *L'economia politica nelle Marche*, Università di Macerata, Collana della Facoltà di Economia. L'ultimo, negli atti del convegno Lorenzoni. Cfr. V. GIOIA, S. SPALLETTI (a cura di), *Giovanni Lorenzoni: dall'economia agraria all'etica*, Atti del convegno "Giovanni Lorenzoni economista e sociologo" (Macerata, 20 settembre 2002), Università di Macerata, Facoltà di Scienze Politiche, Pubblicazioni del Laboratorio "Ghino Valenti".

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terà di dimostrare che Valenti è stato un economista che si è costruito in fretta. Valenti era « venuto alla cattedra "dopo essersi cimentato nelle lotte della vita reale" » (1): la partecipazione all'inchiesta Jacini, l'atmosfera e gli umori colti dalla relazione per le Marche stilata dall'economista, le sue radici culturali e la maniera con cui Valenti aveva filtrato questo patrimonio d'esperienze in una carriera accademica cominciata a Macerata con un corso di « Lezioni sulla teoria economica della proprietà » nell'anno accademico 1889-1890. Gli elementi citati saranno incasellati in un percorso atto a dimostrare che la letteratura commemorativa accumulatasi dopo la morte di Valenti presenta degli elementi di debolezza, per effetto della conoscenza imperfetta della vita dell'economista e della mancanza di alcune tessere fondamentali della sua bibliografia scientifica. Per questo motivo, la discussione preliminare verterà sui difetti di tali opere celebrative, per rilevare come il ricco ed articolato progetto di ricerca di Valenti debba essere retrodatato di un decennio. Già negli anni settanta dell'Ottocento, infatti, l'economista aveva elaborato le categorie analitiche associate ai suoi temi prediletti. Un progetto di ricerca che l'insegnamento universitario aveva arricchito, ma non modificato nei suoi pilastri vitali (2).

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(1) A. CARACCIOLO, *Ghino Valenti e l'agricoltura delle Marche*, « Quaderni Storici delle Marche », n. 7, gennaio 1968, p. 92. La citazione usata da Caracciolo è tratta da: G. VALENTI, *Il valore pratico delle dottrine economiche*, Drucker, Verona, 1903, pp. 4-5.

(2) Gioacchino Alfredo Valenti [Ghino] (Macerata, 14 aprile 1852 — Roma, 20 novembre 1920), come il suo quasi coetaneo Maffeo Pantaleoni, appartenne all'aristocrazia intellettuale di Macerata. Era figlio dell'avv. Teofilo Valenti e della contessa Eleonora Spada Lavini. Il padre era docente di Diritto Civile, Preside della Facoltà Giuridica e principe del foro locale. La madre discendeva dalla nobile famiglia Medici. La famiglia affidò la formazione culturale del giovane Gioacchino ai Padri Scolopi di Siena. Ritornato a Macerata per frequentarvi l'Università, Valenti scoprì l'economia politica attraverso le lezioni di Piero Giuliani. Come Presidente del Comizio Agrario di Macerata, fu chiamato a collaborare all'inchiesta Jacini e ad elaborare la relazione finale per le Marche. Avviato l'insegnamento dalla cattedra di economia politica della sua città natale, Valenti impartì il suo magistero anche nelle Università di Roma, Modena, Bologna, Padova e Siena. Per l'albero genealogico di Ghino Valenti (linea materna) e il suo certificato di battesimo, cfr. Archivio di Stato di Macerata, *Archivio Amedeo Ricci*, Notizie e appunti storici, b. 3, *Albero genealogico delle famiglie Spada — De' Medici e Spada Lavini*; Curia Vescovile di Macerata, *Archivio anagrafico*, Certificato di battesimo di Ghino Valenti (Macerata, 28 aprile 1852). Quasi per un singolare gioco del destino, per un economista affermatosi con il solo diminutivo colloquiale di Ghino, la registra-

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2. *I motivi di un'assenza.*

Nella lista degli « scritti dell'autore » pubblicata in coda agli "Studi di politica agraria" del 1914 (3), Ghino Valenti fa cominciare la sua carriera nel biennio 1887-1888, quando pubblica i saggi "Il rimboschimento e la proprietà collettiva nell'Appennino Marchigiano" (4) e "L'accelleramento [sic] della perequazione fondiaria nella provincia di Macerata" (5), riappropriandosi anche della paternità del lavoro svolto per l'inchiesta agraria Jacini con la stampa di "Economia rurale nelle Marche" (6). Una scelta che taglia via un decennio fondamentale della sua vita e nel quale, parallelamente agli studi per l'inchiesta agraria, si determinano tutte le categorie analitiche e si esprime un'opzione metodologica che non verrà mai tradita nell'arco della sua vita. In secondo luogo, risalgono a questo periodo anche le prime pubblicazioni dell'economista su « La Rassegna Provinciale » con titoli direttamente riconducibili allo schema generale della relazione per le Marche. Valenti vi pubblica articoli

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zione dell'anagrafe non coincide con quella della curia perché l'economista risultata battezzato come Gioacchino, Alberto, Pasquale, Novello (?), Virgilio. Dal matrimonio dell'economista con la Marchesa Irene Costa nasce Teofilo Valenti — poeta e saggista — morto senza eredi nel 1951. Dalle ricerche finora compiute non è stato possibile accertare l'esistenza dell'archivio personale di Valenti.

(3) G. VALENTI, *Studi di politica agraria*, Athenaeum, Roma, 1914, pp. 565-570. Su questa lista sono modellate le due bibliografie curate da Rocca e Virgilii. Cfr. G. ROCCA, *Un economista agrario: Ghino Valenti*, « La Riforma Sociale », serie III, anno XXVIII, vol. XXXII, maggio-giugno 1921, *Pubblicazioni di Ghino Valenti*, pp. 151-155; F. VIRGILII, *Ghino Valenti nella vita e nella scienza. Commemorazione letta nell'aula magna della Regia Università di Siena il 23 febbraio 1921*, Estratto da « Studi Senesi », vol. XXX, f. 1-2, F.lli Bocca, Torino, 1921, *Pubblicazioni del Prof. Ghino Valenti*, pp. 17-22. Diversamente da Valenti, Rocca e Virgili segnalano tra le opere dell'autore anche la prima pubblicazione della relazione per le marche nel 1883.

(4) Stab. Tip. Mancini, Macerata, 1887.

(5) Stab. Tip. Mancini, Macerata, 1888.

(6) G. VALENTI, *Economia rurale nelle Marche*, Tip. Mancini, Macerata, 1888. La pubblicazione in nome proprio della relazione è giustificata dal momento storico in quanto, secondo Valenti, era necessario far circolare nuovamente quelle idee in anni nei quali le rese agricole si erano fortemente ridimensionate. Sull'inchiesta agraria Jacini, cfr. A. CARACCIOLO, *L'inchiesta agraria Jacini*, Giulio Einaudi Editore, Torino, 1958. Per valutazioni più direttamente attinenti all'animus dell'inchiesta e all'impegno personale di Valenti, cfr. S. JACINI, *Un conservatore rurale della nuova Italia*, Laterza, Bari, 1926; G. VALENTI, *L'economia rurale nelle Marche*, cit., *Al lettore*, pp. 5-7.

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del seguente tenore: « Distribuzione della popolazione nelle Marche » (7); « L'inchiesta agraria e il comitato agrario di Macerata » (8); « Statistica della proprietà rurale nella provincia di Macerata » (9); « L'avvenire industriale della nostra provincia » (10); « L'istruzione agraria nella nostra provincia » (11); « Beneficenza e lavoro » (12); « La proprietà collettiva nell'Appennino marchigiano » (13); articoli che, accompagnati da quelli altrettanto importanti di Enrico Morselli sulle condizioni sanitarie delle popolazioni marchigiane fotografano, con strumenti adeguati, lo stato dell'economia rurale marchigiana ai tempi dell'inchiesta Jacini (14).

(7) Anno I, n. 7, 18 maggio 1879, pp. 57-59.

(8) *Ibidem*, pp. 59-61. Articolo firmato La Direzione.

(9) Anno I, n. 11, 15 giugno 1879, p. 93-94.

(10) Anno I, n. 18, 3 agosto 1879, pp. 147-148.

(11) Anno I, parte I, n. 26, 28 settembre 1879, pp. 109-111; parte II, n. 28, 12 ottobre, pp. 124-126; parte III, n. 29, 19 ottobre, pp. 134-136; parte IV, n. 30, 26 ottobre, pp. 141-143.

(12) Anno II, n. 41, 11 gennaio 1880, pp. 246-247.

(13) Anno II, n. 48, 29 febbraio 1880, pp. 402-403; n. 49, 7 marzo, pp. 410-411, ID. « L'opinione », n. 54, 25 febbraio 1880. Tra gli articoli riconducibili all'atmosfera ed ai temi dell'inchiesta si segnalano anche i seguenti: Anonimo, *Inchiesta agraria*, « La Rassegna Provinciale », n. 3, 20 aprile 1879, p. 17-18; Anonimo, *Istruzione ed educazione*, *Ibidem*, n. 17, 27 luglio 1879, pp. 136-137; Anonimo, *La questione sociale*, *Ibidem*, n. 19, 10 agosto 1879; Anonimo, *Il credito agrario nella nostra provincia*, *Ibidem*, anno I, n. 30, 26 ottobre 1879, pp. 139-141; Anonimo, *Il rimboschimento dell'Appennino*, *Ibidem*, n. 31, 2 novembre 1879, pp. 148-149; GVB, *L'emigrazione marchigiana nel 1° semestre 1879*, *Ibidem*, n. 32, 9 novembre 1879, p. 137-138;

(14) Enrico Morselli (Modena 1852-Genova 1929) direttore dell'ospedale psichiatrico di Macerata e collaboratore di Valenti nella Rassegna Provinciale. Studioso di scuola lombrosiana, Morselli ha diretto anche le cliniche psichiatriche dell'Università di Torino e Genova, ha fondato numerose riviste tra le quali la « Rassegna di Filosofia Scientifica », la « Rivista Sperimentale di Freniatria », la « Rivista di Patologia Nervosa e Mentale ». Tra le sue opere più note: « Il suicidio », « Manuale di semiotica delle malattie mentali » e « La psicanalisi ». JOUVENAL, *Le condizioni delle Marche*, anno I, n. 38, 21 dicembre 1879, pp. 221-224; n. 39, 28 dicembre 1879, pp. 229-231, anno II, n. 40, 4 gennaio 1880, pp. 237-239; J. *L'istruzione primaria*, *Ibidem*, n. 43, 25 gennaio 1880, pp. 361-363, n. 46, 15 febbraio pp. 385-386; Anonimo, *L'inchiesta Agraria*, *Ibidem*, p. 390. L. ANTOLISEI, *Di alcune industrie nelle Marche*, *Ibidem*, n. 44, 1 febbraio 1880, pp. 370-372; n. 45, 8 febbraio, pp. 378-379; n. 46, 15 febbraio, pp. 388-39; n. 50, 14 marzo, p. 418-419; n. 51, 21 marzo, pp. 427-428. La maggior parte degli articoli della Rassegna Provinciale erano anonimi o accompagnati da acronimi e pseudonimi. Tra le poche firme complete quelle del direttore Ghino Valenti, dello psicologo criminale Enrico Morselli

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La semplice esposizione di questi titoli fa cadere l'illusione che quel decennio sia stata una « fase signorile e amatoriale » (15).

Un errore veniale a fronte dell'evidenza che Valenti, con questo spostamento in avanti della sua presentazione al pubblico, ha indotto in errore la storiografia e alimento una sorta di leggenda intorno alla sua figura ma, comunque, significativo perché si viene a saldare con altre debolezze specifiche della toriografia su questo autore.

Innanzi tutto, è evidente che, a quasi un secolo dalla sua morte e a dispetto della vastità della sua bibliografia, Ghino Valenti non ha ancora avuto una sistemazione definitiva nella storia del pensiero economico italiano. Quello che, a prima vista, può sembrare un paradosso, in realtà è uno spunto di riflessione intorno ai difetti insiti in una lista di titoli composta soltanto da contributi d'occasione in morte dell'economista e da pochi lavori successivi su aspetti peculiari della sua produzione scientifica.

Intorno alla vicenda umana di Valenti avevano dato il loro contributo, nell'ordine, tra il 1920 e il 1922, Bonfante, Coletti, Rocca, Tamagnini e Virgilii (16). Negli anni trenta si sono aggiunti Umberto Ricci e il maceratese Milziade Cola (17). La lista colpisce sfavorevolmente: scrivono economisti non di primo piano; Umberto

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e di Lamberto Antolisei. Nella rassegna Provinciale Morselli si era occupato della diffusione della pellagra, di Statistica e topografia medica", dell'alimentazione della popolazione, della pena di morte nel distretto della locale Corte d'appello e di malattia ed imperfezione.

(15) Cfr. M.E.L. Guidi, *Cooperazione, socialismo ed economia agraria. Note su Ghino Valenti*, cit. Si distaccano da questa ottica Paolo Grossi e Augusta Palombarini. Cfr. P. Grossi, *Un altro modo di possedere: L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Giuffrè, Milano, 1977, Cap. II, *Inchiesta agraria. Un innesto fra teoria e prassi*; A. Palombarini, *Ghino Valenti e la "Rassegna Provinciale"*, « Proposte e Ricerche », n. 14, 1985, pp. 97-101.

(16) P. Bonfante, *Gli uomini dell'Italia odierna. Ghino Valenti*, « Rivista d'Italia », anno XXIV, f. III, 15 marzo 1921, pp. 348-358; G. Rocca, *Un economista agrario: Ghino Valenti*, cit.; G. Tamagnini, *L'economia agraria negli studi di Ghino Valenti*, « Rivista internazionale di scienze sociali e discipline ausiliarie », anno XXVII, vol. LXXXIV, dicembre 1920, pp. 265-274; F. Virgilii, *Ghino Valenti nella vita e nella scienza*, cit.; Id., *Prof. Ghino Valenti*, in Regia Università di Siena, *Annuario della Regia Università di Siena*, AA. 1921-1922, Stab. Tip. S. Bernardino, Siena, 1922, 172-173.

(17) M. Cola, *In commemorazione del Prof. Ghino Valenti (29 dicembre 1922)*, in Id., *Discorsi*, Stab. Tip. Bianchini, Macerata, 1934, pp. 8-10. U. Ricci, *Valenti Ghino*, in

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Ricci si limita alla voce "Ghino Valenti" nella "Encyclopaedia of the social sciences" di Seligman (18) mentre della commemorazione di Francesco Coletti si ha notizia soltanto dai Rendiconti dell'Accademia dei Lincei (19).

Oltre per la mancanza di un vero e proprio profilo critico che superasse i vincoli e i toni dei necrologi e valutasse il merito della sua produzione teorica, la suddetta bibliografia su Valenti è di poco peso specifico soprattutto rispetto alle opinioni che avevano sostenuto in vita l'economista maceratese nei suoi uffici quotidiani e che ne esaltavano il contegno, la « propensione allo studio solitario » (20) e la sua ferma dedizione agli studi prediletti di economia applicata in un'epoca nella quale, come testimoniava Umberto Ricci, i doveri dell'accademia avevano reso più numerosi gli scritti di economia teorica, senza che ciò avesse contribuito a migliorare qualitativamente la produzione scientifica (21). Giudizi che trovano la loro più alta e significativa espressione nel raffigurare Valenti come *the right man in the right place* (22). Allo stesso modo, questa bibliografia è

E.A.R. SELIGMAN (ed.), *Encyclopaedia of Social Sciences*, Macmillan, New York, 1935, vol. XV, pp. 208-209.

(18) Sulla *Encyclopaedia*, la sua storia e i suoi contenuti, cfr. P.F. ASSO, L. FIORITO, *Manifestazioni di pluralismo nel pensiero economico americano fra le due guerre: l'Encyclopaedia of the social sciences*, « Storia del pensiero economico », n. 41, 2001, pp. 131-163.

(19) « Il Socio Coletti tratteggia la figura dell'accademico professore Valenti, scomparso in questi giorni, e mostra come dedicatosi non più giovane agli studi di economia rurale e poi alle questioni riguardanti l'agricoltura italiana e alla statistica, ben presto raggiungesse in tali studi una competenza invidiabile, che rimane consacrata in numerosi lavori, e particolarmente nella recente e importante pubblicazione: "L'Italia agricola e il suo avvenire" ». In Regia Accademia Nazionale dei Lincei, *Rendiconti della R. Accademia Nazionale dei Lincei*, Classe di Scienze morali, storiche e filologiche, *Comunicazioni Varie*, *Commemorazioni*, Serie V, vol. XXIX, *fasc.* 11-12, 1921, pp. 351-352. Ringrazio il Dott. Marco Guardo della biblioteca dei Lincei per avermi fornito i riscontri necessari.

(20) P. BONFANTE, *Gli uomini dell'Italia odierna. Ghino Valenti*, cit., p. 349.

(21) Cfr. U. RICCI, *Sull'opportunità di una storia dell'economia politica italiana*, in AA.VV., *Scritti vari in onore di Tullio Martello*, Laterza, Bari 1917, pp. 377-394. Per una opposta opinione (prevalenza dell'economia applicata sulla teorica), cfr. M. FINOIA, *Gli studi di economia applicata in Italia*, « Rivista milanese di economia », 1984, n. 11, pp. 103-135.

(22) L. EINAUDI *L'Italia coltiva troppo grano? Una rivelazione della nuova statistica agraria*, in ID., *Cronache economiche e politiche di un trentennio (1893-1925)*, vol. III,

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incapace di cogliere i pesanti appunti espressi da Vilfredo Pareto contro Valenti e una generazione antica per mentalità e metodo (23).

Nonostante l'avesse argomentato con disprezzo, Pareto coglie nel vero quando associa a Valenti l'immagine di uno studioso che continuava a testimoniare un modo di essere economista nel quale i contenuti teorici avevano poco valore rispetto al mantenimento di una condotta di vita austera e alla sincerità delle convinzioni personali. Di fatto, in virtù di tali disposizioni d'animo, Valenti si diceva disinteressato alla propria collocazione in una precisa scuola (24). Umberto Ricci lo descrive come « spirito acuto e severo » (25), la cui dirittura morale faceva passare in secondo piano anche la sua solida preparazione. Valenti era troppo geloso della sua libertà intellettuale per avere eredi o cercare glorie personali. Il medesimo atteggiamento lo avrebbe reso restio a riconoscersi in un preciso maestro e a disconoscere, come si vedrà in seguito, gli insegnamenti ricevuti a Macerata da Piero Giuliani. La sua ammirazione andava ad autori come Cattaneo, Lampertico, Messedaglia e Romagnosi, impegnati nel risorgimento della cultura economica d'Italia come nel suo risorgimento politico, ma con i quali non aveva avuto contatti diretti durante il suo apprendistato (26). Gli insegnamenti migliori venivano

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Giulio Einaudi, Torino, 1963, pp. 112-120; G. Rocca, *Un economista Agrario: Ghino Vacenti*, cit., pp. 142-143.

(23) Cfr. V. Pareto, *Epistolario (1890-1923)*, a cura di Giovanni Busino, Accademia Nazionale dei Lincei, Roma, 1973. La definizione "asini" è suggerita da Barone ed accolta da Pareto in una lettera conservata a Sondrio e intestata Celigny, 13 marzo 1908 (Fondo Pareto della Biblioteca Popolare di Sondrio IT PopSo FP R15C309). Ringrazio il Dott. Pier Carlo Della Ferrara per avermi fornito i riferimenti sopraindicati e consentito l'utilizzazione di questo materiale.

(24) Di questo tratto del suo carattere e di un coraggio sufficiente a farlo persistere, con noncuranza per la propria strada, Valenti parla quando si trovò costretto a respingere un attacco di Pantaleoni che considerava infondato nel merito e lesivo per la sua dignità personale. In proposito, cfr. G. Valenti, *A tutela della mia integrità. Promemoria*, Tip. della Regia Accademia dei Lincei, Roma.

(25) Cfr. U. Ricci, *Osservazioni critiche su un libro del Prof. Valenti*, « Il Giornale degli Economisti », Anno XVII, Vol. XXXII, Maggio p. 456.

(26) Una lista di maestri virtuali alla quale si può aggiungere il nome di Stefano Jacini in quanto Valenti scrive che egli gli aveva impartito una memorabile lezione nelle stanze del ministero durante lo svolgimento dell'inchiesta agraria. Il nome di Melchiorre Gioia è invece inserito nella premessa all'edizione dei Principi del 1918. Cfr. G. Valenti, *Principi di scienza economica*, III edizione notevolmente accresciuta, vol. II, Barbera,

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dai cattolici come Lampertico, più rispettosi dei principi, dei valori e dei simboli della vita associata. Regola di condotta dalla quale non si poteva esimere un laico come lui (27).

Chi rimaneva fuori dal coro, non lasciandosi coinvolgere nel dibattito tra le scuole economiche degli anni Settanta, poteva aspirare ad essere, come Messedaglia, un « giudice ascoltato nelle più ardue controversie » (28). Allo stesso tempo, dal collega defunto, Valenti aveva imparato a scegliersi una strada nella quale l'economista non doveva essere « uomo delle ingegnose costruzioni ma delle utili rettificazioni » (29), secondo un indirizzo di studio teso a dimostrare quanta stima gli ispirassero i teorici che dimenticavano la realtà per inutili e vacui tecnicismi.

Le sue scelte poggiavano su un preciso codice metodologico e su una tolleranza che lo induceva a dire che c'era spazio per tutti; tolleranza che era, come scrive, « una dimostrazione luminosa di quella teoria della libertà, che ho la cocciutaggine di professare » (30).

Valenti parla dell'economia politica come universo che « cammina » (31) e al quale nessuno studioso è capace di correre dietro. Se ne può trarre la suggestione di un'immagine delle scuole come

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Firenze, 1918, pp. VII-XII. I sentimenti di Valenti verso Messedaglia e Lampertico sono espressi soprattutto nei necrologi che ha vergato. Cfr. G. VALENTI, *Angelo Messedaglia*, « Giornale degli Economisti », anno XII, vol. XXII, maggio 1901, pp. 462-469; ID., *Commemorazione di Fedele Lampertico*, Reale Accademia dei Lincei (Roma, 17 marzo 1907), Estratto dai Rendiconti, vol. XVI, f. 3, Tipografia della Reale Accademia dei Lincei, Roma, 1907. Per Romagnosi, si veda, in particolare, ID. *Le idee economiche di Gian Domenico Romagnosi*, Loescher, Roma, 1891. Nella bibliografia dell'economista non esiste, invece, un testo dominato dalla figura di Cattaneo nonostante che il nome dello studioso lombardo ricorra con frequenza nella prosa di Valenti. Sugli economisti dell'età risorgimentale e sull'incivilimento, cfr. R. ROMANI, *L'economia politica del Risorgimento italiano*, Bollati-Boringhieri, Torino, 1994. Piero Giuliani apparteneva alla medesima corrente culturale degli scienziati eletti da Valenti a propri maestri.

(27) Sulla religiosità di Lampertico e la sua laicità, cfr. G. VALENTI, *Commemorazione di Fedele Lampertico*, cit., pp. 18-20.

(28) G. VALENTI, *Angelo Messedaglia*, cit., p. 465.

(29) *Ibidem*.

(30) G. VALENTI, *Il suicidio. Saggio di statistica morale e comparata del Prof. Enrico Morselli*, « Rassegna Provinciale di Macerata », anno I, n. 39, 28 dicembre 1879, p. 231.

(31) G. VALENTI, *Sul libero arbitrio e sul determinismo in sociologia*, « Rassegna Provinciale di Macerata », anno I, n. 38, 21 dicembre 1879, p. 226.

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miseri granelli di polvere che accolgono una costituzione del pensiero compatibile con le loro forze e con la loro sensibilità intellettuale dei loro adepti; impressione che si conferma seguendo la prosa dell'età matura, quando Valenti scriveva di essere nato e cresciuto nella convinzione che « tutte le opinioni sono rispettabili ogni qualvolta siano professate con convinzione e facciano parte di un sistema logico, da cui lo studioso non siasi nella vita mai dipartito; in altre parole e più precisamente è rispettabile l'opinione di uno scrittore, sempreché per essa egli non possa essere tacciato d'incoerenza o di insincerità » (32). L'effigie della scienza che cammina appare in coda ad uno scambio epistolare con Enrico Morselli, nel quale Valenti spiega il suo atteggiamento verso la ricerca. Il dibattito era nato all'interno della « Rassegna Provinciale » in occasione della pubblicazione da parte di Morselli de « Il Suicidio » e dopo che Valenti si era disposto a scriverne con un taglio critico verso le premesse scientifiche che animavano quella ricerca. A suo avviso, essa apparteneva a quel modo lombrosiano di ragionare che aveva sostituito il determinismo razionale, ovverosia la capacità di trarre risultati conformi agli assunti di partenza, con un rigido determinismo fisico (33).

Ma quella di Valenti non era una concessione di grazia sovrana. Il motivo ultimo che lo induceva a lasciare posto anche a programmi di ricerca diversi dal suo stava nell'ingenuo convincimento che il nuovo che avanzava era diverso per forma ma non per sostanza dai precetti che lo muovevano. Atteggiamento nel quale, implicitamente, sembra confermarlo Ricci, quando recensisce i *Principi di Scienza Economica* del 1906 e lo presenta come un autore alla ricerca di una scrittura capace di distinguerlo. Ricci scrive: « Solo nuoce al libro il desiderio dell'A. di modificare in più punti la terminologia già in uso » (34). La valutazione di Ricci è duplice e ugualmente

(32) G. VALENTI, *A tutela della mia integrità. Promemoria*, cit., p. 4.

(33) Per i riferimenti a questi materiali, cfr. G. VALENTI, *Il suicidio. Saggio di statistica morale e comparata del Prof. Enrico Morselli*, « Rassegna Provinciale di Macerata », anno I, n. 37, 14 dicembre 1879, pp. 197-199; n. 39, 28 dicembre 1879, pp. 231-232; ID., *Sul libero arbitrio e sul determinismo in sociologia*, « Rassegna Provinciale di Macerata », anno I, n. 38, 21 dicembre 1879, pp. 224-226.

(34) U. RICCI, *Osservazioni critiche su un libro del Prof. Valenti*, cit. p. 456.

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ingenua. Da una parte accusa Valenti di non aver compreso fino in fondo le implicazioni dell'algebra marginalista, dall'altra giudica il marchigiano come un non abusivo compagno di viaggio dei marginalisti (35). Una vicinanza intellettuale sulla quale aveva giocato anch'egli quando, in una lettera ed Einaudi di sette anni prima, aveva tentato di proporsi come studioso dal metodo identico a quello dello scienziato piemontese. « L'identità del metodo da noi seguito nei nostri studi, ci permette di poter affrontare uno scambio di servigi scientifici » (36).

Se, da questo punto di vista e in relazione all'ingenuità di certe sue riflessioni, Valenti è « il compagno che sbaglia dei marginalisti italiani » (37), dall'altra è necessario ricordare altri passaggi fondamentali del suo complicato rapporto con la nuova letteratura. Nel 1890 con « La teoria del valore » (38) aveva teso a ribadire di non avere preclusioni ideologiche verso il nuovo indirizzo di studio. Al marginalismo, Valenti riconosceva un'utilità strumentale dato che esso consentiva di riaprire il dibattito sul valore e di liberarlo dalle pretese dei socialisti di trasformarlo in una bandiera della loro dottrina. Tuttavia, riaprire tale confronto intellettuale non significava, automaticamente, attestare che dagli studi marginalisti potesse uscire una verità capace di soppiantare quella antica, dato che,

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(35) *Ibidem*. L'idea stessa che l'opera di Valenti andasse a sostituire degnamente un testo risultato fondamentale per la diffusione del marginalismo in Italia — *I principi di economia pura* di PANTALEONI (Barbera, Firenze, 1892) — conferma la benevolenza del giudizio di Ricci e la difficoltà degli italiani — Pantaleoni e Ricci in testa — a liberarsi della metodologia cardinalista per aderire all'ordinalismo paretiano e risolversi a rinunciare alle questioni applicate per la teoria pura.

(36) Fondazione Luigi Einaudi, *Archivio Einaudi*, Corrispondenza Valenti – Einaudi, sd.. La data (1899) si evince soltanto dal timbro postale. Da parte sua, Einaudi aveva stima di Valenti fino al punto di attribuire dignità di manuale allo studio sulla cooperazione rurale del 1902. In proposito, cfr. L. EINAUDI, *Recensione a Ghino Valenti, Cooperazione rurale, G. Barbera Editore, Firenze, 1902*, « La Riforma Sociale », anno X, vol. XIII, n. 3, marzo 1903, p. 272.

(37) M. GUIDI, *Cooperazione, socialismo ed economia agraria. Note su Ghino Valenti*, cit.. Espressione scelta da Guidi per il titolo del primo paragrafo. Giannotti, con una prosa meno viva, si limita a descrivere un economista che accoglie con « vigorose critiche » la nuova frontiera dell'utilità marginale. GIANNOTTI, *Ghino Valenti economista agrario e conservatore illuminato*, « Storia e problemi contemporanei », anno II, n. 3, gennaio - giugno 1989, p. 31.

(38) Loescher, Roma, 1890.

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ancora nel 1901, l'economista definisce il principio ricardiano del valore « una suprema legge statica e dinamica dell'economia sociale » (39). In conclusione, i marginalisti potevano occuparsi legittimamente delle loro cose, ma il giudizio sull'opportunità di questo indirizzo di studio non era neutro. In particolare, esso era una sorta di tradimento verso il modo italiano di fare economia politica. Esso comportava la supina accettazione di una nuova vulgata centrata sull'esistenza di un vocabolario standardizzato che superava gli stili nazionali e sostituiva gli spazi di esercizio dei processi intellettuali, proprio di questi stili, con un linguaggio più sterile e privo di fantasia. Viceversa, la scienza economica italiana, « ove sia rettamente interpretata, non significa una esclusiva costituzione di dottrine, o un primato nazionale che non può essere *a priori* stabilito. Essa rivela solo il desiderio e il proposito che il pensiero nostro si esplichi nella sostanza e nella forma in quella guisa che meglio risponde all'indole del nostro ingegno e della nostra cultura. Il che non contraddice punto all'universalità dei principi scientifici, la quale è rafforzata anziché distrutta dalla specifica cooperazione così degli individui come dei popoli » (40).

Dopo la serie dei necrologi, di Valenti si è scritto poco e solo dopo mezzo secolo di silenzio. Alberto Caracciolo e Patrizia Sabbatucci Severini hanno dato spazio soprattutto alle tematiche di storia locale e alla partecipazione di Valenti all'inchiesta agraria Jacini (41). Augusta Palombarini è l'unica ad occuparsi della « Rassegna Provinciale » e a legare Valenti a Piero Giuliani (42). Paolo Giannotti si

(39) G. Valenti, *La proprietà della terra e la Costituzione economica. Saggi critici intorno al sistema di Loria*, Zanichelli, Bologna, 1901, p. 224.

(40) G. Valenti, *Commemorazione di Fedele Lampertico*, cit., p. 6.

(41) A. Caracciolo, *Ghino Valenti e l'agricoltura delle Marche*, cit., n. 7, gennaio 1968, pp. 86-102; P. Sabbatucci Severini, *L'"aurea mediocritas": le Marche attraverso le statistiche, le inchieste e il dibattito politico-economico*, in S. Anselmi (a cura di), *Le Marche. Storia d'Italia. Le regioni dall'unità ad oggi*, Einaudi, Torino, 1987, pp. 207, 239

(42) A. Palombarini, *Ghino Valenti e la "Rassegna Provinciale"*, cit.. Per una panoramica più generale sulla stampa periodica maceratese ed altri riferimenti a Ghino Valenti, cfr. V. Gianangeli (a cura di), *Bibliografia della stampa operaia e democratica nelle Marche (1860-1920)*: p*eriodici e numeri unici della provincia di Macerata*, Il lavoro editoriale, Ancona, 1998; Id., *I periodici*, in A. Adversi, D. Cecchi, L. Paci, *Storia di Macerata*, II edizione, vol. III, Grafica Maceratese, Piediripa (MC), 1988, pp. 197-516; A. Palombarini, *L'ambiente economico e sociale di Macerata attraverso la stampa perio-*

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è applicato sulla figura dell'economista con una breve nota volta a mettere a fuoco i principali interessi di ricerca di Valenti (43). Gli scritti di Paolo Grossi, Nicolò Bellanca e Marco Guidi sono fondamentali soprattutto perché mettono in luce gli aspetti più qualificanti del Valenti economista agrario e, soprattutto, gli studi sulla cooperazione e sulla proprietà fondiaria (44). Massimo Augello, pubblicando degli inediti di Valenti relativi ai corsi universitari modenesi, discute del rapporto dell'economista maceratese con il marginalismo e mostra che Valenti aveva gravi carenze nella conoscenza della nuova letteratura (45). Altre informazioni sulla vita e la carriera di Valenti si trovano nella nota bio-bibliografica pubblicata in *Storia di Macerata* (46), e nel fondo manoscritti della biblioteca civica maceratese. Il materiale del fondo d'archivio è costituito da una selezione di articoli di giornale e da carte prodotte dagli storici locali (47). Una

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dica, in W. ANGELINI e altri (a cura di), *Per una storia del giornalismo nelle Marche*, Provincia di Ancona, Assessorato alla Cultura, Edizioni Tecnostampa, Ostra Vetere (AN), 1990, pp. 195-202; ID., *La stampa periodica a Macerata dal 1860 al 1900*, in Università di Macerata, « Annali della Facoltà di lettere e filosofia », n. 9, 1976, p. 403-425.

(43) P. GIANNOTTI, « Ghino Valenti economista agrario e conservatore illuminato », cit., p. 29-53.

(44) N. BELLANCA, *I "correttivi naturali" della distribuzione: costi dello sciopero e vantaggi della cooperazione*, in M. E. L. GUIDI, L. MICHELINI (a cura di), *Marginalismo e socialismo nell'Italia liberale (1879-1925)*, cit., pp. 357-372, P. GROSSI, *Un altro modo di possedere: L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, cit.; M.E.L. GUIDI, *Cooperazione, socialismo ed economia agraria. Note su Ghino Valenti*, cit., pp. 327-356.

(45) M. M. AUGELLO, *Sulla storia del pensiero economico italiano post-unitario. Note in margine all'introduzione di Ghino Valenti ad un corso di economia politica all'Università di Modena (A.A. 1899-1900)*, « Storia del Pensiero Economico. Bollettino d'informazione », n. 16, 1988.

(46) Anonimo, *Ghino Valenti*, in A. ADVERSI, D. CECCHI, L. PACI (a cura di), *Storia di Macerata*, cit., vol. V, *I personaggi*, pp. 368-376.

(47) La serie dei ritagli di giornale comprende i seguenti materiali: Anonimo, *Giorno per giorno*, Il Resto del Carlino, 13 aprile 1958; Anonimo, *L'anniversario della nascita del precursore Ghino Valenti*, Voce Adriatica, 13 aprile 1961; Emme, *I trattati di Ghino Valenti fanno ancora testo per gli studiosi*, « Il Resto del Carlino », 13 aprile 1961; V. MONTANARI, *Anniversario della nascita dell'economista Valenti*, « Il Messaggero », 19 aprile 1958; Vim, *Ricordo di un illustre maceratese. Anniversario della nascita dell'economista Valenti* », !9 aprile 1961; ID., *Oggi l'anniversario della nascita dell'economista Valenti*, « Il Messaggero », 14 aprile 1961. Per la parte archivistica, cfr. Biblioteca

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serie di contributi che consente ancora di ragionare con la categoria dell'assenza, perché troppo esigui in numero e per il fatto che, con le significative eccezioni di Grossi e della Palombarini, trascurano le prime pubblicazioni valentiane.

Ma, soprattutto, Valenti rischia di venire a mancare nella bibliografia primaria degli specialisti della scienza agraria e proprio in quella parte della sua produzione scientifica meno offesa dallo scorrere del tempo. Ciò a causa di valutazioni come quella di Gian Carlo Di Sandro, che considera *economista agrario* solo chi ha avuto un impegno esclusivo in quella classe disciplinare, chi ha prodotto un manuale specialistico o, in alternativa, chi gode di un'autorità indiscussa nella trattazione di un tema specifico. Una serie di fattori discriminanti che hanno trovato la loro esposizione formale nella lista offerta da Di Sandro delle fonti della disciplina e dei suoi principali nodi evolutivi. Lista nella quale, oltre a quello di Ghino Valenti, mancano i nomi di Francesco Coletti e Giovanni Lorenzoni (48). Non solo. In primo luogo, quell'elenco è capace di registrare solo il passaggio dall'erudizione signorile sull'arte agraria sette-ottocentesca — intesa come intelligenza eclettica che si interroga sulla virtù della terra senza nozioni specifiche di teoria economica — alla scienza moderna, senza alcuna considerazione per le generazioni di mezzo e per le figure che non facevano direttamente riferimento al mestiere dell'agronomo. Il fatto stesso che la scrittura cambi molto precocemente all'interno di

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Comunale "Mozzi-Borgetti" di Macerata, Fondo Manoscritti, b. 1511, *Montanari Vincenzo: raccolta di scritti vari, appunti, ritagli di giornale su Macerata (c. 1950-1977)*, XVI, Personaggi illustri (P-Z), n. 46, *Ghino Valenti*; b. 1103, *Ricci Amedeo. Dizionario biografico dei maceratesi illustri*, sec. XX., n. 139, *Valenti Ghino*; Id., b. 1253, *Natali Giulio. Appunti sugli scrittori marchigiani*, VII, Alcuni letterari marchigiani contemporanei, *Ghino Valenti*. Inoltre, si segnalano i seguenti documenti: Id., *Archivio storico della pinacoteca comunale e del museo civico*; b. 1, Miscellanea, IX, *Carteggio riguardante le seguenti sculture*, n. 1, *Incisione in bronzo in memoria di Ghino Valenti (1921)*.

(48) G. Di Sandro, *Gli economisti agrari italiani tra Otto e Novecento*, Clueb, Bologna, 1995, pp. 20-21. Per una breve selezione di titoli sulla storia e i tempi dell'evoluzione dell'economia agraria in Italia, cfr. M. De Benedictis, *Economia e politica agraria*, in *Enciclopedia delle scienze sociali*, Istituto dell'Enciclopedia Italiana, Roma, 1995, pp. 326-339. M. E. L. Guidi, *Interessi agricoli e nascita dell'economia agraria: iniziative e discussioni*, « Il pensiero economico italiano », Anno III, n. 2, 1995, pp. 55-96, F. Lechi, *Reflexion sur l'evolution de la pensée économique agricole en Italie*, « Economie rurale », novembre-dicembre 1990, pp. 36-39.

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questo lasso temporale è il sintomo più evidente della mancanza di una categoria mediana. In realtà, l'antica agronomia muore quando l'ottica di ricerca si sposta dalle persone alla produzione (49). In secondo luogo, va registrata l'ambiguità del terzo criterio sopra enunciato. Esso è solo apparentemente residuale ed onnicomprensivo, dato che è usato per nobilitare quegli studiosi che nella prima metà del Novecento usavano la base analitica serpieriana per indagare temi puntuali e che, in definitiva, finisce per adattarsi al solo Giuseppe Tassinari (50).

Dalla suddetta scansione risulta che l'età contemporanea comincia con la pubblicazione della *Guida a ricerche di economia agraria* di Arrigo Serpieri (1929) e con la codificazione di una rete di collaborazione tra gli specialisti della materia che, con la fondazione dell'Istituto Nazionale di Economia Agraria nel 1928, viene riconosciuta a livello istituzionale (51).

Anche qui i canoni scelti finiscono per essere troppo sbrigativi, in considerazione del fatto che questo genere di lavoro era nato, vent'anni prima, per iniziativa proprio di Ghino Valenti per la ricerca promossa dall'Accademia dei Lincei per il cinquantennio del Regno d'Italia, per la quale l'economista maceratese aveva organizzato, sotto la sua direzione, i migliori rappresentanti della nuova generazione degli economisti agrari. Una pubblicazione frutto della collaborazione di più menti che Valenti, scrivendo ad Einaudi, chiama il suo testamento e che fa comprendere quanta parte egli avesse avuto nell'indirizzare conoscenze e metodi di lavoro dei più giovani.

« Ti mando la monografia che ho fatto pei Lincei (…). La chiamo il mio testamento, perché c'è tutto il mio pensiero intorno all'economia morale italiana » (52).

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(49) Per illustrare i tratti caratteristici della scrittura degli antichi agronomi, cfr. L. ROSSI, *"Il villano smascherato": lusso, malizie e furti nella manualistica agronomica*, « Proposte e ricerche », anno XXV, n. 48, 2002, pp. 96-116.

(50) Di Sandro si riferisce principalmente al *Saggio intorno alla distribuzione del reddito nell'agricoltura* del 1925; fondamentale anticipazione del cambiamento di mentalità che ha rivoluzionato la disciplina.

(51) Sulla fondazione dell'Istituto Nazionale di Economia Agraria (INEA), cfr. P. MAGNARELLI, *L'agricoltura italiana fra politica e cultura. Breve storia dell'Istituto nazionale di economia agraria dal fascismo ai primi anni settanta*, Edizioni di Comunità, Milano, 1981.

(52) Fondazione Luigi Einaudi, *Archivio Einaudi*, Epistolario Einaudi-Valenti, *Lettera di Ghino Valenti a Luigi Einaudi (Roma, 4 luglio 1911)*. Per l'opera citata, cfr.

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Ma se, come nel caso dell'INEA, modernità dovesse significare l'impegno in una sede istituzionale, allora Valenti avrebbe ulteriori motivi per appartenere a quella lista in virtù del fatto che egli, come segretario della Società degli agricoltori italiani, ha agito anche sulla organizzazione di quegli interessi (53).

In relazione alla debolezza di questi criteri, bisogna notare che anche il primo di essi finisce per essere elusivo, dato che l'impegno esclusivo nella scienza agraria in età contemporanea, per Di Sandro, è soprattutto quello di chi insegnava professionalmente quella materia. In questo senso, la lista proposta è, una volta di più, lacunosa perché non si accorge che Ghino Valenti è stato il primo titolare della cattedra di economia agraria dell'Università di Bologna (54). Oltretutto, la dizione di « autorità riconosciuta maestra » associata alla terza tipologia non è capace di censire le opinioni espresse dagli economisti agrari del periodo in merito ai loro maestri.

Del caposcuola Valenti e della sua indiscutibile autorità parla Giovanni Lorenzoni nel succedergli sulla cattedra di economia politica a Siena nell'anno accademico 1921-1922.

« Vengo quale successore di un uomo che noi tutti abbiamo amato ed ammirato e che da molti della mia generazione fu venerato maestro. Ma, se gli succedo in ordine di tempo, non presumo affatto di sostituirlo, perché Ghino Valenti è di quegli uomini che *non* si sostituiscono. La conoscenza perfetta che egli aveva della tecnica e

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Accademia dei Lincei (a cura di), *Cinquant'anni di storia italiana*, Hoepli, Milano, 1911. Nel volume terzo, Valenti vi pubblica « L'Italia agricola dal 1861 al 1911 ». Tra i collaboratori dell'opera: Serpieri, Alpe, Peglion, Briganti, Pirocchi, Coletti, Azimonti. In proposito, cfr. G. ROCCA, *Un economista agrario: Ghino Valenti*, cit., pp. 148-149.

(53) Sull'argomento, cfr. S. ROGARI, *Proprietà fondiaria e modernizzazione. La società degli Agricoltori Italiani (1895-1920)*, Franco Angeli, Milano, 1994. Succedendo a Valenti nel ruolo, oltre che per la pubblicazione di studi specialistici di economia agraria, anche Coletti avrebbe diritto ad essere incluso nella lista in discussione. A differenza di Valenti, più aperto verso le problematiche dell'industria nascente, Coletti era decisamente schierato su « posizioni preminentemente padronali » contro gli interessi della nuova classe industriale. *Ibidem*, p. 132.

(54) Per l'assegnazione di quella cattedra, cfr. Università di Bologna, Archivio Storico, Pos. 4c, *Professori incaricati*, b. 5, *Prof. Ghino Valenti*. Sull'avvio degli studi agrari nell'ateneo felsineo, G. VALENTI, *La nuova scuola universitaria d'agricoltura fondata dalla Cassa di Risparmio di Bologna*, « Giornale degli Economisti », anno XII, vol. XXII, aprile 1901, pp. 378-398.

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dell'economia agraria, conquistata con accurati studi e con dirette esperienze fatte nei suoi poderi, allargata e approfondita nella sua svariata carriera (…) gli ha permesso di imprimere nel campo degli studi da lui prediletti, un'impronta tutta sua, originale e profonda, per la quale rimarrà modello insuperato alle presenti e alle future generazioni (…). Egli sapeva, che, se qualche veduta poteva distinguerci, ci avrebbe sempre unito il comune amore alla verità e al rigoroso metodo scientifico » (55).

Legare Valenti a Lorenzoni diventa particolarmente significativo perché, in un gioco autoreferenziale, l'inclusione di Lorenzoni nella lista dei maestri finisce per essere determinata da analoghi giudizi espressi da Serpieri in persona (56). Oltre a proseguire sulla strada tracciata da Valenti negli studi sulla piccola proprietà sulle bonifiche e sulla cooperazione, Lorenzoni è anche quello che, più di ogni altro, ha copiato lo stile dell'economista di Macerata e ne ha perpetuato la vocazione per le inchieste (57). Fondamentale, da questo punto di

(55) G. LORENZONI, *La trasformazione del latifondo in Sicilia e il problema meridionale*, Prolusione al corso di economia politica presso la R. Università di Siena (9 marzo 1921), Estratto da « La Nuova Antologia », 16 febbraio 1922, F.lli Bocca Editore, Roma, 1922, pp. 3-4. Per l'insegnamento a Siena di Valenti e i suoi libretti delle lezioni, cfr. Università di Siena, Archivio Storico, *Facoltà di Giurisprudenza, Libretti delle lezioni: Prof. Ghino Valenti*, XIV. C.10 (Dall'AA. 1909-1910 al 1913-1914); XIV.C.11 (Dall'AA. 1914-15 al 1918-1919).

(56) Esiste un'ampia documentazione d'archivio nella quale Serpieri consiglia a Mussolini di delegare a Lorenzoni lo studio di politiche di riforma agraria in tema di piccola proprietà, bonifiche e cooperazione dato che egli era il massimo esperto di quei temi. Le idee di Lorenzoni erano state attuate dal Governo specialmente per le bonifiche pontine. In relazione a ciò, secondo Serpieri, sarebbe stato opportuno ed auspicabile consentire al collega trentino di svolgere un'intensa attività di conferenziere all'estero per spiegare i fondamenti del suo approccio analitico e ottenere, per questa via, un sicuro prestigio per l'esecutivo. In proposito, cfr. Archivio Centrale dello Stato, *Ministero dell'Educazione Nazionale*, Direzione generale istruzione superiore, Divisione I, II e III, Posizione 23, *Elenco dei Fascicoli Personali dei Professori Universitari Ordinari*, B. 21, *Lorenzoni Giovanni*; Archivio Storico dell'Università di Firenze, *Fascicoli del personale docente*, *Giovanni Lorenzoni*. Da osservare che pubblicazioni recenti danno poco lustro al lavoro di Lorenzoni. In proposito, cfr. M. STAMPACCHIA, *"Ruralizzare l'Italia". Agricoltura e bonifiche tra Mussolini e Serpieri*, Franco Angeli, Milano, 2000.

(57) La vita di Lorenzoni è dominata dallo svolgimento di viaggi d'inchiesta in Germania, in Albania e nella maggior parte delle regioni italiane con particolare riguardo alla Sicilia. A lui si deve la relazione finale dell'inchiesta sulle condizioni economiche dei lavoratori siciliani del 1911. Cfr. G. LORENZONI, *Relazione alla Giunta parlamentare*

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vista, il tentativo di Lorenzoni di dare dignità manualistica alla letteratura d'inchiesta. Il manuale tratto dal suo diario di viaggio di studio in Italia gli viene respinto da Laterza nel 1934 perché non collocabile in nessuna collana (58). Tuttavia, a onore di Lorenzoni va tenuto presente che egli aveva adottato gli stessi canoni per la "Cooperazione nella Germania moderna" del 1901: la sua opera « più forte, più pensata e più ricca di risultati sicuri » (59) e che i commissari del concorso del 1912 per la cattedra di economia politica a Sassari concordavano nel giudicare aderente ai contenuti e alle dimensioni di un manuale. Si esprimono in tal senso Pantaleoni, Einaudi, Supino e Jannaccone (60). Ma, secondo Lorenzoni, l'opzione per l'agenda e la scrittura dell'inchiesta non era priva di conseguenze, in quanto lo induceva a considerare improprio il termine di economista agrario e a definirsi sociologo rurale (61). Ma, soprattutto, in Lorenzoni, il rifiuto di un titolo considerato troppo corto per coprire la sua intera produzione scientifica, derivava da una volontà contraria all'uscita dall'alveo degli economisti teorici per accasarsi stabilmente tra gli esperti di economia agraria.

In ultima analisi, l'assenza dei nomi di Coletti, Lorenzoni e Valenti dalla lista del Di Sandro rende evidente che nel primo Novecento in Italia esistevano due scienze agrarie: l'una, fatta di

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d'inchiesta sulle condizioni dei contadini nel Mezzogiorno e nella Sicilia, Camera dei Deputati, Roma, 1911. Per un quadro generale sulla figura di Giovanni Lorenzoni e la lista dei suoi scritti, cfr. A. BERTOLINO, *Giovanni Lorenzoni*, « Rivista di Economia Agraria », vol. 10, n. 4, 1955, ID. in P. BARUCCI (a cura di), *Scritti e lezioni di storia del pensiero economico*, Giuffrè, Milano, 1979, pp. 411-439.

(58) Per la documentazione in oggetto, cfr. Archivio di Stato di Bari, *Archivio "G. Laterza e Figli"*, Archivio Autori, anno 1934, b. 46, Carte 248-249, *Lettera di Lorenzoni a Laterza (18 marzo 1934)*; *Ibidem*, Registri copialettere, anno 1934, *Lettera di Laterza a Lorenzoni (27 marzo 1934)*, Carta 93.

(59) Archivio Centrale dello Stato, *Ministero della Pubblica Istruzione*, Direzione Generale per l'Istruzione Superiore, Divisione I, Pos. 21, b. 10, *Concorsi a cattedre*, f. 10, Sassari (Economia), *Relazione della commissione giudicatrice*.

(60) *Ibidem*, *Giudizi dei commissari del concorso*. L'originalità e la scientificità del metodo di Lorenzoni è riconosciuta in particolar modo da Supino. Circa l'origine della "Cooperazione" da viaggi di studio e note di lavoro, cfr. G. LORENZONI, *La cooperazione agraria nella Germania moderna*, vol. I, *Le varie forme di cooperazione agraria*, Società Tipografica Editrice, Trentina, Trento, 1901, *Avvertenza*, p. IV.

(61) Definizione che Lorenzoni usa esplicitamente nella lettera a Laterza citata alla nota 58.

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tecnici di ispirazione agronomica che avevano in Serpieri il loro faro intellettuale, ragionavano in termini di azienda agraria e sono compresi in quell'elenco; l'altra, che traeva linfa dalla specializzazione di economisti *tout court* che sfuggono a questo genere di classificazione. Lorenzoni, soprattutto, non poteva concepire una collocazione esterna a questo secondo gruppo, perché era convinto che una scienza che concentrasse le sue ricerche su un oggetto inanimato come l'azienda agraria facesse perdere la centralità della persona rispetto alla meccanica del processo produttivo. Questo ragionamento in qualche modo può adeguarsi anche a Valenti e dimostra l'impossibilità di censire produzioni complesse come quelle di Valenti e Lorenzoni con griglie così strette.

3. *L'inchiesta agraria.*

Sebbene il nome di Valenti sia legato indissolubilmente alle vicende dell'inchiesta Jacini, non si può dire che la sua partecipazione sia documentata in modo minuzioso. La relazione ufficiale della quinta circoscrizione del senatore Nobili Vitelleschi lo nomina brevemente, ricordando che a lui si dovevano le ricerche condotte sulle terre marchigiane (62). Scarsi i fondi d'archivio. Nelle buste conservate a Roma all'Archivio Centrale dello Stato non ci sono documenti che riguardano direttamente Valenti e il sottocomitato di Macerata (63). Nemmeno la ricerca negli archivi locali offre risultati soddisfacenti. Le prefetture hanno versato agli archivi di Stato dei rispettivi capoluoghi soltanto una parte delle loro carte e nessuna di queste è connessa ai lavori dell'inchiesta Jacini, mentre la ricerca

(62) Cfr. *Atti della Giunta per la inchiesta agraria e sulle condizioni della classe agricola*, vol. XI, *Relazione del Commissario Marchese Francesco Nobili-Vitelleschi Senatore del Regno sulla quinta circoscrizione*, Forzani, Roma, 1883.

(63) Archivio Centrale dello Stato, *Ministero dell'Agricoltura, Industria e Commercio*, Giunta per l'inchiesta agraria. Per l'inventario di tale fondo, cfr. G. PAOLONI, S. RICCI (a cura di), *L'archivio della Giunta per l'inchiesta agraria e sulle condizioni della classe agricola in Italia (Inchiesta Jacini, 1877-1885). Inventario*, Pubblicazione degli archivi di Stato. Quaderni della rassegna degli archivi di Stato, n. 84, Ministero per i beni culturali e ambientali, Ufficio centrale per i beni archivistici, Roma, 1998. Sulla composizione del sotto comitato di Macerata e sui rispettivi incarichi, cfr. Anonimo, *Cronaca e varietà*, « La Rassegna Provinciale », anno I, n. 3, 20 aprile 1879, p. 23.

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presso i principali archivi comunali è sostanzialmente priva di riscontri (64). A testimonianza del prezioso e minuzioso lavoro di Valenti rimangono soltanto una serie di schede volte al censimento delle derrate agricole conservate nel fondo manoscritto della Biblioteca comunale "Mozzi — Borgetti" di Macerata (65) e sulle quali l'economista ha costruito una relazione puntigliosa, severa e precisa nella sua diagnosi; relazione che costituisce un pezzo unico e non omologato rispetto agli elaborati delle altre circoscrizioni e aveva

(64) Ringrazio il personale degli archivi di stato di Ancona e Macerata per avermi consentito di effettuare delle rapide verifiche nei loro fondi e di accertare la mancanza di questi materiali. I primi contatti telefonici con gli archivi di Stato di Ascoli, Fermo e Pesaro sembrano confermare questa prima impressione. Per il piceno il riferimento è duplice in quanto Ascoli ha sostituito Fermo nell'amministrazione provinciale solo in tempi recenti e l'archivio fermano è incomparabilmente più ricco di testimonianze storiche rispetto a quello ascolano. Per gli archivi comunali, essendo incompatibile un sondaggio completo con i tempi di questa ricerca, sono stati visionati i materiali dei vari capoluoghi di provincia. A questi, è stato aggiunto soltanto il comune di Jesi in quanto, fino agli anni in esame, esso era il municipio più importante del distretto anconetano. Inoltre, organico all'amministrazione jesina, era Ruggero Rosi: ultimo docente della locale Accademia Agraria, docente di economia nella sezione agronomica dell'istituto tecnico e delegato da Valenti a raccogliere i dati per l'inchiesta nel suo territorio di riferimento. L'organicità di Rosi con il municipio derivava, in larga misura, dalla stessa storia interna dell'Accademia. Poco o nulla centro di discussione ma vero e proprio organo d'indirizzo della vita cittadina nel quale, sotto la presidenza del Sindaco, erano organizzati: amministrazione pubblica, vescovado e nobiltà terriera. In proposito, D. GIACONI, F. SANDRONI, S. SPALLETTI, *Le associazioni agrarie delle Marche*, in M. M. AUGELLO GUIDI (a cura di), [2000], § 2, pp. 184-191. Sulla storia interna dell'accademia jesina, cfr., inoltre, A. M. Napoleoni, *La Società Agraria di Jesi dalla fondazione all'Unità*, in S. ANSELMI (a cura di), *Nelle Marche Centrali*, Cassa di Risparmio, Jesi, 1979, pp. 1169-1209. Su Ruggero Rosi, cfr. A. FELCINI, *In memoria di Ruggero Rosi*, Tip. A. Spinaci, Jesi, 1898.

(65) Per questa documentazione, cfr. Biblioteca Comunale Mozzi-Borgetti di Macerata, *Fondo Manoscritti*, b. 579, *Direzione del Censo. Generi di coltivazioni nelle provincie di Macerata, Ancona, Urbino, Pesaro, Ascoli Piceno con annesso elenco dei comuni delle province di Ascoli Piceno e dei territori censuari che li compongono colla indicazione delle varie loro giaciture.* Nella prima pagina, concernente il circondario di Camerino, si legge « Copia originale del lavoro compiuto per la direzione del censo. Ghino Valenti, incaricato per l'inchiesta agraria nelle Marche ». I comuni schedati sono in ordine alfabetico e distinti in sei unità amministrative. I circondari erano: Camerino, Macerata, Urbino, Pesaro e i circondari unici di Ancona ed Ascoli Piceno. Fa parte di questo materiale anche un « Elenco dei comuni della Provincia di Ascoli Piceno e dei territori censuari che compongono colla indicazione delle varie loro giaciture ».

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mostrato un « volto imbarazzante e provocante per i mestieranti romani della politica. Ed era un volto non tratteggiato da una polemica diretta ed irosa, non da un ricorso alle tinte forti delle contrapposizioni sociali o delle invocazioni pietistiche, ma da un'analisi scarna, positiva, intessuta di circostanze obiettive » (66). Oltretutto, il documento di Valenti era una pietra miliare che disfaceva qualsiasi pretesa di trattare la storia dell'agricoltura italiana come un processo uniforme e non modificato dal passato regionalismo. Nel quadro delle « molte Italie agricole », a parere di Valenti, le Marche si distinguevano per un grado di differenziazione interna superiore a quella delle altre regioni, la collocazione mediana sulla linea dello sviluppo, un bacino di competenze non utilizzate e la scarsa penetrazione sul territorio delle innovazioni risparmiatrici di lavoro. Le raccomandazioni di Valenti sono sintetizzate nel noto motto dell'*aurea mediocritas* dove « il secondo termine si riferisce al grado intermedio di intensità delle colture e il primo alla condizione "relativamente felice della grande maggioranza dei coltivatori" » (67). Due passaggi essenziali per illustrare i lineamenti di questa categoria analitica:

1) « Particolarmente nel caso della nostra regione, che non ha ancora profittato degli ultimi ritrovati della scienza agronomica, che non è arrivata ai sommi gradi dell'intensità e che quindi, senza pensare ai progressi futuri, ha già un grande cammino da percorrere per raggiungere quelli già attuati presentemente in altri paesi, ci sembra che lo scoramento da cui alcuni sono invasi non sia seriamente fondato » (68).

2) « È effettivamente rovinata la nostra agricoltura. Lo dichiariamo senza ambagi: sarebbe esagerazione il crederlo. Rovina significa distruzione, significa uno stato che può parificarsi alla morte, significa per un'industria l'impossibilità di smerciare il prodotto, o di

(66) P. GROSSI, *Un altro modo di possedere: L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Giuffrè, Milano, cit., p. 289.

(67) P. SABBATUCCI SEVERINI, *L'"aurea mediocritas": le Marche attraverso le statistiche, le inchieste e il dibattito politico-economico*, cit., p. 215. Sulla collocazione mediana delle Marche, Lamberto Antolisei aveva scritto: « Le Marche adunque che per la loro posizione naturale stanno al centro dell'Italia, stanno pure al centro della scala industriale ». L. ANTOLISEI, *Di alcune industrie nelle Marche*, cit., p. 371.

(68) G. VALENTI, *L'economia rurale nelle Marche*, cit., p. 198.

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produrre in modo che il prezzo ripaghi il costo. Ora in queste condizioni fortunatamente non ci troviamo ancora; e nulla ci autorizza oggi a ritenere che inevitabilmente in esse ci troveremmo domani » (69).

L'*aurea mediocritas* valentiana, pur non facendo leva sulla retorica dei marchigiani razza migliore di un popolo eletto destinato a trarre dalla sua intelligenza risultati eccelsi (70), è sostanzialmente portata a riconoscere le virtù dei marchigiani. In secondo luogo, applicandosi sostanzialmente ad un'agricoltura che non si esauriva nell'affidamento di un seme alla terra, ma era « piante (…), terra (…), intelligenza, lavoro e capitale » (71), permetteva di sviluppare in un contesto salubre un genuino spirito imprenditoriale che dal settore primario sarebbe stato trasferito alle manifatture, dato che « l'economia rurale non sopperisce a tutti i bisogni dell'economia nazionale » (72).

Uno stato di mediocrità aurea che poggiava sulla consapevolezza che la situazione economica presente non fosse necessariamente eterna e alla cui definizione Valenti arriva mettendo insieme elementi differenti nella ricerca di un difficile equilibrio tra modernità e conservazione. Oltre ad escludere movimenti repentini che pro-

(69) Il difficile equilibrio che reggeva una categoria come l'*aurea mediocritas* emerge, con chiarezza, lungo il testo della relazione, in quanto essa contiene periodi nei quali Valenti tratta di un'economia marchigiana che aveva già in sé i tratti della propria rovina. *Ibidem*, p. 238.

(70) Per l'esposizione di questa tesi, cfr. E.C. LAGOMAGGIORE, *Prolusione al corso di economia politica, di diritto amministrativo e commerciale nel Regio Istituto Tecnico di Jesi*, letta il 22 dicembre 1862, Tip. di Floro Flori, Jesi, 1863, p. 11.

(71) Su questa dimensione dell'agricoltura, cfr. L. SABBATINI, *Manuale per il giovane contadino delle Marche e dell'Umbria*, Anno VII, Libreria del Littorio, Roma, 1929, p. 5-7. Già a metà dell'Ottocento in un articolo di redazione del periodico "L'Esio" si sosteneva che per la buona riuscita dell'agricoltura si dovevano combinare terra, capitale e lavoro con « lo spirito di associazionismo ed il cooperamento di tutti i proprietari e particolarmente dei ricchi ». La Redazione, *Introduzione*, « L'Esio. Giornale dell'Accademia agrario-industriale della provincia d'Ancona », anno I, n. 1, 1865, p. 2.

(72) G. VALENTI, *L'Italia agricola nel cinquantennio 1862-1911*, in ID., *Studi di politica agraria*, cit., p. 455. Lo spirito d'impresa doveva nascere dalla terra. Giovanni Lorenzoni sviluppa una tesi analoga. Diverso soltanto il loro contesto culturale: il trentino Lorenzoni combina i valori della terra con le virtù dell'antica cultura germanica. In particolare, sostiene le ragioni della montagna e dell'alpinismo per l'insegnamento di un corretto stile di vita e per l'attaccamento patriottico al territorio.

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ducevano soltanto risultati disastrosi (73), la politica d'intervento auspicata dall'economista maceratese non prevedeva una manovra diretta sui singoli cespiti, ma era un'operazione diretta a « creare le condizioni necessarie ad un più largo sviluppo » (74). L'obiettivo indicato escludeva la ricerca di controproducenti equilibri istantanei e settoriali e privilegiava il miglioramento del rapporto fiduciario tra gli operatori, e tra mondo della produzione e le istituzioni.

Lo schema di partenza poteva definirsi aureo perché l'economista non rilevava errori macroscopici di fondo, ma soltanto debolezze specifiche, livelli di produzione condizionati dal territorio e dalla mancanza di conoscenze in capo ai singoli coltivatori. Le Marche, pur nelle loro difficoltà presenti, avevano il diritto di mettere in campo quello che avevano, senza atteggiamenti pietistici e spirito di rivalsa verso le regioni più ricche. Tra gli altri aspetti aurei: 1) le buone condizioni dei coltivatori davano spazio a processi di sapiente qualificazione e motivazione del lavoro umano e non rendevano un'illusione la speranza di tramutare il deserto in giardino; 2) era disponibile la coordinazione di queste raccomandazioni in un programma agrario, pensato da Jacini per la prima volta nella storia d'Italia secondo le ragioni dell'inchiesta (75). Il riferimento al programma dimostrava, altresì, che le Marche avrebbero mutato in meglio inserendo soltanto quei fattori di modernizzazione che non alteravano gli equilibri socio-economici e rispettavano la destinazione naturale dei suoli e gli ordinamenti della proprietà fondiaria. Da ciò, Valenti derivava una netta contrarietà verso l'applicazione di modelli d'intervento di provenienza esterna che non erano misurati a quel territorio specifico e ai suoi rapporti di produzione. L'intervento era duplice, perché doveva applicare mezzi adeguati a portare sollievo ad una regione afflitta da « un grande perturbamento fisico » e da « un grande disquilibrio economico » (76). Infine, 3) la densità di popolazione era di poco superiore alla media nazionale ed

(73) Sulla possibilità di volgere a proprio favore un equilibrio debole si veda, in particolare, G. VALENTI, *Economia rurale nelle Marche*, cit., p. 198.

(74) G. VALENTI, *L'Italia agricola nel cinquantennio 1862-1911*, cit., p. 479. Opinione espressa trattando dell'allevamento del bestiame.

(75) Su questo punto, G. VALENTI, *L'Italia agricola nel cinquantennio 1862-1911*, cit., p. 481.

(76) Per i due riferimenti, *Ibidem*, p. 478.

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era tendenzialmente orientata all'accrescimento, con una dinamica volta a ridurre il costo del lavoro nel lungo periodo.

Poi, le note dolenti: la « mediocritas ». Mancavano spazi dove innestare processi di specializzazione in senso moderno, allo scopo di ottenere significativi incrementi di produttività. I mercati erano isolati e prevalevano assetti produttivi nei quali la divisione del lavoro era fisicamente o tecnicamente impedita. Le peculiarità della sfera della produzione nelle Marche impedivano il ricorso all'agricoltura intensiva, data l'assenza di capitali di autofinanziamento e di un sistema di credito agrario capillare, sviluppato in senso moderno e a prezzi ragionevoli. Erano disponibili fondi estremamente contenuti da impiegarsi per le innovazioni (77). Il clima vario « permette molte e svariate colture [ma] non è particolarmente favorevole ad alcuna » (78). Le Marche non erano « un giardino della natura » (79), ma rendevano solo a costo di un duro lavoro. Mancavano produzioni di pregio e risorse competitive da destinarsi all'esportazione. « Le buone pratiche di allevamento sono sconosciute; si prende ciò che la natura dà » (80). La classe dirigente era priva di adeguate conoscenze economiche. Mancava nei terreni migliori una sistematica rotazione delle colture. Prevalevano terre mediocri ed aree montane desolate. Dominava un sistema di proprietà che privilegiava il riferimento alla titolarità in luogo del riferimento alla terra, con la conseguenza che, per la natura stessa dell'istituto, non c'erano strumenti per limitare gli abusi: la concentrazione o la frammentazione eccessiva della proprietà fondiaria quasi impossibile, l'aderenza di quelle dimensioni al concetto ideale di « unità di azienda agricola » (81); unica misura che, a parere di Valenti, garantiva

(77) Valenti parla di « trasformazioni che si possono compiere anche con mezzi modesti e con profittevole risultato, purché quei mezzi siano applicati con sano criterio ». *Ibidem*, p. 473.

(78) G. VALENTI, *L'economia rurale nelle Marche*, cit., p. 20.

(79) *Ibidem*.

(80) *Ibidem*, p. 77.

(81) Così Valenti scriveva nel 1894: « Così sì andò formando una proprietà privata monopolistica, non desiderosa di trasformazioni agrarie, ma intenta soltanto ad accrescere l'estensione del possesso; salvo rare eccezioni fra i borghesi del mezzogiorno ma non si concepì altra forma di arricchimento che quella di aggiunger terra alla terra. Quell'arricchimento socialmente benefico che si opera mediante l'industre impiego del

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l'efficienza economica. Si trattava di una misura variabile determinata in relazione al territorio e alla quantità e qualità di capitale e di lavoro disponibili. La misura suddetta è anche la via usata da Valenti per giustificare una visione dell'*aurea mediocritas* come somma algebrica tra le ragioni di un entroterra, dove « l'agricoltura rappresenti un'usurpazione » (82) e dove le proprietà collettive garantivano la stretta sussistenza, e quelle di un'agricoltura di pianura dalle buone rese per ettaro. In termini generali, Valenti individuava i seguenti elementi di debolezza strutturale dell'economia marchigiana: i bisogni della popolazione erano più larghi di quelli che potevano essere soddisfatti con la produzione corrente; si assisteva ad un calo progressivo delle rendite; le antiche fonti del risparmio erano esaurite; c'erano una dinamica crescente dei prezzi e forti esposizioni debitorie. Condizioni per le quali il solo parlare di cambiamenti, a parere di Valenti, sarebbe stato inopportuno e crudele. Erano legittimati solo quei miglioramenti che non richiedevano un gran dispendio di capitali e che assecondavano la natura dell'economia regionale senza cambiamenti intensi e repentini tendenti a modificare il volto della produzione ma, semplicemente, adottare quelle misure utili a mantenere lo stesso livello produttivo su una estensione di terreno ridotta a metà o a un terzo (83). In questa logica, era sufficiente la semplice frammentazione dei poderi per intensificare la produzione. Ma, la riflessione di Valenti mirava ad insegnare che le regole economiche andavano conosciute meglio e quadrate al territorio perché solo così ci si sarebbe potuto rendere

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capitale sul suolo, venne dai più riguardato una risibile utopia ». G. VALENTI, *Indole e importanza dell'economia rurale*, Estratto dal Bollettino dell'Associazione agraria friulana, Tipografia di Giuseppe Seitz, Udine, 1894, p. 13. Osservava anche che la frammentazione dei latifondi era manovra inutile finché non cambiava lo spirito dei proprietari.

(82) G. VALENTI, *L'economia rurale nelle Marche*, cit., p. 169.

(83) In questa logica, Valenti pubblica parte di un discorso del deputato Zucconi dal quale si evinceva il seguente passaggio: « Un altro difetto di metodo, che abbiamo nelle scuole pratiche di agricoltura consiste nella mania, che c'è da noi di insegnare il *nuovo*, anziché l'*utile*. Il professore che viene da una scuola superiore, comincia coll'abbattere tutti i sistemi di coltivazione praticati nel territorio, dove la scuola si trova. Invece di correggere quei metodi, egli vuol l'*istauratio ad imis*. Anche su questo io credo bisogna andare adagio, molto adagio. La novità in agricoltura è pericolosa ove non sia con senno applicata ». *Ibidem*, pp. 280-281.

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conto che il progresso nelle Marche non poteva derivare solo dall'uso dei capitali e dall'applicazione delle grandi colture intensive. Occorreva una sapiente combinazione delle disponibilità di capitale e lavoro e una politica di sostegno per le piccole colture in quanto, soltanto esse, avrebbero consentito l'assorbimento di nuova forza lavoro. In virtù di questi presupposti, Valenti discute di una produzione dominante granaria che doveva essere ridotta in estensione, dell'incremento quantitativo del foraggio per l'allevamento e del mantenimento di tutte le forme dell'agricoltura tradizionale della regione in un generale processo di ristabilimento di un giusto equilibrio tra le varie produzioni e della revisione delle porzioni di territorio sulle quali erano praticate. « È la natura istessa che ci traccia questa via e noi possiamo seguirla con securo animo che l'impresa non potrà fallire » (84). In sostanza, Valenti si affidava all'iniziativa personale, al miglioramento della organizzazione del lavoro in agricoltura e « alla condizione *sine qua non* che il proprietario divenga agricoltore, partecipi colla propria attività, col proprio denaro, col proprio credito alla coltura delle sue terre » (85).

Comunque, la sopra nominata assenza della documentazione d'archivio non impedisce di capire come abbia proceduto il lavoro di Valenti e quali fossero state le preoccupazioni concrete del sottocomitato di Macerata. Il materiale al quale si deve fare riferimento per queste integrazioni è quello pubblicato da Valenti come direttore della « Rassegna Provinciale » in quanto il periodico fondato nel 1879 aveva una politica editoriale che assecondava il metodo di investigazione e la raccolta di dati empirici dell'inchiesta agraria e intendeva « costituire così una utile raccolta di studi pratici, dove, giorno per giorno, verranno registrati tutti gli atti ed i fatti, nei quali si manifesta e si svolge la vita provinciale » (86). Secondariamente, il metodo d'investigazione

(84) *Ibidem*, p. 213.

(85) *Ibidem*, p. 238.

(86) Anonimo, *Programma*, « La Rassegna Provinciale », anno I, n. 1, 6 aprile 1879, p. 1-3. Sulle qualità e i contenuti di questo periodico, scrive Gianangeli, « Il rigore di metodo e di stile non presenta cedimenti lungo l'arco di vita del giornale, fedele sempre al proposito di astenersi dalle oziose e facili dissertazioni politiche, ma tutt'altro che agnostico in fatto di vedute generali e di politica nel senso più alto del termine [Giornale ispirato da] un forte spirito liberale della migliore tradizione cavouriana, fondato sulla fiducia nel valore creativo della libertà, sulla serietà e su un austero

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era « volto al rispetto delle persone e alla temperanza del linguaggio » (87). Ed era condiviso da uomini che esprimevano il loro amor di patria nell'applicazione scientifica. Infine, la rivista voleva distinguersi da tutta quella stampa periodica che aveva chiesto l'inchiesta ma non ne seguiva gli sviluppi.

« Ora la stampa, specialmente quella di provincia, avrebbe dovuto attentamente seguire il lavoro dei comitati locali, accogliere le osservazioni de' vari collaboratori e pubblicare i più importanti dati ottenuti, servendo così di stimolo agli apatici e agli scettici, di lume ai dubbiosi. La pubblicità, oltreché, promuovendo la discussione, avrebbe giovato ad eliminare molti errori, avrebbe servito a dare al lavoro de' Sotto-comitati una maggiore uniformità e a facilitar loro la via, ammaestrandoli dell'esperienza altrui » (88).

La lettura del periodico dimostra che lo spessore della relazione per le Marche non dipendeva soltanto dalle qualità intellettuali personali di Ghino Valenti, ma anche dalla saldatura tra le domande istituzionali dell'inchiesta — la conoscenza di una « Italia agricola finora dispersa, immobile, rassegnata al suo *particolare* » (89) e « che cosa l'Italia agricola potrebbe pretendere ragionevolmente dal governo nella situazione attuale » (90) — e una serie di istanze più direttamente riconducibili al governo locale.

In primo luogo, all'interno del comitato maceratese emergeva la volontà di sottrarre le Marche dal cono d'ombra nel quale erano

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concetto della partecipazione dei cittadini al governo della cosa pubblica, sulla serietà e fermezza dei propositi, sullo spirito ponderato dei problemi, sulla fiducia nelle possibilità della ragione e della scienza. V. GIANANGELI, *I periodici*, cit., p. 311. « La Rassegna Provinciale » era l'organo ufficiale dell'Associazione Liberale Monarchica. La rivista sospende le sue pubblicazioni dopo 67 numeri, fondendosi con « L'Ordine », quando « il Direttore [Valenti] per altri impegni urgentissimi non potrebbe continuare nel suo incarico ». Anonimo, *Ai nostri amici*, « La Rassegna Provinciale », anno II, n. 67, 3 agosto 1880, p. 583.

(87) V. GIANANGELI, *Bibliografia della stampa periodica e democratica nelle Marche (1860-1920): periodici e numeri unici della provincia di Macerata*, cit., p. 49.

(88) Anonimo, *L'inchiesta agraria*, cit., p. 17. In realtà, più che lamentarsi per il silenzio dei colleghi, i redattori della rivista si proponevano di togliere argomenti a quei periodici come « Il Corriere delle Marche » che avevano dato una lettura ideologica dell'inchiesta.

(89) A. CARACCIOLO, *L'inchiesta agraria Jacini*, cit., p. 91.

(90) *Ibidem*, p. 96.

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cadute dopo l'unità per restituirle alla conoscenza dei loro stessi cittadini.

« Le Marche esistono. Qualche volta, in Italia, accade che una regione s'isoli, diremmo, dal consorzio nazionale per una più o meno apparente tranquillità, per una quietezza della vita politica, per un lento ed interno lavorio di ricostruzione affatto particolare, per l'assenza di vivi reclami e di bisogni imperiosamente accentuati; allora questa regione non esiste quasi più presso il Governo e la Stampa, e gli anni s'accumulano sopra di essa senza che se ne senta parlare finché nuovi fatti, preparati nel silenzio, non vengono a risolvere l'attenzione pubblica sulle sue condizioni. Ciò è avvenuto per le Marche, dal 1859 in poi. È avvenuto a causa del carattere marchigiano eminentemente pacifico, a causa del benessere relativamente maggiore di quello d'altre regioni italiane, a causa della non esistenza di grandi centri tumultuosamente importanti » (91).

Il comitato maceratese aveva colto, ma non sviluppato con efficacia nella relazione finale, un problema reale che andava ben al di là della necessità di smuovere i marchigiani dalla loro atavica indolenza (92) e che si riconnetteva alle conseguenze stesse dell'uni-

(91) JOUVENAL, *Le condizioni delle Marche*, cit., p. 221.

(92) Di notevole interesse il ritratto dei marchigiani illustrato da un ospite di passaggio: il commissario straordinario per le Marche Lorenzo Valerio. « I marchigiani sono di carattere pacato e gentile, più facilmente si aprono alle passioni benevole che non alle contrarie; docili a chi si è acquistata la loro fiducia; rispettosi all'autorità, ossequienti al potere. Le loro intelligenze sono naturalmente argute, le idee chiare, l'espressione di rado infedele al concetto, il che è tanto più mirabile presso di un popolo al quale mancarono e l'insegnamento della scuola e le consuetudini con altre popolazioni che danno i viaggi e il commercio (…). Il contadino è più che altrove affezionato alla terra, laborioso, morigerato e non cade facilmente in eccessi di superstizione, sebbene sia religioso. Sono però alieni dal prendere iniziativa, non privi di diffidenza verso l'autorità; talvolta ossequiosi più che all'umana dignità non convenga; obbedienti spesso per timore reverenziale verso la persona non meno che per rispetto alla Legge: chieditori assidui di grazie e di favori ». L. VALERIO (1861), *Le Marche dal 15 settembre 1860 al 18 gennaio 1861. Relazione al Ministro dell'Interno del Regio Commissario Straordinario Lorenzo Valerio*, « Il Politecnico. Repertorio mensile di studi applicati alla prosperità e cultura sociale », XI, f. 1, 1861, p. 24. Sulla gestione commissariale nelle Marche, cfr. D. CECCHI, *L'attività legislativa del Commissario generale straordinario nelle Marche: Lorenzo Valerio (12 settembre 1860-19 gennaio 1861)*, Tip. San Giuseppe, Macerata, 1964; M. POLVERANI, *Lo Stato liberale nelle Marche. Il Commissario Valerio*, Bagaloni, Ancona, 1979.

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ficazione. In questo senso, come dimostrano Millozzi e Raponi, le Marche e la provincia di Macerata in particolare, non si trovavano più nei loro vecchi confini e la loro identità era stata compromessa con l'unificazione; ritocchi al territorio, che i maceratesi imputavano al pregiudizio verso un capoluogo di provincia che aveva denunciato pubblicamente la falsità di un'annessione al Regno motivata da un'istanza spontanea dei marchigiani (93). Una imprecisa percezione del territorio e di sé che, attraverso lo « spavento generale prodotto in tutti i proprietari » (94), si rifletteva in un blocco sostanziale all'evoluzione delle tecniche di produzione. La riflessione di Valenti e della sua « Rassegna Provinciale » non scade in una mera polemica contro i fantasmi dell'unificazione ma è significativa perché ragiona intorno ai difetti di una nuova forma di Stato che, sostituendo un potere assente e amministrazioni locali fondate sugli statuti ci-

(93) Su questo punto specifico, cfr. M. MILLOZZI, *Per una storia delle Marche dall'Unità al fascismo*, Il Lavoro Editoriale, Ancona, 1991; N. RAPONI, *Istituzioni, ceti e società locale maceratese*, in AA.VV., *Studi Maceratesi*, n. 15, *Aspetti della cultura e della società nel maceratese dal 1860 al 1915*, Atti del XV convegno di studi maceratesi (Macerata, 24-25 novembre 1979), Centro di studi storici maceratesi, Macerata, pp. 1-38. La provincia di Macerata aveva perso i distretti di Fabriano, Filottrano, Loreto e Sassoferrato ed era stata compensata miseramente con i territori più poveri di Camerino e Visso. Per ridurre il peso politico della città, Macerata era stata depredata anche di fondamentali istituzioni: la corte d'appello e l'amministrazione centrale delle poste spostate ad Ancona, la riduzione del contingente del distretto militare e la chiusura di tre facoltà universitarie su quattro (teologia, medicina e biologia con la sopravvivenza della sola giurisprudenza). Dell'appello per la liberazione delle Marche dal giogo papale parla il solo Valerio nel proclama "Agli Italiani delle Marche" (Rimini, 15 settembre 1860). Inoltre, il fatto che Valerio fosse stato delegato da Cavour ad assumere la gestione commissariale della regione il 12 settembre, sei giorni prima dello svolgimento della battaglia di liberazione (Castelfidardo, 18 settembre 1860), era motivo di forte rincrescimento per i maceratesi che non esitarono a parlare di operazione condotta dall'alto in totale disprezzo per i sentimenti dei marchigiani. Sulle reazioni dei maceratesi all'unificazione, cfr. G. PIANGATTELLI, *Vicende e umori privati e pubblici nel mondo politico maceratese attraverso l'archivio Luzi (1847-1896)*, § 3, *La gestione commissariale di Lorenzo Valerio e le traumatiche reazioni dell'ambiente maceratese*, *Studi Maceratesi*, n. 15, *Aspetti della cultura e della società nel maceratese dal 1860 al 1915*, cit., pp. 288-297.

(94) Cosi si esprimeva Diomede Pantaleoni in una lettera a Lorenzo Valerio scritta quasi quarant'anni prima dell'inchiesta (Macerata, 17 settembre 1843). In proposito, cfr. R. PICCIONI, *Diomede Pantaleoni*, a cura dell'Istituto per la Storia del Risorgimento Italiano di Roma, Collana « Risorgimento. Idee e Realtà », Nuova Serie, n. 28, Edizioni dell'Ateneo, Roma, 2003, p. 143. L'originale è conservata a Torino nell'archivio Valerio.

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vici (95), aveva spostato lontano dalle Marche il centro delle decisioni. Se ne traeva una lezione sui meriti del decentramento amministrativo. Pur non volendo apparire antistorico, Valenti è comunque consapevole che l'inserimento nello Stato nazionale non aveva dato impulso all'economia marchigiana ma, anzi, al contrario, ne aveva esasperato alcuni tratti isolazionisti. Analogamente, e a dispetto delle opinioni prevalenti nelle élites locali, c'è in Valenti una perfetta percezione dello stato di decadenza in cui versava la sua città natale.

Vi era poi la preoccupazione di annullare gli effetti nefasti di un pensiero fisiocratico penetrato nella Regione e che era stato torto ai bisogni e ai comodi delle élite locali. Sulla questione si esprime Antolisei, riferendosi espressamente allo stato dell'industria estrattiva: « In Italia, ma specialmente nelle Marche, è prevalso e prevale ancora in molti il concetto fisiocratico, ridotto ad uso e consumo nostro, poiché, lasciando la parte le industrie estrattive, abbiamo solamente inneggiato all'agricoltura » (96).

Ma, il vero assillo di Valenti era la creazione di una direttrice ferroviaria interna alla Regione e transitante per Macerata che muovesse la gente, le idee, i prodotti e, in ultima analisi, consentisse di attuare processi di contenimento dei costi di produzione di lungo periodo. Materialmente, il passante ferroviario si doveva innestare su un sistema di viabilità ordinaria che Valenti giudicava abbastanza adeguato a sopportare l'aumento di traffico (97). Ma, questo è soprattutto un punto di distinguo delle ragioni di Macerata con quelle del resto della regione perché la rivista agisce per confronto avendo in mente i benefici ottenuti dalla provincia di Ancona con il

(95) Sui caratteri delle amministrazioni locali nelle Marche, cfr. D. CECCHI, *Dagli stati signorili all'età postunitaria: le giurisdizioni amministrative in età moderna*, in S. ANSELMI (a cura di), *Economia e società. Le Marche tra XV e XX secolo*, Il Mulino, Bologna, 1978, pp. 61-91.

(96) L. ANTOLISEI, *Di alcune industrie nelle Marche*, cit., p. 370.

(97) Punto nel quale Valenti pecca d'ingenuità in quanto, la rete viaria marchigiana della seconda metà dell'Ottocento era rimasta sostanzialmente ferma ad un secolo prima. In proposito, cfr. W. ANGELINI, *Le grandi strade marchigiane nel secolo XVIII. Problemi tecnici, prospettive*, in S. ANSELMI (a cura di), *Economia e società. Le Marche tra XV e XX secolo*, Il Mulino, Bologna, 1978, pp. 133-149; S. SALUSTRI, *Infrastrutture varie nella vallesima tra settecento e fine settecento* in S. ANSELMI (a cura), *Nelle Marche Centrali*, cit., 1169-1209.

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completamento del tratto marchigiano della Ancona-Roma nel 1867; benefici che si erano concretati in un significativo aumento della densità di popolazione attorno ai municipi e alla gestazione del primo nucleo industriale della Regione nella zona di Jesi (98).

La ferrovia a Macerata diventa il vero assillo di Valenti al punto che, trent'anni dopo, sfrutta questo argomento per concludere amaramente che l'inchiesta agraria e le sue raccomandazioni erano passate invano. Sono soprattutto una lettera al direttore del perio-

(98) Su questi due punti specifici, cfr. G. VALENTI, *Distribuzione della popolazione nelle Marche*, cit., pp. 57-59 (popolazione); ID., *L'avvenire industriale della nostra provincia*, cit., p. 147 (ferrovia). Circa i caratteri della prima industrializzazione marchigiana e il primato temporale della Vallesina, cfr. S. ANSELMI, A. BRANCATI, *L'industria nella provincia di Pesaro e Urbino*, Arti grafiche editoriali, Urbino, 1995; A. CARACCIOLO, *Associazionismo agrario e ricerca di "consenso" nell'economia e nella società prefasciste*, « Quaderni storici », n. 36, settembre-dicembre 1977, pp. 645-660; G. CARDINALI, *Sulla localizzazione delle industrie nelle Marche*, « Rivista di politica economica », anno XXVIII, n. 4, aprile 1938, pp. 397-415; A.M. FESTUCCI., *Jesi durante la Restaurazione*, Edizioni della Biblioteca Comunale di Jesi, Tip. Civerchia, Jesi, 1954, cap. II, *La prima industrializzazione della zona e l'agricoltura del tempo*, pp. 29-42; G. GAUDENTI, *Storia dell'industria jesina e movimento economico connesso*, Cassa di Risparmio di Jesi, Jesi, 1984; P. SABBATUCCI SEVERINI, *Dalla stalla al laboratorio: le Marche dalla mezzadria all'industria*, in S. ANSELMI, *Una storia dell'agricoltura marchigiana*, Consorzi Librai Marchigiani, Ancona, 1985, pp. 161-183; P. SABBATUCCI SEVERINI, *Continuità e mutamenti. L'economia marchigiana tra Ottocento e Novecento*, « Quaderni di proposte e ricerche », n. 21, 1996; E. SORI, *Dalla manifattura all'industria (1861-1940)*, in S. ANSELMI (a cura di), *Le Marche. Storia d'Italia. Le regioni dall'unità ad oggi*, cit., pp. 301-392. La ferrovia aveva accellerato un processo di protoindustrializzazione avviato molto precocemente – intorno agli anni trenta dell'ottocento – e che, altrettanto celermente, era stato colto nell'antica città federiciana tra lo sgomento della popolazione. « Tanto moto, tanta industria, maggiore al certo che nelle vicine città, sviluppata tra noi, provano che questa popolazione prima degli altri ha risentito dello spirito di progresso che agita le altre nazioni; che ha perciò un'anima più energica, più eccitabile, che a questo clima non è estraneo lo sviluppo dell'ingegno; e ciò che ha fatto potrebbe occupare una bella pagina della Istoria dell'Esio; ma come in tutte le età, in cose nuove, i primi passi sono incerti, brevi, e dai più coraggiosi soltanto tentati, e così lentamente fu l'andare, poca la via percorsa, scarsi gli utili profitti; e quasi ristretti a quei pochi che primi si mossero; la popolazione in complesso non ne ha risentito un gran bene, se ne accorge anzi appena nel pronunciare un nome nuovo, e la città come il fatto prova, ribocca sempre di uno sciamo di oziosi e di accattoni ». Cfr. C. URIELI, *Jesi (dopo) il suo contado*, Vol. V, Secoli XIX-XX, Tip. U. T. J., Jesi, 1998, p. 107. Parte di un discorso tenuto nella Società d'Agricoltura Jesina dal socio Mainardi nel 1846 e presentato da Urieli con l'efficace intitolazione "una realtà schizofrenica".

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dico « L'Ordine » e un articolo del 1907 su « Le condizioni dell'industria e del commercio della provincia di Macerata » (99) a esplicitare l'amara delusione di Ghino Valenti. Il 12 luglio 1904, Valenti scrive:

« In un libro sull'agricoltura marchigiana, posi il motto *aurea mediocritas*. L' *aurea* si riferiva alle condizioni sociali, ma potrò concedere la si lasci da parte. Resta il *mediocritas*, che parmi rispecchi anche al presente la situazione generale » (100).

4. *Ghino Valenti allievo di Piero Giuliani.*

« Non si fa storia sul serio se non si ripensano e ricostruiscono i contesti » (101). Seguendo il ragionamento di Garin, relativamente alla questione della formazione culturale di Valenti, è impossibile non concludere che la bibliografia sull'autore sia stata carente in questo punto specifico perché dominata dall'idea che l'economista non avesse tratto nulla dalla natia Macerata e dalle lezioni di economia politica impartitegli da Piero Giuliani nella locale università (102). In-

(99) « L'Unione. Periodico politico-amministrativo », anno VII, n. 46, 24 dicembre 1907, p. 1. Nel caso specifico, il progetto di Valenti è ancora più ambizioso perché l'economista chiede la realizzazione della linea trasversale Amandola-Macerata-Ancona che avrebbe messo in comunicazione l'alto maceratese con il porto dorico. È, invece, quasi superiore al passato la considerazione di Valenti per le virtù delle terre marchigiane e per i suoi sistemi di coltivazione. « Senza contare poi che il suo territorio è un modello vero e proprio della cultura intensiva dei campi, e che la sola produzione agricola è tale da costituire di per sé stessa un cespite di guadagno elevatissimo, indubbiamente il maggiore ». *Ibidem*.

(100) G. VALENTI, *Le condizioni delle Marche e l'azione dello Stato. Lettera al direttore de "L'ordine"*, in P. GIANNOTTI, E. TORRICO, *La questione marchigiana (1884-1906). Nascita di una identità regionale. Testi e documenti*, Quattro Venti, Ancona, 1989, p. 108.

(101) E. GARIN, *Intervista sull'intellettuale*, a cura di Mario Ajello, Laterza, Roma, 1997, p. 19.

(102) Piero Giuliani (Matelica 5 dicembre 1811-Macerata, 22 luglio 1880) è stata una delle figure più rappresentative dell'Ottocento maceratese. Uomo politico, giornalista e primo docente di economia politica nell'Università di Macerata nell'AA. 1860-61. La cattedra di economia politica dell'Università di Macerata è stata istituita in virtù dell'applicazione dei dispacci reali del 27 settembre e del 20 ottobre 1861 (numeri 2652 e 6478) che sollecitavano l'adeguamento dell'ateneo alla legge Casati. Non trovandosi nell'archivio dell'università alcun documento direttamente riferibile a questo avveni-

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vece, una lettura attenta delle carte e delle principali fonti della storia locale dimostra che, nonostante gli incontestabili limiti di un ambiente arretrato ed isolato come quello piceno, Valenti economista non era un completo autodidatta che ha costruito la sua carriera soltanto grazie al proprio genio, alla lungimiranza paterna (103) e all'esempio dei grandi padri della cultura dell'incivilimento.

Da questo punto di vista, sebbene Giuliani non fosse un'economista inserito nei grandi dibattiti internazionali (104), non è vero che le sue lezioni peccavano talmente nella profondità di pensiero e nella competente conoscenza delle fonti al punto da impedire al giovane allievo a intraprendere la carriera accademica e a obbligarlo a cercare un'occupazione presso il comizio agrario di Macerata. Valenti ha cominciato ad insegnare solo dopo aver disperso l'ingente patrimonio paterno (105). Tuttavia, nonostante una bibliografia volta

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mento, una testimonianza dei fatti si trova in una petizione firmata dai docenti maceratesi volta a sollecitare il pareggiamento con le altre università del Regno. Cfr. AA.VV., *Al Parlamento Nazionale. Petizione dei professori della Regia Università di Macerata in risposta alle osservazioni della Commissione sul bilancio della Pubblica Istruzione*, Tip. Bianchini, Macerata, 1863. Sulle modalità della istituzionalizzazione dell'economia politica in Italia, cfr. M.M. AUGELLO, M. BIANCHINI, G. GIOLI, P. ROGGI (a cura di), *Le cattedre di economia politica in Italia. La diffusione di una disciplina sospetta (1750-1900)*, Franco Angeli, Milano, 1988.

(103) « Mi educava all'amore della scienza ». Espressione tratta dalla dedica a Teofilo Valenti contenuta nel volume « *Teoria del valore* » (Ermanno Loescher, Roma, 1890). Tra le pubblicazioni di Teofilo Valenti (Montefano, 1805-Macerata, 1879) ricordiamo: TEOFILO VALENTI, Su la sede della corte d'appello per le Marche ed Umbria. Promemoria, Torino, 1861; ID., *Dello studio di un nuovo codice civile. Discorso*, Stab. Tip. BIANCHINI, Macerata, 1864; ID., *Memoria intorno l'Università di Macerata*, Stab. Tip. Bianchini, Macerata. 1868; ID., *All'eccelso consiglio del Municipio di Macerata. Osservazioni sulle censure mosse dal Cav. Avv. Prof. Piero Giuliani contro i curatori della biblioteca "Mozzi-Borgetti"*, Stab. Tip. Bianchini, Macerata, 1868; ID., *Risposta agli equivoci del Cav. Avv. Prof. Piero Giuliani*, Stab. Tip. Bianchini, Macerata, 1869; ID., *Sul riordinamento degli studi di giurisprudenza*, Stab. Tip. Bianchini, Macerata, 1875.

(104) Nonostante la collocazione in una sede decentrata come Macerata e la scarsa circolazione in città della letteratura economica, Alberto Caracciolo definisce Giuliani « non ultimo fra i discepoli di una fra le più brillanti generazioni di economisti italiani ». A. CARACCIOLO, *Ghino Valenti e l'agricoltura delle Marche*, cit., p. 87. Per una trattazione recente di Piero Giuliani, cfr. P. SPALLETTI, *Piero Giuliani tra istruzione e divulgazione economica (1811-1880)*, in P. BINI (a cura di), *L'economia politica nelle Marche*, cit..

(105) « Non pensò di concorrere ad una cattedra, fin tanto che le circostanze della vita non lo costrinsero ». G. ROCCA, *Un economista agrario: Ghino Valenti*, cit., pag. 138.

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a credere che le disgrazie della vita avessero deviato un percorso già tracciato e, quindi, la sua didattica sarebbe stata poco significativa perché non fondata su un porgersi all'uditorio pensato ad arte ma solo un metodo strettamente mutuato dai suoi uffici di esperto di economia agraria (106), Valenti non è stato docente per caso. Pro-

« Ereditò dal padre suo un cospicuo patrimonio in terre (…). È vero che non ebbe fortuna nella sua amministrazione privata: impiegò parte del patrimonio in bonifiche di terreni e in costruzioni di case, ma fu perseguitato da atroci e immeritate sventure finanziarie e domestiche (…). Stava per raggiungere i quarant'anni quando vide disperdersi la maggior parte de' suoi beni, e si trovò nella necessità che il pane della Scienza divenisse anche pane quotidiano, si chiuse allora tutto intero nel fervore de' suoi studi, trovando nel suo indomito amore alle cose della patria agricoltura il miglior conforto a' suoi dolori. Conducendo seco l'unico figlio Teofilo, di cui fu padre amorosissimo, lasciò la natia Macerata per cercare nella retribuzione di un lavoro onorato il sostentamento d'una vita ch'era iniziata nell'agio signorile. Ebbe dapprima un modestissimo impiego al Ministero di Agricoltura; fu poi il primo Segretario Generale della Società degli Agricoltori italiani ». F. Virgilii, *Ghino Valenti nella vita e nella scienza*, cit., p. 5. La documentazione d'archivio e la storiografia sono concordi nel disegnare una figura di economista troppo prodiga nel disperdere le proprie sostanze in iniziative industriali futuristiche rispetto alle logiche dei tempi e allo stato dell'economia del comprensorio maceratese. In particolare, Valenti s'impegnò nella costruzione di un « canale ind.le derivato dal fiume Chienti nei pressi della stazione ferroviaria di Urbisaglia destinato a fornire la forza motrice necessaria all'illuminazione della città di Macerata ». Il contratto venne stipulato con la Ditta Reinecher e Ott Ingegneri il 27 giugno 1892. « La nominata ditta trasse partito da un progetto di canale ind.le redatto fino dal 1887 per commissione dell'Avv. Ghino Valenti il quale aveva già ottenuta la concessione di derivazione dal fiume Chienti nei pressi di Sforzacosta ». Archivio di Stato di Macerata, *Archivio del Comune di Macerata*, b. 515, *Relazione di collaudo del canale Valenti a Macerata dell'Ing. Luigi Mariani (Camerino, 29 aprile 1894)*. Dalla relazione tecnica si possono trarre ulteriori particolari in merito alle iniziative di Valenti. « il Sig. Ghino Avv. Valenti di Mc conosciuto già [...] dall'attività dell'impianto di una fornace per mattoni a fuoco continuo, incaricava la Soc. Italiana per condotte d'acqua a redigere un progetto di derivazione d'acqua dal Torrente Chienti, onde servirsi come forza motrice per le macchine nell'impasto della terra per mattoni ». *Ibidem*. Il 16 luglio 1892, l'economista cede i diritti di sfruttamento di queste attività al municipio di Macerata anche se tutte le pratiche successive continuano ad essere intestate « Canale Valenti ». Da notare che nella relazione stesa per l'inchiesta Jacini, Valenti aveva ventilato la possibilità che i possidenti potessero disperdere i loro patrimoni dato che la loro imprenditorialità era mortificata dall'incapacità di trarre dalla terra un rendimento sufficiente a compensare il tasso d'interesse richiesto dalle banche per i mutui ipotecari. Cfr. G. VALENTI, *L'economia rurale nelle Marche*, cit..

(106) Secondo questa tesi storiografica, Valenti si sarebbe limitato a tradurre in principi educativi quel metodo positivo che aveva elaborato per gli uffici precedenti e

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fonda la sua riflessione intorno ai contenuti dell'insegnamento e inequivoca la sua adesione ad una figura di precettore come faro che dovesse illuminare la crescita intellettuale e morale degli allievi. Didattica anche come strumento per manifestare all'esterno una linearità di idee e di metodo che lo ha accompagnato in tutta la sua carriera (107).

Ma, se appare chiaro che Valenti non sia stato privo di strumenti e di metodi adeguati ai contenuti dell'insegnamento accademico, occorre verificare quanto questo corredo di nozioni sia dipeso dal concorso di Piero Giuliani e quanto la sua vita sia stata intrecciata con le occupazioni e gli interessi di ricerca di Giuliani anche al di fuori delle frequentazioni universitarie. Giuliani aveva portato a Macerata una sensibilità nuova verso le tematiche della sottoproduzione intesa soprattutto nella forma di ostacoli che si opponevano allo sviluppo di una agricoltura razionale e delle manifatture: carenze di capitale umano, impropria o farraginosa strutturazione della finanza pubblica, assenza di liste di censimento delle risorse economiche, incapacità di coordinamento dei cespiti in capo all'amministrazione pubblica, assenza di motivazione negli operatori e di sistemi di credito adeguati, presenza di latifondi e di contratti di dubbia utilità (affitto e mezzadria) in luogo di piccole proprietà lasciate alle cure dei rispettivi titolari. Importante soprattutto, se-

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mutuato direttamente dall'esempio del suo mentore Stefano Jacini ai tempi dell'inchiesta agraria. Su questi punti specifici, cfr. G. ROCCA, *Un economista agrario: Ghino Valenti*, cit., p. 139; G. VALENTI, *Studi di politica agraria*, cit., *Introduzione*, p. X. Caracciolo ha elaborato un ritratto di Stefano Jacini che, per le somiglianze con i lineamenti peculiari di Valenti, aiuta a comprendere perché l'economista maceratese lo avesse eletto a proprio riferimento. « Proprietario di terre e di manifatture, statista provato nella pubblica amministrazione, parlamentare autorevole, appariva ed era legato assai più profondamente di tanti suoi colleghi ai problemi di fondo della società italiana, tanto quanto era disdegnoso delle pure dispute parlamentari e degli intrighi di governo. Non era cioè, lui come gli altri sostenitori della inchiesta, così estraneo agli interessi agricoli come amava dipingersi, rappresentava anzi bene il volto di una *élite* della Italia agricola, certamente minoranza, però combattiva, studiosa, desiderosa di apprendere dalla scienza o dall'esperienza estera tutto quel che di nuovo fosse dato scoprire, e per di più organizzata sempre meglio, come si è visto, in associazioni e circoli e giornali e tecnici o di categoria, attraverso cui condurre la propria battaglia ». A. CARACCIOLO, *L'inchiesta agraria Jacini*, cit., p. 92.

(107) Valenti parla di idee « esposte in tutto il mio insegnamento con interrotta persistenza ». G. VALENTI, *A tutela della mia integrità*, cit., p. 4.

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condo Giuliani, mantenere un corretto rapporto tra le varie forme di produzione nel senso che il progresso manifatturiero non doveva essere concepito a discapito delle forme di produzione tradizionali (108).

In secondo luogo, l'indagine intorno ai contenuti del suo insegnamento accademico dimostra che Giuliani non fosse completamente digiuno di teoria economica. Agli studenti del corso indicava i seguenti manuali: il *Cours complet d'économie politique pratique* di Jean Baptiste Say, gli *Éléments d'économie politique* di Joseph Clément Garnier, le *Harmonies Économiques* di Frédéric Bastiat, il *Cours d'économie politique* di Pellegrino Rossi, il *Trattato teorico pratico di economia politica* di Gerolamo Boccardo e i *Principi della economia sociale esposti in ordine ideologico* di Antonio Scialoja. Una teoria economica sulla quale Giuliani cercava di applicare gli studenti anche nella loro dissertazione finale. Ciò è dimostrabile in base alla lista dei cinque « temi generali di laurea in economia politica per l'anno scolastico 1870-71 » conservata tra le carte dell'archivio universitario. Il docente aveva proposto le seguenti tesi: « n. 54, Cosa è produzione della ricchezza. Differenti specie d'industrie. Come esse concorrono alla produzione della ricchezza; n. 55, I fattori della ricchezza. Come essi agiscono sulla produzione della medesima. Fra chi si ripartono le ricchezze prodotte pel concorso dei loro fattori; n. 56, Teoria del valore. Teoria dello scambio; n. 57, Teoria del prezzo. Formula di Ricardo; n. 58, Accumulazione dei capitali. Consumo dei medesimi. Varie specie di consumi. Nelle economie private quali i consumi da preferirsi » (109).

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(108) Per una panoramica generale sulle indicazioni di Piero Giuliani, cfr. P. GIULIANI, *Se vi abbia un mezzo efficace a migliorare le condizioni economiche del Regno d'Italia*, Tip. Mancini, Macerata, 1878.

(109) Archivio di Stato di Macerata, *Fondo della Regia Università di Macerata*, Miscellanea, b. 56, *Argomenti delle materie (1880-1890)*, *Temi per le dissertazioni di laurea per l'anno scolastico 1870-71*. Il numero progressivo dipende dal fatto che gli argomenti di economia politica erano preceduti da quelli di diritto romano (quesiti 1-7), diritto patrio (dal n. 8 al 37), diritto penale (dal 38 al 44), diritto costituzionale ed amministrativo (dal 45 al 53). Formalmente, i « temi generali di laurea in economia politica » sono concepiti come documento sostitutivo dell'elenco originale. Inizialmente, le tesi proposte erano sette e le modifiche non erano sostanziali. Giuliani aveva soltanto accorpato e scritto meglio l'elenco delle tesi. L'allegato è datato 29 marzo 1871. In relazione alla tesi n. 57, si potrebbe essere indotti a pensare che Giuliani potesse essere

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Oltretutto, sotto la direzione di Giuliani, lo stesso Valenti elabora una tesi di laurea in materia di "teoria del valore", dimostrando che le scelte dell'anno accademico 1870-1871 non erano nuove o occasionali. Alla teoria del valore Valenti destina anche il suo primo lavoro teorico, pubblicato nel 1890 (110). Quanto questo testo, che pone Valenti in linea con la tradizione ricardiana del valore, ripercorra nella struttura e nei giudizi la precedente tesi di laurea, è impossibile a dirsi; nelle buste dell'archivio non c'è traccia di questo lavoro al punto che il titolo della dissertazione, la materia scelta e il nome del relatore si evincono soltanto da un verbale. Ignoto anche l'esatto riferimento temporale, in quanto il documento porta impressa soltanto la dicitura "15 dicembre". In base alla data di nascita dell'economista (1852), la collocazione di questo certificato nei registri degli esami speciali e generali degli anni sessanta dell'Ottocento è fuorviante. L'epoca dovrebbe cadere nella prima metà degli anni settanta e, con ogni probabilità, essere precedente all'avvio — nel 1876 — degli studi condotti su tutto il territorio marchigiano (111).

Anche l'attività lavorativa di Valenti sembra indirizzata e condizionata da Giuliani, in quanto il giovane economista va ad applicarsi in una struttura come il comizio agrario di Macerata, dove il suo maestro aveva interessi rilevanti e per la quale aveva fondato

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stato il primo ad avviare Valenti alla lettura di David Ricardo, suo principale e preferito riferimento culturale.

(110) Cfr. G. VALENTI, *La teoria del valore*, cit. Significativo che questo testo sia dedicato al padre e il fatto che non compaiano riferimenti alla tesi di laurea e a Piero Giuliani. Per una succinta analisi di questo testo, cfr. N. BELLANCA, *I "correttivi naturali" della distribuzione: costi dello sciopero e vantaggi della cooperazione*, cit..

(111) Archivio di Stato di Macerata, *Regia Università di Macerata*, Registro 207, *Verbali degli esami speciali e generali (1863-1870)*. Tale carta è un pezzo unico nell'archivio accademico nel senso che non ci sono altre tracce degli studi di Valenti a Macerata. In merito all'apertura degli studi sul territorio marchigiano nel 1876, Valenti scrive: « Allorché percorsi per la prima volta, fra il 1876 e il 1880, la più gran parte dei territori delle Marche, lo stato delle nostre campagne, se non offriva al visitatore il quadro di un'agricoltura fiorente e progredita in ogni suo ramo, non era tuttavia sconfortante, e poteva far nascere ragionevoli speranze di un più lieto avvenire. Era facile persuadersi che, perfezionando i metodi di coltura e procedendo nella via dell'intensità, la ricchezza delle nostre terre avrebbe potuto accrescersi notevolmente, con reciproco vantaggio della classe dei proprietari e di quella dei lavoratori del suolo ». G. VALENTI, *L'economia rurale nelle Marche*, cit., *Al lettore*, p. 5.

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l'organo ufficiale: il periodico « L'economista delle Marche » (112). Per stile, rigore metodologico e una vocazione alla ricerca scientifica poco comune nei periodici maceratesi della seconda metà dell'Ottocento, questo giornale ha notevoli somiglianze con « La Rassegna Provinciale » di Valenti.

Ma, al di là delle parole e di una didascalica esposizione di aridi fatti, il legame tra i due studiosi si coglie nei comuni interessi editoriali e nelle analoghe preoccupazioni per una regione che mortificava l'industriosità in nome di un malcelato orgoglio di casta e della protezione della proprietà fondiaria.

Comuni ai due autori anche le cure verso un rapido rimboschimento dell'Appennino, in modo da garantire le scarse fonti di reddito delle popolazioni montane e da preservare gli antichi diritti d'uso di pascere e di legnare nelle proprietà collettive (113). Analogamente, i due autori sviluppano interessi di ricerca paralleli in tema di cooperazione e contratti agrari. Ma, è soprattutto, il tema dell'istruzione tecnica a motivare la ricostruzione di un contesto nel

(112) Per la scheda di questo periodico, cfr. V. Gianangeli, *I periodici*, cit., pp. 290-293.

(113) In proposito, cfr. G. VALENTI, *Il rimboschimento e la proprietà collettiva nell'Appennino Marchigiano*, Tipografia Mancini, Macerata, 1887, p. 68. Per l'analoga pubblicazione di Giuliani, cfr. P. GIULIANI, *Del Rimboschimento*, Il Mercurio, anno II, n. 5, 4 febbraio 1865, pp. 21-22; n. 6, 11 febbraio, pp. 34-35. L'analisi di Giuliani è più puntuale nella parte in cui invoca la sistemazione dei bacini fluviali e una più accurata politica per la salvaguardia del territorio. Valenti tratta più generalmente di programmi di bonifica. Sull'argomento, cfr. P. GIULIANI, *Rettificate ed arginate i fiumi*, *Ibidem*, anno II, n. 3, 21 gennaio 1865, pp. 12-13; n. 6, 11 febbraio, p. 26. Rimboschimento, opere idrauliche che Giuliani aveva inserito nella lista di progetti di riforma di cui si faceva portavoce il suo mercurio. « Il Mercurio » (1864-1868) – periodico fondato da Giuliani insieme a « L'Economista delle Marche » e a « L'Educatore del Popolo » – avrebbe discusso lungamente « e diffusamente delle casse di risparmio, delle società di agricoltura, della statistica, delle banche di sconto, dei benefici dell'associazione, della cassa nazionale di assicurazione, della ferrovia, di alcuni urgenti bisogni del commercio, delle esposizioni provinciali, delle società cooperative, dell'inalveamento e rettificazione dei fiumi, della questione importantissima del rimboschimento, della vinificazione e di una società enologica, della metallurgia, dei ricoveri di mendicità e di lavoro, della istruzione tecnica, della libertà politica, del dazio di consumo, della questione finanziaria, delle riforme politiche connesse collo sviluppo della nostra proprietà nazionale », cfr. Anonimo, *Avviso ai lettori presenti e futuri del Mercurio*, "Il Mercurio", anno IV, n. 1, 5 gennaio 1867, p. 1.

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quale siano accentuate le somiglianze tra Valenti e Giuliani. Entrambi appartengono a quella generazione che, per prima, modernamente, contestava un modello di pensiero nato « tramite "rachitiche" accademie, interessate unicamente a dotte disquisizioni "di nessuna utilità pratica" » (114) e che induceva a Valenti a ragionare intorno all'incapacità dei marchigiani di sviluppare uno spirito associativo che consentisse l'applicazione di istituti economici più convenienti rispetto a quelli tradizionali (115).

Si tratta di una parte solo apparentemente scollegata dal tema generale e che necessita di un'investigazione accurata, sia perché contribuisce a definire lo stile della relazione Valenti per l'inchiesta agraria — una scrittura frammista di bonomia e rassegnazione, e un'ottica di ricerca tipica della letteratura di viaggio della quale le accademie erano tra le sostenitrici più attive — sia perché investe la parte meno omogenea dello studio di Valenti (116).

Il testo è importante anche perché questo è l'unico luogo della relazione dell'inchiesta per le Marche in cui l'economista maceratese corregge parzialmente il punto di vista espresso nella « Rassegna Provinciale »: un periodico che resta laboratorio per l'elaborazione

(114) P. GIULIANI, *Intorno allo istituto tecnico professionale di Macerata. Rapporto al Consiglio della Provincia*, Macerata, 1866, pp. 14-15. Su Piero Giuliani e il suo rapporto con le accademie, cfr. M. MORONI, *L'istruzione agraria a Macerata dalla prima scuola di agricoltura all'istituto agrario*, Studi Maceratesi, n. 35, *Scuola e insegnamento*, Atti del XXXV convegno di studi maceratesi (Abbadia di Fiastra, 13-14 novembre 1999), Centro di Studi Storici Maceratesi, Macerata, 2001, pp. 480-482. Per una visione più ampia su questi temi e una breve descrizione delle figure più rappresentative, cfr. ID., « Associazioni e istituzioni agrarie nell'Ottocento piceno », *Proposte e ricerche*, n. 46, 2001, pp. 129-147; Id., *Figure e temi del dibattito agronomico a Macerata tra Sette e Ottocento*, Studi Maceratesi, n. 36, *Scienza tecnica e Tecnologia*, Atti del XXXVI convegno di studi maceratesi (Abbadia di Fiastra, 17-18 novembre 2000), Centro di Studi Storici Maceratesi, Macerata, 2002, pp. 307-339.

(115) « La mancanza di uno spirito di associazione è in genere una caratteristica del popolo marchigiano ma più specialmente esso fa difetto nella classe dei proprietari e degli agricoltori ». G. VALENTI, *L'economia rurale nelle Marche*, cit., pp. 286-287.

(116) I materiali soggetti ad esame sono essenzialmente i seguenti: G. VALENTI, *L'istruzione agraria nella nostra provincia*, cit; ID., *L'economia rurale nelle Marche*, cit., cap. X, *Istruzione tecnica e incoraggiamenti*, pp. 265-301. Per la letteratura di viaggio, Valenti, come poi il suo allievo ideale Giovanni Lorenzoni, si modellava ad Arthur Young.

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di scritti successivi (117). D'altro canto, le dissonanze sono il segno tangibile di un travaglio intellettuale intorno ad un tema delicatissimo come quello dell'istruzione tecnica applicata all'agricoltura.

Prima di affrontare l'analisi di questi contributi, alcune postille. In realtà, attraverso la comparazione dei materiali, si ha l'impressione che il mutamento d'idea da parte di Valenti non sia originato da un cambiamento del suo punto di vista, ma dalla necessità di trovare una giustificazione sostanziale alle scuole pratiche di agricoltura come istituzioni fondamentali per lo sviluppo delle tecniche agronomiche e delle capacità cognitive dei coltivatori, secondo un punto di vista sostenuto dal coordinamento nazionale dell'inchiesta. Valenti vuole uniformarsi ad ogni costo a Jacini e si dispone a scrivere intorno ad una materia in cui non ha mai creduto (118). Lo fa soprattutto elencando le ragioni per le quali tale indottrinamento era inutile o, comunque, non spendibile dalle giovani generazioni. Oltre al solito corredo di lamentazioni intorno ai difetti di questo modello scolastico, l'osservazione più interessante è quella relativa all'incompatibilità tra l'istruzione dei giovani e la struttura patriarcale della società marchigiana, perché sostiene che i giovani licenziati da quelle scuole non avrebbero mai potuto trovare udienza presso i rispettivi capifamiglia (119).

La volontà di uniformarsi agli indirizzi emersi a livello nazionale è tale che Valenti, negli anni novanta dell'Ottocento, finisce per assumere la direzione di quella stessa scuola pratica di agricoltura di Macerata di cui aveva condannato l'istituzione e che giudicava l'ultimo anello dell'eredità nefasta delle accademie. Valenti vede più lontano di Jacini e nella relazione s'impegna a cancellare qualsiasi riferimento al patrimonio culturale che aveva generato le scuole pratiche. Tolte di mezzo le accademie, l'economista può trattare queste scuole come istituzioni di nuova formazione e dal passato immacolato. Cerca poi di moderare il suo istintivo disprezzo, pre-

(117) Augusta Palombarini parla esplicitamente di anticipazioni di lavori successivi. In proposito, cfr. A. PALOMBARINI, *Ghino Valenti e la "Rassegna Provinciale"*, cit., p. 99.

(118) Nella relazione, Valenti non cita Jacini ma De Laveleye e l'idea che « il lavoro intelligente applicato alla terra si procura da sé i capitali necessari al suo sviluppo ». G. VALENTI, *L'economia rurale nelle Marche*, cit., p. 303.

(119) *Ibidem*, p. 275.

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murandosi di sostenere che gli appunti sulla struttura non inficiavano la sua stima per le persone che vi operavano (120).

Si tratta, in definitiva, di un'operazione di facciata che gli riesce poco e male al punto che il capitolo della relazione è una continua altalena tra espressioni di favore e di critica priva di argomentazioni decisive e convincenti. Nella *pars construens*, Valenti parla di scuole agrarie come uniche sedi per lo sviluppo di quella cultura scientifica che la legislazione italiana considerava di secondo piano rispetto a quella umanistica. Scuole che, pur tra innumerevoli lentezze, consentivano di elaborare pensieri nuovi e di insegnare metodi di coltivazione capaci di superare l'applicazione puramente meccanica dello sforzo fisico. Nella *pars destruens*, osservava che l'insegnamento era troppo basso ed incompleto. La scuola non era inserita nel tessuto sociale, sottraeva braccia alle famiglie e la cultura non era percepita come essenziale dalla maggior parte della popolazione. La società era chiusa e con ruoli condizionati storicamente. L'istruzione di pochi giovani consentiva solo movimenti impercettibili in una struttura sostanzialmente immobile. Gli esperimenti, qualora si fossero rivelati utili allo sviluppo agricolo e all'ammaestramento delle maestranze, avrebbero avuto scarsa fortuna nel superare la grettezza della gente marchigiana, i pregiudizi verso la cultura scientifica e l'atavica paura per il nuovo. Non rimediava all'analfabetismo di massa perché era atta a impartire solo l'istruzione di un sapere speciale senza dispensare la formazione primaria. La Scuola Pratica era altresì inadatta ad adeguarsi alla necessità di un insegnamento che doveva essere capillarmente instillato nelle classi più disagiate in modo limpido e privo di orpelli. Invece prevalevano la retorica e la concessione ai frequentatori di premi occasionali e dal valore più morale che economico, laddove le regole economiche per l'intensificazione della produttività in agricoltura richiedevano di aprire stabilmente agli agricoltori l'accesso ai mezzi di produzione. Sebbene non vi facesse esplicito riferimento, l'obiettivo di Valenti era di

(120) Il giudizio di Valenti è particolarmente benevolo verso Piergentino Doni. La scuola pratica di Macerata, diretta da Doni, secondo Valenti, si poteva considerare di diretta filiazione accademica perché era l'espressione della medesima classe dirigente che aveva animato le accademie. Evidenza che, sicuramente, non aiutava Valenti a modificare il suo punto di vista.

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criticare la vocazione delle antiche accademie di generare nuovo capitale umano con la formazione di studenti assidui, dalla condotta quieta e moralmente ineccepibili. Tali dimensioni andavano nella direzione della conservazione e dell'immobilismo ed erano incompatibili con la crescita dell'iniziativa individuale. Rimaneva salvo il fondamento logico e teorico di un insegnamento che doveva educare alla moralità. « L'istruzione senza la moralità non è sicura garanzia del bene operare e quindi del progresso economico e civile » (121). Gli schemi didattici erano mutuati da un modello di sviluppo proveniente dal mondo britannico ed estranei al costume locale. Gli studi erano essenzialmente di tipo dimostrativo e prendevano lo spunto da condizioni ideali di produzione invece che da dati reali. In ultima analisi, lo sviluppo delle Marche non poteva essere ingabbiato in uno schema teorico ideale nell'indifferenza delle persone e delle condizioni morfologiche a cui doveva essere applicato.

Relativamente agli argomenti presentati nella relazione, c'è, secondo Luigi De Rosa, un errato pregiudizio di Valenti contro le accademie agrarie frutto di un difetto di percezione temporale ed esageratamente punitivo verso società di discussione che si erano adoperate con mezzi limitati, in un clima pesantemente condizionato dalla fobia verso lo spirito rivoluzionario e, dopo tutto, erano state capaci di attrarre le forze più dinamiche ed illuminate della classe dirigente (122). La riflessione di De Rosa si riferisce al proemio della relazione dell'inchiesta agraria, nella quale Valenti sostiene che le rese agricole si erano ridotte drasticamente negli anni ottanta dell'Ottocento mentre, per il resto del secolo, esse non erano state sconfortanti. De Rosa evidenzia il fatto che Valenti cancellava le accademie dalla lista delle istituzioni che si erano impegnate nel progresso del mondo agricolo e, contemporaneamente, imputava anche ad esse il peggioramento del quadro economico in un lasso di

(121) Anonimo, *Istruzione ed educazione*, cit., p. 136.

(122) L. De Rosa, *Le Accademie di Agricoltura nell'Ottocento*, in AA.VV., *Le società economiche alla prova della storia (secoli XVIII-XIX)*, Atti del convegno internazionale di studi, Chiavari (16-18 maggio 1991), Azienda Grafica Busco Editrice, Rapallo, 1996, pp. 61-68. Circa la penetrazione anche nello Stato Pontificio di sapere nuovo veicolato dalle accademie e i limiti contingenti di questa parte d'Italia, cfr. D. Felisini, *Accademie e società agrarie nello Stato Pontificio dell'Ottocento*, *Ibidem*, pp. 159-178.

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tempo nel quale tali istituzioni avevano ormai chiuso quasi completamente il loro naturale ciclo di vita.

Gli argomenti di De Rosa sono fondati in riferimento ai contenuti della relazione per le Marche, ma poco aderenti alla trattazione della « Rassegna Provinciale », in quanto, nel secondo caso, la valutazione dell'economista non esprimeva una generica contrarietà verso luoghi ameni nei quali i nobili cercavano trastullo nell'erudizione. Valenti era nipote e figlio di accademici (123), conosceva perfettamente le logiche di quell'agire. L'economista lamenta proprio la capacità delle Accademie di attrarre le forze migliori in un ideale fintamente ammantato da prospettive di efficienza economica. Meccanismi poco consoni a generare sviluppo, perché testimoniavano l'incapacità dei poteri locali di aprirsi all'esterno. Conseguentemente, l'eccessiva concentrazione sull'interesse della *civitas* finiva per istituzionalizzare « una politica di seconda mano », fatta di squallide beghe e di una « malsana curiosità del piccolo aneddoto » (124). Per la proprietà transitiva, da tale politica derivava una predilezione verso applicazioni in campo economico miranti al tornaconto immediato e viziate da una ignoranza che induceva a rigettare la prospettiva di lungo periodo mirante ad una produzione industriale solo apparentemente più costosa.

« Il nostro paese non è predisposto allo sviluppo delle industrie; esso è paese eminentemente agricolo e solo nell'agricoltura possono fondarsi le sue risorse economiche. Ecco ciò che udiamo ripetere assiomaticamente tutto il giorno e con tale insistenza che più nessuno ormai oserebbe porre in dubbio l'esattezza di una tale affer-

(123) Appartenevano all'Accademia Letteraria dei Catenati di Macerata il nonno e la mamma. Non risulta iscritto in nessuno dei circoli cittadini il padre Teofilo. L'Accademia dei Catenati era stata fondata nel 1564 dal bolognese Gerolamo Zoppio, docente di retorica, poetica e filosofia nell'ateneo piceno, con lo scopo di « promuovere lo studio dell'eloquenza e della poesia latina e volgare con prevalente riferimento alla letteratura cavalleresca, sulle orme degli scrittori antichi e moderni, trattare i problemi della lingua italiana e della cultura greca, interessarsi infine alle dottrine scientifiche, tra cui la scienza matematica e quella medica ». M. T. GRAZIOSI, *Gerolamo Zoppio lettore del Petrarca a Macerata*, in Studi Maceratesi, n. 5, *Civiltà del Rinascimento*, Atti del V convegno di studi maceratesi, Centro di Studi Storici Maceratesi, Macerata, 1971, pp. 121-128.

(124) Per le citazioni, cfr. Anonimo, *Programma*, « La Rassegna Provinciale », anno I, n. 1, p. 2.

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mazione. Ma non è men vero, per poco che uno voglia considerare le condizioni dello incremento dell'industrie, che di nessun paese può dirsi assolutamente non essere predisposto alla vita industriale (…). Le cause che hanno impedito fin'ora nella nostra provincia e nella regione marchigiana in genere che le industrie prendessero un sicuro e largo sviluppo, non hanno un carattere di permanenza, ma accidentale e temporaneo (…). Da noi, è utile avvertirlo, più che i capitali, manca una proficua destinazione de' medesimi, manca in una parola, *lo spirito industriale* » (125).

La didattica sperimentale come strumento di autoperpetuazione di questo arcaico modello culturale era, dal suo punto di vista, l'unico disegno che giustificasse la loro esistenza in vita. Nelle condizioni della didattica, l'economista trovava ulteriori motivi per asserire che questo schema era tecnicamente sbagliato. Esso era altresì ibrido, perché non poteva applicarsi senza un acculturamento di base esterno alle accademie. L'analfabetismo di massa era la regola e moltiplicava le figure intermedie allorché le necessità dell'economia richiedevano il pieno recupero da parte dei proprietari dell'amministrazione diretta dei loro fondi. Ci voleva una formazione mirata delle maestranze e l'eliminazione della divisione del lavoro in un campo nel quale essa faceva solo danni (126). L'istruzione è quindi la parte scelta da Valenti per condannare l'intero corpo che l'aveva generata.

« Fu intendimento di coloro che posero mano dapprima alla fondazione della colonia agricola, quello di procurare ai giovani agricoltori l'istruzione necessaria per l'esercizio della loro arte, in poche parole si volle con questa fare niente di più che *de' buoni contadini*. In pratica però la Colonia deviò da questo intento e parve preferibilmente indirizzata, a formare de' fattori e de' Direttori di aziende rurali. Una tale duplicità d'intenti, com'è naturale, fece sì che non fosse dato di raggiungerne alcuno. I giovani che uscivano dalla colonia non erano più dei semplici contadini perché l'indirizzo

(125) G. Valenti, *L'avvenire industriale della nostra provincia*, cit., p. 147. Sullo stesso argomento, cfr. Id, *Beneficenza e lavoro*, cit., p. 247; G. Id, *Le condizioni dell'industria e del commercio della provincia di Macerata*, « L'unione. Periodico politico-amministrativo », cit., p. 1.

(126) In proposito, cfr. G. Valenti, *L'istruzione agraria nella nostra provincia*, cit., parte IV.

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pratico dato alla colonia aveva ingenerato in loro la persuasione di poter aspirare alla posizione di fattori; non erano fattori perchè l'ordinamento dell'istituto rivolto dal fondatore ad altro scopo non era tale da procurare ad essi l'istruzione necessaria per esser tali: *Brevemente per contadini eran troppo, per fattori troppo poco* (…). La stessa casa di abitazione, il loro regime di vita, il loro vestiario, il loro contegno, le loro occupazioni, tutto dice il contrario; dice che quella gioventù non appartiene più alla classe de' lavoratori del suolo. Perché si fosse potuto credere diversamente sarebbe stato d'uopo che gli alunni avessero disimpegnato essi stessi tutte le faccende villerecce. Invece per la custodia del bestiame vi è un apposito incaricato, i lavori della terra vengono fatti per lo più con operai avventizi; ciò che quasi sempre si vede fare agli alunni è la parte di sorveglianti, di capi d'opera e con un'aria, diciamolo, che accenna a persone che sentono di star bene al loro posto (…). Il fatto solo di esser partiti dalle loro case e l'esser entrati in uno istituto per apprendervi l'arte agraria, l'esser pochissimi di una classe numerosa che godono di questo particolare beneficio, basterà per far credere a loro di essere qualche cosa di più degli altri, ed avranno quindi sempre l'aspirazione e la pretenzione di divenire de' direttori di aziende rurali. Non saranno certo essi quelli che potranno pesare l'insufficienza delle loro cognizioni, né invero ponendosi a confronto con gli attuali nostri fattori avranno campo di accorgersene » (127).

Se, da una parte, questa lunga citazione dimostra come Valenti sia riuscito a cogliere la debolezza di fondo di queste strutture, dall'altra essa rende evidente come la natura della sua analisi non consentiva all'economista di cogliere alcun elemento di difformità dal contestato schema generale. Ne deriva che la sua chiusura è particolarmente mortificante per un'esperienza come quella della Società di Agricoltura Jesina che non aveva mai funzionato nei termini canonici delle accademie tradizionali e aveva sviluppato studi incentrati sul diritto di proprietà nei termini della protezione di un diritto assoluto alla proprietà privata e della necessità di istituire un nuovo livello di giurisdizione (i tribunali agrari) per integrare la legislazione ordinaria. Secondo gli Jesini, la normativa corrente

(127) *Ibidem*, parte I, pp. 109-110. Corsivo nostro. Valenti chiama colonia la « Scuola Pratica di Agricoltura » di Macerata.

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doveva essere rinforzata perché figlia della scarsa cultura giuridica dello Stato Pontificio. Temi, questi, che potrebbero essere arrivati a Valenti per il tramite di Ruggero Rosi (128).

A differenza di Valenti, l'analisi di Piero Giuliani era priva di qualsivoglia cedimento e linearmente indirizzata a argomentare il beneficio che le Marche avrebbero ottenuto dall'applicazione di modelli di coltivazione provati oltremanica. Fondamentale, da questo punto di vista, per capire le ambiguità di Valenti, far riferimento alle diversità di natali dei due autori. Giuliani era di estrazione borghese e più pronto ad assecondare gli interessi della sua parte sociale. Il Valenti, pur fieramente critico dei proprietari assenteisti era, pur sempre, di nobili natali, proprietario di terre e sfortunato gestore delle proprie sostanze in fallimentari iniziative industriali.

Un legame latente, quello tra Giuliani e Valenti, ma comunque solidissimo al punto che, nemmeno la categoria della "aurea mediocritas," gli appartenne fino in fondo. *Aurea mediocritas* è soltanto l'elegante dizione coniata da Valenti per codificare un'analisi svolta secondo un modello di ragionamento non nuovo agli uomini di cultura di Macerata e che, nei suoi connotati economici, riproduceva i cardini essenziali della ricetta di politica economica di Piero Giuliani. Questa, nelle sue implicazioni politiche, si riconnetteva alla tradizione del liberalismo moderato di Diomede Pantaleoni e Alessandro Spada e mirava a sviluppare le naturali doti dei marchigiani senza nascondersi di difetti di quelle genti (129). Una politica di

(128) Su Ruggero Rosi e i suoi rapporti con Valenti, si veda la nota 64 di questo scritto.

(129) Diomede Pantaleoni, padre dell'economista Maffeo e amico personale di Cavour e D'Azeglio, era un fermo sostenitore di politiche d'incivilimento graduali e moderate. Su Diomede Pantaleoni e la sua linea politica, cfr. R. PICCIONI, *Diomede Pantaleoni*, cit., Alessandro Spada, Senatore del Regno e capo del partito cavourriano nelle Marche, era lo zio materno di Valenti. Piero Giuliani militava tra i liberali progressisti di Macerata e si faceva portavoce della necessità di trovare un utile compromesso tra « azione costruttiva » e « ispirazione radicale ». Per i due riferimenti, cfr. V. GIANANGELI, *Bibliografia della stampa operaia e democratica nelle Marche (1860-1920): periodici e numeri unici della provincia di Macerata*, cit., p. 26. Discutendo della collocazione politica di Valenti, Virgilii presenta l'economista come « l'ultimo dei pensatori dell'antica destra ». F. VIRGILII, *Ghino Valenti nella vita e nella scienza. Commemorazione letta nell'aula magna della Regia Università di Siena il 23 febbraio 1921*, cit., p. 4.

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giusto mezzo — l'aurea mediocrità — come unica via per assicurare il progresso agricolo e, secondariamente, una volta ristabiliti rapporti sociali meno condizionati dal potere del sangue e del censo, realizzare un più ampio e generale risorgimento economico e politico. Per età e vicinanza intellettuale, Valenti si riconosceva in una destra conservatrice, liberale, monarchica e benevolmente riformista, idealmente guidata da Stefano Jacini. Valori fondanti della destra sui quali si riconosceva l'Associazione Monarchica di Macerata e il suo organo ufficiale: « La Rassegna Provinciale » fondata e diretta da Ghino Valenti.

Non nuovo per Macerata nemmeno il tema dell'inchiesta agraria, in quanto Giuliani ne sollecitava l'apertura fin dal 1872. I due riferimenti sottostanti illustrano, in modo chiaro ed inequivocabile, quanto l'analisi di Ghino Valenti si sia incanalata su un percorso già tracciato da Piero Giuliani.

1. « Sappiamo noi quale sia lo stato attuale della nostra agricoltura? Conosciamo noi quali siano le cose da farsi per far progredire la nostra industria agraria intensamente? Io non lo credo. Ond'è che reputiamo non che utile, necessario, che sia (…) presa l'iniziativa di una inchiesta agraria da aprirsi al fine di conoscere lo stato della nostra agricoltura » (130).

2. « La nostra città possiede grande correnti di ricchezze le quali sciaguratamente sono rimaste inosservate, neglette o peggio ancora disperse. Il suolo feracissimo offre all'economista le più favorevoli condizioni a riforme salutari. Tanto è l'abbandanza di tutte le produzioni del suolo, che agevol cosa sarebbe dimostrare, col mezzo di esatte statistiche come, ad ogni nuovo ricolto, vi sia in questa Provincia il sufficiente al mantenimento delle popolazioni per tre anni e più. Ciò favorisce il commercio, si ponga mente ai nostri mercati settimanali. Con tali risorse, perché non siamo in grado di farci ammirare per l'industria manifatturiera? Perché il popolo maceratese è abulico: bisognerebbe educarlo con discorsi didascalici da parte dei reverendi parroci » (131).

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(130) « L'economista delle Marche », anno I, n. 1, 31 luglio 1872, p. 22.

(131) L. CIOCI, *Appunti sulle vicende economiche e sociali*, in A. ADVERSI, D. CECCHI, R. PACI (a cura di), *Storia di Macerata*, cit., vol. II, p. 522. L'autore non dice da dove abbia tratto questo riferimento e non procede a collocarlo temporalmente.

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Oltre a sollecitare l'apertura di un'inchiesta, Giuliani lamentava la mancanza di un convincente apparato di dati statistici e l'impossibilità di svolgere comparazioni. A suo merito, va anche ascritto il tentativo di sopperire a questa mancanza attraverso l'elaborazione di un questionario simile a quello ideato da Emilio Morpurgo per censire le produzioni del comprensorio maceratese (132).

Tutti gli elementi sopra esposti, se presi nel loro complesso e anche in assenza di un'esplicita attestazione di stima da parte di Valenti, sembrano deporre in favore del fatto che l'economista maceratese si fosse disposto, per tutta la sua vita, ad inseguire Giuliani, soprattutto facendo apparire la relazione per l'inchiesta agraria una sorta di tributo postumo allo scomparso maestro.

[Giuliani] « fu principalmente un grande patriota ed il suo patriottismo coraggiosamente affermò nei dolorosi tempi del servaggio. Spirito eletto, mente vastamente colta e nutrita di forti e severi studi, non mancò mai di mettere al servizio della sua amata Macerata la sua dottrina, il suo ingegno, la sua preziosa attività (…). Carattere saldo e tenace, non pencolò mai, non ismentì mai le sue idee. Morì qual visse — integro, onesto, leale » (133).

5. *Gli studi sulla proprietà.*

5.1. *La proprietà e il suo simbolismo.*

Gli scritti sulla proprietà fondiaria hanno scandito i tempi della vita di Ghino Valenti, finendo per assumere un forte valore simbolico. Da questo punto di vista, più della frequenza di pubblicazioni che coprono tutto l'arco della vita dell'autore, è significativo il fatto che Valenti avesse scelto questo tema per segnare i momenti cruciali della sua storia personale (134).

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(132) Il questionario è pubblicato da Giuliani su « L'economista delle Marche ». Valenti, nella sua relazione per l'inchiesta agraria, non da notizia di questo schema di censimento mentre discute lungamente dei vizi e delle virtù del sondaggio ideato da Morpurgo. cfr. G. VALENTI, *L'economia rurale nelle Marche*, cit..

(133) AA.VV., *Piero Giuliani: commemorazioni*, Tip. Natalucci, Civitanova Marche, 1882, p. 2. Il necrologio era apparso, in forma anonima, sulla Rassegna Provinciale del 1880.

(134) Nonostante il tema della proprietà emerga in quasi in tutta la produzione

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Durante i lavori dell'inchiesta agraria, la categoria della proprietà riassume, nel bene e nel male, tutte le valutazioni dell'economista, in quanto il quadro economico marchigiano, in assenza di forze borghesi, non poteva prescindere da una crescita sollecitata dalla nobiltà terriera. Di conseguenza, lo sviluppo economico della regione era in funzione diretta del recupero da parte dei proprietari della gestione dei loro fondi e della valorizzazione del lavoro umano in agricoltura. La giustezza delle valutazioni di Valenti e i fondamenti dell'economia regionale sono confermate anche da studi recenti riferiti alle Marche sul finire del XVIII secolo: « Ci sembra, quindi, di poter riassumere il quadro della proprietà fondiaria in tre punti: 1) la completa identificazione tra classe dirigente e classe dei proprietari; 2) i proprietari terrieri appartenevano alla nobiltà che basava il suo *status* sulla purezza del sangue, sulla proprietà fondiaria, sulla rendita agricola e sul disprezzo per altre forme di lavoro; 3) le condizioni dell'agricoltura nel maceratese: se ad ogni fenomeno di produzione concorrono la natura, il lavoro, il capitale e se la produzione agricola di un territorio è il risultato dell'attività delle persone che vi operano, occorre sottolineare che nel caso di Macerata la natura era generalmente favorevole, il lavoro non mancava e non mancava neanche il capitale: mancavano gli uomini che sapessero far reagire questi tre elementi; i contadini, e non potevano fare altrimenti, erano senza risorse e senza volontà, la classe dei proprie-

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dell'autore, qui di seguito, saranno segnalati, in ordine di pubblicazione, soltanto gli scritti che, più direttamente, sono riconducibili a questo tema. Si tratta di: G. VALENTI, *Il rimboschimento e la proprietà collettiva nell'Appennino Marchigiano*, cit.; ID., *L'accelleramento della perequazione fondiaria nella provincia di Macerata*, cit.; ID., *L'enfiteusi e la questione agraria in Italia e in Irlanda*, Estratto da « Il Giornale degli Economisti », vol. IV, ff. 2-3, Tip. Fava e Garagnani, Bologna, 1889; ID., *Cooperazione e proprietà collettiva*, estratto dalla « Nuova Antologia », vol. XXXIV, serie III, 16 luglio 1891, Tip. della Camera dei Deputati, Roma, 1891; *Le forme primitive e la teoria economica della proprietà*, cit.; ID., *Indole e importanza dell'economia rurale*, cit.; ID., *L'agricoltura e la classe agricola nella legislazione italiana*, cit.; ID., *La proprietà della terra e la Costituzione economica. Saggi critici intorno al sistema di Loria*, cit.; ID., *L'Italia agricola dal 1861 al 1911*, in Accademia dei Lincei (a cura di), *Cinquant'anni di storia italiana*, cit.; ID., *L'Italia agricola nel cinquantennio 1862-1911*, Estratto dal « Bollettino dell'ufficio delle istituzioni economiche e sociali », anno III, n. 8, Istituto Internazionale di Agricoltura, Roma, 1912; *Studi di politica agraria*, cit.; ID., *La proprietà e l'evoluzione economica*, « Rivista d'Italia », anno XXI, vol. II, n. 2, giugno, 1918 pp. 181-203.

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tari, anche se formata da persone giovani, era mentalmente vecchia e tradizionalista, tesa più all'investimento del proprio capitale, ad un suo mantenimento che le garantisse una rendita sicura ed anche quando si imbarcava in speculazioni lo faceva in prospettiva di questa » (135).

Valenti si riferisce alla proprietà con il medesimo intento strumentale anche nel 1918 nella terza edizione dei *Principi di scienza economica* (136). In quel caso, la proprietà è al centro di un ragionamento sulla professione dell'economista volto a riaffermare la missione civilizzatrice dell'economia politica e l'importanza dello scrivere italianamente — cioè secondo la tradizione economica nazionale — contro le pratiche dell'imperante marginalismo. Pareto nella sua *forma mentis* è il simbolo della distanza culturale tra i due opposti schieramenti. Così scriveva Valenti, abbinando le due linee di pensiero:

« Se non che, non pare egli sia del nostro stesso avviso, poiché della proprietà non ha creduto occuparsi di proposito. In genere, sembra che il Pareto non dia soverchia importanza al fenomeno giuridico e ami ignorare l'esistenza della numerosa schiera di filosofi e di giuristi che onorano la patria nostra. Non ricorda infatti né Romagnosi, né Cattaneo, che pure in fatto di sociologia contarono qualche cosa » (137).

Nella prefazione di questo testo, Valenti aveva anche tratteggiato i contorni dei grandi maestri della scuola italiana rilevando in essi i caratteri ideali che gli scienziati dovevano possedere.

« Furono uomini che prima di entrare nel tempio della Scienza economica aveano stimato necessario di acquistare una forte cultura filosofica e storica, non meno che giuridica e politica, e che possedevano l'istrumento atto ad un'efficace diffusione delle proprie idee: il magistero dello scrivere italianamente. Per loro lo studio dell'Economia politica non fu una professione, ma una missione civile. Essi non si rinchiusero in un gabinetto fra i loro libri, isolandosi dal resto

(135) M. Troscè, *Macerata negli ultimi decenni del sec. XVIII: struttura economica, classi sociali e proprietà fondiaria*, Studi Maceratesi, n. 8, *L'età napoleonica nel maceratese. Atti dell'VIII* convegno di studi maceratesi (Tolentino, 28-29 ottobre 1972), Centro di Studi Storici Maceratesi, Macerata, 1974, p. 113.

(136) G. Valenti, *Principi di Scienza Economica*, cit..

(137) *Ibidem*, vol. II, p. 374.

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del mondo, ma vissero la vita del popolo nostro, caldeggiandone le aspirazioni e propugnandone gli interessi, essi in una parola, nel coltivare la Scienza servirono l'Italia meta costante dei loro pensieri » (138).

Nel suo richiamo all'eclettismo, Valenti giudica questa strada l'unica percorribile in un mondo nel quale la percezione dei contenuti di una determinata categoria era essenziale per la diffusione della conoscenza. In questo senso, riferendosi esplicitamente all'influenza dei lineamenti giuridici sull'ordinamento economico, Valenti sostiene che un determinato negozio giuridico — la proprietà nel caso specifico — è colto dai non specialisti come un oggetto inscindibile all'interno del quale non è possibile distinguere origine e natura delle obbligazioni che lo fanno sorgere. Economia e diritto si fondono insieme ed era buona norma continuare ad insegnarle congiuntamente per garantire la corretta evoluzione della società civile, preservare la qualità del dibattito scientifico e il magistero della scuola italiana.

Un *modus* interpretativo che nel Novecento avrà dei padri illustri nei linguisti Lotman e Usprenskij nella convinzione che sia possibile anche nella lingua ricomporre in uno spazio culturale unico « tutta l'attività umana interessata alla produzione, allo scambio e alla conservazione dell'informazione » (139). Se, dal punto di vista dell'ampiezza del dominio della scienza applicata sulla teorica, la scelta di Valenti può essere in qualche modo avallata, dall'altra essa, sul finire del diciannovesimo secolo, era irrimediabilmente sorpassata in virtù della differenza tra la grammatica del diritto e quella dell'economia politica. Secondo Bonfante, nelle mani di Valenti questo modello scientifico, nonostante la sua evidente vetustà in un'epoca di nascenti specialismi, non pareva improprio; l'economista aveva maturato un vero talento per la giurisprudenza (140). La vocazione per l'eclettismo era spiegabile tenendo

(138) *Ibidem*, vol. II, *Ancora una parola ai giovani studiosi*, pp. XII-XIII.

(139) Cfr. R. WILLIAMS, *Materialismo & Cultura*, introduzione di Paolo Splendore, Tullio Pironti Editore, Napoli, 1983, p. 4.

(140) Scrive Bonfante: « Ma in questo indirizzo il Valenti recava una tempera mentale che non possedevano coloro che egli venerava come suoi maestri; un vero talento giuridico e legislativo. L'analisi economica del fenomeno lo conduceva spontaneamente alla più precisa formulazione giuridica. Alcune sue conclusioni di scritti

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conto che nel suo animo si univano la maestria con la quale egli aveva saputo apprendere la lezione del padre Teofilo, insigne civilista, e « il disprezzo di quelle barriere invalicabili che ora sono stabilite non soltanto tra scienze affini, ma spesso tra discipline di insegnamento che costituiscono frammenti di una stessa scienza » (141).

Il discorso sui contenuti della disciplina era stato ampliato da Valenti fino ad argomentare che l'introduzione nell'ordine degli studi universitari delle tematiche di economia agraria non era un espediente per accelerare la specializzazione della scienza economica ma, al contrario, era un'evidenza di segno opposto, utile per mantenere aperto questo approccio di studio tipico degli italiani. La materia agraria come parte integrante del dominio della scienza economica è anche l'oggetto intorno al quale Valenti costruisce la sua critica al Consiglio superiore della pubblica istruzione, quando questo « opinava che l'insegnamento dell'economia rurale dovesse essere esclusivamente riserbato alle scuole superiori di agricoltura e d'applicazione degli ingegneri e che pertanto non potesse accordarsi la privata docenza in tale materia presso una Facoltà di diritto » (142). Allo stesso modo, si opponeva a quanti volevano ridimensionare gli spazi istituzionali concessi all'economia agraria e chiudere le scuole di Milano e Portici.

Ma il manuale del 1918 era, soprattutto, un testo rivoluzionario per l'inizio del ventesimo secolo proprio per le sue finalità didattiche (143). Al tempo stesso, esso era la testimonianza più lampante

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economici profondamente meditati possono talvolta essere tolte di peso e convertite in articoli di legge, come alcune sue critiche economiche sono la più efficace critica a vieti istituti e testi di legge ». P. BONFANTE, *Gli uomini dell'Italia odierna. Ghino Valenti*, cit., p. 352. Lo stesso Bonfante ricorda come opinioni simili erano state espresse anche da Vittorio Scialoja. « Il nostro Valenti è un economista, nella cui mente le idee si concretano così praticamente che diventano, senza che egli se ne accorga, giuridiche, e se vogliamo trarre il costrutto dal suo discorso noi possiamo formare lo schema di una legge ». *Ibidem*, p. 356. Sulla qualità della formazione giuridica di Valenti, cfr. P. GROSSI, *Un altro modo di possedere: L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, cit., pp. 286-287.

(141) P. BONFANTE, *Gli uomini dell'Italia odierna. Ghino Valenti*, cit., p. 349.

(142) G. VALENTI, *Indole e importanza dell'economia rurale*, cit., p. 3.

(143) « Il presente volume non è un libro di dottrina né pretende di dire cose nuove. Esso è rivolto in genere a coloro che vogliono procurarsi una cultura economica elementare e più particolarmente agli studenti delle università, delle scuole di commercio

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dell'insofferenza di Valenti contro « quel genere di libro che "trasudi dottrina da ogni poro e sia ripieno di notizie storiche e statistiche" (p. 71) e che manchi di osservazione diretta, di impegno personale » (144).

Il precedente salto temporale dagli studi giovanili per l'inchiesta Jacini al manuale del 1918 non è solo una procedura volta a cementare insieme l'intera carriera di Valenti — l'economista muore nel 1920 — ma serve soprattutto per dare ancora maggiore risalto al momento in cui gli interessi di ricerca di Valenti si sono saldati insieme agli obblighi didattici e per sottolineare, ancora una volta di più, come questo fatto sia avvenuto all'insegna del tema della proprietà. Sul piano temporale, tale accadimento si colloca nel triennio 1890-1892 in coincidenza con le « lezioni sulla teoria economica della proprietà » tenute a Macerata nell'AA. 1889-90 (145) ,

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e degli istituti tecnici, superiori e medi. Perciò fu mio precipuo studio quello di esporre le nozioni scientifiche, che vi si leggono, nella forma più semplice ed accessibile, rendendo, per quanto si può, facile il difficile e chiaro l'oscuro ». G. VALENTI, *Principi di scienza economica*, cit., *Prefazione alla terza edizione*, p. VII. Messaggio presente fin dalla prima edizione ma fortemente rafforzato nella terza. La vocazione per la semplicità nella divulgazione scientifica era colta anche dagli studenti di Valenti. « Il prof. Valenti non sedeva che raramente sulla cattedra durante le sue lezioni che teneva di regola nel pomeriggio e nemmeno parlava da cattedratico, con un certo apparato tecnico, per fare effetto sul suo uditorio non mai, a dire il vero, troppo numeroso. Anzi se non avessimo avuto fra le mani il suo volume d'*Economia politica*, pubblicato dal Barbera, e se non avessimo saputo che a Roma occupava alti uffici per la sua speciale competenza nei problemi economici, non avremmo ravvisato in esso il docente scaltrito nello studio costante delle teorie rientranti nella sfera d'attività intellettuale da esso prescelta ed abituato all'analisi ed alla critica della scienza, tanto il suo corso era semplice, piano, svestito d'ogni adornamento oratorio. A noi studenti dava l'impressione d'un buon papà che comunica ai suoi figli in formule sobrie e facilmente accessibili le verità apprese nelle più ardue e più faticose esperienze della vita. E sembrava anche un papà, ottimo di fondo, ma un po' burbero e duro nel suo contegno, per cui tra noi e lui non veniva a stabilirsi agevolmente una continuità di reciproca intesa e confidenza, e forse di ciò la colpa era anche di quella benedetta scienza economica che egli ci rendeva tanto chiara ad ascoltarlo e che poi invece nel suo manuale trovavamo spesso astrusa e non sempre del tutto assimilabile. Cosicché nella scuola Ghino Valenti aveva soltanto degli scolari attenti e rarissimamente qualche discepolo nel significato stesso della parola ». G. TAMAGNINI, *L'economia agraria negli studi di Ghino Valenti*, cit., pp. 265-266.

(144) A. CARACCIOLO, *Ghino Valenti e l'agricoltura delle Marche*, cit., pp. 92-93. Citazione tratta da G. VALENTI, *Il valore pratico delle dottrine economiche*, cit..

(145) F. VIRGILII, *Ghino Valenti nella vita e nella scienza*, cit., p. 5.

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nel suo primo anno d'insegnamento, e con la successiva pubblicazione del trattato *Le forme primitive e la teoria economica della proprietà* nel 1892 (146). L'economista si dedicò all'insegnamento a partire dall'anno accademico 1889-1890 quando, disperso l'ingente patrimonio paterno, « si trovò nella necessità che il pane della Scienza divenisse anche pane quotidiano » (147).

Il manoscritto di questo corso, conservato presso l'Archivio di stato di Macerata, dimostra che le lezioni dell'economista coprivano l'intero indice della monografia del 1892. Sull'attribuzione a Valenti del documento e sulla sua conseguente datazione i margini di errore appaiono assai tenui. L'economista maceratese cita se stesso nella bibliografia di riferimento per gli studenti (148). Manoscritto databile quasi con sicurezza nell'anno indicato in quanto, soltanto per esso, ci sono prove a riscontro sia dell'effettivo adempimento dell'incarico da parte di Valenti sia della contemporanea richiesta di un periodo sabbatico da parte del titolare dell'insegnamento di economia politica, Niccolò Lo Savio (149). Alla vista, il manoscritto si presenta

(146) G. VALENTI, *Le forme primitive e la teoria economica della proprietà*, cit..

(147) Archivio di Stato di Macerata, *Archivio della Regia Università di Macerata*, b. 56, *Argomenti delle materie (1880-1890)*, AA. 1890-91, *Lezioni sulla teoria economica della proprietà (Ghino Valenti)*. Per la trascrizione del manoscritto, cfr. D. GIACONI, *"Lezioni sulla teoria economica della proprietà". Note sull'esordio accademico di Ghino Valenti*, cit..

(148) « Gran parte delle idee esposte trovanti svolte in scritti miei. Il rimboschimento e la proprietà collettiva nell'Appennino Marchigiano. L'enfiteusi e la questione agraria in Italia e in Irlanda. A proposito della crisi edilizia nella città di Roma. Tali scritti trovansi nella Biblioteca comunale ». Archivio di Stato di Macerata, *Archivio della Regia Università di Macerata*, b. 56, *Argomenti delle materie (1880-1890)*, cit., Carta 1, p. 1. Sottolineatura originale. Per le note editoriali dei primi due scritti si veda la nota 134 di questo scritto. Per il riferimento bibliografico della terza opera, cfr. « Giornale degli Economisti », vol. V, fasc. 3, 1890, 3 marzo 1990, pp. 314-322.

(149) Data l'assenza di Lo Savio, è Ghino Valenti a presiedere la commissione esaminatrice in quattro appelli dal 16 al 26 giugno 1890. Il primo verbale successivo a queste date è del 20 giugno 1891 ed è a firma Lo Savio. Dopo il giugno 1890, non è documentabile sotto alcuna forma la presenza di Ghino Valenti a Macerata nonostante l'annuario universitario deponga a favore del fatto che l'economista avesse conservato la libera docenza in economia politica anche per l'anno successivo. cfr. Università di Macerata, *Annuario della Regia Università di Macerata*, AA. 1890-91, Tip. Bianchini, Macerata, 1891. Secondo Amedeo Ricci, Valenti avrebbe mantenuto la libera docenza fino al 1892. Cfr. Biblioteca Comunale "Mozzi-Borgetti" di Macerata, Fondo Mano-

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disposto su quattro fogli protocollo a righe — quindici facciate complessive — scritti soltanto nella colonna di destra. Vi compaiono numerose cancellature, correzioni e integrazioni, specie nella prima parte, che si presenta come un lavoro ragionato e, probabilmente, vicino alla scaletta dell'esposizione orale. Il documento è molto più pulito nella seconda parte, dato che Valenti spesso vi si limita ad enucleare i temi delle lezioni. Riguardo ai contenuti, l'argomento della teoria economica della proprietà non era stato scelto appositamente per il corso universitario, ma derivava dall'invito ricevuto da Valenti dal De Laveleye a commentare pubblicamente la nuova edizione di *De la propriété et de ses formes primitives*. Solo il ritardo di Valenti nella preparazione delle bozze di stampa e la morte improvvisa dello scienziato belga, nel gennaio 1892, avevano dato vita autonoma a questa lettura — commento (150). L'opera è intesa dall'autore come una naturale integrazione al testo esaminato perché, a parere Valenti, De Laveleye trascurava colpevolmente l'Italia e una varietà di forme di proprietà ignote negli altri paesi (151).

Il corso pensato per le lezioni maceratesi non è rimasto un fatto isolato nella didattica di Valenti. In primo luogo, Valenti, nell'anno

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scritti, b. 1103, *Ricci Amedeo. Dizionario biografico dei maceratesi illustri*, cit.. Su Niccolò Lo Savio e la sua opera scientifica, cfr. F. SANDRONI, *L'economia della "cooperazione" in Niccolò Lo Savio. La cattedra di economia politica a Macerata dal 1880 al 1911*, in P. BINI (a cura di), *L'economia politica nelle Marche*, cit..

(150) Circa questa natura dell'opera, cfr. G. VALENTI, *Le forme primitive e la teoria economica della proprietà*, cit., *All'onorevole Comm. Fedele Lampertico Senatore del Regno*, p. XVI. Oltre a quella di Valenti, l'opera del De Laveleye (Paris, Alcan, 1891) era stata oggetto di un'ampia valutazione critica da parte di Cathrein (S. J. CATHREIN, *La propriété foncière privée et ses adversaires ou le socialisme agraire de E. de Laveleye et de Henry George*, opuscule traduit de l'allemand par C. FRITSCH, A. UYSTPRUYST-DEUDONNE libraire éditeur, Louvain, 1894). Il testo di Cathrein si collocava tra i difensori ad oltranza delle prerogative della proprietà privata e imputava a De Laveleye di aver mancato agli obiettivi del suo progetto di ricerca. La proprietà primitiva e, di conseguenza, i residui delle forme comunitarie non erano riconducibili ad una vera e propria teoria della proprietà, dato ad essi non si accompagnava un opportuno sistema di sanzioni contro le violazioni del diritto collettivo. Quella del De Laveleye era una storia finta e parziale; una storia costruita attraverso la selezione mirata di casi che confermavano le sue pretese e che celava i dati inconciliabili con il disegno generale. Accuse di cecità e di parzialità che Valenti prendeva in considerazione per rimandarle agli avversari.

(151) Su questo punto specifico, cfr. G. VALENTI, *Il rimboschimento e la proprietà collettiva nell'Appennino Marchigiano*, cit., p. 69.

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accademico 1893-94 all'Università di Roma, aveva destinato all'illustrazione dei temi della monografia il primo punto della parte terza del programma preparato per gli studenti di economia politica (152). In relazione a questo fatto, si potrebbe pensare che, anche a Macerata, gli argomenti delle lezioni non fossero limitati alla sola teoria economica della proprietà. Nella didattica successiva si rilevano i seguenti riscontri in merito allo svolgimento di questi argomenti. Al volgere del secolo, egli tratta « della proprietà della terra in rapporto alla distribuzione della ricchezza » nelle lezioni bolognesi di « economia sociale applicata all'agricoltura » (153). La proprietà è l'oggetto della lezione quarantaquattresima dell'AA. 1910-11 tenuta a Siena (154). Successivamente, le annualità comprese tra l'AA. 1915-16 e il 1918-19 sono destinate da Valenti all'esposizione ragionata agli studenti del suo nuovo manuale: la terza edizione dei Principi. Nella distribuzione tra i vari corsi delle sezioni dell'opera, al tema in esame erano destinate soltanto le ultime dieci lezioni dell'AA. 1918-19 e, in corrispondenza, otto dei trentaquattro « argomenti per gli esami di economia politica nell'anno 1918-1919 » allegati al registro (155). Contemporaneamente, Valenti pubblicava il suo ultimo scritto: « La proprietà e l'evoluzione economica » (156).

5.2. *La "teoria economica della proprietà".*

Chiarito come, nell'esame di questa parte della produzione

(152) Cfr. G. VALENTI, *Indole e importanza dell'economia rurale*, cit., *Appendice: programma per un corso di economia sociale applicata all'agricoltura e alla produzione forestale che doveva tenersi nella R. Università di Roma durante l'anno scolastico 1893-1894*, pp. 16-19. Il « doveva tenersi » potrebbe indurre a pensare che Valenti non abbia tenuto questo programma di lezioni o ne abbia mutato il contenuto.

(153) In proposito, si veda la nota 54 di questo scritto.

(154) Cfr. Università di Siena, Archivio Storico, *Facoltà di Giurisprudenza*, XIV, C 10, *Libretto delle lezioni di economia politica dettate dal Sig. Prof. Ghino Valenti, AA.* 1910-11.

(155) *Ibidem*, XIV C 11, *Libretto delle lezioni di economia politica dettate dal Sig. Prof. Ghino Valenti, AA.* 1918-19. In coda al registro dell'AA. 1915-16, Valenti attesta che il riferimento bibliografico era proprio il manuale. Non essendovi ancora la disponibilità del testo a stampa, l'economista si era adoperato per consentire la distribuzione delle bozze.

(156) Cfr. G. VALENTI, *La proprietà e l'evoluzione economica*, cit..

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scientifica dell'economista maceratese, si possa considerare come testo di riferimento il manoscritto delle lezioni maceratesi. Di qui, alcune considerazioni preliminari. In primo luogo, per chiarezza e propositi, il testo di Valenti è talmente limpido da potersi considerare la prima esposizione organica e completa della "Teoria economica della proprietà" di Ghino Valenti. Sono però necessarie precisazioni intorno al titolo scelto da Valenti in quanto, se per « teoria » intendiamo una « formulazione sistematica di principi generali relativamente a una scienza, arte o branca del sapere » (157), allora quello che egli propone non può qualificarsi sotto questi termini perché l'opera di Valenti non è un'esposizione di principi ma un'indagine rigorosa e puntuale delle forme di proprietà affermatesi lungo il corso della storia umana. Al tempo stesso, si può parlare di teoria in senso lato perché, secondo l'economista, soltanto dall'osservazione del proprio passato si potevano desumere i correttivi capaci di migliorare gli ordinamenti vigenti; correttivi che egli considerava alla stregua di veri e propri principi generali.

In secondo battuta, il materiale in questione è tagliato a misura da far risaltare l'amore per la pratica del suo estensore. Prima di cambiare registro, un'ultima annotazione relativa a questa vocazione di Valenti per la scienza applicata. Secondo Caracciolo, in questa rinuncia alla teoria Valenti sarebbe stato « condizionato dal rispetto accademico nel contestare teorie come quelle di Loria » (158) piuttosto che dall'esercizio di una vera e propria opzione a favore di uno specifico campo di studi. Questa tesi ha dei grossi limiti. Innanzi tutto, Valenti bocciava senza appello lo stile dei teorici. La loro incapacità nell'abbandonare le « alte elucubrazioni scientifiche [per affrontare] questioni pratiche più vitali ed urgenti » (159), a suo avviso, gettava discredito sull'intera categoria fino a convincere l'opinione pubblica che gli economisti erano inadatti a risolvere i problemi sociali. Allo stesso tempo, Valenti non si proponeva come nuovo modello di scienziato. Qualche anno più tardi, dichiarava,

(157) G. DEVOTO, G. C. OLI, *Dizionario della lingua italiana*, decima ristampa, Le Monnier, Firenze, 1979.

(158) Cfr. A. CARACCIOLO, *Ghino Valenti e l'agricoltura delle Marche*, cit., p. 92.

(159) G. VALENTI, *Le forme primitive e la teoria economica della proprietà*, cit., *All'onorevole Comm. Fedele Lampertico Senatore del Regno*, p. XV.

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senza alcuna punta di rincrescimento, di aver rinunciato al proposito di comporre un manuale di economia applicata perché lo sforzo non era commisurato alle sue capacità (160). Valenti aveva scelto la scienza applicata e l'osservazione diretta dei fenomeni perché « stanco dei luoghi comuni, onde trovansi pieni molti scritti, anche di gente che va per la maggiore » (161). Una lente puntata sul mondo reale che si giovava anche della teoria perché, come rileva Grossi, Valenti aveva una « vocazione a instaurare un rapporto fra il terreno della prassi — tipico lavoro degli inquirenti — e il terreno della riflessione scientifica [Un personaggio] forse scomodo ma estremamente consapevole, che non si sarebbe contentato di rilevamenti e di statistiche » (162). Inoltre, come ampiamente illustrato da Guidi, il fatto stesso che Valenti non avesse esitato a rivolgere critiche puntuali all'economista patavino sui cardini della teoria della terra libera sta a dimostrare che la sua scelta era stata meditata e non originata da una valutazione di inadeguatezza o di sudditanza psicologica (163).

Infine, e non certamente per ordine d'importanza, esistono delle chiavi di lettura esterne a questi studi sulla proprietà dato che Valenti si era trovato costretto a rispondere alle critiche di Lampertico e a dare l'interpretazione autentica alle sue note secondo il tipico linguaggio della giurisprudenza. Oltre a catturare pienamente lo spirito del suo progetto di ricerca, la replica a Lampertico è anche l'occasione scelta dall'economista per tratteggiare gli *orrori* che accompagnavano un'indagine teorica troppo manichea e la, conse-

(160) Cfr. G. VALENTI, *Studi di politica agraria*, cit., *Introduzione*, p. XLVII. Indifferente alle opinioni dei colleghi, Valenti dice di non temere un giudizio avverso e la possibilità che i suoi studi siano giudicati come non degni di un economista.

(161) G. ROCCA, *Un economista agrario: Ghino Valenti*, cit, p. 138. Tale giudizio era stato formulato da Valenti in relazione agli studi sulla campagna romana.

(162) P. GROSSI, *Un altro modo di possedere: L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, cit., pp. 286-288.

(163) Per il ventaglio completo delle contestazioni rivolte a Loria cfr., in particolare, G. VALENTI, *La proprietà della terra e la Costituzione economica. Saggi critici intorno al sistema di Loria*, cit.. Per una panoramica complessiva su queste contestazioni, cfr. M. E.L. GUIDI, *Cooperazione, socialismo ed economia agraria. Note su Ghino Valenti*, cit., § 3, *La critica a Loria*. Per una trattazione recente della terra libera, cfr. R. PATALANO, *La "teoria della terra libera" di Achille Loria e la questione agraria in Italia (1889-1898)*, « Il pensiero economico italiano », vol. VII, n. 2, 1999, pp. 31-71.

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guente, maggiore libertà di pensiero dei pratici. La facilità con la quale gli accademici tacciavano di socialismo tutti coloro che non si adeguavano al canone del pensiero unico — la teoria pura — senza una reale cognizione di causa per il significato *autentico* di quella parola, è portata a titolo di esempio della differenza di stile con la quale Valenti si porgeva. Il fatto che l'economista si senta giustificato a rimarcare questo punto a ben ventidue anni di distanza conferma quanto egli si fosse sentito toccato dall'infondatezza di quel rilievo.

« Più tardi a complemento dei diversi fatti attorno all'Italia raccolti dal Laveleye, pubblicai uno studio su *Le forme primitive e la teoria economica della proprietà* (Roma, Loescher, 1892), nel quale esposi alcuni concetti che mi valsero, taluno nol crederà, la taccia di socialista. *On est toujours jacobin pour quelqun*. Eppure esposi idee, che più tardi sono state accolte da molti, ma che certo i nostri socialisti non degnarono di alcuna considerazione. E siccome socialista non è, secondo quanto affermava argutamente Arturo Labriola, che *colui il quale professa le idee del partito*, così io resto mondo dalla accusa che qualche timorato della scienza economica ortodossa volle lanciarmi » (164).

Proprietario terriero che aveva perso sostanze e status sociale, toccando con mano la *grande peure* della borghesia del secondo Ottocento di fronte alla fragilità degli assetti proprietari, è comprensibile che Valenti abbia rivendicato la sua lontananza dalla nuova religione politica del diciannovesimo secolo (165). Un qualcosa d'altro — da intendersi sia come stato d'animo sia come scelta stilistica — che non consente di aggregare Valenti al dibattito di fine secolo orchestrato da Loria intorno al tema della terra libera e che lasciava sullo sfondo il problema dell'interpretazione del pensiero di Marx. Atavicamente antisocialista, Valenti contesta Loria sia in merito alla congruenza degli argomenti sia per l'infelice scelta linguistica. « Se un individuo sappia che esiste una vasta estensione di terreno disoccupata, esso non può dire ch'è sua. Dacché, se un tale diritto

(164) G. VALENTI, *Studi di politica agraria*, cit., *Introduzione*, p. XXVII.

(165) Sulla religione politica come categoria dell'analisi, cfr. E. GENTILE, *Il fascismo come religione politica*, « Storia contemporanea », anno XXI, n. 6, dicembre 1990, pp. 1079-1106, ID., *Il culto del littorio. La sacralizzazione della politica nell'Italia fascista*, II edizione, Laterza, Bari, 1995.

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fosse riconosciuto a lui, dovrebbe ugualmente essere riconosciuto agli altri e il diritto di tutti si risolve individualmente nel diritto di nessuno » (166).

Quello che realmente muove l'economista maceratese è la consapevolezza che la teoria della proprietà consolidata nella prassi non era sostenuta da una precetto di fede ma era una categoria che si era evoluta congiuntamente all'idea stessa di progresso umano e, come tale, era giudicabile ogni qualvolta non rispondeva più ai bisogni degli uomini. In special modo, l'assetto della proprietà era modificabile quando non proteggeva a sufficienza i frutti del lavoro e gli interessi dei lavoratori, cioè a dire ogni volta che il suo "fondamento economico-giuridico" era stato compromesso (167).

Secondo tale indirizzo, Valenti elabora il suo approccio analitico arrivando alle seguenti conclusioni: « La teoria che abbiamo esposto apparirà al certo assai diversa da quelle che si contengono nei libri della più gran parte dei filosofi del diritto e degli economisti e che vengono insegnate nelle scuole. Alcuno anzi la qualificherà addirittura per una teoria *eterodossa*. Noi speriamo tuttavia si possa riconoscere dal lettore imparziale: 1° che essa si fonda sull'osservazione dei fatti e che da questa trae i suoi principi; 2° che pur concedendo ad un ordinamento della proprietà fondiaria differente da quello attuale, i modi di possesso ch'essa vorrebbe fondanti non sono novità cervellotiche, ma forme realmente esistenti determinate dalle esigenze economiche, che, il più delle volte furono abbandonate per ragioni *antieconomiche*; 3° che infine essa si allontana più dalle disposizioni positive dei codici che dalla costituzione di fatto della proprietà fondiaria » (168).

Abbiamo preferito anticipare le conclusioni perché questa operazione dimostra che la chiave più efficace per misurare questo

(166) G. VALENTI, *Le forme primitive e la teoria economica della proprietà*, cit., p. 64.

(167) L'importanza di questo assunto si conferma con la lettura del manoscritto essendo questo il primo messaggio che Valenti lancia, immediatamente dopo i preliminari riferimenti bibliografici per gli studenti. Cfr. Archivio di Stato di Macerata, *Archivio della Regia Università di Macerata*, b. 56, *Argomenti delle materie (1880-1890)*, cit., Carta 1, p. 1.

(168) G. VALENTI, *Le forme primitive e la teoria economica della proprietà*, cit., p. 77.

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Valenti non sta nel dibattito scientifico o, in una più o meno marcata diversità con « Loria e gli altri » (169), ma in motivazioni tutte interne alla sua stessa opera. Più specificatamente, con la ribadita e ferma condanna di un diritto di proprietà *usque ad sidera, usque ad inferos* (170) che non corrispondeva al suo reale dominio storico, Valenti ha voluto chiudere un ciclo. Stilisticamente, la tesi è plausibile in virtù del fatto che si nutre di precedenti linee di ricerca e beneficiava di un richiamo esplicito allo studio sull'enfiteusi nell'apertura del manoscritto (171). L'origine stessa de « L'enfiteusi » come recensione-discussione al libro del 1888 di Vincenzo Simoncelli lega inequivocabilmente i materiali investigati (172) ed esalta il temperamento dell'uomo e l'attenzione con cui seguiva le novità letterarie.

Sul piano tematico, questi studi sulla proprietà rappresentavano la rielaborazione teorica delle osservazioni dell'inchiesta agraria secondo delle premesse che Valenti aveva già posto nella Rassegna Provinciale di Macerata nel biennio 1879-1880. L'esistenza di un simile filo conduttore su degli argomenti dove tutto è minuziosamente pensato e cesellato e, nel quale Valenti usava l'inchiesta come una sorta di « banco sperimentale » (173) per provare la solidità di

(169) Per questa dizione cfr. R. FAUCCI, *Revisione del marxismo e teoria economica della proprietà in Italia (1880-1900): Achille Loria (e gli altri)*, « Quaderni fiorentini per la storia del pensiero giuridico moderno », nn. 5-6, 1976-1977, pp. 587-680. Faucci insiste nel ribadire che il dibattito italiano sulla teoria della proprietà era stato viziato da due pregiudiziali: la collocazione a parte di Loria e la strumentalità di questa questione rispetto all'argomento di elezione concernente l'interpretazione di Marx. Elementi questi che fanno intendere come il vero corpo estraneo fosse, in realtà, proprio Ghino Valenti. Sulle tematiche della proprietà si erano impegnati, tra gli altri, Lampertico, Manara, Graziani, Conigliani, Mortara, Rabbeno.

(170) Alla tradizionale dizione dei latini, nel 1918 Valenti sostituisce la seguente: usque ad coelum et usque ad profundum. Cfr. G. VALENTI, *La proprietà e l'evoluzione economica*, cit., p. 198.

(171) Cfr. Archivio di Stato di Macerata, *Archivio della Regia Università di Macerata*, b. 56, *Argomenti delle materie (1880-1890)*, cit., Carta 3, p. 1. Si tratta di G. VALENTI, *L'enfiteusi e la questione agraria in Italia e in Irlanda*, cit..

(172) V. SIMONCELLI, *L'enfiteusi*, Milano, Tip. di Pietro Agnelli, 1888. Circa questa origine, cfr. P. GIANNOTTI, *Ghino Valenti economista agrario e conservatore illuminato*, cit., pp. 39-40.

(173) P. GROSSI, *Un altro modo di possedere: L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, cit., p. 295.

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sue riflessioni antecedenti, induce a confermare quanto detto nei paragrafi precedenti intorno ad una fase temporale che non può essere banalmente qualificata come « fase signorile e amatoriale ». La dimostrazione che quello tra studi di fine ottanta, inchiesta agraria e trattato sulla proprietà sia l'unico legame genetico — funzionale che abbia senso è fornita dallo stesso Valenti quando, nelle note preliminari al saggio del 1892, accennava ad una elaborazione decennale il cui tempo era servito soltanto a cementare le convinzioni iniziali (174).

Si deve poi tener conto che la mancanza di un'adeguata collocazione accademica non implicava, necessariamente, l'uso di mezzi non professionali. L'economista agrario Ghino Valenti aveva concluso il suo apprendistato scientifico ed era fieramente determinato ad assumersi le responsabilità delle sue argomentazioni. Su questo peculiare punto insiste Grossi per sottolineare la differente statura intellettuale del Valenti applicato all'inchiesta Jacini rispetto agli altri ricercatori coinvolti (175).

L'obiettivo di Valenti era una teoria economica delle proprietà e non un diritto monoliticamente arroccato intorno allo schema della proprietà privata di diritto romano. Deduzione rilevante sotto un duplice punto di vista. In primo luogo, come dimostra Marrone, la capacità di Valenti di osservare la realtà per leggervi una regola scientifica è giustamente indirizzata nel rilevare come un diritto di proprietà assolutamente illimitato non era mai esistito nemmeno nell'epoca più fausta dello jus quiritium (176). Inoltre, le argomen-

(174) In proposito, si veda la nota 111 di questo scritto.

(175) Confrontando i testi dell'inchiesta, Grossi scrive: « Lo stesso non potrebbe dirsi per l'apporto di Ghino Valenti: ampio, fondato su un'analisi minuta, profondamente pensato in ogni sua affermazione, proiettato al di là dei termini dell'Inchiesta ». P. GROSSI, *Un altro modo di possedere: L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, cit., p. 286.

(176) Cfr. M. MARRONE, *Istituzioni di diritto romano*, Palumbo, Palermo, 1994, p. 306. La proprietà quiritica era, per definizione: assoluta, esclusiva e soggetta sia ad infiniti ingrandimenti sia alla polverizzazione infinitesimale. Valenti descrive una proprietà collettiva che nelle montagne marchigiane conviveva con il diritto romano. In proposito, cfr. G. VALENTI, *Il rimboschimento e la proprietà collettiva nell'Appennino Marchigiano*, cit., p. 85. Circa il sostegno di riferimenti di storia locali, Valenti dichiarava di aver fatto ampio uso degli studi sulla storia di Macerata dell'Avv. Raffaele Foglietti e dei documenti dell'archivio vescovile del capoluogo piceno. *Ibidem*, p. 85.

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tazioni dell'economista riempivano di dignità scientifica dei negozi che nelle Marche erano noti fin dall'antichità (177).

Valenti aveva inteso dimostrare che la proprietà collettiva non era uno sbaglio della storia o un occasionale residuo di forme arcaiche. Essa esisteva legittimamente, e sarebbe sempre esistita perché rispondeva a precise necessità materiali e si costituiva in uno spazio fisico dove l'iniziativa individuale non poteva *fare giornata* (178). Un concetto ribadito e fortificato dalla convinzione provocatoria secondo la quale, in un ipotetico punto e a capo,

(177) Valenti riferisce di trecentocinquantuno comunanze distribuite in trentasette comuni che correvano lungo tutto l'Appennino. La massima concentrazione spettava alla provincia di Ascoli Piceno con centosettantasei nuclei di proprietà collettiva distribuiti in undici comuni del comprensorio dei Monti Sibellini. Il comune di Montefortino, nell'alta valle del Tenna, ne contava ventisette. Per una pubblicazione recente di queste valutazioni di Valenti tratte dalla relazione dell'inchiesta agraria, cfr. G. VALENTI, *Consorzi di famiglie, università e diritti d'uso nell'Appennino Marchigiano*, in M. GUIDETTI, P. H. STAHL (a cura di), *Un'Italia sconosciuta. Comunità di villaggio e comunità familiari nell'Italia dell'800*, Jaca Book, Milano, 1977, pp. 294-296. Per la definizione di comunanza, cfr. G. VALENTI, *La proprietà collettiva nell'appennino marchigiano*, cit., p. 403. Sulla proprietà collettiva nelle Marche cfr., inoltre, J. LUSSU, *Le comunanze picene*, Andrea Livi Editore, Fermo, 1989, id. http://www.lottadiclasse.it/lotta50/art8.htm. Per un'analisi recente condotta secondo termini analoghi a quelli suggeriti dall'economista maceratese, cfr. D. FIORETTI, *La proprietà collettiva nel vissano in età moderna*, Studi Maceratesi, n. 20, *Ambiente e società pastorale nella montagna maceratese. Atti del XX convegno di studi maceratesi (Ussita, 29-30 settembre 1984)*, Centro di Studi Storici Maceratesi, Macerata, 1987, pp. 411-425.

(178) Indagando sui principali caratteri dell'economia montana a partire dagli anni di Valenti e sulla legittimazione della proprietà collettiva in queste aree territoriali, Petrelli si sofferma su due caratteri delle comunanze: la costituzione in aree depresse dove la titolarità in proprietà individuale è assente e la bassa redditività: « Va prima chiarito un punto. Quello della montagna considerata come *res nullius*. Lo era di fatto, ma non di diritto. Di fatto perché il reddito ricavabile non avrebbe compensato le spese organizzative e quindi prodotto un utile per i proprietari (…). Ma allora il tempo non entrava nella formazione del prezzo, né la giornata per questa gente era divisa in ore lavorative e di riposo. Fare giornata voleva dire guadagnare il necessario per il vivere del giorno, sapendo che nel seguente bisognava ricominciare con la stessa lena e la stessa pazienza ». S. PETRELLI, *Microimprendere nell'appennino umbro-marchigiano in età moderna e contemporanea*, in A. LEONARDI, A. BONOLDI (a cura di), *L'economia della montagna interna italiana. Un approccio storiografico*, Seminario permanente sulla storia dell'economia e dell'imprenditorialità nelle Alpi, Atti della sessione tenutasi a Trento il 5 dicembre 1997, 1999, id. http://www.economia.unitn.it/new/pubblicazioni/papers/1-99-leonardi.pdf, pp. 56-58. Analogamente, in Valenti si trova una valutazione similare

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qualora le lancette della storia potessero essere azzerate, si sarebbero riprodotti i medesimi rapporti di forza tra i vari tipi di proprietà.

Intorno alla persistenza nel tempo e alla natura delle proprietà collettive, l'esperienza dell'inchiesta agraria aveva mostrato a Valenti che la comunanza aveva una duplice radice. Da una parte, era antichissima perché la sua forza di radicamento sul territorio e il suo consolidamento nel diritto consuetudinario erano impermeabili a qualsiasi intervento legislativo che intendeva soppiantare tali istituti naturali con un ordinamento artificiale. La comunanza era uno « schema organizzativo reclamato dal basso e non imposto dall'arbitrio di qualcuno o da una bizzarria della storia » (179). Dall'altra, era modernissima perché, in virtù dell'applicazione del principio dell'associazione, assicurava la sussistenza e l'iniziativa economica in una porzione di territorio morfologicamente disagiata, dove la nozione di profitto d'impresa non apparteneva alla cultura comune, il capitale era pressoché inesistente, la terra abbondante e liberamente accaparrabile. Terra dove, ribadisce Valenti, non si sostituiva la proprietà privata con la comunanza perché questa non vi avrebbe mai potuto essere impiantata (180). Forme di proprietà assolutamente non concorrenti, soprattutto in virtù del fatto che gli atti di concessione in comunanza non creavano diritti nuovi a scapito della proprietà individuale ma, semplicemente, riconoscevano gli anti-

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sulla condizione di res nullius. Cfr. G. VALENTI, *Cooperazione e proprietà collettiva*, cit., p. 17.

(179) P. GROSSI, *Un altro modo di possedere: L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, cit., p. 298.

(180) Sui caratteri della proprietà collettiva e sulla sua funzione sociale, cfr. G. VALENTI, *Cooperazione e proprietà collettiva*, cit., p. 6. L'intervento di Zucconi in Parlamento a sostegno del riconoscimento dell'ordinamento delle comunanze come deterrente contro la questione sociale e la proliferazione del latifondo aveva dato linfa a questo scritto. Da osservare che, rispetto alla relazione dell'inchiesta agraria, i saggi del biennio 1891-1892 non fanno cenno alla combinazione tra lineamenti economici e politici che cementavano verso l'esterno le comunanze. Nelle pagine della relazione, l'economista aveva sostenuto che questi nuclei erano le forme arcaiche dei moderni comuni. Una fitta rete di rapporti personali e di ripartizione delle funzioni senza le quali tale genere di proprietà non realizza il proprio naturale disegno. Per lo svolgimento di temi analoghi, cfr. G. VALENTI, *Consorzi di famiglie, università e diritti d'uso nell'Appennino Marchigiano*, cit., pp. 304-305.

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chi (181). Inoltre, il fatto stesso che la comunanza realizzava un'integrazione in orizzontale alle proprietà individuali smontava, secondo Valenti, qualsiasi idea peregrina circa un ipotetico ritorno alle origini e alla proprietà indivisa dei popoli primitivi.

Credendo fermamente che il ciclo della storia umana non poteva, in alcun modo, essere invertito, Valenti sollecitava, comunque, uno studio sistematico delle forme arcaiche e la messa in opera di progetti di riforma che legittimassero le comunanze. Con tali operazioni si poteva imparare dal passato con un sano esercizio della virtù della conoscenza, investire con profitto in un sapere non macchiato da pregiudizi e riparare ad un'ingiustizia (182). Riforma indispensabile e improcrastinabile, perché la normativa di tradizione romanistica impediva di collocare le risorse produttive nelle mani di chi era più capace di farle fruttare e conteneva condizioni che Valenti definiva intollerabili e nocive per tutti. Ne conseguiva che, se era vero, come diceva Nietzsche, che la paura era madre della morale e di tutto quanto era conforme al giudizio di opportunità di un ordine costituito, allora la difesa del regime della proprietà privata maturava soltanto per il naturale istinto a proteggere la roba senza alcuna concessione alle ragioni dell'efficienza economica.

In virtù di ciò, i risultati sarebbero andati al di là della pura e semplice rivalutazione di un canale sottostante e parallelo a quello della proprietà quiritaria (183), perché essi consentivano di: 1) smon-

(181) Per quanto concerne la presenza materiale di documenti formali che attestino l'esistenza di un diritto universalistico, Valenti reputa che tali atti sono necessari soltanto dopo l'insorgenza di una lite per ristabilire e censire i diritti pregressi. Il diritto nasce spontaneamente senza il corredo di alcuna carta.

(182) Per quanto concerne il secondo punto, bisogna osservare che Valenti credeva veramente e illuministicamente nella giustezza del detto di Beniamino Franklin secondo cui « l'investimento in conoscenza paga il migliore interesse ». L'economista amplia, a tal punto, il campo di applicazione di questo dettato fino a pensare che le azioni stesse fossero un frutto proprio del conoscere. In questo senso, la ricerca storica più meritevole era quella che sapeva trarre dati significativi dai fatti reali. In secondo luogo, essa era realmente progressiva soltanto se ogni categoria fosse studiata nella sua evoluzione spazio-temporale a partire da una ipotetica società di nuova formazione e andando a verificare la portata degli errori che la società moderna aveva ereditato dal passato.

(183) Canale sottostante e parallelo perché, come scrive lo stesso Valenti in una relazione alla prefettura ai tempi dell'inchiesta Jacini: « È una condizione di cose che

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tare nei giuristi la falsa idea che la disciplina della proprietà individuale esaurisse il mandato del legislatore; 2) integrare la normativa e, contemporaneamente, gli studi teorici. Compilare una teoria della proprietà, moderna nei contenuti e completa nel dettato normativo, per Valenti significava la padronanza assoluta della normativa vigente — legislazioni speciali comprese — e la conoscenza di tutte le condizioni particolari che regolavano tale negozio giuridico e che non entravano nella codificazione formale. Secondo Valenti, tutti gli autori avevano mancato questo intento. Esistevano soltanto analisi condizionate da peculiari punti di vista — come quella dei socialisti — o che contenevano scampoli di verità (184). L'errore stava nella mancata distinzione tra proprietà sui beni naturali e quella sui beni

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sembra aver preesistito alla formazione del diritto romano, quale pervenne a noi nelle Pandette, e risale ai tempi primitivi, se non anche anteriori alla costituzione della proprietà privata. Certo è che trattasi d'una forma di proprietà e del suo uso, di cui non si potrebbe determinare l'origine e che per molti secoli ha resistito al variare di domini, di ordinamenti politici e sociali, di costumi e di dottrine. Le comunanze hanno un regime rappresentativo per le deliberazioni d'interesse generale, sono amministrate da due "massari" che ricordano i due consoli dell'antichità; negli statuti consuetudinari è sempre una sapiente previdenza, affinché gl'interessi dei singoli siano in armonia con quelli della collettività. Il dominio comune si tripartisce in bosco, pascolo e terra coltivabile. Nel bosco ognuno fa provvista del combustibile per il consumo della famiglia e del legname da costruzione per usi domestici e agrari. Il pascolo si esercita nei boschi di alto fusto, nei campi seminativi dopo il raccolto. Ogni famiglia ha in uso esclusivo, ma temporaneo, qualche appezzamento coltivabile. I prodotti dei tagli dei boschi e della falciatura si dividono tra i comunisti. Il godimento della comune proprietà è subordinato al lavoro proprio ed è in proporzione ai bisogni della famiglia ». J. LUSSU, *Le comunanze picene*, cit..

(184) Per rafforzare con un esempio pratico la forza della parola, l'economista si riferisce al motto « la proprietà è un furto ». Una « bestemmia del genere », per usare il suo gergo, era esatta perché « sintesi brutale e rabbiosa » di un ordinamento pieno di anomalie ed ingiustizie. Chi deteneva in proprietà, formalmente e deliberatamente, non aveva rubato nulla anche se ladri potevano essere definiti *certi* proprietari incapaci e assenteisti che sottraevano all'iniziativa di chi aveva volontà i necessari mezzi di produzione. La falsa capacità euristica di questo motto lo aveva convinto che i sentimenti utopici dei primi socialisti avevano avuto facile gioco tra le menti più deboli e in un mondo dominato dalla arbitraria convinzione che il titolo di proprietario aggiungesse meriti peculiari alla naturale costituzione psicologica dell'assegnatario. Il contratto di proprietà in sé non è lesivo dei principi dell'equità e dell'economicità. Lo è di fatto, nella vita di tutti i giorni. Per il riferimento a Proudhon e le citazioni nel corpo del testo, cfr. G. VALENTI, *Le forme primitive e la teoria economica della proprietà*, cit., p. 62.

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prodotti, perché soltanto la seconda doveva essere assoluta. La prima non entrava nel campo della soggettività individuale, dato che l'uomo non aveva il diritto di appropriarsi dei mezzi di produzione non trovandosi « il rapporto necessario su cui fondare un tale diritto » (185).

Valenti ragionava intorno alle qualità di un sistema economico sostanzialmente cieco di fronte alle persone. Da questo punto di vista, il titolo di proprietà non era un requisito necessario in quanto, al regolare procedere degli atti economici, erano sufficienti il possesso stabile ed esclusivo di una porzione del bene naturale, il diritto di godere dei frutti del proprio lavoro e la garanzia della contabilizzazione finale delle migliorie apportate dall'assegnatario: un contesto al cui disegno concorrevano lo Stato e la disciplina dell'enfiteusi. Nella separazione tra proprietà e possesso dei mezzi di produzione, l'assegnazione allo Stato della loro titolarità in proprietà non aveva motivazioni etiche ma solo pratiche. Lo Stato esisteva e, quindi, liberava il sistema dalla necessità di creare un meccanismo *ad hoc* e non imponeva costi aggiuntivi alla gestione aziendale. Nell'ambito dell'economia rurale l'intervento pubblico doveva servire per « ravvivare la privata iniziativa, fonte perenne di ogni progresso economico » (186). La collocazione dello Stato all'esterno del rapporto di produzione non era alterata da considerazioni di ordine morale. A questo proposito, nulla in Valenti può indurre a pensare che per lui le masse proletarie dovessero essere difese dall'arroganza dei padroni e dallo spirito aggressivo del capitale. Lo Stato era un arbitro che definiva le regole del gioco e regolava la ripartizione dei mezzi di produzione secondo criteri di economicità e in base alle qualità personali degli operatori. A sua volta, l'enfiteusi, oltre a riparare ai citati difetti, aveva il vantaggio di apparire identica alla proprietà nella percezione esterna (187). Ciò che importava non era

(185) *Ibidem*, p. 64.

(186) Su questo punto specifico, cfr. G. VALENTI, *Indole e importanza dell'economia rurale*, cit., p. 6.

(187) Valenti esprime un giudizio di preferenza per l'ordinamento giustinianeo rispetto alla codificazione dell'età repubblicana dato che, in quella fase, l'ampliamento territoriale dell'impero era coinciso con l'allargamento del diritto di proprietà e di cittadinanza a soggetti esterni all'antica *gens* romana. Secondo l'economista maceratese, l'enfiteusi era una soluzione praticabile soltanto se proteggeva il possessore dalla volontà

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essere proprietario ma comportarsi — apparire — come tale nell'esercizio di una sovranità generale sulla cosa. Il diritto di enfiteusi risolveva altresì alla radice le problematiche connesse alla gestione dei beni indivisibili e dei monopoli naturali. Da osservare che, a parere dell'economista, i benefici risultati garantiti dall'enfiteusi non potevano essere conseguiti tramite l'acquisto della proprietà per atto tra vivi. Due erano le ragioni per le quali la normale contrattazione di mercato non poteva garantire un'efficiente ripartizione delle risorse. Esisteva una domanda a scopo d'investimento, per conseguire una rendita, indipendente dalla volontà di applicarsi nella produzione. In secondo luogo, il proprietario godeva di uno status in virtù del quale il privilegio sociale condizionava l'ordinamento economico.

Valenti diceva che le sue non erano illazioni campate in aria o voli pindarici, ma tesi che « discendono limpide e certe » dall'osservazione del tempo storico (188). Lo stile d'indagine dell'economista giustifica l'accostamento con uno strumento estraneo ai suoi tempi e alla sua cultura come lo spazio culturale unico, perché è egli stesso ad accostare la visione complessiva di un fenomeno a termini che attengono al piano linguistico della ricezione di un messaggio, cioè al modo in cui la proprietà veniva percepita ed utilizzata nella pratica quotidiana. A parere di Valenti, era il mestiere stesso dell'economista a selezionare naturalmente questo metodo di riflessione perché, di fronte agli istituti sociali e alla loro normativa di riferimento, l'economista era abituato a cogliere la *ratio* di ogni fenomeno e valutare l'adeguatezza di ogni struttura normativa ai bisogni puntuali della società. Nel caso specifico della proprietà, l'oggetto di riferimento era la conciliazione degli interessi del proprietario con quelli del lavoro agricolo, nella prospettiva della massimizzazione dell'interesse collettivo. Dati questi presupposti, Valenti concludeva che l'economia politica non aveva nel proprio statuto il compito di difendere la proprietà privata, perché quella sanciva soltanto il

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del proprietario di recuperare la pienezza delle sue prerogative. In questo senso, la durata del contratto doveva essere particolarmente lunga e inequivocabili i termini relativi alla chiusura della concessione.

(188) Per la citazione, *Ibidem*, p. V. G. VALENTI *Le forme primitive e la teoria economica della proprietà*, cit., p.v..

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privilegio di pochi. In secondo luogo, l'interesse collettivo era garantito più efficacemente dall'enfiteusi (189).

« Molti economisti han detto e ripetuto che l'Economia politica ha il compito di difendere la proprietà e qualcuno più particolarmente ha posto tra gli scopi pratici dell'economia rurale quello ch'essa dissipa il pregiudizio che la proprietà sia un privilegio, mentre la medesima è una necessità sociale, è a tutti accessibile come ogni altro valore e non importa necessariamente che fra proprietari e coltivatori esistano interessi contrari. In queste asserzioni che racchiudono la quintessenza dell'ortodossismo economico non crediamo poter consentire. Ormai i molteplici e fecondissimi studi venuti in luce in questi ultimi tempi per opera di illustri economisti e giuristi non ci permettono più di parlare di una proprietà ideale, quale troviamo magnificata nei libri dei filosofi del diritto, ma che non ha, né ebbe mai concreta esistenza. Noi dobbiamo giudicare della proprietà come ci si presenta di fatto, cioè nella grande varietà delle sue forme storiche e il nostro esame deve essere diretto ad avverare quel che in esse vi ha di necessario e di accidentale, onde escogitare a grado a grado quell'ordinamento legislativo della medesima, che meglio risponda ai bisogni economici della nazione. Dire che l'economia politica e l'economia rurale giustificano la proprietà qual è, è porle al servigio di particolari interessi, è attribuir loro un ufficio, il quale ripugna all'indole nobilissima della scienza, che vuol essere indipendente da ogni freno e, come già fu detto, ricerca la sola verità, qualunque interesse questa possa offendere e a qualunque danno possa esporci. Noi diciamo pertanto che l'Economia rurale dissipa il pregiudizio che la proprietà sia un privilegio » (190).

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(189) « L'enfiteusi è forse il solo mezzo pel quale sia dato armonizzare l'interesse pubblico della coltura con quello dei coltivatori ». G. VALENTI, *L'enfiteusi e la questione agraria in Italia e in Irlanda*, cit., p. 3. L'enfiteusi garantiva l'interesse collettivo contro le scelte antieconomiche dei proprietari oziosi. Inoltre, essa non faceva diventare il coltivatore enfiteuta schiavo della terra perché, alla cessazione del contratto, egli aveva diritto alla contabilizzazione delle migliorie apportate. Apparteneva a quello stesso insieme di condizioni materiali che aveva consentito la conservazione della proprietà collettiva e, soprattutto, metteva il coltivatore enfiteuta in posizione migliore rispetto a quella del mezzadro, dell'affittuario e del salariato rurale.

(190) G. VALENTI, *Indole e importanza dell'economia rurale*, cit., p. 14.

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L'evidenza che la proprietà terriera potesse far parte del corredo dell'apparato economico dello Stato segna la frattura tra l'opera di Valenti e gli studi similari e induce studiosi come Grossi a testimoniare a favore della modernità dell'economista marchigiano. Le sue considerazioni su chi dovesse essere titolare di diritti sul fattore primario erano determinate dall'esigenza di un'esclusiva ricerca di efficienza economica (191), avulsa da qualsiasi giudizio intorno a quanto lo Stato poteva o non poteva fare secondo i dettami del liberalismo classico. Quello era compito della politica e doveva restare tale.

In secondo luogo, Valenti, oppositore intransigente del pensiero marxiano, si accoda a Marx nel sostenere che « la terra è un grande laboratorio, l'arsenale che dà e i mezzi di lavoro e il materiale di lavoro, così come la sede la base della comunità » (192). Il lavoro umano estrinsecato sulla terra definiva *status*, regole di comportamento e vincoli sociali che trascendevano la volontà e i comportamenti del singolo. Va da sé che le qualità del bene terra diventavano inevitabilmente il modello al quale si rapportano le altre forme dell'attività umana. Per questo motivo l'occhio del legislatore e quello dello studioso devono andare necessariamente dalla proprietà della terra agli altri modelli e non viceversa. La terra era il modello a cui si uniformano tutti gli altri regimi proprietari onde per cui, essa esauriva totalmente la disciplina generale di questo titolo normativo (193).

L'uso di un concetto marxiano non è un vezzo o un indebito tentativo di nobilitare il pensiero dell'economista maceratese in

(191) Convinzione giustificata dall'evidenza che il malato non potesse curarsi da sé. « Ma non è maraviglia che il malato non sappia indicare il rimedio: è già molto ch'egli abbia saputo da sé indicare la sede del morbo ». G. VALENTI, *Le forme primitive e la teoria economica della proprietà*, cit., p. XIV. In virtù di ciò, l'allargamento della codificazione formale alle forme consuetudinarie è l'unica soluzione praticabile per contrastare una proprietà quiritaria che sanciva soltanto i diritti dei più forti. Formalmente, secondo Valenti, nessuna forza si opponeva ad una modifica sostanziale della legislazione nel senso da lui desiderato. Essendo questi correttivi parte integrante della realtà fatturale, lo studioso non inventa nulla di nuovo ma suggerisce soltanto al legislatore la strada da percorrere.

(192) K. MARX, *Forme economiche precapitalistiche*, III edizione a cura di J. Hbsbaum, Editori Riuniti, Roma, 1974, p. 71.

(193) In ragione delle sue premesse, Valenti assegnava alla legislazione speciale il compito di disciplinare la proprietà di oggetti diversi dalla terra.

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quanto, come egli aveva spiegato nell'introduzione a *Studi di politica agraria* del 1914 (194), Valenti non si sentiva in debito con la propria coscienza per aver utilizzato argomenti qualificanti di quella corrente di pensiero. Egli li giudicava parte integrante di un sapere che apparteneva a tutti. Valenti ne traeva un insegnamento. Si potevano zittire le sirene socialiste incoraggiando i giovani studiosi a sviluppare la capacità di tessere insieme tutti gli aspetti significanti di un dato fenomeno. Operazione fattibile solo con una competente conoscenza del passato. La natura polissemica dell'oggetto proprietà gli pareva l'esempio ideale per dimostrare questo suo punto di vista.

Vi è infine un punto 3): le suddette correzioni avrebbero svuotato definitivamente le pretese dei socialisti. La proprietà privata sarebbe stata spogliata del suo carattere universalistico-sacrale e il dibattito avrebbe perso i suoi connotati ideologici. Riflessione e proposta di rinnovamento della normativa in tre diversi tempi logici che, a parere di Bellanca, si potrebbero riassumere in una duplice pulsione che avrebbe animato l'economista maceratese: un anelito riformista che mutava « uno *status quo* intollerabilmente ingiusto » e l'applicazione di correttivi che ripristinassero l'ordine naturale (195). Un ordine naturale che si reggeva sul (e, spontaneamente, realizzava il) principio secondo il quale « l'utilità privata deve cedere alla pubblica e la utilità privata minore alla maggiore » (196).

Un'analisi che, invece, nell'opinione di Grossi, trova nella preposizione *delle* applicata a "proprietà" il segno di un indiscutibile progresso rispetto alla letteratura dei suoi contemporanei perché, nell'assegnare una funzione economico-sociale alla proprietà collettiva non subordinata a quella della proprietà individuale, l'economista opponeva argomenti costruttivi contro chi lo aveva accusato di essere anacronistico ed antistorico (197). Paladino di questa posizione

(194) Per questa citazione, si veda la nota 164 di questo scritto.

(195) Sui termini di questa valutazione, cfr. N. BELLANCA, *I "correttivi naturali" della distribuzione: costi dello sciopero e vantaggi della cooperazione*, op. cit., pp. 358-359. Per un giudizio di Valenti in merito alla superiorità dell'ordine naturale su qualsivoglia sistema artificiale, cfr. G. VALENTI, *Cooperazione e proprietà collettiva*, cit., p. 22.

(196) G. VALENTI, *La proprietà e l'evoluzione economica*, cit., p. 190.

(197) Panorama culturale che, secondo Valenti, era composto dalle opere di Maine e da quelle dei suoi figli spirituali fino a De Laveleye. Maine era l'unico al quale l'economista maceratese sentiva di poter attribuire la nomea di innovatore. De Laveleye

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era soprattutto Giuseppe Salvioli in una recensione del 1894. Il giudizio di Salvioli deve essere letto sotto una duplice valenza. In primo luogo, il socialista Salvioli libera Valenti dall'accusa di appartenere alla sua parte politica. Valenti non nutriva malevolenza contro la libertà di possedere, la sua opera non mortificava i proprietari e non vanificava l'interesse legittimo a mantenere l'integrità dei fondi e la ricerca di combinazioni produttive sempre più efficienti. Egli era comunque anacronistico ed antistorico, perché combatteva le ragioni del lavoro contro quelle del capitale con armi non appropriate. In particolare, Valenti s'illudeva di eliminare i difetti del regime di proprietà privata con la diffusione dell'enfiteusi, non accorgendosi che « l'enfiteusi è morta, né risorgerà più, perché è forma che non risponde più alle tendenze prevalenti in un sistema capitalistico: nacque e crebbe quando mancavano le braccia, ma è scomparsa come la popolazione agricola fu esuberante e si elevò la rendita. Perché dovrebbe in queste condizioni il proprietario dividere e perdere in perpetuo una forte parte di rendita, contentandosi di una quota fissa, rinunziare a tutti gli aumenti certi, quando egli può coltivare con altri mezzi e avere per sé tutta la rendita? » (198). Secondo Valenti, invece, l'enfiteusi era una forma di conduzione della terra colpevolmente obliata e che, sebbene antichissima, aveva il merito di apparire come nuova e, quindi, utile a riformare l'assetto della proprietà fondiaria a favore della valorizzazione del lavoro umano e contro la volontà di accaparramento delle persone. In

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aveva invece il merito di aver incasellato una serie di fatti slegati in una versione semplice ed immediata della teoria della proprietà. In proposito, cfr. G. VALENTI, *Le riforme primitive e la teoria economica della proprietà*, cit., p. 2. Per altri fondamentali studi sull'origine della proprietà estranei al sentire dell'economista, cfr. F. ENGELS, *L'origine della famiglia, della proprietà privata e dello Stato*, III edizione, a cura di Fausto CODINO, Editori Riuniti, Roma, 1970; C. MARX, *Forme economiche precapitalistiche*, cit..

(198) Cfr. G. SALVIOLI, Recensione a *Ghino Valenti, "L'agricoltura e la classe agricola nella legislazione italiana*", « La riforma sociale », anno I, vol. II, 1894, p. 1049. Per una combinazione diversa dei medesimi argomenti che conduce ad un giudizio positivo sulla qualità e la modernità del lavoro di Valenti, cfr. P. GROSSI, *Un altro modo di possedere: L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, cit., p. 293. Per una valutazione recente della figura e dell'opera di Salvioli, cfr. P. COSTA, *Il "solidarismo giuridico" di Giuseppe Salvioli*, « Quaderni fiorentini per la storia del pensiero giuridico moderno », nn. 3-4, 1974-1975, pp. 457-494.

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particolare, essa consentiva di frammentare le grandi proprietà senza rivoluzionare con la forza gli assetti proprietari (199).

L'economista credeva profondamente che il suo orizzonte analitico non fosse riempito da due diverse e distinte forme di proprietà, ma da un'unica tipologia normativa. Quello di proprietà era un diritto universale che non veniva modificato dalle forme di esercizio e dalla titolarità dei suoi beneficiari. La proprietà collettiva e quella individuale non erano confliggenti tra loro nella legittimazione reciproca e negli obiettivi che perseguivano. Esse erano parte integrante del medesimo *corpus* teorico e risultato finale di un processo evolutivo che aveva interessato la forma dell'uso piuttosto che il contenuto del diritto medesimo (200). Non due tipologie diverse ispirate da motivazioni e ideali differenti, ma un universo indistinto che si evolveva in una costante e continua compressione ed estensione delle sue forme applicative in risposta ai bisogni della società e alle condizioni ambientali (201). L'obiettivo era quello di scegliere la forma più appropriata al tipo di attività economica da svolgere, alla morfologia del territorio, alla quantità e qualità del fattore lavoro disponibile e degli altri strumenti di produzione; fattori che trovavano la loro espressione formale nella cosiddetta « unità di azienda agricola » (202). Secondo Valenti, questo argomento dissipava qual-

(199) « Ma per istituire la piccola coltura non è indispensabile il crear prima la piccola proprietà ». G. VALENTI, *L'enfiteusi e la questione agraria in Italia e in Irlanda*, cit., p. 39. Valenti era contrario all'espropriazione delle grandi proprietà perché quella una misura violenta che perturbava gli equilibri sociali e non garantiva la realizzazione di una distribuzione efficiente e razionale delle terre. *Ibidem*, pp. 138-140.

(200) Cfr. G. VALENTI, *Le forme primitive e la teoria economica della proprietà*, cit., p. IX.

(201) In proposito, così Bonfante: Valenti « demolisce un preconcetto, che è causa di tutte le illusioni e di tutte le battaglie tra individualisti e socialisti (…). Esso è il seguente: che la proprietà rappresenti un istituto veramente unitario per tutti gli oggetti. In realtà il principio sociale e il principio individuale, che si riflettono nella proprietà, vengono secondo gli oggetti a contemperarsi in una proporzione così diversa e così varia nel tempo da rendere assolutamente vana ogni disputa che non tenga conto di questo diverso atteggiamento ». P. BONFANTE, *Gli uomini dell'Italia odierna. Ghino Valenti*, cit., p. 357.

(202) Per la prima utilizzazione di questa definizione, cfr. Archivio di Stato di Macerata, *Archivio della Regia Università di Macerata*, b. 56, *Argomenti delle materie (1880-1890),* cit., Carta 2, p. 4. Nonostante fosse variabile, Valenti considerava l'unità di azienda agricola come una misura perfettamente operativa che si determinava in relazione a due elementi primari: la disponibilità di lavoro e lo stato del contesto

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siasi illusione che la scelta tra le due forme di proprietà attenesse all'ordinamento generale della società — liberalismo *vs* socialismo — in quanto la scelta o la conservazione della forma comunitaria non erano determinate politicamente dall'accoglimento dei precetti socialisti ma attenevano alla sola sfera della convenienza economica. Chiaramente, in virtù di quanto sopra, non possono essere attribuite a Valenti finalità antiliberali o considerare il trattato sulla proprietà uno scritto antiprogressista. L'economista maceratese non contestava né le modalità dei processi evolutivi che avevano condotto all'affermazione della proprietà privata come strumento più consono per il perseguimento dell'utile economico né la sua dominanza fisica ed economica. In merito alla sua posizione non avversa alla proprietà privata per mere ragioni ideologiche, Valenti è particolarmente esplicito nel passo seguente: « Se può ritenersi un'illusione del socialismo militante quella di credere che in un avvenire più o meno lontano all'ordinamento attuale della proprietà si andrà universalmente a sostituire la proprietà collettiva; se può esser posta in dubbio l'efficacia pratica della generale restaurazione, caldeggiata dal Laveleye, di questi istituti, di cui l'*Allmend* è il prototipo, non è men vero che contro la forma collettiva della proprietà sussiste un pregiudizio dottrinale. La legge di evoluzione della proprietà fondiaria parallela allo svolgimento graduale dell'agricoltura è stata presa da molti in un senso troppo assoluto ed esclusivo. Posto, si è detto, che la coltura intensiva è quella che rappresenta l'agricoltura progredita e che la proprietà individuale è la condizione necessaria dello esercizio di essa, niun'altra forma di proprietà può convenire ad un popolo civile. La proprietà collettiva appartiene alle epoche primitive della civiltà, la sua attuale esistenza non è che un anacronismo destinato col progresso a scomparire » (203).

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ambientale. In base a questi dati, venivano dedotti lo stock di capitale e la forma dell'impresa più consona allo svolgimento dell'attività economica.

(203) G. VALENTI, *Il rimboschimento e la proprietà collettiva nell'Appennino marchigiano*, cit., pp. 91-92. Poche pagine più avanti, Valenti descrive i vincoli che impedivano alla proprietà privata di affermarsi in ogni luogo. « Non sempre questo progresso è possibile, incontrando dei limiti la legge di svolgimento della coltura, così nelle condizioni irreformabili della natura, come in quelle economiche e sociali riformabili solo lentamente ». *Ibidem*, p. 93.

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Egli era, pur tuttavia, convinto che l'esistenza stessa di forme conservative — le arcaiche forme comunitarie — avrebbe consentito che la storia umana mantenesse il suo carattere evolutivo senza essere dominata dalla rivoluzione (204). Come argomenta con efficacia Grossi, economisti come Valenti ragionavano in termini di « proprietà funzione » in luogo di una « proprietà appartenenza », senza che il richiamo alla funzione della proprietà collettiva si riconnettesse ad un'istanza generale di collettivizzazione della società. La proprietà collettiva « è soltanto "un altro modo di possedere" che la storia ha largamente conosciuto, sorretto da proprii valori e non relegabile fra le curiosità o fra le immondizie » (205). Una legittimazione funzionale della proprietà estranea agli ideali ed ai costumi della tradizione socialista e dalla quale questi autori traevano argomenti utili a giustificare la loro mancata valutazione delle opere di Fourier, Marx, Engels ed altri (206). Carenze nella letteratura di riferimento che sono proprie anche di Valenti. In sostanza, l'operato di Valenti trovava la sua sintesi mirabile nella seguente riflessione di Salvioli: « Ora diritto è forza sociale: e chi non ha diritto nulla vale in società. Nella nostra società il diritto privato esiste solo per la proprietà. Chi nulla ha, è senza diritto: la cosa è tutto, l'uomo nulla » (207).

Le contestazioni di Salvioli a Valenti e soprattutto l'idea che egli combattesse una battaglia con armi sbagliate sono comunque importanti, perché colgono dei dati reali e la sostanziale ambiguità dell'autore. Reale l'esclusione dell'economista da un circuito di appartenenza e logicamente giustificato un certo risentimento verso

(204) In proposito, cfr. G. VALENTI, *Cooperazione e proprietà collettiva*, cit., p. 26. A differenza di Valenti, Engels legava indissolubilmente la rivoluzione alla qualità degli assetti proprietari: « Tutte le rivoluzioni fino ad oggi sono state rivoluzione per la difesa di un genere di proprietà contro un altro genere di proprietà. Esse non possono proteggere l'una senza violare l'altra ». F. ENGELS, *L'origine della famiglia, della proprietà privata e dello Stato*, cit., 1970, p. 143.

(205) P. GROSSI, *Un altro modo di possedere*, cit., p. 38.

(206) Circa questi vuoti e, soprattutto, in merito alla colpevole sottovalutazione degli accurati studi di Engels sulle proprietà collettive presso le antiche popolazioni germaniche, cfr. P. GROSSI, *Un altro modo di possedere*, cit., p. 37.

(207) G. SALVIOLI, *Discorso letto nella solenne inaugurazione degli studi*, Annuario della Regia Università di Palermo, AA. 1890-91. Per una riflessione critica intorno a questi temi, cfr. G. VALENTI, *L'agricoltura e la classe agricola nella legislazione italiana*, cit., pp. 42-54.

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i propri simili, tipico di un proprietario appena privato dei suoi tradizionali mezzi di sussistenza che, nella sua nuova ed incerta collocazione sociale, non ammette i suoi errori circa i metodi di amministrazione della terra. Critiche di un escluso che convergono in uno schema di pensiero votato, fin dall'origine, a contestare l'assenteismo proprietario e i suoi effetti perversi dal punto di vista di un retaggio culturale di chiara marca accademica, che Valenti aveva appreso per tradizione familiare (208). Perdita dei segni distintivi di classe e un'incerta collocazione sociale, delle quali non ci si può dimenticare perché hanno dato motivo ai suoi contemporanei per assegnare a Valenti un posto vicino a quello dei socialisti. Da questo punto di vista, nonostante le sue ripetute prese di distanza, risaltano quelle parti dell'opera nelle quali la proprietà quiritaria è considerata un contratto di genere classista eretto a protezione di un ordine sociale. « L'Economia politica non può demandare che al diritto di proprietà si dia un'estensione maggiore di quella qui innanzi indicata; non può perché un'estensione maggiore non si addimostra necessaria, ma perché riesce in fatto socialmente nociva » (209).

6. *Appendice: Valenti e Morselli sul libero arbitrio.*

Nella prospettiva di una ricostruzione puntuale del percorso culturale compiuto da Valenti, dai lavori preliminari per l'inchiesta Jacini agli studi sulla proprietà, gli unici materiali che rischiano di non essere valorizzati a sufficienza sono quelli relativi alla recensione dell'economista maceratese a « Il Suicidio » di Enrico Morselli e al successivo scambio epistolare con l'autore, in quanto essi erano gli unici a non essere espressamente finalizzati all'approfondimento dei caratteri del quadro economico-agrario marchigiano. L'apparente lontananza dai temi prediletti, però, non muta per nulla il carattere della ricerca di Valenti: ferma la sua lista dei riferimenti culturali, l'opzione per una scienza pratica contro una vocazione per i teoremi

(208) Per le prime critiche, in ordine di tempo, contro i proprietari assenteisti, cfr. G. VALENTI, *L'istruzione agraria nella nostra provincia*, cit., parte IV, pp. 142-143.

(209) Archivio di Stato di Macerata, *Archivio della Regia Università di Macerata*, b. 56, *Argomenti delle materie (1880-1890)*, cit., Carta 1, p. 4.

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e le parole vuote, la dimensione laica della ricerca contro le analisi inficiate dalle ideologie e, soprattutto, la sua insofferenza contro i dibattiti sterili, che si esprime in un magistrale « faccio punto e per sempre » (210) con cui chiude la sua risposta alla lettera ricevuta da Morselli contro i suoi primi appunti critici.

Per ragioni di completezza e in virtù dell'assenza di questi titoli nelle bibliografie di riferimento stilate da Rocca, Virgilii e da Valenti stesso e della loro apparizione su un supporto di esclusiva diffusione locale, si è scelto di dare lustro a questo sforzo editoriale dello scienziato maceratese, ripubblicando integralmente questi tre articoli nell'appendice di questo scritto.

"Il suicidio". Saggio di statistica morale e comparata del Prof. Enrico Morselli, Direttore del Manicomio di Macerata, Milano, Dumolard, 1879, opera premiata dal R. Istituto Lombardo e compresa nella Biblioteca Scientifica Internazionale (211).

Il libro dell'egregio amico, Prof. Morselli, si presenta nel mondo scientifico con un battesimo così onorevole e in così buona compagnia, che il darne un giudizio sarebbe per parte mia opera presuntuosa. Nemmeno è mia intenzione di farne una completa rassegna bibliografica, che nol concederebbe lo spazio.

Mi piace soltanto, soffermandosi all'Introduzione, di riassumere brevemente le principali idee in essa svolte e di cogliere il concetto informativo del pregevole lavoro.

Il Prof. Morselli è un cultore tanto appassionato degli studi statistici (e questa Rassegna ha avuto parecchie volte l'onore di pubblicare alcuni suoi interessanti articoli di statistica) che è forse portato talvolta, non che ad esagerare l'importanza, ad attribuire alla scienza statistica una funzione, che non è precisamente quella che le compete, fra le varie banche dello scibile umano. Di più la profonda e larga conoscenza che egli ha delle scienze naturali fa si che nel campo delle scienze morali sembri alcuna volta il fisiologo soverchiare il psicologo, il medico, il cultore delle scienze sociali.

Il libro del Morselli ci prova in certo modo la giustezza di un arguta osservazione del Lampertico, che cioè « le scienze fisiche quasi per vendicarsi della tirannia un dì sofferta dalla scienze filosofiche, dopo essersi rivendicate in libertà, diventano oggi usurpatrici alla lor volta coll'eliminare tutto un intero ordine di fenomeni, col dissimularne i problemi, e, come essere rimproveravano alla filosofia di sopprimere la scienza della natura tutta quanta così alla lor volta sopprimendo la scienza di tutto quanto l'uomo » (*Statistica e libero arbitrio* — Memoria letta nel R. Istituto Veneto di Scienze, lettere ed arti).

Invero ad alcune recise affermazioni scientifiche dell'autore io non saprei così facilmente sottoscrivermi, né coloro che in Italia hanno propugnato validamente

(210) G. VALENTI, *Sul libero arbitrio e sul determinismo in sociologia*, cit., p. 226.

(211) *Ibidem*, anno I, n. 37, 14 dicembre 1879, pp. 197-199.

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l'applicazione del metodo statistico alle scienze sociali, come il Messedaglia, il Lampertico, il Morpurgo, il Gabelli, il Bodio, sono sempre con lui.

Secondo il concetto del Morselli il metodo statistico s'identifica col metodo d'osservazione ed è solo buono a condurci alla scoperta del vero. « Tutti gli altri sistemi di induzione empirica, fin qui creduti erroneamente valevoli di condurre a felice resultati, debbono abbandonarsi ». Quest'affermazione mi sembra eccessiva. La Scienza economica, che più di ogni altra scienza sociale, si è giovata del metodo statistico, non per questa sola via è venuta alla scoperta delle leggi che governano l'ordine economico. Il metodo di cui l'Economia si serve è un metodo misto di deduzione e d'induzione, né i materiali per l'induzione le vengono soltanto forniti e preparati dalla statistica, ma eziandio dalla storia e dalla individuale esperienza. Il metodo statistico è un metodo assai facile ad adoprarsi: un quadro statistico è presto fatto, una media è presto trovata; ma è anche un metodo che può condurre con tutta l'apparenza dell'esattezza matematica ad erronee conclusioni. Esso serve meglio a raffermare le verità conosciute per via di semplice induzione ed intuite, che a farne scoprirne delle nuove, ed ha sempre d'uopo, quando trattisi di fatti su cui influisce l'umana libertà e che sfuggono spesso ad una esatta valutazione numerica, di essere sussidiato dall'osservazione storica ed individuale.

Ho detto: *di fatti sui quali influisce l'umana libertà*: ma il Morselli nega recisamente l'esistenza del *libero arbitrio*; egli non si contenta di porre de' limiti alla *libertà attuale* dell'uomo, ma in esso non riconosce nemmeno una *libertà potenziale e relativa*, quella che ammettono generalmente secondo le più moderne teorie filosofiche, tutti i cultori delle scienze sociali, comprensivi i più distinti statistici.

La teoria del libero arbitrio egli la getta da un canto fra *le vecchie armi* della metafisica, e *metafisici* chiama anche coloro che l'intendono oggi assai diversamente dagli antichi filosofi e in un modo che bene si concilia con l'esistenza di leggi naturali che governano l'ordine morale.

« La base su cui s'incardinano i principi della demografia etica, dice il Morselli, è quella medesima che serve per ogni scienza positiva: « ogni fenomeno è la conseguenza di fenomeni anteriori ». Introdotta nel campo psicologico essa si traduce così: « Tutte le azioni umane volontarie sono la manifestazione di funzioni naturali insiste nell'organismo cerebrale ». Partendo dal qual principio la statistica de' fenomeni di coscienza (*fatti morali*) ha altrettanto diritto alla esistenza quando la statistica de' fenomeni fisiologici o di natura indubitabilmente organica (*Fatti fisici*) ».

Ma chi è portato ad ammettere, dietro uno studio sperimentale delle esterne manifestazioni dell'umana volontà, che l'uomo è potenzialmente libero di agire in conformità della legge morale, non per questo viene a negare la possibilità di una statistica dei fatti morali.

Il Romagnosi ci pone in guardia da una pericolosa confusione che è fonte di errori non pochi e che intorbida l'apprensione del vero concetto della libertà morale. Deve distinguersi la libertà dall'indipendenza, la quale ultima, « è lo stato di una cosa in quanto va esente dalla necessità di determinarsi in forza di una causa estrinseca a lei; mentre la prima è l'esenzione di ogni ostacolo nell'esercizio di una forza ».

Libertà morale adunque non è la facoltà di agire indipendentemente da un motivo determinante l'azione, ma la potenza nell'uomo di formarsi per via di ragione questo motivo, di maturarlo nell'animo, pesando le conseguenze della

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propria azione e dominando anche gli impulsi dello estinto (212) brutale che lo spingerebbe ad operare diversamente; in altri termini è la facoltà di uniformare la propria azione ad una legge morale che la coscienza custodisce legge, che, come espimevasi giustamente il Gioberti, è estrinseca alla sua volontà e si presenta allo spirito come cosa distinta; moralmente impera, ma non è fisicamente necessaria alle azioni umane.

Tutto questo in potenza però: in fatto la libertà umana ha i suoi limiti. Sarebbe invero un assurdo il ritenere il bambino, il decrepito liberi al pari dell'uomo adulto nella pienezza del suo sviluppo intellettuale e morale; un rozzo selvaggio, al pari dell'uomo che vive immezzo all'odierno incivilimento; una povera donnicciuola al pari di un illustre scienziato; colui che agisce sotto l'impero di una forte concitazione, al pari dell'uomo che si determina ad operare dopo maturo consiglio.

Il grado di libertà morale di cui un uomo può disporre è proporzionato allo sviluppo del suo intelletto e della sua coscienza, e l'uomo completamente libero, al pari dell'uomo assolutamente ragionevole, non può concepirsi se non all'ultimo stadio dell'umano perfezionamento. Ragione e libertà s'immedesimano quindi, questa anzi non è che un attributo, una posizione di quella. Negare la libertà è negare la ragione è negare la possibilità dell'umano perfezionamento. Nessuno oppugna che l'uomo sia perfettibile perché imperfetto, e non può del pari oppugnarsi l'umana libertà, solo perché in fatto l'uomo è limitatamente libero.

In tal modo intesa la libertà morale, o *il libero arbitrio*, siano lungi così da quel tremendo fatalismo, secondo il quale ogni azione umana dipende da un indeclinabile destino, come da quella libertà casuale, o d'indifferenza, che non ammette nessun motivo determinante dell'umana azione, e per cui nelle singole azioni la volontà si attua senza altro principio che quello della propria potenza.

Né intesa in questo modo la libertà, si viene ad escluder l'esistenza di leggi generali che presiedono all'ordine de' fatti morali. Al contrario essa ne è una conferma. Quanto più gli uomini sono liberi tanto più le loro azioni tendono ad uniformarsi a norme comuni. Il sentimento del giusto, dell'utile del bello ha maggiore uniformità fra i singoli individui quanto più il popolo è progredito in civiltà e diffusamente colto. Le differenze, le contraddizioni, fra l'operare di questo e di quello sono appunto costituite da quelle cause che limitano in fatto l'umana libertà, non dalla esistenza della libertà istessa; cause che alla lor volta quando hanno, presso un popolo o in una data epoca, un'influenza generale e durevole, danno luogo esse stesse a leggi relative a circostanze di tempo e di luogo, e che cadono pure nel dominio della valutazione scientifica. La legge non dimostra che una *tendenza*, che nell'opera individuale non è sempre dato constatare, ma che si verifica nell'unità collettiva dell'opera di molti, poiché le varietà molteplici e multiformi nella grande quantità si eliminano e si compensano. Fra l'idea di libertà e quella di ordine tutt'altro che esservi contraddizione, vi è correlazione necessaria.

Sono queste verità di tutta evidenza e che sgorgano spontaneamente dall'osservazione di quei fenomeni che chiamansi psicologici. Che se l'uomo, invece di potersi determinare all'azione in forza di un ragionamento, come dall'esame de' fatti, che in ognuno di noi avvengono, sembrerebbe di poter arguire, agisce veramente dietro l'impulso di circostanze esterne ed indipendenti, o le sue volizioni non sono che la manifestazione di funzioni naturali insite nell'organismo cerebrale, non sarebbe egli bene, prima di affermarlo con assiomatica recisione, di darne una rigorosa dimostrazione scientifica?

(212) Refuso di stampa. Estinto in luogo di istinto.

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Finirò col Lampertico: « Si dica pure illusione la coscienza della nostra libertà, ma quest'illusione diviene la massima delle realtà, se nel fatto è la sola che possa spiegarci i progressi dell'umanità: quei momenti sovra a tutto nella vita de' popoli, come degl'individui, in cui questo grande impulso, questo dovere di ricominciare lo sentiamo profondamente nell'intima nostra energia: il momento in cui dentro ci parla il: *da nunc mihi hodie recte incipere*: il momento che è la vita nuova degli individui, come delle nazioni, le grandi ere di liberazione e d'emancipazione ».

Se però io mi sento portato da convinzioni profonde, corroborate dall'opinione di distinti scienziati, a non accettare le idee propugnate intorno al libero arbitrio dall'egregio Autore del *Suicidio*, non per questo io intendo di toglier pregi all'opera sua e di sfrondare quella corona che meritatamente gli spetta pel suo dotto ed accurato lavoro. Ciò potrebbe essere, quand'io mi facessi sostenitore di una teoria che venisse ad escludere l'esistenza di leggi naturali che governano i fatti del mondo morale, al pari di quelli del mondo fisico, e volessi rendere frustraneo l'ufficio, o anche solo menomare l'importanza della statistica considerata come scienza teoretica ed applicata. La differenza fra noi sta solo in ciò, nell'ammettere un *determinismo razionale*, se così mi è concesso chiamarlo, invece di un fatale *determinismo fisico*.

Il lavoro del Morselli, prescindendo da alcune sue idee filosofiche, e considerato come saggio di elaborazione statistica, è certamente tale da richiamare sovr'esso l'attenzione del mondo scientifico e da meritare il plauso generale degli studiosi. È una larga messe di fatti coordinati con sani criteri scientifici di cui viene ad arricchirsi il patrimonio della scienza; è un'illustrazione statistica intorno alle varie manifestazioni di un fenomeno psicologico, così completa come poche ne videro la luce, si in Italia che fuori. Ma dell'ordinamento dell'opera e dei resultati pratici delle ricerche del Morselli, per non trattenere di troppo i lettori, mi riserbo di dire in altro numero.

E l'autore, vorrà perdonarmi, lo spero, se mi permisi di porre in discussione alcune sue idee esprimendo comecchessia la mia opinione in proposito, come vorrà accettare pel suo pregevolissimo lavoro il tributo della mia profonda ammirazione.

Che la mia ammirazione è poca cosa per chi si ebbe già gli elogi di illustri scienziati italiani e stranieri, valga se non altro ad attestare all'egregio amico la mia gratitudine per la benevolenza di cui egli mi onora e insieme l'amore ardente, sebbene infruttuoso, a quegli studi di cui egli è cotanto benemerito.

G. VALENTI

Sul libero arbitrio e sul determinismo in sociologia (213)

Mi ero riproposto oggi di dare alcuni brevi cenni intorno all'ordinamento dell'opera del Morselli e intorno alle conclusioni che emanano dalle sue ricerche; ma poiché l'Egregio Autore ha voluto replicare alle mie povere considerazioni; sento l'obbligo di cedere il posto alla seguente sua lettera.

Caro Valenti,

Ho letto attentamente le sottili osservazioni, che hai voluto fare ai concetti da me esposti nell'introduzione d'un mio recente libro sul *Suicidio* a proposito del libero arbitrio, e mentre debbo ringraziarti di quanto quella critica contiene di cortese e benevolo a mio riguardo, ti voglio ricordare però, che nessuna delle tue

(213) « La Rassegna Provinciale », anno I, n. 38, 21 dicembre 1879, pp. 224-226.

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obbiezioni fu dimenticata nella mia opera, e che tutte hanno la loro risposta dal contesto e dai risultati delle mie ricerche. Certo la dialettica è una gran bella cosa; ma l'antica scuola dei metafisici ed idealisti ne ha troppo abusato, ed oggi nelle scienze naturali come nelle morali, nella fisica come nella sociologia, ai fatti soltanto, non alle parole, è attribuito il diritto esclusivo di risolvere le questioni.

Ebbene: senza volere ammanire ai lettori della *Rassegna* una vacua e teoretica discussione sul libero arbitrio (che incorreresti nel pericolo di vederti disdire tutti gli abbonamenti!), mi permetterai di gettar giù alla buona, e senza il disegno di continuare fino a quando potrei e vorrei, poche mie considerazioni in risposta alle tue.

1 Che le scienze naturali invadano il campo delle cosiddette *morali*, è vero, e il Lampertico ha ragione. Ma è anche vero che le scienze morali, dopo avere sbagliato metodo e indirizzo per una ventina di secoli, ora sono costrette ad accettare il metodo sperimentale, positivo, naturalistico (chiamasi come si vuole), se non vogliono essere minacciate di asfissia. Ma è pur vero, che la storia, la filologia, l'archeologia, l'economia politica, la sociologia, la psicologia, dopo essersi inaridite un pezzo fra i gingilli metafisici, subiscono ora l'influsso benefico e vivificatore del moderno naturalismo, e se avran forza a progredire, lo dovranno all'avere accettate e fecondate, ciascuna nel suo territorio, le idee evoluzionistiche.

2 Di trovarmi in contrasto con Lampertico, Morpurgo, Gabelli, sono dolentissimo; ma disgraziatamente non può essere a meno, dal momento che essi ammettono il concetto della *libertà relativa, o limitata, o graduale*, che veggo far capolino anche nella tua bibliografia, e che è un puro e semplice frutto del periodo di transizione in cui si trovano le scienze morali di fronte al naturalismo. Per noi, medici, naturalisti e psicologi, che non facciamo mai questione di parole, il *limitare* in modo qualunque l'antico concetto metafisico (dico sempre metafisico tutto ciò che è o che vuol essere fuori dalle leggi naturali) del libero arbitrio, o *libertà morale*, è un distruggerlo addirittura, perché spontaneità è negazione di necessità, e non si può creare un intermediario, se non coll'immaginazione, fra due opposti.

3 Non ho detto, come mi fai dire, che il solo metodo statistico debba sostituirsi agli altri sistemi di induzione empirica nella scienza economica, perché avrei parlato fuori della mia competenza. Ho detto bensì che *molte scienze, cioè la medicina, la meteorologia, la biologia, e l'antropologia, la stessa fisica e meccanica* sono costrette a servirsi ora del metodo numerico, e proseguendo (pag. 4 e segg.) ho tentato di dimostrare che nella stessa condizione si trovano già, e più si troveranno nell'avvenire, le scienze morali, fra le quali, se vuoi, metto anche l'economia.

4 Tutta le differenza fra i deterministi e gli economisti semi-metafisici (o razionalisti alla Hegel o alla Schelling!) sta in ciò che i primi non si servono mai di parole, che non abbiano un significato netto e preciso, mentre i secondi portano nella discussione sulla libertà morale un fardello pesantissimo di parole e di frasi, su cui bisognerebbe aprire discussioni secondarie interminabili senza mai trovarsi d'accordo, perché sono parole e frasi prese nell'arsenale della vecchia metafisica. Per esempio, ci sarebbe a discorrere un pezzo su queste che trovo nella tua bibliografia, e nello scritto del Lampertico da te citato più volte « legge morale » — « libertà potenziale » — « necessario e contingente » — « finito e infinito » — « potenza di formarsi un motivo » « legge custodita dalla coscienza » (qui appaiono le idee innate) — « perfezionamento umano » — « ragione » — « ordine dei fatti morali, e sue leggi generali » (qui si vede l'influsso di Augusto Conti [214] — « sentimenti del giusto, del

[214] Probabilmente, Marselli intendeva riferirsi ad Auguste Comte.

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bello, dell'utile » — « coscienza della nostra libertà » (!) — ecc. ecc.. E del seguente periodo del Lampertico, chi mi da la spiegazione? « Il pensiero assoluto, ripiegando sopra sé stesso come soggetto ed oggetto, per via di questa operazione intrinseca si gemina e si sparpaglia nelle due forme distinte dell'ideale e del reale, dello spirito e del corporeo universo ». — E di quest'altro ancora subito sotto? « Il problema si trasferisce nel campo dell'epopea, in cui il pensiero assoluto individua nel finito l'infinito, sino a che il finito stesso all'infinito si riconfonde ». Ecc!! Dante stesso, davanti a queste parole e frasi, dovrebbe ripetere: *Maestro, il senso lor m'è scuro*. Così si vaga sempre nel nebuloso, senza mai prender terra, o posar le piante sul sodo. Ora, non entra nel computo della vera scienza, inspirata al metodo sperimentale, l'addestrarsi a quella sterile ginnastica delle facoltà intellettuali, che l'hegelianismo ha saputo in pieno secolo decimonono introdurre nella filosofia.

Io non ho mai sostenuto un *determinismo fisico* contro ciò che tu chiami *determinismo razionale*. Volevi dire forse, con Oettingen, quel *determinismo da cause d'ordine morale* che il celebre teologo di Dorpat ha messo qual cardine dell'etica sociale (*Moralstatistik*). Ma l'ammettere che l'uomo si determini per motivi morali o razionali, non è provare che l'uomo è libero, bensì che non è delinquente o pazzo, nel qual caso si determinerebbe per motivi immorali o sragionevoli. Resta sempre a darsi la prova della spontaneità o libertà, giacché, come lo ha dimostrato il Ferri in un libro che tu, egregio amico, conosci e avrai certamente studiato (*La teoretica dell'imputabilità*), tutta la confusione proviene da ciò che i filosofi e i sociologisti della vecchia scuola non son giunti a provare più in là della *libertà fisica*, al che noi rispondiamo, come quel tale: sapevamocelo. Del resto, all'obbiezione, che tu mi rivolgi, di non aver data una rigorosa dimostrazione scientifica del determinismo, non risponde tutto il mio libro? Che, se si volesse un trattato di psicologia fisiologica, si potrebbero leggere le opere di Fechner, Wundt, Herbert Spencer, Herzen, Delbeouf, Laycock ecc. ecc. Ma il mio libro è un semplice saggio di statistica, e suppone nel lettore quelle cognizioni psicologiche, che io non potevo dare senza uscire dai miei limiti.

Dunque, mi dirai, una discussione non è possibile? Dunque voi altri, deterministi, volete ragione ad ogni costo?

No, mio caro Ghino — ma guardiamo un po' un gruppo di giocatori, dove uno chiegga al compagno picche e l'altro risponda coppe. È possibile che vadan mai d'accordo nelle loro determinazioni strategiche e vincano la partita? Così è in questa eterna nojosa questione del libero arbitrio. Permettimi di dirlo, da una parte vi è chi espone *fatti, fatti e fatti*; dall'altra chi si ostina a rispondere con *parole, parole, parole*. Non si finirà mai dal discutere. Quando i deterministi hanno scritto libri, come il mio, che pesano mezzo chilo di carta e costano persino otto lire, per dimostrare coi fatti che la volontà umana ubbedisce a leggi fisse, ci si torna a dire come prima, che la questione è assolutamente insolubile. O dunque, che si lavora per nulla? O dunque, si ha sempre a ricominciare, e tornare indietro?

Noi invece andiamo avanti, avanti, avanti; e chi non ci vuol seguire ora, sarà obbligato a seguirci più tardi, perché la scienza è *una*, e nessuna parte di essa può volontariamente arrestarsi nel suo sviluppo, mentre altre procedono e progrediscono. E così capiterà alla economia, se non va di pari passo colla filosofia, colla sociologia, e con quella scienza più recente, ma più nobile di tutte, che studia l'uomo in ciò che ha di più umano — cioè la psicologia.

Ti stringo affettuosamente la mano.

Di casa, 18 dicembre 1879

Tuo E. MORSELLI

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Senza la pretesa di replicare a tutte le obiezioni rivoltemi dallo egregio amico, Prof. Morselli, che discretezza verso i lettori, mi limito ad esporre poche e brevi considerazioni in risposta, nella seguente lettera:Caro Morselli [215],

Permettimi che qui sotto alla briosa tua lettera che ha se non altro il merito di aver sollevato i lettori dall'impressione della mia monotona prosa, punto *metafisica* però, io aggiunga poche e brevissime osservazioni.

Che la teoria intorno al *libero arbitrio* formulata dal Gabelli e da me accettata, sia una teoria *eclettica* non nego, ma non so nemmeno che l'eclettismo sia nella scienza pernicioso, come lo è forse nella letteratura, e nell'arte, dove l'originalità è dote precipua. La storia della scienza parmi anzi sia là a provarci che nessuna teoria venne mai fuori da mente umana completamente vera, ma che tutte le varie teorie, per quanto astruse e paradossali, contennero sempre un lato della verità, e che alla formazione di una teoria perfetta in tutte le sue parti non si giunse mai se non dopo un lavoro lungo e paziente di eliminazione e di coordinazione, nel che sta l'eclettismo. E tu, grande elaboratore di *medie* in statistica, è strano che respinga con orrore una teoria media, che concilia opposti pareri.

Né il concetto di una tendenza che nel fatto subisce limitazione, in altri termini il concetto di *legge limite*, è un concetto trovato apposta per giustificare la libertà morale dell'uomo. Esso è un concetto che domina oggi in tutte le scienze sociali e che non ha germogliato nel loro campo, bensì in quello delle scienze fisiche. Le leggi economiche, suscettibili di una dimostrazione rigorosa e matematica, come quella della divisione del lavoro, e quelle che regolano la circolazione de' valori, hanno pur sempre il carattere di *leggi limiti* [216].

Tu hai infilzato molte mie espressioni, ponendole innanzi ai lettori, come per accusarmi di *metafisicità*. Tutto quanto ho detto, io lo mantengo; e se vorrai un po' meglio considerarlo, ti accorgerai tu stesso che di concetti metafisici non ve ne erano affatto. Per esempio, quando ho detto: *principi custoditi nella coscienza*, non per questo ho voluto ammettere le idee innate, dacché la coscienza può custodire anche principi acquisiti e relativi. Né parmi possibile che tu debba riconoscere in me l'influsso delle idee di Augusto Conti, mentre ho fatto sempre uno studio particolare di tenermene lontano, e, tutt'altro che divise, le ho sempre combattute. Comprenderai che avendo accettato alcune teorie filosofiche come vennero *esposta* fra noi dal Gabelli, sarei troppo inconseguente se ne facessi uno strano miscuglio col neo-cattolicismo del Conti.

Del pari mi sembra che tu abbia citato a torto alcuni brani della Memoria del Lampertico, poiché in essi l'autore non esponeva concetti suoi, ma riassumeva teorie metafisiche, a provare che il concetto di leggi che regolavano i fatti umani non è cosa nuova, ma ammessa anche dalla vecchia filosofia.

Tu mi accusi, e in me accusi tutti i cultori delle scienze morali, di far sempre questione di parole. Vò provarti il contrario. A me pareva che l'espressione di *determinismo razionale* esprimesse ancor più precisamente che *determinismo da cause d'ordine morale*, il concetto della libertà, come dal Romagnosi venne intesa; ma io non faccio, credilo, questione di parole. A me preme soltanto di affermare che l'uomo non si determina ad agire necessariamente per forza di leggi insite nel suo stesso organismo, ma che può formarsi per via di riflessione il motivo determinante la propria azione, uniformando questa ad uno scopo che la mente ha concepito. Questa posizione speciale dell'uomo, che non può non esser presa in considera-

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(215) Data della missiva non indicata.

(216) Errore di Valenti: Leggi limiti in luogo di leggi limite.

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zione in una valutazione scientifica, la si chiami poi *libertà morale, libero arbitrio, determinismo razionale*, a me poco importa.

Per finire, il tuo libro ha grande valore, non perché pesa un chilo e costa otto lire, ma perché contiene un pregevolissimo saggio di elaborazione statistica; esso però non prova quello che tu dici, e che la statistica non potrebbe provare con tutta la copia dei fatti che poni in rilievo, che cioè l'uomo non è libero nel determinarsi ad agire; esso prova soltanto che le azioni umane sono governate da leggi, ma questo non è principio nuovo né in opposizione a libertà.

Tu, mio buon amico, seguita pure a correre innanzi, poiché hai buone gambe, con i pionieri della scienza. Cammina, cammina, cammina ed esercita pure il tuo alto disprezzo verso di noi, poveri e modesti operai, destinati a raccogliere quello che voi nella foga buttate da banda, e ad esaminare se per caso non vi fosse qualche cosa di buono. Ad andar piano un vantaggio c'è sempre; v'è meno pericolo di rompersi il collo.

L'assolutismo, caro Morselli, è l'arme appunto de' metafisici, le cui teorie vogliamo combattere; la prudente circospezione, il dubbio fecondo, il temperato relativismo sono le doti della nuova filosofia. Non facciamo che qualcuno possa dire con ragione che si rimette in vendita la stessa merce con gli stessi barattoli dove una volta sta scritto *metafisica* ed ora si è scritto *fisica*.

In quanto all'Economia, essa, credilo, cammina; e così potessi io tenerle dietro. Essa cammina, e tu non avresti dovuto dimenticare ch'è stata la prima fra le scienze sociali, e non da jeri soltanto, ad adottare il metodo dell'osservazione.

In una cosa noi andiamo pienamente d'accordo ed è sull'inopportunità di trattenere i nostri lettori con *arcadiche* discussioni. Quindi faccio punto e per sempre.

Professandoti sincera amicizia,

Tuo per la vita,

G. VALENTI

"Il suicidio". Saggio di statistica morale e comparata del Prof. Enrico Morselli, Direttore del Manicomio di Macerata, opera premiata dal R. Istituto Lombardo e compreso nella Biblioteca Scientifica Internazionale, Milano Dumolard, 1879. (217)

Ritardata, da uno scambio di considerazioni avvenuto fra me e l'egregio amico Prof. Morselli, a proposito del libero arbitrio, mantengo oggi la promessa di dare un breve cenno intorno all'ordinamento del suo pregevole lavoro e ai resultati delle sue ricerche.

Il Morselli si propone nel suo libro di illustrare nelle sue varie manifestazioni in fenomeno psicologico del *suicidio*, questo fenomeno che col suo spaventoso incremento ne' tempi nostri preoccupa la mente di ognuno. L'autore ha diviso la sua opera in due parti, *analitica e sintetica*. La parte analitica è la più ampia; la parte sintetica si restringe all'ultimo capitolo. L'autore ha voluto opportunamente, per dare consistenza alle sue conclusioni, farle precedere da una larga ed accurata enumerazioni di fatti, da un lavoro minuto, coscenzioso e completo di osservazione, in cui ha considerato « oltre il fenomeno sociale del suicidio in sé, tutte quelle

(217) « La Rassegna Provinciale », anno I, n. 39, 28 dicembre 1879, pp. 231-232.

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influenze, sia della natura esteriore, sia della costituzione individuale, che si esercitano sul numero e sul modo delle morti volontarie ».

Dopo di aver considerato l'incremento del suicidio in questo secolo, l'autore si è occupato in modo speciale delle:

1 *Influenze cosmiche o naturali*: clima — condizioni telluriche — stagioni e mesi — temperatura — fasi lunari — stagioni ed ore.

2 *Influenze etniche o demografiche*: razza, stirpe e nazionalità — caratteri antropologici (statura, tipi umani, morfologia cerebrale) — costumi — rapporti cogli altri fattori della demodinamica.

3 *Influenze sociali*: civiltà — religione e confessioni — coltura ed istruzione — moralità pubblica — commercio ed industria — economia pubblica — condizioni generali politiche ed intellettuali — densità della popolazione — vita urbana e vita rurale.

4 *Influenze individuali biopsicologiche*: sesso — età — stato civile — professioni — condizione sociale — temperamento morale e carattere fisiologico — motivi determinanti.

Finisce la parte analitica con un capitolo sui *modi e luoghi del suicidio*, in cui si dimostra come l'uomo nella scelta di essi sottostia alle numerose influenze sunnominate.

La lettura di questo capitolo è particolarmente interessante. In esso si conosce come fra tanti mezzi che la natura offre, il suicida non si determina pel primo che gli si presenta, ma vi è generalmente nel gran numero di coloro, che si tolgono volontariamente la vita una manifesta tendenza a prescegliere certi dati modi del pari che certi luoghi.

Un tal fatto per il Morselli, viene a comprovare evidentemente la non esistenza della umana libertà, e la comprova tanto più in quanto nessun atto umano, come la preferenza data ad un istromento di autodistruzione, sembrerebbe in rapporto con una libera elezione.

A me invece, mi sia permesso un'ultima volta di ritornare brevissimamente sull'argomento, sembra che provi il contrario e costituisca una dimostrazione luminosa di quella teoria della libertà, che ho la cocciutaggine di professare.

I suicidi avvengono principalmente per annegamento, impiccamento, armi da fuoco, ferite, avvelenamento, precipitazione ed asfissia. I casi di suicidi per altro mezzo, come l'inedia, lo schiacciamento, l'uso di corpi contundenti, l'urto del capo, le malattie d'infezione provocate, la crocifissione, il gettarsi nel fuoco e via di seguito, sono eccezionali o quali mai registrati nelle statistiche. « Dal che si desume, dice l'Autore, che nella scelta del mezzo di morte l'uomo è in generale guidato da due motivi, *la sicurezza dell'esito e la mancanza o brevità del dolore*. Quando il suicidio venga consumato con mezzi esageratamente dolorosi o a costo di una prolungata agonia si può in 99 casi su 100 stabilire che fu atto di mente sconvolta dal fanatismo, dalla pazzia, o da un eccitamento morboso ».

Più bella dimostrazione della libertà umana non avrei saputo dare. L'uomo è libero di scegliere fra tutti quei mezzi che meglio si acconciano al suo scopo, quei mezzi che gli assicurano una morte più pronta e meno dolorosa. *È la legge cosmica del minimo mezzo*, che riluce anche qui. Quando l'uomo agisce *indipendentemente* dai motivi razionali suaccennati, esso non è che è un pazzo, in altri termini non è LIBERO, perché la *libertà*, come con magistrale precisione diceva il Romagnosi, *è l'esenzione da ogni ostacolo nell'esercizio di una forza*.

Che anzi se l'uomo fosse completamente libero e in fatto la sua libertà non venisse da varie circostanze limitate, i modi del suicidio invece che parecchi dovrebbero restringersi ad un solo, perché, assolutamente considerata, dove esserci

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una forma di suicidio che meglio assicuri una pronta morte e che faccia meno soffrire.

Invece le forme di suicidio, come è stato accennato, considerate così nel tempo come nello spazio, sono varie ed a seconda delle varie influenze che il suicida subisce. Il clima, la razza, il sesso, l'età, la condizione, la professione v'influiscono patentemente. Ma anche in questa varietà una certa regolarità si manifesta pur sempre, regolarità che si verifica per esempio, considerando nella successione degli anni il reciproco rapporto de' vari mezzi di distruzione.

Ma ciò non prova appunto quello che mi permisi già di asseverare che quanto più gli uomini sono liberi, tanto più le loro azioni tendono ad uniformarsi a norme comuni, e che le differenze, le contraddizioni fra l'opera di questo e di quello sono appunto costituite da quelle cause che limitano in fatto l'umana libertà, non dall'esistenza della libertà istessa; cause che alla lor volta quando hanno presso un popolo in una data epoca un'influenza generale e durevole, danno luogo esse stesse a leggi relative a circostanze di tempo e di luogo e che cadono pure nel dominio della valutazione scientifica?

Sed de hoc satis!

L'ultimo capitolo del libro del Morselli, come ho sopra accennato, contiene la parte sintetica del suo lavoro. le conclusioni finali dell'egregio amico, che già durante lo esame analitico del soggetto fanno spesse volte comparsa, si riannodano alla teoria Darwiniana — Il suicidio non rappresenta che un ecatombe della *struggle for life*. « *Il suicidio non è che un effetto della lotta per l'esistenza e della selezione umana, che si operano secondo la legge di evoluzione de' popoli civili* ».

Il suicidio cresce fra i popoli in misura del grado d'incivilimento e cresce, dice l'autore, non tanto perché nello sviluppo elevato dell'organismo celebrale aumentano i bisogni da soddisfare, quanto perché è maggiore la partecipazione del cervello alla lotta.

È una legge che tutta l'opera del Morselli è svolta a dimostrare. Alcune carte cromolitografiche prese in fondo al bel volume ci fatto vedere come, fra le nazioni, contino un maggior numero di suicidi quelle maggiormente progredite in civiltà e nella stessa nazione quelle provincie che accolgono maggiori gremii di popolazione urbana. Parimenti il suicidio è quasi sempre in ragione indiretta dell'analfabetismo e fra le professioni quella che conta maggiore numero di suicidi è quella de' maestri.

Ma di fronte a questa verità sconfortante e che farebbe dubitare dell'umano progresso, l'autore viene opportunamente a ricordarci il rapporto inverso che il suicidio ha col delitto, il quale la statistica ha provato diminuire coll'incremento della civiltà. L'uomo rozzo ed ignorante deruba o uccide, l'uomo che ha cultura ed è moralmente educato preferibilmente si uccide. Il resultato finale è lo stesso, ma il valore morale dell'atto è ben diverso.

Il libro del Morselli termina con un breve paragrafo sulla profilassi del suicidio. Il suicidio non è un fenomeno isolato ed accidentale, ma si connette alle presenti condizioni di civiltà in tutto il loro svariato complesso. Impossibile quindi una cura del male immediata e sicura.

Tutta la cura di questo morbo, onde è afflitta l'umana società, conclude l'autore, sta racchiusa in questo solo precetto:

« *Sviluppare nell'uomo il potere di coordinare sentimenti ed idee, onde raggiungere un certo scopo nella vita, dar forza ed energia insomma al carattere morale* ».

G. VALENTI

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Letture

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ITALO BIROCCHI, *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna*, Giappichelli, Torino 2002, pp. 654.

Il libro di Italo Birocchi si presenta come un manuale di storia del diritto moderno; e certo conviene prendere sul serio la dichiarazione dell'autore e disporsi a riconoscere nel testo (anche) una precisa destinazione didattica, che si traduce in puntuali informazioni sui testi e i personaggi analizzati e trova conferma nei diversi livelli di lettura che il libro consente, permettendo al lettore di seguire il filo principale del ragionamento oppure di acquisire informazioni più analitiche scorrendo le parti in corpo più piccolo (per non parlare delle note, sempre precise e pertinenti).

Un manuale, dunque. Occorre però affrettarsi a dissipare equivoci che questo termine potrebbe alimentare. Se di manuale si tratta, siamo comunque di fronte a un esperimento (come lo chiama l'autore) assai poco incline ad accogliere quell'assillante richiesta di semplificazione che sta mettendo a dura prova il carattere 'universitario' della didattica nella quale quotidianamente ci impegniamo. Mi riferisco non tanto alla vastità dell'opera quanto alla complessità del disegno e alla molteplicità dei profili tematici: ad un procedimento argomentativo e ricostruttivo, insomma, che scoraggia le schematizzazioni e le contrapposizioni sommarie e facilmente memorizzabili.

La complessità del testo non è ovviamente un risultato imprevisto o un incidente di percorso, ma è il frutto di una precisa ed esplicita scelta, sorretta non solo da motivazioni 'scientifiche' (che non possono che sollecitare una rappresentazione il più possibile ricca e variegata della realtà storico-culturale), ma anche da intenti 'pedagogici': da una 'pedagogia' convinta del carattere stimolante e formativo delle difficoltà, una 'pedagogia' magnificamente compendiata dal verso di Neruda citato in nota (« … Non gli fate trovar tutto pensato/non gli leggete lo stesso libro… »).

Plasmato dall'intenzione di non far 'leggere lo stesso libro' (gli stessi libri), il manuale di Birocchi non è in realtà 'soltanto' un manuale: è un tentativo coraggioso di ripercorrere la modernità (dall'umanesimo alla rivoluzione francese e al Codice Napoleone, assunti nell'epilogo come segno di conclusione e di nuovo inizio), per un verso, seguendo un filo conduttore che impedisca di smarrirsi nel labirinto, per un altro verso, accettando di immergersi in quella grande varietà di testi e contesti che, con la molteplicità degli stili, approcci, orientamenti, valori che li caratterizza, rende difficile una rappresentazione convincente (non soltanto 'speculativa' o, peggio, ideologica) della 'modernità'.

La cifra della modernità (e il filo conduttore del libro, tanto

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rilevante da suggerire il titolo del volume) è, per Birocchi, il problema dell'ordine, anzi, più esattamente, l'ordine come problema: il passaggio dall'idea di un ordine già dato, iscritto nella natura stessa delle cose, alla consapevolezza che l'ordine non si dà, ma si costruisce. Hobbes è, da questo punto di vista, forse il più netto segnale di discontinuità fra due mondi: è il disordine, è il conflitto il dato originario, 'strutturale', mentre l'ordine, da struttura dell'esistente, da cornice predeterminata dell'azione, appare ormai un problema, *il* problema, da risolvere.

È netta e chiara dunque la distinzione fra il 'pre-moderno' e il 'moderno' finché restiamo nell'ambito della contrapposizione fra 'modelli' o schemi argomentativi di carattere generale: che valgono però (finché valgono) come criteri di orientamento, come ipotesi che devono essere verificate, circostanziate (se necessario, 'falsificate') nel corso di una lettura ravvicinata dei testi; il labirinto, come dicevo, entro il quale il libro di Birocchi intende coraggiosamente muoversi senza smarrire il proprio filo conduttore. Ed è appunto nel confronto con quella fitta pluralità di testi e contesti che chiamiamo 'moderna' che il nostro 'manuale' mostra, al contempo, la sua ricchezza analitica e la fecondità della prospettiva tematica adottata.

È impossibile soffermarsi, nello spazio di una recensione, sui singoli capitoli della ricostruzione proposta da Birocchi, ciascuno dei quali meriterebbe un'autonoma considerazione, data la messe di profili interpretativi e di dati messi a disposizione del lettore. Il nostro 'manuale' rende però possibili anche letture trasversali (le uniche riassumibili in questa sede): le rende possibili o addirittura le sollecita, nella misura in cui tornano a proporsi con evidenza, nel vivo della presentazione del singolo autore e del singolo testo, i grandi temi che costellano quella *ricerca dell'ordine* cui il libro è dedicato.

L'ordine come struttura immanente del reale, di contro alla visione costruttivistica e convenzionalistica caratteristica della modernità: si tratta certo di una contrapposizione plausibile e orientativamente utile, che però occorre specificare e complicare seguendola, come fa Birocchi, nei tanti e diversi itinerari della cultura giuridica 'moderna', mettendola in relazione con la rappresentazione della pluralità.

Questo problema non è certamente ignoto alla cultura medievale, ma acquista una tensione nuova nel rinnovamento della temperie e delle categorie culturali dell'umanesimo, cui Birocchi dedica il capitolo d'apertura del suo 'manuale': è un'apertura alla storia (un'apertura che deve essere a sua volta 'storicizzata', senza sollecitarla con 'anticipazioni' indebite) che non erode il soggiacente modello 'ordinante', ma lo arricchisce con una tensione che si apre alla varietà: alla varietà nel tempo, ma anche nello spazio, inaugurando una dimensione 'comparatistica' che, come mette in luce Birocchi, non aspetta Montesquieu per manifestarsi.

E ancora: possiamo, dobbiamo, insistere sul carattere problematico

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dell'ordine moderno; ciò però non ci deve impedire di sottolineare le rilevanti complicazioni di un 'modello' che vale soltanto in termini generali e orientativi; occorre allora vedere all'opera nella modernità immagini e paradigmi anche fortemente differenziati: paradigmi legati alla straordinaria longevità di antiche tradizione (magari aggiornate, rivisitate, trasformate, ma ancora riconoscibili in alcuni loro tratti originari) oppure paradigmi restii a distaccarsi dall'idea antica di un ordine 'naturale', ma pronti a ridefinirne originalmente le caratteristiche e i contenuti, pienamente accreditabili ormai come 'moderni'. Si pensi, dal primo punto di vista, alla prolungata vitalità dell'aristotelismo politico (di cui Birocchi tiene opportunamente conto) e si tenga presente, dal secondo punto di vista, la nozione fisiocratica di ordine naturale: una nozione (puntualmente analizzata dal nostro manuale) estranea al costruttivismo hobbesiano ma non per questo 'anti-moderna', come dimostra anche soltanto la centralità, in essa, del nesso (originariamente lockiano) libertà-proprietà.

Ciò che rende suggestiva una lettura trasversale del manuale di Birocchi è appunto la possibilità che esso offre di cogliere le molteplici componenti tematiche della costellazione che ruota intorno al concetto di ordine e di assistere alla loro complicazione e decantazione storica. Si pensi all'idea di un ordine naturale, di un ordine sottratto alla volontà e alle decisioni del potere, ma anche al manifestarsi dell'esigenza (antica, ma poi sempre di nuovo riproposta in contesti molto diversi) di 'dar forma' all'ordine, di tradurlo in norma, di coniugarlo con una presenza attiva e 'interventista' del potere.

A questo orizzonte appartiene quel lungo e frastagliato percorso che non può non catalizzare l'attenzione di un libro dedicato alla storia della cultura giuridica moderna: quel percorso che dalla redazione delle consuetudini nella Francia di antico regime e dalle *ordonnances* di Luigi XIV giunge ai progetti rivoluzionari e alle codificazioni ottocentesche. Non vorrei però che la metafora del 'percorso' da me impiegata suggerisse l'idea di un'interpretazione continuista e teleologica che è invece del tutto estranea alla ricostruzione di Birocchi: che (tanto per raccogliere sparsi esempi) dedica un importante paragrafo al 'mito' di Domat e di Pothier (spesso vittime di quella perversa categoria della 'anticipazione' che proietta autori e testi verso tempi e problemi ad essi estranei) oppure invita con buoni argomenti a non irrigidire in dogma metastorico la nota distinzione fra 'consolidazioni' e 'codificazioni'.

Ordine naturale e ordine artificiale, ordine rappresentato e ordine costruito, ordine razionale e ordine volontario si connettono 'dialetticamente' secondo modalità volta a volta diverse in tutto l'arco dell'esperienza analizzata; ed è nel campo di tensione che essi compongono che viene attratto il problema del metodo e del compito del sapere giuridico: un sapere che attraverso lo sviluppo della sua vocazione sistematica aspira ad una rappresentazione in sé conclusa dell'ordine; oppure

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un sapere che (per usare le parole di Birocchi) in nome della « politica » (in nome di un dover essere incompatibile con l'esistente) progetta « alternative più o meno radicali rispetto alla situazione corrente ».

Una grande assenza occorre sottolineare: lo Stato moderno. Quello Stato che una risalente storiografia vedeva già pronto e attivo con tutta la sua 'moderna' armatura (almeno) a partire dal Cinquecento, annunciato dagli squilli di tromba della *République* bodiniana, non è per Birocchi (ennesima testimonianza della lucidità interpretativa del nostro autore) l'orizzonte entro il quale collocare il discorso giuridico in un'età moderna (o, se si preferisce, in un regime 'antico') ancora caratterizzato da corpi, autonomie e regimi pattizi.

La rappresentazione dell'ordine (quale che sia il metodo volta a volta seguito) non è peraltro un lusso dottrinario: è una strategia discorsiva che produce effetti non soltanto sul processo di legittimazione dei poteri, ma anche sulla formazione del giurista, quindi sulla prassi e sul processo di interpretazione ed applicazione del diritto: è una dimensione che Birocchi tiene presente soffermandosi, per un verso, sull'insegnamento del diritto, e, per un altro verso, sul ruolo dell'interpretazione (valga come esempio la convincente ricognizione critica del problema dei Grandi Tribunali).

Il tema dell'ordine è dunque un prisma dalle molte facce e proprio per questo la sua analisi permette a Birocchi di scrivere un 'manuale' che si sottrae a scolastiche (e spesso storicamente fuorvianti) distinzioni disciplinari: un manuale che non è una storia del diritto privato piuttosto che del diritto pubblico, della dottrina piuttosto che della legislazione, ma è un guardare all'intreccio dei discorsi giuridici nell'età moderna attraverso una finestra, attraverso un preciso angolo visuale; e ciò, per un verso, impedisce di perseguire l'ingombrante mito della 'completezza', mentre, per un altro verso, permette di mettere a fuoco i passaggi vitali di un'esperienza storica cogliendone il senso e l'interna coerenza.

Nella frase di apertura del libro, l'autore ne sottolineava il carattere 'sperimentale'. Giunto al termine della lettura, il lettore-recensore ha l'impressione che l'esperimento sia pienamente riuscito proprio perché il testo stimola (e richiede) l'intelligenza e la passione non solo dello studente ma anche del più esigente 'specialista'.

PIETRO COSTA

F. CARNELUTTI, *La guerre et la paix. La forza del diritto e il dramma della politica*, a cura di R. GHERARDI, Firenze, Centro editoriale toscano, 2001.

« Nei primi anni dopo la guerra — scriveva Norberto Bobbio — la letteratura giuridica italiana fu piena di esami di coscienza. Era come se

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la dittatura coi suoi misfatti, la guerra con le sue rovine, la liberazione coi suoi problemi avessero interrotto crudelmente la quiete che durava da cinquant'anni » (1). In questo clima si colloca la pubblicazione di un volumetto di Francesco Carnelutti (1875-1965), *La guerre et la paix* — apparso a Roma per i tipi dell'Azienda Libraria Italiana nel 1945 — nel quale, fin dalle prime battute, si colgono i tratti comuni di quella « letteratura della crisi », come la definisce Bobbio nel prosieguo del passo sopra citato, in cui non vi era « discorso generale intorno al diritto che non cominciasse, ritualmente, dalla crisi e dall'angoscia di fronte alla crisi » e non si manifestassero « stati d'animo di turbamento, quasi di smarrimento, dinanzi all'enormità degli eventi ». Carnelutti, infatti, secondo questo *cliché*, sottolinea in più luoghi che occorre tentare di uscire dagli spaventosi avvenimenti che sconvolgono il mondo, avvenimenti dei quali nemmeno i giuristi possono essere giudicati esenti da rimorsi (p. 6 e passim).

Questo *petit livre*, come l'autore stesso lo definisce nell'introduzione, è stato recentemente riproposto all'attenzione da Raffaella Gherardi, che lo ha efficacemente sottotitolato *La forza del diritto e il dramma della politica*, esplicitando così, con terminologia tratta dallo stesso testo carneluttiano, due dei nuclei tematici fondamentali, come la curatrice sottolinea nella ricca introduzione.

Ma, per meglio comprendere il significato storico di quest'opera di Carnelutti, è opportuno inserirla non solo nel contesto della cultura giuridica italiana della prima metà del Novecento (2), ma anche nel quadro di quel dibattito internazionale sul ruolo del diritto e delle istituzioni sovranazionali che, fin dagli anni precedenti la seconda guerra mondiale, aveva trovato a Ginevra nell'*Institut Universitaire de Hautes Études Internationales* (3), uno dei centri di riferimento (non a caso il libro di Carnelutti è pubblicato in francese, dedicato alla Svizzera e preceduto da una lettera al Presidente della Confederazione Elvetica).

Presso l'Istituto ginevrino, tra l'altro, aveva insegnato Hans Kelsen dal 1933 al 1940, prima di trasferirsi negli Stati Uniti, dove nel 1944, quindi quasi contemporaneamente al testo di Carnelutti, pubblicò anch'egli un volume, *Peace through Law* (4), imperniato sugli stessi temi

(1) Cfr. N. Bobbio, *Giusnaturalismo e positivismo giuridico*, Milano, Edizioni di Comunità, 1965, p. 19.

(2) Per un panorama si rinvia a G. Fassò, *Storia della filosofia del diritto. III. Ottocento e Novecento*, edizione aggiornata a cura di C. Faralli, Roma-Bari, Laterza, 2001, particolarmente pp. 318 ss.; L. Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, Roma-Bari, Laterza, 1999; P. Grossi, *Scienza giuridica italiana. Un profilo storico (1860-1950)*, Milano, Giuffrè, 2000.

(3) Sul ruolo e l'attività di tale istituto si è soffermato M. Losano in due recenti pubblicazioni: H. Kelsen-U. Campagnolo, *Diritto internazionale e Stato sovrano*, Milano, Giuffrè, 1999, pp. 1 ss. e U. Campagnolo, *Verso una costituzione federale per l'Europa. Una proposta inedita del 1943*, Milano, Giuffrè, 2003, pp. 3 ss..

(4) Trad. it. H. Kelsen, *La pace attraverso il diritto*, Torino, Giappichelli, 1990

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affrontati da Carnelutti, che erano poi i temi del dibattito sul federalismo europeo che, dopo il *Manifesto per un'Europa libera e unita*, noto come Manifesto di Ventotene — dal quale l'esposizione di Carnelutti prende le mosse — non era più — come ha osservato Bobbio — « soltanto una dichiarazione di principi, ma un programma di azione » (5).

In questo spirito Carnelutti sceglie di indirizzare la sua opera non agli specialisti, ma ad un pubblico ampio, nella convinzione che « le grandi realizzazioni del diritto non hanno nessuna possibilità di riuscire senza l'aiuto dell'opinione pubblica » (p. 6). Infatti — egli sottolinea — il diritto è « un capolavoro che dobbiamo non al genio di questo o quell'artista, ma al lavoro anonimo dell'umanità intera » (p. 32). Esso ha origine dall'economia e la sua funzione fondamentale consiste nel « contenere e dirigere le correnti impetuose dell'economia », la quale genera conflitti di interesse tra gli uomini (6). L'economia produce quindi la malattia, ossia la guerra, ma non appronta rimedi per guarirla, rimedi che solo il diritto può fornire, creando « un sistema di vincoli che operano come i cerchi di una botte o i tiranti di un edificio » (p. 31).

Da questa immagine deriva, sotto un primo profilo, una delle due parole chiave, « la forza del diritto », che Raffaella Gherardi ha scelto, come si è detto, quale sottotitolo della nuova edizione dell'opera di Carnelutti, rinviando anche ad un celebre passo di Rudolf Jhering, autore che, pur senza citare direttamente, il giurista italiano mostra di aver ben presente: « il diritto non è un concetto logico, ma un concetto di forza. Pertanto la giustizia che tiene con una mano il piatto della bilancia con cui pesa il diritto, porta nell'altra mano la spada, per affermarlo. La spada senza la bilancia è la cruda violenza, la bilancia senza la spada è l'impotenza del diritto ».

Una volta che la società si sia dotata di un apparato giuridico, si trasforma in Stato: « diritto e Stato — rileva Carnelutti — sono due nomi per una stessa cosa: il diritto è una certa organizzazione della società e lo Stato è la società organizzata in un certo modo » (p. 31).

Il giudice e il gendarme (rappresentati nell'iconografia tradizionale dalla bilancia e dalla spada, come richiamato anche nel passo sopracitato di Jhering) sono, per il giurista italiano, i pilastri fondanti dello Stato che, poi, nel tempo, ha assunto una struttura molto più complessa: attraverso questi lo Stato svolge la sua funzione neutralizzatrice del

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con nota introduttiva di L. CIAURRO alla quale si rinvia per ulteriori informazioni sul testo kelseniano.

(5) Cfr. N. BOBBIO, *Il federalismo nel dibattito politico e culturale della resistenza*, in S. PISTONE, *L'Italia e l'unità europea. Dalle premesse storiche all'elezione del Parlamento Europeo*, Torino, Loescher, 1982, p. 221.

(6) L'idea che il diritto nasca dalla guerra, che l'economia genera, è sostenuta in numerosi altri scritti di Carnelutti, ma si veda, in particolare, *Come nasce il diritto*, Torino, Eri, 1954.

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conflitto a livello interno. Di qui discende « il dramma della politica » — la seconda delle parole chiave scelte da Raffaella Gherardi per il sottotitolo — , vale a dire la lotta senza fine dell'agire politico nel suo perenne tentativo di costringere l'economia all'interno di schemi ai quali essa tenta costantemente di sottrarsi, lotta che Carnelutti presenta anche attraverso l'immagine della diga (il diritto) e del fiume (l'economia).

Se all'interno degli Stati il diritto opera al fine di perseguire la pace, nel rapporto tra gli Stati mancano regole e giudici, quindi manca il diritto. Poiché — sottolinea Carnelutti — il giudice rappresenta la « forma minima, cioè l'organo indispensabile dello Stato » e poiché senza lo Stato non esiste diritto, non si può parlare in senso pieno di un diritto internazionale. Da questa premessa discendono, da un lato, la necessità di trovare una statualità superiore che, pur garantendo agli Stati membri la loro « qualità di Stati sul piano interno » (ossia autonomia e sovranità), possa rappresentare la vera « forma del diritto » e, dall'altro, la consapevolezza che la guerra tra Stati non potrà essere eliminata « se essi non si rassegnano a stabilire tra di loro un ordine giuridico e di conseguenza a partecipare a uno Stato superiore » (p. 67), termine quest'ultimo che viene usato per indicare una « federazione », « associazione » o « società » di Stati e non uno Stato sopranazionale (7).

Di questa costruzione Carnelutti vede un'anticipazione nella Società delle Nazioni di Ginevra, che definisce « un bambino nato vivo, ma poco vitale, in quanto i suoi organi vitali, ossia il giudice e il gendarme sono così imperfetti che non possono resistere alle dure prove dell'esistenza » (p. 70) e ribadisce la necessità di « costruire solidamente questi organi — il giudice e il gendarme — perché solo quando esistono l'uno e l'altro, quale che sia il loro nome, lo Stato è fondato » (p. 70).

Anche quando ciò si realizzerà non ne discenderà necessariamente la totale eliminazione della guerra, perché ciò dipende dall'estensione del gruppo che si organizzerà, anche se non sembra necessario che quest'ultimo raggiunga i limiti dell'intera umanità. « Dal punto di vista pratico — annota Carnelutti — è sufficiente che l'estensione della federazione assicuri ad esso una tale superiorità di forza sui gruppi

(7) Come ricorda L. Ciaurro nell'introduzione a H. KELSEN, *La pace attraverso il diritto*, cit., p. 17, nel 1959 Giorgio Del Vecchio aveva elaborato una classificazione delle principali concezioni teoretiche della pace (cfr. G. DEL VECCHIO, *Studi sulla guerra e la pace*, Milano, Giuffrè, 1959), individuando una concezione "imperialistica ed assolutistica", una concezione "ascetica", una concezione "empirico-politica" e una concezione cosiddetta "giuridica". A quest'ultima, che vede nel diritto e nella sua capacità unificante lo strumento per il conseguimento della pace mediante federazioni o confederazioni di Stati, possono essere ascritti tanto Carnelutti quanto Kelsen.

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rimasti al di fuori che questi ultimi non possano aspettarsi alcun successo da un attacco contro gli Stati federali » (p. 70).

Concludendo il secondo capitolo Carnelutti mostra di sperare che i progetti in corso possano realizzare le condizioni sopra descritte, sottolinea tuttavia con vigore che il diritto non è solo forza ma è anche giustizia: questa constatazione apre la terza e ultima parte dell'opera che, dopo il problema economico e quello giuridico, affronta il problema morale.

Poiché il diritto possa raggiungere il suo scopo principale, cioè l'eliminazione della guerra, deve divenire perno della giustizia e la condizione affinché ciò si realizzi è che esso si ispiri all'amore. « La forza del diritto », parola chiave, come si è detto, posta nel sottotitolo di *La guerre et la paix* è quindi espressione polisemica, che fa riferimento, da un lato, alla forza prodotta dal diritto, come si è visto sopra, dall'altro, alla forza che produce il diritto, cioè l'amore, inteso da Carnelutti come amore del prossimo e di Dio.

La macchina del diritto è paragonata a un grande trasformatore che trasforma, appunto, la forza dell'amore in giustizia (p. 92). « Se la condizione perché il diritto raggiunga il suo fine principale, cioè l'eliminazione della guerra, è di formarsi secondo giustizia e se la condizione per essere conforme a giustizia è che sia ispirato all'amore, allora — conclude Carnelutti — l'amore è il vero antidoto della guerra » e « se gli uomini sapessero amare non avrebbero bisogno né di giudici né di gendarmi per vivere in pace ».

Si intravedono in questa conclusione del *petit livre* di Carnelutti le premesse di quella clamorosa conversione al giusnaturalismo — come la definisce Guido Fassò (8) — che, progressivamente, lo portò a rinnegare quanto, sulle tracce della *Begriffsjurisprudenz*, aveva teorizzato, ad esempio, nella *Metodologia del diritto* del 1939, e — nel tracciare un bilancio del positivismo giuridico all'inizio degli anni '50 (9) — a dichiarare apertamente, pur senza una profonda coscienza della portata filosofica del problema, di accettare l'idea e il nome stesso di diritto naturale, inteso però non come diritto fuori dalla storia.

La mancanza di una profonda coscienza filosofica del problema è quanto, almeno, gli rimprovera Fassò, che proprio sul tema della giustizia ebbe con Carnelutti una polemica (10), che getta ulteriore luce

(8) Cfr. G. Fassò *Storia della filosofia del diritto*, III, cit. p. 335.

(9) Cfr. F. Carnelutti, *Bilancio del positivismo giuridico*, in *Discorsi intorno al diritto*, II, Padova, Cedam, 1953 e *L'antinomia del diritto*, in « Rivista di diritto processuale », 1959.

(10) I testi della polemica sono: G. Fassò, *La giustizia la carità e qualche pericolo per i giuristi cristiani*, in « Rivista trimestrale di diritto e procedura civile », 1955, pp. 419-423 (anche in G. Fassò, *Scritti di filosofia del diritto*, a cura di E. Pattaro, C. Faralli e G. Zucchini, I, Milano, Giuffrè 1982, pp. 241-247), F. Carnelutti, *La giustizia, la carità e qualche pericolo per i filosofi non cristiani*, in « Rivista di diritto processuale », 1955, I,

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sul clima culturale italiano degli anni del secondo dopoguerra. Secondo Fassò, Carnelutti, affermando che gli insegnamenti evangelici tracciano agli uomini le linee direttive per vivere in una società organizzata secondo il diritto, interpretava un'opinione allora largamente dominante. « Mai come ai nostri giorni — scriveva Fassò — è stata diffusa l'idea che l'ordinamento sociale e giuridico debba ispirarsi ai principî cristiani — che evidentemente debbono essere ricercati nei testi evangelici — e mai si è così poco dubitato che in tali testi le premesse di un simile ordinamento si possano ritrovare; gli anticlericali stessi, se di una grave colpa vogliono accusare gli avversari, rimproverano loro di non aver attuato e di non voler attuare i principi della giustizia sociale evangelica; e numerosissimi, autorevoli giuristi cattolici affermano di ispirarsi all'idea cristiana della giustizia per propugnare un diritto cristiano ». Ma, negli scritti neotestamentari, per giustizia — rileva Fassò, anticipando temi che saranno sviluppati in un libro, *Cristianesimo e società*, pubblicato nel 1956 — non si intende affatto « ciò che essa significa nel linguaggio che potremmo dire "laico", tanto classico quanto moderno », essa « non ha alcun significato giuridico e neppure morale in senso intersoggettivo sociale ». La parola giustizia vi sta invece ad indicare una situazione di ordine esclusivamente religioso: l'elezione, la perfezione, la santità.

Ma se, da un lato, il giusnaturalismo di Carnelutti si ispira alla tradizione cristiana, cadendo in contaminazioni fra dimensione socio-giuridico e dimensione religiosa, che Fassò gli rimprovera, dall'altro, si nutre di quell'esperienza giuridica che Giuseppe Capograssi additava quale via da percorrere per superare i limiti di teorie riduzionistiche, come il positivismo giuridico, e per operare la riconciliazione tra scienza del diritto e filosofia del diritto, di cui positivismo giuridico, per un verso, e filosofia idealistica, per l'altro, avevano decretato il divorzio. Più che di esperienza giuridica, Carnelutti parla di realismo, osservando che « positivismo, nel campo del diritto, vuol dire essenzialmente osservare la legge, che è il diritto positivo; realismo, invece, osservare la vita che non esclude la legge, vita pur essa, ma appunto per questo la include in un complesso, anzi in un universo più vasto. Realismo e non naturalismo mi par corretto dire, poiché si tratta di un'abitudine o forse meglio di un'attitudine a vivere nel mondo dei fatti, che non contrasta, ma piuttosto si concilia con l'altra a vivere nel mondo delle idee » (11).

Ancora una volta, proprio come ai tempi di Grozio, « padre » del

pp. 284-292 (anche in F. CARNELUTTI, *Discorsi intorno al diritto*, III, Padova, Cedam, 1961, pp. 89 ss.); G. FASSÒ, *Giustizia, amore e teologia. Risposta al prof. Carnelutti*, in « Rivista trimestrale di diritto e procedura civile » 1956, pp. 206-214 (anche in G. FASSÒ, *Scritti di filosofia del diritto*, cit., pp. 283-296).

(11) Cfr. F. CARNELUTTI, *Profilo del pensiero giuridico italiano* in *Discorsi intorno al diritto*, II, cit., pp. 177-178. Per un profilo complessivo del pensiero di Carnelutti rinvio a D. COCCOPALMERIO, *Francesco Carnelutti. Il « realismo giuridico italiano »*, Napoli, ESI,

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giusnaturalismo moderno, la guerra aveva fatto rinascere l'idea del diritto naturale e ne aveva riproposto la funzione storica che, come Bobbio ha efficacemente sintetizzato, si manifesta nella « perenne esigenza, particolarmente intensa nei periodi di guerre esterne ed interne, che la vita, alcuni beni e alcune libertà dell'individuo siano protette giuridicamente contro la forza organizzata di coloro che detengono il potere » (12).

CARLA FARALLI

SANTOS M. CORONAS GONZÁLEZ, *El Libro de las Leyes del siglo XVIII. Colección de Impresos Legales y otros papeles del Consejo de Castilla. Adición (1782-1795)*, edición y estudio preliminar a cargo de..., 2 tomos, Centro de Estudios Políticos y Constitucionales / Boletín Oficial del Estado, Madrid, 2003; tomo V (Libros XIII, XIV, XV, XVI, XVII y XVIII, 1782-1787), pp. 2675-3378; y tomo VI (Libros XIX, XX, XXI, XXII, XXIII, XXIV, XXV y XXVI, 1788-1795), pp. 3379-4106.

En 1996 aparecieron publicados los cuatro primeros tomos, más el imprescindible Libro-Índice, de esta misma *Colección de impresos legales*, y de otros varios, dispares y muy interesantes, *papeles del Consejo Real de Castilla*. De dicha edición se proporcionó inmediata noticia en estos mismos *Quaderni*, en su sección *A proposito di...*, por el autor de las presentes líneas (1). Ahora, algún tiempo después, lo que es comprensible, dados los elevados costes de impresión — y de carga de trabajo para su editor — que es fácil presumir en tal empresa, la *Colección* es completada con los volúmenes de *leyes* y *papeles* que todavía restaban por conocer, hasta completar la obra original que se conserva en el Archivo Histórico Nacional de Madrid, en su sección de Hacienda, y libros cuyas signaturas correspondientes van del número

1989 e a *Francesco Carnelutti a trent'anni dalla scomparsa. Atti del Convegno, Udine 18 novembre 1995*, Udine, Forum, 1996.

(12) Cfr. N. BOBBIO, *Giusnaturalismo e positivismo giuridico*, cit., p. 192.

(1) VALLEJO GARCÍA-HEVIA, José María, "El Consejo de Castilla y la brújula de las leyes (a propósito de Santos M. CORONAS GONZÁLEZ, *El Libro de las Leyes del Siglo XVIII. Colección de Impresos Legales y otros papeles del Consejo de Castilla (1708-1781)*, edición y estudio preliminar (pp. 9-39) a cargo de..., Centro de Estudios Constitucionales/ Boletín Oficial del Estado, Madrid, 1996; Libro Índice (338 pp.); tomo I (Libros I, II y III, 1708-1748, pp. 1-677); tomo II (Libros IV y V, 1749-1766, pp. 679-1371); tomo III (Libros VI, VII, VIII y IX, 1767-1776, pp. 1373-2041); y tomo IV (Libros X, XI y XII, 1777-1781, pp. 2043-2674)", en los *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno*, 27 (1998), pp. 537-575. A este estudio de conjunto me remito, en general.

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6550 al 6574. Al período inicial ya editado, de 1708 a 1781, se le añade y complementa con el que faltaba, entre 1782 y 1795. De esta forma, prácticamente toda una centuria, la que genérica, indeterminada y estereotipadamente se conoce en toda Europa Occidental como *Siglo de las Luces*, dispone ya, para el caso del Reino de España, de una sobresaliente fuente histórico-jurídica añadida de disposiciones normativas, al margen de las ediciones oficiales (*Nueva Recopilación* y *Autos Acordados*, *Novísima Recopilación*), coetáneas o inmediatamente posteriores. Y, por otra parte, se satisface un compromiso editorial, asumido en el momento de la salida a la luz de la primera parte de la obra, cuando ya se anunciaba que estaba prevista la publicación de los libros que quedaban, del XIII al XXVI.

Se trata, en efecto, de una colección *facticia* de normas impresas, algunas de ellas *extravagantes*, es decir, no incorporadas — al menos, no íntegramente — en las sucesivas ediciones y reimpresiones (1723, 1745, 1772, 1775, 1777) de la *Recopilación de las leyes destos Reynos* o *Nueva Recopilación* de 1567. En particular, las cédulas, decretos, órdenes, resoluciones reales, autos acordados y otras disposiciones expedidas después de 1745. Al tener que circular al margen, necesariamente, del *corpus* recopilatorio, los Reales Consejos y demás órganos administrativos y judiciales, encargados de su aplicación, tuvieron que combatir la dificultad de conocimiento del derecho vigente, que tal dispersión y *extravagancia* comportaba, haciendo que fuesen recogidas en sus registros y archivos, tanto impresas como manuscritas, y al margen de otras recopilaciones privadas: como las publicadas por Antonio Javier Pérez y López, entre 1791-1798; Santos Sánchez, en 1792-1793; y Severo Aguirre, entre 1793 y 1796. Al mismo tiempo, los oficiales y archiveros de dichas instituciones fueron elaborando índices y resúmenes alfabéticos, que facilitaban su manejo cotidiano por parte de los consejeros, fiscales, agentes fiscales, escribanos, relatores, sin olvidar a los escribientes, auxiliares y meritorios que integraban sus plantillas. Por otra parte, en los archivos de los Consejos, y muy especialmente en el de Castilla, los originales de los textos normativos que eran dados a la imprenta tenían que ser conservados, junto con un ejemplar, al menos, ya impreso. Hay que tener en cuenta, por cierto, que la tirada de ejemplares, en las madrileñas imprentas de Pedro Marín (desde 1772 hasta su fallecimiento, en 1790) y de su viuda, María Ángela Usoz (*Viuda e Hijo de Don Pedro Marín*, desde 1793), sustituidas por la Imprenta Real a partir de 1795, variaba extraordinariamente, de acuerdo con la publicidad y difusión que mereciese, o quisiese dársele a cada disposición. Hasta el punto de poder oscilar entre los 8000 ejemplares de la Real Cédula de 18-III-1783, que declaró que, *no sólo el oficio de Curtidor, sino también los demás Artes y Oficios de Herrero, Sastre, Zapatero, Carpintero y otros a ese modo son honestos y honrados, y que el uso de ellos no envilece la familia, ni la persona del que los exerce,*

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ni la inhabilita para obtener los empleos municipales de la República en que estén avecindados los Artesanos o Menestrales que los exerciten (*CCC*, XIV, 18, pp. 2800-2801), y los escasos 50 de un edicto convocando a oposición, por ejemplo, de una cátedra de Lengua Griega, vacante en la Universidad de Alcalá de Henares, de 15-V-1792 (*CCC*, XXIII, 23, p. 3816).

Pues bien, el origen concreto de la *Compilación* cronológica *del Consejo de Castilla* (2) que nos ocupa fue una iniciativa adoptada por Pedro Rodríguez Campomanes, conde de Campomanes, fiscal del Consejo Real, en 1780, siendo subdelegado general de Penas de Cámara y Gastos de Justicia. Con cargo a estos fondos, que Campomanes administraba, eran costeadas las impresiones legales del Consejo, por lo que, entendiendo, como entendía, que los protocolos de leyes y providencias generales que custodiaba y expedía dicho Consejo no merecían menos atención que los protocolos de escrituras públicas de los escribanos, en las que sólo se dilucidaban intereses particulares, propuso la formación de una compilación cronológica de las disposiciones impresas, lo que facilitaría la labor de su manejo, y evitaría los extravíos. Si Campomanes fue el impulsor de la iniciativa, su ejecutor fue el contador titular de Gastos de Justicia, Obras Pías, Memorias y Depósitos del Consejo de Castilla, Manuel Navarro. A este último se debe la confección del primer — y único — índice alfabético de la compilación de impresos legales del Consejo, que abarca los años comprendidos entre 1708 y 1781. Al carecer los tomos V y VI (Libros XIII a XXVI) de un índice semejante para los años de 1782 a 1795, su editor actual, Santos Coronas, ha tenido que elaborarlo expresamente (*CCC*, tomo VI, pp. 4075-4106), con paciencia y cuidado, puesto que ha respetado el modelo de referencia precedente.

Las dos principales virtudes de esta *Compilación del Consejo de Castilla* del setecientos, como el profesor Coronas pone de relieve en la *Nota preliminar* al tomo V (pp. IX-XIV), son las de su autenticidad e integridad. El valor de la *autenticidad* de los textos normativos recopilados procede de los testimonios de acreditación expedidos por los escribanos de cámara y de gobierno más antiguos del Consejo, que fueron, en la segunda mitad del XVIII, Antonio Martínez Salazar, Pedro Escolano de Arrieta y Bartolomé Muñoz. El de la *integridad* aparece con la reproducción completa, sin los extractos y mutilaciones característicos de las recopilaciones oficiales y privadas, de dichos textos legales. De esta forma, se está en presencia de la colección de

(2) Como antecede, y también en lo sucesivo, para que la cita de las disposiciones de la edición que se comenta resulte más cómoda, se hará uso de las siglas *CCC* (*Compilación del Consejo de Castilla*), seguidas del número romano del libro, del marginal en arábigo de la norma o disposición en cuestión (que, en negrita, destaca el cuerpo de la misma, en el texto de la edición, para facilitar la localización de los textos), y de las páginas que, en cada caso concreto, abarquen su contenido.

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disposiciones más fiable, y también general, de las surgidas de la práctica administrativa del setecientos. Una generalidad que explica su extensión, ya que incluye, junto con las *Reales Pragmáticas, Cédulas, Decretos, Órdenes, Instrucciones, Autos Acordados*, etc., propios de una compilación normativa, también otra multiplicidad de *Cartas Circulares, Providencias, Edictos, Bandos, Reglamentos*, e incluso *Memoriales Ajustados, Dictámenes fiscales, Esquelas* y *Carteles*, cuyo valor estribaba, más en el precedente burocrático de la praxis administrativa, propio de un universo jurídico-político en el que, como así acontecía en el Antiguo Régimen, los conceptos y las materias de gobernación y de jurisdicción estaban, más que indiferenciados o confundidos, inextricablemente entrelazados, sustantiva — que no procesalmente — inescindidos.

No cabe duda de que la *Compilación* impresa del *Consejo de Castilla* es, en buena medida, la del reinado de Carlos III; o, mejor dicho, la resultante de la producción normativa y las disposiciones administrativas derivadas de la actividad burocrática de dicho Real Consejo durante ese reinado. Lo que es lógico, puesto que fue impulsada durante el tiempo en el que Campomanes, primero como fiscal (1762-1783), después como decano gobernador interino (1783-1789), y, finalmente, como gobernador en propiedad (1789-1791), pudo supervisar su progresiva elaboración. Nada tiene de extraño que fuese durante un período en el que tan numerosas y variadas medidas de reforma, política, económica y jurisdiccional se adoptaron, como el carlotercerista, en el que se hiciese más acuciante la necesidad de instrumentar medios de conocimiento de tales reformas, plasmadas normativamente en múltiples textos dispositivos. El progresivo y acelerado ritmo de creación de normas, apreciable en la segunda mitad del XVIII, requería de diligentes medios de conocimiento y ordenación de las mismas. Pero, la lógica de la historia — de las causas históricas y de sus consecuencias fenoménicas, humanas primordialmente — no resulta ser algo inmutable, lógicamente inexorable como acontecer sucesivo y temporal. La *lógica* de los hombres es imprevisible, e imprevista. En nuestro caso, quiere ello decir que, si bien en el reinado de Carlos IV (1788-1808) la necesidad de conocer el derecho aplicable, que seguía siendo crecientemente producido, era la misma, o todavía mayor que en el anterior de Carlos III (1759-1788), un instrumento de conocimiento tan útil para los consejeros y fiscales del Real de Castilla como había demostrado ser su *Compilación* cronológica tendría que haber sido mantenido, y proseguido.

No ocurrió así. Al ser exonerado Campomanes de su cargo de gobernador del Consejo Real, en 1791, la *Compilación* apenas pudo sobrevivirle hasta 1795, cesando cuando la Imprenta Real se hizo cargo de las impresiones del Consejo, a fin de abaratar costes. Una muestra más de que las obras de los hombres suelen ir a la tumba con sus creadores. Aunque les sucedan, cierto es, otras obras y empresas, como

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así fue en lo que se refiere a las diversas colecciones normativas, promovidas por diversas instituciones y desde distintas instancias, sin olvidar las de los particulares, que procuraron seguir recogiendo unas disposiciones y textos legales que, en pocos años, habrían de culminar en la concreta conceptualización de la *ley* como expresión de la voluntad general, llevada a cabo por los representantes del pueblo reunidos en Cortes, de acuerdo con unos determinados procedimientos de elección. Y unas Cortes que fueron, por antonomasia, las de Cádiz de 1810 a 1813. Sin olvidar la actividad colectora resultante de la potestad reglamentaria de las diferentes Administraciones constitucionales, ni tampoco las de los períodos no constitucionales, ya fuesen fernandistas, o no nacionales, como el josefista: *Prontuario de las Leyes y Decretos del Rey Nuestro Señor Don José Napoleón I desde el año de 1808*, Madrid, Imprenta Real, 1810; *Colección de los Decretos y Órdenes que han expedido las Cortes Generales y Extraordinarias... mandada publicar de orden de las mismas*, Cádiz, 1811-1813; *Decretos del Rey Don Fernando VII*, Madrid, Imprenta Real, 1814-1820; *Colección de Decretos y Órdenes generales... expedidos por las Cortes durante los años 1820-1822*, Madrid, Imprenta Nacional, 1820-1822; *Decretos y Resoluciones de la Junta Provisional, Regencia del Reino y los expedidos por Su Majestad desde que fue libre del tiránico poder revolucionario, comprensivo el año de 1823*, Madrid, Imprenta Real, 1824-1834; *Decretos de la Reina Nuestra Señora, Doña Isabel II, dados en su Real nombre por su Augusta Madre la Reina Gobernadora, y Reales Órdenes, Resoluciones y Reglamentos generales expedidos por las Secretarías del Despacho Universal*, Madrid, Imprenta Real, 1835, etc..

En la *Adición* a la *Compilación del Consejo de Castilla*, como en su tiempo, y por su mismo colector material, Manuel Navarro, era conocida, de 1782 a 1795, es bien perceptible la existencia de dos épocas, parcialmente diferentes: el final del pujante reinado de Carlos III, hasta 1788, aunque las disposiciones recopiladas dejan ya traslucir las dificultades económicas y financieras, y los problemas sociales y políticos que le venían minando desde años antes; y el inicio del tormentoso y nada bonancible de su hijo y sucesor, Carlos IV, hasta 1795, esto es, hasta el ascenso al poder de Manuel Godoy, y el final de la Guerra contra la Convención francesa (1793-1795). En definitiva, con esta *Compilación* del siglo XVIII se asiste, de primera mano, al final del Antiguo Régimen, a los pródromos de su enfermedad mortal. Un final que, como la médula espinal del cuerpo de la sociedad que lo sustentaba, la sociedad estamental, fue también jurídico, por las vías de derecho: de revolución constitucional. Por lo demás, manejando las entradas de los dos tomos de la *Adición* se puede penetrar, y contemplar, el panorama de dicha sociedad, la española del Antiguo Régimen, periclitada. Y ni siquiera es preciso saltar de una disposición a otra, de un libro a otro, de un tomo a otro. Dicha sociedad, y sus fundamentos

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sociales, económicos, políticos, hasta religiosos y morales, va desfilando ante nosotros, sin necesidad de que el lector, o quien consulta la recopilación, se tenga que molestar en ordenar o buscar específicamente tal o cual entrada normativa. Véamoslo, aunque sea resumidamente, cual si el lector de hoy fuese un súbdito, y vasallo, de Carlos III y de Carlos IV, que se hallase en edad madura entre 1782 y 1785, y cada mañana, cada mes y cada año de ambos reinados tuviese curiosidad, y noticia — además de posibilidad para ello — de las disposiciones regias que habían sido publicadas.

El primer texto normativo impreso del año 1782, compilado en el Consejo de Castilla, es la Real Cédula de 17-II, de *reducción del número de alcaldes mayores entregadores de la Mesta* (*CCC*, XIII, 1, pp. 2677-2681). Era fruto de la labor de Campomanes, que desempeñaba la comisión de presidente del Honrado Concejo de la Mesta, y que en las juntas generales de la misma procuró reducir los privilegios y exenciones de la jurisdicción mesteña. No sólo como un paso más en la política de fortalecimiento del poder y jurisdicción reales, sino dentro de la general preocupación reformadora, que quería fomentar la riqueza del Reino con el incremento de la agricultura, y no con la extensión de la trashumancia ganadera, considerada gravosa y perjudicial, económicamente. El segundo impreso es otra Real Cédula, de 30-III-1782, de *creación de la Superintendencia General de Policía en la Corte y su rastro* (*CCC*, XIII, 3, pp. 2681-2683). Si, en general, había que acabar con las jurisdicciones extraordinarias y privilegiadas, tal objetivo decaía en presencia del *orden público*. Una sociedad tan aparentemente inmovilista y cristalizada como era la estamental, tan reglada y regulada en lo referente al *status* jurídico de sus miembros, precisaba continuamente de algo que, en principio, se le presuponía rígidamente: *orden*. La amenaza del desorden era obsesiva muchas veces, y otras muchas real: mendigos, vagos, ociosos, mal entretenidos, constituían la encarnación personal de esa amenaza. Los desheredados de la fortuna, y de las *leyes* del Antiguo Régimen, no quedaban concernidos, tan imperiosamente, por tales rigideces o tiranías — jurídicas, jurisdiccionales. El hambre, la escasez de bienes materiales, no entendía de *fueros*. El peligro de un motín de subsistencias, como el de la primavera de 1766 en diversas provincias del Reino, origen de ese conglomerado histórico-político-económico-social conocido como *Motín de* o *contra Esquilache*, estaba siempre bien presente. Sin embargo, el poder político reaccionaba confiando la preservación del orden público a otro *fuero*, nuevo y añadido, para el que no importaba traicionar y vulnerar la práctica de eliminación de las jurisdicciones exentas de la ordinaria regia. No había límites para el mantenimiento del orden social, aunque la Superintendencia de Policía se superpusiese a otras múltiples y encontradas jurisdicciones o fueros, con los que, inevitablemente, no tardaría en entrar en conflictos de jurisdicción: la Sala de Alcaldes de Casa y Corte,

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las Alcaldías de Cuartel y de Barrio, el Juez Comisionado de Vagos, el Corregidor de Madrid y sus tenientes... Todas estas jurisdicciones se acumulaban, lo que era lo mismo que incitarlas a enfrentarse entre sí, de inmediato. Y así fue, lo que explica el rápido fin de dicha Superintendencia, suprimida diez años después, por Real Cédula de 13-VI-1792, a causa — se decía explícitamente — de "las dificultades y embarazos que, desde luego, encontró el exercicio de la Superintendencia, las competencias que se suscitaron, y la imposibilidad de conformar su establecimiento con las máximas, método y orden judicial que prescriben las leyes del Reyno" (*CCC*, XXII, 26, pp. 3819-3821; la cita en la p. 3820).

El Banco Nacional de San Carlos, creado para facilitar las operaciones mercantiles, en España y las Indias, surge ante nosotros a través de otra Real Cédula, de 2-VI-1782 (*CCC*, XIII, 6, pp. 2684-2694). Sus objetivos iniciales, de reducción a metálico de las letras de cambio, vales de tesorería y pagarés, de administración de los asientos del Ejército y la Marina, y de abono de las obligaciones del Giro en el extranjero, pronto sucumbirían ante la inundación de vales reales que las circunstancias bélicas obligaron a emitir. No en vano, premonitoriamente, en la *Compilación del Consejo* le sigue, a continuación, la Real Cédula de 20-VI-1782, de emisión de *catorce millones setecientos noventa y nueve mil y novecientos pesos, de a ciento veinte y ocho quartos cada uno, en medios Vales de a trescientos pesos*. Unas emisiones que se multiplicarían aceleradamente, hasta el abismo de la bancarrota, durante el reinado de Carlos IV (*CCC*, XIII, 9, pp. 2696-2697; XV, 12, pp. 2926-2929; XVI, 42 y 43, pp. 3048-3052; XXII, 5, pp. 3754-3756; XXII, 25, pp. 3816-3819; XXV, 5, pp. 3954-3956; XXV, 27, pp. 3984-3988; XXVI, 11, pp. 4019-4020; XXVI, 13-15, pp. 4021-4029). Siguen otras disposiciones complementarias de la erección del Banco de San Carlos, en detracción de las vitales fuentes de ingresos municipales de las ciudades y villas del Reino: es el supuesto de la Real Cédula de 27-VIII-1782, acerca de las *suscripciones que hagan los Pueblos del Reyno, en el Banco Nacional, de sus caudales sobrantes de Propios, Arbitrios, Encabezamientos, y de los Pósitos* (*CCC*, XIII, 11, pp. 2699-2702; XIII, 12, pp. 2702-2703; XIV, 10, pp. 2785-2786). Seguidamente, más restricciones sobre la jurisdicción privativa mesteña, que — ésta sí — debía ser embridada, reformada y minorada, sino hecha desaparecer (*CCC*, XIII, 17, 2707-2728). Se trata de la aprobación, por Reales Provisiones o Reales Órdenes, de los autos evacuados por Campomanes como Presidente de la Mesta, entre 1779 y 1782, en los diversos concejos celebrados: en Jadraque (1779), en Guadalupe (1780) y en Talavera de la Reina (1782).

Y, junto a los fueros y el orden público, la racionalidad *ilustrada*, teñida de su inevitable utilitarismo social: el de que todos los súbditos de la Monarquía debían resultar *útiles*, socialmente; y productivos,

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económicamente, para el soberano. Es el caso de los *chuetas* mallorquines, de los judíos conversos marginados históricamente de la sociedad, que ahora se quería recuperar, y dignificar, para mostrar las públicas distancias que separaban los tiempos *ilustrados* borbónicos de los del pasado inquisitorial, identificable, sobre todo, con los Austrias: por Real Cédula de 10-XII-1782, que ordenaba que *a los Individuos del Barrio, llamado de la Calle, de la Ciudad de Palma, en el Reyno de Mallorca, no sólo no se les impida habitar en qualquier otro sitio de la Ciudad, o Isla, sino que se les favorezca y conceda toda protección, y que no se les insulte, ni maltrate* (CCC, XIII, 20, pp. 2729-2731; XVI, 54, pp. 3066-3069; XIX, 15, pp. 3393-3397). Unos tiempos *ilustrados*, las *luces* de la razón de aquel siglo XVIII, optimista y, en cierto modo — si se me permite la expresión-, algo presuntuoso, cuyo foro de debate provinciano eran las Sociedades Económicas de Amigos del País, cuya creación y difusión había impulsado el mismo Campomanes. Por supuesto que, también hacen acto de presencia en nuestra *Compilación*, por ejemplo — y serán las dos únicas menciones, para no extenderme, aunque haya otras muchas-, con la Resolución del Consejo, de diciembre de 1782, solicitando informes a todas ellas acerca de los *medios de restablecer las fábricas de lana del Reyno* (*CCC*, XIII, 27, pp. 2736-2738; XIV, 25, pp. 2817-2821; XVI, 14-15, pp. 3000-3008; XVI, 45, pp. 3054-3055; XVII, 27, pp. 3119-3120); o, al situarse en el origen de la Real Cédula de 11-X-1789, que permitía que los fabricantes de tejidos pudiesen *inventarlos, imitarlos y variarlos libremente, según tengan por conveniente, sin sujeción a anchos, números de hilos o peso, ni a maniobras y máquinas determinadas* (*CCC*, XX, 27, pp. 3590-3591), lo que significaba que las ordenanzas gremiales iban siendo *felizmente* desterradas, en la senda de lo predicado por Campomanes en sus *Discursos sobre el Fomento de la Industria Popular* (1774) y *sobre la Educación Popular de los Artesanos, y su fomento* (1775).

El año 1783 se abre con un *tópico* de la actividad política, característico del reinado de Carlos III: el de la incorporación o reversión de señoríos y rentas a la Corona. Esto es, con uno de los instrumentos de fortalecimiento del poder del monarca absoluto frente a los otros poderes corporativos, propios de la sociedad estamental del Antiguo Régimen. Una Certificación de expediente general, que se extiende el 27-VIII-1782, versa sobre la orden regia para que *los Grandes, y demás Señores de vasallos de estos Reynos, que cobran y perciben derechos de Portazgo, Pontazgo, Peazgo, Barcage, y otros de esta clase, lo inviertan precisamente en el loable objeto para que fueron impuestos* (*CCC*, XIV, 1, pp. 2745-2750; XV, 16, pp. 2935-2938; XVIII, 8, pp. 3269-3273). Mayor trascendencia tenía la reversión de señoríos, lo que explica que la *Compilación* recogiese la Defensa fiscal, de 4-VII-1787, sobre incorporación a la Corona de los dominios del monasterio de San Esteban, en la villa de Bañolas, redactada por el fiscal Jacinto Moreno Montalvo,

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en la línea, ininterrumpida, de reclamación de los derechos regios, llevada a cabo durante todo el reinado de Carlos III, y ventilada con diligencia, aunque no con rapidez, ante el Consejo de Castilla (*CCC*, XVIII, 32, pp. 3314-3327). O la adición a la Alegación fiscal de José Antonio Fita y Francisco de Soria, presentada el 26-II-1785 en el pleito de reversión de la villa de Duelas, con sus tercias y alcabalas, frente al duque de Medinaceli, conde de Buendía (*CCC*, XXI, 15, pp. 3628-3631). Sin menospreciar el valor, aunque fuese sólo testimonial, de la potestad regia de imposición de tributos, que afloraba en la reglamentación de la exacción de las medias anatas, y de la contribución de lanzas que adeudaban los Grandes y Títulos del Reino, y que era la única imposición directa que gravaba a los nobles, en cuanto tales. Así consta en una Real Cédula de 17-XII-1787 (*CCC*, XVIII, 55, pp. 3351-3352).

Pero, no sólo el estamento de la nobleza debía afrontar sus responsabilidades (si cobraba unas determinadas contribuciones señoriales, tenía que mantener el servicio que las justificaba teóricamente, exigido por el soberano, interesado en el fomento del comercio entre sus vasallos, y en el incremento de las percepciones de la fiscalidad regia), sino también, por supuesto, el pueblo llano, aunque estuviese organizado corporativamente. Así sucedía con los gremios, cuyas cofradías fueron tan perseguidas por los fiscales del Consejo de Castilla (*verbi gratia*, la Resolución real, certificada el 5-II-1786, a consulta del Consejo, sobre *reforma, extinción y respectivo arreglo de las Cofradías erigidas en las Provincias y Diócesis del Reyno*, que se halla en *CCC*, XVII, 6, pp. 3108-3110). Aunque se tratase de la subsistencia, o extinción, del rico y poderoso gremio de vinateros de la ciudad de Jerez de la Frontera (*CCC*, XIV, 3, pp. 2750-2762; XIV, 41, pp. 2877-2888). Una desaparición que podía llegar por vía legal o judicial, porque las normas eran las que modelaban — o constreñían — a la sociedad, y no ésta la que originaba o producía aquéllas. Y, lo mismo acontecía en la economía. Por ejemplo, el libre comercio de granos o cereales, impuesto en 1765, pero, al que las malas cosechas impedían una efectiva y fructífera vigencia. Como prueba la Real Cédula de 22-II-1783, que no sería la única, ni muchos menos, de excepción en un régimen agrario de imposible liberalización económica, dadas las restricciones y corsés normativos propios de una sociedad corporativa (*CCC*, XIV, 14, pp. 2792-2794; XVIII, 33, pp. 3328-3329; XX, 19-20, pp. 3513-3516; XXI, 24, pp. 3552-3556). Dicha disposición prevenía que, *mediante haber cesado las causas que motivaron la expedición de la de treinta de Julio de mil setecientos sesenta y nueve, en que se prohibió la extracción de Granos fuera del Reyno, se manda quede ésta sin efecto, y se guarde y cumpla la Real Pragmática de once de Julio de mil setecientos sesenta y cinco*. O las Cédulas y Decretos, todos sometidos a la aprobación de las Cortes reunidas por Carlos IV, en los meses de septiembre a noviembre

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de 1789 (*CCC*, XX, 54, pp. 3605), a fin de jurar al príncipe heredero Fernando, y de acordar la modificación del orden sucesorio de la Corona, mediante la derogación de la llamada *Ley Sálica* o *Auto Acordado* de 1713, pese a que habían sido, igualmente, promulgados con anterioridad, que: facultaron a los dueños y arrendatarios de tierras a cercarlas o cerrarlas, a fin de mejorar su cultivo (de 15-VI-1788; *CCC*, XIX, 32-33, pp. 3448-3450); a remediar el abandono de las tierras vinculadas, promoviendo su cultivo, riego y plantación (de 30-IV-1789; *CCC*, XX, 14, pp. 3506-3509); o a prohibir la reunión de mayorazgos *pingües* en una sola persona (también de 30-IV-1789; *CCC*, XX, 13, pp. 3505-3506); y a prohibir la enajenación perpetua, sin licencia real, de bienes raíces (de 14-V-1789; *CCC*, XX, 15-17, pp. 3509-3510).

Ahora bien, si la sociedad corporativa se beneficiaba del mínimo lenitivo *ilustrado* de la rehabilitación y dignificación de los chuetas, para que todo siguiese, estatutaria y legalmente, igual, sin menoscabo apreciable de los fundamentos sociales de los privilegiados estamentos de la nobleza y del clero, económicamente interesaba introducir una simple corrección de sus excesos, que eran improductivos, y un lastre para el fomento de la riqueza: la de la honradez de todos los oficios manuales (de herrero, sastre, zapatero, carpintero, curtidor), por Real Cédula de 18-III-1783, que ya, más arriba, fue mencionada (*CCC*, XIV, 18, pp. 2800-2802); o la de la honestidad del trabajo femenino en las manufacturas de hilos y otros similares, según Real Cédula de 2-IX-1784 (*CCC*, XV, 31, pp. 2963-2964). Eso sí, sin confundir el orden económico con el social. El primero podía admitir leves excepciones, en aras del aumento de la producción; el segundo, aun con modificaciones, resultaba globalmente intocable. Y, el basamento de dicho orden social, la seguridad pública. De ahí las abundantes disposiciones de represión del bandolerismo, que, por sí mismas, denunciaban los defectos y los males intrínsecos de tal orden social, tan rígido como incapaz de responder a las nuevas necesidades y aspiraciones, individuales y colectivas, del pueblo, del tercer estado. Una más, entre otras muchas reiteradas, la Real Cédula de 5-V-1783, estableciendo la *pena en que han de incurrir los Bandidos o Salteadores que hagan fuego o resistencia con arma blanca a la tropa destinada expresamente al objeto de perseguirlos* (*CCC*, XIV, 24, pp. 2815-2817). Esa rígida, encorsetada estructura social, y anquilosada actividad económica, afloraban, en forma de reglamentada práctica jurisdiccional y de oficios *estancados*, en situaciones como la de los escribanos *del número* — tasado, se entiende-, observable en la Cédula Real de 17-VI-1783, aprobatoria del *arreglo de los Escribanos Reales de Madrid, su distribución, y que su número quede reducido en lo sucesivo al de 150, observándose para ello las reglas y prevenciones que se expresan* (*CCC*, XIV, 29, pp. 2827-2829).

En la *Compilación del Consejo de Castilla* no podían faltar los tratados de paz suscritos entre el monarca y otros soberanos, europeos

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y no europeos, y de cuyas cláusulas, de navegación, de comercio, de intercambio de prisioneros, etc., se deducían competencias y actuaciones de dicho órgano administrativo. Así, el de Versalles de 3-IX-1783, concluido con la Gran Bretaña, y varios más: con la Puerta Otomana, firmado en Constantinopla el 14-IX-1782; con el Bey y Regencia de Trípoli, de 10-IX-1784; con el Dey y Regencia de Argel, de 14-VI-1786; con el Bey y Regencia de Túnez, de 1-I-1791 (*CCC*, XIV, 36, pp. 2843-2865; XIV, 40, pp. 2871-2876; XV, 14, pp. 2930-2935; XV, 41, pp. 2976-2982; XVII, 32-33, pp. 3129-3133; XXII, 29, pp. 3778-3785). Por otro lado, como tal soberano, el monarca español, en ejercicio de sus derechos de Real Patronato, y de la regalía del *regium exequatur*, también manifestaba su poderío absoluto sobre la Iglesia, y sobre el estamento eclesiástico. En unos casos, autorizando la circulación por el reino de breves pontificios, como el del papa Pío VI, según una Real Cédula de 1-XII-1783, que facultaba para *exigir de las Dignidades, Canongías, y demás Beneficios de la Real presentación o sujetos al Concordato, no siendo Curados aunque se provean por los Coladores ordinarios, una porción de sus rentas que no exceda de la tercera parte* (*CCC*, XIV, 45, pp. 2896-2901); u otro del mismo Romano Pontífice, que, autorizado su pase por Cédula de 16-IX-1787, prescribía el método de celebración del primer Capítulo general de la nueva Congregación de las Cartujas de España, así como el de elección de su Vicario general, y de los demás Superiores, generales y locales (*CCC*, XVIII, 35, pp. 3329-3340). Y, en este recorrido por los diversos estamentos, no pueden ser olvidados otros marginados de la sociedad, y también del poder y las ideas *ilustradas*. A diferencia de los chuetas, los gitanos no fueron merecedores de su misericordia, y sí víctimas del imperativo de obtener vasallos útiles y productivos, inclusive entre las minorías sociales. A pesar de que se suele creer que las más duras medidas represivas contra los gitanos fueron las de 1748-1749, en el reinado de Fernando VI, que contaron con la colaboración del marqués de la Ensenada, y que supusieron la detención en los presidios de muchos de ellos, lo cierto es que durante el de Carlos III, tal represión no desapareció, y ni siquiera se contuvo. Una Real Pragmática de 19-IX-1783 impuso, bajo duras penas, su asimilación obligatoria, que comportaba la pérdida de su lengua, vestido, formas de vida y costumbres, según recordaba una posterior Real Provisión, de 28-II-1784, relativa a la reducción *a vida civil y christiana de los llamados Gitanos*. Unas disposiciones que serían reiteradamente recordadas en los años siguientes, lo que es indicio de su incumplimiento, pero, al mismo tiempo, también de la dureza y persistencia en la persecución de los gitanos, y de los delitos que cometían, o que se les atribuían, fundada o infundadamente (CCC, XV, 7, pp. 2916-2918; XV, 24, pp. 2951-2954; XVI, 6, pp. 2991-2992; XVIII, 15-16, pp. 3305-3306; XIX, 52, p. 3463; XXVI, 9, pp. 4013-4014). El ejército y la marina fueron dos

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destinos especialmente socorridos para *marginar* legalmente de la sociedad a quienes ya lo estaban, social y económicamente: de ahí que, a los calificados como vagos y malentretenidos, se les urgiese, a través de las autoridades territoriales y municipales, su leva forzosa, que imprimía *utilidad* social también a los desheredados de la fortuna. Puede ello ser comprobado en la Real Cédula de 27-I-1787, sobre prescripción de reglas, a las justicias del Reino, para la admisión de reclutas, y la recolección de ociosos (*CCC*, XVIII, 5-6, pp. 3259-3269).

Si bien los privilegios eran combatidos jurisdiccionalmente, éstos, como es sabido, no eran atacados cuando beneficiaban al poder absoluto del monarca, más *absoluto* cuantas menos exenciones existiesen, por supuesto, fuera de su esfera de competencias y atribuciones. Ahora bien, se ha visto que, como en el caso de la libertad de comercio de granos en 1765, o de libre comercio con las Indias, también en 1765, y 1778, la erradicación de los privilegios económicos (de los tratantes de granos, de los mercaderes y cargadores sevillanos de la Casa de la Contratación) podía ser considerada beneficiosa. Salvo que mediasen intereses regios superiores, y también políticos, a imitación de las Compañías privilegidas de comercio de las Indias Orientales y Occidentales, holandesas, francesas y británicas, ante los cuales volvían a ceder los argumentos liberalizadores, pretendidamente universales, y de imprescindible generalización. De ahí que la *Compilación* cuente, por descontado, con la Real Cédula de erección de la Compañía de Filipinas, de 10-III-1785 (*CCC*, XVI, 27, pp. 3015-3030). Nuevamente, hay que reiterarlo, puesto que constituye una idea, y praxis, recurrente en los ministros de la Monarquía absoluta, las jurisdicciones privilegiadas, que conformaban el único obstáculo constitutivo, en las sociedades del Antiguo Régimen, al poder expansivo de la autoridad absoluta de los soberanos, eran el enemigo a batir por parte de los letrados a su servicio. Como podía ser la universitaria, precisada también de reforma en sus planes y métodos de estudio, en su organización y funcionamiento corporativos, e incluso en su finalidad misma. Es lo que consta en la Real Cédula de 22-I-1786, que reglamentaba, prolija, exhaustivamente, que *en todas las Universidades de estos Reynos sea la duración del curso o año escolar desde diez y ocho de octubre hasta San Juan de Junio; que se observe en ellas lo dispuesto y establecido para la de Salamanca en quanto a la matrícula de estudiantes, su asistencia a Cátedras, exercicios de Academias, oposiciones a Cátedras, exámenes para el paso de unas a otras; y que para la recepción de los grados mayores y menores, en qualesquiera de dichas Universidades, hayan de tener los que fueren admitidos a ellos igual número de cursos y matrículas, acreditando su disposición a recibirlos, siendo examinados con el rigor prevenido* (*CCC*, XVII, 3-4, pp. 3085-3105). Una educación, la que los ilustrados pretendían mejorar y controlar, que también contó con instituciones exentas de los periclitados métodos de enseñanza de las Universidades

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medievales, modernizados a través de la creación de otras, renovadas *ad hoc*. Como el Colegio de Cirujía de San Carlos, de Madrid, aprobado, con ordenanzas de gobierno económico y escolástico, por Real Cédula de 24-II-1787 (*CCC*, XVIII, 14, pp. 3273-3305). La modernidad de estos planteamientos educativos, y asistenciales, queda reflejada, por ejemplo, en la Cédula Real de 20-V-1788, que prescribía cuál había de ser el *uso y conservación de los Específicos que se inventasen, útiles a la salud, y evitar que semejantes medicamentos perezcan, y que el inventor caiga en la desconfianza de manifestarles a facultativos que los aprovechen en su perjuicio* (*CCC*, XIX, 25, pp. 3420-3421).

En cualquier caso, la dualidad contrapuesta del *privilegio*, social, económico, político, jurisdiccional, y de la *libertad*, impuesta de arriba a abajo, quedaba arrinconada o era marginada cuando se trataba de la principal de las cuestiones, como se ha indicado: el orden público, la tranquilidad social, ahora en su vertiente de los abastos. El *pan del pueblo* no podía faltar, motivo por el cual, un preponderante haz de facultades y competencias del Consejo Real de Castilla versaba sobre los pósitos del Reino, su control, organización y funcionamiento, y sobre las medidas que debían asegurar el buen abastecimiento de alimentos en sus pueblos, villas y ciudades (Real Cédula de 2-VII-1792, en CCC, XXII, 28, 28-*bis* y 28-*ter*, pp. 3821-3871). Todo para que no se produjesen *alteraciones, bullicios, conmociones, motines* populares, pues de todas estas formas era designado lo más temido por los reyes y sus ministros: el levantamiento, la rebelión del pueblo, de los vasallos del rey, súbditos de la Monarquía. De ahí las múltiples disposiciones que, anualmente, evacuaba el Consejo del Rey, exploratorias, preservadoras, protectoras de las buenas cosechas en los confines del Reino. Comenzando por unas modestas, pero, indispensables *Prevenciones* del decano gobernador interino, conde de Campomanes, al corregidor de Madrid, de 1-VIII-1786, dirigidas a facilitar los acopios de trigo en los lugares que habían tenido buena cosecha, *como se hizo en el año de mil setecientos ochenta en Palencia*, y su conducción ordenada a la Corte, en carretas y recuas de mulas (*CCC*, XVII, 28, pp. 3120-3121; XX, 24, pp. 3564-3581). O, relacionadas con los problemas del abastecimiento de los pueblos, y la solvencia de sus vecinos y concejos, indispensable para la supervivencia económica y social de los mismos, y la preservación del deseado orden público, aquellas disposiciones relativas a los propios y arbitrios. Por eso fue despachada la Real Cédula, de 12-XII-1786, que mandaba observar una Instrucción adicional a la de 30-VII-1760, que había procurado centralizar el control de dichos ingresos, y tratado de conseguir su mejor administración (*CCC*, XVIII, 1, pp. 3251-3257).

No siempre las reformas *ilustradas*, amparadas en la razón y la utilidad social, pivotaron exclusivamente en torno al interés de disminuir los poderes corporativos, en favor del poder regio absoluto, como un fin en sí mismo. También esta consecuencia fue conseguida por

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medios indirectos, cuando el objetivo principal era otro. Por ejemplo, el de la salud pública, para evitar el contagio de epidemias, a causa de la práctica de enterrar los cadáveres en el interior de las iglesias. Tal fue el origen del extenso *Memorial ajustado del expediente*, seguido ante el Consejo de Castilla en 1786, en virtud de una Real Orden de 24-III-1781, sobre el *establecimiento general de cementerios* en todas las villas y ciudades del Reino (*CCC*, XVII, 36, pp. 3133-3239; XVIII, 19-20, pp. 3306-3308). Sin embargo, una y otra vez, al recorrer los impresos legales consiliares, año tras año, ha de reconocerse que los conflictos de competencias, entre las dispares, múltiples y expansivas jurisdicciones de la sociedad estamental, articulada en diferentes corporaciones, que eran castillos cuyas almenas estaban levantadas con la argamasa del derecho, y derecho privilegiado, constituían su eje vertebrador. Vertebrador, sí, porque sólo la mutua contención, en equilibrio inestable, proporcionaba sentido último a aquella frondosa e inextricable variedad de fueros: señoriales, eclesiásticos, militares, mercantiles, etc. Dos de las jurisdicciones más frecuentemente enfrentadas eran la real ordinaria y la de guerra. Por eso mismo, una Real Cédula como la de 3-VI-1787 prescribía el método que debería observarse en la decisión de sus competencias, extendido, con posterioridad, por Cédula de 30-III-1789, a otras cualesquiera jurisdicciones y tribunales (*CCC*, XVIII, 26, pp. 3310-3311; XX, 9, pp. 3502-3503; XXIV, 16 y 17, pp. 3909-3912). Que no era, por supuesto, el único. Para la resolución de las que se producían entre los tribunales reales y los de hacienda, el procedimiento quedó recogido en una Cédula de 2-XII-1788 (*CCC*, XIX, 53, pp. 3464-3465). A su vez, el atinente a las justicias ordinarias y los cuerpos de milicias, en otra Cédula Real de 15-IV-1790 (*CCC*, XXI, 10, pp. 3622-3623). O el de las Audiencias y Chancillerías con el Consejo de Órdenes, según Cédula de 23-VIII-1793 (*CCC*, XXIV, 39, pp. 3934-3935; XXVI, 8, pp. 4011-4012).

Y, sólidos baluartes de la jurisdicción regia ordinaria, que se perseguía fuese única o, al menos, indiscutiblemente preponderante, eran los corregidores y alcaldes mayores. Integraban la primera línea de defensa de dicha jurisdicción real, ubicada, de abajo a arriba, territorialmente. Ello explica el interés de regular una carrera de corregimientos y varas de justicia que homogeneizase, y racionalizase, mejorando su preparación y perspectivas, la de sus aspirantes y titulares. Un reflejo de lo cual se advierte en la Instrucción que, sobre esta materia, fue insertada en la Real Cédula de 15-V-1788, de singular importancia y trascendencia (*CCC*, XIX, 18-20, pp. 3400-3414). Por encima de dicha línea defensiva se hallaban las Reales Audiencias, de las que todavía alguna fue fundada en el siglo XVIII, como la de Extremadura, en unas tierras y provincia que se deseaba reformar, en su agricultura y ganadería, por Pragmática-sanción de 30-V-1790; complementada con la ampliación de la Audiencia de Sevilla, mediante otra Pragmática-

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sanción de 30-V-1790 (*CCC*, XXI, 21 y 22, pp. 3644-3651; XXII, 2, pp. 3747-3750).

El primer vislumbre de la futura caída del Antiguo Régimen también consta en la *Compilación del Consejo de Castilla*. Esta recopilación, verdadera suma legal de su estructura jurídico-política, llevaba en su seno el germen de su desintegración constitutiva. Tal primer vislumbre aparece, desde luego, en 1789. Es un modesto Auto Acordado, de 4-XII de dicho año, que prohibe la introducción de dos opúsculos impresos, de títulos tan significativos como delatadoramente subversivos: *La France Libre* y *Des Droits et Devoirs de l'Homme* (*CCC*, XX, 48, p. 3603). La Revolución, imparable, estaba en marcha. A estos opúsculos seguirían otros muchos, algunos de ellos ya panfletos periódicos, como el *Correo de París* o *Publicista Francés* (Carta Orden de 5-I-1790, en *CCC*, XXI, 2, p. 3611). No es posible detenerse en todos, pero, evidencian que el reinado de Carlos IV ya no podría seguir, jamás, los caminos trillados del anterior. Los tiempos no eran nada favorables para el reformismo *ilustrado*, incisivamente jurisdiccional, cautamente económico, interesadamente político, y apenas social. A la prohibición de circulación de las obras impresas siguió la proscripción y control de los movimientos de las personas, en este caso, los franceses sospechosos de ser revolucionarios. Las matrículas y registros de extranjeros, incluidos los eclesiásticos, domiciliados y transeúntes, fueron impuestas, cada vez con mayor rigor. Lo demuestran la Instrucción del Consejo, aprobada el 21-VII-1791, que seguía las directrices de aislamiento de lo que acontecía al otro lado de los Pirineos, propugnada por el conde de Floridablanca como secretario del Despacho de Estado; o, la Real Cédula de 10-IX-1791, muy expresiva del temor que atenazaba a las autoridades, en relación con los alarmantes sucesos revolucionarios de Francia, de prohibición de la introducción y curso de cualesquiera *cartas o papeles sediciosos, contrarios a la fidelidad y a la tranquilidad pública*, para lo que se mandaba a las justicias ordinarias que procediesen en este asunto *sin disimulo, y con la actividad y vigilancia que requiere*, que se entendía máxima (*CCC*, XXII, 12 y 13, pp. 3764-3766; XXII, 27 y 28, pp. 3775-3778; XXII, 35, pp. 3789-3790; XXIII, 46, pp. 3885-3887; XXIV, 14, pp. 3906-3908).

El proceso de disolución, primero político bajo Carlos IV, preludio del social y económico que se prolongaría durante el siglo XIX, se abre definitivamente con el ascenso de Manuel Godoy, duque de la Alcudia, al cargo de primer secretario de Estado y del Despacho. Un ascenso que, en el Consejo de Castilla, por lo que se refiere a su ámbito de competencias, se concretó en su nombramiento de superintendente general de Correos, Postas y Rentas, por Real Provisión que mandó observar dicha designación, de 7-I-1793 (*CCC*, XXIV, 1, pp. 3897-3900). Y, el *valido* condujo al Reino al desastre con la Guerra contra la Convención francesa (1793-1795), en la que una Real Cédula del

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Consejo ordenó el cese de toda comunicación, trato y comercio con los habitantes y posesiones del vecino país (*CCC*, XXIV, 24, pp. 3916-3918; XXIV, 32, pp. 3923-3925; XXIV, 36, pp. 3927-3933; XXIV, 55, pp. 3947-3948; XXV, 10, pp. 3959-3960; XXV, 35, pp. 3989-3991). Una guerra que concluyó con la rendición total de España — *de facto*, y a medio plazo—, por el tratado de Basilea de 22-VI-1795, mandado observar por Real Cédula de 12-X-1795 (*CCC*, XXVI, 17, pp. 4030-4035). La derrota le supuso a Godoy el título, nada menos que de *Príncipe de la Paz*. Todo un símbolo, sarcástico, de la impotencia de los viejos tiempos ante el vendaval revolucionario. De esta forma, la *Compilación* cronológica de impresos legales del Consejo de Castilla quedó estancada, sin continuación, que se sepa. Por lo que, aunque sabemos que moribundo ya, dicha *Compilación*, truncada, no permite al lector asistir a la disolución última del Antiguo Régimen. Tampoco hacía falta, dado lo previsible del desenlace.

Para concluir, hay que felicitarse, en fin, como lectores, investigadores, estudiosos, curiosos o aficionados a la Historia del Derecho y de las Instituciones que se pueda ser, de que la tenacidad de editores de fuentes de nuestro pasado histórico — no sólo español, sino también *común* o europeo — como el profesor Coronas, y la generosidad y pericia profesional de organismos públicos como el Centro de Estudios Políticos y Constitucionales, y el Boletín Oficial del Estado, permitan que empresas editoriales tan ambiciosas como ésta puedan ver la luz, con éxito y solvencia. Y ello aunque medie un lapso de tiempo de siete años, de 1996 al 2003, como en el caso que nos ocupa, que prueba que detrás de esta empresa de edición existe, por parte de sus responsables últimos, una política razonada y meditada, constante y ponderada, de difusión del pensamiento jurídico-político del pasado histórico español, y de conservación y preservación de su patrimonio cultural. Las empresas y las obras no surgen de la nada, por generación espontánea. Sólo pueden ser animadas por hombres cuyo entusiasmo les insufle vida, y que sean capaces, por su preparación y dedicación, de acometer tales retos, en este caso, editoriales. De ahí que los lectores, u ocasionales usuarios, que se beneficien del *Libro de las Leyes del siglo XVIII*, en sus seis tomos y el adicional del índice, necesariamente no puedan dejar de sumarse a los dos agradecimientos, tanto al institucional, como al particular y nominal, que el profesor Coronas consigna a la conclusión de su *Nota Preliminar* al tomo V (p. XIV). Es la virtud de la justicia, que necesariamente debe ser encarnada, en un momento y en un lugar concretos, y que también se espera, incluso de la lectura de un Libro *de Leyes*, aunque sea de otro siglo, pero, resucitado y vivificado por concretos hombres, de hoy y de aquí. Porque, como decía Cicerón, la justicia desaparece si no es lícito que a cada uno le corresponda lo

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suyo: *Aequitas tollitur omnis, si habere suum cuique non licet* (*De officiis*, 2, 22).

JOSÉ MARÍA VALLEJO GARCÍA-HEVIA

S. DELLAVALLE, *Una costituzione senza popolo? La costituzione europea alla luce delle concezioni del popolo come "potere costituente"*, Giuffrè, Milano, 2002; E. SCODITTI, *La costituzione senza popolo. Unione Europea e nazioni*, Dedalo, Bari, 2001.

I due libri che presentiamo congiuntamente al lettore dei *Quaderni* appartengono certamente, al di là delle qualificazioni accademiche e professionali dei loro rispettivi autori, al campo mobile e complesso della *scienza costituzionale*. A tale scienza i nostri due autori pongono un interrogativo che oggi si va rivelando sempre più pressante: se essa possieda tutti gli strumenti necessari per comprendere il significato di fondo di quel processo storico, dispiegato nel nostro presente, che sta determinando i caratteri di una nuova forma politica dotata di costituzione, che nel linguaggio corrente sempre più ha assunto la denominazione di 'costituzione europea'.

Su un punto i due autori mostrano di essere d'accordo, anche se con alcune differenze che più avanti metteremo in luce: che questi strumenti, necessari alla scienza costituzionale del nostro tempo, non possono essere quelli consueti, presenti nell'armamentario del *diritto pubblico statale*, ovvero del diritto pubblico europeo degli ultimi due secoli, imperniato sulla figura dominante dello Stato sovrano. Questa consapevolezza, insieme storica e teorica, sembra per altro essere ormai piuttosto diffusa nella più recente letteratura sulla vicenda costituzionale europea (sul punto sia consentito rinviare ad altri due lavori, nei quali anche il recensore è stato coinvolto: *Una Costituzione senza Stato*, a cura di G. Bonacchi, Il Mulino, Bologna, 2001, che giunge a conclusione di un'impegnativa ricerca condotta dalla Fondazione Basso; e *L'ordine giuridico europeo: radici e prospettive*, vol. 31 dei *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, due tomi, Giuffrè, Milano, 2002, che giunge anch'esso a conclusione di un percorso di ricerca disegnato dal *Centro di studi per la storia del pensiero giuridico moderno* che ha consentito di far lavorare sul tema studiosi portatori di diverse competenze, sotto la guida di Pietro Costa). E tuttavia, una volta acquisita tale consapevolezza, il problema rimane di fronte a noi, completamente irrisolto: come qualificare e comprendere il significato del *novum* insito nella attuale prospettiva della costituzione europea?

Dai nostri due volumi vengono effettivamente alcune prime risposte, con le quali intendiamo brevemente confrontarci, nei limiti di questa recensione. Iniziamo da Dellavalle. Nel suo volume, il tentativo

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di trovare un fondamento alla costituzione europea passa attraverso la critica ai due paradigmi dominanti nella tradizione costituzionale europea: quello *olistico* che orienta la ricerca del fondamento di ogni costituzione verso un popolo inteso come soggetto dotato di una forma e di una sostanza storica unitaria pre-data, e per ciò stesso capace di una decisione costituente, e quello *individualistico*, che nella costituzione vede invece essenzialmente lo strumento di garanzia dei diritti individuali, fondato su un contratto stipulato tra gli individui medesimi.

Secondo Dellavalle, entrambi i paradigmi risultano inutilizzabili per la comprensione del fondamento della costituzione europea. Il primo, quello olistico, indirizza chi lo segue nel vicolo cieco della imitazione di quel particolare tipo di unità politica su cui era costruito il 'popolo', o la 'nazione', nell'età degli Stati nazionali, o magari, ancora più indietro, su cui si fondava il popolo costituente della rivoluzione francese: è evidente che sul piano europeo non avremo comunque un 'popolo', o una 'nazione', nel senso della tradizione degli Stati nazionali, né una deliberazione in senso costituente del tipo di quelle che si ebbero nell'età delle rivoluzioni. Ma anche il secondo, quello individualistico, è oggetto delle critiche di Dellavalle. Esso genera infatti l'illusione che i diritti, una volta liberati dall'abbraccio, ritenuto soffocante, della dimensione statuale, siano destinati ad affermarsi necessariamente, quasi per loro natura, sul piano sovranazionale, praticamente per via esclusivamente giurisprudenziale, e lasciando quasi del tutto alle spalle il principio democratico e la dimensione della cittadinanza attiva. Se il primo paradigma, quello olistico, è inutilizzabile perché troppo rivolto al passato, il secondo, quello individualistico, è inutilizzabile perché dimentico di un aspetto importante della nostra tradizione, evidentemente caro a Dellavalle, che per lo meno fino ad ora sembra impedirci di pensare e di fondare i diritti al di fuori della cittadinanza democratica, e dunque al di fuori di una forma politica democraticamente legittimata. Avendo per altro il nostro autore ben chiaro che tale cittadinanza non può essere ricalcata su quella di stampo rousseauviano, e neppure, per lo meno in parte, su quella più recente degli Stati democratici e sociali del Novecento, in fondo pur sempre appartenenti, per il profilo che qui interessa, al tipo storico dello Stato nazionale, si tratta evidentemente, nella sua linea, di trovare, per quella cittadinanza, un fondamento nuovo, adatto al contesto europeo, libero da ogni ipoteca, anche remota, di stampo olistico, ed in ultima analisi diverso anche, in una certa misura, dal fondamento dominante nella stessa tradizione democratica.

È qui, precisamente in questo punto, che prende corpo la proposta di Dellavalle, consistente nell'orientare la ricerca sulla costituzione europea lungo le linee che possono essere suggerite dall'adozione del *paradigma comunicativo*, ovvero di un *terzo paradigma*, costruito in modo da evitare i decisivi errori di prospettiva insiti nei primi due

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paradigmi, a noi già noti. Nel paradigma comunicativo non abbiamo infatti, né l'individuo che trova la sua identità sul piano costituzionale in quanto appartenente alla nazione in senso etnico, o comunque storico-culturale, come nel paradigma olistico, né l'individuo isolato del paradigma individualistico, ma l'individuo collocato in un sistema plurale di relazioni, che costituisce a sua volta 'popolo', ma solo nel senso di un'associazione volontaria d'individui soggetti allo stesso diritto, entro cui la dimensione della appartenenza politica si risolve nella condivisione di un medesimo *status* giuridico.

Lo sforzo di Dellavalle è quello di affermare l'originalità di tale soluzione rispetto alla tradizione, ma nello stesso tempo mantenendosi nella linea storica del costituzionalismo democratico. È questa una via impervia, che il nostro autore intraprende con coraggio, e non senza difficoltà. Così, se è vero che al nostro orizzonte non si profila alcun 'potere costituente' nel senso della tradizione, è anche vero che il legame, che Dellavalle pervicacemente mantiene vivo, con il costituzionalismo democratico impedisce di abbandonare quel terreno, e costringe quindi a reinventare la dimensione costituente, all'interno di un processo in cui si dovrà tenere in equilibrio il ruolo del popolo dei cittadini dell'Unione con il ruolo dei popoli degli Stati membri. Fino poi ad ammettere, nelle pagine conclusive, che l'Unione finirà anch'essa per divenire uno 'Stato', in fondo nella linea degli Stati nazionali democratici e sociali, ma non nel senso della tradizione sul piano teorico riassunta da Weber e da Jellinek, ma nel senso di un ordinamento della condotta, sulla via aperta da Kelsen. È questo uno spunto importante, solo accennato nelle pagine conclusive, che converrebbe forse riprendere.

In ultima analisi, la posizione di Dellavalle è aperta e problematica, alla ricerca di un difficile punto di equilibrio, tra la necessità di emancipare il discorso sulla costituzione europea dai modelli della tradizione e la necessità, dall'autore parimenti sentita, di mantenere quel discorso nella scia del costituzionalismo democratico. Da qui, anche la scelta del titolo del saggio, con un significativo punto interrogativo: 'Una Costituzione senza popolo?'. Una domanda che viene oggi per altro continuamente riformulata in molti altri modi: è possibile davvero una costituzione senza popolo? Oppure, ancora: di quale 'popolo' ha bisogno la costituzione europea? Sottolineiamo questo aspetto anche per introdurre al lettore il secondo saggio, quello di Scoditti, che reca un titolo assai meno dubitativo: 'La Costituzione senza popolo'. Scompare il punto interrogativo, e muta anche l'articolo: la costituzione europea non appare più come 'una' possibile costituzione, alla ricerca di un suo problematico fondamento di tipo democratico, ma come ' la' costituzione, in sé determinata come un *novum* ormai del tutto emancipato dal precedente modello storico, statal-

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nazionale e democratico. Su questa differenza tra i due saggi dobbiamo ora brevemente ragionare.

La proposta di Scoditti è quella del *sovranazionalismo civile*. È questa una dimensione diversa sia dal mero intergovernamentalismo, tipico di una relazione tra Stati sovrani che rimane sul piano del diritto internazionale, sia dal federalismo, in quanto inteso come processo destinato prima o poi a produrre uno Stato federale, ovvero una forma politica riconducibile, pur con la sua specificità, alla tipologia storica degli stessi Stati sovrani. Nella dimensione sovranazionale gli Stati intrecciano relazioni ormai anche radicalmente diverse da quelle tradizionali del diritto internazionale rompendo di fatto la classica opposizione tra costituzione e trattato, tanto che dal trattato deriva un diritto come quello comunitario a certe condizioni immediatamente efficace negli ordinamenti nazionali, per il tramite delle stesse giurisdizioni nazionali. Tutto questo conduce a pensare ad una *costituzione sovranazionale*, che è tale perché compone una pluralità di unità politiche statali su un piano ben diverso da quello della mera confederazione, creando tra esse un diritto comune dai contorni sempre più ampi, dai caratteri sempre più definiti.

È chiaro per altro che a tale costituzione non si deve chiedere di rappresentare, come nell'età delle rivoluzioni e degli Stati nazionali, alcuna *unità d'indirizzo*. L'Europa è infatti vista da Scoditti come *lex*, e non come impresa comune, dotata di un indirizzo fondamentale come tale espresso nella costituzione. In una parola, l'Europa è *associazione civile* — da qui la scelta di qualificare come 'civile' lo stesso sovranazionalismo — e non *associazione d'impresa*, come erano gli Stati nazionali, è *societas* e non *universitas*, secondo la celebre tipologia di Michael Oakeshott, dallo stesso Scoditti esplicitamente ripresa.

Qui sembra essere la differenza più rilevante con Dellavalle, che ancora si muove, per quanto in modo assai originale e problematico, nella linea del costituzionalismo democratico. Per Scoditti, la costituzione come *lex* richiama invece decisamente la *legge fondamentale del paese*, in una prospettiva storica che valica all'indietro le colonne d'Ercole del moderno, pensando alla tradizione medievale della intrinseca limitatezza dei poteri del sovrano, del governo come equa composizione di una pluralità di forze e di soggetti. Non a caso, in una pagina assai significativa Scoditti tende a schiacciare Habermas — per Dellavalle riferimento teorico indispensabile nella delineazione del paradigma comunicativo — su Schmitt: anche se ovviamente in modo molto diverso, entrambi pensano all'89 come all'orizzonte ultimo, fuori del quale non è possibile pensare ad alcuna costituzione. Secondo Scoditti, ciò che invece si deve oggi propugnare è proprio il superamento di quell'orizzonte, e la riduzione della politica nata dall'89, ed imperniata sulla concatenazione sovranità-rappresentanza-indirizzo fondamentale, ad una fase storicamente determinata della politica in Europa, che ha

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avuto le proprie costituzioni, e cui ora segue un'altra e diversa fase, entro cui s'inseriscono costituzioni del tutto diverse, come quella europea, che presentano caratteri del tutto inediti, o magari assai vicini a quelli presenti in Europa prima dell'89.

Come ben si vede, le differenze all'interno del discorso sul fondamento della costituzione europea derivano in radice, come sempre, da consapevolezze di ordine storico. Mentre Dellavalle pensa che il costituzionalismo democratico sia l'unico quadro di riferimento possibile per l'elaborazione di ogni costituzione, e dunque anche di quella europea, Scoditti apre scenari diversi e storicamente più risalenti, che attengono alla stessa tradizione medievale della limitazione e dell'equilibrio dei poteri, e tenta dunque di riferire la costituzione europea, in linea con quella tradizione, ad una consociazione di tipo esclusivamente civile, priva di un punto in cui sia condensata e rappresentata la sovranità e da cui si diparta l'indirizzo politico fondamentale, unita nella *lex*, e non nel perseguimento di obbiettivi sostanziali. Un' Europa — quella di Scoditti — che ha anch'essa la sua missione, che però non è certo più quella di salvare e rivalidare il patrimonio dell'89, ma piuttosto quella di mostrare al mondo un modello pacifico di relazione tra unità politiche, capace di mitigare le volontà di potenza degli Stati nazionali, di determinare i contorni ed i caratteri di un forte diritto comune, senza per questo esprimersi nei termini di un' altra e nuova superpotenza, o anche solo ricadere nella trappola di sempre, insita nella esperienza del moderno, della personificazione del potere.

MAURIZIO FIORAVANTI

CARLA DE PASCALE, *Vivere in società, agire nella storia. Libertà, storia e diritto in Fichte*, Milano, Guerini 2001, pp. 380.

Pur trattandosi di una raccolta di saggi, questo importante libro di Carla De Pascale ha una sua sostanziale compattezza. Certo non si tratta, né si poteva trattare, di una ricerca con una struttura improntata al "sistema" di Fichte, un compito che la De Pascale ha già assolto in un volume del 1994, del quale è appena uscita la traduzione tedesca (*Etica e diritto*, Bologna, Il Mulino; ora anche Berlin, Duncker & Humblot 2003). Ma non ricalcare l'andamento di un sistema ha i suoi vantaggi, che in questo caso emergono dai nodi teorici in cui i vari capitoli vengono raggruppati, in tre sezioni: *forme della libertà*, *filosofia della storia*, *diritto e società*. E vedremo il significato di questa articolazione, ciò che permetterà di intendere e di delimitare il campo in cui ci si muove. Si tratta di problemi centrali per Fichte, ma anche di questioni che si impongono e per sé e nella relazione stretta che li collega proprio negli anni in cui Fichte scrive, a cavallo tra Settecento ed Ottocento, e

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che investono maggiori e minori filosofi del tempo. Sullo sfondo, è ovvio, c'è, sul piano filosofico, la discussione sulla filosofia kantiana, ma ci sono anche, sul piano storico, gli eventi della società e degli Stati europei (primo tra tutti la rivoluzione francese), dei quali Fichte è attento osservatore e interprete. Ma non solo: è caratteristico del pensiero di Fichte, e anche della sua personalità, l'aspirazione a un ruolo della filosofia, e del ceto intellettuale, non disgiunto dalla vita reale. È quasi superfluo, a questo proposito, ricordare l'insistenza fichtiana sull'importanza e sulla funzione del ceto dei dotti, al quale, oltre che nelle opere sistematiche, Fichte prestò tanta attenzione da dedicarvi interi cicli di lezioni, nelle diverse fasi della sua evoluzione intellettuale (1794, 1805, 1811). Qualunque giudizio si voglia dare sulla maggiore o minore unitarietà della filosofia fichtiana, il tema dell'intellettuale come promotore del rinnovamento è certo uno degli elementi costanti: anzi, chi creda in una interpretazione non unitaria (come chi scrive) può utilizzare proprio questi diversi cicli di lezioni come cartina al tornasole delle modificazioni dell'impianto complessivo.

Accennata la questione dell'unitarietà della filosofia di Fichte vale la pena di soffermarvisi un momento per vedere l'atteggiamento che la De Pascale assume di fronte al problema. Non viene certo sposata, in questo libro, la tesi che ha accompagnato a lungo la cosiddetta *Fichte-Renaissance*. Cominciata negli anni Sessanta in coincidenza con l'inizio della pubblicazione dei volumi dell'edizione critica (ormai giunta a buon punto), la grande ripresa di studi fichtiani ha avuto il suo centro a Monaco e il suo infaticabile promotore in Reinhard Lauth. Anche, o soprattutto, grazie allo studio delle diverse versioni della *Wissenschaftslehre*, si è andati alla ricerca di un'immagine della filosofia fichtiana fondata sulle opere successive al 1800, che non fossero quindi riducibili alla prospettiva della "filosofia dell'Io", da un lato, cercando di rileggere tutto il pensiero fichtiano in questa chiave, dall'altro, e di conseguenza, contrapponendo Fichte, come filosofo genuinamente "trascendentale", alle filosofie di Hegel e Schelling.

Pur sensibile all'idea di una lettura unitaria, la De Pascale assume una posizione propria sulla questione. La ricerca di unità non va tanto nella direzione di un modello, o di uno schema, nel quale fare rientrare le diverse istanze della filosofia fichtiana, magari rischiando di far violenza ai testi o di rendere forzatamente omogeneo ciò che omogeneo non è, quanto nella direzione di rintracciare una unità di intenti o un filo conduttore (p. XVIII) che viene però articolato, nel corso della riflessione fichtiana, in modi diversi. Tanto più nella filosofia pratica, che costituisce l'oggetto dei saggi del volume, le scansioni storiche diventano rilevanti, oltre che per lo sviluppo (o comunque il modificarsi) interno della riflessione filosofica di un autore, anche per i problemi che volta per volta il filosofo si trova ad affrontare. In questo senso, solo per fare gli esempi più banali, gli anni della rivoluzione

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francese, del suo "tradimento" da parte di Napoleone, e la necessità, conseguente, di pronunciare dei "discorsi alla nazione tedesca" (usciti in una bella traduzione italiana a cura di Gaetano Rametta presso Laterza nel 2003) incidono in maniera significativa nella riflessione teorica fichtiana. Oltretutto, la De Pascale ci suggerisce di guardare con attenzione alla peculiarità del pensiero di Fichte proprio in riferimento all'individuazione dei temi centrali della sua filosofia: « ogni argomento cui egli dedica la sua riflessione gli si atteggia di volta in volta come centrale, e centrale diventa anche la categoria che lo esprime, cui le altre si riferiscono come subordinate, e anche in parte deformate, perché costrette ogni volta ad adattarsi a un tutto nuovo e diverso » (p. 202). Che Fichte adotti in molti casi *una* prospettiva e questa diventi dominante è certo vero, e questa considerazione metodologica aiuta a non sentirsi costretti a vedere in ogni mutamento di angolo visuale un ribaltamento teorico; il rischio contrario, naturalmente, è ridurre a questa dimensione le modificazioni, anche profonde, che intervengono nel suo pensiero. Ma l'indicazione è interessante e originale, e la prova della sua fecondità sta nei risultati che troviamo in questo libro.

Si è detto dei nodi teorici che articolano il volume: forme della libertà, filosofia della storia, diritto e società. Per tutta la filosofia classica tedesca, ma lo si potrebbe dire per tutta la tradizione filosofica, il termine "libertà" è una nozione dai più significati: sarebbe riduttivo volerla ricondurre a una soltanto delle sue dimensioni, magari pensando prevalentemente a quella "politica". Di recente, Claudio Cesa ha ammonito contro questo genere di appiattimenti, prendendo in esame con finezza, per distinguerle, libertà "filosofica" e libertà "politica" (se ne veda il saggio relativo nel volume curato da G. Duso e G. Rametta, *La libertà nella filosofia classica tedesca*, Milano, Angeli 2000). Ma in particolare per Fichte, è d'obbligo parlare di *forme* della libertà, di configurazioni che la nozione assume sui diversi piani, quello metafisico, quello politico, quello etico. Tra l'altro, per Fichte e per Hegel, come per altri contemporanei, il problema della libertà è anche il problema della sua realizzazione, e il corollario di questo processo di realizzazione è che essa assuma diverse forme, magari anche storiche, perché essa si realizza anche *nella* storia. Evidente dunque il nesso tra i nodi teorici delle forme della libertà e della filosofia della storia, ma immediato anche il nesso che lega questi due termini e la questione del diritto, inteso non solo o non tanto come "elemento costitutivo e fondante della concezione dello Stato", ma come categoria centrale del vivere sociale, essendone condizione, e come prima forma di realizzazione della libertà che dovrebbe preludere, per Fichte, a una libertà più alta. I tre nodi teorici, insomma, che articolano non solo concretamente ma anche idealmente queste ricerche, sono davvero tali, e verrebbe quasi da vederli come sempre compresenti, tanto stretto è il loro nesso per Fichte.

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La prima sezione del volume traccia implicitamente, attraverso i primi tre capitoli, una sorta di ricostruzione della prospettiva etica di Fichte: la prima fase (*Sulla dottrina degli impulsi*, pp. 3 sgg.) fondata sulla dimensione della finitezza, nel concetto di impulso individua un radicamento antropologico assente in Kant, da un lato, ma, dall'altro, lo vede strettamente connesso alla metafisica della *Dottrina della scienza*. La questione dell'impulso e dell'antropologia sarà uno dei temi che progressivamente tenderanno ad attenuarsi fino a sparire, nel modificarsi della metafisica e dell'etica di Fichte. La seconda fase (cfr. *Religione e politica in Fichte*, pp. 35 sgg.), al volgere del secolo, costituisce un punto di passaggio in cui il permanere del tema della libertà si interseca con la ricerca di una sua collocazione sia sul piano religioso (sempre più rilevante) sia sul piano politico. Infine, l'ultimo momento è costituito da "appunti di lettura" dell'ultima dottrina morale di Fichte, nel 1812, della quale possediamo il testo redatto per le lezioni (*Le lezioni di etica del 1812: appunti di lettura*, pp. 61 sgg.). Qui la De Pascale rileva giustamente la radicalità delle modificazioni intervenute nella nuova visione "religiosa" di Fichte, magari nella fondazione ormai diversa di concetti sempre presenti nel suo pensiero come quello di "individualità" (cfr. pp. 70-71), e osserva anche come il tardo Fichte non riesca a conseguire una "armonia d'insieme". Conclude la sezione uno dei lavori più stimolanti che troviamo in questo libro, dedicato alla coppia libertà/necessità, centrale, se intesa come problema, per le molte difficoltà che caratterizzano la concezione fichtiana del rapporto tra diritto e morale e per la stessa filosofia della storia (*Libertà e necessità fra diritto e morale*, pp. 75 sgg.). La proposta fichtiana resta irrisolta, sostiene l'Autrice, nella costante tensione tra individuo e Stato, nell'aspirazione del singolo ad una libertà "vera" che contrasta con l'ossessione fichtiana per un'organizzazione rigida della vita statale che tanta ironia suscitò in Hegel (la famigerata "polizia" e il dirigismo economico). Dal punto di vista della concezione dello Stato, è illuminante l'osservazione per cui la "storia" dello Stato ha nell'orizzonte di Fichte due esiti, entrambi auspicati ma poco conciliabili: da un lato, lo Stato è solo uno strumento che tende, se davvero "conforme a ragione", alla propria estinzione, dall'altro, proprio la tensione tra diritto e morale conduce il tardo Fichte a proporre uno Stato che non può disinteressarsi della moralità dei cittadini e che rischia quindi di diventare educativo ed "etico" (p. 91).

La sezione sulla filosofia della storia ci offre la cornice nella quale la libertà dovrebbe realizzarsi, pur in un'ottica che certo non vede in Fichte "giustificare" il presente. Proprio quando si avvicina con decisione ai temi di filosofia della storia (nei *Tratti fondamentali dell'epoca presente*, 1804-5), al contrario, Fichte individua nell'epoca a lui contemporanea l'epoca della completa peccaminosità (*La filosofia della storia nei primi anni berlinesi*, 127 sgg.). Fa bene la De Pascale a

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rivendicare anche in quest'occasione il retaggio illuministico di Fichte, e l'oggettiva scarsa affinità con le coeve impostazioni *geschichtsphilosophisch* dei romantici (p. 153). È in questo quadro che vanno lette anche le tensioni dei *Discorsi alla nazione tedesca*, (pronunciati a Berlino sotto l'occupazione francese tra il 1807 e il 1808), uno degli elementi che più si è prestato ad arricchire la schiera delle interpretazioni "politiche" di Fichte (cfr. *Il primato della Germania nei 'Discorsi alla nazione tedesca*, pp. 203 sgg.). La questione della storia viene affrontata dall'Autrice, con notevole raffinatezza, anche a partire dal problema del *tempo* (*Il tempo della storia*, pp. 101 sgg.) e della difficile relazione tra temporalità, cioè finitezza, ed eternità: si esprime, in questa coppia, lo sviluppo del tema prima leibniziano e poi kantiano dei due mondi, quello sensibile e quello intelligibile. La vita "vera" è quella sovrasensibile, ma il tempo della vita terrena è indispensabile strumento, e compito, per vivere la prima. E ciò riguarda tanto la vita individuale quanto la vita collettiva.

Proprio l'articolazione tra vita terrena, sensibile, e vita "vera" costituisce l'oggetto del più originale lavoro dell'ultima sezione, quella dedicata alla relazione tra diritto e società. Qui (*Vita, natura e lavoro*, pp. 257 sgg.) riemerge con chiarezza l'importanza dell'antropologia per la prima fase della riflessione di Fichte, ed il suo intersecarsi con i temi del diritto e della vita sociale. Il tema dei bisogni e la sua rilevanza anche all'interno della concezione fichtiana della società e dello Stato fanno sì che, pur sullo sfondo di una vita soprasensibile che rimane, ovviamente, il termine assiologicamente superiore, l'individuo concreto nella sua determinatezza naturale risulti determinante per l'immagine fichtiana dell'uomo *e* del cittadino. Diritto alla proprietà è per Fichte diritto ad un'attività, più che a cose, e questo diritto tende ad essere identificato con il diritto al lavoro e quindi con il diritto stesso alla vita. Per poter vivere si deve poter lavorare, e in ciò si deve essere garantiti dall'autorità dello Stato: è il lato sociale della teoria fichtiana che si impone con forza già nelle pagine del *Diritto naturale* (1796-97), ma si tratta di temi che rimangono costanti negli scritti giuridico-politici del filosofo, per il quale quello della *giustizia* è un elemento, potremmo dire, trainante. Lo stesso ambito problematico, del resto, torna in un altro capitolo del libro (*Archeologia dello "Stato di diritto"*, pp. 233 sgg.), dove oltre a mettere in guardia dall'uso dell'espressione "Stato di diritto" per caratterizzare la concezione kantiana, la De Pascale sottolinea anche come in Kant la categoria del diritto sia usata al singolare, per contrassegnare il diritto dello Stato « per definizione giusto, e identico, sempre per definizione, alla capacità di coazione da esso esercitata » (p. 248). In Fichte, al contrario, si ha un recupero dei "diritti" come diritti sociali che riprende anche la tradizione giusnaturalistica prekantiana, oltre a subire la suggestione degli avvenimenti e delle discussioni francesi (p. 254). Come emerge anche altrove, però (nel capitolo più "attualiz-

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zante", forse il meno convincente sia sul piano metodologico sia per quanto riguarda i contenuti: *I diritti umani nella prospettiva fichtiana*, pp. 283 sgg.), ciò che colpisce, nella pur grande attenzione che Fichte dedica al diritto e ai diritti, è "la totale assenza dei diritti politici" (p. 310).

Questo volume di studi fichtiani (che si chiude con un capitolo sul diritto internazionale, *Il diritto e il rapporto fra i popoli*, e con uno su *La filosofia politica di Fichte secondo Richard Schottky*) è il frutto di ricerche che si sono estese per quasi trent'anni e che ci danno, tra l'altro, la misura di quanto la filosofia classica tedesca, fino a poco tempo fa chiamata piuttosto *idealismo tedesco*, sia ben lungi dall'essere un corpo monolitico e, ancor più, dall'avere trascurato i temi della concretezza della vita sociale. Non solo ciascuno dei grandi filosofi che incontriamo in quest'ambito viene ormai visto nella sua configurazione autonoma, e non in un processo di "superamento", ma l'impianto idealistico non ha significato affatto una qualsivoglia trascuratezza per i problemi dell'individuo e della vita reale nelle sue diverse articolazioni. Se ciò vale per tutti questi grandi filosofi, vale in modo particolare per Fichte, peculiare interprete del suo tempo e di questo, in molti sensi, rappresentante esemplare, anche, o soprattutto, per le molte tensioni che caratterizzano il suo pensiero e che sarebbe vano volere ricondurre ad armonia. Sarebbe fargli un torto immeritato. Della ricchezza delle sue riflessioni e della ricerca di soluzioni, magari non trovate, questo libro ci offre una testimonianza di alto livello.

LUCA FONNESU

MARIA DONZELLI e REGINA POZZI (a cura di), *Patologie della politica. Crisi e critica della democrazia tra Otto e Novecento*, Roma, Donzelli, 2003.

Nell'ampio e diversificato orizzonte di indagine delle scienze storico-sociali contemporanee, il confronto con il lato più oscuro della storia politica del Novecento continua a godere di un'indiscussa centralità. Delle tre domande-chiave che alimentavano la pionieristica riflessione di Hannah Arendt sul totalitarismo — che cosa è successo? Perché è successo? Come è stato possibile che accadesse? (1) — soltanto la prima sembra, infatti, aver trovato nel corso del tempo soddisfacenti, sebbene pur sempre provvisori, elementi di risposta: della dinamica materiale e simbolica dei regimi dittatoriali del Novecento — così come del funzionamento delle devastanti macchine di morte da essi alimen-

(1) H. ARENDT, *The Origins of Totalitarianism*, 1951(trad. it. *Le origini del totalitarismo*, Milano, Comunità, 1999, p. LVI.

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tate — ora sappiamo abbastanza, sebbene il rischio dell'azzeramento della memoria sia sempre in agguato. Ciò che continua a mancare nei nostri inventari di inizio millennio è però una spiegazione completamente convincente dei processi storico-sociali che hanno potuto condurre a forme così estreme di imbarbarimento collettivo. A distanza di decenni continuiamo perciò ad interrogarci sul mistero della politica novecentesca, alla ricerca di frammenti di senso che consentano di rileggere la nostra vicenda recente nella prospettiva tutto sommato rassicurante di una più piena comprensione storica.

È appunto l'esigenza di un confronto a tutto campo con il lato più oscuro della nostra modernità che ha spinto gli autori del volume *Patologie della politica* (2) a ripercorrere a ritroso la vicenda politico-ideologica dell'età contemporanea, in un complesso itinerario genealogico centrato sull'evoluzione storica di categorie concettuali e codici del pensiero. Alla base dell'itinerario di ricerca che forma l'intelaiatura del volume c'è infatti la convinzione che la deriva totalitaria della politica novecentesca debba essere interpretata in primo luogo come una devastante *crisi di civiltà*, in cui giunge a dissoluzione — « dopo più di un secolo di elaborazioni dottrinarie e più o meno compiuti tentativi di realizzazione » — un certo modo di pensare e praticare la politica, sostanzialmente coincidente con l'innovativo spazio di esperienza inaugurato in Europa dalla Rivoluzione francese (3). Non è possibile, dunque, interrogarsi sul significato epocale della « crisi degli anni Trenta del Novecento » senza indagare il complesso ideologico e concettuale che, seppure in concomitanza con numerosi altri fattori, ha offerto un contributo decisivo al prodursi di quell'immane catastrofe della coscienza europea. Un approccio ricostruttivo, questo, che nell'impostazione del volume tende sostanzialmente a coincidere con la storia di quel pensiero — e di quell'*ethos* — antidemocratico che nella vicenda intellettuale europea tra Otto e Novecento sembra costituire un decisivo, e trasversale, orizzonte di senso.

Contrariamente a quanto ci si potrebbe aspettare, l'itinerario ricostruttivo proposto eccede però largamente il convenzionale arco cronologico della crisi della civiltà liberale. Come sottolineano Maria Donzelli e Regina Pozzi nell'introduzione al volume, la dissoluzione della costellazione di valori emersa dalla Rivoluzione rappresenta, infatti, un processo di lunga durata, « in parte sotterraneo » e « frutto di una lunga incubazione »: perché « se è soprattutto negli ultimi decenni dell'Ottocento che la nebulosa delle ideologie antiliberali e antidemocratiche ha preso forma, dando vita a un *corpus* dottrinario cui il nuovo secolo non avrebbe avuto che da attingere, è sull'arco lungo

(2) *Patologie della politica. Crisi e critica della democrazia tra Otto e Novecento*, a cura di Maria Donzelli e Regina Pozzi, Roma, Donzelli, 2003.

(3) M. Donzelli-R. Pozzi, *Introduzione*, in *Patologie della politica*, cit., p. 3.

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dell'età post-rivoluzionaria che si sono enucleate le categorie analitiche con le quali la democrazia è stata sottoposta al vaglio di una critica sempre più orientata a valutarla in chiave di esperienza anomala o patologica » (4). Non può sorprendere, dunque, che accanto ai protagonisti, più o meno noti, della pubblicistica conservatrice e reazionaria del XIX secolo — da de Maistre a Bonald, da Barrés a Maurras, per ricordarne solo alcuni — il volume chiami in causa molti celebri esponenti del *pantheon* liberal-democratico sette-ottocentesco, da Condorcet a Constant, da Bentham a Tocqueville: autori ben diversi l'uno dall'altro, ma accomunati dal tentativo di dare nuova forma speculativa ad un presente « dominato dall'urgenza di sistemare e dare soluzione ai problemi aperti dalla Rivoluzione francese e dalle sue premesse illuministiche » (*ibidem*).

A ben vedere, proprio uno dei padri nobili della moderna cultura liberal-democratica — Alexis de Tocqueville — merita anzi di essere considerato come la figura-chiave di questo itinerario di indagine alle radici della *democrazia come problema*. Sottoposto al fuoco incrociato di linee di analisi diverse per impostazione e obiettivi ricostruttivi, il pensiero tocquevilliano emerge, infatti, da queste pagine come un denso e illuminante prologo alla storia ideologica e concettuale dell'età contemporanea. Come ricorda Regina Pozzi, è proprio nelle analisi de *La Démocratie en Amérique* che la democrazia si rivela per la prima volta con chiarezza come « il fenomeno centrale e caratterizzante della modernità », come un ambivalente specchio dei tempi di cui occorre sforzarsi di decifrare in parallelo « le virtù e i difetti, la normalità e le patologie » (5). Dal canto suo, Tocqueville risponderà a questa sfida epocale, elaborando un nuovo tipo di indagine nel quale i fattori di crisi inscritti nell'ordine della politica post-rivoluzionaria trovano per la prima volta una forma riflessiva adeguata al loro livello di complessità: « un nuovo paradigma che opererà facilitando il metabolismo tra descrizione e prescrizione, tra diagnosi della democrazia reale e normatività della democrazia ideale » (6), incidendo profondamente sui successivi sviluppi del pensiero politico occidentale.

Certo, diversi sono tra Ottocento e Novecento i punti di attacco di questa critica 'immanente' ai fondamenti dell'ordine democratico. Non sorprende perciò che nello sviluppo del volume il lettore sia chiamato a confrontarsi con contesti problematici — e orizzonti categoriali — anche molto distanti l'uno dall'altro: così, se nei saggi dedicati alla triade Condorcet-Constant-Tocqueville al centro dell'attenzione si pone essenzialmente la classica dialettica rivoluzionaria tra libertà ed eguaglianza, as-

(4) Ivi, p. 4.

(5) R. Pozzi, *Tocqueville, la triade rivoluzionaria e i problemi della modernità politica*, in *Patologie della politica*, cit., p. 17.

(6) P. P. Portinaro, *Democrazia d'America e democrazia d'Europa*, in *Patologie della politica*, cit., pp. 36 s..

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sunta come decisivo contesto genetico di nuove forme di dispotismo politico, attraverso la mediazione del pensiero controrivoluzionario e della nascente riflessione sociologica l'asse del discorso si sposta già sulla dialettica tra ordine e anarchia, per concentrarsi poi sulla problematica questione della *legittimazione democratica*, che trova i suoi accenti più radicali ed inquietanti nel dibattito europeo tra le due guerre.

Ad essere declinata sotto gli occhi del lettore è allora l'infinita gamma di sfumature di un *discorso sulla democrazia*, impegnato a sviscerare « la novità e le potenzialità positive dell'assetto sociale, culturale e istituzionale democratico ma anche le patologie, già in atto o in incubazione, ad esso connesse » (7). Come ha recentemente sottolineato Jacques Derrida, è sempre stato difficile però — e « per ragioni essenziali » — « compiere una divisione rigorosa tra il bene e il male della democrazia » (8). Ecco perché questo tipo di analisi tende inevitabilmente ad alimentarsi di forme polarizzate di articolazione discorsiva, dirette a separare nell'ordine del pensiero ciò che nella realtà dei fatti spesso è indistricabilmente interrelato. Nello sviluppo del dibattito ottocentesco, la tradizionale polarizzazione *diacronica* — democrazia degli antichi *versus* democrazia dei moderni — ereditata dalla cultura illuministica, cede però decisamente il campo ad una polarizzazione *sincronica*, tutta interna all'orizzonte di esperienza della contemporaneità. Qui, in altre parole, il processo di differenziazione di cui vive il discorso sulla democrazia tende ad essere articolato non più sul piano del *tempo*, ma su quello dello *spazio*, grazie ad un sapiente gioco di specchi che coinvolge a pieno titolo il Vecchio e il Nuovo mondo (9). Anche in questo caso è Tocqueville ad indicare la strada. Molti altri però lo seguiranno in questa analisi della 'democrazia in America' che non è altro che un modo per decifrare la complessità di uno spazio di esperienza, dominato dalla compresenza di opposte dinamiche evolutive. Nei decenni successivi, l'*America* finirà così per imporsi come una fondamentale categoria costruttiva del discorso sulla *democrazia in Europa*. Attraverso la sua mediazione prenderanno forma, cioè, sogni e incubi dell'élite intellettuale europea alle prese con il 'giano bifronte' della democrazia. Ed è sicuramente uno dei meriti di questo volume quello di mostrare lo sviluppo di questo processo di 'interpretazione orientata' in tutta la molteplicità dei suoi nuclei di aggregazione tematica: dalla critica delle tendenze cesaristiche della democrazia di massa, all'analisi delle nuove forme di organizzazione partitica (e partitocratica), dalla diagnosi del ruolo ambivalente dell'opinione pubblica sino alla individuazione di nuovi spazi, peculiarmente post-statuali, di mediazione politica.

(7) Ivi, p. 39.

(8) J. Derrida, *Voyous*, Paris, Galilée, 2003 (trad. it. *Stati canaglia*, Milano, Cortina, 2003, p. 44).

(9) P. P. Portinaro, *Democrazia d'America e democrazia d'Europa*, cit., pp. 36 s..

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Sullo sfondo di questa vertiginosa sequenza di linee di fuga analitico-critiche si staglia, però, già quello che agli occhi degli autori del volume è il vero nucleo problematico della politica moderna: vale a dire, la dimensione intimamente dilemmatica di una *società degli individui* costretta a rifondare su basi radicalmente egualitarie quel legame sociale che nell'esperienza dell'*Ancien Régime* aveva assunto le forme *naturali* di una comunità gerarchica e corporata. Proprio questo è, infatti, in ultima analisi, il terribile interrogativo al quale tanta parte del pensiero otto-novecentesco tenterà ossessivamente di trovare una risposta: come dare una forma organizzata e coesa a una società che nell'indipendenza delle parti sembra trovare il suo fondamentale principio costitutivo? O, in altre parole, « come ricreare tra gli individui atomizzati delle società democratiche delle relazioni che riproducano in via del tutto artificiale, i legami naturali delle società tradizionali? » (10).

Come è evidente, a questo livello il discorso sulla democrazia come forma di governo si è già trasformato però in un discorso sulla democrazia come *forma di vita*, in una riflessione sull'*ethos* della modernità come « epoca dell'eguaglianza delle condizioni ». Come sottolinea Antonella Besussi, già nell'opera di Tocqueville diviene infatti palese « che la democrazia non è solo una forma di governo, ma un modo di vivere, perché richiede siano internalizzate come abitudini le disposizioni necessarie alla sua tenuta, dato che le circostanze nelle quali si afferma esaltano l'indisponibilità a vincolarsi, producendo esistenze slegate e mobili, prive di ancoraggi tradizionali » (11). Solo un *ethos* condiviso può tenere assieme questa dispersa pluralità di *individui*, incanalando le centrifughe energie democratiche nei « confini sacrali » di uno spazio politico-istituzionale, all'interno dei quali « l'autogoverno è libero di manifestarsi ». Ciò implica, tuttavia, un'eccedenza del politico sul sociale, che apre lo spazio di esperienza della democrazia a nuovi e più radicali rischi: l'eguaglianza come ideale politico dell'eguale valore degli individui tende a tradursi, infatti, in « passione assimilazionistica rivolta alla cancellazione delle distinzioni, a un lavoro di uniformazione lento, ma inesorabile; la procedura decisionale maggioritaria in cui la sovranità politica democratica si esprime eccede i suoi limiti istituzionali per diventare criterio morale che estende la sorveglianza maggioritaria a diversi e sempre più numerosi dettagli della vita; l'eguaglianza di condizioni si commisura ai livelli di benessere, ai risultati vantaggiosi privatisticamente valutati, e dunque favorisce compulsione acquisitiva e domesticizzazione della vita pubblica » (12).

Sono sufficientemente note le principali strategie costruttive con le quali a partire da Tocqueville la riflessione politica contemporanea ha

(10) M. Donzelli-R. Pozzi, *Introduzione*, cit., p. 7.

(11) A. Besussi, *I due K. Poteri tutelari e arte della libertà*, in *Patologie della politica*, cit., p. 161.

(12) Ivi, pp. 161 s..

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tentato di fronteggiare i rischi degenerativi impliciti nella forma di vita democratica: in questo orizzonte, infatti, i tentativi di rivitalizzazione etica dell'autonomia razionale-partecipativa del singolo vanno fianco a fianco con approcci protezionistici fondati sul progressivo potenziamento dell'intelaiatura giuridico-istituzionale posta a difesa delle prerogative individuali. La storia del discorso otto-novecentesco sulla democrazia è ben lungi, però, dal poter essere ridotta alla vicenda di questo propositivo rapporto dialettico con il « groviglio patologico » che inficia « le potenzialità liberatorie del nuovo regime » (13). Per molti autori dell'epoca, l'unica risposta valida ai *dilemmi della democrazia* consiste, infatti, proprio nella sistematica demolizione di quella costellazione individualistico-egualitaria di valori e pratiche di vita che ne rappresenta la fondamentale base di articolazione. Come sottolinea Maria Donzelli nella sua analisi della sociocrazia comtiana (14), a questo livello il *discorso sulle patologie della democrazia* tende, dunque, rapidamente a trasformarsi in un *discorso patologico sulla democrazia*: un approccio regressivo ai paradossi della modernità che grazie al simbiotico rapporto esistente tra teorizzazione politica e comunicazione di massa finisce per alimentare quegli « strati simbolici » diffusi che costituiranno l'ideale brodo di coltura delle più estreme ideologie novecentesche (15).

Nella sua complessiva articolazione, il volume *Patologie della politica* offre un'ampia disamina delle diverse linee di approfondimento teorico che tra la fine dell'Ottocento e l'inizio del Novecento si intrecciano nella sistematica demolizione dei presupposti logici ed ontologici della modernità politica. Attraverso un'attenta analisi del dibattito dell'epoca, esso non manca, in particolare, di sottolineare il ruolo decisivo svolto in tale contesto discorsivo da alcuni dei principali modelli epistemologici impostisi nella ricerca scientifica ottocentesca, dall'organicismo all'evoluzionismo alla teoria cellulare. Sotto questo profilo sarebbe stato forse opportuno, però, dedicare maggiore attenzione a quell'orizzonte di indagine psico-fisiologica che sempre più viene emergendo come un fondamentale snodo nell'evoluzione dell'episteme contemporanea. Da questo punto di vista, la riflessione sul rapporto tra scienza e politica che costituisce il sotterraneo filo conduttore di molti contributi del volume trova un interessante contrappunto nella personalissima variazione sulle patologie della modernità offerta da Remo Bodei nel saggio *Destini personali*. Qui, infatti, proprio lo sviluppo otto-novecentesco delle dottrine e delle tecniche psicologiche e psicopatologiche si rivela come un decisivo momento fondativo di

(13) A. Besussi, *I due K. Poteri tutelari e arte della libertà*, cit., p. 162.

(14) M. Donzelli, *Critica della democrazia e « sociocrazia » in Auguste Comte*, in *Patologie della politica*, cit., p. 237.

(15) V. Collina, *Natura e politica in Maurice Barrès e in Charles Maurras*, in *Patologie della politica*, cit., p. 358.

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quell'« età delle colonizzazione delle coscienze » che troverà nei regimi totalitari del Novecento la sua più tragica espressione storica. Grazie alla convergenza di questi saperi, l'*individuo* — emerso dal passaggio rivoluzionario come il protagonista indiscusso dello spazio di esperienza della modernità — sarà, « dapprima, smembrato nelle sue componenti ed esibito nel suo sfinimento, poi consegnato alla politica per una pubblica terapia d'urgenza ». In diversi paesi, e primo fra tutti in Francia, il principio lockiano della autonomia individuale, « fatto fruttare dal pensiero e dalla prassi liberale e democratica », viene abbandonato, infatti, « a favore della tesi che l'individuo è incapace di autogoverno. Deve perciò esser posto sotto la tutela di un "io egemone" esterno, rappresentato dal *meneur des foules*, da un capo che agisce, per sua stessa ammissione, alla stregua di un ipnotizzatore di masse inerti e manovrabili » (16).

Certo, occorre una certa cautela nel presentare questo traumatico passaggio collettivo come l'esito dello scontro tra una volontà di dominio assistita da saperi e tecniche disciplinari e l'espansiva dinamica della libertà ed eguaglianza degli individui (17). Le logiche del dominio sono, infatti, più complesse e articolate di quanto qualunque meccanica sociale possa far credere e non c'è potere tutelare che non trovi alimento nella stessa energia individuale, che non coinvolga cioè il soggetto nella « produzione » della sua stessa docilità (18). Da questo punto di vista, già Tocqueville aveva richiamato l'attenzione sulla contraddittoria costituzione di una società formata da « individualisti di massa », animati da una simultanea aspirazione alla dipendenza e all'autonomia individuale; e non aveva mancato di indicare nel misterioso circuito della *rappresentanza politica*, il dispositivo costruttivo in grado di soddisfare a livello ideologico ed istituzionale le contraddittorie istanze del dimidiato soggetto contemporaneo: « I nostri contemporanei sono incessantemente dilaniati da due passioni nemiche: sentono il bisogno d'essere condotti e il desiderio di restare liberi. Non potendo distruggere né l'uno né l'altro di questi istinti contrari, si sforzano di soddisfarli a un tempo entrambi. S'immaginano un potere unico, tutelare, onnipotente, ma eletto dai cittadini. Combinano la centralizzazione e la sovranità popolare (…). Ogni individuo sopporta

(16) R. Bodei, *Destini personali. L'era delle colonizzazioni delle coscienze*, Milano, Feltrinelli, 2003, pp. 13 e s..

(17) Ivi, p. 15: « La richiesta di maggiore libertà ed eguaglianza degli individui si incrocia e si scontra in tal modo con l'opposta volontà di risucchiarli nell'"anima delle folle". Alla figura del vecchio demagogo subentra così quella dello psicagogo, del politico che si pone alla guida delle masse invadendo l'interiorità dei singoli, indotti all'obbedienza mediante la fede suscitata nella sua indiscutibile superiorità ».

(18) A. Besussi, *I due K. Poteri tutelari e arte della libertà*, cit., p. 171.

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di sentirsi legato, perché vede che non è un uomo né una classe, ma il popolo stesso a tenere in mano il capo della catena » (19).

Ora, non c'è dubbio che gran parte della deriva patologica della politica contemporanea si leghi ad una sistematica e radicale valorizzazione delle potenzialità autoabdicatorie implicite in questa ambivalente logica della rappresentanza politica. E qui, ancora una volta, la crisi di civiltà degli anni trenta del XX secolo si rivela legata ad un percorso di lungo periodo, in qualche modo riconducibile alle contraddizioni fondative della politica rivoluzionaria. Riletta in questa prospettiva, persino un'affermazione forte come « la democrazia ha reso la moltitudine pronta per il fascismo » (20) può apparire, dunque, non priva di una sua drammatica persuasività. Come non si stancano di ricordare molti protagonisti del dibattito contemporaneo, fa parte infatti delle modalità costitutive della democrazia la tendenza a giocare contro se stessa, a mettere a rischio la sua esistenza in nome dei suoi stessi principi (21). Da questo punto di vista, affrontare il lato oscuro della politica del Novecento significa anche confrontarsi con i dilemmi del nostro tempo.

LUCA SCUCCIMARRA

GIULIA MARIA LABRIOLA, *Barbeyrac interprete di Pufendorf e Grozio. Dalla costruzione della sovranità alla teoria della resistenza*, Editoriale Scientifica, Napoli 2003, pp. 708.

Il volume è uscito nella collana "Pensiero giuridico e politico", diretta da Francesco De Sanctis, primo di una nuova serie intestata al Centro di Ricerca sulle Istituzioni Europee (CRIE) dell'Istituto Universitario Suor Orsola Benincasa. Segna un doppio esordio: anche la giovane studiosa è al primo libro. Presenta d'altro canto il frutto maturo di un lungo impegno: è la rielaborazione di una tesi di dottorato, discussa nel febbraio 2002, a sua volta "profondamente legata", dichiara l'autrice, a una tesi di laurea del 1997. Viene a colmare una lacuna cospicua. Jean Barbeyrac è nome di certo notissimo ma oggetto

(19) A. de TOCQUEVILLE, *La démocratie en Amérique*, Paris, Gallimard, 1951 (trad. it. *La democrazia in America*, in *Scritti politici*, a cura di N. Matteucci, Vol. II, p. 831).

(20) J. BENOIST, *Quando l'immanenza deborda: democrazia e violenza*, in *Patologie della politica*, cit., p. 55: « Ciò non vuol dire, naturalmente, che ogni democrazia porta in sé il germe del fascismo, né che esso ne sia il risultato naturale e inevitabile (…). Non si deve però ignorare la natura profondamente democratica del fascismo, che lo rende differente dalle dittature più tradizionali. Il fascismo ha preso il proprio concetto e la propria realtà fondamentale, cioè la massa, dai sistemi democratici che, da questo punto di vista, ne hanno consentito l'avvento ».

(21) M. GAUCHET, *La démocratie contre elle même*, Paris, Gallimard, 2002; J. DERRIDA, *Stati canaglia*, cit., p. 59 ss.: « La democrazia è sempre stata suicida… ».

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di rari studi. Gli erano dedicati due libri, due soli, di molti meriti ma di campo ridotto: Philippe Meylan, *Jean Barbeyrac (1674-1744) et les débuts de l'enseignement du droit dans l'ancienne Académie de Lausanne*, Rouge & Cie., Lausanne 1937, e Sieglinde C. Othmer, *Berlin und die Verbreitung des Naturrechts in Europa. Kultur- und sozialgeschichtliche Studien zu J. Barbeyracs Pufendorf-Übersetzungen und eine Analyse seiner Leserschaft*, W. de Gruyter, Berlin 1970. La Labriola offre ora una monografia ampia, anche di prospettiva, e organica; senza pretese di completezza, di Barbeyrac riguarda comunque le operazioni e gli acquisti maggiori.

Di Barbeyrac sono stati ripubblicati di recente degli *Écrits de droit et de morale* (a cura di Simone Goyard-Fabre, Centre de philosophie du droit, Paris 1996) che potranno apparire trascurabili, a chi tenga in poco conto il giudizio di Voltaire o di Pietro Giannone. Ma è celebre come traduttore: di Pufendorf e di Grozio, soprattutto, e di Cumberland. Aveva cominciato con Pufendorf, rendendo in francese prima il *De iure naturae et gentium* (*Le Droit de la Nature et des Gens, ou Système général des Principes les plus importans de la Morale, de la Jurisprudence et de la Politique*, 1706) e subito di seguito il *De officio hominis et civis* (*Les Devoirs de l'Homme & du Citoyen, tels qui sont prescrits par la Loi Naturelle*, 1707. Del *De iure belli ac pacis* di Grozio pubblicò nel 1720 un'edizione critica, nel 1724 una versione (*Le Droit de la Guerre et de la Paix*). Di questi lavori curò ristampe, a volte con aggiunte di mole e di rilievo. L'anno della morte licenziava la versione di Cumberland, *De legibus naturae disquisitio philosophica* (*Traité Philosophique des Loix Naturelles*, 1744). È difficile sopravvalutare la fortuna e l'efficacia delle traduzioni di Barbeyrac. Intanto hanno di certo incrementato, e di molto, la circolazione di codesti autori. Hanno poi dato largo contributo alla formazione e al consolidamento di un lessico, della politica e del diritto pubblico, che nel latino languido del primo Settecento restava porosissimo. Il francese fece da modello e attraversò, in solleciti calchi, le lingue d'Europa. Bastino un paio di esempi. Con Sorbière, il traduttore del *De Cive* di Hobbes, è stato proprio Barbeyrac, probabilmente, a favorire l'affermarsi della parola fatidica *État*, resa costante (in Barbeyrac, non ancora in Sorbière) di *civitas*. E ricco di futuro si è rivelato il conio di *institution*, a rendere *impositio* (che significa il modo di generazione di *entia moralia*, in Pufendorf). Forse in questo calco risultano anzi le radici di Barbeyrac, figlio di un pastore della chiesa riformata e avviato a studi di teologia, se è vero (come pare a chi scrive) che le prime mosse della carriera semantica di *institution* captano quanto di nuovo, o di sporgente dalla tradizione, si profilava già nell'accezione del termine latino in Calvino, *Institutio christianae religionis*.

La Labriola ha da offrire prima di tutto un'acribica, meticolosa ricognizione del Barbeyrac traduttore di Pufendorf e di Grozio. O

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meglio, esamina, come appunto recita il titolo, *Barbeyrac interprete di Pufendorf e Grozio*. Perché Barbeyrac non si limitava a tradurre; su quei testi, su quegli autori, ha fatto operazioni che esauriscono le accezioni di interpretare, e di *interpretatio*. Nella *Préface du Traducteur* a quello che chiamava il *grand Pufendorf*, ossia alla versione del *De iure naturae et gentium*, egli stesso indica modi e fini dei suoi interventi, i medesimi che fa nel Grozio (assai più lieve è invece l'apparato del *De officio*, che mantiene l'agilità del compendio). Ne distingue tre ordini: *reparations*, *libertez* e *notes*. Le prime ammontano a un lavoro di *editing*, che nel *grand Pufendorf* va da una serie di ritocchi minuti (il cambio di carattere tipografico nelle citazioni, per esempio) a vere e proprio incisioni nella struttura della pagina (i capoversi lunghi dell'originale vengono interrotti e ricomposti). Né le *libertez* sono di quelle che comunque comporta il mestiere di traduttore, non rispondono (o non soltanto, né soprattutto) a esigenze di resa. Sono intrusioni, piuttosto, a correggere e integrare; sono già interpretazioni inscritte e compaginate nel testo medesimo. Fanno sponda al folto apparato di *notes*, che Barbeyrac intende non come illustrazione e commentario ma come un dialogo con Pufendorf. Funzione dichiarata delle *notes* (delle critiche, distinte dalle bibliografiche) è, riassume la Labriola, "supplire alle lacune dell'originale, confermare, difendere, o criticare serratamente il pensiero e le argomentazioni svolte nel testo" (p. 24). Con effetti di "torsione": e questo vocabolo ricorre infatti frequentissimo, nella Labriola, a connotare l'impatto su Pufendorf e Grozio dell'interprete Barbeyrac. In guisa di sistemazione, viene un rifacimento. L'esito complessivo dei tre ordini di intervento (e, naturalmente, della traduzione medesima) è la confezione di un altro testo, a intarsi e strati, del quale Barbeyrac è co-autore. Questa specie di *Doppelgänger* ha circolato almeno tanto quanto gli originali; è in questo altro testo che sono stati letti (da Rousseau, per esempio) Pufendorf e Grozio. (Gli interventi di Barbeyrac sono stati poi accolti in diverse traduzioni in altre lingue moderne e le sue annotazioni, voltate "ex Gallico in Latinum sermonem", apposte a diverse riedizioni dei testi originali.) Non c'è tuttavia di che essere sorpresi. Che leggere un testo implichi sperimentarlo, ovvero sondarne le tensioni, le direzioni e gli usi possibili, e per così dire provocarne le reazioni: era questo l'assunto di una pratica diffusa, era anzi lezione di Locke. Sperimentale, in questo senso, era stato l'adattamento francese dell'*Essay concerning Human Understanding*, al quale Locke attese in fitto contatto col traduttore Pierre Coste, e che va in stampa nel 1700, proprio mentre Barbeyrac comincia il suo Pufendorf (con Locke, attraverso Coste, Barbeyrac era entrato in corrispondenza). Esempio dei più nitidi e radicali di traduzione come rifacimento, ossia di rifacimento in guisa di traduzione, è poi la versione inglese che Locke aveva dato di saggi di Nicole (che ora si può leggere a fronte dell'originale in *John Locke as Translator: three of the Essais of Pierre Nicole in*

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French and English, a cura di J. S. Yolton, Oxford 2000). Importa rammentare specialmente la lezione di Locke perché a orientare le operazioni di Barbeyrac, in una costellazione di decisivi punti di teoria, è stato Locke, appunto. Lo mostra e lo dimostra, con dovizia di illustrazioni e di ragionamenti, la Labriola, che principia da un'analisi minuziosa della *Préface* al *grand Pufendorf*: un manifesto, intarsiato di motivi e di luoghi lockiani. Di questa analisi, che costituisce la Parte prima del libro (pp. 43-191), due blocchi di pagine (58-102, 110-116) sono dedicati quasi interi a un'esposizione di Locke: del Locke che Barbeyrac si trova e si mette di fronte.

Per Barbeyrac Locke, un certo Locke, è stato un approdo ma anche, prima di tutto, un ponte: un ponte tra Pufendorf e Grozio. La mediazione di Locke ha consentito di imprimere all'uno una "torsione" congrua con la "torsione" dell'altro. Il fatto è che Barbeyrac, piuttosto che tradurre (ovvero apparecchiare) singoli testi, ha allestito un *corpus*. Ha selezionato testi e autori e, per trattarli, li ha innestati l'uno nell'altro, li ha fatti discorrere insieme. La sistemazione o saturazione dell'uno (per via di *reparations*, *libertez*, *notes*) suppone la sutura con l'altro. Barbeyrac è andato da Pufendorf a Grozio (e poi a Cumberland); ha riletto Grozio a partire da e sotto la scorta di Pufendorf, e aveva già letto Pufendorf da e con Grozio. Il *De iure naturae et gentium* (o meglio il *Droit de la Nature et des Gens*) fa da sfondo e da chiave del *De iure belli ac pacis* (ovvero del *Droit de la Guerre et de la Paix*). È un disegno che diventa a mano a mano più lucido e più risoluto, negli anni; ma già dalla seconda edizione del *Droit de la Nature et des Gens* (pubblicata come la prima a Amsterdam, nel 1712) appare un Pufendorf voltato a Grozio. La reciproca integrazione dei due è il fulcro e insieme la posta degli interventi di Barbeyrac. Una scoperta? Di certo soprattutto una consapevolissima invenzione. Del resto Barbeyrac lo ammette, con precauzioni e qualche riserva ma esplicitamente. La *Préface* alla versione di Grozio, per esempio, rinvia a quella del *grand Pufendorf*, "qui doit désormais servir pour les deux Ouvrages, inséparables & en eux mêmes, & par la manière dont je m'y suis pris en les traduisant & en les commentant". Ma Grozio e Pufendorf, è il minimo che si possa dire, non mettono capo insieme facilmente. Rileggerli come in sinossi era appunto un'invenzione, un'operazione tanto delicata quanto azzardosa. Non sorprende che abbia suscitato (in Vattel e in tanti altri) proteste e repliche. La reciproca integrazione dei due non risponde della o alla logica di ciascuno; è, piuttosto, il filo e lo sfondo degli interventi di un Barbeyrac che in tanto è interprete in quanto è, eminentemente, autore. Pufendorf e Grozio diventano voci di un discorso solo perché quello che nella versione francese dei loro testi si distende è un discorso di Barbeyrac. Barbeyrac ha infatti un lungo discorso da fare, e dei più incisivi e innovativi: lo fa discorrendo dei e coi suoi *auctores*, per intermittenza o appunto per intromissione in

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discorsi altrui. Tra i meriti del lavoro della Labriola non il minore è quello di spostare il suo oggetto, di modo che ora se ne colgono meglio, per cominciare, le dimensioni. La Labriola ci documenta che Barbeyrac non è stato chiosatore modesto, umile addetto alla manutenzione di classici; ci permette di scorgere (nitidamente, per la prima volta) un Barbeyrac autore, protagonista.

Che quella della Labriola sia un'opera prima non si avverte, se non negli aspetti più gradevoli. La Labriola mantiene un registro sommesso, procede sempre con la massima discrezione. È con pudore che segnala il ritrovamento anche di inediti; è con riserbo e circospezione che esprime dissenso, che rettifica giudizi anche di illustri. Della maniera di una tesi resta, semmai, qualche prolissità. Le pagine su Locke, per esempio, sono probabilmente troppe (anche se procedendo nella lettura si dovrà ammettere che la lunga e circostanziata *enumeratio* fa poi molto comodo). Non è però la ridondanza che a tratti tiene bordone alla cautela a motivare il lungo percorso, cui non bastano 700 pagine. Il fatto è che la Labriola fronteggia un campo vastissimo, e si impegna in una "rievocazione dei caratteri fondativi del modello giusnaturalistico", che dichiara "rapsodica ma necessaria" (p. 41). Rapsodica la rievocazione non è più di tanto (non più del lecito o dell'opportuno); necessaria, invece, risulta davvero. Perché è solo con lieve iperbole che si può sostenere che il modello giusnaturalistico, in una delle sue varianti principali, è invenzione e prodotto di Barbeyrac. Il modello però consiste non in un assetto di tesi ma in un *corpus* di testi, allestito e connotato dagli interventi di Barbeyrac. Il quale ha sdegnato di approntare, come pure gli veniva ripetutamente richiesto, l'ennesimo trattato o *système* e ha scelto invece di inscrivere, anzi di scrivere, un suo proprio testo tra le righe e sui margini di testi altri. Per questo non si poteva neppure individuarlo, questo testo discontinuo e diffuso di Barbeyrac, se non appunto obliquamente, contro lo sfondo del vasto *corpus* scorrevole, sempre *in fieri*, in cui si incide e in cui viene a consistere. Ovvero, mediante ampia rievocazione.

La Labriola non tenta l'impraticabile, ossia non fa oggetto di indagine tutti i punti e le questioni che Barbeyrac tratta, tocca o evoca. Il recensore ritiene che, per esempio, abbia fatto benissimo a dedicare relativamente poca attenzione alla *querelle* che si trascinò, per anni e per molte pagine, intorno a Pufendorf (e al se, al quanto, al come di un suo rapporto con Grozio). L'aveva del resto già ricapitolata la Goyard-Fabre, nel lungo saggio (*Barbeyrac et la théorie du droit naturel*) che presentava la citata riedizione di *Écrits de droit et de morale*, mostrando per quanti garbugli debba passare una ricognizione di fronti e schieramenti e quante siano le voci da risentire o recuperare (e anche all'appello della Goyard-Fabre mancano interlocutori importanti: penso, per fare solo un paio di esempi, a Gottlieb-Gerhard Titius e a Johann Jacob Mascovius). La Labriola si orienta puntando risolutamente su nodi di

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teoria. Avanza "un'ipotesi di ricostruzione" che privilegia "quello che [ci] sembra costituire il vertice dello sforzo teorico del traduttore, ed insieme il momento di maggior distacco dalle posizioni degli autori": e le risulta "individuabile nei luoghi in cui sono discusse la teoria della sovranità e la configurabilità di un diritto di resistenza" (p. 41, dall'ultimo capoverso dell'Introduzione). Il diritto di resistenza è l'asse intorno al quale scorre, e col passare delle pagine si addensa, lo "sforzo teorico" della Labriola medesima. Ne viene un discorso molto lucido, dagli esiti nitidi, proposto però in maniera sempre schiva e guardinga; alcuni dei passaggi più tesi e importanti sono da ritrovare nel folto delle note (che, numerate parte per parte, fanno la bella somma di 1335). (Immagine esemplare della maniera può dare, a p. 515, la nota 252, di ferma asciuttezza: dove è affrontato come si conviene, con l'indice, uno dei nodi maggiori nel rapporto di Pufendorf con Hobbes.) Ora, il diritto di resistenza è, sì, "il momento di maggior distacco dalle posizioni degli autori". Ma segna anche un insieme di luoghi tanto fertili quanto cruciali, è anche il momento in cui le divergenze (nette, tra Pufendorf e Grozio e tra i due e Barbeyrac, col suo Locke) si aprono, si confrontano, e si fecondano.

Il tessuto di argomenti della Labriola è troppo ricco e fitto perché sia possibile riguardarlo qui se non di rapido scorcio. Dovranno bastare segnalazioni sommarie. È dalle tensioni interne all'impianto di Pufendorf, dalla difficile e perplessa distinzione tra potere assoluto e potere sovrano, che Barbeyrac ha potuto cavare una dottrina dei limiti della sovranità, indispensabile a un diritto di resistenza, ovvero a una nozione di resistenza come diritto; per questo sono da vedere nella Parte terza, dedicata all'interpretazione delle dottrine giuspubblicistiche del pufendorfiano *De iure naturae et gentium*, il capo III,"La teoria della sovranità nel pensiero di Pufendorf" (specialmente nel paragrafo 5.1, "L'approdo della critica di Barbeyrac", che stringe in chiusa sulla "funzione di rottura della categoria del potere limitato"), e il IV, "Lo sviluppo della teoria della sovranità". Barbeyrac guarda al Pufendorf che, in un'occasione decisiva, aveva fatto operazione analoga alle sue: era intervenuto a integrare e correggere (e ribaltare) un luogo del *De Cive* di Hobbes. Proprio nel *De iure naturae et gentium* (VII.1.2-3) Pufendorf aveva inserito un aggettivo, *civilis*, là dove Hobbes adoperava, semplicemente, *societas*. E ne conseguiva la dissociazione, moderna per eccellenza, di società e Stato. È questo Pufendorf che poteva essere affiancato a Locke e messo in serie e in circolo con Grozio. Al quale Grozio fa capo un'altra delle mosse che premono e interessano di più a Barbeyrac: il dislocamento, dalla parte del consenso, dell'efficacia, ossia della capacità di produrre effetti reali (nelle compravendite, così come in ogni traslazione e transazione che supponga o che attivi un diritto). A questo la Labriola dedica pagine tra le più attente e felici; da vedere è specialmente, nella Parte seconda, il capo V, sezione seconda ("I

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devoirs mutuels conditionnels"). "La parola è atto e fatto", annuncia un luogo celebre dell'*Enciclopedia* di Hegel: e tirava così le somme di un complesso di premesse e di argomenti che Barbeyrac aveva contribuito a formare e a organizzare. (E che poi, come è noto, l'equazione di efficacia e consenso abbia dato frutti spettacolari, anche nei codici, soprattutto in terra di Francia sarà forse merito, o colpa, piuttosto di Barbeyrac che di Grozio.) Sempre in Grozio Barbeyrac ritrovava l'incunabolo, o almeno la premessa maggiore, di una teoria della legittimazione: lo mostra la Labriola mentre si avvia a concludere, nel capo III della Parte quarta, ultimo del volume (da vedere è specialmente il capoverso che termina il paragrafo 6, pp. 682-683). E qui diventa chiaro che il consenso di Grozio e di Barbeyrac (o di Grozio, secondo Barbeyrac) non si può intendere come stipulazione puntuale, estemporanea; è, piuttosto che una convenzione, un convenire: che si accorda con quell'ente essenzialmente dinamico, o anzi essenzialmente irrequieto, che è, da Pufendorf in poi, la *societas civilis*.

Nelle prime tre delle quattro Parti del suo lavoro la Labriola illustra e discute Barbeyrac seguendo da vicino le movenze del *Droit de la Nature et des Gens*. Adopera l'edizione apparsa a Basilea nel 1732, nella comoda ristampa anastatica alla quale ha provveduto il Centre de Philosophie politique et juridique dell'Università di Caen, nella benemerita "Bibliothèque de Philosophie politique et juridique. Textes et Documents" (1987, 1996^2); questa edizione, che si presenta come la quarta, "revûë et augmentée considerablement", non è l'ultima curata da Barbeyrac (che uscì a Amsterdam nel 1734) e viene dopo la versione di Grozio. La scelta di partire dal *grand Pufendorf* è comunque dettata non dalla considerazione di un qualche privilegio che spetterebbe a un'opera più sistematica, o impaginata meglio, del testo groziano ma dall'esigenza di ripetere il filo della cronologia. È vero che Barbeyrac mette capo a un discorso che si vuole coerente e unitario, e che punta (e già dal 1712, come si è accennato) a individuare e premiare le parentele e le convergenze. Molto importa e significa però anche la sequenza. È nel tempo che matura e piglia figura il progetto di questo modello giusnaturalistico, anche grazie alla lunga meditazione di Locke: che è ponte, diciamo ora meglio, *da* Pufendorf *a* Grozio. Delle ragioni e delle cadenze dell'itinerario è il libro intero della Labriola che fa ampio catalogo. Qualcosa manca, però. Il recensore lo dice con molto imbarazzo, e nella più ferma consapevolezza del fatto che sempre, se si riesce a dire qualcosa, è perché si rinuncia a dire tutto: ma è davvero un peccato che la ricchissima ricostruzione della Labriola abbia dovuto lasciare fuori campo l'ultimo termine della sequenza di Barbeyrac, la versione di Cumberland. Di certo è la meno riuscita, la meno innovativa; di fronte a Cumberland anche Barbeyrac (come molti dei lettori successivi) appare incerto, perplesso. E non che il Cumberland sia come lo sbocco naturale di un processo necessario: l'itinerario di Barbeyrac è

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stato una costruzione, non uno svolgimento. Ma forse è qui, alla fine, che viene meglio in luce, se non una qualche logica, almeno l'*enjeu* del progetto. Nel *De legibus naturae* (apparso nel 1672, che leggo però nella seconda edizione, Lubecae & Francofurti 1683), fin dal § I dei *Prolegomena*, Cumberland sollecita un ritorno a Grozio: per andare contro Hobbes. O meglio, per andare oltre: proponendo non "un mero salto all'indietro rispetto ad Hobbes" ma "un tentativo di superamento, complesso e non lineare, di questo autore". Così come diceva, nel breve succoso paragrafo dedicato appunto a Cumberland, Pietro Costa, *Il progetto giuridico* (Giuffrè, Milano 1974, pp. 105-110: 109). Il punto o il nodo (è sempre Costa a indicarlo, p. 106) è che Cumberland "dipende, in negativo, da Hobbes": "è il 'sì' al quesito al quale Hobbes rispondeva 'no', ma è pur sempre una risposta al quesito, hobbesiano, della possibilità di un ordine sociale auto-sussistente, fondato su se stesso, riportabile ad unità ecc.". Ecco, lo stesso è da dire probabilmente di Barbeyrac: si è ingegnato di dare altre risposte, senza però buttare, prendendo anzi a cuore, le domande di Hobbes. Barbeyrac ha forse fatto, o tentato di fare, anche molto di più: ha cercato anche di separare e sezionare quelle domande. Ha inteso (così pare a chi scrive) di smontare il *coup de force* di Hobbes, di disarticolare quella coesione e quell'intreccio di temi, premesse, concetti che aveva permesso a Hobbes di inaugurare un campo di teoria, il medesimo che il modello giusnaturalistico (di Barbeyrac) viene a occupare.

Perché Barbeyrac ha sdegnato il trattato e ha scelto piuttosto di allestire un *corpus*, con artigianale pazienza e pacatezza? Ragioni di stile, intanto. Barbeyrac ha voluto essere operaio di una *Manufaktur*, non di una *Fabrik*: per ripigliare una coppia ingaggiata e caricata di intenti polemici da Kant, verso la chiusa di un saggio celebre, *Von einem neurdings erhobenen vornehmen Ton in der Philosophie* (si veda nella Akademie-Ausgabe, vol. VIII, pp. 387-406: 404). Premevano però, così come in Kant e nel suo procedere *mosaikartig*, anche altre ragioni, tutte di merito.

La Labriola sottolinea benissimo, e fa benissimo a sottolineare, che in Barbeyrac il diritto di resistenza è filo che avvolge molte questioni, tutte cruciali: questioni che si implicano a vicenda. La prima e decisiva implicazione riguarda la teoria della sovranità, che del diritto di resistenza "costituisce il *prius* logico", dice la Labriola a p. 32 (e la Parte terza, intera, fa eco). Tutto vero? Forse no, o non del tutto e incondizionatamente. Guardiamo in Grozio. Una teoria della sovranità appare nel *De imperio summarum potestatum circa sacra* (che è pubblicato nel 1647 ma risale al 1614), a proposito dell'autorità della *civitas* nelle questioni di religione; non concerne il congegno o il principio d'unità della *civitas* stessa, e poco o nulla ha a che fare con il diritto naturale di cui Grozio aveva parlato, quanto ai rapporti tra *civitates*, nel *De iure predae* (1604 o 1605, di cui va a stampa un estratto, *Mare liberum*, nel

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1609). Compaiono dunque in Grozio teorie eterogenee, messe in campo in momenti e a fini diversi, che solo nel *De iure belli* (1625) si presentano insieme, ma in articolazione ancora problematica e precaria. Sarà Pufendorf a farne disciplinato sistema; ma dovrà adoperare Hobbes, ossia l'unica effettiva saldatura disponibile di diritto naturale *stricte* (dello stato e della legge di natura), sovranità e contratto. (Di questa eterogenesi del giusnaturalismo moderno ragiona un libro recente di Jean Terrel, *Les Théories du pacte social*, Seuil, Paris 2001, che non c'è bisogno di sottoscrivere, tantomeno *in toto*, per trovare molto stimolante.) Il ritorno a Grozio da Pufendorf ha molte motivazioni. Oltre a quelle che la Labriola rintraccia con intelligente attenzione c'è in Barbeyrac, forse, anche l'acquisita consapevolezza del carattere appunto eterogeneo degli elementi e punti di teoria che il suo modello prevede. La scelta dell'allestimento, piuttosto che del trattato, corrisponde, forse, a questa consapevolezza, e alla precisa veduta del compito che ne deriva: il campo teorico del giusnaturalismo moderno funziona per intermittenze, è da costruire per assemblaggio. Il diritto naturale non ha alle spalle un *proprium*. Quanto possa e debba esserci, nel giusnaturalismo moderno, di natura *ut sic*, lo ha detto alla svelta Pufendorf, nel *De iure naturae et gentium*, in una battuta molto pungente: "ex arbore fiunt tabulae et trabes". È probabile che, quando ha letto, Barbeyrac abbia sorriso e annuito.

Si chiude il lungo percorso di questo volume con molte delle risposte possibili, su Barbeyrac. Con molte domande, anche. Il giusnaturalismo moderno ci è diventato, pagina dopo pagina, oggetto più variegato e più stratificato; si scopre che chiede un ripensamento. Di questo ripensamento il libro di Giulia Labriola fornisce molti materiali, un ricco armamentario, un convincente avvio. Per la giovane studiosa e la rinnovata collana, un esordio eccellente.

ROBERTO RIGHI

M. G. LOSANO, *Sistema e struttura nel diritto*, 3 voll., Milano, Giuffrè, 2002.

L'opera, dedicata alla storia della nozione di sistema giuridico nella cultura occidentale, si snoda, nei tre volumi in cui si articola, lungo un arco temporale che va dalle origini della riflessione filosofico-giuridica fino all'epoca contemporanea. La nozione di sistema, considerata "un pilastro della saggezza occidentale, in quanto ad essa fa riferimento — consapevolmente o inconsapevolmente, per consenso o per dissenso — chiunque intraprenda una descrizione scientifica o una costruzione tecnica" è quindi assunta come chiave di lettura della storia del pensiero occidentale per passare in rassegna l'evoluzione della scienza giuridica.

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L'interesse di Mario Losano per tale nozione risale all'insegnamento di Norberto Bobbio, di cui è stato allievo: Bobbio negli anni Cinquanta del secolo scorso aveva introdotto nella cultura giuridica italiana l'opera di Hans Kelsen, al quale riconosceva tra l'altro il grande merito di aver spostato l'interesse dei teorici del diritto dalla norma all'ordinamento giuridico, ovvero dalla frammentarietà alla sistematicità del diritto. « Non si insisterà mai abbastanza sul fatto — egli rilevava — che primariamente col Kelsen la teoria del diritto si era orientata definitivamente verso lo studio dell'ordinamento giuridico nel suo complesso, considerato come concetto fondamentale per una costruzione teorica del campo del diritto, non più il concetto di norma, ma quello dell'ordinamento, inteso come sistema di norme » (1).

Negli stessi anni Settanta in cui Bobbio richiamava l'attenzione su questa svolta negli studi giuridici operata da Kelsen, in area anglosassone un altro filosofo del diritto, Joseph Raz, dedicava alla nozione di sistema un'importante monografia, *The Concept of a Legal System. An Introduction to the Theory of Legal System* (2) opera rispetto alla quale la ricerca di Losano appare complementare. Infatti Raz si occupa quasi esclusivamente del contesto anglosassone, Losano invece dell'Europa continentale (unico autore in comune tra le due ricerche, ovviamente, Kelsen).

Sul versante storico-giuridico una decina di anni più tardi uscivano i due volumi di Paolo Cappellini, *Systema iuris* (3), in cui l'autore traccia la storia delle origini del sistema giuridico, soprattutto nel tardo Settecento e nella Pandettistica, con una tale ricchezza di documentazione e profondità di analisi da essere indicati da Losano come testi imprescindibili per l'approfondimento storico delle tematiche oggetto della sua ricerca di carattere più teorico.

Nel primo volume di Losano la ricerca sull'uso del termine "sistema" copre il periodo che va dall'epoca greca alla Pandettistica tedesca dell'Ottocento (più di 18 secoli) e spazia dalla teologia alla filosofia, al diritto, in quanto in questi secoli il pensiero sistematico è raramente oggetto di una trattazione specifica, ma viene per lo più affrontato come digressione metodologica rispetto ad altri temi. Di qui la necessità di volgere l'attenzione verso discipline e opere disparate.

L'esame del significato del termine "sistema" nel greco antico mette in luce la presenza in esso di due significati tecnici — legati rispettivamente alla musica e alla metrica — e di due significati atecnici — uno nel senso generale di insieme l'altro di ordine che regna nel

(1) Cfr. N. Bobbio *Dalla struttura alla funzione. Nuovi studi di teoria del diritto*, Comunità, Milano, 1977, p. 201.

(2) Oxford University Press, London, 1970 (seconda edizione, aggiornata e con l'aggiunta di un *Postscript*, 1980).

(3) I *Genesi del sistema e nascita della "scienza" delle Pandette*, Giuffrè, Milano, 1984; II, *Dal sistema alla teoria generale*, Giuffrè, Milano, 1985.

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cosmo. Mentre i primi due si estinsero col mondo classico, gli altri due sono giunti fino a noi attraverso una serie di passaggi e di evoluzioni.

Il mondo romano non conosce una esigenza sistematica almeno fino al momento della compilazione, al tempo di Giustiniano, del *Corpus iuris* che sotto l'influenza della logica greca rappresenta il primo grande sforzo sistematico di natura giuridica.

Nel Medioevo diritto e teologia vengono studiati con metodi molto simili, tanto che il termine "sistema" lo troviamo utilizzato tanto nell'una quanto nell'altra disciplina con uno stesso significato: ricerca di un "insieme coerente" tra le varie parti di un tutto. Nella prima età moderna continua la consolidazione del termine in entrambi i settori: i teologi, anche in seguito alla Riforma protestante, cominciano a sviluppare una teologia sistematica e i giuristi, seguendo la logica greca riscoperta dagli Umanisti, cominciarono a organizzare la loro materia in modo sistematico, andando dal generale al particolare.

E' nel Seicento che la nozione di sistema comincia a diffondersi e a raffinarsi, vari autori iniziano a riflettere sul concetto espresso da quel termine e a introdurre una distinzione tra "sistema interno" e "sistema esterno", inteso il primo come "sistema insito nella specifica materia oggetto di una certa scienza" e il secondo come "il sistema delle proposizioni scientifiche descriventi una certa realtà".

Nel Settecento lo studio del sistema, grazie alle riflessioni di Leibniz, Lambert, Wolff, viene condotto a stretto contatto con il procedimento matematico, nell'ideale di una *mathesis universalis*, e giunge al suo apogeo con Kant che definisce il sistema "l'unità di molteplici conoscenze sotto un'idea".

Dopo Kant, con la filosofia idealistica tedesca la nozione di sistema si afferma decisamente e si diffonde in ogni disciplina: nella scia di Hegel nascono le storie universali del diritto che riguardano il fenomeno giuridico nella sua totalità o un suo settore (come, ad esempio, la storia universale del diritto ereditario di Gans o la storia universale del diritto matrimoniale di Unger).

In ambito più strettamente giuridico l'elaborazione sistematica wolffiano-kantiana fu recepita dai giuristi della scuola storica che, attraverso i pandettisti (soprattutto Puchta e Windscheid) ispirano la sistematica di Heise e con lui la costruzione del codice civile tedesco (BGB) del 1900.

Nel passaggio dall'Ottocento alla prima metà del Novecento, per usare una celebre definizione bobbiana, la filosofia del diritto dei filosofi cede il passo alla filosofia del diritto dei giuristi. A questo periodo è dedicato il secondo volume dell'opera: in esso il campo di indagine si restringe al solo diritto, in quanto l'interesse si è spostato dal sistema esterno (tipico, come si è visto, dell'Ottocento) a quello interno sia da parte dei fautori (i giuspositivisti) sia da parte degli avversari (i giusliberisti) della visione sistematica del diritto.

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Nella prima parte del volume è preso in esame quale esempio di sistema giuridico interno quello proposto da Hans Kelsen di cui vengono vagliati i rapporti con la sistematica ottocentesca di Jellinek e Gerber e le caratteristiche intrinseche, a partire dalla concezione di norma fondamentale che, come culmine della piramide delle norme, è l'elemento strutturante dell'intero sistema.

La seconda parte del libro è invece dedicata alle critiche alla concezione sistematica del diritto e ripercorre la storia del pensiero giuridico antiformalistico a partire dalla seconda fase del pensiero di Jhering per giungere al movimento per il diritto libero e alla giurisprudenza degli interessi. In questi autori il termine sistema subisce un'ulteriore evoluzione: da "sistema per dire" (ossia per descrivere il diritto) diviene "sistema per fare" (ossia per applicare il diritto). Il primo ha per oggetto la struttura del diritto, il secondo la funzione.

Se l'antiformalismo determinò l'apertura del sistema ai fatti, ossia agli interessi sottostanti alle norme, il giusnaturalismo post-bellico richiese l'apertura ai valori, ossia a principi morali e giuridici, sentiti come necessari per porre un freno a distorsioni come quella del nazionalsocialismo "che libera il giudice dalla norma, ma lo asserve al potere politico".

Nella seconda metà del Novecento si approfondisce questa svolta: la nozione di sistema giuridico e il dibattito su di esso escono di nuovo dal ristretto ambito della scienza giuridica. Il positivismo giuridico si attenua e il diritto cerca sempre più il collegamento con i valori e con la società: si ripropone, in forme rinnovate, la connessione tra sistema giuridico e teorie elaborate dalle scienze fisiche e umane.

Da qui prende la mosse il terzo volume, sottotitolato "Dal Novecento alla post-modernità". Esso esamina, in particolare, tre correnti di pensiero, la cibernetica, lo strutturalismo e la teoria sistemica di Luhmann. Il primo capitolo descrive l'affermarsi della cibernetica negli Stati Uniti e le sue applicazioni al diritto fino alla nascita dell'informatica giuridica e del diritto dell'informatica, discipline ormai ineliminabili nel sapere giuridico. Il secondo capitolo ripercorre la storia dello strutturalismo nella linguistica e nell'antropologia cercando di tracciare un bilancio di esso in campo giuridico in cui, a parte alcuni sviluppi di semiologia giuridica, l'influenza è stata limitata ed è oggi del tutto scomparsa. L'ultima parte si occupa della teoria generale dei sistemi dalla sua origine nelle scienze biologiche fino a Luhmann, massima espressione del modello sistemico applicato alla società e al diritto. La nozione di sistema giuridico alla quale perviene il sociologo tedesco è l'antitesi di quello di Kelsen, in quanto non riguarda le parti che compongono il diritto, ma i suoi rapporti con l'ambiente esterno, non è più uno studio del sistema nel diritto, ma del diritto nel sistema.

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Si tratta dell'ultima tappa (ma solo in ordine di tempo) di una storia secolare che è perennemente *in itinere* e che non consente quindi una conclusione, ma solo un bilancio provvisorio.

L'opera qui recensita rappresenta una felice sintesi delle linee di ricerca di Mario Losano che dalla metà degli anni Sessanta ad oggi si è dedicato allo studio del pensiero giuridico soprattutto tedesco — importanti i suoi contributi su Jhering, Gerber e Kelsen — di temi sociologici e comparatistici nonché di informatica giuridica che è stato tra i primi a far conoscere e a coltivare in Italia.

CARLA FARALLI

FRANCESCO MANCUSO, *Diritto, stato, sovranità. Il pensiero politico-giuridico di Emer de Vattel tra assolutismo e Rivoluzione*, Edizioni Scientifiche Italiane, Napoli-Roma, 2002, pp. 384 ("Collana del Dipartimento di Teoria e Storia del Diritto dell'Università degli Studi di Salerno — Sezione di Storia e di Filosofia giuridico-politica", 3).

Il problema della nascita e del consolidamento del diritto internazionale costituisce indubbiamente uno dei problemi più affascinanti della storia del pensiero giuridico moderno, sia per la sua collocazione sistematica nel tessuto normativo dell' età nuova, sia per gli stretti rapporti con la Scuola del diritto naturale "laico" che, a partire da Grozio, era destinata a segnare in maniera indelebile la vita e la cultura giuridica dell' Europa sei-settecentesca e, attraverso questa, del mondo intero. In tale cornice si colloca la figura e l'opera del giurista svizzero Emer de Vattel (1714-1767), un seguace di Christian Wolff, la cui dottrina egli esamina partitamene nelle *Questions de droit naturel et observations sur le traité de droit de la nature de M. le Baron de Wolff* (1762), ma i cui tratti più originali emergono da quello che comunemente viene considerato il suo capolavoro: *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758).

Com'è noto (cfr. G. Fassò, *Storia della filosofia del diritto*, II: *L'età moderna*, Roma-Bari, 2001^2, p. 193 ss.), il movimento rinascimentale iniziato in Italia alla fine del Quattrocento si era diffuso nei principali paesi europei, dalla Francia all'Inghilterra, dalla Svizzera alla Germania, portando al ripudio di qualsivoglia conoscenza non filtrata adeguatamente dalla *ratio*. Anche nel campo giuridico, i maggiori esponenti avevano cercato di ricondurre alla ragione i principi primi della *lex naturalis*. Tale atteggiamento si era accentuato nel secolo XVIII con l'aspra lotta dei "lumi" della ragione contro le più diverse autorità. Ma più che un organico sistema, tale secolo aveva espresso uno stato

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d'animo diffuso, un atteggiamento spirituale oltre che culturale, che aveva permeato gli ambienti intellettuali aristocratici e borghesi.

Dopo gli studi di J. J. Manz (*Emer de Vattel. Versuch einer Würdigung*, 1971) e di F. S. Ruddy (*International Law in the Enlightment. The Background of Emmerich de Vattel's* Le Droit des Gens, 1975), di H. Muir Watt (*Droit naturel et souveraineté de l'Etat dans la doctrine de Vattel*, 1987) e di A. Bandelier (*De Berlin à Neuchâtel: la genèse du Droit des gens d'Emer de Vattel*, 1996), di A. Hurrell (*Vattel: Pluralism and its Limits*, 1996) e di E. Jouannet (*Emer de Vattel et l'émergence doctrinale du droit international classique*, 1998), l'opera qui esaminata non procede ad un confronto minuzioso delle opere di Vattel con quelle dei maggiori giusnaturalisti del sec. XVII, ma cerca piuttosto di indagare la capacità del giurista svizzero di mutare senso, spesso impercettibilmente, allo strumentario concettuale che funge da supporto all'analisi dei principi etico-giuridici. Ne emerge nel complesso un giusnaturalismo razionalistico (di chiara impronta wolffiana) che tenta di enucleare (per usare la felice espressione di Herbert Hart) una sorta di "contenuto minimo del diritto naturale" al fine di poter paradossalmente operare una *epoché* dei principi di giustizia sostanziale tale da consentire al diritto internazionale una maggiore *vis* sul piano operativo, in quell'epoca contrassegnata da virulenti conflitti ideologici e politici (pp. 11-12).

Il libro si articola in tre capitoli. Nel primo: "Obbligo e diritti", viene evidenziato come il ripudio di una concezione dell'obbligazione essenzialmente *verticale*, teorizzata da Pufendorf e da Barbeyrac, svolga un ruolo di grande rilevanza all'interno del sistema vatteliano, soprattutto se posto in relazione con l'insistito tentativo di porre a fianco del diritto naturale uno *jus gentium* "positivo". Sganciando nettamente l'idea dell'obbligazione (e di conseguenza dei diritti e dei doveri) dall'ottica del rapporto "superiore-inferiore", ed elaborandone per contro un concetto eminentemente *orizzontale*, la giuridicità delle relazioni tra gli Stati, soggetti primari del diritto internazionale, finisce per essere modellata sulla base di rapporti fra entità libere ed uguali. E poi, per analogia, l'affermazione di una "perfetta uguaglianza di diritti" viene estesa a tutti gli uomini (p. 70).

Nel secondo capitolo: "La teoria dello Stato", Mancuso sostiene che la costruzione internazionalistica del giurista svizzero si fonda complessivamente sopra elementi che offrono una teoria completa della società e dello Stato. In particolare Vattel perverrebbe alla propria visione di un diritto internazionale basato sull'indipendenza degli Stati sovrani facendo perno sopra un'immagine della sovranità che recupera frammenti di teoriche cinquecentesche (*in primis* Bodin) facendoli interagire con l'idea giusnaturalistica dell'origine razionale della società, vivificata attraverso il riferimento al concetto emergente di "nazione". Tale idea si lega alla formulazione di un concetto di "costituzione"

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(intesa come *lex fundamentalis*) nuovo e polisenso, precorritore della dottrina sieyèsiana. Mentre però Wolff era orientato a costruire una catena di doveri vòlti alla "vita buona", implicante la continua mediazione tra individuo e corpi sociali gerarchizzati, in Vattel l'individuo appare piuttosto un'entità che conquista la propria politica soggettività nel corpo privilegiato della "nazione" (pp. 112-113).

Nel terzo capitolo, infine, dedicato al "Diritto internazionale", si sostiene che la dottrina del giurista svizzero si sviluppa attraverso tre percorsi fondamentali: il primo costituito dalla definizione di diverse tipologie di diritto internazionale, nelle quali si evidenzia il difficile equilibrio tra diritto "naturale" e diritto "volontario"; il secondo offerto dall'analisi delle relazioni pacifiche tra le nazioni e dalla ricerca di norme atte ad organizzare uno spazio giuridicamente determinato fra i soggetti esclusivi del diritto internazionale; il terzo infine consistente nell'analisi delle relazioni conflittuali fra gli Stati, accompagnato dalla ricerca di norme capaci di attutire gli effetti perniciosi della guerra (p. 248).

Esempio cospicuo della dialettica politica che assistette allo sviluppo dell'Illuminismo in seno all'Assolutismo, il pensiero di Vattel denota una continua oscillazione tra "l'argomentazione etico-civile e quella politico-statale" (Koselleck); in questo secondo caso il giurista svizzero contribuisce al processo di affermazione dello Stato moderno, vòlto a neutralizzare i permanenti contrasti religiosi attraverso la separazione di politica e morale, nel solco del processo di secolarizzazione tipico dell'età nuova (pp. 229-230). Anche se privo di spiccata originalità e di grande vigore speculativo (v. ancora Fassò, *Storia*, II, cit., pp. 211 e 195), l'opera di Vattel fu comunque efficace nella diffusione dei principi filosofico-giuridici della linea leibniziano-wolffiana tra gli operatori del diritto e della politica settecenteschi sensibili alle problematiche internazionalistiche. E poiché il limite del giusnaturalismo illuministico è sempre stato identificato nel suo eccesso di astrattezza, all'atto di interpretare le esigenze sociali, politiche ed economiche della sua epoca, possiamo dire che nell'ampia e articolata ricostruzione di Mancuso matura la consapevolezza che l'opera di Vattel manifesta per contro una certa concretezza, un "realismo moderato" che oltrepassa in qualche misura la chiusura del sistema entro verità razionali assolute, metastoricamente plananti sullo scenario internazionale. Come sintetizza molto bene Maurizio Bazzoli (*Il pensiero politico dell'assolutismo illuminato*, Firenze, 1986, p. 135) "la prospettiva universalistica, erasmiana e tollerante, nella quale già all'inizio del Seicento Grozio aveva inscritto il motivo giusnaturalistico come fattore di una pace operosa nei rapporti internazionali, si converte qui con Vattel, in una prospettiva politica più definita e realistica, in cui il valore illuministico della pace internazionale è condizionato all'equilibrio del sistema europeo di potenza". Per cui alla fin fine, quando A. H. L. Heeren "indicherà nel

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'diritto delle genti' e nell'equilibrio politico (consistente in 'una vicendevole libertà e indipendenza contro il dispotismo') i cardini dell'intero sistema dell'Europa civile, concludendo che 'l'idea dell'equilibrio politico è connaturale ad un libero sistema di popoli inciviliti', non farà — nel 1809 — che ribadire una convinzione che il Settecento illuminista aveva già acquisito".

FRANCO TODESCAN

FRANCESCO SAVERIO NISIO, *Jean Carbonnier*, Giappichelli Edit., Torino, 2002, 232 p.

Ironie du sort, ces lignes vont paraître au moment où vient de nous quitter le protagoniste de ce livre. Avec la disparition du doyen Jean Carbonnier, il n'est pas exagéré de dire que c'est une époque qui se clôt, quasi un monde qui disparaît. Ce livre en porte témoignage, permettant en outre au lecteur de langue italienne de connaître une œuvre à laquelle il a, semble-t-il, peu accès. De cela aussi, l'auteur doit être remercié.

Jean Carbonnier, le civiliste, le sociologue du droit! Ce livre va au-delà du stéréotype. Il ne constitue pas une pure bibliographie; il sait éviter le panégyrique, il ne se borne pas à établir un précieux état des lieux. Il développe une perspective inédite: brosser le profil épistémologique d'une œuvre qui, jusqu' ici, n'avait pas été considérée sous cet angle. L'auteur inclut cette approche dans une série de propositions personnelles: ainsi, à côté de propos sur la règle d'objectivité (p. 52 sq.) et le phénomène juridique (p. 59 sq.), trouve-t-on des réflexions pénétrantes et fort bienvenues sur le droit comme espace (p. 122).

L'œuvre de Jean Carbonnier, contrairement aux apparences, est relativement complexe. L'auteur a raison de le souligner. Complexe par ses références culturelles, qui plongent à la fois dans la philosophie, dans le droit, dans l'histoire, dans la théologie, dans la sociologie; qui, tour à tour, passent du classique au baroque, et de la tradition au post-modernisme (p. 39). Une pensée dont l'auteur souligne la richesse et s'étonne qu' elle n'ait pas vraiment franchi les Alpes… mais ne va-t-il pas montrer plus loin combien elle se rattache à un contexte très hexagonal, aussi difficile à exporter qu' à être profondément compris de qui n'est pas d'attache culturelle française?

Montesquieu de l'époque contemporaine, se plaît-on à dire de Jean Carbonnier. C'est un peu le caricaturer. Qu'il ait été, comme celui en qui l'on voit son illustre prédécesseur, en même temps qu'un grand professionnel du droit, un homme clairvoyant, un juriste éclairé, un grand penseur, un critique fort, cela est indubitable. Il fut aussi un grand législateur car, placé en position de dessiner un nouveau droit de la famille, il sut faire prendre en compte les données propres au milieu

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culturel, social, économique de son temps. Mais l'auteur est trop fin pour s'en tenir là. Il s'intéressera à l'influence spinoziste à l'œuvre en arrière-plan aussi bien dans la pensée de Montesquieu que dans celle de Jean Carbonnier — un renouvellement de leur approche de la nature, de l'importance des mœurs et, comme en toile de fond, de leur faveur pour la fameuse théorie des climats.

Au lecteur français lui-même, l'auteur dévoile des aspects insoupçonnés de l'œuvre de Jean Carbonnier. Outre les propos sur la mémoire collective et le rappel d'une possible influence d'un Halbwachs qui, mort en déportation, ne put donner la suite attendue à ses travaux, on en retiendra deux ici: le rapport au cinéma et des similitudes avec le taoïsme.

Quoique ce soit assez inattendu quand on connaît la retenue et la sévérité de l'homme, il était intelligent de proposer l'idée que Jean Carbonnier serait la grande figure d'une 'nouvelle vague' chez les juristes: celle que fut la 'déferlante' de la sociologue juridique, par relation avec ce qu'a connu le cinéma français. Lorsqu'il parle de cinéma, en fait, Jean Carbonnier le fait dans les termes d'une technique au service d'une pensée. Et c'est bien ainsi qu'il traita la sociologie. Je ne crois pas, pour reprendre une expression que l'auteur dit avoir trouvé dans mes propres écrits, que Jean Carbonnier se soit jamais ''abandonné'' à quoi que ce soit. Il vécut son calvinisme à la lettre. Jean Carbonnier parle du cinéma comme de la musique, dans la mesure où, comme le relève justement l'auteur, la vie forme un tout (p. 36).

Partant, par ailleurs, de deux réflexions de Jean Carbonnier sur l'importance qu'accorde le Tao aux ouvertures (portes et fenêtres parties vitales de la maison, p. 39, 74) et l'enracinement de la loi dans les mœurs et la religion (p. 74), l'auteur va développer l'évocation d'un taoïsme en filigrane sous les lignes du maître. Il revient là-dessus à mainte reprise, comme une sorte de leitmotiv dans le livre (expressément évoqué des pages 70 à 86), se fondant sur quelques traits marquants du taoïsme: les mœurs, création ancestrale sans fin; une conception bipolaire de la réalité et une approche de la création du droit fondée sur l'alternance des contraires, deux facteurs qui auraient à voir avec la distinction du *yin* et du *yang*; une faveur discernable pour une conception de la propriété fondée sur une appropriation collective étrangère à notre approche par les droits subjectifs; l'importance e la figure du juge; l'hypothèse même du *non-droit*… Et de conclure: « Carbonnier *taoista del diritto*? L'ipotesi non è peregrina » (p. 71).

On pourra répliquer que la conception de la propriété d'un Thomas d'Aquin — qui fait partie de notre héritage culturel — a peu à voir avec celle de nos codes; que l'importance de la tradition constitue l'un des fondements de la pensée des auteurs néo-libéraux contemporains; que les similitudes entre sagesses ne sont pas rares — comme on le sait, le « Ne fais pas à autrui ce que tu ne voudrais pas qu'on te fasse »

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se trouve à la fois dans la Patristique et chez Confucius. Qu'importe: il n'était pas inintéressant de repérer dans l'œuvre de Jean Carbonnier un certain nombre de traits qui ne sont pas communs chez les juristes de tradition romano-canonique.

Cette position très spécifique de Jean Carbonnier entre nature et culture, entre matière et religion, entre théorie et empirie, entre autorité et liberté; cette faculté d'être à l'écoute des masses en auscultant les mœurs (p. 120), il était important qu' on la soulignât en permettant au lecteur de suivre en permanence le texte original, par des citations souvent longues et jamais inutiles. On notera, à ce propos, l'usage que fait l'auteur lui-même, pour des incises toujours utiles, des 'petits caractères' d'imprimerie comme disait Jean Carbonnier quand il expliquait la forme toute particulière qu' il avait imposée aux éditeurs de son manuel de Droit civil. Et l'auteur d'offrir, dans un Appendice, comme une prime de fidélité au lecteur, la traduction d'un texte de Jean Carbonnier: « Legislazione e religione mescolate nella sociologia de Montesquieu ».

Bref, on retiendra de l'ouvrage, outre l'énorme curiosité et originalité de l'auteur dans son analyse d'une œuvre complexe et savante, et ce qu' il apporte de connaissance proprement dite de l'œuvre de Jean Carbonnier, un style souple et rigoureux et une langue très pure qui font de la lecture de ce livre un moment de véritable bonheur.

André-Jean Arnaud

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A proposito di…

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ANDREA BORTOLUZZI

DONAZIONE: SCAMBIO IMPRONTATO A GRATITUDINE O SCAMBIO ANNULLATO DALLA GRATUITÀ?

(a proposito di G. B. Ferri, *Dall'intento liberale al così detto impegno etico e superetico: ovvero l'economia della bontà*, in *Diritto Privato*, 1999-2000, pp. 327-464)

> Per Giovanni Pozzi con memore gratitudine.
>
> Se l'idea d'uno scambio è necessariamente legata all'idea di gratitudine, allora nel pensiero di San Francesco i termini della relazione vengono spostati in modo paradossale. Verso l'uomo benefattore sono rovesciati, verso Dio sono annullati, perché qualunque cosa l'uomo faccia o dica è semplice restituzione, anche la lode (...). Figlio di mercante, uomo legato a una società in cui era capitale il principio del dare e dell'avere, Francesco radicalizza quel dato mettendo fuori gioco la gratitudine sia in effectu perché di restituzione sempre e solo si tratta, sia in affectu perché, pur dovendo essere praticata costantemente, anche la lode appartiene totalmente a colui che chiamava il Grande Elemosiniere. Francesco così passa dalla gratitudine alla gratuità.
>
> (Giovanni Pozzi, La gratitudine nel lessico di San Francesco).

L'occasione di una recensione al volume di Antonio Palazzo (*Atti gratuiti. Donazioni*, *I singoli contratti*, in *Trattato di diritto civile*, diretto da Rodolfo Sacco, Torino, 2000) muove l'Autore a riconsiderare l'intera materia delle donazioni. E lo fa da par suo non disdegnando incursioni nel campo della teoria generale che la materia di confine (non a caso Ferri cita Bonfante per il quale le donazioni continuano a "vagare come istituti in pena, per le varie parti del sistema, senza trovare requie in nessuna") sollecita.

Ne esce un lungo, densissimo saggio, di cui qui non si può che testimoniare per rapidi cenni l'impianto, per proporre qualche nota critica al lettore, cui si sollecita la lettura di un testo testimone della sollecitudine interpretativa che ancora si muove (sia pur sempre più raramente) in ambito accademico. Della donazione viene messo in chiaro il suo porsi al di fuori dello scambio di mercato sia pur sposando

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la tesi (blandamente) utilitaristica dello Jhering, secondo il quale "non esiste un agire a vantaggio altrui nel quale il soggetto non voglia, al tempo stesso, qualcosa per sé".

La donazione dunque non è riconducibile allo schema del contratto a titolo oneroso che sulle orme di Pothier e del Code Napoléon era definito come il contratto "nel quale ciascuno dei contraenti intende, mediante equivalente, procurarsi un vantaggio" (art. 1101 cod. civ. del 1865), ma al contratto gratuito o di "bienfaisance" come quello in cui uno dei contraenti intende procurare un vantaggio all'altro senza equivalente (sempre art.1101/1865) o come quello "dans lequel l'une de parties procure a l'autre un avantage purement gratuit" (art. 1105 code Napoleon).

Al *contrat de bienfaisance* sono attratti sia la "donation" che suppone "enrichissement du patrimoine du donataire et appauvrissement de celui du donateur" sia "les contrats désintéressés" nei quali chi riceve non vede arricchirsi il proprio patrimonio.

Secondo Ferri nell'ambito dei contratti di "bienfaisance" va tracciata una linea di divisione tra donazioni e contratti gratuiti e disinteressati (espressioni della privata autonomia) e le prestazioni cortesi e di solidarietà superetica (sentite come doverose in quanto attuazione di doveri morali) ravvisandosi in queste ultime una sorta di commistione tra dimensione del gratuito e mercato; d'altro canto della donazione Egli mette in luce l'ambiguità sotto il profilo strutturale e nel rapporto con gli altri negozi gratuiti, citando da Domat, Pothier, Gorla, von Savigny, Bonfante e Windscheid.

Le scelte legislative annoverano la donazione ora nella disciplina dei contratti capaci di trasmettere la proprietà (*code Napoléon*) o "a ridosso" di quella delle successioni e dei contratti come ideale "trait d'union" tra le due discipline (codice italiano del 1865), una collocazione ritenuta ambigua. Più decisa la collocazione nel BGB che disciplina la donazione nell'ambito dei contratti. Il progetto di codice civile italiano del 1936 colloca le donazioni nel libro secondo "delle successioni" sia pur affermandone la natura contrattuale.

Il codice del 1942 conferma la collocazione del progetto del 1936 e la donazione, che avrebbe dovuto trovare collocazione nell'ambito del libro quarto "Delle obbligazioni", trova collocazione nel secondo intitolato alle "Successioni".

La donazione, come le relazioni al progetto del 1936 e al codice del 1942 mettono in risalto, hanno aspetti comuni con la materia testamentaria e pur essendo annoverabili tra i contratti hanno sensibili diversità di disciplina da questi ultimi. La volontà del donante vi è preminente come quella del disponente nel testamento.

L'unilateralità "marchia" la donazione: si pensi all'istituto della revoca o alla conferma o esecuzione delle donazioni nulle. La marcata unilateralità della donazione è confermata dalla struttura della dona-

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zione obnuziale, quella della sua sostanziale ambiguità dalla donazione remuneratoria.

La donazione è un contratto per la cui validità è richiesta la forma dell'atto pubblico solenne, a tutela degli interessi del donante e della sua famiglia al cospetto di un atto destinato ad impoverire entrambi patrimonialmente. Da un punto di vista sociale ciò era giustificato dal fatto che una società di mercanti e proprietari terrieri era incentrata sull'"avere" e dunque sulla proprietà, e tale centralità trovava rispondenza nel contenuto del libro terzo del Code Napoleon e del codice civile del 1865 disciplinanti testamenti, donazioni e contratti quali mezzi di di trasferimento della proprietà. La società odierna si connota come società del "fare", ciò che trova rispondenza nella centralità del libro quinto del codice del 1942 dedicato al lavoro e all'impresa. Gli oneri formali solenni assumono, in tale prospettiva, una funzione assai meno incidente che nel passato sulla circolazione dei beni. Le regole circolatorie dei beni d'oggi, prevalentemente dematerializzati come essi sono, implicano un più ridotto ruolo degli oneri di forma, circoscritto alla riconoscibilità, certezza e prova degli scambi e dei negozi. Questo ridotto ruolo la forma svolge anche in riguardo alla donazione che come abbiamo visto non realizza alcuno scambio di mercato. Gli atti esecutivi come la consegna assumono allora rilevanza strumentale per porre in essere atti gratuiti.

La donazione è un contratto singolare, fuggito dal libro del codice cui apparteneva per rifugiarsi in un altro. Uno "strano" contratto che ben può essere preso a paradigma della dogmaticità della necessitata natura bilaterale dell'istituto. Muovendo dalla ricostruzione della natura del contratto con obbligazioni del solo proponente di cui all'art. 1333 quale negozio unilaterale a struttura e rilievo bilaterale sulle tracce di Benedetti, anche la donazione, si sostiene, "ha una configurazione economicamente unilaterale, anche se questa si esprime attraverso una struttura che il legislatore ha voluto contrattuale" ciò che consente di inquadrare l'eventuale accettazione da parte del beneficiario quale "formalizzazione del mancato esercizio di un possibile rifiuto ed allora di una definitiva stabilizzazione di un effetto sostantivo favorevole che per il donatario, forse (come nello schema dell'art. 1333 c.c.) si è già verificato, sulla base della sola dichiarazione di colui che intenda compiere la liberalità". In tali casi il rifiuto del donatario assumerebbe "la valenza di un rifiuto eliminativo di un effetto già verificatosi".

L'"ambiguità" della donazione intesa come contratto ha modo d'esprimersi là dove si considerino i suoi profili funzionali e formali.

Oggettività della regola e elemento soggettivo dello spirito di liberalità producono numerosi equivoci in tema di rapporti tra causa e motivo cui non è estranea la nozione codicistica fondata sullo spirito di liberalità quale "essenza" della donazione. A cercarla, la causa intesa nel senso proprio del contratto sinallagmatico, non sembra dato di ritro-

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varla se non ricorrendo a invero strani stratagemmi come quello di disegnare l'*animus donandi* come "un intento comune alle parti e non come motivo individuale" come propugnato dal D'Ettore, ovvero di considerarla non già come requisito del contratto ma come essenza della donazione stessa secondo l'insegnamento del Biondi. La causa intesa come causa dell'obbligazione è matrice dell'insegnamento secondo il quale, non ravvisandosi nella donazione la mancanza di un obbligo per uno dei contraenti, si poneva il problema di come giustificare la prestazione dell'altro. Sulla scia di Domat e di Pothier nella donazione pura il problema del fondamento della liberalità veniva ricondotto o a qualche ragionevole e giusto motivo o allo spirito di liberalità inteso come "causa sufficiente": accostando la donazione ad una sorta di negozio astratto se ne deduceva che la forma solenne tiene luogo della causa.

Per Ferri tolta che per l'ipotesi della donazione remuneratoria o onerosa, la questione della causa della donazione si presenta come insolubile e l'idea che la forma possa essere considerata un succedaneo della causa non convince il Nostro. Che vede nel formalismo una funzione protettiva propria della società dell'"avere" ma che ha poco senso nella società del fare e cita il Gorla scettico sullo charme della forma notarile ormai "soggetta ad un processo di decadenza".

La via d'uscita all'empasse interpretativo è rinvenuta nella concezione della causa fuori dallo schema del rapporto obbligatorio e dunque come funzione economico individuale del negozio: ogni regola negoziale è espressione oggettivata di specifiche finalità soggettive e vale non solo per la sua oggettività ma anche per quelle finalità soggettive di cui essa è portatrice. Se si tiene conto della particolare struttura del contratto di donazione inteso come negozio unilaterale a struttura e rilievo bilaterale, soggetto a rifiuto, allora la causa, intesa come raccordo tra aspetti oggettivi e soggettivi che presiedono e caratterizzano ogni regola negoziale, semplifica il problema della funzione economico individuale del negozio che si riduce "alla presa d'atto che le finalità soggettive di quegli specifici contraenti (che sono gli autori di quella specifica regola negoziale) ed alle quali da questa si può risalire, sono quelle stesse che risultano dal contenuto della concreta regola negoziale, per quei caratteri e quegli specifici elementi, con i quali i contraenti stessi hanno oggettivamente costruito l'operazione economica che intendono realizzare". I motivi che spingono il donante a organizzare in un dato modo i suoi interessi, oggettivati nella regola contrattuale assumono rilievo funzionale del negozio considerato, "fanno parte della sua causa".

Von Savigny, Demolombe, Bonfante, Gorla e Monteredon, la dottrina, insieme ai dettati codicistici e relative relazioni non riescono a dar per convinto il Nostro di una distinzione in termini appaganti tra donazioni e atti gratuiti diversi: l'unico elemento caratterizzante la

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donazione sembrerebbe, a ben vedere, restare proprio quell'impalpabile spirito di liberalità che se è intrinseco nella donazione contratto, spiegherebbe tutto il suo ruolo anche rispetto a quegli atti, diversi da quest'ultima per dimostrarne la loro natura liberale. Ma "l'animus donandi" appare criterio troppo evanescente per una distinzione e per altro non esclusivo della prestazione liberale, ma che potrebbe essere presente anche in altre e diverse figure di negozi gratuiti.

Non ha allora più senso mantenere in vita la "distinzione culturale tra liberalità (dirette o indirette che siano) e negozi gratuiti": rimane la distinzione tra oneri formali della donazione propria (artt. 769 e 782) e a-formalismo degli atti gratuiti (art. 809). Ma la forma solenne si rivela, nella società attuale "illogica, superflua ed inadeguata a garantire al donante da se stesso e dagli altri"..."ben potendosi attraverso il ricorso a donazioni indirette spogliare dell'intero patrimonio e raggiungere quel risultato, negativo per il donante, che proprio la previsione del formalismo solenne aveva per missione storica, di controllare ed, in un certo senso, di circoscrivere". Liberalità e atti gratuiti sono accomunati dalla oggettività della operazione economica che intendono realizzare e dunque "in quell'analogia di risultati economici, cui tutte le ipotesi predette pervengono e che si sostanzia in una regolamentazione di interessi, liberamente realizzata, nella quale, non corrispondendo ad una prestazione una controprestazione, si determina il consapevole e spontaneo impoverimento di una parte a favore dell'altra che conseguentemente si arricchisce". Ciò che ne tiene distinta la disciplina è l'entrata e l'uscita di un bene da un patrimonio ad un altro propria della donazione e non già degli altri atti gratuiti che tale ipotesi non realizzano.

Tra area del gratuito e area della solidarietà va posta una linea di demarcazione: da un lato stanno le donazioni e i contratti gratuiti e disinteressati, dall'altra le prestazioni cortesi e di solidarietà superetica. Le prime sono espressione ed esercizio di privata autonomia, le seconde sono sentite come doverose in quanto attuazione di doveri morali di solidarietà. La prestazione cortese è dunque tendenzialmente estranea alle logiche dell'ordinamento dello Stato. La prestazione cortese non può essere costruita in termini contrattuali: dalla promessa di prestazione cortese non deriva alcun obbligo e una volta iniziata, la prestazione può essere revocata "ad nutum". L'affidamento che essa può far nascere è una mera speranza sfornita di qualsiasi rilievo e tutela giuridici. La sanzione cui può andare incontro l'autore della prestazione amichevole è quella del discredito e della riprovazione sociale. Resta possibile la risarcibilità dell'eventuale danno extracontrattuale derivante dalla prestazione cortese, non già a termini dell'art. 2043, ma dell'art. 414 cod.nav..

Anche le prestazioni superetiche pertengono al campo della solidarietà morale e dell'appartenenza a un gruppo sociale e anche esse esulano dalla sfera della disciplina giuridica statuale: la responsabilità vi

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è dunque ridotta alla ipotesi di cui all'art. 414 cod.nav.; l'affidamento che esse ingenerano si riduce ad una mera speranza; la sanzione nel caso di inadempimento della promessa non potrà che essere quella della riprovazione; anche sull'ipotesi di recesso "ad nutum" non vi sono dubbi così come sulla sua sola riprovabilità morale. Le prestazioni superetiche stanno fuori dalla sfera del giuridico, e, al proposito, Ferri cita, con saggia consapevolezza, rifiutando le chimere del pangiuridicismo, Carbonnier: esse ci fanno scoprire "le devoir du pur amour, la gratuité du 'hors soi pour l'autre'... ou sur un autre registre les heroismes fous" in questi luoghi "on entrevoit le royaume du non-droit: un raison pour les juristes, de se taire".

Abituati come si è ai contorcimenti dell'esegesi monotona e autoreferenziale, come non salutare il saggio di Ferri con stupore insieme a felicità? Sono lo stupore di chi aduso a tanta letteratura giuridica che fa dell'abilità tecnica l'esercizio più alto del suo sapere scopre un taglio di luce che fende la nebbia di tanta prolissa oscurità e la felicità che sa muovere l'approccio interpretativo e dunque critico alla realtà (anche quella limitata del giurista) senza perdere di vista l'idea di continuità e dunque di tradizione che è propria del diritto.

Dove la "force de choses" sa plasmare in nuove forme gli istituti che essa dà per superati secondo un processo di graduale evoluzione cui l'esercizio del metodo per prova ed errore dà insostituibile propulsione.

Proprio il contrario degli incomprensibili e inammisibili "colpi di mano" siano essi frutto della faziosità del legislatore, o dell'interprete, accademico, giudice, avvocato o notaio, a mezzo dei quali con metodo parziale e indiretto (il metodo secondo il quale le leggi secondo Kafka divengono un segreto del piccolo gruppo di nobili che ci governa e di cui non si sa nulla, nemmeno se esistono)si tende a "far diritto".

Detto del felice incontro del lettore col saggio resta da dire che il giurista dovrebbe consentire con Wittgenstein che "su ciò di cui non si può parlare si deve tacere" e con Pascal che "il supremo passo della ragione sta nel riconoscere che c'è un'infinità di cose che la sorpassano". Ma l'ineffabilità fa mostra di sè nel Mistico. Se Dio non rivela sè nel mondo sta al giurista, scienziato del diritto, di dire come il mondo sia dal suo umile posto d'osservazione. È vero che di fronte a taluni fenomeni del nostro tempo egli sembra sprovvisto degli arnesi del mestiere perché deve misurarsi con l'inedito: ma è forse vero come mi è accaduto di scrivere che bisogna riandare alle fonti e cioè "ritornare a sondare e a discutere sui valori etici di una comunità sociale che sono fondativi della strumentazione istituzionale e dunque procedurale di una collettività" e che "il viaggio odierno del giurista debba scavare gallerie nei monti che gli si parano davanti, scendere in una parola negli abissi del divenire, come è necessario quando si scompone un mito nei suoi tratti tipici. Il mito che il giurista odierno deve scomporre è quello dell'artificialità normativa" (Cfr. A. Bortoluzzi, *Globalizzazione e diritto:*

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c'è ancora spazio per la legge?, in « Quaderni Fiorentini », 2001, pp. 669 ss.).

Torniamo al dono: l'ambiguità di fondo che anima l'approccio normativo statualista così ben messa in luce da Ferri altro non è che l'esito ultimo della incapacità dello Stato a dare giuridica disciplina a atti individuali che si pongono fuori dello Stato e fuori dal mercato e che là dove disciplinati dallo Stato ne sono pervertiti (sul che le belle pagine di J. T. Godbout, *Lo spirito del dono*, Torino, 2002).

Non è un caso che le categorie civilistiche di derivazione illuministica non riescano calzanti alla donazione e che la nozione di causa elaborata dal Ferri riesca funzionale alla bisogna in virtù del rispetto ontologico dell'atto individuale su cui si fonda: resta allora la forma solenne, nei codici moderni pensata in funzione di tutela degli interessi coinvolti da un atto un pò "folle" ("something extra" come per Cheal) ma voluta dal diritto antico come sostitutiva della norma, quale approvazione politica (della "polis") di un atto misterioso (gli atti individuali vengono imbrigliati e sottomessi ad una eteronomia simbolica assoluta) in quanto ascrivibile al sè dell'individuo in relazione alle altre persone e alle cose — facenti parte della famiglia allargata composta di tutti gli uomini viventi, di tutte le creature, dei fiumi, delle rocce, degli alberi (penso alle riflessioni a proposito di donazione e testamento nelle società arcaiche di Montesquieu e di Sumner Maine).

L'invito del Ferri a ripensare la materia senza pregiudizi porta a pensare che non tanto il giurista quanto il legislatore, di fronte a fenomeni come quelli della donazione "debba tacere". Se è vero che bisogna guardare alla pluralità delle fonti del diritto occidentale (e al proposito Ferri cita il Bonfante filosofo) le norme prodotte dalla realtà sociale non debbono essere disattese: siano esse codificate o meno.

Pensando allora alla donazione nella odierna società come unico modo di cui disponiamo per costruire socialmente la nostra unicità ci pare che lo Stato dovrebbe "fare un passo indietro": fissando dei principi inderogabili che siano la consacrazione delle regole sociali che si sono via via fissate in materia e ricorrendo alle prescrizioni di forma intesa non già nel suo significato simbolico e dunque come mezzo per tipizzare un comportamento attuoso condannato alla eterna ripetizione dell'identico (mediante investitura sociale della privatezza dell'atto con la celebrazione della cerimonia) ma nel suo significato segnico di formalizzazione di un determinato atto individuale mediante controllo della congruità di quell'atto con i principî fissati dall'ordinamento.

Si tratterebbe di abbandonare il formalismo arcaico e di sposare la causa della forma che, come mi è occorso di dimostrare è compatibile con qualsiasi strumento di comunicazione. (Cfr. il nostro *Forma e interpretazione nel negozio giuridico notarile*, Torino, 1998).

Il formalismo arcaico sarebbe destinato a permanere "fuori dal diritto" quale mezzo di consacrazione di quegli atti gratuiti che non

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possono trovare giustificazione alcuna sotto il profilo contabile, economico nel senso del calcolo dell'equivalenza tra le cose che circolano, come nella donazione di organi tra viventi (paradigmatico è il dono del rene). In questo caso i donanti sono trasformati dal dono "al punto che le loro testimonianze ricordano per certi aspetti i testi che descrivono i riti di iniziazione, di "nuova nascita": ciò che avvicina in modo inatteso il dono di organi e lo scambio arcaico che come ci suggerisce Godbout, trova fondamento nel lavoro rituale e del tempo consacrato alla sola esigenza della riproduzione simbolica della società. Il rituale in tutte le sue forme, sacrificale, magica, estatica, spazza via ed elimina in permanenza le scorie della ufeis e riporta ciascuno all'esigenza del dono".

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ALBERTO GARGANI

IL SISTEMA PENALE TRA TRADIZIONE LIBERALE E POSITIVISMO

(a proposito degli *Scritti giuridici* di Giacomo Matteotti)

1. *La tardiva "scoperta" del pensiero giuridico matteottiano.*

Dal limpido ed ineguagliabile *ritratto* della personalità di Giacomo Matteotti che ci ha lasciato Piero Gobetti (1), emergono la complessità e la ricchezza della formazione umana e culturale del martire socialista, nella quale assumono un ruolo preminente e fondante gli studi giuridici. Sarebbe, infatti, difficile disgiungere la "fede", severa ed intransigente, negli ideali di "individualismo e di libertà", il rigorismo 'protestante' sotteso all'azione militante (2), dal culto dei valori della legalità e della certezza del diritto, che contraddistingue Matteotti penalista. I principi di garanzia fissati dal pensiero giuridico liberale assurgono ad autentico *ubi consistam* dell'idealismo matteottiano, riflettendo il valore pregiudiziale, quasi 'sacrale', che la sfera della legalità e delle istituzioni assume rispetto allo stesso progetto riformatore.

Non si può, peraltro, fare a meno di osservare come, sul piano storico, il profilo — determinante — di Matteotti studioso del diritto punitivo non sia stato sempre adeguatamente valorizzato. Dai ricono-

(1) V. P. Gobetti, *Per Matteotti. Un ritratto*, 1924, (rist., Genova, 1994), p. 11 e ss..

(2) Gobetti evidenzia il "fondo solido di virtù conservatrici e protestanti" dal quale prese le mosse il "sovversivismo" matteottiano e che spiega la severità e il rigore della condotta politica. "L'intransigente" e "l'aristocratico" del 'sovversivismo' era mosso, secondo Gobetti, da una "fede ideale: bisogna saper vedere in Matteotti, giurista, economista, amministratore, uomo pratico, queste pregiudiziali di disperata utopia, di assoluto idealismo, di reazione assurda contro la grettezza filistea dei falsi realisti" (P. Gobetti, *Per Matteotti*, op. cit., p. 12).

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scimenti e dalle testimonianze di Florian, Stoppato e Lucchini dopo il 10 giugno 1924 (3), ai primi contributi su "Matteotti giurista", apparsi tra gli anni Sessanta e Settanta, si registra un periodo di relativa "rimozione" del pregnante significato della produzione giuridica del martire socialista. Sovente relegati "ai margini" di analisi retrospettive, gli studi giuridici dell'esponente socialista sono rimasti a lungo "in ombra". È, infatti, solo con gli approfondimenti di Arfè (4) e Casanova (5), e, poi, di Mascilli Migliorini (6) e, soprattutto, di Carini (7), che agli scritti penalistici del *leader* socialista sono stati gradualmente "restituiti" e riconosciuti il valore e l'importanza che essi meritano in chiave storico-dogmatica (8). Né le ricostruzioni della disputa polemica tra le scuole giuridiche italiane, né le indagini sul cd. socialismo giuridico, hanno, invero, preso in debita considerazione il ruolo e la collocazione del pensiero di Giacomo Matteotti nell'ambito della dottrina penalistica degli inizi del secolo XX. Eppure, com'è stato osservato, questi "si inserisce a pieno titolo in quella che è stata (...) definita la 'centralità della questione penale' in Italia agli inizi del secolo" (9), l'identificazione, cioè, in molti settori del socialismo italiano "dell'organizzazione repressiva dello Stato come punto centrale per iniziare un'analisi generale della società civile e delle sue 'ingiustizie' con il conseguente impegno di intere generazioni di dirigenti socialisti — da Filippo Turati a Giacomo Matteotti — intorno alla questione penale ed ai suoi risvolti politici generali" (10). Molteplici sono le ragioni per le quali il complesso della produzione penalistica di Matteotti è rimasto per così tanto tempo in secondo piano (11): quel che appare certo è che

(3) Per il giudizio di Lucchini, v. *Rivista penale* 1924, I, 101; per i tributi di Florian e Stoppato, v. *Giacomo Matteotti nel 1° anniversario del suo martirio*, a cura del Comitato Centrale delle opposizioni, Roma, 1925, p. 35, 72.

(4) G. Arfè, *Giacomo Matteotti uomo e politico*, in *Rivista storica italiana*, LVIII, 1966, I, p. 63 e ss..

(5) A. G. Casanova, *Matteotti. Una vita per il socialismo*, Milano, 1974, p. 26 e ss..

(6) L. Mascilli Migliorini, *La formazione giuridica di Giacomo Matteotti*, in *Ricerche storiche*, VIII, 1978, p. 717 e ss..

(7) C. Carini, *Giacomo Matteotti. Idee giuridiche e azione politica*, Firenze, 1984, *passim;* dello stesso autore si vedano, altresì, gli scritti *Le idee giuridiche di Matteotti*, in *Giacomo Matteotti a sessant'anni dalla morte*, 1985, p. 52 e ss.; *Il pensiero giuridico di Giacomo Matteotti*, in *Giacomo Matteotti. La vita per la democrazia*, a cura di M. Quaranta, Rovigo, 1993, p. 130 e ss..

(8) "Le sue preoccupazioni iniziali — ricorda Gobetti — erano esclusivamente scientifiche: ai facili successi avvocateschi preferì subito gli aridi studi di procedura penale" (P. Gobetti, *Per Matteotti*, op. cit., p. 15).

(9) V. L. Mascilli Migliorini, *La formazione giuridica*, op. cit., p. 718.

(10) Così il fondamentale contributo di M. Sbriccoli, *Il diritto penale sociale. 1883-1912*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 1974-75, n. 3-4, *Il "socialismo giuridico"*, tomo I, p. 563.

(11) Secondo alcuni ciò sarebbe dipeso dalla "più generale difficoltà di mettere a fuoco i nessi tra movimento operaio e istituzioni dello Stato, soprattutto quando essi si

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la complessità e la peculiarità della visione matteottiana del sistema penale, irriducibile a schematiche e precostituite etichettature, rendono tutt'altro che agevole il compito di ricostruirne le ascendenze culturali e di decifrarne le reali appartenenze "ideologiche". È lo stesso Matteotti che si preoccupa di evitare "di dare al proprio lavoro di studioso il senso dell'affiliazione ad una 'scuola', di non costringersi ad una scelta tra i vari indirizzi di pensiero agitatisi nel dibattito politico contemporaneo" (12). La posizione di tendenziale estraneità ed indipendenza rispetto alla disputa polemica tra scuole giuridiche contrapposte, il pragmatismo e la concretezza dell'indagine scientifica, sono il riflesso della multiforme e composita formazione giuridica del socialista polesano, che sfugge, per l'atipicità degli assunti, a inquadramenti convenzionali. Il superamento, in via eclettica, della disputa tradizionale tra scuola classica e scuola positiva (13), il distacco dal primato attribuito al "fattore sociale" da Turati ne *Il delitto e la questione sociale* (14), la tensione di fondo tra momento antropologico e momento sociale, sono i profili qualificanti l'impostazione giuridica di Matteotti, penalista *sui generis*, "stimato da studiosi di opposte convinzioni", la cui produzione scientifica, in parte disseminata in risalenti annate di riviste giuridiche (non agevolmente reperibili), reclamava una nuova e più attenta considerazione.

La recente pubblicazione, a cura di Stefano Caretti, dell'insieme degli *Scritti giuridici* matteottiani (15), è destinata, in questo senso, non solo a colmare una considerevole lacuna, bensì, anche, a suscitare nuovi ed ulteriori interessi intorno al pensiero di un autore di singolare rigore ed indipendenza intellettuale. Gli *Scritti*, raccolti in due tomi, sono preceduti da una puntuale introduzione del curatore dell'opera, che descrive la "*storia esterna*" del peculiare e discontinuo itinerario di studi e di ricerche giuridici compiuto da Matteotti. Da anni impegnato nella valorizzazione storico-editoriale della figura, dell'opera e dell'attività del martire socialista, Stefano Caretti illustra dettagliatamente le origini e gli sviluppi dell'attività scientifica, arricchendo l'esposizione di preziosi dati biografici e di riferimenti epistolari, volti ad illuminare il lacerante conflitto interiore tra l'impulso a privilegiare i "*prediletti*" studi penalistici e il superiore dovere etico e morale di seguire fino in

presentino come proposte di riforma dei meccanismi del potere" (L. MASCILLI MIGLIORINI, *La formazione giuridica*, op. cit., p. 717 e s.).

(12) L. MASCILLI MIGLIORINI, *La formazione giuridica*, op. cit., 720.

(13) Cfr. L. MASCILLI MIGLIORINI, *La formazione giuridica*, op. cit., p. 721; C. CARINI, *Giacomo Matteotti*, op. cit., p. 7.

(14) F. TURATI, Il delitto e la questione sociale. Appunti sulla questione penale, Milano, 1883; sul significato di tale opera, v. per tutti M. SBRICCOLI, *Il diritto penale sociale*, op. cit., p. 567 e ss..

(15) Giacomo MATTEOTTI, *Scritti giuridici*, a cura di Stefano CARETTI, I e II, Nistri e Lischi, Pisa, 2003.

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fondo i propri ideali politici, rimanendo "*al posto più pericoloso*", a lottare per il diritto e le libertà civili. È proprio il sofferto intreccio con le vicissitudini esistenziali e politiche, a fare da sfondo alla breve ma intensa esperienza scientifica. A Luigi Lucchini che — nonostante l'ormai incolmabile distanza ideologica — appena un mese prima del 10 giugno 1924, gli propone di tornare allo studio del diritto, profilandogli, con la prospettiva di un insegnamento universitario, la via per sottrarsi *in extremis* alla esiziale spirale di violenze e sopraffazioni in atto, Matteotti risponde declinando l'invito ed anteponendo l'impegno e la missione politica. Nell'abbandonare definitivamente e con amara fermezza il percorso, discontinuo e travagliato, di studioso, che tanto peso e influenza aveva avuto nella propria formazione, egli compie un primo significativo sacrificio. Come osservato da Carini, "nell'esercizio della pratica politica, Matteotti conservò sempre l'abito dello studioso che non accetta compromessi e non sacrifica il rigore del metodo e la coerenza del pensiero all'ideologia" (16). L'intransigenza riformistica, l'inesorabilità nel denunciare soprusi e illegalità, erano il riflesso di una cultura giuridica ispirata ai valori della uguaglianza e della certezza del diritto, che lo guidarono nella scelta del tetragono rigore, quale modello esistenziale e metodologico (17). Mentre il realismo e l'inesorabilità dell'azione politica riflettono la solidità del metodo scientifico applicato negli studi, la modernità dell'approccio ai temi istituzionali è la spia rivelatrice della stretta interdipendenza tra sapere giuridico e attività politica, che nel periodo della formazione intellettuale, si arrichiscono della medesima sostanza, delle medesime esperienze di studio e di approfondimento — "sul campo" — delle realtà sociali e giuridiche delle principali nazioni europee (18). Se l'attività politica matteottiana è tragicamente segnata da un prematuro ed eroico sacrificio, parimenti "incompiuta" appare, dunque, la produzione scientifica, più volte interrotta e ostacolata dagli assorbenti impegni della militanza socialista. Come avverte Giuliano Vassalli, nella splendida *presentazione* del doppio volume di *Scritti*, "non è difficile immaginare quello che avrebbe potuto essere, in un contesto solo parzialmente diverso da quello in cui la lotta politica si svolse e il sacrificio si consumò, l'ulteriore cammino negli studi penalistici e processualpenalistici prediletti nella prima gioventù e il percorso accademico (…) che Giacomo Matteotti avrebbe indubbiamente fatto se la passione politica e l'altissimo sentimento di un dovere da compiere non ne lo avesse distolto". Analizzando il contenuto e la natura dei contributi penalistici, in rapporto alla successiva evoluzione legislativa, Giuliano Vassalli delinea magistralmente gli

(16) C. Carini, *Giacomo Matteotti*, op. cit., p. 41.

(17) Cfr. A. G. Casanova, *Matteotti*, op. cit., 40, il quale sottolinea, altresì, come le testimonianze del tempo (Ruini, Gobetti, Zibordi) insistano sul rigore della personalità di Matteotti, sul suo profilo di "uomo di eccezione".

(18) Cfr. C. Carini, *Giacomo Matteotti*, op. cit., p. 8 e ss.; p. 15 e ss..

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spunti di attualità del pensiero matteottiano, evidenziando la modernità di talune anticipazioni e l'acutezza delle riflessioni giuridiche. È, soprattutto, il significato ultimo della iniziativa editoriale in esame quello che la presentazione di Vassalli mette a fuoco con particolare lucidità ed incisività: "la ripubblicazione in forma ordinata dei suoi scritti giuridici ha non solo il valore di un ulteriore omaggio reso alla sua memoria, ma anche quello di una doverosa sua collocazione nella storia delle dottrine penali" (19).

2. *Il carattere atipico ed eclettico dell'opera giuridica.*

Sulla formazione giuridica di Giacomo Matteotti esercitano la loro influenza molteplici modelli di pensiero: sulle radici culturali del *socialismo giuridico* (20), si innesta, come già anticipato, la tendenza, eclettica, a porre le nuove metodologie positivistiche al servizio dei valori e dei principi della tradizione giuridica liberale. Per quel che concerne il rapporto con il socialismo giuridico, è stato sottolineato come — attraverso l'esempio e gli insegnamenti del fratello Matteo, conoscitore della cultura economico-giuridica del tempo — Matteotti avesse condiviso la necessità di spostare l'attenzione dal fattore economico alla priorità del diritto e del fattore giuridico: nel postulare il ritorno all'individuo, alla sua capacità di incidere sulla storia e sui singoli eventi, in un'"osmosi di libertà e giustizia", veniva riaffermato il primato kantiano del soggetto (21). Ad orientare gli studi giuridici in direzione di un "riformismo istituzionale", sensibile al principio della certezza ed oggettività del diritto, furono — secondo Carini — le indicazioni di Menger in ordine alla necessità di passare dal *codice privato individuale* al *codice sociale* (22), superando i mali della società capitalistico-borghese con la correzione dei codici e delle leggi sociali (23). Come osservato da Mascilli Migliorini, la rivendicazione dell'autonomia della sfera del diritto rispetto ai dati della realtà sociale, quale premessa per avviare iniziative riformatrici, implicava la valorizzazione del diritto

(19) G. Vassalli, *Presentazione*, in G. Matteotti, *Scritti giuridici*, I, a cura di S. Caretti, Pisa, 2003, p. 32.

(20) Sul *diritto penale sociale* quale 'presenza' culturale, "mosaico" eterogeneo di orientamenti, non assimilabile ad una vera e propria scuola ("nel senso di avere anche suoi precisi confini, una sua organizzazione culturale, degli aderenti, dei capofila"), v. M. Sbriccoli, *Il diritto penale sociale*, op. cit., p. 558 e ss., il quale, sul tema in esame, v., altresì, C. F. Grosso, *Le grandi correnti del pensiero penalistico italiano tra Ottocento e Novecento*, in *Storia d'Italia, Annali 12*, a cura di L. Violante, Torino, 1997, p. 17 e ss.; G. Neppi Modona, *Una 'scuola' dimenticata: il socialismo giuridico nel diritto penale*, in *Giust. e cost*., 1971, n. 4, p. 29 e ss..

(21) C. Carini, *Giacomo Matteotti*, op. cit., p. 13.

(22) A. Menger, *Il diritto civile e il proletariato*, Torino, 1894; Id., *Lo stato socialista*, Torino, 1905.

(23) Cfr. C. Carini, *Giacomo Matteotti*, op. cit., p. 31 e s..

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naturale e del suo corollario, lo Stato di diritto: la trasformazione della società non poteva prescindere dalle forme giuridiche, dalla partecipazione al processo di civilizzazione dell'ordinamento (24). La "visione classica del diritto come forma e limite del potere", l'idea che il processo socialista della lotta di classe "poteva pienamente dispiegarsi solo in virtù di regole garantite da uno stato di diritto sorto da un patto costituzionale", rispecchiano l'integrarsi della trasformazione politica sul piano del diritto, in ossequio a tematiche contrattualistiche proprie del pensiero liberale (Beccaria, Romagnosi, Carmignani e Carrara) (25). Sulla riscoperta della ontologica pregiudizialità della sfera dell'ordinamento giuridico, si innesta la visione dell'autonomia e specificità del diritto penale, rispetto alla politica criminale e alle scienze sociali (26). Se soltanto il delitto può essere "*causa produttrice dell'intervento penale*", la tesi secondo la quale il delinquente sarebbe "*obbietto della penalità*" deve essere intesa in modo diverso dalla sociologia e della filosofia, che inutilmente *"muove alla ricerca della causa prima, del primo motore di tutte le cose, dell'Inconoscibile"* (27). In quanto scienza autonoma, il diritto penale si ferma alla "*causa uomo*", che "*accoglie ed elabora in sé le cause, si evolve e se ne forma il proprio carattere, le proprie tendenze e una propria personalità, tale da produrre il delitto in quella normalità instabile delle condizioni esterne, nella quale la maggioranza degli uomini invece non delinque e ritiene necessario punire. In codesta causa individuale — nel fattore personale permanente — ha solo origine e possibilità di essere il criterio penale; nella temibilità del delinquente insomma — diremmo volentieri, ripetendo la parola lucidamente spiegata e fissata da Garofalo, se non ci premesse di evitare gli equivoci, cui essa diè luogo*"

(24) L. Mascilli Migliorini, *La formazione giuridica*, op. cit., p. 724 e s..

(25) C. Carini, *Giacomo Matteotti*, op. cit., p. 10 e s.; sulla "continuità" tra la scuola classica e il socialismo giuridico, v. M. Sbriccoli, *Il diritto penale sociale*, op. cit., p. 564: "il diritto penale si era storicamente presentato come la scienza delle libertà, delle riforme e dei diritti civili, ed attraverso esso si venivano formando i grandi intellettuali del 'secolo sconfitto' che avrebbero però determinato ed accompagnato la vittoria del nuovo". Rispetto a tale tradizione "libertaria", i giuristi socialisti, pur nel rinnovamento dei contenuti e degli obbiettivi, si pongono come "i suoi veri eredi e continuatori: dal momento che resta in essi la convinzione della *priorità della questione penale* come questione di fondo sulla quale si misurano sia l'urgenza di riforma sociale di portata molto ampia, sia la volontà politica di iniziarla e portarla a termine" (M. Sbriccoli, *Il diritto penale sociale*, op. cit., p. 564 e s.).

(26) C. Carini, *Giacomo Matteotti*, op. cit., p. 9: "se l'indagine storico-naturalistica portava ad escludere che la pena fosse semplice e astratta retribuzione, il suo "scopo" non poteva che rinvenirsi nella tutela di beni giuridici violati. Statalizzazione del diritto di punire, creazione giuridica delle singole figure di reato, giusta retribuzione determinata dalla 'scossa' subita dall'ordinamento: questi i fondamenti del diritto penale".

(27) Cfr. C. Carini, *Giacomo Matteotti*, op. cit., p. 37, in riferimento a G. Matteotti, *La recidiva. Saggio di revisione critica con dati statistici*, Torino, 1910, p. 292.

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(28). Come ha evidenziato l'analisi di Carini, Matteotti media tra i positivisti, che "riducevano il diritto a problema sociale" e i classici, come Manzini e Lucchini, che difendevano, "in nome della teoria 'abolizionista', la concezione del diritto penale come strumento punitivo di un'infrazione giuridica, al di là delle cause determinatrici del delitto" (29). Se è vero, come osservato da Vassalli, che Matteotti non può essere considerato *tout court* un positivista (30), nondimeno è evidente come l'elaborazione penalistica sia decisamente improntata al metodo sperimentale e all'abitudine a tener conto dei risultati delle scienze antropologiche e sociali (31). Sarebbe, peraltro, riduttivo limitare al piano metodologico l'influenza della scuola positiva: su un tema, centrale nell'economia dell'opera monografica, come quello della pena indeterminata quale rimedio avverso i cd. '*delinquenti nati*' , Matteotti rivela, infatti, una particolare sensibilità alle esigenze di difesa sociale e alle tematiche di marca prettamente positivistica. Ciò precisato, è indubbio che il processo di involuzione delle teorie della cd. nuova scuola verso posizioni politiche reazionarie, rafforzò nell'allievo di Stoppato l'idea antipositivistica e volontaristica, secondo cui "il delitto non può essere imputato alla società, ma alla volontà del soggetto responsabile" (32). La centralità del momento etico nella scienza giuridico-politica è il *leit-motiv* che attraversa l'elaborazione penalistica matteottiana: il substrato di valori e principi cui si ispira la produzione giuridica è, in questo senso, largamente debitore della cd. *scuola classica*, filtrata attraverso l'insegnamento dei due maestri, Stoppato e Lucchini. Se dell'orientamento clerico-moderato del primo, fu ereditato il convincimento del contenuto essenzialmente *morale* del magistero punitivo (33), si deve alla matrice liberale del secondo la sostituzione del concetto naturalistico di *evoluzione* con quello etico-giuridico di *trasformazione* (rispondente all'autonomia del singolo, alla capacità e volontà di agire) (34). I capisaldi "classici" dell'indagine penalistica, i valori sottesi alla visione del sistema penale, rispecchiano la sensibilità garantistica di Matteotti per la difesa delle libertà del cittadino dalle

(28) G. MATTEOTTI, *La recidiva*, op. cit., p. 292.
(29) C. CARINI, *Giacomo Matteotti*, op. cit., p. 9.
(30) Cfr. G. VASSALLI, *Presentazione*, op. cit., p. 24.
(31) Cfr. C. CARINI, *Giacomo Matteotti*, op. cit., p. 9.
(32) C. CARINI, *Giacomo Matteotti*, op. cit., p. 9.
(33) Decisiva è l'idea che le influenze sociali condizionano, ma non sono la *causa* della moralità e del delitto; nell'affermazione matteottiana che "nel delinquente io scorgo e considero l'uomo che pensa che vuole e che opera"; è evidente l'influsso dell'impostazione seguita da Stoppato nello scritto *La scuola giuridica italiana e il progresso del diritto penale*, pubblicato nel 1908; come rilevato da Gobetti, "benché già socialista militante, seguiva con predilezione la scuola dell'on. Stoppato, uno degli uomini rappresentativi del clericalismo moderato" (GOBETTI, *Per Matteotti*, op. cit., p. 15 e s.).
(34) C. CARINI, *Giacomo Matteotti*, op. cit., p. 21.

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ingerenze del diritto penale (35). Avverso le tendenze positivistiche a punire non già il fatto criminoso, ma una mera tendenza subbiettiva, contro il tentativo di anteporre i diritti della società a quelli fondamentali dell'individuo (36) (e di "*formare in opposizione al Codice penale,* (…) *nientemeno che un Codice universale, dappoiché tutte le norme, che regolano il vivere sociale, possono avere, e hanno in realtà, un più o meno diretto rapporto con la criminalità*") (37), il diritto penale assurge al ruolo di ultimo 'baluardo' delle libertà individuali. In tal modo il socialismo giuridico si salda con le concezioni della scuola classica, sia sul piano etico-politico (sotto il profilo del primato del volontarismo etico), sia su quello giuridico-politico (38): dalla concezione della neutralità liberale del diritto, discendono il primato della certezza della pena (sottratta ad influenze amministrative), l'avversità verso gli istituti del sospetto, della vigilanza speciale, dell'ammonizione, del domicilio coatto (39). Ricondotto alla sfera della libertà morale e della volontà (che "*non è determinata da motivi, ma li sceglie*"), avverso la tendenza positivista ricondurre il fattore criminale esclusivamente a quello antropologico, economico e sociale (40), l'ordinamento penale diviene, come rilevato da Sbriccoli, "il terreno naturale e privilegiato sul quale far progredire il livello del paese, l'eguaglianza tra i cittadini, le condizioni generali di esistenza in termini — soprattutto — di libertà dei singoli e di spazi di organizzazione dei lavoratori e della lotta politica diretta al mutamento delle strutture sociali" (41). L'originalità del pensiero giuridico matteottiano, che valorizza in chiave progressista i fondamentali principi-valori fissati dalla scuola liberale (42), è l'espressione, incompiuta ed atipica, di

(35) I caratteri generali dell'impostazione penalistica di Matteotti sono individuati da Carini nel reato come punto di partenza dell'imputabilità, nel rifiuto di classificazione di delinquenti se non avuto riguardo all'ordinamento della pena detentiva, nella distinzione tra recidivi e primari, nella critica degli istituti dell'ammonizione, del domicilio coatto e della sorveglianza, nella rieducazione morale del condannato come forma di prevenzione sociale, obbiettivo già raggiungibile tramite l'effetto intimidativo della pena (v. C. CARINI, *Giacomo Matteotti*, op. cit., p. 37).

(36) G. MATTEOTTI, *La recidiva*, op. cit., p. 428.

(37) G. MATTEOTTI, *La recidiva*, op. cit., p. 297; nelle pagine successive si osserva che "*il criminalista diventerebbe quindi l'arbitro e il signore assoluto; col pericolo e anzi col sicuro danno conseguente di vederci presentare, a imitazione di Ferri, delle nuove abborracciature di programmi radicaloidi di governo, nei quali si risolve, con la più invidiabile sicumera e nel nome abusato della scienza del delitto, ogni più ardua questione travagliante la società moderna, dal liberismo doganale* (...) *a quello matrimoniale*!" (G. MATTEOTTI, *La recidiva*, op. cit., 347).

(38) C. CARINI, *Giacomo Matteotti*, op. cit., p. 37 e ss..

(39) C. CARINI, *Giacomo Matteotti*, op. cit., p. 46.

(40) C. CARINI, *Giacomo Matteotti*, op. cit., p. 46.

(41) M. SBRICCOLI, *Il diritto penale sociale*, op. cit., p. 632.

(42) Come osservato da Sbriccoli, la tendenza liberale realistica si raccoglieva intorno ad alcuni principi fondamentali:"principi di tipo dottrinario, prima ancora che di ordine tecnico o dogmatico, che riguardavano la funzione del diritto penale, i limiti

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un modello di "*giusnaturalismo*" riformista, di elevato significato dogmatico, che si inserisce a pieno titolo nel graduale processo di civilizzazione dell'ordinamento giuridico destinato ad attualizzarsi nella carta costituzionale.

3. *La causalità del reato tra "occasioni esterne" e "fattore personale permanente": l'indagine monografica sulla recidiva.*

Allievo e collaboratore di Alessandro Stoppato (insigne professore di diritto e procedura penale all'Università di Bologna ed autorevole avvocato), Matteotti si dedicò con passione ed impegno agli studi di diritto e procedura penale e di sociologia criminale, facendo tesoro dell'impostazione '*classica*' e liberale seguita dai propri maestri (Stoppato e Lucchini) nello studio del reato. La produzione giuridica si articola in due fasi, contrassegnate da materie ed oggetti di indagine eterogenei, pur se collegati dalla continuità dei caratteri e dei valori qualificanti, riassumibili rispettivamente nel primato della libertà morale e della legalità. Il periodo che va dalla elaborazione e discussione della tesi di laurea (1907) alla pubblicazione del saggio sul cd. progetto Luzzatti per la riforma degli artt. 81-83 c.p. (1911), risente della influenza del metodo positivistico ed è dominato dall'approfondimento dell'istituto della recidiva e del diritto penitenziario, culminato nella nota monografia del 1910. Il secondo arco temporale — il biennio che va dal 1917 al 1919 — registra il tendenziale distacco dalle tematiche positivistiche e vede Matteotti impegnato principalmente sul versante processualpenalistico, nel tentativo, rimasto incompiuto, di realizzare uno studio monografico sulla Corte di Cassazione (*Cassazione. Studio di diritto processuale penale*) ([43]). Nel complesso, l'opera giuridica riflette la versatilità e multidisciplinarietà dell'approccio alle problematiche, affrontate "a tutto tondo", secondo un'illuminante prospettiva "integrata" del piano sostanziale e di quello processuale, destinata ben

dell'incriminazione, la responsabilità del reo, la preminenza del valore della libertà individuale tutelata soprattutto nelle sue sfere espressive (pensiero, parola, scritti), le garanzie processuali, la chiarezza e la tassatività degli enunciati normativi raccolti in un *corpus* organico, le diverse funzioni della pena, il principio di adequazione e quelli di inesorabilità e certezza. Poi, alcuni fondamentali principi-valori quali potevano essere il principio di legalità e la non retroattività delle norme penali, il divieto di procedere per analogia o la presunzione di innocenza. È la tendenza liberale che raggruppa gli uomini che, sotto la guida di Zanardelli, riusciranno a fare effettivamente il codice. Francesco Carrara è ancora il loro nume tutelare, Luigi Lucchini, con la sua "*Rivista*" e il suo carattere combattivo ne è l'uomo di punta" (M. SBRICCOLI, *La penalistica civile. Teorie e ideologie nel diritto penale nell'Italia unita*, in *Stato e cultura giuridica in Italia dall'unità alla Repubblica*, Bari, 1990, p. 188 e s.).

([43]) Sul punto, v. S. CARETTI, *Introduzione,* in *Giacomo Matteotti, Scritti giuridici*, op. cit., p. 20, nt. 57.

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presto a venir meno per effetto della progressiva ed irreversibile separazione accademica dei due insegnamenti.

L'opera più nota e significativa della produzione penalistica di Giacomo Matteotti è, senza dubbio, rappresentata dalla monografia su "*La recidiva. Saggio di revisione critica con dati statistici*", dedicata al "fratello e amico" Matteo, prematuramente scomparso, e pubblicata nel 1910, per i tipi dell'editore Bocca di Torino. Rielaborazione e approfondimento dei contenuti della tesi di laurea (44), lo studio monografico riflette uno studioso di scienze criminali di sorprendente sensibilità e vivacità intellettuale, particolarmente attento alle implicazioni interdisciplinari dell'indagine: l'opera monografica racchiude e disvela le molteplici componenti culturali sottese al pensiero giuridico dell'autore, in cui le "*nuove scienze*", che hanno accompagnato lo sviluppo del diritto penale a partire dalla fine del secolo XIX (come la criminologia, la statistica, le discipline carcerarie, la 'nuova' medicina legale, l'antropologia e la sociologia criminale) (45), si intrecciano armonicamente, denotando la ricchezza e la fecondità del metodo. È, soprattutto, sul piano conoscitivo del fenomeno che si apprezza l'influenza dello strumentario ereditato dalla scuola di Ferri. I temi della recidiva e del trattamento da riservare ai cd. *delinquenti incorreggibili* erano stati, infatti, al centro dell'attenzione della nuova scuola positiva, tanto da rappresentare veri e propri *laboratori* per la rifondazione del sistema penale e penitenziario. Lo studio del fenomeno della ricaduta nel reato aveva costituito il *locus* privilegiato dell'applicazione del metodo positivistico, per quel che concerneva la messa a fuoco delle cause criminogene (ovvero dei *fattori* — antropologici, fisici e sociali — determinanti il reato), la classificazione categoriale dei delinquenti e, infine, l'individuazione dei possibili rimedi penali, con particolare riferimento ai cd. "*delinquenti nati*" (eliminazione, soppressione, ecc.) (46). Come è stato lucidamente osservato, la recidiva — "ossessione creatrice" del secolo (47) — "era uno dei terreni sui quali, oggettivamente, i positivisti stavano dando un contributo di 'invenzione del problema' di tutto

(44) Come è noto, Giacomo Matteotti si era laureato giovanissimo in giurisprudenza nell'ateneo felsineo il 7 novembre 1907, discutendo con il maestro Stoppato una tesi in diritto penale su "*I principi generali della recidiva*" (ora in Giacomo MATTEOTTI, *Scritti giuridici*, op. cit., I, p. 37 e ss.), la cui struttura anticipa quella adottata nella successiva indagine monografica.

(45) Cfr. M. SBRICCOLI, *La penalistica civile*, op. cit., p. 185.

(46) E. FERRI, *La scuola positiva di diritto criminale*, Siena, 1883, p. 40 e s.; sul punto, v. M. SBRICCOLI, *La penalistica civile*, op. cit., p. 202.

(47) Cfr. B. SCHNAPPER, *La récidive, une obsession créatrice au XIX siècle*, in *Le récidivisme, Atti del XXI° Congresso della Association Française de Criminologie* (1982), Poitiers, 1986, p. 25 e ss. p. 208; sull'evoluzione della disciplina legislativa, v. L. RICCIO, v. *Recidiva (abitualità, professionalità, tendenza a delinquere)*, in *Nuovo Digesto italiano*, XI, Torino, 1939, p. 7 e ss..

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riguardo" (48); un tema dal quale si erano andati, dunque, diffondendo i germi di quella "*bufera di empirismo*" (49) che aveva scosso profondamente le certezze e gli equilibri della dottrina tradizionale. Come riconosciuto nel 1886 da un acuto critico del movimento positivistico, quale fu Gabelli, se avviata "a un intento più determinato e più utile", la nuova scuola sarebbe diventata "principalmente uno studio della recidiva, studio del quale ha le condizioni e i caratteri e di cui non è necessario di provare l'opportunità in un paese, dove i recidivi giungono a più della metà dei malfattori" (50). Nell'approfondimento del tema della ricaduta nel reato si intersecavano, dunque, prospettive sociologiche e politico-criminali, in un *continuum* di chiara matrice positivistica (51). Su questo *humus* dogmatico si radica l'indagine di Giacomo Matteotti: pur utilizzando le categorie e i dati valorizzati dalla nuova scuola, egli muove dal tendenziale rifiuto del positivismo obbiettivistico e deterministico. Nel convincimento che oggetto di analisi debbano essere, in primo luogo, le cause produttrici "*ultime*" del delitto, "*che hanno sede nell'individuo*", viene, infatti, instaurata una complessa relazione dialettica tra l'istituto della recidiva e il piano della sanzione penale. Nella visione "idealistica" dell'autore, la ricaduta nel reato, quale "*indizio di maggior temibilità*", assume un ruolo nevralgico in rapporto alle finalità portanti del sistema sanzionatorio, rispecchiando il cd. *fattore personale permanente*. Nell'ottica del penalista, tale concetto, fondante, è "*la volontà, la tendenza delittuosa, permanente dell'individuo, nel momento del delitto, comunque essa sia stata acquistata, per eredità o per azione posteriore dell'ambiente, e in contrapposto alla semplice occasione, ultima esterna determinatrice, e passeggera*" (52). Se le altre scienze sociali si rivolgono "*allo studio complesso dei fattori umani, ricercando con i diversi mezzi, compreso il diritto penale, la felicità dei consociati, il diritto penale si rivolge al delinquente, riuscendo a una azione preventiva generale, nel tempo stesso in cui esercita la particolare specifica sua azione verso il colpevole, esplorandone l'intima permanente*

(48) M. Sbriccoli, *La penalistica civile*, op. cit., p. 208; sul vivace confronto tra Lucchini e Ferri in materia di recidive, v. M. da Passano, *Echi parlamentari di una polemica scientifica (e accademica)*, in *Materiali per una storia della cultura giuridica*, XXII, 1/2002, p. 59 e ss..

(49) M. Sbriccoli, *La penalistica civile*, op. cit., 203.

(50) A. Gabelli, *Sulla 'Scuola positiva' del diritto penale in Italia*, in *Rivista penale*, 23, XII, 1886, 526 e s..

(51) Cfr. V. Manzini, *La recidiva nella sociologia, nella legislazione e nella scienza del diritto penale*, Firenze, 1899, p. 531 e ss..

(52) G. Matteotti, *La recidiva*, op. cit., 105; come osservato da Carini, Matteotti, sotto l'influenza del concetto di libertà morale sviluppato da Labriola, marca la natura morale del fattore personale permanente, inteso come difetto di capacità morale, che dovrebbe essere ristabilita nell'individuo - insieme con l'equilibrio dell'ordine giuridico dalla pena (C. Carini, *Giacomo Matteotti*, op. cit., p. 41).

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criminalità, e adeguando ad essa la pena" (53). La prospettiva positivistica viene, per così dire, arricchita ed integrata dall'idea — centrale nello studio monografico — che il delitto nasca da una disposizione intima, da una precisa scelta criminosa dell'individuo, in conformità all'idea — sostenuta in origine da Ellero — della "relazione causale tra movente interiore del delitto e stimolo esteriore scatenante, per cui l'azione criminosa mentre coinvolge economia e società e stato, attiene in particolar modo alla psicologia e alla morale dell'individuo" (54).

Nell'*Introduzione*, incentrata sulla definizione dell'istituto della recidiva, si sottolinea la tendenza — pressoché costante nel tempo — della coscienza collettiva a sostenere la necessità di "*provvedimenti eccezionali contro i recidivi*" e si osserva come la progressiva restrizione del campo di applicazione della pena capitale e la progressiva eliminazione delle pene corporali, abbiano, di fatto, dischiuso alla "*potenzialità di ricadere*", tipica dell'uomo colpevole, nuovi spazi d'azione. Se è indubbio che "*la recidiva dilaga invadente, e assorbe quasi in sè tutto il problema penale*", dando vita ad "*un gruppo sociale nemico congiurante ai danni degli altri*", l'autore intende, dunque, "*conoscere*" — con l'aiuto della statistica — le forze, i fattori e i mezzi di tale "*nemico*", per poi, sulla base di tali dati, risalire all'interpretazione della natura e del significato giuridico del fenomeno e, infine, individuare i mezzi più idonei a prevenirlo e a contrastarlo (55), cosicché l'indagine viene divisa in tre parti, aventi rispettivamente per oggetto i *dati*, le *teorie*, e i *rimedi*.

Matteotti affronta, in primo luogo, la dimensione "*statico-quantitativa*": la comparazione dei dati emergenti dalle statistiche europee concerne sia il profilo dei soggetti, sia quello dei reati, con l'accurata e puntuale rappresentazione sinottica delle specifiche tipologie di delitti che caratterizzano le manifestazioni della recidiva (56). Sulla base dei risultati statistici viene, quindi, impostato l'esame "*eziologico-qualitativo*", relativo ai fattori e alle condizioni antecedenti e concomitanti alla recidiva. L'obbiettivo è quello di coglierne l'essenza e la natura mediante la ricerca e l'individuazione delle cause antropologico-individuali e dei fattori sociali. Tra i singoli "*gruppi causali*", l'autore pone, anzitutto, in evidenza il "*fattore*" di recidiva esercitato dallo stesso sistema penale (57). Le distorsioni derivanti dalla introduzione di molteplici cause di impunità (come, ad es., i provvedimenti di natura clemenziale) (58) e dall'eccessivo livellamento verso il basso della pena

(53) G. Matteotti, *La recidiva*, op. cit., p. 292.

(54) C. Carini, *Giacomo Matteotti, op. cit*., 33 in riferimento a P. Ellero, *Della prevenzione dei crimini,* in *Opuscoli criminali*, Bologna, 1874, p. 41 e ss..

(55) G. Matteotti, *La recidiva*, op. cit., p. 7 e ss..

(56) Secondo una tendenza comune ai trattatisti dell'epoca: cfr. I. Gregori, *Recidiva e abitualità nella dottrina e nella legge*, Roma, 1923, p. 1 e ss..

(57) Cfr. M. Sbriccoli, *La penalistica civile*, op. cit., p. 208, nt. 112.

(58) Nella stessa direzione, v. anche la successiva critica mossa da Matteotti al

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comminata e/o irrogata (59), si cumulano all'inefficacia del sistema carcerario (incapace di intimidire i recidivi, ma al contempo incentivante il cd. contagio criminale) (60). Respinta l'idea — allora diffusa, nel convincimento del troppo blando regime penitenziario — del fattore carcerario quale causa primaria (o, addirittura, unica) della ricaduta nel reato, Matteotti estende la propria analisi critica al trattamento riservato ai soggetti che hanno terminato di scontare la pena detentiva, sottolineando i controproducenti esiti applicativi di taluni istituti (quali, ad es., la sorveglianza speciale, l'ammonizione e il domicilio coatto), che — introdotti in funzione preventiva della recidiva — finiscono, poi, in realtà, per incentivare il ritorno all'illegalità del soggetto liberato dal carcere. Non integralmente riducibile, sul piano eziologico, ai difetti del sistema penale e penitenziario, la recidiva viene altresì, analizzata, sulla base di un rigoroso e solido metodo statistico, in rapporto a due ordini di fattori: quelli *economico-sociali* (comprensivi dei dati ambientali e "*fisico-sociali*", come, ad es., il clima, la razza e la religione) e quelli *antropologico-individuali* (ossia l'aspetto "*psico-fisico*" derivante da cause acquisite o ereditarie, compresi i profili concernenti la formazione, l'educazione e lo stato civile dei singoli individui). L'esame integrato di tali fattori è condotto sulla base dell'equilibrato concetto di "*libertà limitata*" dell'individuo, tendente a conciliare gli estremi del determinismo "lombrosiano" con il principio della assoluta libertà morale. Dissociandosi da coloro i quali considerano in via esclusiva il fattore antropologico o, in alternativa, quello ambientale e sociale, Matteotti perviene all'affermazione della "*multifattorialità*" della ricaduta nel reato, rispecchiata dalla costante tensione dialettica tra la predominante "*causa personale-individuale*", rappresentata dalla natura "*permanente-intima*" del soggetto e la concorrente e condizionante matrice sociale, che funge da "*fattore occasionale-esterno*". È proprio avverso la "*causa del delitto permanente nell'individuo*" (radicata sul piano organico, psichico o ambientale-familiare) che si orienta lo scopo primario della pena.

La seconda parte dell'indagine monografica si incentra sul significato sostanziale della recidiva in rapporto alla funzione punitiva dello Stato (61). Alla luce della disciplina prevista dal codice Zanardelli

provvedimento di amnistia introdotto con decreto 22 dicembre 1922, n. 1641, contenuta ne "*Dopo un anno di dominazione fascista*", in *Critica sociale*, 1924, 5, in cui si analizzano con lucidità i riflessi esplosivi sul conflitto politico delle arbitrarie scelte adottate dal legislatore.

(59) Cfr. G. VASSALLI, *Presentazione*, op. cit., p. 24.

(60) "*Che* — osserva Matteotti — *invero le prigioni attuali, anziché impedire la recidiva riescano a fomite di nuovi delitti e a peggiorare le tendenze criminose dei reclusi è cosa fuori discussione*" (G. MATTEOTTI, *La recidiva*, op. cit., p. 119).

(61) Come rilevato da Vassalli, "la recidiva, tema che è centrale nella politica criminale e che dette luogo a famose polemiche in Italia negli ultimi anni dell'Ottocento,

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(62), l'analisi delle diverse teorie formulate in ordine al fondamento dell'istituto rispecchia la prudente adesione alla "teoria classica" — di derivazione carrariana — dell'insufficienza della prima pena, in conseguenza dell'insensibilità dimostrata in concreto dal recidivo (cd. giustificazione personale dell'aumento di pena) (63). In conformità di tale orientamento, si ritiene che la "*malvagità*" del recidivo — pur non potendo farsi rientrare nel "*calcolo assoluto*" della *penalità*, nè potendo incidere sul piano del grado di imputazione, dell'obbiettività e quantità del reato (dipendenti, come tali, dalle circostanze del fatto) — necessiti di un aggravamento della sanzione, affinché la medesima risulti effettivamente '*parificata*' e sufficiente a compensare la abituale maggior "*pravità*" dell'agente (64). Matteotti considera, infatti, riduttiva la con-

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ha sempre grandemente interessato i giuristi, i quali si sono anzitutto interrogati sulla legittimità di sancire — come da gran tempo fanno molte legislazioni — nei confronti del recidivo un aumento della pena che gli toccherebbe per il nuovo reato, oltre che altre conseguenze sfavorevoli, quali l'esclusione da determinati benefici penali (sospensione condizionale della pena, liberazione condizionale, amnistie, indulti, prescrizione della pena, eccetera)" (G. VASSALLI, *Presentazione*, op. cit., p. 26).

(62) Si tratta di materia assai controversa e delicata: come osservato da Vassalli, "basti pensare che nella sola legislazione dello Stato italiano unitario si seguirono in ordine temporale tre diversi sistemi". Mentre il codice del 1889 prevedeva, agli artt. 81-83, l'obbligatorietà dell'aumento o aggravamento della pena in caso di recidiva "specifica" e l'impossibilità del ricorso da parte del giudice al minimo della pena in presenza di quella "generica", il codice del 1930, ispirato dalla necessità di rimediare alle insufficienze e debolezze palesate dal regime previgente nel fronteggiare le esigenze di difesa sociale (e in particolare nel contrastare la criminalità dei delinquenti abituali), generalizzò, in linea di principio, la soluzione dell'aumento della pena, introducendo altresì le ipotesi della recidiva aggravata e reiterata. Con la riforma operata dal d.l. 11 aprile 1974, n. 99, conv. in l. 7 giugno 1974, n. 220, venne, infine, generalizzata la facoltatività dell'aumento di pena nonché mitigato il livello degli incrementi sanzionatori. Come osservato ancora da Vassalli, "sono rimaste — è vero — in vigore le figure del delinquente abituale e del delinquente professionale introdotte dal codice Rocco nel 1930, con le misure di sicurezza affiancate agli aumenti di pena per la recidiva, ma la Corte costituzionale da un lato e la prassi giudiziaria dall'altro si sono incaricate nel corso del tempo di ridurre enormemente la pratica portata di questi controversi istituti; così come del resto è diminuita l'estensione della penalizzazione della recidiva una volta che quest'ultima è diventata facoltativa" (G. VASSALLI, *Presentazione*, op. cit., p. 26 e s.).

(63) Cfr. F. CARRARA, *Programma del corso di diritto criminale, Parte generale*, V ediz., Lucca, 1877, §§ 719 e ss.; Id., *Stato della dottrina sulla recidiva*, in *Opuscoli*, II, Prato, 1885, p. 226 e ss..

(64) In questa prospettiva vengono, pertanto, criticate sia le posizioni sostenute dalla dottrina classica "abolizionista" (che sosteneva l'identità del reato commesso dal recidivo e dal reo primario), sia la tesi avanzata dagli esponenti delle teorie neo-classiche, fautori della tesi dell'attenuata responsabilità (o, addirittura, dell'irresponsabilità) del recidivo, sulla base della negazione della libertà del volere: cfr. G. MATTEOTTI, *La recidiva*, op. cit., p. 250 e ss.; sul punto, v. R. DELL'ANDRO, *La recidiva nella teoria della norma penale*, Palermo, 1950, 127; sul fondamento dell'istituto, v. F. DASSANO, *Recidiva e potere discrezionale del giudice*, Torino, 2000, 14 e ss.; E. M. AMBROSETTI, *Recidiva e recidivismo*, Padova, 1997, p. 239 e ss.; P. PITTARO, v."*Recidiva", Digesto delle discipline penalistiche*, XI, Torino, 1996, p. 366 ss..

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siderazione riservata alla recidiva dalla scuola positiva, in termini di mero sintomo del *delinquente d'abitudine* e di pericolosità.

È proprio dalla necessità — sostenuta dai positivisti — di privilegiare le esigenze della difesa sociale (utile pratico-sociale *versus* giustizia astratta e assoluta), che l'autore trae spunto per fondare la *pars costruens* della propria indagine. Il profilo ritenuto decisivo è rappresentato dalla *temibilità* del soggetto, ovvero la "*causa individuale*" espressa nel concetto di "*fattore personale permanente*" e considerata dall'autore quale ragione di esistere dello stesso *criterio penale* (65). Se l'agente è la causa del delitto, il diritto penale si deve volgere a considerare "*il singolo individuo, agente ultimo e immediato del delitto, o più precisamente a quella parte di causalità che gli pertiene, e che, per essere in lui permanentemente intrinseca, è anche capace di nuova violazione dell'ordine giuridico*", in presenza di condizioni esterne normali rispetto alla sua condizione o alla vita sociale (66). Da qui la necessità di scindere i reati indotti da *fattori esterni*, eccezionali e anormali, da quelli, invece, che rispecchiano un'intrinseca tendenza "*perversa*" e malvagia: il delitto — secondo la suggestiva visione dell'autore — è prodotto dall'incontro della linea dello spazio, rappresentata delle "*occasioni e circostanze esterne*", con quella del tempo, attraverso il quale l'uomo si è formato e trasformato. Considerati i limiti insiti nelle scienze antropologiche, l'unica possibilità di apprezzare e valutare la gravità del "*fattore personale permanente*" (ossia la *tendenza antigiuridica* del carattere individuale, che deve essere arginata e fronteggiata dal diritto penale), è quella di "*sottrarre*" dal risultato criminoso il "*contributo dell'occasione, del motivo esterno anormale*" (67). Con il ricorso al concetto di "*temibilità*", quale fattore "*permanente e ultimo*" del carattere individuale, Matteotti salda, così, determinismo e liberismo morale, senza rinunciare al ruolo centrale dell'elemento obbiettivo, giacché è sempre dalla gravità dell'offesa, dalla violazione giuridica, che deve prendere le mosse il giudizio sulla pericolosità del reo, per passare, quindi, a distinguere "*le cause esterne occasionali dal fattore personale permanente, dalla temibilità*", alla quale deve essere commisurata la pena da applicare (68). Si tratta, allora, di ricercare un criterio di riconoscimento e di valutazione del predetto "*fattore permanente*", che non soffra della incertezza e genericità del (pur indicativo) riferimento alla vita anteatta (cd. "*sintomo causale generico*"). L'indice più affidabile della permanenza della tendenza specificamente "*antigiuridica*", viene, per l'appunto, individuato nello *stato di recidiva*: è proprio da tale dato che si può inferire quel modo costante del carattere interno (*temibilità*), che

(65) Sul carattere di 'austerità' del concetto di "*fattore personale permanente*" nell'elaborazione penalistica di Matteotti v. A. G. CASANOVA, *Matteotti*, op. cit., p. 40.

(66) G. MATTEOTTI, *La recidiva*, op. cit., p. 292.

(67) G. MATTEOTTI, *La recidiva*, op. cit., p. 293.

(68) G. MATTEOTTI, *La recidiva*, op. cit., p. 298.

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comprova la *causalità individuale* del delitto commesso e l'ininfluenza dei fattori esterni, imponendo una più energica reazione penale. Se, sul piano delle classificazioni, alla *summa divisio* tra "*soggetti irrecuperabili*" e "*soggetti correggibili*", si aggiunge quella tra delinquenti *"primari*" e delinquenti "*recidivi*", un'ulteriore funzione assegnata alla ricaduta nel reato è quella di indicare statisticamente i recidivi c.d."*incorreggibili o induriti*", "*per i quali la pena non può avere altro scopo che quello di metterli nell'impossibilità di nuocere*": il fallimento dei tentativi di emenda impone razionalmente il passaggio all'isolamento perpetuo (69). L'idea, avanzata in nome della difesa sociale, di un trattamento *ad hoc* dei cd. "*incorreggibili*" (che, solo in astratto e idealmente, contempla la possibilità di una sospensione dell'isolamento e di reinserimento sociale), determina un'inquietante e meccanicistica prospettiva di separazione dell'elemento *ribelle* dal corpo sociale, indotta dal cd. *fattore personale permanente*, espressione della '*certezza matematica*' di nuovi misfatti.

Il significato funzionale assegnato alla recidiva si salda con l'inquadramento della pena in termini di emenda e di correzione, di *"intimidazione particolare*": se il fine della sanzione penale deve essere quello di ricondurre alla normalità giuridica chi ha dimostrato nel fatto uno speciale *fattore permanente*, essa non potrà mai essere inflitta "*per semplice scopo di intimidazione altrui*" (70). La varietà della *"posizione antigiuridica*" del fattore permanente impone un giudizio penale individualizzato. È qui che giungiamo al "cuore" della ricostruzione di Matteotti, che distingue le ipotesi di ricaduta nel reato a seconda che siano indotte da fattori *specifici* o, invece, *generici*. Da un lato, si pone il — limitato — numero di casi in cui si conosce la *prevalente causa specifica* che ha spinto il soggetto al crimine: il progressivo riconoscimento di "*cause speciali*" di delinquenza (quali, ad es., l'epilessia, l'alcoolismo, la nevrastenia o altre forme psicopatiche) consente l'adozione di pene "*specializzate*", dotate di caratteri e istituti finalizzati a contrastare la causa *particolare* che rende l'individuo contrario al diritto. Dall'altro lato, si situano, invece, i casi — prevalenti — in cui, per l'"*improbabile conoscenza dell'essenza ultima della morale umana*", non rimane che prendere atto di un'individualità "*avversa alle norme del vivere civile*"; si tratta di "*cause generiche complessive, ancora ignote nella loro essenza*", che si rivelano più forti e persistenti nei recidivi e che possono, finora, essere limitate o contrastate con *"quel trattamento generico, quella disciplina rigorosa di lavoro nella quale di solito oggi si*

(69) Come osservato da Vassalli, "Matteotti insiste sulla "temibilità" del delinquente recidivo, avvicinandosi in ciò ai positivisti, ed anzi a quell'ala estrema che vede nei delinquenti abituali, o almeno in alcuni di essi, dei soggetti assolutamente incorreggibili" (G. Vassalli, *Presentazione*, op. cit., p. 26).

(70) G. Matteotti, *La recidiva*, op. cit., p. 316.

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identifica la pena" (71). L'"*individualizzazione penale*" ha, dunque — secondo l'autore — la finalità di contrapporre ad ogni causa personale di delinquenza — sia essa *generica* o *specifica* — una pena efficace e adeguata, nella sua durata e intensità, allo speciale "*fattore permanente*" tendente al delitto e alle peculiarità e al grado di antisocialità dimostrati dall'individuo.

Delineati il valore e il significato attribuiti all'istituto in esame, Matteotti passa all'esame delle principali questioni discusse in dottrina. Che l'indagine ambisca ad assumere contorni sistematici è confermato dalla ricerca di ulteriori "*spie*" dell'inclinazione delittuosa. Di particolare interesse si rivela, in questa direzione, il rapporto della recidiva con il concorso di reati (72). L'inserimento della recidiva nel *genus* della "*reiterazione*", accanto a professionalità e abitualità nel reato, è frutto della reazione critica alla tendenza dottrinale a tener aprioristicamente distinto il concorso di reati e di pene dal tema della ricaduta nel crimine: l'autore ritiene, infatti, ingiustificabile e contraddittoria "*l'opposizione di trattamento*" che caratterizza i due istituti, giacché nel primo caso "*si fa luogo a una riduzione sulla somma di pene legali, nel secondo ad aumento*" (73). Particolare attenzione viene, altresì, rivolta alla tradizionale alternativa tra *recidiva generica* (relativa a qualsiasi reato) e *recidiva specifica* (concernente reati omogenei). Riconosciuta in astratto come più fondata in chiave teleologica la prima tipologia, Matteotti valorizza, soprattutto, la seconda, in un senso nuovo e diverso, strettamente correlato al significato funzionale assegnato, in generale, alla recidiva. Rivelatrice di *un'"identità psicologica di impulso*", di un'"*identità di tendenza*", la recidiva specifica è, infatti, espressione

(71) G. MATTEOTTI, *La recidiva*, op. cit., p. 310 e ss..

(72) Sul punto, v. A. R. LATAGLIATA, *Contributo allo studio della recidiva*, Napoli, 1958, p. 48; G. MAZZA, v. *Recidiva*, in *Enciclopedia del diritto*, XXXIX, Milano, 1988, p. 72.

(73) G. MATTEOTTI, *La recidiva*, op. cit., p. 322. Se l'aggravamento di pena conseguente alla recidiva viene giustificato dai più con "*il maggior disprezzo dimostrato contro la legge*", con "*l'aumento della forza morale e soggettiva del reato, anche in colui che commette un reato di seguito all'altro, si dovrebbe ritenere lo stesso maggior disprezzo e una maggior inclinazione al delitto, e quindi sminuita, a maggior ragione, la fiducia dei cittadini nella sicurezza generale*" (G. MATTEOTTI, *La recidiva*, op. cit., p. 323). Pur non potendosi invocare una "*una parificazione*" tra i due istituti, si auspica la valorizzazione della *"maggior luce sul fattore personale e sulla insistenza della sua posizione antigiuridica*" assicurata dalla considerazione delle circostanze che accompagnano l'iterazione del reato, consentendo al giudice di irrogare pene anche molto prolungate (G. MATTEOTTI, *La recidiva*, op. cit., p. 324). Non trattandosi "*di due serie opposte*", bensì di "*due serie contigue, chiari indizi della maggior temibilità del delinquente*" (G. MATTEOTTI, *La recidiva*, op. cit., p. 324), la recidiva e iterazione fungono, di fatto, da strumenti di lettura del tasso di delinquenza dell'individuo. Una funzione nevralgica, che rende, dunque, pressoché, obbligata, l'opzione a favore della natura perpetua della recidiva, "*quale criterio sempre utile per giudicare della permanenza e correggibilità del carattere individuale*" (G. MATTEOTTI, *La recidiva*, op. cit., p. 329).

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della *"causalità criminosa risiedente nell'individuo"* ovvero di un vero e proprio *"movente individuale a delinquere"*, che conferma l'importanza attribuita ai "*motivi*" nella determinazione della pena. Se il reato deve riflettere il carattere *intimo* dell'individuo, il motivo — quale *individualità psichica* — determina il delitto "*in concorso con le occasioni immediate esterne"*. Sul piano della *"plurilaterale ricerca causale"*, l'impulso interno si contrappone ai fattori occasionali esterni, consentendo di misurare il profilo psichico individuale, ossia quel dato recondito, che la recidiva generica non consente di discernere (74). Due infatti, sono le serie causali tra le quali si pone il motivo: il "*me*" e il "*non me*", il già ricordato "*fattore personale permanente*" e le "*occasioni esterne"*. Se scopo della pena è riportare il soggetto in "*posizione giuridica*", contrastando la "*tendenza contraria al diritto*" e distruggendo "*i motivi delittuosi*" che sono nel reo, la previsione della recidiva specifica mira ad incidere — frontalmente ed in modo più agevole — sul *fattore personale permanente*.

La visione "psicologico-antropologica" del "*motore*" del reato si riflette, altresì, sul piano della ricerca dei mezzi di contrasto, oggetto della terza ed ultima parte dello studio monografico. Gli strumenti "*terapeutici*", da utilizzare per la tutela dell'*ordine giuridico*, riflettono la concezione di fondo secondo la quale la funzione generalpreventiva della pena (cd. "*codice preventivo*"), deve essere integrata della "*prevenzione, tutta particolare, che sorge dalla commissione delittuosa, e si rivolge immediatamente all'agente di questa, al fattore personale permanente*" (75). La necessità della prevenzione specifica sul delinquente (cd. *codice penale*), discende dal fatto che *"causa sufficiente dell'atto antigiuridico"*, del *"malefatto"*, non sono state le circostanze esteriori *anormali* (e, cioè, le condizioni ambientali e sociali), bensì il fattore personale permanente, l'anormalità e la tendenza contraria al diritto che risiedono nell'individuo. Donde la necessità di punire l'autore del reato "*per quanto precisamente è in lui la causa del malefatto*" (76). Obbiettivo delle norme penali e dell'esecuzione è, per l'appunto, la lotta alla recidiva, ossia alla causa del delitto che è nell'individuo, restringendone la libertà, "*per tutto quel tempo e fino a che non sia ridotto a posizione normale di fronte al diritto, con probabilità di non più ricadere*" (77). Respinte le connotazioni "assolute" assegnate alla pena dalla dottrina classica, Matteotti indica nella sequenza "*intimidazione-emenda-eliminazione*" il modulo gradualistico e ascendente degli scopi concreti della sanzione, rispondente a criteri di utilità sociale, nel quale l'"*eliminazione*" (da intendersi come "*isolamento del reo*" di durata perpetua o temporanea) è chiamata a svolgere un significativo e specifico ruolo di

(74) G. Matteotti, *La recidiva*, op. cit., p. 330 e ss..
(75) G. Matteotti, *La recidiva*, op. cit., p. 348.
(76) G. Matteotti, *La recidiva*, op. cit., p. 357.
(77) G. Matteotti, *La recidiva*, op. cit., p. 357.

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contrasto della ricaduta nel reato. In pratica, Matteotti propone un programma di riforma delle comuni pene detentive, articolato sulla distinzione tra delinquenti *primari, recidivi e incorreggibili*, che ruota intorno al concetto fondamentale della recidiva. Nell'ambito dei minori, il problema può essere affrontato e risolto con maggiori margini di successo, data la possibilità di combattere la recidiva *"radicalmente, nelle sue prime origini individuali"*, senza necessariamente ricorrere alla pena tradizionale: essendo nel minore più riconoscibile e vincibile il fattore permanente, ai fini della *riforma morale* appare sufficiente, in linea di principio, il ricorso al metodo pedagogico-educativo e all'indagine psico-antropologica. Tutt'altri contorni assume il problema per i maggiorenni. Per quel che concerne i delinquenti primari, nella maggioranza dei casi non temibili, non si ritiene necessario isolare e separare il reo dalla società. Per scongiurare la recidiva e garantire l'effetto intimidativo, si ritiene sufficiente il ricorso a pene "non detentive" (come la detenzione domiciliare, l'esilio, il confino, le sanzioni interdittive, le pene pecuniarie, la condanna condizionale), le quali mirano a conseguire il duplice obbiettivo di debellare la "*lieve*" anormalità insita nell'individuo e di evitare gli effetti — controproducenti, quali, ad es., il "*contatto corruttore*", il casellario e la disistima sociale — discendenti dalla detenzione "*corta*" (78). Oltre che per i pochi rei primari, il cui reato risulti collegato ad una "*permanente anormalità individuale*", tale da far probabilmente ricadere nel reato, la pena detentiva si rivela, altresì, necessaria per la maggior parte dei recidivi, la cui reale e superiore *temibilità* è dimostrata dall'inadeguatezza o insufficienza della sanzione irrogata a loro carico in precedenza. Nell'ambito delle sanzioni detentive, vengono enucleate, *in primis*, quelle aventi un contenuto conforme alla specifica causa individuale (alcoolismo, pazzia, ecc.), che ha determinato il delitto (ricovero in manicomi criminali, in *asili* di bevitori, degenerati, epilettici, nervose, in case di custodia; assegnazione a case di lavoro per oziosi e vagabondi, ecc.) (79). Nell'ottica positivistica qui adottata da Matteotti, le varie tipologie di "*pene detentive specifiche*" sono accomunate dall'applicazione per un tempo assolutamente indeterminato: se scopo della pena è quello di combattere la *causa* del delitto, che sia insita e permanente nell'individuo, il regime detentivo ordinario è diretto a fronteggiare il fenomeno della recidiva che non risulti collegato a cause specifiche, bensì ad una persistente

(78) G. MATTEOTTI, *La recidiva*, op. cit., p. 369 e ss., il quale percepisce la disfunzionalità delle pene detentive brevi.

(79) Al manicomio criminale — "*primo quanto a specifica ed esatta corrispondenza tra la natura dell'anormalità giuridica individuale e il trattamento applicatole, tra la genesi e la terapia del delitto*" (G. MATTEOTTI, *La recidiva*, op. cit., p. 390), si unisce, dunque, — per le cd. *anomalie minori* — la serie di misure, già sperimentate in altri ordinamenti occidentali e finalizzate a neutralizzare la anormale tendenza individuale, dipendente da specifici fattori di natura organica o psichica.

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tendenza intima, non conosciuta o conoscibile, che impone un trattamento parimenti generico, sul piano morale e disciplinare, qual'è quello del carcere (80). Se per i recidivi — cui non risultino adatte le cd. *pene detentive specifiche* — è necessario il rimedio del *generico trattamento morale* basato sul lavoro (ovvero una pena temporanea di rilevante durata), il profilo più delicato e problematico è quello concernente i cd. *incorreggibili o irriducibili*, per i quali non vi è margine né per l'intimidazione, nè per l'emenda. Per questa categoria di soggetti "*quello che della pena resta vitale è l'eliminazione*", ovvero l'isolamento dalla società fino a quando non si modifichi "*l'antigiuridicità*" del fattore permanente (81). Respinta l'eventualità del ricorso alla pena di morte o alla deportazione, Matteotti ritiene che il regime di isolamento debba essere attuato nella forma della pena perpetua "*in giusta corrispondenza con la perpetua permanenza del fattore personale antigiuridico*" (82). L'unica ammissione concerne la liberazione condizionale, quale riflesso della (sempre possibile) "*riforma*" del detenuto. Tale misura viene valorizzata in funzione antagonistica della recidiva (83): se, da un lato, la liberazione condizionale si rivela "*giusta*" (in quanto solo l'osservazione della personalità del detenuto in corso di esecuzione consente di apprezzare l'effettiva antigiuridicità del fattore personale permanente e di adeguare la qualità e quantità della pena al grado reale di predisposizione al crimine), dall'altro risulta "*utile*", nella misura in cui la prospettiva della libertà anticipata induce a tenere un comportamento osservante delle leggi, incentivando l'emenda e la *riforma* del delinquente. Nell'attesa,

(80) In proposito, Matteotti censura aspramente il rimedio della *segregazione cellulare*, che, a ben vedere, finisce per risultare *"dannosa preparatrice di nuove recidive"* (G. Matteotti, *La recidiva*, op. cit., p. 400): a giudizio dell'autore, l'unico, reale, mezzo di emenda non può che essere individuato nel lavoro nel penitenziario o nelle colonie agricole, giudicato essenziale nella disciplina carceraria. Deve, in effetti, essere sottolineata la particolare attenzione riservata da Matteotti, anche in chiave comparatistica, ai temi del lavoro in carcere e delle colonie di relegati. Sia nello studio monografico, sia negli scritti minori, traspare la particolare sensibilità dell'autore per le problematiche sociali e le implicazioni economiche del lavoro prestato in regime penitenziario, sia esso industriale o agricolo (in questa direzione, di notevole interesse storico e sociologico, si rivelano, ad es., le osservazioni sull'organizzazione delle colonie agricole sarde di Castiadas, Asinara e Mammone).

(81) G. Matteotti, *La recidiva*, op. cit., p. 410.

(82) G. Matteotti, *La recidiva*, op. cit., p. 415.

(83) Come rilevato da Matteotti, la liberazione condizionale, "lontana dall'essere una misura eccezionale e graziosa, richiede anzi per natura sua propria di essere considerata come un mezzo normale del diritto penale, e fornita di tutte le garanzie che alla nostra disciplina convengono, e non più oltre abbandonata indifferentemente a questo o a quel ministro o autorità lontana e incompetente" n. 629; tale "visione illuminata" sembra, in effetti, precorrere — come rilevato da Vassalli — "le future riforme repubblicane degli anni Sessanta, Settanta e Ottanta, che hanno profondamente inciso sull'estensione di tale istituto e sugli organi competenti alla concessione" (G. Vassalli, *Presentazione*, op. cit., p. 27).

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fideistica, che il diritto penale, da contraddittoria *astrazione empirica* si tramuti in vera e propria *scienza umana* e che venga attuata una riforma che conformi il regime penitenziario all'obbiettivo dell'emenda, Matteotti riconosce l'attuale irrealizzabilità di un modello assoluto e integrale di pena indeterminata, e la necessità di ricorrere, *medio tempore*, ad un empirico sistema di pene di lunga durata, mitigate dalla possibilità di avvalersi, in corso di esecuzione, della liberazione anticipata.

4. *Il dibattito sui delinquenti incorreggibili: le osservazioni sul "progetto Luzzatti".*

L'orientamento manifestato nella monografia a favore della pena a tempo indeterminato e le critiche mosse al vigente trattamento dei recidivi abituali e all'istituto del domicilio coatto, sono ribaditi in un intervento di poco successivo, apparso nel 1911 sulla *Rivista italiana di diritto e procedura penale*, con il titolo "*Il progetto Luzzatti per la riforma degli art.81-83 del cod. pen.. La legge inglese del 1908. La colonia di Merxplas-Le colonie italiane*" (84). Lo scritto trae spunto dall'imminente discussione alla Camera di un disegno di legge finalizzato all'abolizione del domicilio coatto ed alla contestuale introduzione di due "*nuovi grandi principi*" correlati: "*1° la determinazione di una classe di delinquenti, recidivi abituali; 2° la pena a tempo indeterminato*" (85). Si trattava dell'ennesimo tentativo di rafforzare la difesa avverso i delinquenti recidivi (86), poi naufragato a seguito della caduta del Governo (dal quale proveniva tale progetto di riforma). Il testo del progetto è esaminato da Matteotti in chiave comparatistica, alla luce delle esperienze maturate nell'ambito "*delle colonie belghe per mendicanti e vagabondi, e della legge inglese 1908 per la detenzione di delinquenti abituali, ancora ignote o mal note alla nostra letteratura penale*" (87). Pur condividendo, in linea di principio, l'obbiettivo perseguito dal disegno legislativo (88), Matteotti critica l'incertezza del criterio impiegato per la fissazione dei caratteri della *recidiva abituale* (due condanne per omicidio o tre per determinati delitti "gravi", specificamente catalogati). La carente considerazione dei tipi di delinquente abituale offerti dagli studi

(84) In *Rivista di diritto e procedura penale*, 1911, p. 203 e ss..

(85) *Il progetto Luzzatti*, op. cit., p. 207.

(86) Esso faceva seguito al disegno di legge Finocchiaro-Aprile del 4 febbraio 1889 contro i recidivi ed ai progetti Bonasi (7 novembre 1899), Granturco (22 novembre 1899) e Ronchetti (30 gennaio 1904); sul punto v. M. Da PASSANO, *Echi parlamentari*, op. cit., 59 e ss..

(87) G. MATTEOTTI, *Il progetto Luzzatti*, op. cit., p. 203.

(88) "*I recidivi abituali sono ormai un fatto acquisito alla scienza del diritto penale, e ammesso da quasi tutti i moderni criminalisti, tanto che sarebbe un portar vasi a Samo la necessità, che anche la nostra legge debba cominciare a conoscerli*" (G. MATTEOTTI, *Il progetto Luzzatti*, op. cit., p. 207).

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di antropologia criminale e la astrusità ed artificiosità della casistica (89), fondata esclusivamente sul dato dei delitti commessi e sul numero delle condanne già riportate, inducono l'autore a dubitare della reale efficacia intimidativa dei contenuti della riforma. Egli non si fa alcuna illusione circa le effettive possibilità di emenda o correzione dei cd. *delinquenti incorreggibili* (non già in senso metafisico, ma avuto riguardo alle "*attuali condizioni sociali in genere e penitenziarie, in specie*"): "*fin d'ora si sappia che il solo, vero effetto utile sperabile dalle pene, dai provvedimenti applicati alle descritte categorie di delinquenti, non può essere per noi, allo stato attuale delle cose che quello dell'eliminazione, dell'isolamento*" (90). La proposta governativa di applicare il principio della pena della relegazione a tempo indeterminato dei recidivi abituali è condivisa nella misura in cui consente di segregare "*dalla società l'individuo finché non si ritenga emendato, e quindi i recidivi abituali e gli incorreggibili, finché tali, continuerebbero a restar sempre segregati*" (91). In attesa che il regime penitenziario sia effettivamente orientato all'indirizzo *emendativo*, Matteotti ritiene necessario privilegiare la difesa sociale: il modulo della relegazione a tempo indeterminato si rivela così l'"antesignano (...) di alcune misure di sicurezza proprie della visione del codice Rocco di venti anni dopo, ispirate a principi anche di rieducazione, ma soprattutto di sicurezza, fulcro quest'ultima — per quel codice — della prevenzione speciale" (92). La condivisione sostanziale della misura proposta dal progetto non esclude il timore che, "*nella pratica applicazione*", si perpetui il fallimento registrato nella corrispondente esperienza della relegazione vissuta nella colonia belga di Merxplas, ove il rapido succedersi di periodi di relegazione e di libertà delittuosa, piuttosto che favorire l'emenda, aveva finito per incentivare la ricaduta nel reato. Nel dubbio, l'autore manifesta pragmaticamente la sua preferenza per un "*empirico e meno audace, ma più sicuro, termine fisso (di vent'anni per esempio), temperato dalla liberazione condizio-*

(89) "*Casistica artificiosa e dannosa, come quasi tutte le altre che imperversano nel nostro codice e nella procedura*" (G. MATTEOTTI, *Il progetto Luzzatti*, op. cit., p. 208).

(90) G. MATTEOTTI, *Il progetto Luzzatti*, op. cit., p. 208. Come sottolineato da L. MASCILLI MIGLIORINI, *La formazione giuridica*, op. cit., p. 727, "il passo è importante, potendo da esso ricavarsi l'ipotesi di una subordinazione in Matteotti all'esigenza della difesa sociale anche di alcune istanze riformatrici; senza però spingersi così lontano, è certo che la questione della pena indeterminata rappresenta uno dei "luoghi" di maggiore significato nella problematica matteottiana sul diritto. Innanzitutto, pur discendendo la pena indeterminata da quella distinzione tra fattore permanente e individuale che Matteotti rivendica come sua "scoperta", è sicuramente questo uno dei punti in cui egli mostra di aderire con maggiore immediatezza alle tesi della "scuola positiva", e, dunque, può assumersi come chiave interpretativa del modo della sua formazione giuridica".

(91) G. MATTEOTTI, *Il progetto Luzzatti*, op. cit., p. 208.

(92) G. VASSALLI, *Presentazione*, op. cit., p. 28.

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nale" (93). A ciò si aggiungono le critiche in ordine alla proposta — contenuta nel progetto in esame, in omaggio alle teoriche dei provvedimenti amministrativi distinti dalla pena, che "*oggi inutilmente e irrazionalmente infestano il diritto penale*" — diretta ad introdurre una categoria 'intermedia' di recidivi (soggetti che dopo due reati qualsiasi vengano condannati per un terzo reato a oltre sei mesi di reclusione), cui il giudice può, oltre all'ordinario aggravamento, applicare la relegazione da uno a cinque anni. Tale commistione di pene e misure di sicurezza (anticipazione del cd. "doppio binario" adottato poi dal codice Rocco) dà luogo ad un "*semplice cuscinetto, un ponte di passaggio, tra le pene fisse normali e l'ardimento della pena indeterminata*" (94), che urta con il convincimento che la relegazione non dovrebbe essere considerata una misura accessoria, susseguente alla pena, ma dovrebbe, piuttosto, essere unificata alla seconda, al fine di una maggiore utilità della sanzione (95). Secondo Matteotti, l'idea di compromesso, sottesa al progetto, di tenere distinto il provvedimento della relegazione dalla pena fissa principale, può essere accolta a condizione che quest'ultima si sconti in un istituto in grado di assolvere al fondamentale compito dell'"*osservazione*", "*dove tutta la complessa individualità del delinquente sia assunta in esame, per meglio determinare quale debba essere il migliore e più utile trattamento, e quindi a quale particolare stabilimento debba poi essere rinviato per la relegazione*" (96).

5. *La tensione dialettica tra condizionamento e responsabilità.*

Nel complesso, l'indagine svolta da Matteotti sul tema della recidiva e dei cd. delinquenti incorreggibili rispecchia la consapevolezza delle implicazioni antropologiche e socio-economiche del diritto punitivo. Privilegiata la prospettiva criminologica e penologica a scapito della dimensione esegetico-interpretativa, l'autore muove alla ricerca di un delicato equilibrio tra istanze di garanzia ed esigenze di prevenzione, nel quadro di una visione del sistema penale che confida, utopisticamente, nelle capacità delle scienze criminali di discernere e misurare agevolmente il tasso di "*antigiuridicità*" del reo. Dialetticamente sospeso tra contingenze ambientali esterne e indole criminale dell'individuo, nella visione di Matteotti, il reato è occasionato dall'urto di tali fattori, in un inesausto contrappunto di necessità e libertà, condiziona-

(93) G. MATTEOTTI, *Il progetto Luzzatti*, op. cit., p. 209.

(94) G. MATTEOTTI, *Il progetto Luzzatti*, op. cit., p. 210.

(95) Come osservato da Vassalli, Matteotti "non è dunque d'accordo con quello che stabilirà il codice Rocco con il suo sistema del "doppio binario" (pena più misura di sicurezza)" (G. VASSALLI, *Presentazione*, op. cit., p. 28).

(96) Nell'ambito del commento alla parte esecutiva, amministrativa e finanziaria del progetto governativo, Matteotti esamina le destinazioni stabilite per i circa 2400 relegati previsti.

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mento e responsabilità, che affonda le radici della propria problematicità nella limitatezza e approssimatività delle conoscenze umane. Spia della speciale inclinazione delittuosa dell'individuo, la recidiva costituisce lo strumento privilegiato di lettura e di misurazione del tasso di pericolosità, rivelandosi l'unico criterio di immediata verifica empirica della permanente criminosità e dell'incidenza dei condizionamenti sociali e personali. Ideologicamente sbilanciata sulla componente soggettiva e sulla "*causalità psichica*" del reato, la ricostruzione di Matteotti privilegia l'approfondimento della capacità a delinquere, sondando l'impervio terreno della colpevolezza d'inclinazione e della colpa d'autore. La teoria del reo sviluppata nell'ambito dello studio monografico si integra con il tentativo, condotto sul piano delle finalità della pena, di saldare l'ispirazione positivistica con la necessità di adottare soluzioni pragmatiche ed efficaci, rispettose dei principi di garanzia. Taluni esiti rispecchiano, peraltro, la difficoltà, percepita dallo stesso autore, di mettere in pratica l'armonico programma di contrasto delle cause personali del reato, che nelle sue rigide connotazioni bio-antropologiche e generalizzanti, tradisce l'intento di sistematizzazione e di semplificazione della complessità ed imprevedibilità della fenomenologia criminale. Per certi versi, come sottolineato da alcuni commentatori, il tema, nevralgico, del trattamento sanzionatorio da riservare ai delinquenti incorreggibili, rivela "l'impressione di una rigida concezione dell'ufficio del diritto penale sostenuta e ribadita senza mezzi termini, e improntata ad un'austerità che conosce poche sfumature" (97). Ciò nonostante, ed è questo, forse, l'aspetto oggi più significativo, dalla trama dell'indagine traspaiono una solida piattaforma metodologica e un non comune "slancio" argomentativo, che trovano concretizzazione nell'ampiezza e nella singolare ricchezza dei riferimenti: sagacemente filtrata attraverso la lente del criminologo, la multiforme e complessa materia della recidiva viene proiettata da Matteotti, profondo conoscitore delle scienze sociali, verso una feconda prospettiva di adeguamento dell'istituto alle istanze di razionalizzazione e rinnovamento delle funzioni della pena, emergenti in dottrina e dall'esperienza comparatistica.

6. *Il ciclo di studi processuali: la legalità come pregiudiziale.*

Ad una prima fase di studi e di soggiorni di ricerca all'estero, volti, *in primis*, ad approfondire i profili sostanziali del diritto punitivo (98), fa

(97) A. G. Casanova, *Matteotti*, op. cit., p. 40.

(98) Fase, che include anche lo scritto, di tenore informativo, "*Riforme penitenziarie in Inghilterra*", pubblicato in *Il Progresso del diritto criminale*, II, 1910, V, p. 317 e s., e che si chiude nel 1911 con lo scritto "*Il segreto della confessione in alcune legislazioni straniere*", scaturito da un soggiorno estivo in Germania e pubblicato nella *Rivista penale*, XXXVII, LXXIV, p. 589 e s..

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seguito, nell'arco temporale che va dal 1912 al 1916, l'interruzione "forzata" della produzione scientifica. Il gravoso impegno nell'attività amministrativa e sindacale impedisce a Matteotti, "*irregolare attratto per temperamento dalla politica*", di seguire la propria volontà "*sempre ed esclusivamente rivolta*" agli studi penali (99). Con l'avvento della prima guerra mondiale e l'accesa presa di posizione antibellicista si creano, forzatamente, le premesse per il ritorno all'attività scientifica: ciò che avviene a seguito del trasferimento, insieme ad altri internati militari politici, nel confino siciliano di Campo Inglese, nei pressi di Messina. La precarietà e l'isolamento della condizione, rendono quasi "eroico" il 'severo programma scientifico' che egli si impone, in questa sospensione coattiva della dimensione dell'azione: la nuova stagione di studi e di progetti di ricerca si caratterizza per il "rigido tecnicismo" (100), il formalismo dei temi e dei problemi prescelti, perlopiù riconducibili al diritto processuale penale (101). La drammaticità della contingenza bellica ed istituzionale, induce Matteotti a privilegiare la dimensione politica del diritto punitivo, ossia l'approfondimento di tematiche strettamente connesse ai profili di garanzia delle libertà dei cittadini. Questa seconda fase di studi giuridici si ispira, come osservato da Carini, all'idea — di ascendenza elleriana — della supremazia del diritto che deve orientare lo stato e gli individui e che si riflette nei postulati della eguaglianza della legge, della certezza della pena, della giustizia tributaria, della indipendenza della magistratura, della esclusione di funzioni giudiziarie al pubblico ministero, considerato parte dell'esecutivo (102).

Lo scritto *Nullità assoluta della sentenza penale* pubblicato nel 1917 sulla *Rivista di diritto e procedura penale* (103), evidenzia l'esigenza di

(99) Cfr. S. CARETTI, *Introduzione,* in *G. Matteotti, Scritti giuridici*, op. cit., p. 14.

(100) C. CARINI, *Giacomo Matteotti*, op. cit., p. 49; secondo L. MASCILLI MIGLIORINI, *La formazione giuridica*, op. cit., 730, "non si tratta più di 'tecnicismo di scuola', ma scelta, come da più luoghi si desume, deliberata, di temi fortemente astratti, scelti e finalizzati per lo più alla intravista carriera universitaria. Significativa di questa separazione che si opera nella seconda produzione matteottiana tra la sfera dell'attività scientifica e quella dell'impegno politico, ci è parsa pure la circostanza che questa produzione, a differenza della prima, che compare sulle rassegne di Florian, Zerboglio e Carnevali, è, in buona misura accolta dalla *Rivista penale* di Lucchini, proprio nel periodo in cui, per le vicende legate all'intervento e, successivamente, alla condotta della guerra e della pace, le posizioni politiche della rivista vanno colorandosi di tinte sempre più marcatamente reazionarie".

(101) L'abbandono dei temi sostanziali dipende anche dall'involuzione tecnicistica e conservatrice della scuola classica: come osservato da Carini, l'incrinarsi, per cause politico-ideologiche, dei rapporti con Lucchini (e la successiva rottura nel 1922), conferma "la difficoltà di Matteotti a continuare a far propri gli itinerari della scuola tecnica di diritto penale" (C. CARINI, *Giacomo Matteotti*, op. cit., p. 80).

(102) C. CARINI, *Giacomo Matteotti*, op. cit., p. 32.

(103) Oggetto dello scritto è la distinzione tra nullità assolute (insanabili e deducibili in ogni stato e grado del giudizio) e relative (ossia da dedurre entro determinati termini perentori) contemplata dal codice di rito del 1913; come osservato

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garantire il rispetto della legge e della volontà autentica del legislatore (104), a fronte di anomale ed arbitrarie tesi ermeneutiche avanzate in dottrina e giurisprudenza a proposito della differenza tra inesistenza e nullità assoluta della sentenza penale (e, più in generale tra nullità assoluta e insanabilità). "*Sembra urgente determinare* — scrive Matteotti — *con precisione schematica, in conformità alla procedura penale che ci regge, alcuni concetti atti ad arrestare le deviazioni e gli errori che in questo momento già minacciano di diffondersi, anche ad opera di alcuni dei migliori cultori della nostra disciplina*" (105). L'affermazione del primato della legalità passa attraverso il richiamo alle tesi dei classici che potevano meglio garantire, con la certezza e la formalità del giudicato, le libertà del cittadino, il diritto di liberamente muoversi e organizzarsi nella società civile: i sistemi giuridici possono e debbono essere modificati, ma in "*uno stato e in un tempo come il nostro, dove è altrettanto facile l'abuso delle autorità quanto la diffidenza del popolo verso di esse, è da preferirsi nelle leggi l'interpretazione più esatta e rigida, e far posto alle esigenze dell'equità solo con le dovute riforme legislative*" (106). La formalità del giudicato è ritenuta l'unico "scudo" in grado di difendere sia la libertà del cittadino, sia il diritto dello stato di prevenire e punire: all'organo di giustizia, "*costituito non per arbitrio, ma secondo regole e garanzie pubbliche*", deve essere affidato il compito di emanare la sentenza definitiva, non più contestabile (107). Respinta l'idea (sostenuta, tra gli altri, da Lanza) secondo cui le nullità assolute sarebbero rilevabili anche dopo il passaggio in giudicato (108), mediante incidente di esecuzione, si ribadisce il principio — "inesorabile" e, al contempo,

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da Vassalli, tale binomio è stato conservato nei due codici successivi, "sotto il nome delle nullità di ordine generale": ora come allora "le nullità assolute si sanano — suol dirsi — solo per effetto del giudicato. E gravano come un incubo per tutto il corso del processo" (G. VASSALLI, *Presentazione*, op. cit., p. 30).

(104) C. CARINI, *Giacomo Matteotti*, op. cit., p. 72 e s. il quale sottolinea come Matteotti colga "il senso politico dei processi giuridici in atto".

(105) G. MATTEOTTI, *Nullità assoluta della sentenza penale,* in *Rivista di diritto e procedura penale*, VIII, 1917, p. 315.

(106) Si è osservato che secondo Matteotti, il codice penale si basa su concetti "essenziali", che richiedono "assoluta saldezza e unità", assoluta indipendenza da "ogni criterio politico dove prevalga la contingenza e il compromesso, per poter pretendere una maggiore purezza formale": sulla visione matteottiana del "codice come sistema logico di principi che non può essere alterato senza gravi danni per la libertà del cittadino", derivanti "dal rispetto formale e dalla comprensione unitaria della pur antiquata normativa vigente", v. C. CARINI, *Giacomo Matteotti*, op. cit., p. 73 e s..

(107) Cfr. C. CARINI, *Giacomo Matteotti*, op. cit., p. 73.

(108) A proposito della possibilità, sostenuta da Stoppato, di svolgere l'esecuzione nell'ambito di un giudizio ancora aperto, Matteotti osserva che "*è sempre una breccia che si apre in un sistema legislativo ben definito, scuotendone le fondamenta per le quali è, invece, certo, che una sentenza passa in giudicato non appena trascorra il termine utile senza che sia presentato un gravame formalmente valido*" (G. MATTEOTTI, *Nullità assoluta*, op. cit., p. 316 e s.).

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garantistico — dell'irrefragabilità della sentenza definitiva. Nell'affermare che "*gli inconvenienti non si tolgono con sottigliezze e amputazioni incoerenti: ma è meglio che li pratica li riveli nella loro piena corrispondenza con i testi di legge, per suggerire oneste e sicure modificazioni*", Matteotti risolve in favore della certezza del diritto, dell'applicazione della legge "*secondo la sua precisa e chiara volontà*", il conflitto tra giustizia e formalità del giudicato. Una posizione manifestamente rigoristica, che se rapportata al contesto politico-sociale del tempo, è, peraltro, espressione — nel pregnante richiamo al rispetto delle leggi — di un'esigenza di garanzia e al contempo di funzionalità del sistema (109). Vengono, quindi, analizzati i vizi e i difetti che danno luogo alla vera e propria *inesistenza* della sentenza: in questa direzione si precisa che le sentenze di "*tribunali eccezionali creati talvolta in Italia in occasione di moti rivoluzionari o lotte civili, con la proclamazione dello stato d'assedio e la dittatura della autorità militare*" non sono accettabili perché "*chiunque si permetta di giudicare e condannare senza averne il potere secondo lo statuto fondamentale del regno (art.71) secondo le leggi, sia esso anche incaricato dal potere esecutivo e investito dal ministero, egli non è giudice; la sua sentenza penale non vale più di quella che potrebbe arbitrarsi di emanare un privato qualsiasi, un consiglio comunale, o il consiglio di stato; non esiste assolutamente*".

Il secondo scritto in materia processuale, pubblicato nel 1918, nella *Rivista penale*, concerne "*Il concetto di sentenza penale e le dichiarazioni d'incompetenza in particolare*". Prendendo le mosse dalla definizione di sentenza prevista all'art.98 dell'allora vigente codice di procedura penale (110), in termini di "*decisione che definisce l'istruzione o il giudizio*", Matteotti mette a fuoco la superfluità e l'inconguenza rispetto allo scopo di tale formulazione. Il convincimento che possa essere definita 'sentenza' "*quella sola decisione che definisce il procedimento penale, che esaurisce l'azione penale*" (111), induce l'autore a escludere la configurabilità di una vera e propria sentenza sulla competenza. Non essendovi rimedio alla inesattezza e contraddittorietà della lettera della legge, spetta alla dottrina il compito di affermare "*un rigoroso criterio, una precisa definizione*", che valga non solo per il futuro, ma anche nell'attuazione e applicazione del diritto positivo vigente; "*se non si vuole continuare alla deriva, se non si preferisce all'unità sostanziale l'arbitrio*

(109) Come rileva C. CARINI, *Giacomo Matteotti*, op. cit., p. 234, "rimasto fedele ai principi della scuola classica, Matteotti non aveva allora esitato a dichiarare tutta la sua diffidenza verso modificazioni dei codici che non fossero il risultato di un lungo processo storico o che non derivassero dal maturo rigore della scienza".

(110) Sul codice di rito del 1913 (cd. codice Finocchiaro-Aprile), v. M. CHIAVARIO, v. *Codice di procedura penale,* in *Dig. disc. pen*., II, 1988, p. 258 e ss..

(111) G. MATTEOTTI, *Il concetto di sentenza penale*, in *Scritti giuridici*, op. cit., I, p. 266.

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delle più diverse apparenze legali" (112). Il concetto selettivo e razionale di *sentenza* viene, in tale direzione, individuato da Matteotti nella "*decisione che, decidendo sulla pretesa penale, mette fine al procedimento*", apportando chiarezza sistematica e ordine sul piano applicativo.

Dimostrando di aver affinato i propri strumenti di indagine e di dominare la controversa materia, Matteotti prosegue, dunque, la propria missione in difesa del diritto e dell'autorità dello Stato, la quale trova nitida espressione negli ultimi scritti in cui è tangibile la "sostanza politica" degli istituti e dei temi trattati (113). Se nello studio su *Oggetti di ricorso per cassazione nelle giurisdizioni non ordinarie* si invoca la necessità garantistica di un'interpretazione estensiva dell'art.500 del codice di rito, atta ad evitare le restrizioni e gli abusi conseguenti alla giurisprudenza del Tribunale Supremo di guerra e marina (tendente a limitare e vanificare i margini per l'impugnazione delle sentenze emesse dai tribunali militari), nel contributo sulla *Classificazione degli incidenti di esecuzione*, analizzati e classificati con lucidità le diverse tipologie di incidenti, si affronta la funzione di controllo che il giudice dell'esecuzione è chiamato a svolgere sull'attuazione del giudicato (114). È qui che Matteotti marca la distinzione tra provvedimento amministrativo e sfera penale, ponendo in primo piano le garanzie di libertà dei cittadini avverso gli abusi del potere esecutivo (115): "*l'unica autorità che ancora oggi esamini o decida i problemi dell'esecuzione dal punto di vista più integrale del diritto penale, è il giudice. E a lui per ora ricorriamo*". Non vi è, infine, necessità di sottolineare la costante attualità e problematicità politico-istituzionale sottesa al tema dell'ultimo scritto giuridico, *Il pubblico ministero è parte*. La questione se collocare l'organo della pubblica accusa in un ruolo funzionale prossimo a quello del giudice —

(112) G. MATTEOTTI, *Il concetto di sentenza penale*, op. cit., p. 285.

(113) Ne è un esempio il breve scritto "*Dalla critica alla ricostruzione (a proposito dell'Intendente di finanza improvvisato giudice penale)*", pubblicato nella *Rivista di diritto e procedura penale*, IX, 1918, IX, I, p. 396 e ss., concernente la competenza penale dell'intendente di finanza in materia di violazioni doganali, in cui Matteotti, osservato che "*lo scandalo giuridico di un intendente di finanza che siede a giudicare reati e delinquenti", è grave assai, grave in procedura e grave in diritto", auspica che "esca finalmente dal diritto penale tutta codesta materia che non gli appartiene, che anzi lo deforma, per mancanza della caratteristica essenziale, la qualità e quantità della pena proporzionata non solo all'elemento materiale, ma all'elemento morale, individuale*".

(114) Come osservato da Vassalli, in questo scritto Matteotti, dopo aver delineato i rapporti dell'esecuzione penale con la giurisdizione, "enuncia una propria visione dogmatica che tocca il rapporto tra diritto penale sostanziale e giurisdizione" (G. VASSALLI, *Presentazione*, op. cit., p. 32).

(115) "*Quando, oggi*, — afferma Matteotti a difesa del principio di legalità — *si dice che un provvedimento è affidato all'amministrazione, significa subito abbandono alla discrezione più indiscreta, all'arbitrio, a criteri che ormai nulla hanno di comune con i fini e l'essenza della pena*" (G. MATTEOTTI, *Classificazione degli incidenti di esecuzione,* in *Rivista di diritto e procedura penale*, X, 1919, I, p. 136 e s.).

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in virtù dei fini di giustizia e degli interessi collettivi perseguiti, nonché dell'imparzialità, così come formalmente statuito dal codice vigente — oppure mantenerlo nel novero delle parti, viene decisa da Matteotti nel senso di considerare il pubblico ministero come parte sostanziale che agisce "*non per interesse proprio, ma per quello di una collettività di cui esso è organo*" (116).

Come già anticipato, gli spunti e le riflessioni maturate nel biennio di studi processualistici avrebbero dovuto trovare espressione organica e compiuta in un'ampia indagine monografica sulla Corte di Cassazione, destinata a divenire la *summa* delle istanze di legalità e di certezza del diritto sottese al ciclo di studi processuali. Nelle funzioni e nell'operato della Suprema Corte, Matteotti individuava, infatti, il *locus* privilegiato della garanzia di libertà, la sede istituzionale atta a promuovere ed assicurare l'unità e l'uniformità del diritto (117). Ultimo baluardo avverso soprusi, illegalità e soluzioni ermeneutiche tendenziose, dettate da istanze equitative o di giustizia sostanziale, lo strumento del ricorso per cassazione incarnava la garanzia dell'osservanza e dell'uguaglianza delle leggi, senza la quale, scrive Matteotti, "*tutto sarebbe risospinto nell'incertezza e ognuno potrebbe ripromettersi la prevalenza di un giudizio favorevole con continue perturbazioni*" (118).

7. *Osservazioni conclusive.*

Vivida testimonianza di uno spirito critico e indipendente, gli *Scritti giuridici* mettono in luce i valori fondanti l'impegno civile e sociale dell'autore, restituendoci, sul piano storico, un'immagine più nitida e pregnante, certamente più ricca e definita, del grande socialista riformista. L' *'abito mentale dello studioso'* che Einaudi gli riconoscerà (119), è, in effetti, emblematico dello straordinario contrappunto tra ideali politici e concezioni giuridiche, sotteso alla "lotta per il diritto" che caratterizza l'ultima, tragica, stagione di militanza. La

(116) G. MATTEOTTI, *Il pubblico ministero è parte*, in *Rivista penale*, XLV, 1919, p. 345.

(117) Cfr. L. MASCILLI MIGLIORINI, *La formazione giuridica*, op. cit., 731; come osservato da Carini, il tema del ricorso per Cassazione, denso di implicazioni politiche, "garanzia di libertà in tempi normali", diventava "addirittura indispensabile in tempo di guerra o di accelerato conflitto sociale, in cui la tendenza del potere esecutivo era di servirsi di organi di giustizia militare o comunque indebolire la tutela del condannato prevista dall'ordinamento"; l'idea di uno studio sulla Cassazione, quale presidio della uniformità della giurisprudenza e della certezza del diritto, riflette — secondo Carini — "il tipo di approdo — la rivendicazione dei diritti del parlamento — che caratterizzò il momento terminale della lotta di Matteotti contro il regime di Mussolini" (C. CARINI, *Giacomo Matteotti*, op. cit., p. 233).

(118) G. MATTEOTTI, *Nullità assoluta*, op. cit., p. 316.

(119) L. EINAUDI, *Matteotti finanziere*, in *Giacomo Matteotti nel 1° anniversario del suo sacrificio*, op. cit., p. 19 e s..

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feconda osmosi tra percorso politico e produzione giuridica, fanno di Matteotti un raro esempio di studioso integrato nella realtà sociale e giuridica, che si avvale delle scienze del diritto e dell'economia per adeguare concretamente il progetto di riforma alle esigenze e alla complessità del presente. Critico verso gli estremismi del socialismo positivistico e culturalmente distante dal dibattito sui rapporti tra diritto penale e lotta politica (alimentato da Zerboglio nella prospettiva dell'ordinamento penale quale "diritto di classe", riflesso della supremazia economica di una componente sociale sull'altra) (120), Matteotti ha il merito di aver colmato le profonde lacune e i gravi ritardi che caratterizzavano il movimento socialista in rapporto all'evoluzione del sistema giuridico e delle istituzioni democratiche. La "lotta di classe" si doveva attuare nel quadro delle garanzie del diritto, confrontandosi con le altre forze sul terreno istituzionale, al fine di promuovere e realizzare gli ideali di civiltà e progresso sociali perseguiti (121). Sul presupposto della "neutralità" politica del significato garantistico dei principi-valori ereditati dalla tradizione liberale, Matteotti ritiene che la trasformazione sociale possa e debba avere luogo nel quadro dell'osservanza delle leggi e delle libertà dei cittadini. Il riconoscimento e la difesa del primato dei diritti naturali, il mantenimento dello Stato di diritto, quali premesse per attuare il processo di civilizzazione politico-sociale del paese, rispecchiano la sintesi tra tradizione giuridica liberale e ideali di uguaglianza e di democrazia, che è alla base dell'atipicità del pensiero giuridico dell'autore.

La tensione ideale verso modelli di giustizia in grado di soddisfare le imprescindibili istanze di legalità e certezza, si scontrava con la realtà di progressive sopraffazioni ed abusi: la "lotta per la legalità" chiamava Matteotti in prima linea, alla difesa, estrema e vana, dell'istituzione parlamentare. Le illusioni e i progetti utopistici di riforma del sistema delle pene lasceranno, ben presto, spazio ad una lucida ed amara presa d'atto dell'irreversibile involuzione subìta dalla legalità per effetto dell'affermarsi del regime fascista. Nel noto articolo, dal titolo "*Dopo un anno di dominazione fascista*", pubblicato nel 1924 sulla rivista *Critica sociale*, egli traccia un cupo bilancio della situazione giuridica, economica e sociale del paese. A fronte della asserita "necessità" di ristabilire l'autorità dello Stato e della legge, addotta dal fascismo a giustificazione del sovvertimento dello stato democratico, Matteotti, quasi presentendo il proprio, imminente, destino, osserva come "*mai come in questo*

(120) Sul punto v. M. Sbriccoli, *Il diritto penale sociale*, op. cit., p. 614 e ss..

(121) Come rilevato da Carini, "restituire al diritto la funzione, ad esso propria, di limitare e legittimare il potere, significava rafforzare le barriere contro la reazione, consolidare le garanzie, assicurare ai lavoratori gli spazi necessari alla vita delle loro organizzazioni, cosicché il socialismo poteva liberamente crescere, e maturare sostituendo "fecondamente" all'ordinamento borghese il 'nuovo ordinamento politico — sociale'" (C. Carini, *Giacomo Matteotti*, op. cit., p. 236).

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periodo di tempo la legge è divenuta una finzione, che non offre più nessuna garanzia per nessuno. La libertà personale, di domicilio, di riunione non sono più regolate dallo Statuto e neppure dai soli capricci della polizia, ma continuano ad essere alla mercè di qualsiasi capo fascista. Ottanta cittadini italiani sono stati in quest'anno uccisi impunemente dai cittadini che godono il privilegio fascista, e le stesse esecuzioni sommarie, pubblicamente organizzate e condotte, non hanno avuto alcuna sanzione, non che di condanne, neppure di procedimenti giudiziari" (122). Di fronte all'uso della violenza, alla sostituzione dell'arbitrio alla legge ed alla divisione in atto tra "dominatori e sudditi", la difesa dello Stato di diritto (contro gli abusi degli stessi detentori del potere) ed il ristabilimento delle garanzie individuali assumono il significato di una reazione necessaria (123). Anche "*il codice riconosce la legittima difesa*", cosicché "*chi ha violato le leggi, deve subirne le conseguenze*": il *vulnus* alla democrazia e alla vita delle istituzioni, la rottura della legalità, impongono il passaggio dal riformismo gradualistico alla *resistenza* attiva e rivoluzionaria. Di fronte all'abisso che separa, ormai, la realtà effettuale e il dover essere dell'ordinamento giuridico, Matteotti è chiamato ad un primo, sofferto, sacrificio. "*Per rivendicare quelli che sono* (...) *i presupposti di qualsiasi civiltà o Nazione moderna*" (124), egli non esita a scegliere la via più difficile e dolorosa. Nella rinunzia allo studio del diritto — linfa vitale del pensiero matteottiano — imposta dalla necessità, superiore, di una strenua ed estrema difesa dell'autorità dello Stato e della legge, trovano limpida espressione il rigore e la dignità morale del martire socialista, che dai principî e dal metodo del diritto punitivo, aveva appreso i valori fondanti e i criteri direttivi. Primo fra tutti il primato, sacro ed inviolabile, dei diritti fondamentali dell'individuo, quale 'pre-condizione' da cui anche il riformismo socialista, così come ogni altro orientamento ideologico, deve prendere le mosse per l'attuazione dei propri ideali ed obbiettivi politici. La continuità di valori tra *diritto naturale* e progetto di società socialista si sostanzia nella convergenza di legalità e giustizia: la pregiudizialità logica e funzionale assegnata ai principî-valori ereditati dalla tradizione giuridica liberale rispetto agli stessi modelli ideologici della lotta politica, rispecchia una visione "costituzionale" dei diritti fondamentali, nella quale, in accordo al "*neo-giusnaturalismo*" dell'autore, le garanzie individuali si fondono con le istanze di uguaglianza sociale e di progresso civile.

(122) G. MATTEOTTI, *Dopo un anno di dominazione fascista*, in *Critica sociale*, 1924, p. 5 e ss..

(123) Secondo Carini, dalla lettura dei testi classici del diritto liberale Matteotti aveva "derivato facendola originalmente propria la concezione contrattualistica del pensiero borghese in base alla quale in caso di violazione unilaterale del patto, al contraente offeso andava riconosciuto il potere di ristabilire, anche con la forza, l'equilibrio spezzato" (C. CARINI, *Giacomo Matteotti*, op. cit., p. 120).

(124) Cfr. S. CARETTI, *Introduzione*, op, cit., p. 21.

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LUCA MANNORI

UN "AFFARE DI SENTIMENTO". L'IDENTITÀ CIVILE DEL SIGNOR PIETRO VERRI, GENTILUOMO MILANESE

(a proposito di C. Capra, *"I progressi della ragione". Vita di Pietro Verri*, Il Mulino, Bologna 2002)

1. A due anni ormai dalla sua pubblicazione, il libro di Carlo Capra che qui recensiamo non ha più bisogno di essere presentato al pubblico. La larga circolazione che ha subito conosciuto e le approfondite letture a cui è stato già sottoposto da parte di noti specialisti del Settecento italiano ci sollevano da questo compito. In particolare, il lettore interessato a veder discusse le coordinate metodologiche dell'opera e la sua collocazione nell'ambito della storiografia verriana ha già a propria disposizione tre saggi, rispettivamente firmati da Marcello Verga, Bartolo Anglani e Giuseppe Ricuperati, a cui ben poco sapremmo aggiungere sul piano della disamina critica (1). Pur movendo da prospettive differenti, i tre recensori concordano nel salutare nel volume di Capra un importante saggio di biografia integrale, capace di offrire una ricostruzione senza precedenti della personalità intellettuale forse più intrigante di tutto il nostro Settecento. Affidandosi infatti ad un telaio narrativo in apparenza semplicissimo, unicamente scandito dal fluire della vita del suo personaggio, l'autore restituisce un ritratto di grande ricchezza e profondità, nel quale il complicato percorso intellettuale di Verri si apre ad una nuova leggibilità. Alla base di un tale successo interpretativo sta la piena disponibilità di Capra ad abbracciare nella sua interezza l'esperienza umana di Verri, attribuendo una pari dignità alle sue letture e al suo mondo affettivo, alle sue scelte di uomo pubblico e ai suoi rapporti socio-familiari, alle sue scoperte politiche e alle sue vicissitudini patrimoniali. Il libro si costruisce così: intrecciando insieme con accortezza e sensibilità questi disparati piani

(1) Tutti e tre i contributi sono usciti sul numero 96 di "Società e storia" XXV (2002): M. VERGA, *Pietro Verri: una biografia erudita*, p. 351 ss.; B. ANGLANI, *Ragioni e contraddizioni di un intellettuale riformatore*, p. 363 ss.; G. RICUPERATI, *Pietro Verri e il genere della biografia*, p. 377 ss.. Ma ora si veda anche l'articolo di R. PASTA, *Ritratto di un magistrato filosofo: la 'Vita di Pietro Verri' di Carlo Capra*, in corso di pubblicazione sulla "Rivista storica italiana", che ho potuto vedere in dattiloscritto, grazie alla cortesia dell'autore, quando questo contributo era già in bozze.

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d'analisi lungo le circa seicento pagine del suo sviluppo. E appunto per questa strada esso riesce a superare definitivamente quell'immagine 'eroica' di Pietro Verri consegnataci da Franco Venturi alla fine degli anni Sessanta (2). Tale immagine, beninteso — a sua volta radicata in alcune pagine gobettiane e destinata a trovare una prima consolidazione forte nella monografia di Nino Valeri del 1937 — non costituisce in alcun modo un intenzionale referente polemico per Carlo Capra: il quale anzi si affretta fin dalla prefazione a ricordare i propri debiti culturali nei confronti, se non di Venturi, quantomeno di Valeri. Eppure, non c'è dubbio che il libro segni un punto di svolta rispetto a questi pur illustri e non contestati predecessori. Diversamente da essi, Capra non è più interessato a misurare la "volontà di riforma" impersonata da Verri, a valutare la forza, l'originalità e la novità del suo progetto o il rilievo delle realizzazioni istituzionali da esso derivate (tutte questioni che, nella misura in cui restano ancora attuali, possono ricevere risposte appaganti solo attraverso approcci diversi da quello strettamente biografico). L'attenzione dell'autore è rivolta piuttosto a lumeggiare il percorso personale che ha accompagnato e sostenuto l'avventura intellettuale verriana: ovvero, a ricostruire in concreto il complesso delle motivazioni che hanno condotto questo esponente della aristocrazia lombarda a far propria una visione del mondo totalmente diversa, e per certi versi antitetica, rispetto a quella tradizionalmente propria del suo ceto e del suo ambiente d'origine. Insomma: è come se il *focus* della ricerca si fosse spostato verso un punto più arretrato e riposto rispetto a quello occupato dai prodotti stessi del pensiero di Verri. Il vero oggetto dell'indagine di Capra non è tanto costituito da quel pensiero, ma dal modo in cui esso si è formato e dall'insieme di fattori che ne hanno provocato passo a passo l'emersione e articolato il profilo.

Questa ridislocazione dell'interesse storiografico non è ovviamente casuale. Essa risponde ad un'esigenza di contestualizzazione dei fenomeni culturali che nel campo degli studi sull'illuminismo lombardo vanta un'ormai lunga tradizione (si pensi solo al celebre convegno milanese di studi teresiani del 1980, nei cui atti troviamo già alcuni tra i fili conduttori del bel volume di Capra (3); per non parlare poi di tutta la vasta messe di ricerche specificamente verriane apparse soprattutto

(2) Sulla quale cfr. G. Ricuperati, *Pietro Verri e gli specchi. Appunti per una storia delle interpretazioni da Isidoro Bianchi a Franco Venturi*, in *Pietro Verri e il suo tempo*, a cura di C. Capra, Bologna, Cisalpino-Monduzzi, 1996, vol. I, p. 3 ss..

(3) Cfr. soprattutto N. Jonard, *Cosmopolitismo e patriottismo nel 'Caffè'* e C. Dipper, *Dispotismo e costituzione: due concetti di libertà nell'illuminismo milanese*, entrambi basati in gran parte su una rilettura degli scritti verriani, in *Economia, istituzioni, cultura in Lombardia nell'età di Maria Teresa*, a cura di A. De Maddalena, E. Rotelli, G. Barbarisi, Bologna, Il Mulino, 1982, vol. II, rispettivamente p. 65 ss. e p. 863 ss..

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nel corso degli anni Novanta, che quel volume hanno preparato e reso possibile (4)). Prodotto ultimo di questa nuova stagione di studi, il nostro libro finisce per guardare a Pietro Verri non solo e non tanto come ad un grande protagonista del Settecento lombardo, ma soprattutto come ad un eccezionale testimone di quella stessa epoca e delle sue contraddizioni. Attraverso la sua *full immersion* nell'universo emozionale di Verri, Capra si assegna in realtà un fine più ambizioso di quello di scrivere una biografia. La sua vera scommessa consiste infatti nel mettere a fuoco le grandi nervature della crisi dell'antico regime assumendo il punto di vista *interno* di uno di coloro che la vissero con maggiore intensità e consapevolezza. Il risultato è un libro su Verri, ma anche e più ancora sulla crisi identitaria di un intero ceto dominante; ceto che attraverso la penna di Verri e grazie al suo quasi parossistico lavorìo introspettivo ci confessa fino in fondo il suo travaglio e le difficoltà che incontra nello scegliersi un nuovo modello di appartenenza. Al centro della ricerca di Capra, insomma, sta anzitutto una questione d'identità. La domanda che si sottende a tutta l'intelaiatura del lavoro e che ne garantisce la coesione non è tanto: 'che cosa ha fatto, scritto o pensato Pietro Verri', ma piuttosto: 'chi era mai costui' e 'chi si propose di essere' nelle varie fasi della sua esperienza umana, intellettuale e politica.

Letto in questa prospettiva, il libro si offre come uno strumento di prim'ordine non solo per scandagliare le trasformazioni della società settecentesca ma anche per verificare fino a che punto quella stessa società abbia fatto da incubatrice involontaria ai nuovi sensi identitari destinati ad affermarsi a partire dai primi dell'Ottocento. Se c'è un punto, in effetti, che le forse ormai troppe ricerche sul tema dell'identità italiana tendono a lasciare nell'ombra, esso è proprio costituito dal passaggio da un Settecento assai povero di 'italianismo' alla spettacolare impennata nazionalista che segna fin dai suoi esordi la fisionomia del secolo successivo. Impennata che a lungo si è continuato a descrivere più che a spiegare, rinviando per il resto a quella sorta di senso comune storiografico che indica nell'approdo alla nazionalità uno degli elementi 'ineluttabili' dello spazio moderno-contemporaneo. Una ricerca come quella qui recensita può offrire — ci pare — un contributo indiretto, ma non per questo meno prezioso per illuminare un tale tornante. Essa ci aiuta infatti a misurare quanto fosse difficile, per un esponente di punta di un'*élite* regionale italiana del secondo Settecento, assicurare a

(4) Oltre ai due volumi di scritti *Pietro Verri e il suo tempo*, cit., basti ricordare S. Baia Curioni, *Per sconfiggere l'oblio. Saggi e documenti sulla formazione intellettuale di Pietro Verri*, Milano, Angeli, 1988; G. Scianatico, *L'ultimo Verri, dall'Antico Regime alla Rivoluzione*, Napoli, Liguori, 1990; P. Verri, *Delle nozioni tendenti alla pubblica felicità*, a cura di G. Barbarisi, Roma, Salerno, 1994; P. Verri, *Del fulmine e delle leggi. Scritti giornalistici 1766-1768*, a cura di G. Gaspari, Milano, All'insegna del pesce d'oro, 1994; P. Verri, *Memorie*, a cura di E. Agnesi, Modena, Mucchi, 2001.

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quel suo nuovo, esigentissimo ego individualista che la civiltà dei lumi aveva plasmato una posizione veramente appagante in seno agli spazi asfittici della vecchia società; e ci permette quindi di comprendere meglio come le generazioni immediatamente successive, sperimentate inutilmente una serie di opzioni in apparenza più facili da percorrere, si siano incamminate lungo il pur così impervio itinerario della costruzione di una nuova appartenenza nazionale.

Chi è dunque il Verri di Capra? Proviamo a rispondere forzando in qualche misura la discrezione dell'autore, che, scrupolosamente fedele al suo ruolo di voce narrante, lascia essenzialmente al lettore la libertà di trarre le sue conclusioni d'insieme.

2. È evidente, anzitutto, che ci troviamo di fronte ad una personalità stratificata. Il libro non ci presenta 'un' Verri, ma ne inventaria diversi, facendoli entrare in scena in corrispondenza delle varie fasi della vita del personaggio; e d'altra parte ognuna di queste identità, al proprio apparire, più che cancellare quelle precedenti, tende a sovrapporsi ad esse, contribuendo a creare una figura di notevole complessità.

Lo strato più profondo e persistente di questo spaccato interiore è dato senz'altro dal Verri patrizio e 'milanese'. La centralità di questa cifra è dichiarata da Capra fin dalla scelta di dedicare le prime quasi cinquanta pagine del suo volume a ricostruire le vicende della famiglia prima della nascita di Pietro: pagine che risultano tutt'altro che marginali nella contessura del volume. Per quanto infatti fin dalla giovinezza la vicenda di Verri sia segnata dal ben noto, durissimo conflitto con i genitori e dalla contestuale adozione di un atteggiamento fortemente critico nei confronti dei suoi pari-ceto, tutto il mondo etico di Pietro si basa su un complesso di valori non solo intrinsecamente aristocratici ma in fin dei conti strettamente contigui a quelli del padre, col quale intrattiene un rapporto fatto molto più di rabbiosa emulazione che di autentico rifiuto. Pur essendo quello dei Verri un casato di antica nobiltà cittadina, è solo con Gabriele, padre di Pietro, — il noto giurista commentatore delle *Novae Constitutiones* — che esso compie il balzo decisivo verso la vetta della piramide sociale lombarda, grazie ad una consistente base patrimoniale accumulata nel corso del secolo precedente ad opera di oscuri ed operosi ascendenti. Il nostro Verri nasce dunque in seno ad una famiglia decisamente 'rampante', per la quale l'orizzonte municipal-nobiliare non ha niente di stagnante e di sonnacchioso, ma costituisce piuttosto l'arena entro cui giocare una impegnativa partita sociale, scandita dalla scalata alle grandi cariche del Ducato, dall'inserimento entro i complessi circuiti che legano Milano a Vienna e dalla acquisizione di un patrimonio familiare conforme a questa nuova dignità. Da Gabriele egli ha ereditato un tipo di ambizione che, compenetrando l'individuo nel casato, lo destina automaticamente, in quanto primogenito, ad affermare un nome che è tanto suo quanto di

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quella famiglia che presto o tardi si troverà a governare. La brillante carriera del padre, che per tanti versi segna già uno iato decisivo rispetto al chiuso mondo degli avi (muratoriano convinto, Gabriele basa tutta la propria strategia d'affermazione sul nuovo legame tra sapere intellettuale e servizio del principe), suona come una sfida permanente per Pietro: il quale si trova impegnato fin da giovane in una micidiale gara generazionale, giocata tutta però entro la cornice di una identità nobiliare a cui egli aderisce intimamente. A confermare questa accettazione, basti la compiaciuta soddisfazione con cui il Verri maturo registra l'ormai avvenuto 'sorpasso' compiuto su Gabriele ("egli è dimenticato dalla Corte, nel Ministero il mio rango è uguale al suo, anch'io nel diploma sono *magnifico* quanto è *magnifico* lui. Egli ha 13.000 lire, io 14.000 di stipendio; io sono invitato a Corte, egli non lo è": p. 395). Mentre non meno significativa, su un altro piano, è la spietata battaglia legale da lui ingaggiata contro i fratelli cadetti (ivi compreso l'amatissimo Alessandro) all'indomani della morte del padre, al fine di mantenere ad ogni costo nelle proprie mani l'unità di un patrimonio domestico concepito come indefettibile usbergo della famiglia nobiliare (in tale occasione arriverà a difendere il valore stesso di quel fedecommesso contro cui avevano tuonato certe pagine del *Caffè*, osservando come la sua abolizione, "disperdendo in poche generazioni il patrimonio, ridurrebbe poi e i primogeniti e i cadetti a mancare di mezzi per vivere nobilmente e la sola consolazione de' cadetti venturi sarebbe d'essere artigiani egualmente come il primogenito invece di essere nobili poveri": p. 484 in nota).

'Vivere nobilmente', dunque, come scelta identitaria primaria e basilare; e prima ancora come modo di essere affatto congenito e naturale per un personaggio che, ovunque vada, si muove sempre all'interno della cerchia dei suoi pari-ceto, con questi si deve confrontare e da questi è principalmente valutato. A questo tipo d'identità corrisponde uno specifico livello di appartenenza, che trova il suo fulcro in quella Milano patrizia a cui Verri si riferisce correntemente come alla sua 'patria', ma che non si esaurisce però entro il breve circuito delle mura urbane. Capitale di uno Stato e insieme periferia di un impero, la Milano di Verri è la porta d'accesso di una ben più vasta nazione nobiliare, al cui interno egli sembra muoversi con disinvoltura, sempre riconosciuto ed accolto come un membro di pieno diritto (durante la sua breve esperienza militare, per esempio, pur non essendo che un ufficialetto di prima nomina, è ammesso regolarmente alla mensa del maresciallo Daun, comandante in capo dell'esercito imperiale; mentre a Vienna, dove pare perfettamente a suo agio, si concede addirittura il lusso di trascurare un pochino Maria Teresa, a cui quella piccola mancanza d'attenzione continuerà a bruciare a lungo). Il fatto, poi, che la sua appartenenza a questo mondo aristocratico sia stata da lui declinata in termini spesso spietatamente critici verso i suoi pari-ceto

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non significa che egli non vi abbia aderito *in toto*, come ad un ambiente inseparabile dalla propria stessa essenza di uomo.

3. Su questa prima identità a partire dalla fine degli anni Cinquanta se ne sovrimprime un'altra, che matura rapidamente in coincidenza con la sua permanenza al campo ed a Corte. L'evento decisivo che porta alla luce questo 'secondo' Verri, incanalando in una direzione ormai definita il suo ribellismo, è l'incontro con la grande cultura illuminista anglo-francese e col nuovo tipo di razionalità spregiudicata e concreta che essa veicola. La scoperta di Montesquieu, degli economisti e ancor più del sensismo elveziano, corroborata dall'amicizia con un tipico campione dell'intelligenza anglosassone quale Henry Lloyd, dischiude a Pietro un uso della ragione completamente diverso ed incomparabilmente più efficace rispetto a quello tradizionale, grazie al quale è possibile riprogettare la realtà secondo stilemi nuovi, senza sentirsi vincolati dal peso del passato o dall'autorità dei propri maggiori. Ed è appunto la raggiunta certezza di essere in possesso di questo decisivo *know-how* a far scattare nell'intimo di Verri — nota Capra — "una nuova consapevolezza di sé e del proprio valore" (p. 164) e ad aprire così un solco profondo tra lui stesso e quelle "gens vulgaires" da cui d'ora in poi si vedrà perpetuamente circondato. L'illuminismo non offre a Verri soltanto un nuovo orizzonte culturale, ma soprattutto un inedito spazio identitario, corrispondente all'insieme di coloro che hanno appreso a fare un uso critico della ragione e che partecipano della medesima *civilisation*. Nasce così il Verri-'filosofo', ascritto a una comunità cosmopolita di "hommes de genie" destinati a non avere "souvent pour toute recompense que l'oublie de leurs concitoyens, et quelquefois les plus acharnées persecutions", eppure assistiti dalla certezza che le verità da essi dichiarate presto o tardi trionferanno, imponendosi con la forza dell'evidenza finanche a ministri e sovrani (p. 161). Scrivendo queste righe, verso il 1760, il nostro Pietro sbozza per la prima volta un'immagine destinata a riaffiorare spesso nei suoi scritti successivi, in cui si esprime la percezione del nuovo 'noi' a cui egli sente di appartenere: in sostanza, un gruppo di campioni dell'intelletto accomunati dalla disponibilità ad accettare una visione crudamente meccanicistica della natura e dei rapporti umani, ma proprio per questo portatori di un sapere sociale dalle grandi potenzialità, che trova il suo fulcro non più nella eterna *ars boni et aequi* dei giuristi, ma semmai nella nuova scienza economica. Un tale gruppo, ancora estremamente ridotto nella sua consistenza effettiva, rivela però un diametro proiettivo immenso, trovando il suo punto di fuga in una pubblica opinione di dimensioni universali ("lo spirito filosofico va dilatandosi per ogni parte, e questo ruscello un tempo povero e disprezzato è vicino a diventare un fiume reale, il quale sormontando gli argini ormai logori… innaffierà colle acque sue fecondatrici la terra" (p. 197); "l'Europa tutta

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è ormai una nazione intera", e i popoli "trovansi divisi bensì in diverse provincie e sotto diversi governi; ma … formano piuttosto diverse famiglie d'uno Stato che nazioni diverse" (p. 224)).

La grande impresa del *Caffè* rappresenta appunto, per Verri, il tentativo di dar corpo a questa comunità, invero assai più virtuale che effettiva, di cui egli si sente così intensamente partecipe. Per un momento, sembra che egli abbia scelto la strada di viversi come un formatore dell'opinione e un costruttore del pubblico, secondo il modello proposto dai grandi intellettuali d'oltralpe e d'oltre Manica. Il progetto del suo giornale era infatti proprio quello di strappare al "letargo dell'ozio" coloro che "non devono avere inquietudine per il loro sostentamento", e per questa strada pervenire, "per un insensibile pendio", all'"universale ripulimento su tutta una nazione" (p. 225). Il che implicava, in sostanza, di porsi senza riserve dal lato della nascente società civile, facendosene insieme portavoce e maieuta. L'indagine di Capra, tuttavia, conferma che Verri non pensò mai di calarsi davvero in un ruolo come questo, conforme all'ideale d'alembertiano di un "homme de lettres" dedito unicamente al dialogo col suo pubblico e deciso a trovare in esso la sua ragion d'essere. Una scelta del genere non era solo agli antipodi di quell'urgenza di emergere che Verri provava tanto acutamente, ma ancor prima del suo stesso genoma cetual-familiare, che lo voleva membro attivo della classe dominante e avviato ad occupare un preciso ruolo istituzionale nell'ambito del governo della 'patria'. Proprio l'incontro con il nuovo universo dei lumi, anzi, aveva esasperato l'impazienza temperamentale di Pietro, sfidandolo a "ridurre a dimostrazione la bestialità di chi col fatto s'ostina a non volermi trovare buono a nulla" (p. 168). "Render[si] superiore alla comune degli uomini con qualche carica" e marcare in questo modo quel divario tra sé e gli altri che ormai sentiva come una dimensione profonda del suo io diventò in breve il suo obbiettivo prioritario. E rispetto a un disegno siffatto, quale sostegno poteva mai offrire una sfera pubblica ancora tanto gracile e povera di politicità come quella della Milano degli anni Sessanta? L'esperienza del *Caffè*, che pure costituisce l'episodio forse più memorabile della vita di Verri, nel racconto di Capra si configura come una sorta di pur brillante interludio: funzionale, nell'ottica del protagonista, da un lato a compensare "la disgrazia di non essere ancora impiegato in nulla" (p. 233) e dall'altro a segnalarsi ad un governo in cerca di nuovi collaboratori, fornendogli una prova di autonomia rispetto al vecchio patriziato. "L'opinione che contava non era quella di un pubblico indifferenziato, quanto piuttosto quella di chi teneva le leve del potere, il ceto politico e la classe dirigente della società" (p. 230). Certo, già pochi anni dopo la cessazione del giornale sarebbero cominciati i rimpianti e con essi i conati (invero più verbali che effettivi) di "riedificare Gerusalemme", cioè di riavviare in qualche modo un tentativo di comunicazione mediatica il cui valore non poteva

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sfuggire a chi ne era stato protagonista. Ma la scelta era stata diversa e si rivelò irrevocabile. E se per un verso si trattò di una scelta certamente più coraggiosa e, nell'immediato, assai più produttiva rispetto a quella di servire la causa dei lumi soltanto con la penna, essa è anche il sintomo della debolezza di una *élite* intellettuale che non riesce ancora ad autonomizzarsi dallo Stato e dalla sfera istituzionale in genere.

4. A distanza, dunque, di poco più di un lustro dalla sua apparizione, il 'filosofo' diventa funzionario; o meglio, prosegue il suo cammino adottando appunto quest'altra identità, che lo vede ora incardinarsi non nel seno di una società vocazionalmente 'borghese', ma nella pianta organica di uno Stato che in questa fase sembra costituire il fattore di rinnovamento più significativo del piccolo universo lombardo. Tra la fine degli anni Sessanta e il 1771 Verri vive il suo momento di massima realizzazione esistenziale, in cui la scelta di affermare la propria superiorità attraverso l'alleanza col principe pare rivelarsi vincente. Forte della protezione sovrana, il ministro "industrioso" può spingere a fondo la sua grande offensiva contro i fermieri, gettare le basi di un nuovo assetto economico-finanziario statale e intanto dare libero sfogo al suo disprezzo per il vecchio patriziato e per l'arcaica società corporativa che lo sorregge. Milano, la patria naturale, diventa una "nazione corrotta", "incallita sotto la schiavitù dei secoli" e "sprovveduta d'ogni criterio morale" (p. 291); mentre è attorno a Vienna, capitale di una illuminata monarchia burocratica e centro irradiante di un benefico dispotismo, che finiscono per orbitare in questi anni i suoi sensi d'appartenenza. Ad aprirgli le braccia è ora (parafrasando Chabod) una sorta di 'nazione degli officiali', idealmente composta da uomini superiori come lui, tutti uniti da un grande progetto di rinnovamento civile da condurre sotto la guida del sovrano. Una nuova patria, insomma, anche se tanto esigente nelle sue griglie d'accesso da stentare a ricomprendere parecchi dei suoi stessi compagni di strada d'un tempo (come Carli o Beccaria), ormai ripiegati su posizioni per lui troppo convenzionali.

Poi, a partire dal 1771, i primi disinganni. Posposto a Carli nella direzione delle finanze lombarde, Verri comincia a sentirsi più uno strumento nelle mani dello Stato che quel protagonista della scena politica che aveva creduto di poter diventare. La nazione funzionariale a cui si era ascritto si trasforma in una macchina burocratica sempre più grigia ed estranea; e lui stesso si scopre ora come un "uomo degradato", costretto a faticare "bestialmente" sulla "carta sporcata" di un ingrato lavoro d'ufficio. La partita, certo, è tutt'altro che chiusa. Alla fine del 1780, in particolare, il conseguimento della agognata presidenza del Magistrato Camerale lo risarcisce in parte delle frustrazioni precedenti e lo riavvicina ad un sovrano come Giuseppe II il cui furore iconoclasta non poteva non avvincerlo. Ma l'entusiasmo è tramontato e con esso

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anche il frenetico ritmo di lavoro che aveva caratterizzato l'esordio del suo servizio. "Filosofo maritato", egli è ormai convinto che, se "nella gioventù conviene azzuffarsi", "nella virilità un decente, comodo seggio, una vita regolare e placida, una borsa non vuota sono i beni che si preferiscono" (p. 459); e comincia a desiderare di essere "dimenticato nella folla", per trovare così il "tempo di far[si] colle lettere un nome che duri più che non durerebbe un pecorino d'oro che quei signori mi appendessero al collo" (p. 424). Mentre dunque la comunità di eccellenti che idealmente lo accoglie si disloca sempre più apertamente fuori dallo Stato ("gli uomini di genio singolare non servono agli affari della società se non nascono sotto il trono; la loro carriera è aperta nelle scienze e nelle arti, ma nella guerra e nella politica troppo timore cagiona l'uomo che superi gli altri colla energia dei sentimenti e delle idee": p. 429), i suoi superiori non possono non rilevare quanto gli sia "difficile… adattarsi al giornale materiale travaglio" richiesto dalla nuova pratica amministrativa (p. 458).

Perché il problema è proprio questo: votandosi al servizio del principe, Verri aveva creduto di entrare in politica, mentre in realtà si era dato in ostaggio all'amministrazione — a quella nuova amministrazione, dai tratti vocazionalmente moderni, che andava sostituendo i valori dell'impersonalità e dell'efficienza esecutiva ad un'autonomia decisionale già propria dei vecchi apparati di ceto e ora fatalmente avviata al tramonto — . D'altra parte, il disagio indotto in lui dal nascente universo burocratico non poteva certo riavvicinarlo in alcun modo a un patriziato verso il quale la sua avversione non faceva che crescere: ché anzi, fu proprio la sempre più decisa curvatura antinobiliare assunta dalla politica viennese nel corso degli anni Ottanta a fare di lui, nonostante tutto, un partigiano entusiasta dell'"adorato Giuseppe II" — "il Giusto e l'amico degli uomini" — e del suo radicalismo riformatore.

5. Ecco, dunque, che la messa a riposo da cui si trova improvvisamente colpito nel maggio del 1786 apre per Verri una drammatica crisi d'identità. Il carattere del tutto inatteso del suo licenziamento (solo un anno prima l'Imperatore si era familiarmente intrattenuto con lui in un colloquio di cui egli aveva conservato un commosso ricordo) e la gelida, impersonale fermezza con cui esso viene confermato contro tutte le sue proteste, gli rivelano finalmente l'enormità dell'equivoco in cui si era cullato per vent'anni. Messo da parte non a seguito di una qualche insufficienza specifica, ma semplicemente per il fatto che un funzionario del suo livello risultava in soprannumero rispetto alla nuova pianta organica approvata nell'86, egli scopre come quello Stato-apparato che l'ultimo Settecento stava prefigurando non fosse incompatibile soltanto con le vecchie forme della politica, ma anche con l'integrazione di qualsiasi *élite* diversa da quella puramente burocratica. Esso poteva

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costituire un luogo d'appartenenza — una 'patria' — tutt'al più per degli anonimi, servili impiegati, non certo per quell'individuo libero ed autosufficiente che egli sentiva di essere. Dove trovare dunque rifugio? Abbandonato da uno Stato che si era servito di lui solo per instaurare un nuovo dispotismo sulle rovine dell'antico, e sempre più estraneo alle grette coordinate della patria cetuale (la "corrotta Repubblica" milanese), Verri non riesce a lenire il proprio isolamento neppure tornando a volgersi verso quella cosmopolita comunità letteraria di cui pure, grazie al suo instancabile attivismo di pubblicista, egli non aveva mai cessato di essere un cittadino *optimo iure*. Le ancora esilissime trabeazioni della sfera pubblica italiana di fine Settecento sono ben al di sotto del bisogno di visibilità e di gratificazione sociale che gli brucia dentro; e lo *status* di scrittore, ora come negli anni Sessanta, non può rappresentare altro, per lui, che il complemento (sia pur essenziale) di una identità fondata su presupposti diversi. In più, l'esperienza accumulata e il suo sempre più radicale scetticismo verso gli uomini e le cose hanno finito per allontanarlo molto da un pubblico che egli avverte restío a comprendere il suo messaggio e a condividere i suoi travagli ("a chi scrivo? A nessuno. Chi ne avrebbe bisogno non si cura di leggere, chi legge non ne ha bisogno": p. 531). La scrittura, che pure egli continuerà a coltivare intensissimamente nel corso degli ultimi anni, non è più destinata alla stampa e alla diffusione, ma diventa ora una forma di sfogo e di testimonianza interiore: è il dialogo con una sorta di pubblico futuro, morfologicamente vicino a quello a cui Alfieri sta offrendo, proprio in questo stesso torno di anni, i suoi celebri trattati politici, anch'essi pensati in vista di un consumo differito.

E intensamente, anche se del tutto inintenzionalmente, alfieriana (una inintenzionalità che rende ancora più significativa la convergenza) è appunto la nuova identità che Verri si drappeggia addosso nella seconda metà degli anni Ottanta: raffigurandosi come un solitario eroe della ragione che svetta al centro di un'umanità vile e meschina ed il cui compito — nell'oggettiva impossibilità d'incidere e di esser compreso — consiste nel continuare a testimoniare i grandi valori di cui è stato eletto custode. Come s'è visto, si tratta di una percezione di sé tutt'altro che nuova per il nostro personaggio. Nuovo è però il vuoto assoluto che sta attorno al protagonista, stretto tra uno Stato ormai a lui indifferente ed una società di "uomini mediocri" che "s'uniscono facilmente contro quell'uomo grande, unicamente perché s'accorgono di essere conosciuti da lui per mediocri" (p. 511). In astratto, certo, l'"opinione" continua ad essere la "sovrana immortale del mondo" e a garantire agli uomini di lettere un dominio universale sui popoli e sui monarchi: ma ormai si tratta di una certezza appartenente più agli articoli di fede che all'esperienza comune. Nell'immediato, anzi, "il volgo… si lascia sedurre dalla opinione riunita dei molti mediocri da esso creduti eccellenti", imprigionando il filosofo in una spirale d'ostilità da cui egli può difendersi

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solo mediante un'accorta dissimulazione: "la verità sta nei libri, e rare volte pure vi sta; l'uomo che ingenuamente la presenti nelle cose ordinarie della vita, peggio poi negli affari, s'espone ad una pericolosa carriera" (ibidem). Il punto d'arrivo, insomma, non è molto lontano da quello dell'Alfieri della *Virtù sconosciuta*: l'uomo d'eccezione, il 'virtuoso', sopravvive solo mascherando prudentemente la sua eccellenza sugli altri e mantenendo viva la propria verità entro una dimensione intima e segreta, in attesa di giorni migliori.

All'interno di questo nuovo quadro la questione dell'appartenenza si presenta nella prospettiva di un prepotente bisogno inappagato. Il Verri-eroe è un uomo senza patria, un esiliato virtuale; e d'altra parte questo vuoto è per lui così doloroso e incolmabile che proprio attorno ad esso si costruisce tutta la sua nuova figura, densa di umori preromantici (che poi la cura di un pingue patrimonio ed una vita di grande agiatezza finalmente affrancata dalla tutela paterna dovessero compensare abbondantemente, su un altro piano, le frustrazioni che egli veniva accumulando nella sua dimensione pubblica, niente toglie all'autenticità di queste ultime).

6. Lo scoppio della Rivoluzione interviene proprio nel momento più acuto di questa crisi identitaria; e il suo primo effetto è quello di confermare in pieno a Verri l'enormità storica della emarginazione a cui si trova condannato. Mentre gli intellettuali francesi suoi omologhi sono divenuti i padroni dello Stato, egli, "nato in Italia e singolarmente nel Milanese, non *può* sfogare i suoi pensieri se non collo scrivere, e per non turbare la placidezza della *sua* vita rinunciare a pubblicare un libro che non conciterebbe che paura ed odio contro il suo autore" (p. 541). Quella nuova sfera pubblica che prima in Inghilterra e ora anche in Francia ha sostenuto e sospinto avanti le "gens de lettres", fino a condurle ad una trionfale conquista della sovranità, nell'oscura Lombardia non è neppure disposta ad ascoltare le verità che esse anelano di offrirle! E tuttavia, proprio l'esempio d'oltralpe spalanca una prospettiva davanti alla quale Verri non sa rimanere impassibile: quale quella di una politica condotta *in proprio* da uomini come lui, che fino ad allora non avevano saputo immaginarsi altro che come collaboratori del principe o animatori di una mera scena culturale. La Rivoluzione materializza, in uno spazio non più astratto o remoto (la felice Inghilterra, la rustica Svizzera, la piccola Olanda…), l'immagine di quella comunità autosufficiente di liberi e di eguali che egli andava confusamente cercando da sempre. Né la conclamata arretratezza del contesto italiano basta a spengere in lui ogni speranza di veder realizzato anche nel suo paese il miraggio di una *élite* dei talenti che si renda padrona dei propri destini. Dal '90 in poi, la sua riflessione politica assume la forma di un monitoraggio continuo della vicenda francese, volto soprattutto a verificarne la riproducibilità costituzionale in altri contesti. Che le

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conclusioni di questa ricerca siano state positive è ben noto (come si sa, egli si fece dapprima paladino di un costituzionalismo monarchico di marca fisiocratica, che cercò di far prevalere sulle viete istanze di restaurazione cetuale avanzate dalla aristocrazia milanese all'indomani della morte di Giuseppe II; mentre nel '96, all'arrivo dei francesi, aderì pubblicamente al nuovo ordine democratico-rivoluzionario, divenendone un attivo sostenitore). Più contraddittori, invece, apparivano fino ad oggi i percorsi grazie ai quali Verri era giunto a questi traguardi, affidati come sono da un intrico di scritti inediti in cui sembrano affacciarsi spesso posizioni del tutto antitetiche. La ricostruzione di Capra rivendica al contrario l'intima coerenza di quest'ultimo tratto dell'itinerario verriano. Esso può esser letto come la progressiva scoperta di una identità ulteriore — quella di cittadino —, anch'essa da sempre embrionalmente presente nella coscienza del personaggio, ma di cui solo il reagente rivoluzionario provocò l'emersione.

Se per un verso, infatti, l'intrinseco aristocratismo di Verri lo spingeva in modo quasi parossistico a sottolineare la sua preminenza sugli altri ("io amo che il popolo sia meno illuminato di me, amo a far de' paragoni consolanti il mio amor proprio, e se dovessi diventare non più che una frazione centesima milionesima d'Europa io m'impiccherei", confidava al fratello nel '67), quella stessa matrice patrizia gli aveva inoculato l'esigenza non meno imperiosa di venir accolto da un gruppo formato da pari grado, nel cui seno soltanto l'eccellenza del singolo poteva trovare una piena valorizzazione tramite il riconoscimento reciproco. L'ingresso nella grande società criticante settecentesca gli aveva poi confermato, su un altro piano, quanto fosse essenziale essere ricevuti e apprezzati dai propri simili, in base all'argomento tipicamente illuminista per cui il solo, vero metro del valore individuale è il giudizio 'democratico' e imparziale della pubblica opinione. La confessione retrospettiva, perciò, che egli rende sempre ad Alessandro nel settembre del 1796 ("la mia anima è sempre stata repubblicana") non è affatto una giustificazione posticcia della sua adesione al nuovo ordine, ma coglie un tratto profondo della sua personalità (5). In quanto patrizio e insieme membro della cosmopoli letteraria, Verri non poteva non sentirsi 'repubblicano' già da moltissimo tempo. Il fatto è, però, che né le logore vestigia dell'antica costituzione patrizia né le diafane strutture della repubblica letteraria erano state capaci di offrirgli un *habitat* adeguato a radicare quel sentimento. Di qui, il suo ripiegare verso quel surrogato di repubblicanesimo che era stato per lui l'assolutismo livellatore: il quale, tuttavia, aveva mancato del tutto all'impegno di fondare uno spazio egualitario per lui accettabile, dal momento che fra il trono ed i sudditi si era insediata una casta di mediocri

(5) In questo senso, oltre al volume, si veda anche C. Capra, *"La mia anima è sempre stata repubblicana". Pietro Verri da patrizio a cittadino*, in *Pietro Verri e il suo tempo*, cit., t. I, p. 519 ss..

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burocrati ("feudatari senza diploma") che avevano eretto un tipo di gerarchia intermedia ancora più dispotica, perniciosa e ingiustificata di quella già propria dell'antico sistema. La Rivoluzione, al contrario, testimonia la possibilità di creare un ordine di cui gli uomini liberi siano, in solido, i soli padroni. Secondo la lettura di Capra, le oscillazioni di Verri circa la forma — monarchico-costituzionale o repubblicana — da assegnare a quest'ordine sono tutto sommato secondarie (esse non riflettono una vera diversità di opzioni identitarie, ma solo le differenti opportunità offerte dal contesto). E ancor meno rilevanti sarebbero le discordanze pur sovente riscontrate nei suoi giudizi sulla Rivoluzione (in realtà, secondo il nostro autore, il suo atteggiamento a questo riguardo fu dall'inizio alla fine di sincera e piena adesione, eccezion fatta per una comprensibile condanna morale del regicidio e per un'ovvia presa di distanze dall'episodio terrorista). Le stesse difformità nel configurare la cittadinanza politica (che nel '92 vuole riservata ai soli proprietari, mentre successivamente accetta senza difficoltà di estendere a tutti i maschi adulti) sono semplici passaggi interni di un medesimo cammino verso l'accettazione della nazione rivoluzionaria. Maturata a partire dai primi anni Novanta, una tale accettazione viene tenuta ferma da Verri pur nonostante le acutissime angosce provocate in lui — nobile, ricco e padre di numerosa prole — dal contatto diretto con le armate rivoluzionarie e con i loro famelici condottieri, nonché con quei giovani "riscaldati" che per l'avanti "avevano vissuto senza che alcuno si fosse accorto dell'esistenza loro" (p. 572) e che ora guidavano invece la rumorosa avanguardia del movimento patriottico. Più ancora: quella specie di elitismo che lo aveva condotto, per tutta la vita, a misurare ossessivamente la distanza tra sé e gli altri sembra sciogliersi nel grande abbraccio egualitario della Rivoluzione, lasciando il posto ad un senso di grande sollievo. L'azzeramento delle differenze proclamato dalla nuova cittadinanza è salutato come la fine di un incubo. "Avete perduto il privilegio di rimirare le schiene di molti uomini da nulla che vi facevano riverenza — rileva rivolgendosi ai nobili milanesi — ; ma siete liberi dall'umiliante servaggio che prestavate ai pochi che vi comandavano… Non siete più nobili, ma siete qualcosa di meglio: siete uomini e non schiavi" (p. 576). E a chi gli replica che "la libertà non val la pena di essere pagata con tante inquietudini", Verri ancora risponde che "l'affare è di sentimento: gli uni non sentono ribrezzo ad essere schiavi; gli altri lo provano fortissimo" (p. 558). "Il vivere è noioso, o si viva co' superiori, ovvero cogli inferiori. La uguaglianza è la sola che ammetta società, gioia, cordialità", recita ancora il suo ultimo articolo giornalistico del giugno '97 (p. 599). Non è un caso che proprio queste ultime righe siano indicate da Capra come "il più autentico testamento politico del vecchio riformatore". In esse si scioglie la tensione di tutta una vita spesa nella ricerca di un luogo in cui concretizzare il profilo di quella comunità paritetica di uomini liberi che il suo duplice codice di aristocratico e di letterato moderno gli assegnava come vera patria. La

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nazione rivoluzionaria diventa appunto, per l'ultimo Verri, questo luogo lungamente agognato: anche se, certo, un tale riconoscimento, nell'atto in cui segna per lui un punto d'arrivo, viene a costituire per le generazioni a venire l'*incipit* di un nuovo, lunghissimo e sofferto processo.

Di questo processo di creazione di una identità nazionale italiana, Verri ovviamente non riesce a scorgere molto: e tuttavia anche su questo piano la sua testimonianza offre alcuni spunti di grande rilievo. A partire dal '90, in effetti, la sua attenzione è attratta sempre più insistentemente da uno spazio identitario — l'Italia, appunto — che nelle sue riflessioni precedenti aveva avuto ben poco posto, schiacciato com'era tra la 'patria' milanese e la cosmopoli europea. La malcelata freddezza con cui egli aveva accolto, nel '65, il famoso articolo di Carli sulla patria degli italiani ("bello veramente; non vorrei però che sembrasse che l'amor della Patria ci pregiudicasse nell'imparzialità di buoni cosmopoliti") registra bene il suo scarso *penchant* a vestire i panni dell'italiano; panni che il fratello Alessandro, in quella stessa occasione, dipingeva come quelli propri di un popolo "maldicente, inquieto, tumultuante tra la miseria di piccole passioni, costante nell'odio, vendicativo, maligno, povero, abietto, furbo, accorto". "Voi che fate tanto l'italiano — concludeva ancora Alessandro rivolgendosi a Carli —, ho l'onore di dirvi che non lo siete punto; l'entusiasmo vostro per la virtù e la limpidezza del vostro cuore non sono roba italiana" (6). Non molto lontana da questa doveva essere l'Italia di Pietro: un luogo morale e civile definito in negativo, secondo l'immagine imposta dai viaggiatori stranieri a partire dall'inizio del secolo, e dunque un problema da studiare e da comprendere (segnatamente attraverso quel prisma storico della 'decadenza' alla cui costruzione egli stesso aveva dato un contributo decisivo nella *Storia di Milano*), ma non certo uno specchio in cui riconoscersi. Per un figlio dei lumi e un "cittadino d'Europa", come lui stesso si definiva, l'Italia attuale era proprio il reciproco della patria cercata: uno spazio da osservare a distanza, attraverso l'occhiale asettico del filosofo, un altrove abitato da coloro che non si erano ancora districati dalle maglie dell'arretratezza e della corruzione.

Già alla fine degli anni Ottanta, però, le cose vanno ad assumere un'altra piega. Brutalmente estromesso da quella nazione burocratica in cui si era tanto sforzato di credere, egli comincia a nutrire verso il governo di Vienna un risentimento venato di xenofobia. Se già in gioventù non aveva mancato di rilevare che "questi Signori Austriaci ci guardano come provinciali, come gl'Inglesi riguarderebbero gli Americani loro sudditi" (p. 142), ora si è davvero convinto che tutto il così detto programma riformatore giuseppino non abbia avuto altri moventi che la "nazionale rivalità" e l'"ambizione di comando" (p. 506). Di qui,

(6) Entrambi i passi sono citati da M. S. SAPEGNO, *"Italia", "Italiani"*, in *Letteratura italiana*, vol. V, *Le Questioni*, Torino, Einaudi, 1986, p. 192.

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non solo il rigetto del paternalismo viennese, ma anche l'emergere di un primissimo germe di orgoglio nazionale (l'Austria è "una nazione naturalmente stupida" che si vuole "rendere padrona di una nazione colta": p. 531): orgoglio che la Rivoluzione intercetta ed amplifica, sia pure in forme estremamente problematiche e sofferte. Nel momento, infatti, in cui i "progressi della ragione" additano come unica strada percorribile quella della emancipazione dei popoli, il nuovo soggetto collettivo, il 'noi' concreto in cui riconoscersi, non può che essere quello italiano. A fronte dell'angustia dell'orizzonte regional-cittadino e della indeterminatezza di quello europeo, è l'Italia a farsi avanti e ad occupare il proscenio — anche se si tratta di un'Italia ancora geograficamente indefinita e quasi certamente incapace di superare i confini padani. A partire da questa fase, l'identità italiana sembra divenire per Verri un tratto non più disponibile della sua personalità. Certo, si tratta di un'identità difficile e addirittura ingrata da vivere. L'ultima parte del libro di Capra sorprende sempre più spesso il vecchio illuminista a interrogarsi angosciosamente su che cosa sarà dell'Italia — di questo paese che "geme nell'inerzia sotto il peso della falsa politica e della superstizione" e che è divenuto giustamente "l'oggetto del disprezzo dell'Europa" (p. 559) —. "Immaturi e non ancora degni di vivere sotto il regno della virtù", "a forza di voler esser furbi siamo al pari dei Greci il rifiuto dell'Europa dopo esserne stati i maestri" (p. 552). Come potrà questo popolo "cieco e smarrito", il cui carattere è "l'effetto della decadenza", rendersi "capace di una costituzione", quando l'emancipazione politica non può che germinare dai lumi, e quindi da quella giusta intolleranza dell'oppressione che da essi soli discende (p. 561)? L'esperimento rivoluzionario non si ridurrà, per l'Italia, a "rinnovare le sciagure de' Guelfi e Ghibellini"? Il tormentoso riproporsi di questi dubbi non impedisce però a Verri di abbracciare un'italianità che non può più essere rifiutata e di scoprire un nuovo patriottismo, ben differente da quello quietamente ragionevolistico dei giorni del *Caffè*. Diversamente dalla piccola patria lombarda di quel tempo ormai lontano, l'Italia non attende più riforme doganali o frumentarie, revisioni del sistema fiscale o miglioramenti della produzione agricola: essa chiede invece una "conversione", un "risorgimento" che la risvegli dal "lungo sonno" della decadenza e le restituisca qualcosa dell'antica dignità di "domatrice d'Europa, maestra, signora de' popoli". E se "l'Inghilterra, un tempo rozza e barbara, ora è la maestra dell'Europa", perché allora anche la penisola non potrebbe un giorno tornare ad aprire i suoi occhi (p. 561)?

7. In conclusione, il libro qui recensito sembra offrire un sondaggio prezioso sulle radici dell'identità italiana, utile non solo per leggere la storia del Settecento, ma anche quella del secolo successivo. Il dramma vissuto con grande precocità dal sensibilissimo Verri presenta

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vari punti di contatto — *mutatis mutandis* — con quello attraverso il quale passeranno molte *élites* italiane di primo Ottocento, gradualmente raggiunte dalla stessa ondata modernizzante che ha scosso il nostro riformatore. Anche quelle *élites* si troveranno a raccordare le loro identità premoderne, di regola radicate in ristretti spazi locali, con la scoperta di appartenere ad una nuova *koiné* intellettuale, dai confini indefiniti, dai linguaggi dirompenti e dalla forte vocazione egualitaria. Anch'esse deriveranno da questa consapevolezza una più alta coscienza del loro valore, ma al tempo stesso sperimenteranno la difficoltà di conquistarsi un ruolo che a quel valore sia pari in seno a un paese scarsissimamente acculturato e dotato di una sfera pubblica appena embrionale. Anch'esse, perciò, saranno portate a volgersi insistentemente verso lo Stato, nel quale si sforzeranno di vedere un loro alleato naturale e addirittura un luogo d'integrazione, finché ne saranno in varia misura deluse o respinte. Strette tra una società arcaica e un mondo istituzionale sordo al loro richiamo, esse produrranno allora un'immagine di sé che ricalca in buona misura quella eroica e abnegativa sbozzata dal Verri più tardo; fino a costruire poco a poco su di essa una nuova identità nazionale. Non va comunque dimenticato che fin nel cuore dell'Ottocento l'avvento della nazione non escluderà assolutamente il persistere di altri luoghi identitari di diverso diametro. Ancora per molto tempo la 'patria' continuerà a costituire, per le *élites* italiane, uno spazio tutt'altro che univoco e a rinviare, come nell'immaginario verriano, ad una concezione telescopica dell'appartenenza politica. "La patria è, come la famiglia, un nome indeterminato che può estendersi più o meno, e sempre rimane intero in ogni sua parte — scriverà Cesare Balbo —. Famiglia de' figliuoli è quella del padre; famiglia quella lontana e più numerosa dell'avo e del bisavo e di qualunque ascendente che eserciti l'autorità paterna. Così succede della patria, che taluno ne può avere diverse, per così dire, di diverso grado, comprese l'una nell'altra" (7).

(7) C. Balbo, *Pensieri ed esempi. Opera postuma*, Firenze, Le Monnier, 1856, p. 66.

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FILIPPO RUSCHI

IUS PRAEDAE. OSCAR CRUZ BARNEY E LA 'GUERRA DI CORSA' COME PARADIGMA DELLA MODERNITÀ

(a proposito di O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, UNAM, Mexico, 1997 e di O. Cruz Barney, *El combate a la piratería en Indias. 1555-1700*, Oxford University Press, Mexico, 1999)

La 'guerra di corsa' ha avuto, a partire dagli albori dell'età moderna, una notevole rilevanza sul piano politico, giuridico ed economico. Non è certo un caso che Grozio, giovanissimo e brillante *Advokaat-fiscaal*, dovesse molto della sua fama tra i contemporanei ad un breve scritto, *Mare Liberum*. Questo testo era stato concepito come un parere *pro-veritate* sulla liceità della cattura di un galeone portoghese da parte di una nave della *Verenigde Oostindische Kompanie* — la potente compagnia olandese delle Indie Orientali — nelle tribolate acque delle Molucche. (1) Ed è appena il caso di ricordare come la talassocrazia inglese si sia affermata proprio grazie alla guerra di corsa, condotta con indiscutibile successo fin dalla metà del '500 da personaggi destinati ai fasti della storia della navigazione. Basterà citare John Hawkins, precursore del tragico quanto lucroso commercio rappresentato dalla tratta degli schiavi, Francis Drake, la cui circumnavigazione del globo fu segnata da continue razzie ai danni delle colonie spagnole, e Walter Raleigh uno dei maggiori artefici delle fortune inglesi in Nordamerica e già celebre 'scorridore' delle coste caraibiche (2).

(1) La vicenda è intricata. Apparso anonimo nel 1609, *Mare Liberum, sive de iure quod Batavis competit ad indicana commercia, dissertatio*, costituiva in realtà un capitolo del *De Jure Predae commentarius*: un'ampia riflessione sui fondamenti del diritto marittimo portata a termine da Grozio tra il 1604 ed il 1605. La delicata situazione politica, però, lo aveva costretto a lasciare inedito questo manoscritto che venne ritrovato solo nel 1864 e, finalmente, pubblicato nel 1885. *Mare Liberum* venne successivamente ripubblicato nel 1618, questa volta a firma dell'autore. Sulla vicenda si veda F. De Pauw, *Grotius and the Law of the Sea*, Editions de l'Institute de Sociologie, Bruxelles, 1965 ed anche C. G. Roelofsen, *Grotius and the International Politics of the Seventeenth Century*, in H. Bull, B. Kingsbury, A. Roberts (eds), *Hugo Grotius and International Relations*, Oxford University Press, Oxford, 1992, pp. 95-131.

(2) Se è indubbio che la guerra di corsa ha conosciuto la sua età dell'oro tra la metà del Cinquecento e gli inizi del Settecento e ha trovato nelle acque del medio Atlantico il massimo sviluppo, non si può tacere l'importanza che il fenomeno ha avuto nel Mediterraneo, come tra gli altri ha ampiamente documentato Fernand Braudel, cfr.

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Confronto tra due differenti ordinamenti spaziali — per dirla con Carl Schmitt —, il prolungato conflitto anglo-spagnolo per il dominio degli oceani è uno snodo fondamentale della modernità attraverso il quale l'Inghilterra riuscì a imporsi come *sea-power*. E proprio acquisendo questa nuova dimensione, come ha osservato Wilhelm Grewe nel suo poderoso *Epochen der Völkerrechtgeschichte*, essa si pose in una "deep antithesis to all political, constitutional and legal concepts developed in continental Europe" (3).

Si tratta di una vicenda che trova origine nella ben nota bolla *Inter caetera* con cui papa Alessandro VI, ad un anno dalla scoperta del Nuovo Continente, aveva attribuito *las Indias* alla corona castigliana a titolo di *donatio*, *concessio et adsignatio*. Alessandro VI, però, non si era limitato a legittimare la *Conquista* spagnola delle Indie. Altrettanto dirompente sul piano geo-politico fu l'attribuzione alla Spagna del monopolio commerciale, pena la scomunica *latae sententiae* per coloro che avessero contravvenuto al divieto. In un'Europa prossima al trauma della Riforma, era inevitabile che le disposizioni pontificie fossero presto travolte dagli appetiti delle potenze oceaniche della prima modernità: Inghilterra, Olanda e Francia (4). Una situazione che la Pace di Cateau-Cambrèsis avrebbe fotografato con chiarezza, nel momento in cui, chiudendo la prima fase delle guerre di religione nel Vecchio Continente, lasciava irrisolta la questione delle Americhe, investite da una conflittualità endemica e diffusa.

Proprio a partire da tale contesto storico-politico Oscar Cruz Barney conduce un'accurata analisi della guerra di corsa in una prospettiva, per altro, assolutamente singolare: quella dello storico del diritto. E sempre per rimarcare l'originalità di queste ricerche, occorre sottolineare che Cruz Barney non si occupa delle vicende inglesi o francesi, relativamente conosciute, ma studia l'esperienza della 'corsa' ispanica e di quella messicana, che le era succeduta. A partire dai primi decenni del Seicento l'Impero spagnolo, ormai all'inizio di un irrever-

F. Braudel, *La Méditerranée et le monde méditerranéen à l'époque de Philippe 2*, Colin, Paris, 1949, trad. it., *Civiltà e imperi del Mediterraneo nell'età di Filippo II, voll. I-II*, Einaudi, Torino, 2002. Le relazioni tra la sponda settentrionale e quelle meridionale furono sottoposte fin dagli esordi della marineria araba e berbera ad una costante conflittualità, con alterne vicende. E certo fu sintomatico che l'Occidente cristiano abbia dovuto approntare una sorta di forza multinazionale permanente, nella singolare forma della milizia di San Giovanni di Gerusalemme: un ordine 'religioso' e 'militare' allo stesso tempo, con sede prima a Rodi e poi a Malta, che aveva l'obbiettivo di bloccare — e di replicare adeguatamente — le scorrerie provenienti dal Nordafrica.

(3) Cfr. W. G. Grewe, *Epochen der Völkerrechtgeschichte*, Nomos Verlagsgesellschaft, Baden-Baden 1984, engl. trans., *The Epochs of International Law*, Walter de Gruyter, Berlin-New York, 2000, p. 274.

(4) Per una ricca bibliografia relativa alle questioni giuridiche e politiche sollevate dalle Bolle alessandrine, cfr. M. G. Losano, *I grandi sistemi giuridici*, Laterza, Roma-Bari, 2000, pp. 246-255.

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sibile processo di decadenza, iniziò ad emettere patenti di corsa del tutto analoghe alle *letters of marques* ed alle *lettres de marche* che già da tempo i sovrani di Inghilterra e di Francia usavano concedere in abbondanza (5). E lo facevano proprio al fine di bloccare il flusso di ricchezze provenienti dal Nuovo Mondo e dirette verso i forzieri di Madrid (6). Si tratta di una prassi che le deboli repubbliche latinoamericane, una volta emancipatesi dalla Spagna, avrebbero fatto propria. Il Messico, in particolare, a lungo oggetto delle attenzioni tutt'altro che benevole delle potenze europee, travagliato da una serie ininterrotta di guerre civili e costretto a fare i conti con un vicino ingombrante come gli Stati Uniti, non avrebbe esitato a emettere — e siamo nel 1846 — dettagliati *Regolamentos* per disciplinare la guerra di corsa.

Le ricerche di Cruz Barney, oltre al loro indiscutibile valore sul piano della storiografia giuridica, hanno il merito di offrire ulteriori, preziose, chiavi di lettura per interpretare il fenomeno del *corso*. Ripercorrere queste vicende significa, in primo luogo, confrontarsi con un momento delicatissimo della modernità: il passaggio dalla nozione medioevale di guerra privata a quella moderna di guerra pubblica. Si tratta di una dinamica complessa in cui il fenomeno della 'corsa' è momento importante, anche se non privo di ambiguità. L'individualismo che caratterizza la figura del corsaro, l'essere in definitiva un *private enterprenateur*, come ha suggerito John Hale, proietta infatti la guerra di corsa nell'Evo Moderno (7). Alla luce del processo di accentramento istituzionale che caratterizza lo Stato moderno e del progressivo svilupparsi di burocrazie specializzate anche in campo militare, il corsaro appare però con il passare del tempo un residuo dell'età basso-medievale, l'epoca delle 'condotte', per intenderci.

In una fase storica contraddistinta da feroci lotte religiose, la 'corsa' si profila poi come una guerra 'laica'. Se in Europa i conflitti furono segnati da stragi e devastazioni, frutto di un furore fanatico, la 'corsa' si caratterizza come un nuovo modo di fare guerra, inteso a piegare l'economia avversaria, ad indebolirne la capacità produttiva. Il corsaro, si è già detto, era un imprenditore che doveva far quadrare i conti dell''azienda': all'affondamento della nave avversaria preferiva di gran lunga la cattura. Alla distruzione di una città — operazione per altro tecnicamente difficile con gli scarsi mezzi a disposizione dei corsari — era preferibile la spoliazione. È vero che nelle cronache dell'epoca è

(5) È la vigilia del Natale 1621, quando Filippo IV promulga la *Ordenanza de su Mageftad, para navegar en corso, afsi contra Turcos, Moros, y Moriscos, como contra los Rebeldes de las islas de Holanda, y Zelanda*. Si tratta della prima *ordenanza de corsa* emanata dalla Spagna.

(6) Cfr. in merito ai *privateers* W. G. Grewe, *The Epochs of International Law*, cit., pp. 312-315.

(7) Cfr. J. R. Hale, *War and Society in Renaissance Europe*, Sutton, Phoenix Mill, 1998, p. 82.

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ricorrente l'espressione 'corsarios luteranos', ma con questa locuzione ci si riferiva solo all'area geografica di provenienza dei corsari, senza alcun specifico significato confessionale.

Ripercorrere la 'corsa', inoltre, significa riflettere sull'evoluzione del concetto stesso di *polemos*, che in questo particolare contesto assume una valenza — per così dire — 'protoclausewitziana': la 'corsa', prima che strumento militare, era duttile artifizio politico, mezzo di dissuasione dell'avversario e allo stesso tempo strumento di pressione nei confronti dell'incerto alleato. In tal senso la 'corsa' precorreva quel processo di secolarizzazione del conflitto, per cui la guerra, perduto ogni attributo etico-teologico, si è progressivamente trasformata in uno degli istituti fondamentali delle relazioni internazionali: come infatti ha rilevato Hedley Bull, nell'epoca moderna "war is a means of enforcing international law, of preserving the balance of power, and, arguably, of promoting changes in the law generally regarded as just" (8).

Infine l'aspetto giuridico: l'impulso che le vicende della corsa e della lotta al contrabbando — fenomeni strettamente connessi nell'ordinamento marittimo ispanico — hanno dato allo sviluppo del diritto internazionale marittimo è innegabile e trova negli studi di Cruz Barney una definitiva, preziosa testimonianza. Il diritto di preda, la nozione di contrabbando, lo *status* della nave neutrale, il diritto di visita, il blocco, prima di essere istituti fondamentali del diritto internazionale marittimo contemporaneo — si pensi solo alle recenti vicende legate al controllo del Mar Arabico e del Golfo Persico — hanno rappresentato questioni 'sensibili' su cui tanto la dottrina che le cancellerie ottocentesche si sono a lungo interrogate, faticando a trovare soluzioni unitarie.

Le vicende ricostruite da Cruz Barney si collocano in un lasso di tempo che vede la Spagna decadere da primo attore della scena internazionale a semplice comparsa, oggetto degli appetiti dinastici delle monarchie europee. Le *ordenanzas de marinas* che hanno disciplinato la guerra di corsa testimoniano questa decadenza: se ancora durante tutto il Seicento la materia era regolata da due sole *Ordenanzas de corso*, il Settecento avrebbe conosciuto ben undici di questi atti legislativi. E la necessità di una dettagliata disciplina del settore, più che un omaggio al 'secolo cortese', prova la crescente importanza della guerra di corsa nelle strategie spagnole.

John Hattendorf, ricostruendo l'evoluzione del diritto bellico marittimo, ha puntualizzato che "the scholarly debate (…) was less a determining factor than the voyages of Drake, Hawkins, Cavendish, and Van Heemskerk in forcefully asserting the freedom of the seas while, simultaneously, trade patterns became firmly established" (9). Si tratta di

(8) Cfr. H. Bull, *The Anarchical Society*, Macmillan, London, 1977, pp. 184-199, ed in particolare p. 188.

(9) Cfr. J. B. Hattendorf, *Maritime Conflict*, in M. Howard, G. J. Andreopoulos,

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un'affermazione difficilmente contestabile. Eppure la sua ricostruzione avrebbe rischiato di rimanere parziale se Cruz Barney si fosse limitato al puro dato storiografico e non avesse dedicato ampio spazio anche all'inquadramento dottrinario della guerra di corsa. Ed in tal senso l'ampia riflessione sul *bellum iustum* svolta dalla Seconda Scolastica è essenziale: uno dei meriti più notevoli di Cruz Barney sta nella sua capacità di coinvolgere in un ideale contraddittorio moralisti come Francisco de Vitoria, Domingo de Soto, Domingo Báñez, Louis de Molina e Fráncisco Surez, ma anche giuristi laici quali Diego de Covarrubias e Baltasar de Ayala.

Questo dibattito è ricostruito da Cruz Barney in maniera senza dubbio articolata e convincente, ma nello stesso tempo pone più dubbi di quanti non ne risolva. Ad esempio, ci si può chiedere, con Wilhelm Grewe, come mai la Scolastica spagnola dedichi alla questione della libertà dei mari, tutto sommato, poca attenzione, pur in un momento storico-politico in cui la diplomazia spagnola — si pensi alla celebre disputa tra l'ambasciatore Bernardino de Mendoza e ed Elisabetta I Tudor — era tesa ad affermare il principio del *mare clausum* (10).

Adottando lo schema del *continuum* tra *ius belli*, *ius maris* e *ius predae*, si potrebbe provare poi ad allargare il dibattito facendo riferimento anche alle tesi, originalissime, di Fernando Vasquez de Menchaca — nel suo *Illustrium Controversiarum aliorumque usu frequentium Libri tres* (1563) sembra precorrere il tema della libertà dei mari — o a quelle più tarde di Serafino de Freitas che nel *De Iusto Imperii Lusitanorum Asiatico* (1625) aveva vigorosamente contrastato gli assunti groziani. E si potrebbero coinvolgere — al di là della prospettiva 'ispanocentrica' di Cruz Barney — anche autori 'protestanti' come Ugo Grozio, Alberico Gentili e John Selden, che su tali questioni hanno lasciato pagine preziose (11). Per altro, dal confronto delle opinioni espresse nel dibattito dottrinario — così come è stato ricostruito da Cruz Barney nei suoi studi —, sorprende che solo nel *De Indiis* di Vitoria si affronti in modo esplicito la questione della guerra di corsa. Ci si può domandare se questo silenzio non fosse dovuto al fatto che, nel momento in cui la Scolastica spagnola fioriva, la guerra di corsa non godeva ancora di uno status giuridico preciso nell'ordinamento ispanico, costituendo per la corona spagnola al più un problema militare. Va però segnalato come Cruz Barney preferisca optare per una soluzione più sottile: il silenzio della dottrina non signi-

M. R. SHULMAN (eds), *The Laws of War: Constraints on Warfare in the Western World*, Yale University Press, New Haven (Mass.), 1994, pp. 98-115, ed in particolare p. 102.

(10) Cfr. W. G. GREWE, *The Epochs of International Law*, cit., p. 258.

(11) Gentili nell'*Hispanicae advocationis libri duo* anticipava i termini di un dibattito destinato a degenerare in vera e propria *bataille de livres*, a partire dalla celebre polemica condotta da John Selden in *Mare Clausum seu de dominio maris libri duo* nei confronti degli assiomi groziani. Su Selden ed in generale sul dibattito intorno alle tesi di Grozio, si veda S. CARUSO, *La miglior legge del regno*, voll. I-II, Giuffrè, Milano 2001, in particolare pp. 185-194, 590-629.

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ficava scarsa considerazione del fenomeno. Significava solo che, lungi da qualsiasi frettolosa assimilazione del fenomeno della corsa a quello della pirateria — ed il pirata era e rimaneva *hostis humani generis* —, si ammetteva la liceità di affidare a *particulares* la conduzione di operazioni militari, disciplinandone l'attività in via analogica, alla luce dei principi generali dello *ius belli*. Ed è sempre *per analogiam* che era possibile risolvere questioni, invero delicatissime tanto sul piano giuridico che su quello politico, quali quella della liceità dell'acquisizione della preda, della sua eventuale restituzione, nonché della sua ripartizione, trovando larga ispirazione negli istituti germanici e latini che compongono il diritto ispanico 'classico'.

Al di là dello spazio accordato al dibattito dottrinario, il nucleo centrale degli studi di Cruz Barney è saldamente ancorato alla prospettiva storico-giuridica. Ed è proprio alla luce di questa scelta analitica che è suo scrupolo mettere in risalto la complessità del fenomeno. La patente di corsa, in primo luogo, è un atto amministrativo — si discute se una forma di arcaico *privilegium* o piuttosto di moderna concessione od autorizzazione — che richiede specifici requisiti soggettivi ed oggettivi. Può forse sorprendere la prassi di 'appaltare' a privati la condotta di operazioni navali. È appena il caso di ricordare, però, come la conquista castigliana delle Americhe fosse avvenuta tramite delle *capitulaciones*, vero e proprio sistema di licenze con cui la Corona autorizzava le incursioni dei *conquistadores* all'interno del continente. Carlo V arrivò addirittura a concedere ai Welser, la potente famiglia di banchieri tedeschi che aveva appoggiato in maniera decisiva la sua ascesa imperiale, la colonizzazione dell'intero Venezuela.

Del resto, quello che Cruz Barney definisce "un acto de suplencia de las funciones del Estado" (12) era in realtà una pratica tutt'altro che isolata nella prima modernità. È Franco Cardini ad aver mostrato quanto l'eredità delle 'condotte' fosse consistente. E come ancora nel corso di buona parte del Settecento gli eserciti europei, lungi dall'idea rivoluzionaria della *leveè en masse*, facessero grande affidamento su forze mercenarie, formate da Tedeschi, Svizzeri, Italiani, Irlandesi, Scozzesi Magiari, Croati, Serbi e organizzate secondo criteri che oggi non esiteremmo a definire imprenditoriali. Ancora in pieno Ottocento, l'esercito britannico, all'apice della sua proiezione 'imperiale', stentava ad abbandonare l'arcaica prassi di 'appaltare' l'attività militare: forti resistenze si opponevano alla riforma dell'arcaico sistema delle commissioni, per cui i gradi superiori erano rilasciati, come vere e proprie concessioni, dietro il pagamento di un corrispettivo di forte entità (13).

(12) Cfr. O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, UNAM, Mexico, 1997, p. 123.

(13) Cfr. F. Cardini, *Quell'antica festa crudele*, Mondadori, Milano, 1997, pp. 162-201.

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La definitiva 'statalizzazione' della guerra è dunque il portato della più recente modernità.

Colpiscono piuttosto, nella ricostruzione di Cruz Barney, il grado di raffinatezza normativa della guerra di corsa, la meticolosità con cui veniva disciplinata. Fonte principale era la regia ordinanza, integrata all'occorrenza da "reales declaraciones, reales òrdenes y reales cedulas". Inoltre, il *corsario* era tenuto a rispettare le *instrucciones particulares* contenute nella patente di corsa. Ma il quadro normativo era ancora più complesso: durante la sua attività il corsaro era infatti soggetto anche alle *ordenanzas navales*, alle disposizioni dei trattati internazionali oltre che ai principi consuetudinari dello *ius gentium*. Per di più non tutte le *Ordenanzas de Corsa* avevano validità *erga omnes*: a partire dal 1674 si conoscono ordinanze valide solo per *las Indias*. Si trattava dunque di un quadro normativo tanto articolato da giustificare qualche dubbio sulla sua effettività e da spingere i giuristi dell'epoca a spericolati tentativi di armonizzare la disciplina, come ampiamente provano le fonti raccolte da Cruz Barney (14).

L'autorità competente a rilasciare la patente di corsa era destinata a mutare nel corso dei decenni: agli inizi del Seicento erano le autorità locali — i Viceré, ma anche i capitani generali, i governatori ed i *corregidores* preposti alle diverse unità in cui era suddivisa l'Amministrazione coloniale spagnola — a concedere la patente di corsa. Questa prerogativa fu più tardi avocata dal Ministero della Marina (ordinanza generale del 1718), ma successivamente (1762) pur venendo confermata tale competenza, si decise di attribuire al *Consejo de Indias* la giurisdizione sull'attività dei *corsario* (15). Si può intravedere, dietro il mutare della legislazione, un braccio di ferro tra il centro e la periferia del sistema coloniale spagnolo: per Madrid il controllo della 'guerra di corsa' era da un punto di vista geo-strategico imprescindibile, tanto più in una fase di grave crisi della marineria iberica. Per le colonie americane, invece, mantenere il controllo sui *corsarios* significava garantirsi una notevole autonomia sotto il profilo militare, ma anche sotto quello economico, soprattutto nel momento in cui la guerra di corsa si stava indirizzando a contrastare il contrabbando. In ogni caso "las patentes iban sempre firmadas por el rey", o dai suoi diretti rappresentanti (16). Cruz Barney non ha dubbi: non si tratta solo di un requisito essenziale per la validità formale dell'atto. Si tratta piuttosto di un indizio rivelatore della natura della guerra di corsa che, per quanto attività 'privata' di natura imprenditoriale — in lingua inglese il corsaro si chiama *privateer* — ha carattere strettamente bellico. E "la facultad para declarar y hacer la guerra" — prescrive la dottrina

(14) Cfr. O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., pp. 133-139.

(15) Ivi, pp. 140-141.

(16) Ivi, p. 141.

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scolastica del *bellum iustum* — "compete al príncipe, quien en este caso puede otorgar la patentes" (17).

Non tutti potevano ottenere la patente: era infatti necessario essere "españoles puros". In un contesto in cui l'idea di esercito nazionale era quanto meno labile — si pensi al ruolo ricoperto nelle file degli imperiali da comandanti italiani come Alessandro Farnese, Ambrogio Spinola, Ottavio Piccolomini, Raimondo Montecuccoli ed Eugenio di Savoia — questa rigidità può essere motivata solo alla luce dell'importanza e della delicatezza riconosciute alla guerra di corsa. L' 'Ordenanzas de Corso' del 1714 richiese addirittura che l'intero equipaggio fosse spagnolo. Una misura tanto impopolare da costringere il governatore di Portorico, Francisco Danío Granado, a scrivere immediatamente a Madrid denunciando il fatto che "sin tripulaciones de la gente francesa e italiana con los españoles" la 'corsa' avrebbe rischiato la paralisi (18).

Altri requisiti avevano invece carattere 'tecnico': le caratteristiche del 'legno', l'armamento, l'equipaggio, erano oggetto di una dettagliata regolamentazione. Inoltre, il rilascio della patente era subordinato al pagamento di una somma molto consistente: verso la metà del Settecento il 'concessionario' doveva versare sessantamila reali di *vellon*. Tale somma era funzionale a "garantizar la seguridad de su conducta y observancia de la ordenanza en vigor y tambièn para asegurar que hiciera buena guerra" (19). È proprio attraverso dettagli normativi di questo genere che la versione ispanica della 'guerra di corsa' mostra la sua ambiguità: il monarca non poteva fare a meno dei servizi dei *corsarios*, ma ne regolava con precisione l'attività mirando a far sì che si svolgesse entro i limiti del *bellum iustum* e, assai più prosaicamente, fosse conforme agli interessi spagnoli.

Il lascito più consistente della dottrina Scolastica si misura però nei limiti posti all'esercizio della 'guerra di corsa'. 'Correre' senza patente è un atto di pirateria. Se — come ha notato Carl Schmitt in uno dei passi più suggestivi di *Der Nomos der Erde* — nell'età pre-moderna libertà dei mari significava libertà di preda, e se Alciato poteva permettersi di osservare che "pirata minus delinquit, quia in mari delinquit", nell'età dei grandi imperi marittimi la pirateria è bandita (20). Ed i padri della Scuola di Salamanca sono in buona compagnia nell'attribuire alla pirateria il carattere di terribile stigma: Cornelius Van Bynkershoek — e siamo nel 1737 — non esitava a assimilare in un unico tipo giuridico il pirata ed il bandito: "qui autem nullius principis auctoritate, sive mare, sive terra rapiunt, piratarum predonumque vocabolo intelliguntur". Ed in quanto

(17) Ivi, p. 142.
(18) Ivi, p. 143.
(19) Ivi, p. 144.
(20) Cfr. C. SCHMITT, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europeum*, Duncker & Humblot, Berlin 1974, trad. it., *Il Nomos della terra nel diritto internazionale dello Jus Publicum Europaeum*, Adelphi, Milano 1991, p. 21.

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"hostis humani generis", il pirata si collocava davvero ai limiti della nozione stessa di *humanitas*. Alberico Gentili aveva perfino dubitato che a suo favore si potessero invocare i principi non solo dello *ius belli*, ma perfino della *lex naturalis*. Se Grozio nel terzo libro del *De Iure Belli ac Pacis* era più cauto — del resto i Paesi Bassi erano uno dei grandi serbatoi della pirateria atlantica —, Samuel Pufendorf sosteneva che il pirata, violando ogni principio posto da Dio per regolare la *societas humani generis*, si collocava irrimediabilmente al di fuori del consorzio umano. Sulla questione c'era una singolare convergenza tra dottrina e legislazione: se già la Scolastica era concorde nel riconoscere che la repressione della pirateria rientrava nei canoni del *bellum iustum*, le *Rôles de Oleron*, il più antico codice nautico francese, avevano stabilito che chiunque avrebbe potuto legittimamente attaccare un 'legno' pirata, in virtù di una sorta di *actio popularis*. Si trattava di una soluzione senza dubbio efficace se, ancora nel 1667, gli Stati Generali olandesi sancirono espressamente che il pirata "puniri posse a quocumque Principi, in cuius potestatem fuisset redactus, eiusque rei quam plurima etiam exstare exempla" (21). È chiaro che se, nonostante queste norme draconiane, la pirateria ebbe la sua grande stagione tra il Cinquecento ed il Seicento — i 'Fratelli della Costa' caraibici, ma anche i *guex de mer* lungo la Manica, come già un oltre secolo prima i *Vitalienbrüder* baltici e gli Uscocchi dell'Adriatico —, questo fu dovuto alla spregiudicatezza con cui gli Stati europei si servirono dei pirati nelle proprie 'politiche di potenza' (22).

Va inoltre ricordato che ai sudditi spagnoli era vietato 'correre' sotto altra bandiera in quanto "la facultad de otorgar patentes estaba vinculada a la soberanìa, el recibirlas de otro Estado es un modo de usurpar la regalìa" (23). La corsa era sì un'attività 'privata', ma non per questo poteva sfuggire ai canoni del *bellum iustum*. Verso la metà del Settecento, Felix Joseph de Abreu, nel suo trattato dedicato al *Corso*, ipotizzerà tuttavia la legittimità di una patente rilasciata da un sovrano alleato. Si trattava di un'opinione che con tutta probabilità tendeva a giustificare una prassi tutt'altro che rara anche nella marineria iberica.

Scorrendo le pagine di Cruz Barney si nota come, con il passare del tempo, la legislazione diventasse sempre più restrittiva. Già Schmitt del resto ha avuto modo di osservare come a partire dalla Pace di Utrecht venisse generalmente rafforzandosi il controllo pubblico sulla *guerre de*

(21) Cfr. W. G. Grewe, *The Epochs of International Law*, cit., p. 306.

(22) Ivi, p. 274. Tra i *sea-dogs* inglesi, in particolare, la distinzione tra *privateer* e *pirate* tendeva spesso a sfumare: Henry Mainwaring, ad esempio dopo aver studiato ad Oxford ed essersi dato all'avvocatura presso l'*Inner Temple*, fu nei primi anni del XVII secolo il più celebre pirata inglese. Nel 1618 Giacomo I, gli concesse il perdono e, in virtù delle sue imprese contro gli Spagnoli, lo nominò baronetto.

(23) Cfr. O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., p. 148.

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course (24). Non si tratta solo di un riflesso dell'evoluzione dello *ius belli*. Piuttosto, ci troviamo di fronte ad un processo di assimilazione della 'corsa' che diviene sempre più uno strumento di controllo di aree marittime strategicamente cruciali, e che anticipa la sua successiva evoluzione nelle forme della polizia guardacoste. Anche l' 'umanizzazione' della corsa è indizio sicuro di questa progressiva attrazione dei *corsarios* nella burocrazia statale: nel 1762, ad esempio, si provvide a stabilire "que los capitanes corsarios no podían optar por dejar abandonados, por cualquier pretesto, a los prisioneros en islas o costas remotas, so pena de ser castigados con todo el rigor correspondiente" (25). Una lunga serie di *Ordenanzas* estendevano anche ai marinai imbarcati su navi corsare le indennità di invalidità previste per i 'regolari'. L'intervento 'pubblico' era tangibile poi nelle facilitazioni concesse per il reclutamento dell'equipaggio e per armare il legno. A partire dalla seconda metà del Settecento iniziarono ad essere concessi — sul modello francese e inglese (26) — importanti premi per la cattura di cannoni e prigionieri. Questo avrebbe dovuto in qualche modo bilanciare gli oneri fiscali che gravavano sul corsaro al momento della vendita della preda e che, senza dubbio, contribuivano a raffreddare non poco gli entusiasmi dei potenziali *corsarios* (27).

Una disciplina particolarmente minuziosa regolava la convalida della preda. Una volta tornato in porto, infatti, il corsaro doveva redigere un circostanziato rapporto da presentare all'autorità competente, in genere rappresentata da una commissione formata da membri del Ministero della Marina secondo il modello dell'*Admiralty Court* inglese (28). Questo vero e proprio organo giurisdizionale doveva valutare se effettivamente si trattasse di "buenas presas". A tal proposito "se establecìa que eran de buena presa todos los navìos pertenecientes a enemigos y los mandados por piratas, corsarios" e significativamente "y levantados" (29). Anche in questo caso la legislazione

(24) Cfr. C. Schmitt, *Il Nomos della terra*, cit., pp. 220-221. Non si tratta di un fenomeno isolato: a partire dal primo Settecento si contano numerosi esempi di sostanziale 'assorbimento' nella funzione statale di gruppi sociali ed etnici fino ad allora marginalizzati: si pensi alle vicende delle sotnie cosacche inglobate nel sistema militare russo, dei clan scozzesi incorporati nel rigido sistema reggimentale britannico, nonché delle irrequiete comunità serbe delle Krajne, a cui Vienna attribuisce il ruolo strategico di vigilare il confine con l'Impero Ottomano.

(25) Cfr. O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., pp. 225-226.

(26) Cfr. W. G. Grewe, *The Epochs of International Law*, cit., p. 314.

(27) Cfr. O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., pp. 153-165.

(28) Sulle vicende di questo peculiare istituto cfr. S. Mannoni, *Potenza e ragione*, Giuffrè, Milano, 1999, pp. 222-226.

(29) Cfr. O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., p. 170.

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divenne progressivamente più selettiva nell'accordare il diritto di *presa.* Si trattava di un fenomeno, a dire il vero, generalizzato: le potenze marittime europee da un lato avevano bisogno di rotte commerciali sicure, dall'altro, come sottolinea Grewe con la consueta lucidità, "too strict a control would curtail the entrepreneurial spirit of the privateers" (30). Parole che trovano conferma, all'indomani dell'indipendenza degli Stati Uniti, nell'autorevole opinione del *Procureur Général* francese, quando di fronte all'ennesimo episodio della guerra di corsa annotava con schietto realismo che: "L'encouragement est certainement dû aux Corsaires… mais en même temps la Navigations des Neutres, ne peut être trop protégée d'aprés les resources qu' elle offre au Commerce National pendant la Guerre" (31).

Da tale situazione derivava l'esigenza di un controllo sempre più articolato relativo non solo allo *status* del 'legno' oggetto della preda, ma soprattutto della nazionalità della merce trasportata. E proprio la questione della nazionalità del carico, e della conseguente sua 'aggredibilità', è stato uno dei temi più delicati non solo della storia della guerra di corsa, ma del diritto marittimo *tout-court*. Siamo di fronte, infatti, ad un problema che ancora per tutto l'Ottocento sarà all'ordine del giorno delle cancellerie, coinvolgendo la dottrina internazionalistica in un appassionato dibattito. Come ricorda Stefano Mannoni, che del dibattito ha dato una convincente ricostruzione, "la lotta un tempo combattuta sui mari prosegue, ma al posto delle salve di cannone vi sono ora innocue pagine di dotte dissertazioni" (32).

Nelle calde acque caraibiche contese tra Spagna, Francia, Inghilterra, Olanda, la sorte del traffico neutrale era una questione tutt'altro che accademica. Per lo meno a partire dall'inizio del Settecento svariate *Ordenanzas de Corso* riconoscevano lo *ius predae* nel caso in cui l'imbarcazione catturata fosse priva della regolare documentazione attestante la nazionalità del vettore e dei beni trasportati. Inoltre la Spagna, aderendo ancora una volta 'all'uso' inglese, mirava a porre forti limiti al traffico neutrale, non solo prevedendo la confisca delle merci nemiche, ancorché trasportate su una nave battente bandiera neutrale, ma dichiarando l'imbarcazione stessa, pur con significative eccezioni, *buena presa*. Si trattava di norme che, unite ad un rigoroso controllo pubblico nei procedimenti di convalida della 'preda', mostravano un duplice intento disciplinare: da una parte la corsa era sempre più attratta nella sfera statale e la sua funzione, da suppletiva, si trasformava in quella di organo di polizia. Dall'altra parte, queste norme intendevano impedire che i corsari, giovandosi

(30) Cfr. W. G. Grewe, *The Epochs of International Law*, cit., p. 313.

(31) Ibidem. Per altro la guerra di Indipendenza americana vide una vera e propria esplosione del *privateering*. Le navi impegnate nella guerra di corsa furono ben 1697, a fronte di una marina 'regolare' — la Continental Navy — composta da soli 67 vascelli. Cfr. http://www.usmm.org/revolution.html.

(32) Cfr. S. Mannoni, *Potenza e ragione*, cit., p. 227.

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della loro autonomia, finissero per trasformarsi essi stessi in contrabbandieri o peggio. I tentativi di aggirare questi controlli non mancavano: è Grewe a ricordare quanto fosse diffuso l'uso di far scomparire o contraffare i documenti di carico. E come tra i *sea-dogs* inglesi, nei lunghi periodi di tensione tra le due sponde della Manica, fosse pratica tutt'altro che inconsueta quella di alzare bandiera francese, abbordare la nave da carico, costringere lo sventurato capitano a sottoscrivere un falso documento attestante la nazionalità francese del carico, e quindi svelare la propria nazionalità sequestrando le merci (33). Cruz Barney, per giustificare la complessità di questa normativa, suggerisce però un'ulteriore chiave di lettura che ci riporta a Salamanca, palesando la continuità che, sul piano concettuale, caratterizza l'esperienza giuridica internazionalistica spagnola: "Consideramos que este normativismo es un claro reflejo de las teorìas sobre la guerra justa (…). Las limitaciones, los requisitos, la responsabilidad del corsario en caso de retraso para poner en libertad al navío mal apresado, todo ello no es màs que una clara indicación de que las ideas de los teólogos-juristas tuvieron una clara influencia en la legislación española sobre corso" (34).

Continuità. Forse è proprio questa la lente giusta per interpretare le peculiari vicende della 'corsa' iberica: se è vero che anche in quest'ambito la guerra di corsa si presenta come un fenomeno innovativo sul piano giuridico e politico, se è vero che la sua disciplina si evolve e migliorano gli strumenti per controllarla e se è vero, infine, che si assiste sempre più ad un processo di progressiva statalizzazione, occorre tuttavia riconoscere che il regime giuridico del *corso* presenta, sotto il profilo ideologico, una straordinaria continuità. Non si tratta solo della permanenza di una sintassi normativa più o meno indebitata con la dottrina della Scuola di Salamanca. Piuttosto, ad avere una forte connotazione unitaria, è la stessa organizzazione spaziale del potere. L'Impero spagnolo non conosce differenze tra i diversi sottosistemi politico-territoriali. Non le conosce *in primis* sul piano etico-normativo: quello che è *iniustum* a Cadice lo è anche a Cartagena. E questo grazie alla presenza di un sistema culturale condiviso, tendenzialmente inclusivo, basato su un'*auctoritas* universalmente riconosciuta. Ma soprattutto non vi è cesura sotto il profilo 'geo-giuridico': lo spazio viene concepito ed organizzato in maniera omogenea e unitaria. Le stesse *rayas* — le linee di divisione con cui la corona castigliana e quella lusitana si erano spartite il Nuovo Mondo — sono avvertite come linee di un confine 'fisico', funzionalmente identico ad un fiume o ad una catena montuosa. È Schmitt ad aver richiamato l'attenzione sul fatto che la *raya* fosse strumento di ripartizione spaziale, quantitativa, del

(33) Cfr. W. G. Grewe, *The Epochs of International Law*, cit., pp. 314-315.

(34) Cfr. O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., pp. 207-208.

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potere, fondata "su un accordo di diritto internazionale concernente la conquista territoriale, dove non si distingue tra occupazione di mare e occupazione di terra" (35). Sempre seguendo la lezione schmittiana, si può dunque ipotizzare che la concezione 'amministrativistica' che contraddistingue l'esperienza del *corso* derivi proprio da questa peculiare costruzione degli spazi giuridici e politici. E si può ritenere che il *corso* rappresenti per certi versi il paradigma di una precisa 'filosofia del diritto internazionale', che ha avuto un peso decisivo nell'evoluzione e nella crisi del sistema coloniale spagnolo.

È il caso di insistere sulla forte analogia tra le soluzioni — giuridiche e politiche prima ancora che militari — adottate per difendere i confini terrestri e quelle adottate per difendere i confini marittimi. Nella prima fase dell'espansionismo spagnolo la questione del controllo degli spazi oceanici non doveva apparire particolarmente urgente. Madrid poteva vantare un titolo giuridico —- la bolla alessandrina — per giustificare il monopolio delle rotte atlantiche, ed una indiscussa superiorità militare per far rispettare tale diritto. E d'altra parte i possedimenti di Oltreoceano apparivano un teatro tutto sommato secondario rispetto a quello mediterraneo — nella sfortunata impresa di Algeri del 1544 si consumava l'*afàn de cruzada* di Carlo V — e nordeuropeo, dove solo con la sconfitta dell'*Invencible Armada*, nel 1588, si verificò la crisi definitiva del progetto imperiale e controriformistico di Filippo II. Ma nel quadro geo-strategico spagnolo divenne sempre più prioritario proteggere l'afflusso dal Nuovo Mondo di ricchezze vitali per le finanze di Madrid. Già nel 1521 fu costituita l'*Armada de la Guarda de la Carrera de las Indias* "para la defenza costera y protección de las naves mercantes españolas" impegnate nell'attraversamento dell'Atlantico. (36) I decenni successivi videro la creazione di nuove *Armadas* preposte esclusivamente al controllo delle turbolente acque caraibiche e, dopo le fortunate imprese di Drake, dell'Oceano Pacifico. Ma i galeoni spagnoli erano ben lontani dall'assicurare un'effettiva vigilanza degli immensi spazi del Nuovo Mondo. È così che, per lo meno a partire dalla metà del Cinquecento, vennero sempre più coinvolte nella lotta alla corsa ed alla pirateria le municipalità del Nuovo Mondo, perché provvedessero alla formazione di milizie cittadine. Le comunità *indios* prossime alle coste, negli ottimistici auspici di Madrid, avrebbero dovuto costituire invece un sistema di avvistamento costiero, ispirato al sistema di torri e fortificazioni che fin dall'Età di Mezzo costellavano le rive settentrionali del Mediterraneo (37).

Le vicende della corsa ispanica si collocano dunque in un contesto che vede la marina spagnola tesa a garantire la salvaguardia *de la Carrera*

(35) Cfr. C. Schmitt, *Il Nomos della terra*, cit., p. 89.

(36) Cfr. O. Cruz Barney, *El combate a la piratería en Indias. 1555-1700*, Oxford University Press, Mexico 1999, p. 13.

(37) Ivi, pp. 39-40.

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de las Indias, ma incapace a svolgere un controllo diffuso sugli spazi marittimi, identificati ed organizzati come se fossero fisicamente analoghi a quelli terrestri. Di questo approfittarono non solo corsari, pirati, bucanieri e filibustieri, ma anche, e soprattutto, i contrabbandieri (38). Nonostante il monopolio del traffico con le colonie americane che la Spagna si era riservata fin dalle bolle alessandrine, già nel Cinquecento le Indie "se convertieron en el principal mercado de consumo de las manufacturas de […] tres países": la Francia, l'Inghilterra e l'Olanda (39). La Giamaica per gli inglesi e Tobago per gli olandesi furono, fino a tutto il Settecento, le centrali del contrabbando verso le colonie ispaniche. Si trattava di un fenomeno imponente, che la progressiva decadenza della marina da guerra spagnola non poteva che acutizzare.

La peculiarità del *corso* sta tutta qui: se per i *privateers* inglesi correre i mari significava rivendicare la peculiarità degli spazi marittimi, ribadirne il carattere di *res omnium* (40), la guerra di corsa spagnola era legata essenzialmente alla repressione del contrabbando (41). Se i corsari britannici aprivano rotte commerciali ed aggredivano il naviglio mercantile avversario, il *corso*, sotto il profilo funzionale, era statico, passivo, espressione di una concezione degli spazi giuridici ormai superata. Non è una coincidenza che i *privateers* fossero il frutto della stessa società che esprimeva un ceto mercantile audace e spregiudicato, capace di lì a poco di costituire nell'Oceano Indiano un impero commerciale, prima ancora che politico-militare. E non è un caso che i *corsarios*, invece, fossero il prodotto di una società segnata da una borghesia debole, arroccata nei privilegi garantititi dallo Stato, adagiata sul monopolio commerciale esercitato dalla *Casa di Contratación de Sevilla*.

Il governo di Madrid non tardò ad accorgersi della difficile situazione dei privati che continuavano a correre le acque caraibiche come *Guardacostas corsarios o de la Marina Real*. Ma questo non significò riuscire a trovare una soluzione al problema. Ormai in piena età borbonica si pensò di intensificare il controllo delle acque territoriali addirittura attraverso l'istituzione di compagnie commerciali: nel 1728 nasceva infatti a Caracas

(38) Per altro a partire dai primi decenni del XVII sec., almeno in Inghilterra, il fenomeno del *privateering* inizia progressivamente a ridursi.

(39) Cfr. O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., p. 227.

(40) Per giustificare tale carattere non si esitava ad appellarsi all'*auctoritas* di Ulpiano, laddove il giurista romano osserva che "mari quod natura omnibus patet, servitus imponi privata lege non potest" D. 8, 4, 13 pr. (Ulp., VI *opin.*). Per un inquadramento critico del passo ulpianeo cfr. B. Santalucia, *I Libri opinionum di Ulpiano*, I, Giuffrè, Milano, 1971.

(41) In tal senso la Spagna fondava le proprie pretese sulla considerazione che gli spazi oceanici fossero *res nullius*, liberamente occupabili e pertanto legittimamente acquisite dalla corona spagnola. Per un inquadramento critico del confronto tra le dottrine contrapposte del mare *res nullius* o *res omnium* si vedano le classiche pagine Schmitt, cfr. C. Schmitt, *Il Nomos della terra*, cit., pp. 211-214.

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la *Real Compañia Guipuzcoana* (42). Si intendeva probabilmente replicare ai successi della *East India Company*, istituendo una figura giuridica innovativa nell'ordinamento spagnolo perché dotata di una duplice funzione: da una parte la compagnia aveva il monopolio del commercio, dall'altra era direttamente chiamata a tutelare questo privilegio, impegnandosi nella lotta al contrabbando. Si trattò però di una soluzione ormai tardiva, incapace di raggiungere i risultati auspicati.

In tal senso si può concludere, con Cruz Barney, che la 'corsa spagnola' fu sin dall'inizio, più che un dispositivo militare, un duttile strumento nelle mani dell'amministrazione coloniale. La legislazione così dettagliata in tema di cattura della nave, di ripartizione della preda, di risarcimento del danno ingiustamente sofferto per la 'corsa' illecita, come si è visto, provano questo suo carattere 'amministrativistico'. Ed adottando le categorie schmittiane si può ipotizzare che, alla base della crisi dell'Impero spagnolo, ci sia un *Raumordnungsbegriff* tragicamente errato. Il tentativo di replicare nelle immense distese oceaniche le linee di confine che delimitavano gli 'spazi di dominio' dei territori statali, era inevitabilmente destinato al fallimento. Concepire l'oceano sotto un profilo concettuale e giuridico come spazio analogo alla terra era infatti un formidabile *misunderstanding*. E ci si può chiedere se dietro questa concezione non vi fosse anche una carenza teorica, che non avvertiva che con la scoperta del Nuovo Mondo erano poste le basi per la definizione di un nuovo '*Nomos* della terra'. Un *Nomos* che trovava nella distinzione tra "occupazione di terra" ed "occupazione di mare" il suo carattere distintivo: "La separazione di terraferma e mare libero" — osserva Schmitt — è la caratteristica specifica fondamentale dello *jus publicum Europeum*" (43). E la libertà dei mari — è sempre Schmitt a ricordarcelo — comporta in primo luogo la determinazione di uno spazio 'anomico', sanzionato dalle *amity lines*, "in cui si afferma il libero e spietato uso della violenza" (44).

La Spagna, potenza terrestre, nonostante la sua proiezione globale non riuscì dunque a divenire potenza navale. L'interpretazione schmittiana ha, a mio avviso, il pregio di cogliere i motivi profondi di questa incapacità che si celano in una concezione giuridico-politica arcaica. La Spagna, che ai primi del XVI secolo si stava lanciando nell'impresa della colonizzazione delle Americhe, era ancora la terra degli *Hidalgos*, la cui cultura semi-feudale aveva, inevitabilmente, salde radici 'terrestri'. Ed era, come si è detto, la terra di una borghesia imprenditoriale sostanzialmente parassitaria. Nessuna sorpresa dunque se fu l'Inghilterra, sostenuta da uno spregiudicato ceto mercantile, a divenire "la portatrice di una visione marittima universale dell'ordinamento euro-cen-

(42) Cfr. O. Cruz Barney, *El régimen juridico del corso maríttimo: el mundo indiano y el Mexico del siglo XIX*, cit., p. 247.

(43) Cfr. C. Schmitt, *Il Nomos della terra*, cit., p. 223.

(44) Ivi, p. 93. Sulla contrapposizione tra *rayas* e 'linee di amicizia', pp. 90-101.

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trico" (45). Le beffarde parole — riportate da William Camden — con cui Elisabetta I rispose a Mendoza nella celebre *querelle* diplomatica sono un ideale suggello delle tesi schmittiane (46).

> She understood not, why hers and other Princes subjects should be barred from the Indies which she could not perswade herselfe the Spaniard had any rightfull title to by the Byshop of Rome' s donation, in whom she acknowledged no prerogative, much less authority in such causes that he should bind Princes which owe him no obedience, or infeoffe as it were the Spaniard in that New World and invest him with the possession thereof: nor yet by any other title than that the Spaniards had arrived here and there, built Cottages and given names to a River or a Cape; which things, cannot purchase any proprietie. So as this donation of that which is anothers, which in right is nothing worth, and this imaginary property, cannot let, but that other Princes may trade in those Countries, and without breach of the Law of Nations, transport Colonies thither, where the Spaniards inhabite not, for as much as prescription without possession is little worth.

Le vicende della 'corsa' spagnola, pertanto, possono essere interpretate come il tentativo della Spagna di replicare ai successi navali delle Potenze dell'Europa nordoccidentale, dotandosi di uno strumento capace di proiettare il proprio *imperium* anche sugli Oceani. Il progetto era destinato al fallimento. E la ricostruzione di Cruz Barney sembra avere il tono di un diario clinico in cui il medico, constatata l'inutilità di ogni terapia, non può che assistere impotente al declino delle condizioni del paziente.

Se la 'corsa' ispanica si è collocata in una fase di grandi mutamenti giuridici e politici — la nascita dello *jus publicum Europeum* — e ha rappresentato il tentativo di Madrid di adeguarsi a questi cambiamenti, le vicende della 'corsa' moderna — come quella condotta nel secolo decimonono dalla giovane repubblica messicana — sembrano preludere alla successiva crisi del sistema moderno delle relazioni internazionali.

Come ricorda Cruz Barney, negli anni della lotta per l'indipendenza del Messico — il conflitto durò dal 1810 al 1820 con alterne vicende — il *Supremo Gobierno Mexicano* non esitò ad emanare un decreto "a través del cual abrìa el corso para mexicanos y extranjeros contra España" (47). Il debole governo messicano intendeva garantirsi una forza navale 'a basso costo', comunque in grado di disturbare le linee di comunicazione avversarie. E per far questo concesse alla 'corsa' forti incentivi fiscali, abolendo molti dei divieti che nella legislazione

(45) Ivi, p. 209.

(46) Cfr. W. Camden, *The Historie of the Most Renowned and Victorious Princesse Elizabeth, late Queene of England*, II, London 1630, p. 116, citato in W. G. Grewe, *The Epochs of International Law*, cit., p. 246.

(47) Cfr. O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., p. 259.

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coloniale ne avevano limitato l'attività. Ma più che questi incentivi, fu la possibilità di trovare nei porti statunitensi un riparo sicuro ed un mercato privilegiato per le prede, a far sì che la pratica della 'corsa' divenisse uno degli elementi determinanti della lotta per l'indipendenza: sulla base di testimonianze dell'epoca si calcola che fossero oltre cinquanta i corsari attivi a favore dei secessionisti.

La necessità di garantirsi un'*armada* a costi economicamente e politicamente sostenibili tornò a farsi impellente nei momento in cui gli Stati Uniti si rivelarono un vicino sempre più ingombrante. Non è un caso che il Messico sentì la necessità di dare una disciplina organica alla 'guerra di corsa', tramite due dettagliati *Reglamentos*, proprio nel 1854, poche settimane dopo la dichiarazione di guerra di Washington. Si trattava di un disperato tentativo di resistere alla potenza statunitense che proprio in questo conflitto avrebbe assunto la sua precipua dimensione navale ed anfibia. In tale contesto, l'annuncio della volontà di rilasciare patenti di corsa anche a *extranjeros* aveva il sapore di uno scoraggiato appello alla solidarietà latinoamericana.

Sarà dunque un Messico politicamente umiliato, privato dei territori a nord del Rio Grande e attraversato da una profonda crisi istituzionale, quello che si rifiuterà di sottoscrivere la Dichiarazione di Parigi del 1856. La scelta di non aderire ad un'iniziativa di tale importanza — Mannoni non esita a definire la Dichiarazione "un grande evento diplomatico che segna il giro di boa nella storia della neutralità" (48) — merita qualche riflessione. A Parigi si celebrava uno dei momenti più alti del liberalismo mercantilista ottocentesco. Questioni delicatissime del diritto marittimo — Cruz Barney ne è affidabile testimone — sembravano trovare una soluzione definitiva: non solo veniva abolita la 'guerra di corsa', ma si risolveva finalmente l'annoso problema dello *status* delle merci trasportate, prevedendo che la neutralità della bandiera si estendesse a tutto il carico e che la mercanzia di uno Stato neutrale non fosse comunque confiscabile, anche se trasportata da una nave nemica. Infine il blocco, strumento devastante sul piano economico prima ancora che su quello politico, veniva riconosciuto valido solo se effettivamente mantenuto da forze navali adeguate.

La Dichiarazione, voluta dalle potenze del Concerto Europeo, fu sostenuta da un consenso generalizzato, con alcune vistose eccezioni. Gli Stati Uniti, ormai divisi tra Unione e Confederazione, rifiutarono di sottoscrivere la Dichiarazione sostenendo le ragioni strategiche della 'guerra di corsa'. Del resto, la Guerra Civile era alle porte e i due futuri contendenti erano perfettamente consapevoli — ed i fatti lo confermeranno — che il controllo degli spazi marittimi avrebbe condizionato la vittoria (49). La Spagna, lacerata al suo interno dalle rivolte carliste e

(48) Cfr. S. MANNONI, *Potenza e ragione*, cit., p. 231.

(49) Durante la Guerra civile, la Confederazione fece ampio uso di *Letters of*

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ormai gravemente mutilata nei suoi possessi coloniali, pur concordando sulla bontà delle scelte operate a Parigi, rifiutò di ripudiare *el corso*, sostenendo che "no podía en aquel instante, por consideraciones peculiares suyas, imposibles de desatender, admitir el principio de que el corso estuviera y quedase abolido" (50). Lo spettro della guerra del '98, in cui la Spagna umiliata dalla potenza navale statunitense dovrà cedere gli ultimi domini coloniali, evidentemente già si aggirava nelle stanze del *Ministerio de Estado*.

Infine, un netto rifiuto venne dalla repubblica messicana. Le ragioni della mancata adesione alla Dichiarazione meritano attenzione, poiché offrono abbondante materiale per un'analisi della successiva evoluzione delle relazioni internazionali. *Prima facie* il rifiuto sembrerebbe il frutto di un lucido realismo: se gli Stati Uniti, che avevano appena mostrato quali fossero i loro appetiti territoriali proprio a scapito del Messico, avevano rifiutato di sottoscrivere la Dichiarazione, perché mai il governo messicano avrebbe dovuto aderirvi, rinunciando ad un'arma preziosa a sua disposizione? Ma, ad una indagine più attenta, si ha l'impressione che ci fossero ragioni più profonde, sintomatiche di una frattura nel sistema delle relazioni internazionali allora appena percettibile, ma destinata a progredire in maniera inarrestabile nel secolo ventesimo. Si tratta in sostanza dei prodromi di quella che Hedley Bull definirà in un celebre scritto "The Revolt against the West" e che è segnalata dal venir meno nella società internazionale di un lessico giuridico e politico comune (51).

A Parigi la Dichiarazione era stata celebrata come un passo significativo verso il progresso mondiale e la pace tra i popoli. Ed era opinione diffusa che si fosse finalmente sanzionato il tanto auspicato divorzio della politica dal mercato, riconoscendo implicitamente la supremazia del secondo. Negli auspici dei delegati la guerra — almeno quella navale — si sarebbe ridotta a un *Kriegspiel*, fatto di scontri isolati ma risolutivi, caratterizzati dalle eleganti manovre delle squadre navali. Gli scambi mercantili, invece, tutelati dal principio del *navire libre,*

Marquee and Reprisal ed oltre 200 navi furono le affondate dai corsari confederati che, per lo più, erano di nazionalità britannica. Ma la conseguenza più grave fu senza dubbio il fatto che, a fronte della minaccia corsara, "1,600 ships were reflagged as foreign vessels to avoid their danger, resulting in a long-term loss to the U.S. merchant marine, since they were not allowed to return to United States registry thereafter." Cfr. http://www.usmm.org/civilwar.html.

(50) Cfr. J. L. De Azcárraga Y De Bustamante, *El corso marítimo*, Instituto Francisco de Vitoria — Consejo Superior de Investigaciones Científicas, Madrid, 1959, p. 381, citato in O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., p. 314.

(51) Cfr. H. Bull, *The Revolt against the West*, in H. Bull, A. Watson (eds), *The Expansion of International Society*, Oxford University Press, Oxford 1984, trad. it., *La rivolta contro l'Occidente*, in H. Bull, A. Watson (a cura di), *L'espansione della società internazionale*, Jaca Book, Milano, 1993, pp. 227-238.

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marchandise libre, non avrebbero più dovuto temere alcuna interferenza dagli ammiragliati (52). In definitiva il commercio, anche in presenza di un conflitto navale, avrebbe potuto svolgere finalmente indisturbato quella missione civilizzatrice che Richard Cobden, fra gli altri, aveva inteso assegnargli. Ed una volta limitato in maniera così significativa il conflitto — preconizzava con buona dose di dogmatismo l'utopia liberale —, era sufficiente aspettare il perfezionamento di un effettivo sistema di libero scambio perché il concetto stesso di guerra venisse definitivamente bandito dalle relazioni internazionali.

Rispetto a questa retorica, la risposta messicana, così come viene ricostruita da Cruz Barney, usava un lessico completamente differente, in cui si può già misurare la futura crisi dello *jus publicum Europeum*. Il Messico, a sostegno del proprio rifiuto, non solo non esitava ad invocare lo *status necessitatis*, ma richiedeva esplicitamente di differenziare il sistema etico-normativo internazionale in funzione delle condizioni dei singoli Stati. Senza dubbio c'era anche una buona dose di *Realpolitik* nella volontà del governo messicano di contestare la Dichiarazione di Parigi:

> Crece de punto la considerción de la ventata que tendría el corso para México, si se reflexiona en que seria un modo de guerra casi sin represalia posible; porque siendo muy limitado nuestro commercio marítimo, las pérdidas que en el corso de la Nación enemiga hiciese sufrir á este, no serian muy graves, en tanto que las que los corsarios harían sufrir al enemigo podrían ser mucho mayores (53).

E tuttavia, emerge con chiarezza dalle pagine di Cruz Barney quanto, nel parere della commissione governativa incaricata di valutare l'opportunità per il Messico di aderire alla Dichiarazione di Parigi, fosse radicata la diffidenza verso la missione civilizzatrice ed umanitaria proclamata nella Dichiarazione. Tanta era la sfiducia, che i delegati messicani non esitarono ad ipotizzare la possibilità di un sistema alternativo al modello giuridico e politico trionfante a Parigi. E va sottolineato come, al di fuori dell'*European International Society*, ad essere declinato in modo differente è sin dall'inizio proprio il concetto di umanità:

> En este sentido, aquellas potencias que contaran con una marina fuerte, una población abundante y los recursos necesarios, el corso podría considerarse *como innecesario, renunciable e, inclusive, un deber con la humanidad el abandonarlo.* Sin embargo, aquellas naciones que no tuvieran grandes

(52) Cfr. S. Mannoni, *Potenza e ragione*, cit., p. 227.

(53) Cfr. *Tratados y Convenciones concluidos y ratificados por la República Mexicana desde su independencia hasta el año actual, acompañados de varios documentos que les son referentes*, I, Mexico, 1878, p. 677 citato in O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., p. 316.

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> armamentos permanentes y al sueldo, *era necesario que acudieran al corso, pues de lo contrario quedarían desarmadas en momentos de peligro.* (54)

Non è il caso di amplificare oltre modo la portata dell'evento. È sufficiente segnalare come, proprio nel momento in cui l'idealismo liberale sembrava trionfare, l'immagine di una società internazionale fondata sull'azione positiva delle potenze europee iniziava a mostrare le prime crepe. Si trattava dei sintomi precoci di una frattura destinata ad ampliarsi fino a travolgere l'*ordo europeum* stesso, come hanno sostenuto Raymond Aron, Martin Wight e Carl Schmitt con dovizia di argomenti. (55) In tal senso, credo che sia possibile intravedere un sottile filo rosso che lega il rifiuto del Messico di aderire alla Dichiarazione di Parigi a quel processo di de-strutturazione delle relazioni internazionali che, a partire dalla decolonizzazione, ha caratterizzato il secolo scorso. La sintassi eversiva dei *convenors* di Bandung, in sostanza, è già presente nel rifiuto del Messico di aderire alla Dichiarazione di Parigi. E si può interpretare l''anomalia' messicana come prodromo di quella critica alla società internazionale — avvertita come minacciosamente estranea — che, promossa a tale conferenza dai rappresentanti di un folto gruppo di Stati dell'area afro-asiatica, ha sancito la problematica emersione del Terzo Mondo sulla scena internazionale (56).

Dieci anni dopo la Dichiarazione di Parigi, le Potenze europee tenteranno di ricomporre questa frattura, riconoscendo Massimiliano d'Asburgo Imperatore del Messico. Ma fu una vicenda, come è noto, destinata a concludersi in un bagno di sangue e che, alla luce dei successivi sviluppi dei rapporti internazionali, assume un sapore tristemente premonitorio.

La Repubblica Messicana abolirà formalmente la 'guerra di corsa' solo nel febbraio 1909.

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(54) Cfr. O. Cruz Barney, *El régimen juridico del corso marítimo: el mundo indiano y el México del siglo XIX*, cit., p. 315. Il corsivo è mio.

(55) Cfr. R. Aron, *Paix et guerre entre les nations*, Calmann-Levy, Paris, 1962, trad. it., *Pace e guerra tra le nazioni*, Edizioni di Comunità, Milano, 1983. Cfr. M. Wight, *Systems of States*, Leicester University Press, Leicester, 1977; Id., *Power Politics*, Penguin, London 1978. Cfr. infine C. Schmitt, *Il Nomos della terra*, cit. Per una convincente interpretazione di questi autori come 'filosofi della crisi', cfr. A. Colombo, *L'Europa e la società internazionale*, "Quaderni di scienza politica", 6 (1999), 2, pp. 251-301.

(56) È stato Peter Lyon a rilevare come la locuzione 'Tiers Monde' coniata in Francia alla metà del secolo scorso, si richiami esplicitamente alla nozione di 'Tiers Etat', così come declinata dall'Abbé Seyès. Cfr. P. Lyon, *The Emergence of the Third World*, in H. Bull, A. Watson (eds), *The Expansion of International Society*, cit., pp. 229-238 trad. it., *L'emergere del Terzo Mondo*, in H. Bull, A. Watson (a cura di), *L'espansione della società internazionale*, cit., pp. 239-247, ed in particolare p. 239.

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JOSÉ MARÍA VALLEJO GARCÍA-HEVIA

FELIPE II Y EL DESPACHO DE DOS MUNDOS: LA MONARQUÍA EN SUS PAPELES O EL MODERNO GOBIERNO DE LA PLUMA

(a propósito de José Antonio Escudero, *Felipe II: el Rey en el despacho*, Editorial Complutense, Madrid, 2002; 637 págs. más un cuadro sinóptico desplegable, titulado *La Máquina de Gobierno*, en edición exenta)

> "Dicen las letras, que sin ellas no se podrían sustentar las armas, porque la guerra también tiene sus leyes y está sujeta a ellas, y que las leyes caen debajo de lo que son letras y letrados. A esto responden las armas que las leyes no se podrán sustentar sin ellas, porque con las armas se defienden las repúblicas, se conservan los reinos, se guardan las ciudades, se aseguran los caminos, se despejan los mares de corsarios; y finalmente, si por ellas no fuese, las repúblicas, los reinos, las monarquías, las ciudades, los caminos de mar y tierra estarían sujetos al rigor y a la confusión que trae consigo la guerra el tiempo que dura, y tiene licencia de usar de sus privilegios y de sus fuerzas".
>
> (Miguel de Cervantes Saavedra, *El Ingenioso Hidalgo Don Quijote de la Mancha*, Imprenta de Juan de la Cuesta, Madrid, 1605, Primera Parte, capítulo XXXVIII, *Que trata del curioso Discurso que hizo Don Quijote, de las Armas y de las Letras*)

1. Felipe de España y Miguel de Cervantes: sobre el tópico de la pluma y la espada; y sobre el *topos* de los títulos del rey, sus formas y los territorios de la Monarquía Católica. — 2. El Rey en el despacho: la obra; y sus papeles, tanto los de las armas como los de las letras. — 3. El historiador en el archivo: la vida, y la pluma.

El poder, consustancial a toda forma y expresión, geográfica y temporal, de organización social — de la vida del hombre en sociedad-, tiene historia, obviamente, como cualquier otra actividad humana. Y esa historia (la historia del poder, en sus más variadas manifestaciones, políticas, administrativas, económicas, sociales, culturales, etc.) ha ocupado a los historiadores; sobre todo, la del poder político, desde sus primeros vislumbres helénicos en las *Historias* de

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Heródoto de Halicarnaso (*c.* 484-*c.* 425 a.C.) y, mejor aún, en la *Historia de la Guerra del Peloponeso* de Tucídides (*c.* 470-*c.* 395 a.C), hasta culminar en las conocidas reflexiones de los protagonistas de la primera y más acabada estructura unitaria de poder, la que conformaron la República y el Imperio romanos: como es el caso de las *Historias* de Polibio de Megalópolis (*c.* 201-120 a.C.), de los relatos biográficos de Julio César (100-44 a.C.) sobre *La guerra de las Galias* y *La guerra civil*, de las narraciones de Cayo Salustio (87-34 a.C.) sobre la crisis de la República en *La conjuración de Catilina* y en *La guerra de Yugurta*, de ese monumento a la *pax augustea* — una primigenia paz política y militar universal, puesto que el universo romano era el *Mare Nostrum* — que trazó Tito Livio (64 a.C.-12 d.C.) en su *Ab urbe condita*, o de ese trágico panorama de los primeros emperadores romanos que nos ha legado Cornelio Tácito (*c.* 55-120 d.C.) en sus *Anales* y en sus *Historias*.

Pues bien, historiográficamente, el poder ha aparecido siempre como un *diálogo* permanente entre las armas y las letras, es decir, entre los que se consagran a la milicia o vida castrense y los que permanecen en la civil. También, según su expresión normativa — o ausencia de ella, en muchas ocasiones-, entre la obediencia a las órdenes militares o el respeto a las leyes civiles. Y, en última instancia, como un *diálogo* — u obligados y simultáneos, o sucesivos, *monólogos* discordantes — entre la Fuerza y la Razón, sin que una y otra, necesariamente, hayan residido siempre en un lado u otro de esa pugna dialéctica e histórica. Así ha quedado recogido en la mitología griega y romana, con un aliento poético y un vigor artístico extraordinarios. Desde la época homérica (ss. VIII-VII a.C.), Ares, luego identificado con el itálico Marte, hijo de Zeus y de Hera, aparece como el dios de la Guerra por excelencia, representado con coraza y casco, y armado de escudo, lanza y espada. De forma paralela, y muy significativa, Palas Atenea, identificada en Roma con Minerva, e hija de Zeus y de Metis, que era considerada generalmente en el mundo griego, y sobre todo en su ciudad, Atenas, como la diosa de la Razón, siempre fue representada con casco, lanza y égida o escudo de piel de cabra. Sabido es que Atenea nació, saliendo o surgiendo de la cabeza de su padre Zeus, completamente armada, y profiriendo un grito de guerra que resonó en cielo y tierra. Desde luego, el parto de la Razón no fue visto, en el seno de la sociedad humana, como algo natural, ni pacífico. Y siempre fue una diosa guerrera. Estaba claro que, sin armas, la Razón no podía imponerse entre los hombres. Lo que explica que Ares no lograse hacer señorear su voluntad, en muchas ocasiones, ni entre los dioses, ni entre hombres. Por el contrario, ya los griegos de la época de Homero se complacían en mostrar la fuerza bruta de Ares, el dios de la Guerra, *funesto para los mortales*, contenida o burlada por la prudencia de Atenea, la diosa de la

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Razón (1). Por ejemplo, con ocasión del combate entre los dioses en Troya, relatado en los cantos 20 y 21 de la *Ilíada*, Atenea lucha contra Ares, y le vence, dejándole aturdido de una pedrada:

> "Pero una reñida y espantosa pelea se suscitó entonces entre los demás dioses: divididos en dos bandos, vinieron a las manos con fuerte estrépito; bramó la vasta tierra, y el gran cielo resonó como una trompeta. Oyólo Zeus sentado en el Olimpo, y con el corazón alegre reía al ver que los dioses iban a embestirse. Y ya no estuvieron separados largo tiempo, pues el primero, Ares, que horada los escudos, acometiendo a Atenea con la broncínea lanza, estas injuriosas palabras le decía: — ¿Por qué nuevamente, ¡oh mosca de perros!, promueves la contienda entre los dioses con insaciable audacia? ¿Qué poderoso afecto te mueve? ¿Acaso no te acuerdas de cuando incitabas a Diómedes Tidida a que me hiriese, y cogiendo tú misma la reluciente pica, la enderezaste contra mí y me desgarraste el hermoso cutis? Pues me figuro que ahora pagarás cuanto me hiciste. Apenas acabó de hablar dio un bote en el escudo floqueado, horrendo, que ni el rayo de Zeus rompería; allí acertó a dar Ares, manchado de homicidios, con la ingente lanza. Pero la diosa, volviéndose, aferró con su robusta mano *una gran piedra negra y erizada de puntas que estaba en la llanura y había sido puesta por los antiguos como linde de un campo*, e hiriendo con ella al furibundo Ares en el cuello, dejóle sin vigor los miembros. Vino a tierra el dios y ocupó siete yugadas, el polvo manchó su cabellera y las armas resonaron. Rióse Palas Atenea, y, gloriándose de la victoria, profirió estas aladas palabras: — ¡Necio! Aún no has comprendido que me jacto de ser mucho más fuerte, puesto que osas oponer tu furor al mío. Así padecerás, cumpliéndose las imprecaciones de tu airada madre, que maquina males contra tí porque abandonaste a los aqueos y favoreces a los orgullosos teucros. Cuando esto hubo dicho, volvió a otra parte los ojos refulgentes" (*Il.*, 21, 383-415; la cursiva es mía).

Adviértase que, en esta disputa divina, entre la Guerra y la Razón, la segunda vence esgrimiendo un *arma* jurídica, una *ley* de los hombres: la gran piedra que había sido *puesta por los antiguos como linde de un campo*. Leyes y armas, letras (cuando el Derecho sea escrito, no sólo consuetudinario) y lanzas irán unidas, pues, en la mitología y en la historia. De un tópico, por tanto, de un lugar común, es de lo que se hará eco Cervantes cuando, en la famosa venta de la Primera Parte de *El Quijote*, el hidalgo caballero proclame la primacía de los soldados sobre los letrados en la república, según se recoge, en parte, en la cita preliminar. Una primacía de sacrificio y abnegación en el servicio a su príncipe, que no en la necesidad de sus respectivos oficios, puesto que ambos, el soldado y el letrado, resultan imprescindibles para el gobierno de los hombres. Pero, ambos también, difieren injustamente

(1) Pierre GRIMAL, *Diccionario de mitología griega y romana*, ed. revisada por el autor, con prefacio de Charles PICARD, Barcelona, 1981 (1ª ed. en francés, París, 1951), pp. 44-45, 59-61 y 400.

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— se queja Cervantes — en lo que se refiere a la prontitud y cuantía del premio que reciben por sus respectivos servicios, ya que

> "es más fácil premiar a dos mil letrados que a treinta mil soldados, porque a aquéllos se premian con darles oficios, que por fuerza se han de dar a los de su profesión, y a éstos no se pueden premiar sino con la misma hacienda del señor, a quien sirven" (cap. XXXVIII).

Del Olimpo de los dioses griegos, que combatían entre sí y con los aqueos durante el asedio de Troya, y de las moradas celestes de las correspondientes divinidades romanas, que protegían a las legiones de la República y del Imperio que conquistaron, por ejemplo, Hispania, en el extremo occidental del *Mare Nostrum*, hemos pasado a la Monarquía Universal del siglo XVI, a los hombres del quinientos. De la Antigüedad clásica al Renacimiento. De Homero a Cervantes, de las epopeyas heróicas helénicas a las hispánicas que se gestaban en el *Novus Mundus*, aquel *Orbe Novo*, las Indias, que había comenzado a describir en sus cartas un humanista como Pedro Mártir de Anglería en 1494, aun sin poner el pie en ellas, al igual, por cierto, que Felipe II, y con él todos los demás monarcas que, desde los Reyes Católicos, pudieron intitularse soberanos de las tierras e islas de la Mar Océana. Pero, tal salto religioso, histórico, y político a fuer de económico, social y cultural, no supone que Ares y Atenea, el dios de la Guerra y la de la Razón — incluida la razón jurídica — hubiesen, y hayan, dejado de combatir entre sí. Bien lo sabe el lector de estas líneas, y bien lo sabía Cervantes, que había resultado herido en la batalla de Lepanto, el 7 de octubre de 1571, a bordo de la galera *La Marquesa*, y *aventajado* por ello, en su salario, con tres escudos mensuales; es decir, premiado con una ayuda de costa o *ventaja* de tal importe. Fue una de las escasas mercedes regias que su servicio a la corona le deparó en vida. De ahí la queja vicaria de Don Quijote, y la expresión, por su boca, del lamento de las armas, de la dura condición del soldado que, inválido, impedido o retirado, carecía de oficio (civil) y de beneficio (eclesiástico). Estaba claro que, en Troya, en Roma, en Castilla, en Nápoles, en Flandes o en las Indias, Atenea seguía protegiendo mejor a los suyos que Ares a sus devotos. Quizás, entre otras razones, porque — como reconocían Cervantes y Don Quijote — la guerra, y quienes la hacían, también tenían sus leyes, y estaban sujetas a ellas. En cualquier caso, leyes y armas seguían conformando y disputándose el poder político, la dirección de los negocios humanos, en el siglo XVI, y entretejiendo conjuntamente sus *razones* y sus *fuerzas*. No en vano Don Quijote pronuncia su discurso, no en la ciudad, en la corte, sino en una venta en medio de los caminos que conducían a todas y a ninguna parte, por donde transitaban galeotes, bandidos, pícaros y vagabundos, y donde flaqueaba el imperio de las leyes, y no sólo las criminales. Tampoco es en vano el que discurra dicho alegato entre la novela del *Curioso Impertinente*, en la que dos ricos y principales caballeros florentinos, Anselmo y Lotario, ponen a prueba las *leyes* civiles

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y eclesiásticas del matrimonio (caps. XXXIII-XXXV), y la novela del *Cautivo en Argel* (caps. XXXIX-XLI), en la que un castellano de las montañas de León padece las *fuerzas* de los enemigos del Rey Católico Felipe II, en las fronteras de las armas cristianas de la Monarquía Hispánica.

Este preámbulo sólo pretende mostrar, tan someramente como es comprensible, la vigencia histórica — y presente — del tópico clásico de las armas y las letras, de la *economía* militar y de la *ratio iuris*, cuya forma para el período que aquí interesa, el del reinado de Felipe II y la Monarquía española del siglo XVI, ha quedado consagrada en el texto cervantino. Un tópico, el del poder político escindido en su sumisión a los dictados, bien de Ares, bien de Atenea, que también incluye una perspectiva esencial: la de quien sustentaba, organizaba y daba razón de ser a los miles de soldados y centenares de letrados que combatían, en sus respectivas trincheras, por la supervivencia de ese mismo poder político del que dependían, y al que servían. El Príncipe reunía, en el Antiguo Régimen, la doble condición, en tanto que soberano, de Fuerza militar suprema y de Razón jurídica decisiva, de Ares y de Palas Atenea. Pero, además, el Príncipe del Renacimiento se sentía impulsado a dejar de ser un dios hierático (ya de la guerra, ya de la razón o rey-juez), para quedar concernido por el saber, por el conocimiento de los resortes de ese poder político del que era único y supremo titular.

En la *Máquina de Gobierno* que ha estudiado magistralmente el profesor José Antonio Escudero — iluminando el conocimiento de todas sus piezas, desde las principales o motrices hasta la más pequeña y recóndita de las mismas, por seguir con la metáfora que él mismo ha rescatado, y que deja consagrada en su obra-, el monarca ya no se conformaba con aparecer como su dominador (*dominus*) o dueño eminente: estaba obligado también a ser su administrador o dueño directo. Una convicción ésta siempre presente, desde luego, aunque, en la práctica, delegase o ejercitase el poder por medio de *privados* o *validos*. Como rector de la guerra, y de la hacienda que la posibilitaba (gobierno), como suprema instancia que dictaba leyes y las aplicaba (justicia), y como fuente de mercedes y premios, oficios, y rentas, ayudas de costa y otros dineros (gracia regia), el monarca había terminado por convertirse en un burócrata, puesto que la guerra y la razón sólo circulaban, desde finales de la Edad Media, por los arcaduces administrativos.

Pues bien, de la dimensión burocrática del poder político, ejemplificada en el reinado de Felipe (II) de España, y en su persona, trata la espléndida y documentadísima investigación que nos ocupa del profesor Escudero. En ella, nos es presentado *el Rey en el despacho*: un despacho en el que se velaban *armas* y se decidía sobre la adopción de *leyes* (reales provisiones, cédulas, ordenanzas, instrucciones) para todos los territorios y todos los súbditos de la Monarquía. De él dependía, en

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palabras de un súbdito de aquella Monarquía — no por literario, menos real, sino todo lo contrario-, el que los reinos fuesen conservados, las ciudades guardadas, los caminos asegurados, y los mares despejados de corsarios. Un aspecto de la historia del poder político ciertamente desatendido, por otra parte, historiográficamente. A este respecto, el autor, en el *Prólogo* del libro (pp. 9-15), recordando y reafirmándose en ideas, y propósitos, ya hechos públicos años antes, en 1969, entonces en la *Introducción* de su tesis doctoral, que mereció la concesión del Premio *Menéndez Pelayo* del Consejo Superior de Investigaciones Científicas y del Premio Nacional de Historia, titulada *Los Secretarios de Estado y del Despacho (1474-1724)*, delimita su objeto investigador, ciñéndolo a esas olvidadas y esenciales estructuras del poder político, sin las cuales, y sin cuyo conocimiento, la actividad política y la producción jurídica carecen de explicaciones, o parecen brotar fruto del azar o de la necesidad:

> "Olvidémonos así, para lo que aquí interesa, de las controvertidas empresas felipistas, de las grandes glorias de resonancia universal, y también de los grandes desastres y desventuras. Dejemos de lado los efectos deslumbrantes del poder para atender las causas oscuras del poder mismo. Contemplemos no lo que se hizo, sino aquello que facilitó que se hiciera. No los resultados del gobierno, sino las estructuras que lo posibilitaron. No la llamativa acción política de aquella monarquía universal en tierras y mares del orbe, sino la maquinaria escondida que lo movía todo, o el esqueleto oculto que mantuvo el inmenso y formidable organismo en pie" (p. 10) (2).

(2) En 1969, decía el profesor Escudero, en este sentido, explanando una exigente y coherente línea de investigación a la que ha consagrado su vida, y los esfuerzos de sus numerosos discípulos, lo siguiente: "Acontece, a mi juicio, que la brillante etapa del Imperio español ha sido observada más en sus manifestaciones que en el aparato que le sirvió de sustento. En consecuencia, instituciones de primera magnitud que ordenaron el despliegue, o personajes decisivos en la orientación del mismo, parecen arrastrados a un singular confinamiento. Desvelar esa trama en su efectiva vigencia y discernir la auténtica misión de las piezas que formaron aquel sistema de Administración, es labor que apremia solidariamente a todos los estudiosos del Estado moderno" [*Los Secretarios de Estado y del Despacho (1474-1724)*, 2ª ed., Instituto de Estudios Administrativos, 4 tomos, Madrid, 1976 (1ª ed., Madrid, 1969), t. I, pp. VII-XII; la cita en la p. IX]. Y, años después, en 1979, en otra monografía fundamental, se ratificaba en dicha posición, añadiendo que: "El régimen de despacho del rey con los ministros constituye un tema altamente significativo en la historia política de las monarquías europeas. Por debajo de los sistemas ideológicos al uso o de la estructura más visible del Estado, justificada o combatida desde ángulos diversos, el ejercicio real del poder se urdió casi siempre en el diálogo del monarca con sus colaboradores, con lo que la política fue en gran medida el eco y la resultante de ese estilo de gobierno. Así, la acentuada discrecionalidad de los ministros en ciertas etapas, o la más frecuente absorción intervencionista de los reyes en otras, aparecen para quien se asoma al horizonte histórico como signos de muy fértiles consecuencias. Esa forma concreta de despacho no ha sido, pues, en modo alguno, una cuestión de tono menor, sino muy a menudo la causa instrumental del vigor o de la arritmia de las instituciones centrales de gobierno en la maquinaria global del Estado"

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Hay que decir, no obstante, que el planteamiento de este objeto de investigación peca, por mor de su encomiable exigencia y estricta precisión científica, de excesiva modestia. Como se verá, al exponer exhaustivamente los engranajes de aquella *maquinaria escondida que lo movía todo*, esto es, al conocer profundamente el funcionamiento y los límites (los defectos) de dicha *maquinaria*, se está en disposición de saber por qué llegó — política, jurídica e institucionalmente — hasta donde llegó, por qué pudo hacer lo que hizo, y por qué fracasó en lo que fracasó. En definitiva, a la conclusión de este original *Felipe II: el Rey en el despacho* (original, puesto que, aunque conocida y repetida su vocación burocrática, nadie antes se había preocupado de estudiar tan esencial faceta regia), al lector no le resta una imagen estática de aquella concreta forma institucional de poder político que fue la Monarquía Universal Hispánica, sino, por el contrario, la visión dinámica de una época, de un mundo jurídico y político, de unas estructuras político-administrativas que funcionaban en tanto que constituidas de tal y peculiar forma, de Derecho y en Derecho. Unas *formas* administrativas de las que se da *razón*, jurídica y política.

1. *Felipe de España y Miguel de Cervantes: sobre el tópico de la pluma y la espada; y sobre el* topos *de los títulos del rey, sus formas y los territorios de la Monarquía Católica.*

> "En los despachos de Castilla se pone León inmediatamente después della, y en el Supremo Consejo y Reynos de la Corona de Aragón se pone Castilla, Aragón, León, etc., porque quieren preceder a León, y no ay quien se lo estorve porque *cada gallo canta en su muladar*".
>
> (Carta del secretario del Norte del Consejo de Estado, y secretario del Consejo de Italia, Gabriel de Zayas, al Cardenal Granvela. Elvas, 16-XII-1580. La cursiva es mía, y la cita, procedente del archivo del Instituto de Valencia de Don Juan [IVDJ] de Madrid, envío 58, envuelto 13, en Escudero, J. A., *Felipe II: el Rey en el despacho*, p. 558).
>
> "De los estados de Alemania no hay que dezir (...), siendo claro que por derecho de mayorazgo y por causa de paterna sucesión pertenecieron tiempo ha a Carlos Quinto, de gloriosa memoria, como a heredero primogénito, el qual, en tiempo de la división que se siguió después entre él y su hermano don Fernando, de

(*Los orígenes del Consejo de Ministros en España. La Junta Suprema de Estado*, Editora Nacional, 2 tomos, Madrid, 1979, t. I, pp. 7-13; la cita en la p. 9).

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> gloriosa memoria, quién dubda sino que pudiera retenerlos (...). De suerte que ni aun puedo aprobar la opinión de los que parece*(n)* inclinarse a quitar los dichos Reynos de Alemania, que son paternos, del título regio, como si fuera cosa nueva o arrogante, el que sucede en derecho de mayorazgo, conservar los títulos antiguos de su familia paterna, y sabe V.S.I. el uso y costumbre universal de toda Alemania, que ni me parece fuera de razón, ni aun de ornato, *porque ¿quién sabe qué tal será al fin la tarde?* Por ventura vendrá tiempo en que aplazga haver guardado con cuydado la memoria de la antigua casa de Austria".
>
> (Billete de respuesta, traducido del latín, del consejero Funch al Cardenal Granvela. S. l. [¿Madrid?], s. f. [*c.* 22-XII-1580]. La cursiva también es mía, y la cita, extraída de IVDJ, envío 58, envuelto 13, en Escudero, J. A., op. cit., pp. 559-560, nota núm. 1380)

Este *Felipe II*, este *Rey en el despacho*, aparece ante el lector como una obra voluntariamente alejada de los tópicos historiográficos, pasados y presentes, y al margen de fastos académicos y conmemorativos. Cierto es que la Sociedad Estatal para la Conmemoración del Cuarto Centenario (1998) de la muerte de Felipe II y del Quinto Centenario (2000) del nacimiento de Carlos V ha impulsado muy sobresalientes y destacadas exposiciones, publicaciones y congresos, aunque también ha propiciado la multiplicación de aportaciones de ocasión y de reiterativos debates. Es la servidumbre de tales empresas. Pero, dicho queda que no es el caso, puesto que, en primer lugar, hace más de treinta años, cuando nadie se dedicaba a tales menesteres, y apenas nada se sabía de ello, el profesor Escudero ya se preocupaba, con sus *Secretarios de Estado y del Despacho*, de desentrañar los arcanos de la organización político-administrativa de la Monarquía felipina del siglo XVI, dentro de la más amplia perspectiva de la ordenación institucional correspondiente al reinado de su padre y predecesor, el de Carlos V, y de los reinados de sus sucesores, los Felipes (III y IV) y el Carlos (II) del XVII, hasta penetrar en los albores del setecientos con el esquema cristalizado del cauce ministerial de las Secretarías de Estado y del Despacho. Y, en segundo término, porque las páginas de la obra delatan que ha sido tejida con la obligada morosidad que han de tributar quienes transitan por las aduanas del *sancta sanctorum* de los archivos, o de las colecciones de manuscritos de las grandes bibliotecas. En el caso del autor, se trata de archivos y bibliotecas europeas, a los que ha peregrinado, y de las que se ha abastecido, sin reparar en tiempo, ni en esfuerzos personales.

Y es que otra característica, muy significativa y bien clarificadora, de la monografía que es objeto de nuestra atención es la de ser un *libro de archivo*. De hecho, la entera obra y producción científicas del

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profesor Escudero ha sido construida elevándola sobre los sólidos cimientos de los archivos, españoles y europeos, nacionales, eclesiásticos o municipales (3). Hay que decir, a este respecto, que enaltece a quien, siendo un historiador consagrado, de prestigio reconocido, no sólo en su país, sino fuera de sus fronteras, entre sus colegas de Europa y América, se advierte en él que no ha cedido un ápice, con el paso del tiempo, en su íntimo convencimiento de que toda obra histórica de la Edad Moderna no puede ser gestada alejada, o extrañada, de los archivos. Una de las enseñanzas, y no menores, de las que se puede beneficiar el lector de sus aportaciones monográficas es la de que, también hoy día, por encima de modas y tendencias historiográficas, el historiador del Derecho y de las Instituciones sigue reclamado para que confronte sus hipótesis y propuestas con los documentos archivísticos. Sin la superación de tal prueba — esencial, aunque no única, ni suficiente en sí misma y por sí sola, desde luego-, se tenderá, inevitablemente, a escribir sin fundamento, ni constancia fehacientes, o con el riesgo de reiterar lo ya sabido, y manido, salvo interpretaciones extraordinariamente originales y, por tanto, excepcionales. Y de ello da ejemplo el profesor Escudero, en primera persona y en tiempo presente. El capítulo V y último de su *Felipe II*, al que luego se aludirá con detenimiento, fue presentado, con algunas modificaciones y el mismo título, como *Discurso de ingreso* del autor en la Real Academia de la Historia de España (4). Anotado con la minuciosa y humilde puntillosidad del más riguroso y estricto practicante — aprendiz y maestro —

(3) Sin que falten otras incursiones por los archivos de América o de Asia. Así, en su colectánea de artículos y trabajos de investigación publicada en 1999, bajo el título de *Administración y Estado en la España Moderna*, al mencionar su deuda con los archivos y colecciones documentales, recordaba que: "Ése fue el taller — un taller sin fronteras — donde se tejió la urdimbre de los trabajos más significativos. Desde el primero, construido a mediados de la década de los sesenta en los archivos de Viena e Innsbruck, donde el autor se inició en la investigación de la historia de la Administración, hasta el último, escrito en el Archivo Nacional de Filipinas treinta años después. Por medio, en esas tres décadas, otros varios elaborados en archivos y bibliotecas nacionales de muchos países, y también otros en archivos menores que no son menores, tales como los municipales y eclesiásticos" (*Administración y Estado en la España Moderna*, Junta de Castilla y León, Consejería de Educación y Cultura, Valladolid, 1999, pp. 9-10). Los artículos mencionados son, el primero, el que fue publicado como los "Orígenes de la Administración Central austro-alemana: las reformas de Maximiliano a finales del siglo XV", en el *Anuario de Historia del Derecho Españo*l (*AHDE*), Madrid, 36 (1966), pp. 255-299; luego reproducido en la recopilación citada, pp. 13-42; y, el último de los apuntados, "El destierro de un primer ministro: notas sobre la expulsión de Valenzuela a Filipinas", inédito e incluido, por primera vez, en *Administración y Estado en la España Moderna*, pp. 621-635.

(4) J. A. Escudero, *Felipe II: el Rey en el despacho*, discurso leído el día 3 de marzo de 2002 en el acto de su recepción pública en la Real Academia de la Historia por el Excmo. Sr. D..., y contestación por el Excmo. Sr. D. Miguel Artola, Madrid, 2002, 137 pp. 8.

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del método histórico-crítico, sus páginas mantienen el mismo nivel de exigencia de treinta años antes, cuando sus *Secretarios de Estado y del Despacho* irrumpieron en una disciplina que, como la de la Historia del Derecho y de las Instituciones en España, se mantenía aferrada al medievalismo en sus temas de investigación. Desde entonces, su contribución, directamente personal, e indirecta y a través de sus discípulos, a la apertura de los estudios histórico-jurídicos a otros períodos históricos y hacia diferentes inquietudes investigadoras, en particular, en torno a los siglos de la Edad Moderna, ha resultado más que decisiva.

En consecuencia, se aprecia que entre *Los Secretarios de Estado y del Despacho* y su *Felipe II*, pasando por *Los orígenes del Consejo de Ministros en España* y las múltiples, y sugerentes, monografías contenidas en su *Administración y Estado en la España Moderna*, existe una clara línea de continuidad, temática, metodológica e investigadora. Y una sorprendente madurez, perceptible desde sus primeras aportaciones de juventud, que convirtieron *Los Secretarios* en una obra clásica nada más nacer, y que incluyen, aquéllas, tempranas y profundas reflexiones sobre los presupuestos metodológicos y la trayectoria de la historiografía en nuestra disciplina (5). De ahí que no quepa, en puridad, calificar de trabajo de madurez este *Felipe II*, puesto que ésta ya había sido adquirida mucho tiempo antes, pero sí del resultado de decantación de todavía una mayor experiencia en el manejo de los documentos del reinado de Felipe II, y de la sabiduría acumulada durante decenios en el estudio y la meditación sobre el gobierno de la Monarquía en los siglos XVI, XVII y XVIII.

Dicho queda que este *Felipe II en el despacho* ha sido elaborado manejando el autor los documentos que el *Rey Prudente* leyó, y con los que trabajó, mediata o inmediatamente, en vida. En una palabra, ha sido "construido sobre legajos y papeles de la época, que ahora andan dispersos por media Europa" (p. 13). Y de esta *persecución* documental hay variadas pruebas, y numerosas estancias: en el Archivo General de

(5) J. A. Escudero, "La historiografía general del Derecho inglés", en *AHDE*, Madrid, 35 (1965), pp. 217-356; *Id.*, "La problemática de la Escuela Histórica del Derecho", en *Revista de la Facultad de Derecho de la Universidad de Madrid*, Madrid, XI, 28 (1967), pp. 107-129; *Id.*, "En torno al objeto de la Historia del Derecho", en *Revista de la Facultad de Derecho de la Universidad de Madrid*, XIII, 34-35-36 (1969), pp. 391-432; *Id.*, "Derecho y tiempo: dogmática y dogmáticos", en *AHDE*, 40 (1970), pp. 269-286; e *Id.*, "Francisco de Espinosa: *Observaciones sobre las leyes de España*. (Precisiones acerca de la más antigua Historia del Derecho Español)", en *AHDE*, 41 (1971), pp. 33-55. Luego, estos estudios han sido recogidos en Escudero, J. A., *Historia del Derecho: historiografía y problemas*, 2ª ed., Servicio de Publicaciones de la Facultad de Derecho de la Universidad Complutense, Madrid, 1988 (1ª ed., Madrid, 1973), pp. 147-304, 89-117, 13-65, 67-88 y 119-145, respectivamente. Con posterioridad, ha dado a la imprenta otros, como los que versan "Sobre los Cuentos de Grimm y otros cuentos", en *Ius Fugit*, Zaragoza, 3-4 (1994-1995), pp. 469-483; e *Id.*, "Tríptico escandinavo (en recuerdo de Gunnar Tilander)", en *AHDE*, 70 (2000), pp. 425-447.

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Simancas, para conocer la estructura global del gobierno de la Monarquía Católica, sin olvidar el Archivo Histórico Nacional, el Archivo del Palacio Real, la Biblioteca de la Real Academia de la Historia y la Biblioteca Nacional de Madrid, ni la *British Library* de Londres, el *Haus-, Hof- und Staatsarchiv* de Viena, o el *Archive du Ministère d'Affaires Étrangéres* y la *Bibliothèque National* de París; de los papeles del Cardenal Granvela y del secretario Antonio Pérez, en los *Archives Générales du Royaume* y en la *Bibliothèque Royale de Belgique*, en Bruselas; de los del gobierno del Reino de Portugal, en el *Arquivo Nacional da Torre do Tombo*, en Lisboa; de los del gobierno de los Reinos de Nápoles y Sicilia, y del Ducado de Milán, en el *Archivio di Stato di Napoli* (6); y del primitivo archivo del secretario Mateo Vázquez, que formó parte, en tiempos pasados, del Archivo de la Casa de Altamira, para después fraccionarse en cuatro series, dispersas por media Europa: en la Sala de Manuscritos del *British Museum*, trasladada desde finales de la década de los noventa del pasado siglo a la *British Library*; en la Collection Édouard Favre, de la *Bibliothèque Publique et Universitaire* de Ginebra; y en dos pequeños y recoletos archivos españoles, el del Instituto de Valencia de Don Juan y el de la Biblioteca Francisco de Zabálburu, ambos en Madrid, y ambos poco conocidos, visitados y consultados. Amén de otros repositorios de documentos y libros, muy interesantes en tanto que relacionados con dos de las principales Universidades castellanas del quinientos, las de Salamanca (Biblioteca de la Universidad de Salamanca) y Valladolid (Biblioteca de Santa Cruz).

El aporte documental de la obra del profesor Escudero es concluyente y determinante, y tan exhaustivo como denotan sus casi mil quinientas notas a pie de página, puesto que cada dato, afirmación o hipótesis está adverado con su correspondiente justificación y reenvío archivístico. Pero, no ha de temer el lector que el texto se convierta en un monólogo personal del autor, o, como máximo, en un diálogo cerrado y exclusivo con las fuentes primarias. Por el contrario, se hace uso en él, con mano maestra, de una selecta y actualizada *Bibliografía* (pp. 601-615), cuidadosamente elegida en atención a los méritos y aporte de ideas innovadoras contenidas en cada monografía, con la que, en muchas ocasiones, se entabla un diálogo vivo, al corroborar el autor determinados planteamientos e hipótesis, o, por el contrario, rectificar o impugnar otros, al hilo de la presentación de sus propias tesis. El *Índice Onomástico* final (pp. 617-637) permite, en cualquier caso, seguir el curso de estas interesantes disquisiciones, y la atribución a cada historiador de sus personales posiciones.

(6) De la revisión de las series manuscritas de la sección *Archivio Farnesiano*, resultó "Un manuscrito napolitano sobre las Secretarías de Estado a principios del siglo XVII", en *AHDE*, Madrid, 69 (1999), pp. 351-357.

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Consta el libro, en fin, de seis partes, sobre las que se ha operado con dos métodos de investigación y de exposición diferentes, y complementarios: el cronológico y el sistemático. La introducción y los cuatro primeros capítulos siguen el orden temporal de la vida y el reinado del monarca, en función de sus diferentes regímenes de gobierno y de despacho; el quinto y último capítulo recapitula, de forma sistemática, la forma y el estilo de despacho del rey.

En la *Introducción* (pp. 27-69) son examinados los años de formación del príncipe Felipe, acompañados de un resumen obligado del complejo aparato de gobierno que habría pronto de regir (Reales Consejos, Juntas y Secretarios), heredado de su padre, el emperador Carlos, y que habría de ir completando y reformando a lo largo de su reinado. Acto seguido, el capítulo I (pp. 71-133) se introduce en el período de gobierno de los reinos peninsulares e indianos protagonizado por el príncipe-regente, entre 1543-1559, marcados por la permanencia de esa especie de diarquía de influencia gubernativa que respresentaban dos hombres de confianza de Carlos V, el secretario Francisco de los Cobos y el consejero flamenco Nicolás Perrenot, señor de Granvela; el posterior ascenso de un pariente de Cobos, el secretario Juan Vázquez de Molina; y la aparición de otro preponderante, Francisco de Eraso, que basaba su poder en acompañar al emperador en sus viajes y estancias por Europa, siendo la cabeza de sus secretarías en Flandes, mientras que Vázquez de Molina permanecía en España. Al final de ese período se afianzan las dos principales facciones cortesanas, de poderoso influjo en momentos posteriores, en torno al III duque de Alba, Fernando Álvarez de Toledo, y al portugués Ruy Gómez de Silva, futuro príncipe de Éboli.

En el capítulo II (pp. 135-204), dos son los protagonistas, entre 1559 y 1572, en el despacho de los negocios de la Monarquía, sobre la base de una mantenida, ora latente, ora activa, pugna entre las dos conocidas facciones, en la que triunfan, desde 1560, los ebolistas: Francisco de Eraso, beneficiado con el ocaso de la estrella de Vázquez de Molina, y la marcha a Flandes de Antonio Perrenot, hijo de Nicolás, cardenal de Granvela, en 1564; y la privanza, como supremo consejero, desde 1566, del cardenal Diego de Espinosa, favorecido por Felipe II, probablemente, por no pertenecer a ninguna de las facciones contendientes, y una vez que Éboli había perdido influencia, y el duque de Alba se hallaba en Flandes. En 1570, tras su caída del poder, Eraso falleció, y lo mismo le sucedió a Espinosa, que murió en 1572. Con la desaparición de ambos, nuevos secretarios hacen acto de aparición, aunque con un poder limitado a sus concretos ámbitos de competencia: Pedro de Hoyo y Martín de Gaztelu en las de Obras y Bosques, Juan Delgado en la Secretaría del Consejo de Guerra, y Antonio de Eraso (hijo natural de Francisco de Eraso) en la del Consejo de Indias. Pero, no serán estos secretarios de los Consejos, o del importante oficio de

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Obras y Bosques, tan próximo y querido por el monarca, al tratar de la construcción y reparación de los palacios (entre ellos, el de El Escorial), jardines y reales sitios, los que alcancen la cúspide del poder, ni la máxima confianza regia, sino los secretarios privados: Mateo Vázquez, sobre todo, y en mucha menor medida, Antonio Gracián o el *pseudo-secretario* Sebastián de Santoyo. Su crédito y pujanza justifican un tercer período de despacho, el que se extiende entre 1572 y 1585, sobre el que versa el capítulo III (pp. 205-327). El secretario privado por excelencia, esto es, Mateo Vázquez — el *archisecretario*-, se convirtió entonces en el eje de la Administración felipista, oscureciendo a los demás secretarios *institucionales* o de los Consejos, particularmente a Antonio Pérez, lo que explica su enfrentamiento con él, y también con Gabriel de Zayas, quien resultaría beneficiado, a la postre, en la gran batalla burocrática de aquellos años, que fue la de cubrir la plaza de secretario del Consejo de Italia. El asesinato de Juan de Escobedo, secretario de Juan de Austria, supuso la caída de Antonio Pérez, y la rehabilitación, en 1579, para la dirección de los asuntos de política internacional (Italia, Flandes, Francia, Alemania) de aquel consejero flamenco, el cardenal Granvela, que se hallaba alejado de la corte desde 1564. Reemplazado Antonio Pérez, *de facto*, en la Secretaría del Consejo de Estado por Juan de Idiáquez, con él se consolidaría una poderosa familia de secretarios vascos.

Los últimos años del reinado de Felipe II, entre 1585 y 1598, que son de los que se ocupa el capítulo IV (pp. 329-446), se resienten de la clara repercusión que en su estilo de gobierno conllevó el evidente empeoramiento de su salud, y las cada vez más reiteradas crisis de sus enfermedades, principalmente, la de la gota. Tras la celebración de las Cortes de Monzón de 1585, se advierte un oscurecimiento de la presencia y de la actividad de los Reales Consejos, a costa del establecimiento de una suprema junta, la llamada *Junta de Noche*, que se convierte en un órgano supremo de gobierno general, encargado de supervisar la labor de todos los demás Consejos y Juntas particulares. La desaparición, en 1591, de Mateo Vázquez, lejos de suponer el eclipse de la figura del secretario privado significa, por el contrario, su consolidación institucional: le sustituye su cuñado, Jerónimo Gasol, como secretario de la denominada *Junta de Noche*, continuando con el despacho de sus papeles con el rey. Finalmente, se impuso el criterio de fraccionar las Secretarías de los Consejos (de Cámara de Castilla, de Órdenes, de Guerra), de modo que el aparato de gobierno alcanzó, entonces, su mayor complejidad. Una complejidad que no impidió el rápido encumbramiento de Juan de Ibarra, amparado por el ascendiente de Mateo Vázquez, y por haber concertado matrimonio con una sobrina de éste. Fue Ibarra, secretario titular del Consejo de Indias, y de Obras y Bosques, desde 1586, de los pocos secretarios que lograron mantenerse en el poder con Felipe III y el duque de Lerma. A la muerte

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de Felipe II, en 1598 — desde 1596 ó 1597 no podía el soberano rubricar, por culpa de la gota, documento alguno-, se produjo el verdadero tránsito en la forma de gobierno: del monarca con muchos privados (el *Rey Prudente*) al monarca con un solo privado o valido. A nuevo rey, nuevo estilo de despacho..., y nuevos problemas.

El último capítulo, el V (pp. 447-597), es el que sistemáticamente aborda el análisis de la forma y estilo de despacho — es decir, de gobierno-, del último de los Austrias Mayores, y el que marcaría definitivamente el rumbo de la Administración de la Monarquía española. Los anteriores apartados permiten comprender, y encuadrar históricamente, lo que ahora se sintetiza y decanta esencialmente. Eso mismo que, en 1979, el profesor Escudero subrayaba y denotaba como básico para la comprensión última del poder político — siempre temporalmente delimitado-, dentro del entramado político-administrativo de las Monarquías históricas europeas, y que ya ha sido citado con anterioridad, pero que conviene volver a recordar:

> "El ejercicio real del poder se urdió casi siempre en el diálogo del monarca con sus colaboradores, con lo que la política fue, en gran medida, el eco y la resultante de ese estilo de gobierno (...). Esa forma concreta de despacho no ha sido, pues, en modo alguno, una cuestión de tono menor, sino muy a menudo la causa instrumental del vigor o la arritmia de las instituciones centrales de gobierno" (7).

Gracias a este centenar y medio de páginas postreras, se puede comprender cómo y de qué manera Felipe de España despachaba el gobierno de *dos mundos*: el Viejo y el Nuevo, desde los Virreinatos de la Nueva España y el Perú hasta la gobernación de las islas Filipinas, desde Flandes hasta Sicilia, y de Nápoles a Portugal. En los aposentos regios del Real Alcázar, o, avanzado el reinado, en cierta pieza o cámara de palacio llamada la *sala de la bóveda*, en invierno, en El Escorial los veranos, en Aranjuez las primaveras, y en Valsaín y El Pardo los otoños, el *Rey Prudente* velaba *armas* y escribía *letras*: aquéllas, las que combatían sin cesar en Flandes desde 1567, o las que fueron aprestadas y embarcadas para la desastrada armada y *empresa de Inglaterra*, en 1588; éstas, las que proveían oficios, dispensaban mercedes regias, impartían justicia en última y suprema instancia, o dictaban reales provisiones, cédulas y pragmáticas. *Armas* y *letras* de las que dependían sus vasallos, y que se hallaban suspendidas sobre las cabezas de todos los súbditos de aquella extensísima Monarquía, cualquiera que fuese su *naturaleza*, y sus privilegios, territoriales o personales.

Un vasallo y súbdito que podía ser, entre tantos otros *ingenios* de aquellos tiempos y tierras, el *Príncipe de los ingenios*, Miguel de Cervantes (Alcalá de Henares, 29-IX-1547/Madrid, 23-IV-1616). Sa-

(7) J. A. Escudero, *Los orígenes del Consejo de Ministros en España*, t. I, p. 9.

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bido es que Cervantes, combatiente en Lepanto en 1571 y preso en Argel entre 1575 y 1580, padeció los reveses de las *armas*, y de la fortuna que bien supo que no acompañaba al soldado tras la batalla, en el retiro de las oficinas. En 1587, establecido en Sevilla, tuvo que recorrer los pueblos de Andalucía, comisionado para el acopio de víveres con destino a la *Armada* que no resultaría, a la postre, como se temían sus enemigos, *Invencible*. En 1590, presentó Cervantes ante el Consejo de Indias — el 21 de mayo — un memorial, suplicando del monarca la concesión de un oficio de los que se hallaban vacantes en las Indias: el de contador del Nuevo Reino de Granada, el de contador de las galeras de Cartagena, el de gobernador de la provincia de Soconusco, o el de corregidor de la ciudad de La Paz. Nada obtuvo, sin embargo, del despacho de estas sus *letras* de talludo *pretendiente*, teniendo que seguir dependiendo, como comisionado, del proveedor general de las armadas y flotas de Indias. Ni siquiera tuvo la oportunidad de que Felipe II, al otro lado del *despacho*, decidiese sobre la suerte de aquel oscuro escritor, ya que en el Consejo de Indias se resolvió, simplemente: "Busque por acá en que se le haga merced". Mas, no alcanzó nunca el alcalaíno el que se le despachase la tan deseada merced real. Por el contrario, en 1592, el corregidor de Écija, alegando que había vendido sin licencia trescientas fanegas de trigo, le metió en prisión en Castro del Río. El Consejo de Guerra, a la vista de su apelación contra esta injusta sentencia condenatoria, le absolvería y daría por libre. Comisionado, una vez más, para el cobro de ciertas tercias y alcabalas en el Reino de Granada, en 1594, al quebrar en Sevilla el banquero en el que había depositado parte de lo recaudado, los contadores del Consejo de Hacienda le inculparon, siendo preso en Sevilla, a pesar de tener prestadas fianzas, en 1597. Tan esquivas como las *armas*, le fueron ingratas a Cervantes las *letras*, y los números, de los oficios y los dineros. No fue mejor su fortuna, pues, que la de otro vasallo literario de Felipe II, salido de su pluma, el Don Quijote que velaba armas en una venta para ser armado caballero (*Primera Parte*, cap. III), y en cuya librería un cura y un barbero quemaban casi todos sus libros (*Primera Parte*, cap. VI), sus *letras* de caballero (8). La soledad de este vasallo y de aquel otro, ambos tan reales como prototípicos, debió ser pareja, a pesar de la dispar fortuna de sus destinos, literarios y vitales, a la del monarca, que también velaba por las noches despachando consultas, memoriales e informes, cubriendo con sus *letras* hasta el más mínimo resquicio de

(8) Luis Astrana Marín, "Cervantes y *El Quijote*", en Cervantes Saavedra, Miguel de, *El Ingenioso Hidalgo Don Quijote de la Mancha*, edición Cuarto Centenario, adornada con 356 grabados de Gustavo Doré, enteramente comentada por Diego Clemencín, y precedida de un estudio crítico de..., más un índice resumen de los ilustradores y comentadores del *Quijote* por Justo García Morales, Madrid, s.a., pp. V-CXI, en especial, pp. VII-XVI; y nota núm. 15 del *Comentario* de Clemencín al capítulo XXXVI de la *Segunda Parte*.

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los mismos: resquicios que eran tanto los de su vida, como los de la de los vasallos sobre cuya suerte y hacienda tenía que decidir a diario.

En este capítulo V y final, por consiguiente, el lector asiste con Felipe II a su *despacho* diario, al que correspondía a una Monarquía Universal, a la rutina y desvelos de sus quehaceres de cada día, y los de sus secretarios, de los muchos que le acompañaron a lo largo de su longeva vida — setenta y un años cumplidos para un hombre del quinientos-, y dilatado reinado. Sabemos, así, de su renuencia al despacho *a boca*, y a las audiencias, y su preferencia por el despacho por escrito, que le permitía reflexionar con detenimiento *sobre* y *en* los papeles. Lo que conllevaba y posibilitaba otro *reinado* paralelo sobre dichos papeles: el de sus secretarios, encargados de *hacer relación* sobre todo, o casi todo. Lo que producía, en consecuencia, una corriente o aluvión extraordinario, entre ellos y el monarca, de consultas, cartas, billetes y notas; entre *corresponsales* que, por otra parte, habitaban en el mismo palacio, en el ala norte del segundo patio del Alcázar madrileño en muchas ocasiones, y que se hallaban a pocos pasos, o estancias, de distancia. Podemos conocer el horario de trabajo — agotador e incansable — del soberano, y, sobre todo, el peculiar ritmo de papeles, paradójicamente siempre afectados de la misma carcoma: la *priessa*. Paradoja doble, ya que la complejidad del aparato de gobierno de la Monarquía, y las colosales distancias de sus dominios se compadecían mal con la sensación de urgencia y de prisa que parecía aquejar al monarca y a sus colaboradores, por una parte; y, por la otra, se constata que si bien Felipe II era moroso en la toma de decisiones, no lo eran — ni lo podían ser — sus secretarios en su ejecución. Los procedimientos burocráticos podían ser lentos, pero, los secretarios del rey eran muy activos. De ahí su preocupación por la pronta llegada de los correos y de la correspondencia, y por su rápido curso y ordenación. Un curso y una ordenación en la que se advierte que todos los secretarios se transmitían órdenes — del rey — entre sí. Las cartas y las consultas iban por *la vía de* o *en manos* de un determinado secretario, o bien eran hechas llegar al monarca *en sus reales manos*. Entre las materias propias del despacho regio, destaca la irresolución de Felipe II a la hora de proveer oficios y cargos; y entre los temas recurrentes que surgen en ese *diálogo* privado que se ha conservado, entre el rey y sus secretarios, en los billetes y notas que se cruzaban entre ellos, sobresalen las consideraciones religiosas, la salud personal del monarca y de sus ministros, o la situación económica — las penurias — de sus secretarios y colaboradores. En fin, todo un *mundo de papeles* — el tercero, superpuesto a los otros dos terrenales, el Viejo y el Nuevo-, en el que había orden y desorden simultáneos, agobios burocráticos, cansancios tanto de aquel monarca esclavo del despacho como de sus subordinados consagrados a él; y, asimismo, como característica peculiar, una antinomia difícilmente resoluble entre el carácter prudente del rey, y su irresolución en

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muchas cuestiones: en su preocupación por todo, por los grandes problemas y los menudos asuntos de detalle, por lo esencial y lo adjetivo, por lo urgente y lo accesorio. Algo muy humano, como lo eran otras facetas del protagonista de la *leyenda negra* que comenzaron a crearle, en vida, Guillermo I de Nassau, príncipe de Orange, y Antonio Pérez, dos hombres criados y educados en la corte, que gozaron de su confianza: las de un soberano inclinado a la arquitectura, aficionado a los jardines, amante de las flores y de los pájaros.

Ya se han hecho abundantes referencias al tópico de la pluma y la espada, imprescindibles para entender el pensamiento político y la práctica político-administrativa de los tiempos modernos. Resta, sin embargo, aludir a otro *topos* íntimamente relacionado con el anterior: el de los títulos del rey, sus formas y los territorios de la Monarquía. Un lugar común en los encabezamientos de las cartas regias, y de las reales provisiones, cédulas, pragmáticas y otras disposiciones emanadas de la voluntad soberana del príncipe. En definitiva, sobre los *títulos* del monarca, sobre su relación de territorios (reinos, principados, ducados, marquesados, condados, señoríos), y sobre los vasallos que en ellos vivían, vigilaba la espada, y dictaba la pluma del rey. Pues bien, sabiendo que los diferentes territorios de la Monarquía poseían distinta naturaleza jurídico-pública, y, por lo tanto, distinto rango, en 1580, con ocasión de la incorporación del Reino de Portugal, se planteó el problema de intercalar el nuevo reino entre los restantes de la Monarquía: en una palabra, el de enumerar, y ensamblar, la nueva pieza de aquella Monarquía *plural* (pp. 555-567). Hay que tener presente que no todos los reinos y territorios citados en los títulos regios tenían la misma naturaleza, existiendo los que estaban unidos con carácter *accesorio* (como eran los que integraban la Corona de Castilla), y los que se habían unido con carácter *principal*, manteniendo su peculiar régimen jurídico y político (caso de los de Navarra, Flandes, Nápoles, Milán o Portugal, entre otros). Una cuestión en absoluto baladí era ésta de los títulos del rey, que ilustra extraordinariamente sobre los límites, las ventajas y las dificultades de una Monarquía *plural* o *compuesta* como fue la española en los siglos modernos. De ahí la expresión, tan castiza como expresiva, que he subrayado en la primera cita de las liminares de este apartado, incluida por el secretario Gabriel de Zayas en su carta al Cardenal Gravela, desde la villa portuguesa de Elvas, de 16-XII-1580: *Cada gallo canta en su muladar* (p. 558). Por eso, la enumeración de dichos títulos no era uniforme, estática, ni idéntica en los documentos destinados a los diferentes territorios de la Monarquía. Por el contrario, manteniendo unas referencias fijas (por ejemplo, la primacía de Castilla y Aragón; en ocasiones, como en los destinados a Flandes, resumida en la locución *Hispaniarum rex* o *rey de las Españas*), se daba entrada a un orden variable, que primaba y anteponía el título del reino, ducado, condado o señorío *ad quem*, o sea, el territorio destinatario y receptor

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del texto regio. Por lo demás, se trataba de una Monarquía compuesta e histórica, constituida sobre la base de las herencias regias, que incluían tanto reinos y territorios adquiridos, y conquistados (*ganados*), como otros — la mayor parte — heredados de sus antecesores, o *de abolengo*. Por eso, por derecho de mayorazgo regio, eran preservados en los títulos incluso aquellos que no pertenecían ya, de hecho, a la Monarquía. Como era el caso de los reinos y territorios de Alemania, porque, como decía el consejero Funch al Cardenal Granvela, hacia el 22-XII-1580, en la segunda de las mencionadas citas liminares de este apartado, que también he destacado en cursiva: *¿Quién sabe qué tal será al fin la tarde?* (p. 560, nota núm. 1380). La memoria de la *antigua casa de Austria* atesoraba derechos latentes, y, por eso mismo, irrenunciables.

Antes de pasar a un examen algo más detallado del *Felipe II* del profesor Escudero, hay que singularizar que su contenido no es sólo todo lo exhaustivo, instructivo y enriquecedor que se puede deducir de lo hasta aquí resumido, especialmente, en lo atingente a la estructura y funcionamiento del aparato administrativo y gubernativo de aquella formación política que fue la Monarquía Universal española, sino que también incluye pequeñas monografías, plenas de sugerencias maestras, sobre los orígenes u otros aspectos institucionales de diversos órganos de aquella Administración histórica. Así, por ejemplo, el autor reclama la realización de una investigación iushistórica sobre la llamada *Junta de Obras y Bosques*, lo que no le impide, sino que, por el contrario, le estimula a dar los primeros pasos en ese sentido, proporcionando valiosísimos datos e hipótesis. Así, le consta que el secretario Pedro de Hoyo se encargó, desde 1560, de lo relativo *a obras y bosques*, pero, siempre "al margen de una *Junta* cuya existencia entonces no consta, o al menos no consta conexa a la actividad de Hoyo, pese a los testimonios repetidos de los autores, que quizá se repiten unos a otros en lo relativo a la fecha de su creación, sin que se sepa bien quién garantiza la afirmación que sirve de punto de partida" (p. 186; y, en general, pp. 184-191, 308-320 y 429-430). Las primeras referencias a una efectiva *Junta* de Obras y Bosques parece ser que han de retrasarse al año 1592. Otros apuntes monográficos de gran interés son las reflexiones del profesor Escudero acerca de la fecha de creación del Consejo de Italia, que le llevan a sostener que su erección formal debió tener lugar en el mes de julio de 1558, sin que sea posible adelantarla al de enero de 1555, cuando un grupo de consejeros fue encargado de los negocios de Nápoles y Milán (pp. 114-120). O las que emplea en desentrañar los orígenes de la conocida como *Junta de Noche*, el grupo de consejeros que se ocuparon de ayudar directamente a un Felipe II postrado por la gota, en el último tramo de su reinado, a despachar los negocios de gobierno. Al ser desconocida la orden constitutiva de esta Junta, el autor se decanta por una institucionalización progresiva de la misma,

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constatando que sólo se reunió formalmente desde el mes de julio de 1586. Además, indaga sobre el problema de su exacta denominación, desechando los calificativos que se le han aplicado tradicionalmente, de *Junta de Noche* (ya que, al ser reorganizada en 1593, su horario de reuniones pasó a ser diurno), de *Junta Grande* (puesto que ni el rey, ni los secretarios, la conocieron por ese nombre), o los equívocos de *Junta de los Tres* o de *Junta de acá*. A su juicio, el nombre inequívoco es, simplemente, el de *la Junta*, dado que así fue llamada por sus secretarios, Mateo Vázquez y Jerónimo Gasol, desde que fue creada, en 1585 ó 1586, siendo reformada en 1593, y extinguida en 1598, a la muerte de Felipe II. Una Junta que fue, propiamente, una Junta de Estado, sustancialmente distinta de otras Juntas particulares existentes a lo largo del reinado, y en la que sólo fueron adecuadamente formalizadas sus reuniones desde julio de 1588, que es desde cuando se conservan actas y registros de las mismas (pp. 335-350).

Un *Cuadro Sinóptico* desplegable, de extraordinarias dimensiones, en edición exenta y conjunta con el libro que nos ocupa, y de todavía más extraordinario valor, por su riqueza informativa y claridad visual, recapitula e informa acerca de la sucesión de secretarios, presidentes de los Reales Consejos y demás colaboradores del *Rey Prudente* a lo largo de su reinado, entre 1556 y 1598, e incluso antes, durante los años, de 1543 a 1556, en los que el príncipe Felipe fue regente de los reinos peninsulares e indianos de la Monarquía carolina (9). En la faja que envuelve esta gran *Sinopsis* (verdadero tesoro, de valía inestimable, para todo investigador de este período, y auténtica guía de caminantes o *Lazarillo de ciegos* lectores), figura la clave de su contenido: *La Máquina de Gobierno*. Y es que, en efecto, en ella se recogen, cronológicamente, los diferentes presidentes y secretarios de los Consejos (de Hacienda, de Guerra, de Estado, de Indias, de Castilla, de Cámara de Castilla, de Aragón, de Inquisición, de Órdenes, de Italia, teniendo en cuenta que en los Consejos de Estado y de Guerra el presidente era el rey, por lo que sólo había secretarios), que se fueron sucediendo desde 1543 hasta finales del siglo XVI. Junto a ellos, también tienen cabida los miembros de la llamada *Junta de Noche* o Junta de Gobierno, los secretarios de

(9) Un recurso clarificador, y de síntesis expositiva, que ya ha sido utilizado por el autor en anteriores investigaciones editadas. Como fue el caso de los dos *Cuadros Sinópticos*, relativos a "los Secretarios de Estado hasta 1724" y "los Secretarios del Despacho hasta 1724", incluidos en *Los Secretarios de Estado y del Despacho (1474-1724)*, 4 tomos, Madrid, 1969 (y, también en la 2ª ed., Madrid, 1976). O del presentado con su estudio sobre la sucesión de ministros o secretarios de Estado y del Despacho al final del Antiguo Régimen, desde la supresión de la Junta Suprema de Estado, el 28-II-1792, hasta el 4-V-1814, día en el que Fernando VII tomó las riendas políticas de la Monarquía, que retornó al absolutismo tras la experiencia y el paréntesis liberal de la Constitución de Cádiz de 19-III-1812: J. A. Escudero, *Los cambios ministeriales a fines del Antiguo Régimen*, Centro de Estudios Políticos y Constitucionales, 2ª ed., Madrid, 1997 (1ª ed., Universidad de Sevilla, Sevilla, 1975).

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alguna negociación especial como la de Obras y Bosques, los consejeros principales, y los secretarios privados, que "no se suceden entre sí, sino que son nombrados independientemente unos de otros, salvo en el caso de la primera secretaría privada del monarca, donde Jerónimo Gasol sustituye a Mateo Vázquez, y en la sustitución de Santoyo por Ruiz de Velasco" (*Nota* preliminar del *Cuadro Sinóptico*).

Un último acierto editorial del autor ha sido, a mi entender, el de reproducir en la cubierta del libro, entre los numerosos retratos de Felipe II que se conservan, precisamente el que pintó del monarca, en la década de los años setenta del quinientos, Sofonisba Anguissola, y que se conserva en el Museo Nacional del Prado de Madrid. Nos hallamos ante un rey en plena madurez, de rostro sereno, mirada confiada y decidida, y actitud devota, puesto que posa con el rosario en la mano, en contraste con su padre, Carlos V, siempre cabalgando entre sus soldados; o con anteriores retratos suyos de juventud, como el de Tiziano de 1551, también custodiado en el Museo del Prado, o el de Antonio Moro de 1557, guardado en el Real Monasterio de San Lorenzo de El Escorial, en los que figura representado como un apuesto caballero, con sus armas — la espada en la siniestra, pendiente del tahalí-, y la firme mirada del soldado que no fue. Procedente de Italia, Sofonisba Anguissola llegó a España en 1559, convirtiéndose al año siguiente en dama de honor de la nueva reina, Isabel de Valois. Permaneció en la corte hasta 1580, partiendo rumbo a Palermo tras la muerte de Ana de Austria, donde contrajo matrimonio con Fabrizio de Moncada, hermano del príncipe de Palermo. La gran calidad de su obra pictórica, su fina factura y cuidada ejecución, con una pincelada que delata el origen italiano de la pintora, y el buen parecido de sus modelos, han llevado a que la mayor parte de sus cuadros del período español hayan sido confundidos con los de Alonso Sánchez Coello, el pintor especializado en ejecutar los retratos de la real familia (10), como ha ocurrido también en este caso. Aclarada la confusión, aquí interesa destacar la imagen de *Rey burócrata* que transmite el retrato desde la cubierta del libro, al tiempo que la de rector de una — *la* — *Monarquía Católica*, principio y fin, cuna y sepultura, de muchos de los problemas que hubo de afrontar a lo largo de su reinado, y de los sufrimientos que sus vasallos, del Norte y del Sur, de Oriente y de Occidente, tuvieron que padecer, sacrificados a tan altas como sobrehumanas miras.

(10) Alfonso E. Pérez Sánchez, "Las artes en la España de Felipe II", en VV. AA., *Felipe II. Un monarca y su época. La Monarquía Hispánica*, Sociedad Estatal para la Conmemoración de los Centenarios de Felipe II y Carlos V, Madrid, 1998, pp. 409-421. Y Juan Martínez Cuesta, "Ficha catalográfica correspondiente al Retrato de la Infanta Isabel Clara Eugenia, de Sofonisba Anguissola", en *Felipe II. Un monarca y su época. La Monarquía Hispánica*, núm. 162, pp. 496-497.

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2. *El Rey en el despacho: la obra; y sus papeles, tanto los de las armas como los de las letras.*

> "Considerando la importancia de que son papeles *(cuando Felipe II ordenó que fuese creado el Archivo de Simancas)*, como quien por medio dellos meneaba el mundo desde su real asiento".
>
> (Cabrera de Córdoba, Luis, *Felipe Segundo, Rey de España*, 4 vols., Madrid, 1876-1877, vol. I, p. 504; cit. por Escudero, J. A., *op. cit.*, p. 578).

> "Sea mil vezes enorabuena el aver empleado a Vuestra merced en lo que meresce, que dize el señor Cardenal que an echo a Vuestra merced segundo rey del mundo".
>
> (Carta de Jerónimo de Barrionuevo a Mateo Vázquez, con ocasión del nombramiento de éste, el 6-I-1588, como secretario del Patronato eclesiástico para el despacho con el rey en el Consejo de Cámara de Castilla. Sevilla, 18-I-1588. La cita proviene de la *Bibliothèque Publique et Universitaire* [BPUG] de Ginebra, Collection Édouard Favre, vol. XXXI, f. 383; cit. por Escudero, J. A., *op. cit.*, p. 388).

Felipe II nació en la villa de Valladolid el 21 de mayo de 1527, en momentos de júbilo para su padre, el emperador Carlos V. Tres meses antes se había trasladado allí desde Granada, en compañía de la emperatriz, Isabel de Portugal. Instalada la familia real en la casa de Pimentel, la educación del príncipe fue encomendada a un primer ayo, tal vez Pedro González de Mendoza, obispo de Salamanca, que años después asistiría a las sesiones del Concilio de Trento. Como preceptor fue nombrado luego Juan de Zúñiga y Avellaneda, comendador mayor de Castilla de la Orden de Santiago. Varias fueron sus ayas, como Inés de Manrique, antigua dama de compañía de Isabel la Católica y sobrina del célebre poeta Jorge Manrique, y, sobre todo, Leonor de Mascareñas, una noble portuguesa que tiempo después fundaría el convento de franciscanas de Nuestra Señora de los Ángeles, en Madrid. También fue preceptor y maestro del príncipe Juan Martínez Silíceo, obispo de Cartagena y futuro arzobispo de Toledo. Éstos y otros ayos, preceptores y maestros fueron claves en la educación de un príncipe que perdió a su madre cuando no había cumplido aún los doce años, y que pasó la mayor parte de su infancia alejado de su padre, ausente en los países del norte de Europa (11). Parece ser que llegó a comprender, sin hablarlos,

(11) J. A. ESCUDERO, "El camino al trono", en VV. AA., *Felipe II. Un monarca y su época. La Monarquía Hispánica*, pp. 97-101.

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los idiomas italiano y francés, que apreció la lengua materna, el portugués, que manejó toscamente el latín, y que usó casi exclusivamente el castellano, cuyo aprendizaje encarecía con frecuencia. En 1539, huérfano de madre, hubo de afrontar su primera lección de práctica política. Al finalizar aquel otoño, Carlos V partió para Flandes, quedando el gobierno en manos de un regente, el cardenal Juan de Tavera, de Fernando Álvarez de Toledo, III duque de Alba, y del secretario Francisco de los Cobos. Cuatro años después, cuando el príncipe Felipe todavía no había cumplido los dieciséis, el emperador volvió a marcharse, ahora prácticamente para siempre, puesto que no retornaría a la Península más que para su retiro en Yuste. Desde entonces, comenzaría su gobierno como príncipe-regente (pp. 29-34).

También entonces sería cuando el jovencísimo príncipe Felipe entraría en contacto — al menos, más directo y responsable — con el complejo aparato administrativo de gobierno de la Monarquía: con los Reales Consejos, Juntas y Secretarías que habrían de ocuparle, y preocuparle, durante los restantes días de su vida. Aquí, el profesor Escudero proporciona una apretada síntesis de dicho aparato gubernativo (pp. 35-51), que ya ha expuesto en otros lugares y ocasiones con el rigor y la pericia acostumbrados (12). Es de notar que Felipe II, que heredó el antecedente institucional de las *Juntas*, tanto las generales de gobierno como las especiales, habría de potenciarlas hasta constituir una segunda red de órganos colegiados, complementaria de la de los Consejos (p. 47). Y de recordar que los *secretarios*, cuyo oficio *de papeles* les permitía hilvanar un poder soterrado, que crecía en el silencio del despacho con el rey, eran gentes de extracción social media, criados desde niños a la sombra de algún familiar del que aprendían el oficio, en el seno de familias (las de los Eraso, los Pérez o los Idiáquez) tradicionalmente dedicadas a ello. Un aprendizaje en el que el secreto, el silencio y la paciencia eran requisitos exigibles, y cualidades muy apreciadas, y cultivadas. De ahí que todos se considerasen *hechuras* de sus maestros y antecesores (p. 50).

Junto a las instituciones, el príncipe-regente Felipe también heredó los hombres, que eran, lógicamente, los de su padre: los que gozaban de la confianza del emperador Carlos, ya que él los había elegido y nombrado (pp. 53-69). En septiembre de 1517, casi con la misma edad de Felipe, Carlos había desembarcado en España. En su comitiva, dos cortesanos flamencos tenían la máxima influencia sobre él: una especie de *privado*, hábil y autoritario, llamado Guillaume de Croy, señor de Chièvres; y, bajo su control, Jean de Sauvage, Gran Canciller de los Países Bajos desde 1515. Sauvage fallecería repentinamente en Zara-

(12) J. A. Escudero, *Curso de Historia del Derecho. Fuentes e Instituciones Político-Administrativas*, 2ª ed. revisada, Madrid, 1995 (1ª ed., Madrid, 1985; hay una 3ª el., corregila y aumentala, Madrid, 2003), pp. 738-752.

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goza, en junio de 1518, siendo sustituido por un humanista de gran formación, y un político de gran talento: Mercurino de Gattinara, que recibió el título, el 5-X-1518, de *Gran Canciller de todas las tierras y reinos del rey*, lo que le otorgaba una jurisdicción general, y amplísimos poderes. Gattinara pronto comenzó a dominar los resortes de la Administración central de la Monarquía, y en 1521 creó el Consejo de Estado, en el que ejerció de secretario Jean Hannart, vizconde de Lombeck, quien, al marchar a Alemania en 1523, fue sustituido por Jean Lalemand (hispanizado como Juan Alemán), señor de Bouclans. Sin embargo, Lalemand, al conspirar torticeramente contra su protector Gattinara, fue despedido por Carlos V de la secretaría del Consejo de Estado en diciembre de 1528. Fue la primera destitución de un secretario (del Consejo) de Estado, y un claro antecedente de la de Antonio Pérez, acaecida medio siglo después (p. 58). El destierro de Lalemand alzó la figura de Nicolás Perrenot, señor de Granvela y consejero de Estado, que le sucedió como hombre de confianza de Gattinara, y colaborador del emperador. Como secretario titular del Consejo de Estado fue nombrado, el 24-X-1529, Francisco de los Cobos, quien habría asumido el despacho de los asuntos españoles, mientras que Granvela se ocupaba de los del norte de Europa, y ambos bajo la dirección del canciller Gattinara. Al morir éste, el 5-VI-1530, Cobos y Granvela vieron revalorizadas sus respectivas posiciones, pasando a estar a las órdenes directas del emperador. Con el paso del tiempo, esta diarquía de gobierno se consolidó: Cobos siguió despachando lo relativo a España, Italia y las Indias, y el consejero borgoñón lo atinente a Flandes y Alemania (p. 65). Cobos acompañó a Carlos V en sus viajes por Europa hasta el año 1539 (en 1529-1533, 1535-1536 y 1538), para después quedarse junto al príncipe Felipe y la regencia en la ausencia del emperador de 1539-1541, al igual que en la mucho más larga de 1543 en adelante. Su influencia queda de manifiesto en el hecho de que un sobrino segundo suyo, Juan Vázquez de Molina (hijo de su primo, Jorge de Molina), fuese ascendido nada menos que al cargo de secretario del Consejo de Guerra, un sínodo que estaba íntimamente vinculado al de Estado, cuya secretaría manejaba Cobos, lo que suponía ampliar directamente su esfera de poder y de competencias.

Un poder que no se ceñía sólo al de los Consejos mencionados. Francisco de los Cobos, el poderoso secretario carolino, también lo era de los Consejos de Castilla, de Hacienda y de Indias. Sólo quedaban fuera de su jurisdicción o influjo los de Aragón y Órdenes. En 1543, cuando comienza la regencia del príncipe Felipe en España, estaba claro que Cobos era quien ostentaba el poder principal. Hasta el punto de que, lógicamente, sin abandonar las correspondientes titularidades, tuvo que ceder el ejercicio de varias secretarías de los Consejos: la de Indias, desde 1539, en la que actuaba como secretario interino Juan de Samano; la de Estado, para la que designó como tal, el 1-V-1543, a

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Gonzalo Pérez, un clérigo segoviano de ascendencia aragonesa, latinista de vasta cultura que se había formado junto a Alonso de Valdés, antiguo colaborador del canciller Gattinara; ese mismo día recibió un nombramiento semejante, como secretario interino del Consejo de Cámara de Castilla, su primo Pedro de los Cobos; y, en el de Hacienda, Hernando de Somonte. Al mismo tiempo, junto con el cardenal-arzobispo de Toledo, Juan de Tavera, y el obispo Hernando de Valdés, presidente del Consejo de Castilla, Cobos había sido encargado por el emperador de asesorar en la regencia a su hijo, el príncipe Felipe, quien, desde ese mes de mayo de 1543, pasó a suscribir todos los documentos con la titulación de *Yo el Príncipe*. Por otra parte, entre los protegidos de Cobos comenzaron a destacar, por aquellos años, dos secretarios, Francisco de Eraso y Alonso de Idiáquez, el primero de los cuales habría de tener gran peso en los decenios siguientes, ya en el reinado de Felipe II. Ambos acompañaron al emperador Carlos en su viaje al Norte de Europa, en 1543 (pp. 73-85).

En el bienio de 1545-1546 se produjeron varios fallecimientos en la corte del príncipe Felipe, que significaron la desaparición de muchas de las personas que Carlos V había recomendado a su hijo, al partir en 1543 de la Península: las del cardenal Tavera, fray García de Loaysa, presidente del Consejo de las Indias e Inquisidor general, Miguel Mai, vicecanciller del Consejo de Aragón, Juan de Zúñiga, los condes de Cifuentes y Osorno... En 1547 murieron dos de los principales secretarios: el todopoderoso y omnipresente Francisco de los Cobos, y Alonso de Idiáquez, asaltado y muerto al cruzar el río Elba, en Sajonia, cuando acudía a Nuremberg, a unirse a la corte del emperador. Por si todo ello no fuera suficiente, Nicolás Perrenot, señor de Granvela, falleció, en Augsburgo, en 1550. Pero, pese a la magnitud del vacío político y administrativo que tantas desapariciones habían dejado, ni Carlos V decidió proveer las vacantes, ni el príncipe Felipe parece ser que le instó a ello. Ambos prefirieron mantener el despacho en manos de los secretarios interinos, que ya actuaban al frente de sus respectivos ámbitos de competencias (pp. 87-94). En cualquier caso, no podía seguir todo igual, y, de hecho, hubo importantes modificaciones, aunque éstas se retrasasen. En la corte del emperador, en el Norte de Europa, el gran beneficiario fue el secretario Francisco de Eraso, que se había quedado solo, al morir Idiáquez, y al tener que regresar a España, enfermo, Vázquez de Molina. Por lo que se refiere al mundo de los consejeros, la quiebra ocasionada por la muerte de tantos impulsó la figura del portugués Ruy Gómez de Silva, que había llegado a España en el séquito de la emperatriz, y que se convirtió en el compañero de juegos y en el amigo predilecto del príncipe Felipe. En torno al año 1555, aproximadamente, el duque de Alba y Gómez de Silva, conde de Melito y futuro príncipe de Éboli desde 1559, encabezaron decididamente dos facciones cortesanas, luego conocidas como las de los *albistas*

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y los *ebolistas*, que se habrían de disputar el poder y el favor de Felipe II a lo largo de gran parte de su reinado. El *rey Gómez*, como era conocido en los ambientes cortesanos, acumuló los cargos de consejero de Estado y de sumiller de corps, e incrementó su influencia con su enlace matrimonial con Ana de Mendoza, lo que le permitió aliarse con Diego Hurtado de Mendoza, el marqués de Mondéjar, los duques de Medinaceli y Béjar, y el conde de Feria, Gómez de Figueroa. Además, también atrajo a su órbita al secretario Francisco de Eraso. Por su parte, el duque de Alba encabezaba a la poderosa familia de los Toledo, que había emparentado con la italiana de los Colonna, y más tarde con el conde de Barajas y el III conde de Chinchón, Diego Cabrera de Bovadilla. Entre los secretarios y consejeros, contaba con un importante consejero valón, Antonio Perrenot — hijo de Nicolás-, obispo de Arras y futuro cardenal Granvela, y con los secretarios Gonzalo Pérez y Gabriel de Zayas (pp. 98-101 y 108-114).

Tras la victoria de Mühlberg, en el otoño de 1547, enfermo en Augsburgo, Carlos V debió decidir organizar un primer viaje del príncipe Felipe, para que fuese jurado como heredero del trono, y conocido por sus súbditos del norte de Europa. Durante este viaje, iniciado en el otoño de 1548 y concluido en el verano de 1551, se hicieron cargo de la regencia el archiduque Maximiliano de Austria y la infanta María. Tras contraer matrimonio en Valladolid, ambos fueron nombrados *lugartenientes generales y gobernadores de los reinos y señoríos de Castilla, León, Granada, Navarra, islas Canarias, e Indias y Tierra Firme del Mar Océano, descubiertas y por descubrir*. En el verano de 1550, el príncipe Felipe acompañó a su padre en la Dieta de Augsburgo (pp. 94-98). A la vuelta de este primer viaje, al poco de desembarcar en Barcelona, a finales de julio de 1551, se despidió de Maximiliano y María, que partían rumbo a Italia, al haber concluido su regencia, en Zaragoza. De esta forma, de nuevo se quedó el príncipe Felipe, con nuevas instrucciones del emperador, como lugarteniente general y gobernador. Pero, tres años después, en julio de 1554, tuvo que volver a embarcarse, esta vez en La Coruña, para ir a Inglaterra, a casarse con la reina María Tudor. Entonces, Felipe, rey consorte de Inglaterra y príncipe de España, pasó a firmar los documentos y cartas, que solían ser refrendadas por el secretario Pedro de Hoyo, como *Rey Príncipe*. Tal titulación se mantuvo, no obstante, durante pocos meses, ya que, en septiembre de 1555, tuvo que pasar a Bruselas, donde tuvieron lugar las abdicaciones del emperador. En efecto, el 25-X-1555, Felipe fue proclamado rey de los Países Bajos; y, el 16-I-1556, de los reinos de las Coronas de Castilla, Aragón y Sicilia, siendo proclamado rey el príncipe ausente, en Valladolid, el 28-III-1556. Por tanto, "aquel don Felipe, que había firmado en los primeros años como *Yo. El Príncipe*, y luego en Inglaterra como *Yo. El Rey Príncipe*, firmará definitivamente *Yo. El Rey*" (p. 105, y, en general, pp. 103-106).

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Durante estos años, entre 1548 y 1556, de ausencias y presencias del príncipe Felipe en España, en Flandes, en Alemania y en Inglaterra, el despacho se mantuvo sobre la base de una clara subordinación de la Península a las decisiones adoptadas por Carlos V y sus colaboradores en el centro y norte de Europa. Desde el punto de vista de las Secretarías y los secretarios, Francisco de Eraso era el preeminente en Flandes, y Vázquez de Molina en España. Ambos eran los personajes claves de sus respectivas Administraciones. Tras las renuncias formalizadas por el emperador, Felipe II, ya rey, acometió a lo largo del año 1556 una serie de reformas administrativas, que afectaron a varios Reales Consejos, y a sus Secretarías. La posición del secretario Juan Vázquez de Molina fue todavía reforzada con dos títulos más: el de secretario de Estado y Guerra de España, para que despachase lo que librasen "los del nuestro Consejo de Estado y Guerra", y el de secretario de la Cámara de Castilla (pp. 106-108). Además, Gonzalo Pérez fue nombrado "secretario de Estado en los negocios que se ofrescieren fuera de España"; Francisco de Eraso, iniciando así un imparable ascenso, secretario del Consejo de Hacienda; y Juan de Samano, secretario titular del Consejo de Indias, en un cargo que hasta entonces había desempeñado interinamente. Al morir Samano en diciembre de 1558, le fue concedido al ya poderoso Eraso también esta secretaría del Consejo de Indias. Por otra parte, en el Consejo de la Inquisición, los asuntos correspondientes a las Indias fueron integrados en la Secretaría de Aragón, y no en la de Castilla (13), ejerciendo como titulares de la primera Jerónimo de Zurita, Juan de Valdés y Pedro de Tapia, manteniéndose en la segunda Juan Martínez de Lasao; en la Secretaría del Consejo de Aragón siguió el clérigo Juan Saganta; y, en la del naciente Consejo de Italia, Diego de Vargas (pp. 114-133).

En la nueva diarquía de poder en las Secretarías, que oponía a Eraso y a Vázquez de Molina, uno en Flandes y otro en España, pronto la balanza se inclinó, desde que Felipe II, ya rey, retornó a la Península, en septiembre de 1559, en favor del primero. Es más, el profesor Escudero asegura que el triunfo de Francisco de Eraso era previsible, por una serie de razones:

> "las propias recomendaciones del emperador; la amistad de Eraso con el privado Ruy Gómez; el trato que a lo largo de los últimos meses había tenido Eraso con don Felipe *(en Flandes)*; y hasta el papel subordinado que los que estaban en España desempeñaban con respecto a los que vivían en Inglaterra o en Flandes" (p. 139).

(13) Una extraña y singular decisión, puesto que las Indias habían sido incorporadas a la Corona de Castilla a todos los efectos. Sobre ella ya llamó la atención el mismo J. A. ESCUDERO, "Conflictos en el régimen funcional del Santo Oficio: los Secretarios del Consejo", en *Historia, Instituciones, Documentos*, Sevilla, 14 (1987), pp. 75-84.

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El 15 de agosto de 1559, fechado en Zierizel, antes de embarcarse para la Península, Felipe II decidió adoptar un nuevo orden en el despacho de los Consejos y las Secretarías, que fue formulado por el mismo Eraso, resultando unas instrucciones intituladas o encabezadas del siguiente modo: *La orden que quiero se guarde en algunos negocios, llegado yo a España, es esta que se sigue*. El sentido profundo de la reforma burocrática de 1559 fue la de entregar el poder al nuevo secretario favorito (tras Francisco de los Cobos con Carlos V, cuya prevalente posición fue heredada, en cierto modo, por su pariente, Juan Vázquez de Molina): el madrileño, de ascendencia navarra, Francisco de Eraso. El predominio de Eraso se extendería durante diez años, entre 1556 y 1565, acumulando multitud de cargos: consejero de Estado y consejero de Guerra, secretario titular de los Consejos de Indias y de Hacienda, suplente en la Secretaría del Consejo de Estado para los asuntos de España, sustituto para el otorgamiento de gracias, mercedes y oficios en la Secretaría del Consejo de la Cámara de Castilla, teniente de la Contaduría Mayor de Cuentas, etc. A ello se unió el hecho de que, trasladada definitivamente la corte a la villa de Madrid desde 1561, la amistad y la confianza que Ruy Gómez mantenía con Felipe II desde la infancia, se convirtiese, especialmente desde 1557, en una verdadera privanza. Sus desavenencias con el duque de Alba se ahondaron tras el regreso de éste a Bruselas, en enero de 1558. No obstante, hacia 1560, los *ebolistas* triunfaron en toda regla sobre los *albistas*, gracias a la activa presencia de Ruy Gómez, amigo íntimo del monarca, en el Consejo de Estado, y al dominio de Francisco de Eraso sobre varias Secretarías y otros puestos relevantes. El punto álgido de dicho triunfo llegó con la caída y retiro forzoso, en abril de 1564, de Antonio Perrenot, cardenal Granvela desde 1561, consejero de Estado de la regente Margarita de Parma en Flandes. Una defenestración que, sin embargo, habría de ser temporal (pp. 139-156).

El triunfo y la derrota son, en materia política, como es sabido, ambas pasajeras, puesto que siempre está ascendiendo la buena estrella de unos, mientras otros, hasta hace poco en la cúspide del poder, bajan o caen. Es la ley, tan humana, de la rueda de la fortuna..., que también gira en política. La orden de Felipe II al cardenal Granvela de que saliese de Bruselas, para atender sus asuntos familiares en Borgoña, fue tomada cuando ya estaba en marcha una *visita* a los ministros y oficiales de la Contaduría Mayor de Hacienda. En ella, Francisco de Eraso fue acusado de abusar de sus oficios en provecho personal, aceptando dádivas de los prestamistas y banqueros, y beneficiándose de los arrendamientos de rentas. Por sentencia dictada, el 5-IV-1566, por el Consejo de Hacienda, fue condenado Eraso a la pérdida de sus oficios de secretario de dicho Consejo, y de teniente de la Contaduría Mayor y del libro de la cuenta y razón, y al pago de una multa de más de doce mil ducados. Al mismo tiempo, la política de concesiones en Flandes

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sostenida por el príncipe de Éboli en el Consejo de Estado tenía que claudicar, al perder el favor regio, en octubre de 1566, ante la política de fuerza propugnada por el duque de Alba. Cuando Ruy Gómez de Silva, príncipe de Éboli, falleció el 29-VII-1573, hacía ya años que el predominio de los *ebolistas* había desaparecido. Eraso, que logró retener los oficios que no estaban relacionados con la Hacienda, había muerto el 26-IX-1570 (pp. 156-168). Ambos dispusieron de tiempo, no obstante, para ser testigos del meteórico ascenso del cardenal Diego de Espinosa desde 1565, convertido, por obra y decisión de Felipe II, en heredero del poder que antes habían disfrutado el cortesano Ruy Gómez y el secretario Eraso. De la absoluta privanza del cardenal Espinosa dieron cuenta sus mismos contemporáneos, al afirmar que era "el hombre de toda España de quien el rey haze más confianza, y con quien más negocios trata, así de España como fuera della" (p. 137). Siendo ya cardenal, desde marzo de 1568, Felipe II le dispensó un especial tratamiento, saliendo a recibirle descubierto a la antecámara, no cubriéndose hasta que Espinosa lo hiciese, y sentándolo en las audiencias públicas en un solio especial, además de llevarle a su derecha en las procesiones (pp. 169-173). Sin embargo, acierta el profesor Escudero al no perderse en la compleja malla de las intrigas cortesanas, y en los enfrentamientos entre las diversas facciones, bandos y parcialidades, ni en los intereses personales y clientelares entonces en liza. Al relativizarlos, el panorama es más diáfano, y, muy probablemente, más acertado y equilibrado. Interesa mucho más detenerse en las consecuencias institucionales (nombramientos y ceses, permanencias y caídas de los consejeros, secretarios y otros ministros) de dichas pugnas, de personas o de grupos, que perderse en el mare mágnum de los pequeños detalles o de las miserias individuales.

De ahí que interesen también al autor, y al lector, ante todo, por ejemplo, las consecuencias de la visita a Eraso en Hacienda. La privación de sus oficios, en 1566, dejó vacantes tres cargos: el de teniente de la Contaduría Mayor de Cuentas, que fue entregado a Francisco de Laguna; el de la toma de la cuenta y razón, que fue dividido en dos, y dados a Francisco de Garnica y al secretario Pedro de Hoyo; y el de la Secretaría del Consejo de Hacienda, para el que fue nombrado el secretario Juan de Escobedo. En la Secretaría del Consejo de Guerra, convertido en un organismo de vital importancia, ya que en agosto de 1567 el duque de Alba, al frente de un poderoso ejército, había entrado en Bruselas, puesto que su titular, Juan Vázquez de Molina, se había retirado a su ciudad natal de Úbeda, aquejado de una grave enfermedad, le sustituyó un sobrino suyo, Juan Vázquez de Salazar. Como se ve, el poder e influencia de Francisco de los Cobos, iniciado cuarenta años antes bajo el emperador Carlos V, se mantenía todavía en el seno de la familia. Por lo demás, en la Secretaría del Consejo de Estado, la muerte del clérigo Gonzalo Pérez, en abril de 1566, dejó una vacante para la que Felipe II dudó a la hora

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de nombrar sucesor. A ella aspiraban un oficial, el clérigo Gabriel de Zayas, y el joven hijo — al que se le llamaba *sobrino*, dada la condición también clerical de su padre — del secretario difunto, Antonio Pérez. Indeciso, Felipe II se mostró partidario, en diciembre de 1567, de expedir dos títulos de secretario de Estado, dividiendo así la hasta entonces única Secretaría del Consejo de Estado: Antonio Pérez se encargaría de la Secretaría de Italia, es decir, de los papeles y despachos que procediesen de Nápoles, Sicilia y Milán, y de las embajadas presentes en los restantes territorios italianos; y Gabriel de Zayas de la del Norte (de Europa), esto es, de las embajadas en Viena, Inglaterra, Francia, etc. De este modo, se iniciaba el proceso de fraccionamiento de las Secretarías únicas de los Consejos. Un proceso, expediente o solución que habría de tener mucho éxito en los años siguientes, aun a costa de introducir una notable complejidad administrativa, muchas veces innecesaria e indeseable. Simultáneamente, a partir de 1560 se puede detectar la existencia de un secretario encargado de *lo de obras y bosques*, que era lo mismo que decir el encargado de llevar el despacho de los negocios relacionados con la construcción, mantenimiento y reparación de los palacios, jardines y Reales Sitios. Dicho secretario será Pedro de Hoyo, que siempre mantuvo, pese a ser un secretario de trayectoria oscura, sinuosa y confusa, una estrecha e ininterrumpida relación con Felipe II, sobre todo, en lo referido a la prioritaria — para el monarca — construcción del monasterio de San Lorenzo de El Escorial. Hoyo falleció el 8-IX-1568, siendo sustituido por el navarro Martín de Gaztelu, con quien dicha Secretaría, embrión de la futura Junta de Obras y Bosques, parece ser que mínimamente se institucionalizó.

Esta serie de cambios, propiciada por los resultados de la visita a Francisco de Eraso en Hacienda, se completó tras la desaparición de éste, en septiembre de 1570. La plaza vacante en la Secretaría del Consejo de la Cámara de Castilla fue dividida en dos, como antes había acontecido con la del Consejo de Estado: todo lo relativo a la provisión de gracias y mercedes recayó en Juan Vázquez de Salazar; y lo relacionado con el Patronato eclesiástico, en un secretario ya conocido, Martín de Gaztelu, que también *heredó* de Eraso la Secretaría del Consejo de las Órdenes Militares. A su vez, Vázquez de Salazar perdió la Secretaría del Consejo de Guerra, que fue a parar a manos de otro secretario, Juan Delgado. Finalmente, a la Secretaría del Consejo de las Indias fue promocionado un hijo natural suyo, Antonio de Eraso, que llevaba varios años dedicado al *ejercicio de la pluma*, y que en 1568 recibió el preceptivo título de secretario del rey (14). A los pocos meses de ser

(14) Es curioso observar cómo en la infancia y en el aprendizaje en el *manejo de papeles* que se atribuyen a Antonio de Eraso se concitan la misma leyenda, o historia imaginada, atribuida a Francisco de los Cobos en relación al secretario de los Reyes Católicos, Hernando de Zafra, e incluso, ya en el siglo XVIII, a Pedro López de Lerena, secretario de Estado y del Despacho de Hacienda con Carlos III, respecto del conde de

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efectuados estos nombramientos, empero, se produjo la caída del poder del cardenal Espinosa. Su pérdida de la gracia real fue casi tan rápida como su encumbramiento, posiblemente, a causa de su práctica de proveer empleos, poco meditada y tan opuesta a las convicciones del monarca, y a las protestas de los nobles, que se quejaban de la arrogancia y desconsideración con las que les trataba el cardenal. Lo cierto es que Espinosa falleció, caído en desgracia, el 5-IX-1572, siendo enterrado en la villa segoviana de Martín Muñoz de las Posadas, bajo una soberbia sepultura de alabastro, obra de Pompeo Leoni 15. En el destierro y el ostracismo desapareció aquel *otro rey*, como le llegó a llamar un embajador francés. Y aquí constata y concluye el profesor Escudero, frente a las tesis actualmente dominantes entre los historiadores políticos, que el cardenal Espinosa no consolidó, ni llegó a crear, un sistema clientelar apreciable. Dada la novedad y originalidad de esta documentada conclusión, conviene recoger aquí una cita completa de la misma, a pesar de su extensión:

> "Su enorme poder no se tradujo, sin embargo, en una promoción en las Secretarías de gente nueva, cuya carrera él hubiera auspiciado. La gran mayoría de quienes entonces accedieron al *establishment* burocrático venían de atrás, y su historia había dependido de otros secretarios. Éste era el caso de los sucesores de Gonzalo Pérez en la Secretaría de Estado: Antonio, a quien promocionaría su padre, y Zayas, oficial y amigo de Gonzalo. El nuevo secretario de Guerra, Vázquez de Salazar, era sobrino de Vázquez de Molina. Pedro de Hoyo, el de Obras y Bosques, era conocido de antiguo. Antonio de Eraso debió de conseguir la Secretaría de Indias por ser hijo de quien era. Y así sucesivamente. No se aprecia, pues, una intervención estimable del cardenal, hombre nuevo como dijimos, en favor de sus *hechuras* u otros hombres nuevos, y en detrimento de quienes habían servido desde antiguo en las Secretarías. Los aspirantes, lógicamente, buscarían su protección, pero él, según parece, la aplicó a quienes estaban en el orden natural del curso de los oficios. La única persona ostensiblemente nueva y vinculada a Espinosa que alcanzó el poder fue Mateo Vázquez, pero eso sucederá por motivos más complejos y cuando ya haya muerto el cardenal" (pp. 202-203, y, en general, pp. 174-204).

Floridablanca, José Moñino y Redondo. Así, Cobos, siendo un muchacho, habría encontrado por azar a Zafra en una venta de Sierra Morena, y necesitando éste escribir una carta, quedó sorprendido por la pericia del joven con la pluma, tomándolo a su servicio como paje, y ascendiendo luego con él, al ir enseñándole los secretos de su oficio. Lo mismo le habría ocurrido a Antonio de Eraso con Francisco de los Cobos, lo que es totalmente inverosímil, puesto que Cobos murió en 1547, y sabemos que el joven Eraso comenzó a trabajar con su padre en 1559. Para los pormenores de esta curiosa leyenda, traslaticia en el tiempo y los protagonistas, *vid.* J. A. Escudero, *Los Secretarios de Estado y del Despacho (1474-1724)*, t. I, pp. 51-60*; Id., Los orígenes del Consejo de Ministros en España*, t. I, pp. 388-405; e *Id., Felipe II: el Rey en el despacho*, pp. 196-200.

(15) J. A. Escudero, "Notas sobre la carrera del inquisidor general Diego le Espinosa", en *Revista del la Inquisicíon*, Madrid, 10 (2001), pp. 7-16.

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Al inicio del decenio de 1570, al igual que había acontecido en el bienio 1545-1546, se produjo otro rosario de muertes de personajes influyentes en la corte de Felipe II: las ya aludidas de Eraso en 1570, de Espinosa en 1572 y de Ruy Gómez en 1573, unidas a la caída en desgracia del duque de Alba, tras intentar en 1572, infructuosamente, sofocar la rebelión en los Países Bajos empleando sólo el terror y la fuerza. Lo cual tuvo, como es natural, consecuencias. Particularmente, dos: el ascenso en la confianza regia de los secretarios privados, y las crisis en las Secretarías de Italia (tanto en la del Consejo de Italia, al morir su titular, Diego de Vargas, en 1576; como en la del Consejo de Estado, que condujo a la caída, preñada también de consecuencias, funestas para el monarca, de Antonio Pérez). Por secretario *privado* hay que entender "al que tiene relación personal y directa con el rey, y despacha con él, sin apoyatura en puestos relevantes del aparato de gobierno; es decir, que sin desempeñar cargos de importancia en el organigrama de los Consejos, tal como hacen los secretarios de Estado o como hicieron quienes acumularon otras varias Secretarías, despacha *a boca* y por escrito con el monarca, y goza de su confianza" (p. 208). Este tipo de secretario *particular*, conocido antes únicamente de forma precaria y relativa, emergerá a partir de ahora como la gran figura institucional que habrá de oscurecer a los demás, logrando interponerse entre el soberano y los otrora poderosos secretarios (del Consejo) de Estado, o de cualquier otra clase de colaboradores, consejeros y ministros, hasta convertirse en el eje y quicio de toda la Administración central felipista (pp. 205-212). Una figura que se vio favorecida con la decisión de Felipe II, tras la caída y muerte del cardenal Espinosa, de no buscarle sucesor en la privanza, sino de proveer los cargos que dejaba vacantes en diferentes titulares: como Inquisidor general fue nombrado Gaspar de Quiroga, obispo de Cuenca y luego arzobispo de Toledo; y, como presidente del Consejo de Castilla, Diego de Covarrubias, a quien le sucedió, tras su fallecimiento en 1577, Antonio Mauricio de Pazos.

El secretario privado por antonomasia, el *archisecretario* o el *segundo rey del mundo* — como le calificaba Jerónimo de Barrionuevo, en la carta de 18-I-1588 cuya cita figura en la primera de las dos liminares de este apartado — fue Mateo Vázquez de Lecca. Protegido por el cardenal Espinosa, logró ser designado, en 1567, secretario del Consejo de la Suprema y General Inquisición en los asuntos de Aragón, Navarra e Indias. Al quedar como depositario de los papeles de Espinosa a su fallecimiento, Vázquez alcanzó el codiciado título de secretario del rey el 29-III-1573. A partir de entonces, durante dieciocho años ininterrumpidos, desde 1573 hasta 1591, en que murió, Mateo Vázquez trabajó a las órdenes directas del monarca, e incluso en su intimidad. En este largo período de tiempo pueden ser distinguidas dos etapas: en una primera, de 1573 a 1585, hasta que Felipe II enfermó, despachó

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prácticamente a solas con el rey; de 1585 a 1591, actuó como secretario de *la Junta* o *Junta de Noche*. Parece ser que uno de los factores determinantes para la institucionalización de la figura del secretario privado fue el de crear, precisamente, un ámbito reducido e íntimo de trabajo, el rey y su secretario, que evitase que todo pasase por los Reales Consejos, o que estuviera sujeto a otros controles. No es de extrañar, pues, que Vázquez acompañase a Felipe II a Portugal, permaneciendo en aquel reino durante más de dos años (entre diciembre de 1580 y abril de 1583), desplegando una extraordinaria actividad, comprobable en las numerosas cartas que escribió desde Elvas, Thomar, Almada, Lisboa, etc. Y tampoco que, para quedar descargado de ocupaciones, fuese exonerado de la Secretaría de Aragón del Consejo de la Inquisición desde julio de 1574. Pero, no fue Mateo Vázquez, hombre de carácter adulador, flexible y puntilloso, el único — aunque sí el principal — secretario privado de Felipe II. Hubo algunos otros, como Antonio Gracián y Dantisco, hijo primogénito de Diego Gracián de Alderete, secretario de Carlos V y culto latinista, y erasmista, que se encargó del reparto de los memoriales y peticiones remitidas al rey; o incluso, aunque sin poseer título de secretario real, Sebastián de Santoyo, ayuda de cámara de Felipe II, que puede ser calificado como una especie de *pseudosecretario*, puesto que llegó a remitir órdenes e instrucciones políticas del monarca al mismo Mateo Vázquez, y hasta a mediar entre él y Antonio Pérez con ocasión de sus disputas y enfrentamientos, tras el asesinato de Escobedo (pp. 213-241).

Una de estas disputas fue la que se tejió en torno a la sucesión de Diego de Vargas, que falleció el 6-XII-1576, en la Secretaría del Consejo de Italia. Varios fueron los *pretendientes* de la plaza: el influyente Juan de Idiáquez, embajador ordinario ante la República de Génova, presentó la candidatura de su primo, Francisco de Idiáquez; y, con él, también aspiraron a ella Jerónimo Gasol, Antonio de Eraso, Martín de Gante ([16]) y el mismo Antonio Pérez. Quería éste juntar la Secretaría del Consejo de Italia a la Secretaría de Italia del Consejo de Estado que venía desempeñando, y, de esta forma, controlar todos los negocios y papeles de Italia. Mateo Vázquez, desde luego, se opuso a sus deseos, y consiguió dilatar la adopción de una decisión. Finalmente, Felipe II resolvió atribuir a Gabriel de Zayas la plaza vacante (pp. 243-270). De esta forma, se produjo en 1579 una curiosa situación, que dio lugar a evidentes confusiones de competencias. Desde 1567, Antonio Pérez y Gabriel de Zayas regían, respectivamente, las Secretarías de Italia y del Norte del Consejo de Estado, vinculados a las facciones *ebolista* y *albista*. La confusión se produjo cuando, en 1579, Zayas

([16]) Quien, por cierto, el 13-IX-1578 escribía al rey insistiendo en que la experiencia era la base para el desempeño de las Secretarías, puesto que — afirmaba de modo bien expresivo — "el curso de los papeles se ha de mamar en la leche" (J.A. ESCUDERO, *Felipe II: el Rey en el despacho*, p. 263).

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incorporó a sus competencias la Secretaría del Consejo de Italia; máxime cuando sabemos que, al llegar Juan de Austria a Flandes, a la muerte de Luis de Requesens en 1576, pidió al monarca que determinados negocios del norte de Europa, que correspondían a Zayas, pasasen a Antonio Pérez. Confusión y complicaciones que aumentaron todavía más con el asesinato de Juan de Escobedo, secretario de Juan de Austria, por orden de Antonio Pérez, el 31-III-1578, seguida de la prisión del secretario de Estado de Italia en la noche del 28-VII-1579 (17). Sorprendentemente, la prisión de Antonio Pérez no fue acompañada de su cese fulminante como secretario titular del Consejo de Estado, sino que, por el contrario, siguió "exercitándose el oficio en casa de Antonio Pérez, a su costa (...), hasta último del año de 1585" (p. 289). Eso sí, de hecho, fue reemplazado por Juan de Idiáquez, hijo de Alonso de Idiáquez, secretario del emperador Carlos V al que ya se ha hecho referencia, pasando a estar bajo sus órdenes los oficiales y amanuenses del prisionero. Por lo tanto, desde agosto de 1579, Juan de Idiáquez, junto con una plaza de consejero de Guerra, pasó a desempeñar la de secretario interino, tanto de Italia como del Norte, del Consejo de Estado. Por otra parte, en marzo de ese mismo año de 1579, Felipe II decidió rehabilitar al cardenal Granvela, que había sido virrey de Nápoles entre 1571 y 1575 — probablemente, porque era un consejero independiente tanto de los *ebolistas* como de los *albistas*-; le hizo consejero de Estado y presidente del Consejo de Italia, y le encargó el despacho de los asuntos de Italia, Francia, Alemania y Flandes, rehusando él mismo intervenir en los internos de España para no suscitar los recelos de los españoles. La posición de Granvela se vio

(17) De este confuso, oscuro y controvertido episodio del reinado de Felipe II, a Escudero le interesa destacar tres cosas. En primer lugar, las relaciones del mismo con la provisión de la Secretaría del Consejo de Italia, puesto que el asesinato de Escobedo determinó las actitudes de unos y otros en la corte. En segundo lugar, el grado de confianza del rey con Antonio Pérez con anterioridad a la perpetración del asesinato, que el autor cuestiona que fuese tan absoluta y sin fisuras como se cree. Por ejemplo, Escudero apunta que: "Según he podido constatar, el secretario privado Antonio Gracián aparece a menudo en el trabajo burocrático, interpuesto entre uno y otro, disfrutando de un mayor grado de confianza con don Felipe. Gracián consulta así lo que Pérez debe o no debe ver, las cartas que hay que enseñarle u ocultarle, o los asuntos delicados de los que conviene o no ponerle al tanto" (pp. 276-277). En tercer lugar, la naturaleza de las conflictivas relaciones entre Mateo Vázquez y Antonio Pérez, teniendo que precisar que las desavenencias graves surgieron precisamente con la muerte de Escobedo, cuando Vázquez asumió el papel de acusador. Finalmente, Escudero, aunque el tema discurre al margen de la marcha institucional de la Secretaría de Estado, que es el objeto de su estudio, manifiesta su opinión acerca de tres cuestiones, en relación con el asesinato del secretario montañés: que la complicidad política del monarca en el crimen parece manifiesta; que las relaciones amorosas del secretario Antonio Pérez con la princesa de Éboli, Ana Mendoza de la Cerda, viuda del príncipe de Éboli, parecen notorias; y que, en cambio, las de Felipe II con ella no pasan de ser una lucubración melodramática (pp. 272-278).

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todavía más reforzada tras la muerte del III duque de Alba, Fernando Álvarez de Toledo, el 12-XII-1582 (pp. 271-300). Por lo demás, por lo que atañe a las Secretarías de los restantes Consejos, durante estos años, cabe apuntar que, al fallecer el secretario de Guerra, Juan Delgado, el 9-X-1585, se alzó con la vacante el secretario de Indias, Antonio de Eraso. Tiempo antes, el 21-IX-1580, había fallecido también Martín de Gaztelu, quedando encargado del importante negociado de Obras y Bosques un guipuzcoano de Éibar, llamado Juan de Ibarra; y de la Secretaría de Patronato de la Cámara de Castilla, y de la Secretaría del Consejo de Órdenes, Francisco González de Heredia. En este período fue muy importante, desde el punto de vista institucional, desde luego, la creación del Consejo de Portugal, erigido por carta patente de 12-XI-1582 (18), y en el que dominará la figura de Cristóbal de Moura, veedor de Hacienda (pp. 301-327).

Los últimos años del reinado de Felipe II se extienden, claramente, entre 1585 y 1598. Marcados por el empeoramiento de la salud del monarca, sus enfermedades repercutieron sustancialmente en el estilo de gobierno. Necesitado de que se le aliviase del extenuante ritmo de trabajo, que le obligaba a examinar personalmente todos los papeles, mano a mano con sus secretarios, a la conclusión de las Cortes de Monzón, en diciembre de 1585, que suponía la finalización de su viaje por la Corona de Aragón, durante el cual le fue prestado juramento al príncipe Felipe (futuro rey, Felipe III), resolvió Felipe II establecer una forma de despacho distinta, y algo más cómoda. Fue tal el origen de *la Junta* o *Junta de Noche*, a la que ya se ha hecho alusión más arriba, por lo que se refiere a sus orígenes. Constituida en un órgano supremo de gobierno general, dicha Junta de Estado oscureció la labor y la preeminencia de los Reales Consejos. En un principio, sus miembros fueron cinco: Juan de Idiáquez, encargado de las consultas y papeles de Estado y de Guerra; Diego Cabrera de Bovadilla, conde de Chinchón, de los de Aragón, Italia y Obras y Bosques; Cristóbal de Moura, de los de Portugal, Hacienda y Castilla; más Juan de Zúñiga, ayo y mayordomo del rey; y Mateo Vázquez, que actuaba como secretario de *la Junta*. Debió comenzar ésta a reunirse formalmente en julio de 1586. Casi inmediatamente, en noviembre de ese mismo año de 1586, falleció Zúñiga, por lo que los consejeros de la *Junta* se redujeron a tres, más Vázquez. Sólo desde julio de 1588 se conservan las actas y registros de sus sesiones, como ya se ha indicado con anterioridad. Sabemos que los Reales Consejos se resistieron a que *la Junta* monopolizase las competencias sobre los asuntos de gobierno. Y tiene especial relevancia la circunstancia de que el cardenal Granvela quedase excluido y margi-

(18) J.A. Escudero, "La creación del Consejo de Portugal", en *Estudios em homenagem aos Profs. Doutores M. Paulo Merêa e G. Braga da Cruz*, Coimbra, 1983, pp. 1-20; luego reproducido en su *Administración y Estado en la España Moderna*, pp. 125-134.

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nado del grupo selecto de consejeros que integraban aquella Junta de Estado y General de Gobierno, ya que a ellos les correspondía decidir sobre los negocios de Flandes, Italia, Francia y Alemania que él venía despachando hasta entonces. Disconforme con la política seguida por *la Junta*, Granvela apenas pudo oponerse a ella, puesto que murió el 21-IX-1586 (pp. 331-354). Con él moría, tal vez, el fin y la ambición misma que, junto con su padre, había perseguido a lo largo de toda su vida: el triunfo y la hegemonía definitivas de la causa de la Casa de Austria.

Por otra parte, en este período final del reinado de Felipe II se produjo también la consolidación de la figura del secretario *privado*. Mateo Vázquez falleció el 5-V-1591, pero, como secretario privado y como secretario de *la Junta*, le sucedió, a todos los efectos, su cuñado, el catalán Jerónimo Gasol, casado con su hermana María Vázquez en 1581. Antes de la desaparición de Vázquez, el conde de Chinchón había enfermado gravemente, y en mayo de 1587 no podía ya sostener la pluma. En consecuencia, durante cuatro años, hasta 1591, *la Junta* quedó reducida a sólo tres miembros (los consejeros Idiáquez y Moura, y el secretario Vázquez); manteniéndose desde entonces, hasta su desaparición en 1598, Juan de Idiáquez y Cristóbal de Moura como los más influyentes colaboradores del monarca, asistidos por Gasol como secretario, en sustitución de su difunto cuñado. Pero, a pesar de todo, el sistema de gobierno de la Monarquía seguía siendo absolutamente personalista, y dependiendo de la salud y aplicación a sus deberes administrativos del monarca: como decía el cronista Luis Cabrera de Córdoba, si el rey se cansaba o descansaba, "paraba toda la máquina" (p. 368). La Junta de Estado, que revisaba una a una las consultas procedentes de los Consejos y de las Juntas particulares que existiesen, aliviaba el trabajo del rey, pero no lo eliminaba, puesto que seguía remitiéndole los papeles a través de su secretario (Vázquez, luego Gasol), que era, al mismo tiempo, secretario privado del monarca. Por eso mismo, dado el agravamiento de la enfermedad de gota que padecía Felipe II en 1593, y la reducción de *la Junta* a sólo dos consejeros, se impuso una cierta reforma de gobierno dicho año. Por un lado, el paralizado Consejo de Estado fue rehabilitado y fortalecido, entrando a formar parte de él Gómez Dávila, marqués de Velada, ayo y mayordomo mayor del príncipe Felipe; Diego Fernández de Cabrera y Bovadilla, conde de Chinchón, y el conde de Fuensalida, ambos mayordomos del rey. Por otro, también fue reorganizada *la Junta*, y asociados a las tareas de gobierno el archiduque Alberto y el príncipe Felipe. Ambos, junto con el marqués de Velada, pasaron a formar parte de *la Junta*, que quedó integrada por ocho miembros: los cuatro antiguos (Idiáquez, Moura, el disminuido conde de Chinchón y el secretario Gasol), y los cuatro nuevos (el archiduque Alberto, el príncipe Felipe y el marqués de Velada, más el secretario Juan de Villela,

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admitido para que, "sin perder tiempo, mientras Gasol refería las consultas, él, como su oficial, sentase las resoluciones"). Esta reforma fue acompañada de unas *Instrucciones* escritas, de 26-IX-1593, que, por primera vez, establecieron, entre otras cosas, el horario de las sesiones vespertinas de *la Junta* (pp. 355-373). Aunque, como consecuencia de la imposibilidad de utilizar la mano derecha, Felipe II tuvo que delegar su firma en el príncipe Felipe, quizás en 1596, o más probablemente en 1597, advierte el profesor Escudero que la reforma de *la Junta* de 1593 no significó la marginación en el gobierno del monarca, ante la presencia de su hijo y de su sobrino, el archiduque Alberto, ya que siguió despachando y anotando consultas, billetes y cartas hasta fechas tan avanzadas como, al menos, el mes de septiembre de 1596. Esos papeles, en fin, con los que, como también significaba el cronista Cabrera de Córdoba y ha sido recogido en la segunda de las citas que encabezan este apartado, Felipe II "meneaba el mundo desde su real asiento": hasta — hay que añadir — su postrer suspiro.

Una última característica del final del reinado felipino fue la de la multiplicación y fraccionamiento de las Secretarías de los Consejos, acentuándose entonces un fenómeno institucional ya detectado y apuntado antes, que hizo todavía más complejo, si cabe, el aparato político-administrativo de la Monarquía Universal Hispánica. Hay que decir que la situación de dicho aparato gubernativo, a finales del siglo XVI, se podría resumir del siguiente modo, y en una única frase: la preterición del régimen de los Reales Consejos, ante la vigencia de otro en el que el eje sustancial era *la Junta* o Junta de Estado, más otras Juntas especiales (19). Veamos cuál era la situación, por entonces, de dichas Secretarías de los Consejos (pp. 375-438). Ha quedado dicho que Juan de Idiáquez rigió las Secretarías de Italia y del Norte del Consejo de Estado desde 1579, con independencia de que Antonio Pérez mantuviese formalmente la titularidad de la primera hasta el año 1585. Pero, al ser llamado Idiáquez a formar parte de la denominada *Junta de Noche*, Felipe II decidió proveer las dos Secretarías de Estado en otras personas, y recayeron, en diciembre de 1586, en dos primos del influyente consejero: Francisco de Idiáquez en la de Italia, y Martín de Idiáquez en la del Norte (Flandes, Francia y Alemania). Ambos permanecieron en sus cargos con Felipe III, hasta la muerte del segundo en octubre de 1599, y el retiro del primero, cuatro meses después. En el Consejo de la Cámara de Castilla, unas *Instrucciones* de 6-I-1588 desdoblaron, así mismo, su Secretaría en tres: la de Cámara propiamente dicha, a cargo de Juan Vázquez de Salazar como titular; la de Justicia, dividida entre quien llevaba los papeles en la Cámara como interino (Juan Vázquez de

(19) El período inmediatamente posterior, el correspondiente al reinado de Felipe III, también ha sido estudiado por J. A. Escudero, "La Corte de España en Valladolid: los Consejos de la Monarquía a principios del siglo XVII", en su *Administración y Estado en la España Moderna*, pp. 483-511.

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Salazar), y quien los despachaba con el rey (Mateo Vázquez); y la de Patronato eclesiástico, también desdoblada entre quien actuaba en el Consejo de Cámara (el secretario Francisco González de Heredia), y quien llevaba las consultas y papeles al monarca (Mateo Vázquez, igualmente). En última instancia, se comprueba que quien controlaba las propuestas de nombramiento era Mateo Vázquez, y, por eso mismo, llegó a ser conocido como *el segundo rey del mundo* (20). La Secretaría del Consejo de Guerra fue, por su parte, igualmente disgregada en dos. Muerto el anterior único titular, el secretario Juan Delgado, en 1585, le sucedió Antonio de Eraso, que falleció a los pocos meses, en 1586. En junio de ese mismo año, Felipe II dispuso que fuese, a su vez, desdoblada en una Secretaría de Tierra, para la que nombró a Andrés de Prada, y en una Secretaría de Mar, para la que designó a Andrés de Alva. Este último falleció en 1591, siendo sustituido por Esteban de Ibarra. La Secretaría del Consejo de Hacienda también fue fraccionada en dos, dándose la curiosa circunstancia de que, en 1596, fueron nombrados titulares de unas poco o precariamente especificadas, y delimitadas — con evidente indeterminación institucional de sus zonas territoriales de reparto de competencias-, Secretarías *de Tajo acá* y *de Tajo a la otra parte*, respectivamente, Cristóbal de Ipeñarrieta y Gil González de Vera.

Por lo que se refiere a la Secretaría del Consejo de las Indias, al morir su titular, Antonio de Eraso, en 1586, en Valencia, como consecuencia de la epidemia que había asolado, semanas antes, las Cortes de Monzón, le sucedió Juan de Ibarra en el mes de octubre de ese mismo año, y también adquirió la titularidad de los asuntos de Obras y Bosques, de los que se había hecho cargo, con carácter provisional, desde 1580. Las razones del súbito encumbramiento de Ibarra hay que buscarlas en el compromiso de enlace matrimonial que contrajo con una sobrina de Mateo Vázquez, llamada Isabel Vázquez de Lecca, en mayo de 1586, finalmente no consumado por no consentir en él la interesada. Favorecido por la pugna institucional que, desde 1571, se había desatado en el Consejo de Indias, entre su presidente y los consejeros, acerca de si la propuesta de mercedes, oficios y cargos correspondía exclusivamente al primero, o bien conjuntamente al presidente con los consejeros, Ibarra pronto se convirtió en el eje de funcionamiento de dicho Consejo, llegando a ser directamente consultado por el rey acerca de asuntos de la competencia del presidente, y del mismo Consejo de las Indias. Una influencia institucional que se incrementó desde 1597, al asumir las competencias de la Escribanía de Cámara de Gobernación. No resulta extraño que Juan de Ibarra fuese

(20) Esta complicada reforma ha sido estudiada, también en profundidad, por J. A. ESCUDERO, "El Consejo de Cámara de Castilla y la reforma de 1588", en *AHDE*, Madrid, LXVII, 2 (1997), pp. 925-941; luego incluido en su *Administración y Estado en la España Moderna*, pp. 467-482.

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de los pocos secretarios y ministros que mantuvieron el poder con Felipe III y el duque de Lerma, ni que, en 1604, fuese ascendido a las plazas de consejero y camarista de Indias. Hay que decir, por último, que también la Secretaría del Consejo de Italia fue fraccionada, en este caso, en tres, en junio de 1595, cuando ya hacía tiempo, desde julio de 1593, que había quedado vacante, por muerte de su único titular, Gabriel de Zayas: la Secretaría de Nápoles, que recayó en Francisco de Idiáquez; la de Sicilia, para la que fue designado Martín de Gante; y la de Milán, entregada a Juan López de Zárate.

En su último decenio de reinado, Felipe II trabajó en el despacho de los negocios de la Monarquía con grandes dificultades, tornándose las crisis de su enfermedad de gota cada vez más graves y frecuentes. En el transcurso de dichas crisis, el monarca quedaba imposibilitado de anotar papeles, y, como se ha recordado, a partir de 1596 ó 1597, ya le resultó imposible firmar o simplemente rubricar. De ahí que autorizase a su hijo y heredero, el príncipe Felipe, a hacerlo en su nombre, mientras que *la Junta* o antigua *Junta de Noche* proseguía con sus reuniones (pp. 439-446). Al morir en los Países Bajos el archiduque Ernesto, se vio obligado, además, a sustituirle con su sobrino favorito, el cardenal archiduque Alberto, que llegó a Bruselas en febrero de 1596. Su ausencia conllevó un nuevo hueco entre los miembros integrantes de *la Junta*, que continuó funcionando bajo la dirección de sus dos consejeros principales, Cristóbal de Moura y Juan de Idiázquez. Para entonces, Felipe II ya había redactado testamento, el 7-III-1594, y añadido un codicilo el 24-VIII-1597, en el que dejaba constancia de que "tengo resuelto que mi hijo firme por mí todas las cartas, cédulas y despachos que se hicieren" (p. 440). En un *rey burócrata* o *papelista* como él, tan amante del despacho y tan devoto de sus obligaciones, todo hacía presentir el fin. Y así fue. A finales del mes de junio de 1598, desoyendo el criterio de sus médicos, ordenó que se le trasladase de Madrid a El Escorial. Y allí, acogido entre las paredes de la *obra de su vida*, murió, un domingo, el 13 de septiembre de 1598. Fue el ocaso de un reinado, el final de un hombre, y también la clausura de un régimen de despacho y de gobierno. Parece ser que sus últimas palabras, que se recogen en la cita que está puesta al frente del apartado siguiente, se preocuparon de advertir al futuro rey, Felipe III, que debía servirse de todos sus ministros y criados, cada uno en su oficio, pero, con la prevención de no "sujetaros a nadie, ni dejaros gobernar conocidamente de ninguno" (p. 442). Vanas palabras e inútil consejo el suyo. El duque de Lerma fue nombrado inmediatamente caballerizo mayor y consejero de Estado, y, aunque el profesor Escudero ha demostrado con sólidos argumentos que Felipe III no delegó en él su firma (21), como se ha venido sosteniendo de ordinario, sí es cierto que Lerma

(21) J. A. Escudero, "Los poderes de Lerma", en el *Homenaje al Profesor Alfonso*

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apareció, desde un principio, como el hombre de absoluta confianza del nuevo monarca, como su *privado* o *valido*. Prueba de ello es la arrogancia con la que exigió a Cristóbal de Moura, por medio del príncipe Felipe, cuando acababa de fallecer su padre, o incluso, quizás, en sus últimas horas de vida, la entrega de las llaves de "los escritorios que guardavan los papeles mayores de la puridad de toda esta Monarquía, y sus intereses" (p. 443). Comenzaba el tránsito, nada pausado y sí brusco y directo, de un rey que había contado — sabiamente — con muchos privados, a un rey que sólo se habría de servir — tan ingenua como negligentemente — de un único privado o valido.

3. *El historiador en el archivo: la vida, y la pluma.*

> "Y también os quiero advertir en esta ocasión (...), que un Príncipe como vos se ha de servir de todos y de cada uno en su oficio, sin sujetaros a nadie, ni dejaros gobernar conocidamente de ninguno".
>
> (González Dávila, Gil, *Monarquía de España. Historia de la vida y hechos del ínclito monarca, amado y santo, Don Felipe Tercero*, Madrid, 1771, p. 26; *cit.* por Escudero, J. A., *op. cit.*, p. 442).

Un anhelo íntimo, creo yo, de todo lector, y, en particular, de cualquier historiador, es que la lectura de un libro, ya sea erudito, ya literario, nos rapte y nos seduzca de principio a fin, de la cruz a la raya. Que sea la suya una lectura prolongada, puesto que todo buen libro exige muchas horas o algunos días para que pueda ser aprehendido esencialmente, al tiempo que la razón o los sentimientos experimentan el goce de asumir los conocimientos o las sensaciones de los que van, poco a poco, apropiándose. Toda obra artística, literaria, pictórica, escultórica o arquitectónica, es un itinerario de aprendizaje, no sólo para quien la contempla o estudia, sino también, y en primer lugar, para su autor, para quien la escribe, pinta, cincela o traza y erige. Y el *placer de la lectura* consiste, también creo yo, en recorrer ese itinerario, en ir aprendiendo, con delectación y morosidad, y contemplando el *paisaje* intelectual, moral o sensorial que hay a la vera de ese camino de las letras y las artes, quintaesenciado en una obra concreta: concreta en el tiempo y en el espacio. Desde luego, es en la infancia donde el ser humano adquiere esa noción — que luego descubre, por desgracia, tan fugaz y esquiva — del placer de la lectura: sólo en la infancia se puede abrir las páginas de un libro con ánimo despreocupado, puesto que existe todo el tiempo del mundo para ocuparse en aquello que se tiene

García-Gallo, Madrid, 1996, t. II, vol. I, pp. 47-103; luego incluido en su *Administración y Estado en la España Moderna*, pp. 275-325.

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entre las manos. Entonces es cuando son erigidos los monumentos al placer literario, de cuyo recuerdo muchos viven — o vivimos-, entre las brumas de la añoranza y la melancolía. Y digo melancolía porque pasa el tiempo, y esos monumentos van hundiéndose en la soledad. Y es que, desafortunadamente, aquel joven lector va perdiendo la inocencia. ¿En qué estriba esa pérdida de la inocencia? En el amargo descubrimiento de que muchos libros, muchas monografías, no merecen que tal itinerario sea recorrido lentamente, en jornadas de lector que camina a pie. Sobre todo, en momentos como los actuales, en los que tanto se publica, con apresuramiento o despreocupación; sin mesura, poso, ni ese santo y muy recomendable horror a la letra impresa, que siempre queda grabada — aun sepultada en las bibliotecas — para siempre. Como algún escritor y ensayista, como Francisco Ayala, ha pedido en varias ocasiones, los autores debemos ser más exigentes con nosotros mismos, y sólo tener el atrevimiento de dar a la luz pública lo mejor de nuestra producción: sólo permitirnos el parto de nuestros mejores hijos, literarios y científicos. Un mandamiento éste de difícil cumplimiento, que estoy seguro que quien primero lo está infringiendo es el autor de estas líneas, y que es merecedor del castigo que estime justo el posible, y paciente, lector. Puede ser, eso sí, si se me permite la expresión, que el *suplicio de la postmodernidad* consista precisamente en que unos a otros, lectores-autores y autores-lectores, tengamos que soportarnos mutuamente nuestros respectivos *discursos* — e incluso tener que proceder a su deconstrucción-. Unos discursos que el hombre moderno no tiene el pudor del hombre clásico de seleccionar con crítica exigencia, y de guillotinar en su raudo camino a las linotipias o computadoras tipográficas.

La anterior reflexión ha sido, sin duda, demasiado larga, e incurrido muy probablemente en los mismos vicios que pretende apuntar, pero, no creo que sea extemporánea. A ningún historiador se le ocurre ojear, y hojear apresuradamente como hay que hacer con la ingente masa de publicaciones de la disciplina que se acumulan en los anaqueles de las librerías o en las mesas de los despachos, amenazando aplastar a cualquiera, obras maestras de la literatura histórico-jurídica, histórico-económica o histórica, en general, como, pongo por caso, las de *España, un enigma histórico*, de Claudio Sánchez-Albornoz; *Carlos V y sus banqueros*, de Ramón Carande; *Erasmo y España*, de Marcel Bataillon; o *El Mediterráneo y el mundo mediterráneo en la época de Felipe II*, de Fernand Braudel. Más que libros, son los aludidos llaves que abren las puertas de un tiempo y un mundo, jurídico, económico, social o espiritual, periclitados, en todo o en parte. Sin esas llaves, y sin guías y exploradores tan avezados como los que las manejan, nada encontraríamos, o lo que descubriésemos pasaría inadvertido en sus matices constitutivos. Los citados son lienzos de una época, de unos hombres, de unas tierras, de unos modos de pensar y de actuar. Pues bien, nada se aventura, ni nada se

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descubre al constatar que la obra que nos ocupa del profesor Escudero, que envuelve y forma parte, al mismo tiempo, de un todo que es lo que constituye su entera y coherente trayectoria investigadora, pertenece a esos libros-claves, a esas obras-guías, con cuya sola lectura se está en disposición de comprender el universo mental — jurídico-político e institucional, en este caso — de otros múltiples mundos históricos perdidos. En una palabra, ese conjunto que conforman *Los Secretarios de Estado y del Despacho*, *Los orígenes del Consejo de Ministros en España* y *Felipe II: el Rey en el despacho*, junto con todas sus demás aportaciones complementarias, permite entender correctamente, y hacerlo con máximo provecho, la bibliografía de referencia sobre la Monarquía Universal Hispánica del quinientos, el seiscientos y el setecientos, que equivale a decir la de uno de los protagonistas principales, sino el principal en muchos momentos, de la historia occidental en dicho período.

Ya se ha hecho mención de que la dilatada y fecunda obra investigadora del profesor Escudero confluye, y ha sido construida como una profunda y documentadísima respuesta a ellos, en los interrogantes siguientes: ¿Cómo se estructuró, organizó y conformó el poder político en la Edad Moderna? ¿Qué aparato de gobierno u organización político-administrativa e institucional posibilitó el surgimiento del Estado Moderno? ¿Qué configuración adoptó dicha organización o estructura administrativa en la Monarquía hispana de los siglos XVI a XVIII, que constituyó, de hecho, la primera y más acabada expresión del poder político *moderno*? Esa respuesta a las preguntas planteadas, nucleares tanto para la historia jurídica e institucional como para la historia política, social, e incluso económica, ha sido trazada por el profesor Escudero, a lo largo de más de treinta años, en monografías básicas e insustituibles acerca de la Administración central histórica, no sólo del XVI (22), sino también del XVII (23) y el XVIII (24), sin olvidar

(22) En ésta, y en las notas siguientes, serán recogidas las aportaciones todavía no citadas de J. A. Escudero, *Rey, ministros y grupos políticos en la España de los Austrias*, lección solemne de apertura del Curso de la Universidad Internacional Menéndez Pelayo, leída en el Paraninfo de Las Llamas el 2 de julio de 1979, Universidad Menéndez Pelayo, Santander, 1979; luego reproducido en su *Administración y Estado en la España Moderna*, pp. 515-529. Sin olvidar la más treciente de las impresas hasta el momento, de J. A. Escudero, "Sobre la génesis de la Nueva Recopilacion", en *AHDE*, 73 (2003), pp. 11-33.

(23) J. A. Escudero, "Consultas al Consejo de Estado: trámites irregulares en el reinado de Carlos II", en *Homenaje al Doctor Don Juan Reglà Campistol*, Facultad de Filosofía y Letras, Universidad de Valencia, Valencia, 1975, vol. I, pp. 661-664; y en su *Administración y Estado en la España Moderna*, pp. 109-112; *Id.*, "Don Juan José de Austria frente al Padre Nithard", en *Historia 16*, Madrid, 121 (mayo, 1986), pp. 71-74; y en *Administración y Estado en la España Moderna*, pp. 615-619; e *Id.*, "El traslado de la Corte a Valladolid", en *Estudios Jurídicos en homenaje al Profesor Aurelio Menéndez Menéndez*, Madrid, 1996, vol. IV, pp. 4161-4179; y en *Administración y Estado en la España Moderna*, pp. 255-273.

(24) J. A. Escudero, "Orígenes de la Administración Central borbónica", en las

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tamporo, ni descuidar, la del XIX (25), en tiempos ya de aparición e implantación constitucional de los Estados liberales.

A ellas hay que añadir, por lo demás y en primerísimo lugar, otra línea preferente, y complementaria, de su actividad investigadora: la del Santo Oficio de la Inquisición (26). Una institución enraizada, como se sabe, en la peculiar estructura que adoptó la expresión del poder en la Edad Moderna, en aquella Monarquía que se proclamaba Católica y Universal, desde que el papa Sixto IV suscribió, en Roma, el 1-XI-1478, la bula *Exigit sincerae devotionis*, otorgada a los Reyes Católicos, Isabel y Fernando, para perseguir a los que habían juzgado enemigos o peligrosos para tal poder, pudiendo, desde entonces, "inquirir e proceder contra los tales inculpados e maculados de la dicha infidelidad e herejía, e contra los favorecedores e receptores dellos". Sobre materia inquisitorial versan

Actas del Primer Symposium de Historia de la Administración, Madrid, 1970, pp. 293-304; y en *Administración y Estado en la España Moderna*, pp. 43-51; *Id.*, "Notas sobre el Consejo de Estado entre los siglos XVIII y XIX", en *Hispania*, Madrid, XXXIV (1974), pp. 609-625; y en *Administración y Estado en la España Moderna*, pp. 97-108; *Id.*, "La dimisión del Marqués de Rubí. Consejo de ministros y Juntas especiales en el reinado de Carlos III", en *AHDE*, 50 (1980), pp. 815-831; y en *Administración y Estado en la España Moderna*, pp. 113-124; *Id.*, "La reconstrucción de la Administración Central en el siglo XVIII", en la *Historia de España. Menéndez Pidal*, dirigida por José María Jover Zamora, t. XXIX, vol. I, Madrid, 1985, pp. 81-175; y en *Administración y Estado en la España Moderna*, pp. 135-203; *Id.*, "El Ministerio de Hacienda y la reforma de Soler (1800)", en el *Homenaje a Ismael Sánchez Bella*, Pamplona, 1992, pp. 231-237; y en *Administración y Estado en la España Moderna*, pp. 235-240; e *Id.*, "Las Reales Academias y su protocolo", en las *Ponencias del I Congreso Internacional de Protocolo*, Oviedo, 1995, pp. 103-117; y en *Administración y Estado en la España Moderna*, pp. 241-253.

(25) J. A. Escudero, "Memoriales privados sobre la situación de España en el reinado de Fernando VII", en *AHDE*, Madrid, 42 (1972), pp. 331-384; y en su *Administración y Estado en la España Moderna*, pp. 53-88; *Id.*, "La creación de la presidencia del Consejo de Ministros", en *AHDE*, 42 (1972), pp. 757-767; y en *Administración y Estado en la España Moderna*, pp. 89-96; *Id.*, "Las Sociedades secretas ante la legislación española del siglo XIX", en Ferrer Benimeli, José Antonio (coord.), *Masonería, Política y Sociedad*, 2 vols., Zaragoza, 1989, vol. II, pp. 511-543; y en *Administración y Estado en la España Moderna*, pp. 205-233; *Id.*, "Estudio introductorio" a su edición de Martínez Marina, Francisco, *Teoría de las Cortes*, 3 tomos, Junta General del Principado de Asturias, Oviedo, 1996, t. I, pp. XV-CLXXX; y en *Administración y Estado en la España Moderna*, pp. 327-465; e *Id., La Real Junta Consultiva de Gobierno (1825)*, Instituto Nacional de Administración Pública y Boletín Oficial del Estado, 2ª ed., Madrid, 1997 (1ª ed., Madrid, 1973).

(26) J. A. Escudero, "Inquisidor General y Consejo de la Suprema: dudas sobre competencias en nombramientos", en sus *Perfiles Jurídicos de la Inquisición Española*, editados por..., Madrid, 1989, pp. 531-539; *Id.*, "Sobre bibliografía inquisitorial: la obra de Van der Vekene", en *Revista de la Inquisición*, Madrid, 3 (1994), pp. 259-262; *Id.*, "Netanyahu y los orígenes de la Inquisición española", en *Revista de la Inquisición*, 7 (1998), pp. 9-46; e *Id., La Inquisición española: revisión y reflexiones*, lección inaugural del Curso académico 2000-2001 en la Universidad Nacional de Educación a Distancia, Madrid, 2000.

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algunos de los más acabados estudios del profesor Escudero, como esa monografía modélica que es — al igual que la antes citada de *Los poderes de Lerma* — la que se titula *Los orígenes del Consejo de la Suprema Inquisición*. Y es que, en efecto, se trata de un insuperable modelo magistral de investigación histórico-jurídica, y, al mismo tiempo, de un valiosísimo ejemplo para un aprendiz o neófito en la disciplina de cómo se aborda la realización de un trabajo científico. Del *estado de la cuestión*, que es el de que el Consejo de la Inquisición fue fundado hacia 1483, el autor avanza analizando exhaustivamente las diferentes posiciones de los historiadores que se han ocupado de tal asunto, y su respectiva fundamentación crítica, o su falta de ella: *¿Fue establecida la Suprema en 1478? ¿Se creó el Consejo en las Cortes de Toledo de 1480? ¿Apareció la Suprema en 1482? ¿Fue creado el Consejo en 1483? Réplica a la doctrina común (tesis de Kamen, Llorca y Lea). El tema en Llorente y las Instrucciones de Sevilla de 1484. Zurita y Páramo. La referencia a textos manuscritos*. Sólo entonces, una vez reflexionado críticamente y cuestionado las diversas hipótesis operativas acerca del origen del Consejo de la Suprema, el profesor Escudero plantea su tesis (*la aparición de la Suprema en 1488*), cuyo basamento son las fuentes archivísticas (*el libro 1253 de Inquisición del Archivo Histórico Nacional de Madrid, los manuscritos 2278 de la Biblioteca Nacional y C-184 de la Biblioteca de la Real Academia de la Historia en Madrid*), enriquecidas con las conclusiones alcanzadas en el anterior proceso de depuración crítica de las fuentes bibliográficas y documentales conocidas. Sólo entonces está en disposición el investigador de explicitar su *interpretación final*, relativa a un Consejo cuya fundación hay que datar el 27-X-1488 (27). Como es lógico suponer, esta redatación no es una simple corrección cronológica o de detalle, sino que conlleva una muy diversa, rica y compleja modificación de nuestro conocimiento acerca de dicha institución, su puesta en funcionamiento, su organización y actividad en aquellos tiempos fundacionales, con repercusiones en los inmediatamente posteriores, etc., etc.. He aquí una muestra de una obra en la que el placer de su lectura, científica y literaria, presupone un itinerario de aprendizaje; y en la que el lector no sólo acumula saberes, sino también, lo que es más importante, conocimientos instrumentales que le han de permitir, en el futuro, acometer similares retos investigadores con expectativas de éxito. No en vano el autor le ha llevado a un venero de tales saberes y conocimientos con mano maestra. En definitiva, el lector aquí sí *pesca*, y, al mismo tiempo, adquiere su propia *caña de pescar*.

Precisamente, para proporcionar, no una, sino muchas *cañas de pescar*, el profesor Escudero impulsó en su día, y sigue impulsando, el estudio y la investigación sobre el Santo Oficio de la Inquisición, desde

(27) J. A. ESCUDERO, "Los orígenes del Consejo de la Suprema Inquisición", en *AHDE*, Madrid, 53 (1983), pp. 237-288; luego reproducido, con una versión documental más reducida, en Alcalá, Ángel *et alii*, *Inquisición española y mentalidad inquisitorial*, Ed. Ariel, Barcelona, 1984, pp. 81-122.

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que, en el mes de julio de 1976, en el Palacio de la Magdalena de Santander, bajo los auspicios de la Universidad Internacional Menéndez Pelayo, organizó y dirigió un Simposio Internacional sobre los *Problemas históricos de la Inquisición española*. Como luego dejó escrito, en 1989, aquella reunión científica, "la primera dedicada en nuestro tiempo al estudio del Santo Oficio", pretendía examinar, con serenidad y rigor, "un tema mayúsculo que, desde las Cortes de Cádiz, había sido objeto de interpretaciones enconadas y dispares, vertidas en publicaciones de autores que no habían tenido la oportunidad de temperar sus puntos de vista en el foro académico del diálogo". Luego, en efecto, después de tal sequía científica, vino el diluvio, en forma de congresos, cursos, simposios, conferencias, exposiciones, erección de centros de investigación, etc., tanto en Europa como en América: Copenhague, septiembre de 1978; Cuenca, septiembre de 1978; Roma, octubre de 1981; Santander, julio de 1982 (también organizado y dirigido por el profesor Escudero, en la Universidad Menéndez Pelayo, bajo el título de *Inquisición y censura en la España Moderna*); Madrid, en el Archivo Histórico Nacional, octubre y noviembre de 1982; Nueva York, abril de 1983; Madrid-Segovia-Palma de Mallorca, junio de 1986 (un Congreso Internacional que significó el acta de nacimiento del *Instituto de Historia de la Inquisición*, fundado y dirigido por el mismo profesor Escudero, y que nació con la vocación de aportar una perspectiva jurídico-institucional a la historia del Santo Oficio) ([28]); Segovia, mayo de 1987 (en el que, al abordar los *Problemas Jurídicos del Estado Moderno*, fueron perfilados los objetivos de una publicación periódica de contenido inquisitorial, la *Revista de la Inquisición*), etcétera. El último de tales Congresos Internacionales, debilos a su impulso y coordinacón, fue el organizarlo por la Sociedad Estatal de Conmemoraciones Culturales, bajo el título de *Los problemas de la intolerancia: orígenes etopa fundacional de la Inquisicíon*, celebralo eu Madrid y Segoria, del 19 al 21 de febrero de 2004.

Según se puede apreciar, se concitan en la personalidad del profesor Escudero, no sólo el talento del erudito y sabio investigador, del sugerente y ameno expositor, del maestro de vocaciones docentes e investigadoras, sino también, y en sumo grado, el talante de generoso impulsor de *empresas* académicas y culturales, encauzadas siempre bajo el amparo de la *Mater* universitaria, y el certero difusor en la sociedad de múltiples inquietudes y preocupaciones intelectuales. Sólo en casos excepcionales se reúnen en una misma persona ambos saberes, teórico y práctico, en tal grado de excelencia. Aquí sólo cumple referirse al

([28]) Sus actas fueron publicadas en 1989, y del *Prólogo* que las encabeza proceden las citas de las palabras del autor que se incluyen en el texto: J. A. ESCUDERO, (edit.), *Perfiles Jurídicos de la Inquisición Española*, Instituto de Historia de la Inquisición, Universidad Complutense de Madrid, Madrid, 1989, pp. 5-7; dichas citas, en la p. 5. Esta obra ya figura mencionada en la nota número 25.

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primero, y quiero detenerme, brevemente, en un aspecto de él que acaba de ser mencionado: el de la amenidad. En 1969, ya en su primera gran obra, hacía referencia a la dificultad que conllevaba exponer la historia de los oficios *de papeles*, de las Secretarías, de modo atractivo y deleitable, por muy interesante y trascendental que fuese su conocimiento: "Seguir a los Secretarios significa, en buena parte, seguir un intensísimo ajetreo burocrático, para dibujar luego las líneas maestras de su competencia operativa. El panorama es denso y el margen de espectacularidad bastante escaso. Un libro sobre los Secretarios — que, como éste, pretenda abstenerse de redimir y desvirtuar el medio ambiente — forzosamente tendrá poco que ver con un *divertimento* placentero de entretenida apologética. El nutrido ensamblaje de notas y la invocación reiterada a cartas o documentos refrendados por los Secretarios, conducen, a pesar de su aparente atonía, hacia la médula misma de la institución" [29]. En realidad, nada de atonía se transmitía en aquella primera y central monografía, pionera en España en la investigación histórico-jurídica e institucional del aparato de gobierno de la Monarquía Universal hispana. Cartas y documentos, lejos de mostrar las aristas de su aridez en una impresión inicial (relegada, en todo caso, a los dos últimos tomos de apéndices documentales), eran vivificados en el texto, al quedar ensamblados en un conjunto expositivo claro, preciso, de trazo firme y ágil, que rápidamente conducía hacia la *médula* del poder político, encarnado históricamente en unas determinadas formas institucionales. Y lo mismo habría de suceder en *Los orígenes del Consejo de Ministros en España* (1979), su continuación para el siglo XVIII, y en otras monografías complementarias.

Pues bien, de esa misma amenidad expositiva y de idéntica precisión científica, dado el enorme caudal documental aportado, e interpretado, ha aparecido dotado este *Felipe II* publicado en el año 2002, culminación de toda una vida de historiador consagrada al *archivo*, y a los *papeles*, de los Austrias, mayores y menores. Y, muy particularmente, esa aportación nuclear que es el quinto y último de sus capítulos, dedicado a *La forma y el estilo del despacho* (pp. 447-597), que fue elegido por el profesor Escudero para su acto y discurso de ingreso en la Real Academia de la Historia de España, como ya se ha señalado. Una elección que entraña una metáfora personal: el rey en el despacho, con sus papeles de gobierno; el historiador en el archivo, con sus documentos, principales testimonios de ese pasado, común ya para ambos, y para todos nosotros. En definitiva, dos vidas, la del biografiado y la del biógrafo, con la pluma en una mano, y los papeles en la otra. El resultado es el de contar con centenar y medio de páginas que resumen extraordinariamente, e instruyen de forma excepcional, sobre toda una

[29] J. A. Escudero, *Introducción* a *Los Secretarios de Estado y del Despacho (1474-1724)*, t. I, p. XI.

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forma y estilo de gobernar, crucial para tratar de entender qué pasó, cómo pasó y por qué pasó lo que pasó en la Europa de los siglos XVI y XVII. Aludiremos brevemente a ellas.

Entre los mismos colaboradores y coetáneos del *Rey Prudente*, su asombrosa capacidad para el trabajo burocrático, y su extenuante dedicación al despacho, fue reconocida unánimemente. Un cortesano flamenco de su época llegó a comentar, con admiración, que Felipe II "debió escribir durante su vida más papeles de los que podrían cargar cuatro mulas": una comparación que, como ha constatado el profesor Escudero, por "lo que sabemos y hemos visto, se quedó más que corta" (p. 10). Y es que, en efecto, el monarca amó en vida más la palabra escrita que el verbo menos preciso, y reposado, de una conversación o de una audiencia. No se sintió nunca Felipe II muy inclinado a conceder audiencias, públicas o privadas, ni a despachar oralmente, prefiriendo ostensiblemente el despacho escrito. En cierta ocasión, llegó a confiar a Mateo Vázquez que, "de las audiencias me queda poco en la cabeza" (p. 454). El despacho *a boca* quedaba reservado, preferente y sistemáticamente, para sus secretarios. En cualquier caso, los secretarios no disfrutaron nunca de asistencia reglada para ver al monarca, y sólo podían acudir si se les llamaba, y cuando se les llamaba. De ahí que el reinado de Felipe II suponga el triunfo claro del despacho *por escrito*. Y ello pese a que el rey no desconoció las ventajas que el verbal conllevaba, haciendo uso de él en ocasiones: la de facilitar la consulta de un mismo asunto a varios secretarios, sin las complicaciones de volver a escribir billetes u ocultar al segundo interlocutor lo escrito por el primero; la de servir para aclarar cuestiones que resultaban confusas en el texto escrito; o la de constituir un procedimiento más liviano y llevadero cuando el monarca estaba sobrecargado de trabajo, y no podía contestar tantos papeles como le llegaban. Pese a todo, para Felipe II, los despachos escritos, aun contando con la inmediatez de unos Consejos a otros en su sede común del Alcázar madrileño, e incluso la proximidad de las viviendas de los secretarios y colaboradores en el entorno palaciego, siempre supusieron una garantía de claridad, orden, seguridad y buen gobierno. La exigencia de sigilo y secreto en materias gubernativas obligaba, por otra parte, a extremar más las medidas de custodia de los documentos. Por otro lado, el despacho por escrito pronto quedó ordenado según unos usos y estilos introducidos por los secretarios más relevantes. Unos usos y estilos que, para ser aprendidos, favorecían que los secretarios se criasen y aprendiesen en el seno de unas mismas familias dedicadas al *oficio de papeles*. De ahí que dichos secretarios se considerasen *hechuras* unos de otros, respecto de quienes les habían formado; y, en última instancia, *hechuras* del mismo rey. Porque el rey, sobre todo en el caso de Felipe II, también era el primero de los secretarios, el *secretario* supremo y por excelencia. Advierte Escudero que en sus notas y observaciones, el monarca

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corregía a menudo las inexactitudes, las faltas ortográficas, los desajustes en los tratamientos o los errores de estilo deslizados por sus secretarios. Su vocación burocrática era evidente, y sus conocimientos y autoridad técnica en tal materia indudables: de ahí que vigilase implacablemente el cumplimiento de los trámites preceptivos, o que aclarase cuáles eran las competencias de un determinado Consejo en el trámite de cualquier asunto. Sólo había una excepción: las materias económicas y de números, en las que confesaba, modestamente, ser un lego en tales cuestiones.

Pero, en todo lo demás, los archivos están llenos de extractos e informes (*relaciones*) presentados por los secretarios felipinos en relación con las múltiples cartas, memoriales y pedimentos que llegaban a la corte, y de billetes de respuesta y anotaciones marginales en dichas relaciones puestas por el monarca. Es lo que algún autor, como Jon Arrieta, ha bautizado como *gobernar rescribiendo* (30). En dichas notas, breves o extensas, pero, en muchas ocasiones prolijas y detallistas, Felipe II entablaba una especie de diálogo con sus secretarios, con alusiones de carácter religioso o referidas a la salud, propia o del destinatario. Era la familiaridad que dispensaba un rey que vivía muchas horas al día, muchos días a la semana, y muchas semanas al año, en soledad con sus papeles, sus deberes y sus responsabilidades. El estudio de estas miles de notas de gobierno permite concluir que, por encima de todo, sobresale en ellas el temperamento dubitativo de aquel *Rey* — que lo era en exceso — *Prudente*: "En cuanto a las notas, y a modo de reflexión general, cabría decir que en conjunto reflejan el temperamente indeciso y dubitativo de don Felipe, propenso siempre a recabar nueva información, y a contrastar el juicio que se le transmite con otro distinto" (p. 480, y, en general, pp. 449-485).

Para los territorios de aquella extensísima Monarquía, y para aquel *reino de los papeles* que eran los palacios reales, el espacio y el tiempo, y su mutua conjugación e interrelación, resultaban vitales (pp. 487-509). En el antiguo Alcázar de Madrid, hasta su destrucción por un incendio en el siglo XVIII, la mayor parte de los Reales Consejos estaban situados en el ala norte del segundo patio. Ese segundo patio parece ser que estaba abierto al trasiego de las gentes, que visitaban las tiendas, joyerías y librerías allí situadas; se entretenían en las exposiciones que realizaban los pintores, o acudían a gestionar sus papeles, e intereses, en las dependencias de los Consejos que estaban en la planta baja. Detrás de ese patio — conocido como el *patio de las covachuelas*-, se hallaba el llamado *cuarto bajo de verano*, desde el cual, una escalera conducía al *cuarto alto* o *cuarto y aposento de Su Majestad*, guardado y vigilado por

(30) Jon Arrieta Alberdi, "Gobernar rescribiendo. Felipe II y el Consejo de Aragón", en VV. AA., *Felipe II y el Mediterráneo*. vol. III. *La Monarquía y los Reinos*, Madrid, 1999, pp. 65-96.

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las distintas guardias, española, alemana y borgoñona. No había, pues, una distancia apreciable entre el lugar de trabajo del monarca y el de los Consejos, que nunca dispusieron, por otra parte, de dependencias amplias, cómodas y desahogadas en palacio. Algunos Consejos, incluso, como el de la Inquisición y, ocasionalmente, el de Cruzada, se reunían en las *posadas* de sus respectivos presidentes. Obviamente, durante sus *jornadas* primaverales en el Real Sitio de Aranjuez, las otoñales en Valsaín y El Pardo, y de verano en El Escorial, Felipe II disponía de otros lugares de trabajo. Por ejemplo, en el monasterio de El Escorial, tenía para el despacho una estancia amplia, con vistas orientadas al mediodía. Algo que siempre agradeció, puesto que caminar por el campo constituía para él el mejor descanso posible del ajetreo de los papeles. Aunque no dejase tampoco de despachar durante los viajes y traslados, ni incluso mientras caminaba por el campo. Por lo que se refiere al tiempo dedicado al despacho, el horario regio fue siempre variable. En ocasiones, Felipe II instó a sus secretarios a que acudiesen a comer a palacio, a fin de poder despachar juntos después del almuerzo, que el monarca y sus colaboradores habrían efectuado por separado, ya que la comida de los reyes era un acto solemne y semipúblico, en el que difícilmente tendrían cabida gentes de inferior condición social como eran los secretarios. Por las noches, después de cenar, Felipe II solía también trabajar.

Un trabajo, el del despacho, tanto matutino y vespertino como nocturno, siempre marcado por la *prisa* (la *priessa* a la que aluden muchas veces los papeles). Es la *paradoja de la priessa*, en la que se detiene el profesor Escudero: el régimen administrativo y de gobierno de Felipe II ha sido tachado de lento y retardatario, entre otras razones, por las dudas, desconfianzas e indecisiones del mismo monarca; y, sin embargo, por las cartas, memoriales, consultas, billetes y notas de los secretarios recorre siempre una sensación, muchas veces explicitada, de prisa, de premura de tiempo, de urgencia, de atraso casi irreparable. Unas realidades tan aparentemente contradictorias se concilian teniendo presente — y ya se ha hecho alusión a ello — que, si bien Felipe II fue moroso en la toma de decisiones, no lo eran, ni lo podían ser, sus secretarios en la ejecución de las mismas, ni en sus trámites de preparación y adopción. Por lo tanto, cabe advertir que aquellos procedimientos administrativos — como los de todas las épocas, por lo demás — eran lentos y tortuosos, pero, las personas eran activas y diligentes. Por otra parte, el proceso de toma de decisiones en la Monarquía española tenía que ser necesariamente lento por dos motivos: por la existencia de una complejísima *máquina de gobierno*; y porque todos los papeles que circulaban por ella, grandes y pequeños, importantes e intrascendentes, tenían que ser revisados, uno a uno, por el *Rey Prudente*. De ahí la casi obsesiva preocupación de los secretarios y de los consejeros, de todos los ministros de la Monarquía, por la pronta llegada de los correos y de la correspondencia.

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En lo que se refiere al método de despacho regio *stricto sensu*, hay que subrayar, en primer lugar, el extremo cuidado que siempre tuvo Felipe II en la provisión de los oficios y el nombramiento de ministros y colaboradores, muy especialmente, los propios secretarios (pp. 511-533). También se preocupó de que dichos secretarios no ejerciesen, subrepticiamente, funciones de consejeros en el seno de los Reales Consejos, invadiendo competencias que les eran ajenas. Pero, lo cierto fue que, en la práctica del despacho, los secretarios, y particularmente los secretarios privados, casi siempre se interpusieron entre los Consejos y el rey. Hasta el punto de que el profesor Escudero detecta una *jurisdicción universal* del secretario privado — paradigmáticamente, Mateo Vázquez — en el reinado de Felipe II (pp. 514-518). Lo que no impedía que, en el desempeño de sus funciones, también ellos recibiesen órdenes de otros secretarios, de los consejeros y de los demás ministros del rey, que eran, a su vez, transmisores de órdenes regias. Ni que los mismos secretarios se comunicasen órdenes entre sí, puesto que el soberano podía darlas a varios al mismo tiempo, para que se las hiciesen llegar a los restantes. Hay que tener en cuenta que, si bien la correspondencia llegaba al monarca y salía de él *por vía de* o *en manos de* un determinado secretario, todos los súbditos de la Monarquía, en general, y no sólo sus ministros, disponían del cauce particular de hacerle llegar sus cartas, memoriales e informes directamente, bajo la cláusula de entrega *en sus reales manos*.

Una materia de despacho que siempre ocupó un lugar principal fue, como se ha recordado, la del nombramiento de cargos y la concesión de mercedes. Pues bien, una constante en el reinado de Felipe II fue su retraso en la provisión de los oficios, incluidos los de rango inferior y menor entidad. Unos oficios que eran solicitados incluso cuando todavía no había muerto su titular, mediando una simple enfermedad o su edad avanzada. El monarca gustaba de reflexionar detenidamente sobre los méritos de los candidatos, lo fuesen éstos para una plaza de presidente del Consejo Real de Castilla o de portero en ese u otro Real Consejo. Y también gustaba de respetar el orden de los méritos de cada uno de ellos, y la autonomía de los órganos administrativos consultados, a los que siempre les era requerido su parecer previo. Por otra parte, y es una cuestión a la que igualmente se ha hecho referencia con anterioridad, en los numerosísimos billetes y notas que el rey y sus secretarios se cruzaban entre sí, aparecían una serie de temas recurrentes, al margen del concreto que les ocupaba en aquel momento: las consideraciones religiosas, las relativas a la salud del monarca y de sus ministros, y las atinentes a la situación económica — siempre precaria — de los secretarios y de sus colaboradores (pp. 535-555).

En aquel ingente *océano de papeles* de la Monarquía siempre reinaba — una paradoja más — el orden y el desorden. Felipe II quería tener ordenados y repartidos sus papeles, pero, resultaba imposible,

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dada su profusión y el barullo de manos por las que pasaban (pp. 569-597). Pese a los buenos deseos del rey, y a las ponderaciones de sus apologistas, como Baltasar Porreño en sus *Dichos y hechos del Señor Rey Don Felipe II, el prudente, potentísimo y glorioso monarca de las Españas y de las Indias*: "Tenía tanto cuidado con los papeles que dexava en su mesa, que aun advertía el orden con que los dexava" (p. 569). No es de extrañar que el monarca se queje repetidas veces, en su *correspondencia* con los secretarios, de cansancio y agobio de trabajo en el despacho. Así, en un billete autógrafo de 6-IV-1575, se desahogaba con Mateo Vázquez, diciendo que: "No os he llamado oy por aver tenido mucho que hazer en las cosas de aquí para poderme despachar dellas, y ir mañana a la tarde, aunque primero os llamaré para tratar algunas cosas de más priessa, y poder desembaraçar este caxón que tengo delante de papeles" (p. 572). Es la figura de un rey *esclavo del despacho*, y del gobierno. Lo que no obstaba para que, al margen de estas quejas y desahogos periódicos, el lenguaje que mostraba Felipe II en el despacho, a tenor de los billetes que escribía o de las notas con las que contestaba, fuese monocorde y frío, sin dejar traslucir otras emociones o estados de ánimo. Si es cierto, como reiteraba el cronista Cabrera de Córdoba, que, por medio de sus papeles, *meneaba el mundo desde su real asiento*, también lo es que sabía y se preciaba de dominar sus impulsos y sentimientos: hasta el punto de que sus glosas y comentarios no reflejaban, "de ordinario, ni excesivo entusiasmo, ni excesiva contrariedad o preocupación" (p. 577). Era la encarnación, por tanto — o, al menos, así quería ser reconocido-, de la prudencia política. Pero, de la actitud de *Rey Prudente* a la de *rey irresoluto* sólo hay — había — un paso. Y como lo segundo fue tenido por muchos de sus contemporáneos, incluidos sus mismos secretarios, que eran quienes más relación tenían con él. Por ejemplo, por el secretario Diego de Vargas, quien, explicando a Álvar García de Toledo el retraso en el despacho de cierta provisión, le recordaba, en carta fechada en Madrid el 11-X-1565, que el rey "es de su costumbre no saberse resolver presto" (p. 584, nota núm. 1430). El mismo Felipe II era consciente de ello, y de su predisposición a las *menudencias*, es decir, a atender con minuciosidad toda clase de asuntos, grandes y pequeños: como le confiaba, también a García de Toledo, otro secretario, Francisco de Eraso, el 3-V-1565, a responder "a todo tan particularmente" (p. 586). En realidad, tal predisposición psicológica y gubernativa al detalle manifestaba una clara incapacidad de delegar. Y el *pecado* llevaba consigo su condigna *penitencia*: el rey era un *galeote* más, por muy distinguido y preeminente que fuese, al remo de la *galera* de la Monarquía. Fue el destino querido por él mismo. No por su hijo y nieto, ya que ambos, Felipe III y Felipe IV, se redimieron de su *penitencia* regia cediendo el *remo* a sus respectivos *validos*, el duque de Lerma o el conde-duque de Olivares, entre otros. Sobre todo, este último, que también pasó la mayor parte

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de su vida, y de su *valimiento*, entre papeles y en el despacho: el *despacho* de un rey ausente (31). Eso sí, las *mortificaciones* que conllevaban sus deberes y responsabilidades regias para un tan devoto cristiano como fue Felipe II hallaron alivio, y se mitigaban parcialmente, con sus aficiones, a las que también dedica atención el profesor Escudero (pp. 589-597): las de la caza, por supuesto, pero, además, también la muy conocida de la arquitectura y la construcción de El Escorial, y la reparación o ampliación de los demás Reales Sitios; la de los jardines, y su amor declarado por las flores y los pájaros.

Más arriba se ha indicado que este *Felipe II en el despacho* ha sido elaborado, no en exclusivo monólogo con sus papeles y documentos, ni siquiera con las obras anteriores del autor ya mencionadas y pormenorizadas, cuya dedicación durante tantos años a esta compleja y vastísima materia de las estructuras de gobierno de la Monarquía española en la Edad Moderna así se lo habrían permitido, e incluso justificado, sino en diálogo abierto, humilde y generoso, con las aportaciones de otros investigadores. Muchos de ellos, historiadores que son discípulos del mismo profesor Escudero, y algunos de los cuales se han convertido en autoridades en sus respectivas áreas de especialización. No es posible mencionar aquí a todos, pero sí recordar, a título de ejemplo, a varios de ellos, como es el caso de Feliciano Barrios (32), Juan Carlos Domínguez Nafría (33), Juan Francisco Baltar (34), Eduardo Galván (35) o José Ramón Rodríguez Besné (36). Una relación que se amplía considerable-

(31) John H. Elliott, *El Conde-Duque de Olivares. El político en una época de decadencia*, Ed. Crítica, Barcelona, reimpr. de 1991 (1ª ed. en inglés, Londres, 1986; 1ª ed. en castellano, Barcelona, 1990), pp. 284-323.

(32) Tampoco resulta factible proporcionar aquí más que la referencia de dos o tres obras, quizás las más representativas, hasta el momento, de la trayectoria investigadora de los autores que son mencionados a continuación. Así, en primer lugar, Feliciano Barrios, *El Consejo de Estado de la Monarquía española, 1521-1812*, editado por el Consejo de Estado, Madrid, 1984; e *Id., Los Reales Consejos. El Gobierno central de la Monarquía en los escritores sobre Madrid del siglo XVII*, Madrid, 1988.

(33) J.C. Domínguez Nafría, *El Real y Supremo Consejo de Guerra (siglos XVI-XVIII)*, Centro de Estudios Políticos y Constitucionales, Madrid, 2001; e *Id.*, "Carlos V y los orígenes de la polisinodia hispánica", en Ernest Belenguer Cebriá (coord.), *De la unión de las Coronas al Imperio de Carlos V*, Sociedad Estatal para la Conmemoración de los Centenarios de Felipe II y Carlos V, Madrid, 2001, vol. I, pp. 497-531.

(34) J.F. Baltar Rodríguez, *Las Juntas de Gobierno en la Monarquía Hispánica (siglos XVI-XVIII)*, Centro de Estudios Políticos y Constitucionales, Madrid, 1998; e *Id., El Protonotario de Aragón, 1472-1707. La Cancillería aragonesa en la Edad Moderna*, Institución Fernando el Católico, Zaragoza, 2001.

(35) E. Galván Rodríguez, "Aproximación institucional al Consejo de Aragón a la luz de los manuscritos de Londres y París (1586-1589)", en *AHDE*, Madrid, 68 (1998), pp. 239-384; e *Id., El secreto en la Inquisición española*, Servicio de Publicaciones de la Universidad de Las Palmas de Gran Canaria, Las Palmas, 2001.

(36) J.R. Rodríguez Besné, "Aproximación histórica a los Consejos de Italia y de Aragón", en el *Homenaje al Profesor Alfonso García-Gallo*, Servicio de Publicaciones de la Universidad Complutense, Madrid, 1996, t. II, vol. I, pp. 549-564; e *Id., El Consejo de*

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mente si se traspasa el umbral de los siglos XVI y XVII, y se llega al XVIII, incluyendo, junto a la Historia de las Instituciones político-administrativas de la Edad Moderna, el particular desarrollo histórico e institucional del Santo Oficio de la Inquisición, que ha sido siempre, como antes se indicó, un ámbito de estudio e investigación muy caro para el profesor Escudero, fundador y director del Instituto de Historia de la Inquisición de la Universidad Complutense de Madrid, como ha quedado dicho, y de la *Revista de la Inquisición*, de la que han sido publicados, hasta el momento, liez números desde el año 1991. Así, han de ser citados, con riesgo siempre de olvidos tan involuntarios como no deseados, y únicamente con el propósito de dejar simple constancia del numeroso grupo de trabajo que ha sabido crear en torno suyo — y que constituye una *escuela*, en tanto que hay un maestro que ha enseñado a los que se sienten integrantes de ella unos métodos de investigación, compartiendo todos unos mismos ámbitos de estudio y de especialización —, los nombres de Consuelo Maqueda (37), Isabel Martínez Navas (38), María Concepción Gómez Roán (39), Beatriz Badorrey (40), Manuel Aranda (41), María del Camino Fernández (42), María Dolores

la Suprema Inquisición. Perfil jurídico de una institución, Editorial Complutense, Madrid, 2000.

(37) C. Maqueda Abreu, *El Auto de Fe*, Ediciones Istmo, Madrid, 1992; e *Id., Estado, Iglesia e Inquisición en Indias. Un permanente conflicto*, Centro de Estudios Políticos y Constitucionales, Madrid, 2000.

(38) I. Martínez Navas, "Proceso inquisitorial de Antonio Pérez", en *Revista de la Inquisición*, Instituto de Historia de la Inquisición, Madrid, 1 (1991), pp. 141-200; e *Id.*, "El Ministerio Secretaría de Estado de José Bonaparte. (Notas para el estudio de la Administración josefista en España)", en Regina María Pérez Marcos (coord.), *Teoría y práctica de gobierno en el Antiguo Régimen*, Marcial Pons Ediciones, Madrid, 2001, pp. 53-120.

(39) M. de la C. Gómez Roán, "Notas sobre el establecimiento de la Inquisición española", en *Revista de la Inquisición*, Madrid, 7 (1998), pp. 323-331; e *Id.*, "Control ideológico y ritual: el ceremonial del Inquisidor General en un manuscrito de la segunda mitad del siglo XVII", en *Revista de Estudios Políticos*, Madrid, 103 (enero-marzo, 1999), pp. 247-258.

(40) B. Badorrey Martín, *Los orígenes del Ministerio de Asuntos Exteriores (1714-1808)*, editado por el Ministerio de Asuntos Exteriores, Madrid, 1999; e *Id.*, "La presidencia de las fiestas de toros: un conflicto de jurisdicción entre el corregidor de Madrid y la Sala de Alcaldes en 1743", en *AHDE*, Madrid, 69 (1999), pp. 463-483.

(41) Manuel Aranda Mendíaz, "El manuscrito Add. 28.434: Felipe II y las Cortes de Castilla", en *Revista de Ciencias Jurídicas de la Universidad de Las Palmas de Gran Canaria*, Las Palmas, 4 (1999), pp. 23-38; *Id.*, "Censura inquisitorial en Canarias en el Siglo de las Luces", en *Revista de la Inquisición*, Madrid, 8 (1999), pp. 33-42; e *Id., El Tribunal de la Inquisición de Canarias durante el reinado de Carlos III*, Las Palmas de Gran Canaria, 2000.

(42) M. del C. Fernández Giménez, "Notas sobre la reforma del Consejo de Castilla en 1713", en *AHDE*, Madrid, 69 (1999), pp. 547-577; e *Id., La Sentencia inquisitorial*, Editorial Complutense, Madrid, 2000.

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Álamo Martell (43), Andrés Gambra (especialista en Historia y Derecho histórico medieval) (44), Carmen Sáenz Berceo (45). Amén de otros discípulos de sus discípulos, que se han beneficiado de sus enseñanzas y han aprendido de él, no sólo por la vía de sus respectivos maestros, sino también, afortunadamente, a través de su magisterio directo, tan generoso en tiempo, ocupaciones y preocupaciones, y al hilo de la realización de su incansable actividad investigadora, y de la redacción de sus aportaciones monográficas, constantes en el tiempo a pesar del empleado en los muy destacados cargos de gestión académica que ha desempañado a lo largo de su vida, y de su sobresaliente actividad pública (Presidente de la Comisión de Educación y Cultura del Senado durante la Transición política española, o Diputado del Parlamento Europeo): entre otros, María Soledad Campos (46), José Cano Valero (47), Dionisio Perona (48), o el mismo autor de estas páginas (49).

(43) M. de los D. Álamo Martell, "Repercusión de la Constitución gaditana de 1812 en el Reino de Cerdeña", en *AHDE*, Madrid, 69 (1999), pp. 359-365; *Id.*, "Una aproximación a las Ordenanzas de la Real Audiencia de Canarias", en *Revista de Ciencias Jurídicas de la Universidad de Las Palmas de Gran Canaria*, Las Palmas, 4 (1999), pp. 13-22; e *Id., El Capitán General de Canarias en el siglo XVIII*, Las Palmas de Gran Canaria, 2000.

(44) A. Gambra Gutiérrez, *Alfonso VI. Cancillería, Curia e Imperio*, 2 tomos, t. I. *Estudio* y t. II. *Colección diplomática*, León, 1997-1998; e *Id.*, "Alfonso VI. Reconsideración de un enigma histórico", en las *Actas del Congreso Internacional sobre "El Cid. Poema e Historia"*, Burgos, 2000, pp. 187-202.

(45) M. del C. Sáenz Berceo, "La visita en el tribunal del Santo Oficio de la Inquisición de Valladolid (1600-1650)", en *Revista de la Inquisición*, Madrid, 7 (1998), pp. 333-387; e *Id.*, "Los inquisidores del Tribunal de Valladolid durante el reinado de Felipe III", en *Revista de la Inquisición*, 8 (1999), pp. 43-83.

(46) M. de la S. Campos Díez, "La organización administrativa sanitaria en el palacio de los últimos Austrias. (I). Médicos", en *AHDE*, Madrid, 68 (1998), pp. 171-237; e *Id., El Real Tribunal del Protomedicato castellano (siglos XIV-XIX)*, Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 1999.

(47) J. Cano Valero, "La policía rural castellana en el siglo XVI: la Caballería de la Sierra de las Peñas de San Pedro (Albacete)", en las *Actas del Congreso de Historia de Castilla-La Mancha*, Albacete, 1985, pp. 165-171; *Id.*, "Las Juntas del Señorío de Villena (siglos XIII al XVII). Notas para su estudio", en las *Actas del Congreso de Historia del Señorío de Villena*, Albacete, 1987, pp. 65-84; e *Id.*, "La enseñanza en la Meseta meridional: formación y práctica de los letrados castellanos (siglos XVI y XVII)", en Alvarado Planas, Javier (edit.), *Historia de la literatura jurídica en la España del Antiguo Régimen*, vol. I, Marcial Pons Ediciones, Madrid, 2000, pp. 387-422.

(48) D.A. Perona Tomás, *Los orígenes del Ministerio de Marina. La Secretaría de Estado y del Despacho de Marina (1714-1808)*, editado por el Ministerio de Defensa y el Instituto de Historia y Cultura Naval, Madrid, 1998; e *Id.*, "Apuntes sobre el perfil institucional de Alberoni, Riperdá y Godoy", en *AHDE*, Madrid, 68 (1998), pp. 83-150.

(49) J.M. Vallejo García-Hevia, *La Monarquía y un ministro, Campomanes*, Centro de Estudios Políticos y Constitucionales, Madrid, 1997; *Id., Campomanes y la acción administrativa de la Corona (1762-1802)*, Real Instituto de Estudios Asturianos, Oviedo, 1998; e *Id.*, "La Inquisición en el distrito de la Audiencia de Guatemala (1569-1609)", en *AHDE*, Madrid, 71 (2001), pp. 161-265.

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Unos discípulos, por cierto, a los que el maestro presta un generoso, y emotivo, homenaje conjunto en la persona y méritos de uno de los primeros, sino el primero de ellos, Feliciano Barrios, a quien está dedicado este *Felipe II*, sedente en el despacho de tantas *empresas* como su biógrafo institucional, por ser "discípulo en tan poco y maestro en tanto".

La Monarquía Universal Hispánica y Católica, sabido es que fue la primera formación política e institucional que conservó sistemáticamente sus *papeles* de gobierno, en archivos (como el de Simancas, por orden del mismo Felipe II), consciente de que la base de su poder preeminente era también de *papel*. Otro tópico es el de recordar que uno de los elementos constitutivos del Estado Moderno fue la burocracia; y ninguna burocracia se ha conformado históricamente sin papeles. La Monarquía precisaba de soldados, de escudos y de ducados, de ministros y oficiales, pero, también de papel, muchos papeles. Miles y miles de ellos cruzaban todos los años la Mar Océana, el océano Atlántico, procedentes de los más remotos rincones del Nuevo Mundo, en dirección, por tierra y por mar, hacia la Casa de la Contratación de las Indias de Sevilla y hacia el Consejo de Indias, en Madrid desde 1561. Al monarca y a su Monarquía también hay que buscarlos, y contemplarlos, en los papeles, o *perdiendo los papeles*. El gobierno, y el estilo de gobierno, de los tiempos *modernos* ha sido y es — con las variantes técnicas y tecnológicas que se quieran — el de la *pluma*. De ahí que no resulte nada superfluo haberse referido, por extenso, al tópico de la pluma y la espada. Ni al de los documentos y los archivos. Ambos, el *documento* y el *archivo*, eran instrumentos principales de gobierno, y ninguna historia del poder político e institucional puede, seriamente, preterirlos o minusvalorarlos. Tampoco hipervalorarlos, olvidando que el sujeto de la historia — y de la Historia — es el hombre, pasado, presente y futuro; ni que los documentos encubren casi siempre intereses, muy humanos — en ocasiones, demasiado-, de grupos y clases sociales, por cierto, que el historiador está obligado a desvelar y dejar patentes, en la medida de sus posibilidades. Por último, el historiador tampoco debería olvidar que los *tópicos*, a los que tan aficionados eran los pensadores políticos y los juristas del *ius commune* en la Edad Moderna, lejos de ser despreciados, deben ser estudiados, y, por ello, apreciados en su justa medida, por el historiador actual. De mucho de todo ello nos instruyen las páginas magistrales del *Felipe II: el Rey en el despacho*, del profesor José Antonio Escudero, no sólo como un libro aislado, sino como otro más añadido a su imprescindible *biblioteca* personal, a su obra de conjunto, indispensable e insustituible para conocer las estructuras históricas del poder político en la Edad Moderna, en general, y la concreta organización administrativa, institucional, de la Monarquía española de los siglos XVI a XVIII. Una estructura y organizaciones en las que los tópicos — lo repetiré por última vez-,

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como los de la *pluma* y la *espada*, las *armas* y las *letras*, tenían más importancia para comprender la realidad circundante de lo que actualmente estamos dispuestos a admitir. Y es que la Historia, también la que escribimos los historiadores, mucho me temo que es, en muchas ocasiones, una sucesión de *tópicos* en el tiempo, que se van superponiendo unos a otros. Al buen historiador corresponde deslindar los *historiográficos* de los *históricos*.

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DOLORES FREDA

IL *LAW REPORTING* NELLE CORTI DI *COMMON LAW* (XIII-XVI SEC.): UN SECOLO DI STORIOGRAFIA ANGLOSASSONE

1. *La "questione" delle fonti.*

La storia del *law reporting* in Inghilterra appare indissolubilmente legata alla "questione" della pubblicazione delle fonti. La storiografia ha dovuto infatti, fin dal principio, fare i conti con l'ampia dispersione e la difficile leggibilità delle raccolte di giurisprudenza e, di conseguenza, a prescindere dall'ambito disciplinare di provenienza degli studiosi e dalle diverse opzioni interpretative prescelte, ha posto immediatamente l'accento sulla necessità di una completa edizione a stampa dei *reports*.

Già agli inizi del diciannovesimo secolo il *Select Committee of the House of Commons on Public Records*, istituito « to inquire into the state of the Public Records of Great Britain », raccogliendo l'invito del *reporter* Sylvester Douglas (1), aveva raccomandato una riedizione dei medievali *Year Books* a stampa (2) e la pubblicazione di quelli ancora in manoscritto. Sfortunatamente, a causa della scarsità dei fondi statali

(1) Douglas, *Master of the Library* presso il *Lincoln's Inn*, aveva sottolineato come « such a valuable monument of practical Law and Jurisprudence as the Year Books probably does not exist in any other Country. But: 1. In the printed editions of these important annals there are many chasms and interruptions in the series of the years; 2. The printed copies abound in many imperfections of other sorts (...). » e ne aveva auspicato un'accurata ristampa. (*First report of the Select Commettee appointed to inquire into the state of the public records of the Kingdom, Appendix Q. 3*, London 1800, p. 381).

(2) Ci si riferisce, in particolare, alla cosiddetta "standard edition", pubblicata negli anni 1678-80 in *law-french*, e comprendente — con enormi lacune ed inesattezze — gli *Year Books* a stampa compilati tra la fine del tredicesimo e gli inizi del sedicesimo secolo.

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destinati all'impresa, tali buoni propositi sarebbero rimasti sulla carta per più di cinquanta anni.

Solo nel 1863, infatti, la *Rolls Series* pubblicò, col titolo di *Chronicles and Memorials of Great Britain and Ireland during the Middle Ages*, il primo volume (in *law-french* con traduzione inglese a fronte) degli *Year Books* inediti del regno di Edward I a cura di Horwood. Nei diciassette anni seguenti, altri cinque tomi relativi agli anni 20-22 e 31-35 dello stesso regno e due riguardanti l'undicesimo e dodicesimo anno del regno di Edward III furono editi dallo stesso autore.

Alla morte di Horwood, l'opera fu continuata da Pike, che proseguì nell'edizione dei manoscritti inediti relativi al regno di Edward III introducendo, nei quindici volumi di cui fu editore, la felice quanto utile innovazione di pubblicare, accanto ai *reports*, anche alcuni corrispondenti estratti dai *Plea Rolls*, i *records* ufficiali dei casi decisi dalle corti di *common law.* Ma ancora una volta la penuria di fondi, aggravata dallo scoppio della prima Guerra Mondiale, era destinata a porre fine all'impresa.

Nel frattempo, sull'altra sponda dell'Atlantico, un gruppo di professori di diritto dell'Università di Harvard, ispirati dall'opera di Soule (3), dava vita agli inizi del novecento alla *Ames Foundation* il cui primo volume, un'edizione dei manoscritti inediti degli *Year Books* del regno di Richard II a cura di Deiser, apparve nel 1914. L'attività della fondazione, sebbene molto a rilento ed in modo decisamente discontinuo, è proseguita fino ai giorni nostri e, dopo circa novanta anni, è stato pubblicato il settimo volume di *Year Books* relativo al sesto anno di regno di Richard II.

In realtà, si può dire che solo con la *Selden Society*, fondata nel 1887 da un gruppo di giuristi capeggiati da Frederic William Maitland (4), lo studio scientifico delle fonti, specie di quelle in manoscritto, abbia avuto inizio. Maitland, *Literary Director* della *Society* dal 1895, nella brillante introduzione al primo volume di *Year Books* del regno di Edward II, pubblicato nel 1903, spiegava che lo scopo della *Selden Society* era « to encourage the study and advance the knowledge of the history of English law » e « to redeem the Year Books from that kingdom of darkness in which they are captives, and to hasten the day when they will once more be readable, intelligible and — we do not fear to say it — enjoyable books » (5). Il diritto medievale inglese, secondo Maitland, si celava negli *Year Books*: solo attraverso la pubblicazione

(3) C. C. Soule, *Year-Book Bibliography*, in "Harvard Law Review", 14 (1901), aveva fornito un'accurata ricostruzione bibliografica, corredata da preziose tavole, delle raccolte a stampa esistenti.

(4) R. Webster, M. Cookson, J. Fletcher Moulton, F. Meadows White, W. Paley Baildon, R. Campbell, P. E. Dove, E. Macrory, H. S. Milman, S. Moore e F. Pollock.

(5) F. W. Maitland, *Year Books of Edward II, 1 & 2 Edward II*, Selden Society, London 1903, p. IX.

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dei manoscritti e la riedizione delle lacunose ed incomplete raccolte a stampa del passato, la storia del diritto inglese avrebbe potuto essere finalmente scritta (6).

Seguirono altri due tomi di *Year Books* del regno di Edward II (7) nei quali, così come nel primo, Maitland pubblicò — per la prima volta — testi divergenti degli stessi *reports* provenienti da manoscritti diversi e tutti i *records* corrispondenti rintracciati nei *Plea Rolls*. Tali edizioni, corredate della traduzione dal *law-french* all'inglese, di un apparato di indici, accuratissime note e tavole e, ancor più, di preziose introduzioni esplicative, hanno fatto da modello ai successivi volumi di *Year Books* e *Reports* pubblicati dalla *Selden Society* (8) fino ai giorni nostri.

Dagli anni cinquanta in poi, la storiografia ha manifestato una crescente attenzione e sensibilità nei confronti delle fonti in manoscritto e, a partire dagli anni settanta, ha rivolto il suo interesse non più soltanto ai medievali *Year Books*, ma anche ai più moderni *Named Reports* (9). Oggi, a cento anni dalla pubblicazione del primo volume della *Selden Society*, essa ancora lamenta la scarsità delle edizioni a stampa degli *Year Books*, dei fondi destinati dallo stato inglese alla pubblicazione dei manoscritti in materia giuridica, del numero degli studiosi disposti ad impegnare la loro carriera nell'impresa, tanto affascinante quanto ardua e poco remunerativa, di riportare alla luce il contenuto delle migliaia di pergamene da cui i manoscritti degli *Year Books* e dei *Plea Rolls* sono costituiti (10).

E, per ciò che concerne i *Named Reports*, è stato messo in luce come la situazione non sia certo migliore (11): il numero di manoscritti

(6) « It will some day seem a wonderful thing that men once thought that they could write the history of medieval England without using the Year Books », ivi, p. XX. Ancora: « The first and indispensable preliminary to a better legal history than we have now is a new, a complete, a tolerable edition of the Year Books ». In tal senso, F. POLLOCK-F.W. MAITLAND, *The History of English Law before the time of Edward I*, Cambridge University Press 1895, I, p. 35 (che, non a caso, termina nel 1307).

(7) F.W. MAITLAND, *Year Books of Edward II, 2 & 3 Edward II*, Selden Society, London 1904; e *Year Books of Edward II, 3 Edward II*, Selden Society, London 1905.

(8) La *Selden Society* ha finora pubblicato più di centoventi volumi aventi ad oggetto le fonti del *common law*.

(9) Su questo tema si vedano, in particolare, J.H. BAKER, *The Dark Age of English Legal History, 1500-1700*, in *The Legal Profession and the Common Law: Historical Essays*, The Hambledon Press, London 1986, p. 436 ss.; e W.H. BRYSON, *Law Reports in England from 1603 to 1660*, in C. STEBBINGS (a cura di), *Law Reporting in Britain — Procedings of the 11th British Legal History Conference*, The Hambledon Press, London 1995, p. 113 ss..

(10) Ha particolarmente insistito sul punto J.H. BAKER, *Law Reports and English Legal History: the editorial problem*, in *Scintillae Juris: studi in memoria di Gino Gorla*, Giuffrè, Milano 1994, p. 166, sottolineando che « we are still only two-thirds of the way there, and the rate of editing has slowed; an edition of all the year books would not at this rate be seen before the twenty-fourth century ».

(11) *(ibidem).* Dello stesso avviso, L.W. ABBOTT, *Law Reporting in England,*

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esistenti è, infatti, di gran lunga superiore a quello degli *Year Books* e, inoltre, la *Selden Society* ne ha iniziato la pubblicazione soltanto nel 1977 (12). Da allora, poche altre raccolte sono state stampate (13) ed i moltissimi *reports* in manoscritto, scarsamente leggibili e per lo più disseminati in svariate biblioteche inglesi ed americane, possono essere consultati solo con grande difficoltà dagli studiosi. Sebbene sia ritenuta difficilmente realizzabile una pubblicazione integrale delle innumerevoli raccolte di età moderna, è da più parti auspicata un'edizione a stampa quantomeno selettiva dell'opera dei principali *reporters* e dei casi relativi ad argomenti di particolare interesse (14).

Una soluzione potrebbe essere rappresentata dalle moderne tecnologie che, attraverso *microfilms* e *microfiches*, potrebbero consentire una riproduzione più ampia, veloce ed economica di tutti i manoscritti esistenti ed una riedizione delle incomplete ed erronee raccolte a stampa del passato (15). In ogni caso, si ritiene che solo una completa ed affidabile edizione a stampa delle fonti giurisprudenziali inglesi possa consentire un'adeguata ricostruzione e interpretazione della storia del *law reporting* e, più in generale, della storia del *common law* (16).

1485-1585, The Athlone Press, London 1973; e E.W. IVES, *The Purpose and Making of the later Year Books*, in "Legal History", 89 (1973); *The Origins of the later Year Books*, in *Legal History Studies, Procedings of the first British Legal History Conference, Aberystwyth*, University of Wales Press, Cardiff 1975.

(12) Il primo volume ad essere pubblicato è stato J.H. BAKER, *The Reports of Sir John Spelman*, Selden Society, London 1977-78. Precedentemente erano stati editi, a cura di D. E. C. Yale, soltanto due tomi di casi decisi dalla *Court of Chancery* (*Lord Nottingham's Chancery cases*, Selden Society, London 1954 e 1961-62). In realtà, i *reports* dei casi decisi dalle corti inglesi prima del 1865 (e, perciò, anche i *Named Reports*) erano stati già pubblicati in *The English Reports*, Green & Sons, Edinburgh 1900-32, in centosettantotto volumi, ma si trattava di una riproduzione letterale ed acritica degli stessi, ricca di errori ed imprecisioni e, pertanto, di non grandissima utilità per gli studiosi.

(13) J.H. BAKER, *The Notebook of Sir John Port*, Selden Society, London 1986; *Reports from the lost notebooks of Sir James Dyer*, Selden Society, London 1994; *The Reports of John Caryll*, Selden Society, London 1999-2000. In preparazione, a cura dello stesso autore, *Reports of Cases in the time of Henry VIII*.

(14) In tale direzione, BAKER, *The Dark Age* cit., p. 436 ss.; e *Early Tudor Reports and the Plea Rolls*, in "Cambrian Law Review", 18 (1987).

(15) Così, BAKER, *Law Reports* cit., p. 169 ss.; e *The Dark Age* cit., pp. 458-60. A John Baker, attuale *Literary Director* della *Selden Society*, si deve la catalogazione dei manoscritti in materia giuridica conservati presso la *Cambridge University Library*, la *Oxford Bodleian Library*, il *Gray's Inn*, il *Lincoln's Inn* e la *Library of the Harvard Law School* all'interno del più ampio *English Legal Manuscripts Project*, finalizzato alla riproduzione in *microfilms* e *microfiches* dei manoscritti giuridici inediti.

(16) « History cannot be written in any reliable way until the best evidence has been harvested ». Così, J.H. BAKER, *Why the History of English Law has not been finished*, Cambridge University Press 1999, p. 4.

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2. *Gli* Year Books*: raccolte ufficiali o "student's notebooks"?*

La storiografia sul *law reporting* — sia quella parte di essa che ha fatto oggetto dei propri studi gli *Year Books*, sia quella parte che ha concentrato la propria attenzione sui *Named Reports* — ha posto al centro della ricerca storica il tema dell'origine e della funzione dei *law reports*, con il quale si è in vario modo confrontata.

Le prime ricerche storiche, svolte a partire dagli inizi del secolo scorso ed aventi ad oggetto i medievali *Year Books*, hanno sostanzialmente smantellato la convinzione, fondata sui *Commentaries* di Edmund Plowden, secondo la quale i *reports* avrebbero avuto un'origine "ufficiale". Nella prefazione all'opera, infatti, l'illustre *reporter* riferiva « that in old time (...) there were four reporters of our cases of law, which were chosen men, and had a yearly stipend for their travail therein, paid by the king of this realm » (17). Nei secoli seguenti, tale autorevole affermazione era stata dogmaticamente accolta e mai più messa in discussione: lo stesso Coke l'aveva ripresa (18) e, successivamente, anche Bacon (19) e Blackstone (20) le avevano dato credito.

Tale assunto è stato completamente demolito da Maitland, che ha efficacemente dimostrato come esso non abbia alcun fondamento concreto: infatti, non sono mai stati rinvenuti documenti o altre testimonianze relativi alla nomina o al pagamento dei quattro presunti *reporters* ufficiali; inoltre, lo stile — estremamente vario ed informale — ed il contenuto — anch'esso molto vario, lacunoso ed impreciso — delle raccolte appaiono chiaramente incompatibili con ogni eventuale "ufficialità"; infine, la stragrande maggioranza dei *reports* ci è pervenuta attraverso biblioteche di privati: se essi fossero stati opera dei *clerks* o degli altri *officers* in servizio presso le corti, sarebbero stati certamente conservati, come gli ufficiali *Plea Rolls*, dalle corti stesse (21).

Una volta negati l'origine ed il carattere ufficiale del *law reporting*, la storiografia ha imboccato e percorso strade diverse, oscillando tra l'affermazione di una "non-ufficialità" *tout court* e l'ipotesi, più conciliante, della "semi-ufficialità" degli *Year Books*.

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(17) E. Plowden, *Les Comentaries ou Reportes, Preface*, 1571, p. II.

(18) E. Coke, *Reports, Preface*, 1602, III, p. V: « the Kings of this realm (...) did select and appoint four discreet and learned professors of law to report the judgments and opinions of the reverend Judges ».

(19) Bacon aveva suggerito a James I di nominare due *reporters* ufficiali, pagandoli cento sterline l'anno, « to revive and renew the ancient custom of appointing some grave and learned lawyers to attend our courts at Westminster for the reporting of the judgments and resolutions of law », cit. in J. Spedding, *Letters and Life of Bacon*, 1869,V, p. 86.

(20) W. Blackstone, *Commentaries on the Laws of England*, 1765, I, pp. 71-2, aveva affermato che, dal regno di Edward II a quello di Henry VIII, i *reports* erano stati compilati da *protonotaries* pagati dalla Corona.

(21) Maitland, *Year Books of Edward II, 1 & 2 Edward II* cit., p. XI ss..

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Coerentemente con le decise critiche rivolte alla tradizione, Maitland ha per primo ipotizzato che gli *Year Books* fossero in origine « student's notebooks » e non avessero altro scopo che l'istruzione pratica dei *lawyers.* Essi, redatti « by learners for learners, by apprentices for apprentices », in sintesi, « by lawyers for lawyers » (22) costituivano, cioè, una sorta di "manuale di istruzioni" della complessa procedura medievale, uno strumento indispensabile ad ogni *lawyer* che si accingesse ad intraprendere la *legal profession*. Secondo questa ricostruzione, studenti di diritto e praticanti si recavano quotidianamente a Westminster per assistere alla trattazione dei casi e, successivamente, annotavano nelle loro raccolte quelli ritenuti di maggior interesse. Solo attraverso siffatta "pratica", infatti, un giorno sarebbero stati in grado di destreggiarsi nella difficile arte del *legal pleading* (23).

Maitland ha inoltre suggerito l'esistenza di un legame tra *law reporting* ed *Inns of Court*, le "società" che raccoglievano — e ancora oggi raccolgono — gli appartenenti alla *legal profession*. Egli, in particolare, ha sottolineato come l'appartenenza dei *lawyers* agli *Inns*, presso i quali essi non solo studiavano il *common law* per prepararsi all'esercizio della professione forense, ma anche alloggiavano e condividevano i pasti e gli svaghi, favorisse l'affermazione di un forte spirito "di corpo" ed un'intensa cooperazione.

E proprio tale atmosfera "collaborativa" costituiva senza dubbio l'ambiente ideale per un'ampia circolazione dei *reports.* Essi, annotati dai *reporters* a Westminster e successivamente inseriti nelle rispettive raccolte venivano, con tutta probabilità, proprio negli *Inns* frequentemente "scambiati" tra i *lawyers* ed ulteriormente trascritti e ricopiati, moltiplicandosi così in un gran numero di esemplari, spesso anche molto diversi tra loro (24).

Molto meno convincente e, a prima vista, piuttosto fantasiosa appare l'ipotesi ricostruttiva avanzata da Bolland, secondo il quale gli *Year Books* « were produced for purely commercial reasons » (25) da

(22) Ivi, p. XIII e p. XVIII. Ancora, « they were written by medieval lawyers for medieval lawyers » (*ibidem*).

(23) La tesi della funzione "pratico-didascalica" del *law reporting* è stata completamente avallata da W.S. HOLDSWORTH, *Sources and Literature of English Law*, Clarendon Press, Oxford 1925, p. 80 ss., che in una disamina dell'evoluzione dei *reports* dalle origini al 1865, facendo proprie le critiche mosse da Maitland alla tesi dei quattro *reporters* ufficiali tradizionalmente tramandata, ha affermato che le raccolte venivano redatte « by members of the legal profession, junior and senior alike, for their own use » (p. 81). In un precedente contributo egli aveva inoltre ipotizzato l'esistenza di una qualche forma di organizzazione dei *lawyers* — forse legata ai *serjeants* — nella produzione dei *reports* (*The Year Books*, in "Law Quarterly Review", 87-88 (1906)).

(24) MAITLAND, *Year Books of Edward II, 3 Edward II* cit., p. XII ss..

(25) W.C. BOLLAND, *A Manual of Year Book studies*, Cambridge University Press 1925, p. 55.

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« some medieval capitalists, possibly a syndicate of Serjeants » (26). A suo avviso i casi, annotati in udienza da studenti e praticanti, venivano poi "ritirati" da non meglio identificati "agenti" dei *serjeants* e portati presso gli *scriptoria*, dove venivano trascritti, sotto dettatura, in svariate copie. Queste, distribuite a scrivani di professione, erano ulteriormente ricopiate e, successivamente, raccolte e messe in vendita. In pratica i *serjeants*, secondo Bolland i principali "utenti" degli *Year Books*, avrebbero visto nella crescente domanda di *reports* una sicura fonte di lucro e nell'organizzazione di una "produzione commerciale" degli stessi un fruttuoso investimento. Ma siffatta ipotesi, che anacronisticamente proietta in età medievale le attuali leggi di mercato, non si ritiene condivisibile e, di certo, non ha avuto seguito nella storiografia (27).

Negli stessi anni, sempre nell'ambito della corrente storiografica che può farsi confluire nel filone interpretativo della "non-ufficialità" del *law reporting*, veniva ripresa l'ipotesi dell'esistenza di un legame tra *Year Books* e attività didattica degli *Inns of Court*. Secondo questo orientamento storiografico, che in parte si rifaceva alla teoria maitlandiana in base alla quale i *reports* originariamente non sarebbero stati altro che « note-books » approntati da studenti e praticanti per uso personale, le raccolte sarebbero state redatte "in modo organizzato" negli *Inns*, a scopo didascalico. E sarebbero state il prodotto della collazione di singoli *pamphlets* contenenti i casi trattati dalle diverse corti durante uno o più *terms*, messi insieme negli *Inns* sotto la direzione dei *readers*, autori essi stessi dei *reports* o, comunque, supervisori della loro compilazione (28).

Benché sia indubbia l'esistenza di un legame tra *law reporting* e attività didattica svolta negli *Inns of Court* (29), così come prospettato da tale orientamento storiografico, allo stato attuale non sembra esistere alcuna prova di una compilazione "organizzata" delle raccolte all'interno di essi. E la cd. « pamphlet theory » appare più che altro come il tentativo di

(26) W.C. Bolland, *The Year Books*, Cambridge, University Press 1921, p. 37. Si veda inoltre, dello stesso, anche *Year Books of Edward II, The Eyre of Kent 6 & 7 Edward II*, Selden Society, London 1912, p. XXXVII ss..

(27) Soltanto Pollock (che pure accoglie le critiche di Maitland alla teoria dell'origine ufficiale degli *Year Books*), sembra condividere la tesi avanzata da Bolland. Vedi, in particolare, la sua introduzione a Bolland, *The Year Books* cit., p. 9 ss..

(28) Siffatta interpretazione è stata portata avanti, senza particolare successo, da G.J. Turner, *Year Books of Edward II, 4 Edward II, 1311*, Selden Society, London 1926, p. XXXV ss., in cui egli afferma che « at the end of the 13th century an organised system of law reporting had been established for purposes of instruction » (p. XLII). Si veda pure, dello stesso, il precedente *Year Books of Edward II, 4 Edward II, 1310-11*, Selden Society, London 1914, p. XVI, in cui l'autore aveva già ipotizzato l'esistenza di un « organised system of law reporting under official patronage » affermando che « the tradition » — quella dei quattro *reporters* ufficiali — « is not likely to be wholly wrong » (p. XXIII).

(29) Su questo tema si tornerà più ampiamente in seguito.

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conciliare le diverse ipotesi — e della funzione didascalica, e della produzione "professionale-organizzata" dei *reports* — con quella, tradizionalmente tramandata, dell'origine "ufficiale" delle raccolte.

Carattere "privato" e "pratico" è stato attribuito agli *Year Books* anche da un successivo filone storiografico secondo il quale i *reports*, compilati (in udienza o immediatamente dopo) dai *legal practitioners* per uso personale, avrebbero avuto la funzione, comune ai trattati in materia processuale, di chiarire il complicato sistema procedurale medievale. « Their great preoccupation (...) was pleading and procedure » (30). Ma sul collegamento tra raccolte e procedura avremo modo di tornare in seguito.

A metà strada tra la teoria dell'"ufficialità" del *law reporting* e il paradigma interpretativo che ha portato avanti, sebbene in modo molto vario, la tesi contrapposta della "non-ufficialità" degli *Year Books*, si colloca l'ipotesi formulata da Pike, che possiamo definire della "semi-ufficialità". Secondo siffatta impostazione gli *Year Books*, pur non essendo redatti a scopo ufficiale, erano compilati da *officers* delle corti (*protonotaries* ed altri *clerks*) che si servivano, nella stesura degli stessi, di appunti presi nello svolgimento delle funzioni ufficiali cui erano preposti (31). I *reports* erano, cioè, « the unofficial work of officials of the courts » (32): in questo modo, Pike riusciva acrobaticamente a far salve le affermazioni di Plowden — avallate da Coke, Bacon e Blackstone — e a conciliarle con i più recenti studi (Maitland) che ne avevano negato il fondamento.

3. *I* Named Reports *e la* legal education: *il ruolo degli* Inns of Court

A partire dagli anni cinquanta la storiografia, che fino ad allora aveva posto al centro della propria analisi esclusivamente le raccolte medievali, ha incominciato a rivedere il paradigma interpretativo portato avanti dalle correnti storiografiche precedenti e ad indagare, nell'ambito di un più generale e crescente interesse verso l'età moderna, l'origine, la funzione ed i contenuti dei trascurati *Named Reports*. Inoltre, se già gli storici del diritto della prima metà del secolo avevano compreso e rilevato come lo studio dei *reports* non potesse prescindere da un'attenta valutazione dei manoscritti delle raccolte esistenti, è

(30) T. F. T. Plucknett, *Early English Legal Literature*, Cambridge University Press 1958, p. 103. Già P.H. Winfield, *The Chief Sources of English Legal History*, Harvard University Press, Cambridge, Mass. 1925, p. 159 ss., aveva suggerito che i *reports* avessero una funzione "esplicativa" dei trattati in materia processuale ed aveva affermato che « if we were to give them a subtitle, it might well be "Hints on pleading collected from proceedings in the courts" » (p. 161).

(31) L.O. Pike, *Year Books of Edward III*, Rolls Series, London 1911.

(32) La definizione è tratta da Bolland, *Year Books of Edward II, The Eyre of Kent 6 & 7 Edward II* cit., p. XXXII, che critica aspramente l'ipotesi avanzata da Pike.

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proprio a partire dagli anni Sessanta e Settanta che questi divengono oggetto privilegiato dell'attenzione degli studiosi.

Conseguenza di tale più completa ed approfondita indagine è, senza dubbio, una più corretta valutazione del "fenomeno" *law reporting* e una rinnovata capacità, da parte della storiografia, di mettere a fuoco in modo più chiaro le problematiche ad esso relative.

In particolare, è stata sostenuta con forza ed accolta unanimemente dagli studiosi — risolvendo una volta per tutte, sia pure nell'ambito dei diversi orientamenti seguiti, la suddetta oscillazione tra teoria dell'"ufficialità" e della "non-ufficialità" delle raccolte — la tesi dell'origine "privata" dei *reports*. Si è affermato, inoltre, un orientamento storiografico più attento a rilevare e ribadire con maggiore precisione e pienezza l'esistenza di uno stretto legame tra *law reporting* e *legal education* presso quelle "università" del *common law* che erano gli *Inns of Court* (33).

Pioniere di questo nuovo approccio storiografico può essere considerato Simpson che, con i suoi studi ricostruttivi dei *reports* di Spelman e Keilwey (34), è stato senza dubbio il primo ad analizzare dettagliatamente un gran numero di manoscritti relativi ai *reporters* della prima età *Tudor*, trascurata dalla storiografia precedente proprio a causa della scarsità di opere a stampa pervenuteci. Egli, partendo da un'accurata analisi testuale delle raccolte compilate a cavallo tra la fine del quindicesimo e l'inizio del sedicesimo secolo, ha ripreso l'ipotesi di un'origine didascalica dei *reports*, finalizzati all'istruzione dei *lawyers* e tra questi ampiamente circolanti. Le raccolte erano, secondo questa prospettiva d'indagine, il frutto di una produzione non ufficiale, ma "organizzata", non tanto e non solo negli *Inns of Court*, quanto piuttosto nei minori — ma non meno attivi — *Inns of Chancery* (35).

Il carattere privato dei *Named Reports* è stato in seguito ribadito da Abbott, autore del primo studio completo sugli *early-Tudor reports* (36). Egli, attraverso l'analisi dell'opera dei principali *reporters* dell'epoca, sot-

(33) Il carattere sintetico di questo articolo non consente di soffermarci sugli studi monografici relativi agli *Inns of Courts* ed alla *legal profession*: ciononostante, va evidenziato il fondamentale contributo della ricerca in materia nella ricostruzione della storia, dell'origine e dei caratteri del *law reporting*.

(34) A.W.B. Simpson, *Spelman's Reports*, in "Law Quarterly Review", 72 (1956); e *Keilwey's Reports*, in "Law Quarterly Review", 73 (1957).

(35) Cfr. A.W.B. Simpson, *The circulation of the Year Books in the 15th century*, in "Law Quarterly Review", 73 (1957), in cui l'autore critica le tesi di Plucknett e Bolland; e *The Source and Function of the Later Year Books*, in "Law Quarterly Review", 87 (1971).

(36) In effetti, quasi un secolo prima, già J.W. Wallace, *The Reporters, arranged and characterised with incidental remarks*, Soule & Bugbee, Boston 1882, e H. Van Vechten Veeder, *The English Reports 1292-1865,* in "Harvard Law Review", 15 (1901), avevano fatto oggetto di studio i *reporters* del sedicesimo secolo; e W.S. Holdsworth, *A History of English Law*, 3rd ed., Clarendon Press, Oxford 1923, aveva redatto dettagliate tavole in materia. Sfortunatamente, tutti e tre gli studiosi avevano limitato l'attenzione alle sole raccolte a stampa esistenti.

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tolineando ancora una volta l'importanza di un contemporaneo utilizzo di fonti a stampa e manoscritti inediti — importanza ancora maggiore per le raccolte del cinquecento, in molti casi mai pubblicate —, ha escluso che il *law reporting* avesse carattere ufficiale ed ha affermato che i « reports, we may be sure, were from beginning to end purely the result of initiative within the legal profession » (37). E, sulla scorta di quanto già Maitland aveva ipotizzato a proposito dei primi *Year Books*, ha ribadito che scopo delle compilazioni era di "istruire" sia i *barristers* che gli studenti di diritto « in the art of pleading » (38) e che erano gli stessi *lawyers*, nell'ambito di quei "centri" di istruzione giuridica quali gli *Inns of Court*, ad approntare le raccolte, autonomamente ed al di fuori di qualsiasi forma di produzione "organizzata" o "commerciale".

Presso gli *Inns*, infatti, il *common law* era studiato e dibattuto dai membri della *legal profession*, non solo nel corso di *readings* (*lectures* generalmente riguardanti gli *statutes*, corrispondenti alle *lecturae* tenute nelle università) e *moots* (simulazioni di processi, corrispondenti approssimativamente alle *quaestiones disputatae*), ma anche durante discussioni condotte *ad mensam*. E, ancora presso gli *Inns*, studenti e praticanti formulavano *quaestiones* e chiarivano *dubia*, consegnando alle loro raccolte — insieme ai casi annotati a Westminster o tratti dalle compilazioni altrui — quanto appreso durante lo svolgimento dei suddetti *learning exercises*.

Inoltre, lo spirito fortemente corporativo, la costante cooperazione, la quotidiana condivisione di esperienze ed il continuo scambio di materiale ed informazioni esistenti tra i membri di ciascun *Inn*, alimentavano un'ampia circolazione dei *reports* tra gli appartenenti alla *legal profession* (39).

Tale orientamento storiografico, i cui capisaldi sono stati successivamente ripresi e sul quale si è registrato un generale consenso da parte della storiografia, ha trovato conferma nelle ricerche che hanno ribadito l'origine privata e non ufficiale del *law reporting* mettendo in evidenza, al tempo stesso, il carattere "pratico-processuale" dei *reports*, considerati i « working books of the profession » (40).

John Baker, il principale studioso dei *later Year Books* e dei *Named*

(37) ABBOTT, *Law Reporting* cit., p. 10. Il volume è corredato da quattro utili appendici, due delle quali relative l'una, ai manoscritti — accuratamente elencati e descritti — dei *reports* dal regno di Henry VII a quello di Elizabeth I, e l'altra, ai principali *reporters* dell'epoca.

(38) Ivi, p. 16.

(39) Ivi, p. 31 ss.. Della stessa opinione IVES, *The Origins* cit., p. 146 ss.; e S.F.C. MILSOM, *Historical Foundations of the Common Law*, 2nd ed., Butterworths, London 1981, p. 44 ss., che, pur nell'ambito di una ricerca più specificatamente rivolta al contenuto — sia di diritto processuale che di diritto sostanziale — dei *reports*, concorda con la tesi dell'origine non ufficiale delle raccolte, compilate a suo avviso presso gli *Inns* a scopo didattico.

(40) IVES, *The Purpose and Making* cit., p. 85.

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Reports, ha approfondito le ipotesi avanzate dalla storiografia precedente (fornendo, al tempo stesso, gli strumenti indispensabili alla ricerca storica in materia (41)) rilevando efficacemente come il *law reporting*, praticato tanto da studenti e praticanti quanto da giudici ed avvocati, avesse in realtà una duplice funzione, didascalica e, al tempo stesso, "pratica". In sintesi, se lo studente annotava i casi discussi a Westminster per apprendere le regole disciplinanti il *pleading* processuale, l'avvocato e il giudice vi procedevano per poter disporre di una sorta di "prontuario" o *reference-book* cui far riferimento nella quotidiana pratica forense (42).

Siffatta opzione interpretativa, in base alla quale « reporting was carried out by lawyers who made it the habit of a lifetime » (43), ha confermato e rafforzato l'ipotesi dell'esistenza di uno stretto legame tra *reports* ed *Inns of Court*. Qui la *legal education* aveva luogo, in un processo lungo quanto la stessa carriera dei *lawyers*; qui venivano studiati e discussi (spesso anche alla presenza dei più anziani ed illustri esponenti di *Bar* e *Bench*) i principi di un diritto in continuo "svolgimento" ed evoluzione: il *common law*. E qui, molto probabilmente, i casi — reali ed ipotetici —, insieme agli altri *learning exercises* svolti da studenti e praticanti, venivano annotati nelle raccolte (44).

Un prezioso contributo alla tematica in esame è stato dato dall'undicesima *British Legal History Conference* (avente ad oggetto, appunto, il tema del *law reporting* in Inghilterra) (45), in cui la più recente storiografia, sia medievista che modernista, ha potuto confrontarsi ed esporre i risultati raggiunti. Essa ha confermato, sia per quanto riguarda gli *Year Books*, sia per ciò che concerne i *Reports* dei secoli quindicesimo e sedicesimo, l'origine "pratico-didascalica" — sicuramente non ufficiale — del *law reporting* ed il suo stretto legame con la *legal education* caratterizzata, in un sistema di diritto prettamente "forense", da un'impostazione inevitabilmente "pratica" (46).

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(41) (Vedi nota 15). A Baker si deve, inoltre, un *Manual of law-french*, 2nd ed., Aldershot Scoler 1990, strumento di lavoro indispensabile per la comprensione della complessa lingua dei *reports*, costituita da un misto di francese, inglese e latino.

(42) Così, BAKER, *Early Tudor Reports* cit., p. 25 ss..

(43) J.H. BAKER, *Records, Reports and the Origins of Case Law in England*, nella raccolta da lui stesso curata *Judicial Records, Law Reports and the Growth of Case Law*, Duncker & Humblot, Berlin 1989, p. 34; ma si veda anche, dello stesso, *The Third University of England*, Selden Society, London 1990.

(44) Per una più analitica trattazione, vedi BAKER, *Reports of Sir John Spelman* cit., p. CXXV ss..

(45) Essa si è svolta nel 1993 presso l'Università di Exeter ed i diversi contributi presentati al convegno sono stati raccolti in STEBBINGS, *Law Reporting in Britain*, op. cit..

(46) Più ampie osservazioni sul punto svolge D. IBBETSON, *Law Reporting in the 1590s*, ivi, p. 73 ss.; e *Report and Record in Early-Modern Common Law*, in A. WIJFFELS (a cura di), *Case Law in the Making*, Duncker & Humblot, Berlin 1997, I, p. 55 ss.; ancora, con riferimento ai primi *Year Books*, si vedano le considerazioni di P. BRAND, *The*

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Se le posizioni su cui si è attestata la più recente storiografia appaiono, a nostro avviso, largamente condivisibili, va al tempo stesso messo in luce come non sia necessario — e probabilmente neppure possibile — individuare, per un processo dallo svolgimento plurisecolare quale la nascita e l'evoluzione del *law reporting*, e per un lasso di tempo così ampio quale quello che va dalla fine del tredicesimo alla fine del sedicesimo secolo, un'unica soluzione interpretativa. Se, ad esempio, alla luce dei risultati della ricerca degli ultimi anni, è correttamente ipotizzabile l'esistenza di un legame tra i *reports* (tanto *Year Books* quanto *Named Reports*) e la *legal education*, sarebbe certamente azzardato e a dir poco fuorviante voler stabilire un collegamento tra gli *Inns* (sorti durante il quattordicesimo secolo) ed i primi *Year Books*, ad essi sicuramente antecedenti.

È necessario, pertanto, pur nella consapevolezza della continuità dell'evoluzione del *law reporting*, evitare pericolose generalizzazioni per poter essere in grado di percepire i mutamenti che, coerentemente con un sistema di diritto capace di assicurare al tempo stesso continuità e cambiamento, rispetto della tradizione e aderenza alle nuove istanze della vita concreta, si sono prodotti nel corso dei secoli.

Inoltre, è da sottolineare come proprio l'individuazione degli autori — i *lawyers* — e dei destinatari — sempre i *lawyers* — delle raccolte di giurisprudenza ci consenta di comprenderne correttamente il valore e di individuarne la funzione. A questo proposito, non può che ritenersi corretta l'ipotesi, avanzata dai più recenti filoni storiografici, del carattere non solo didascalico, ma anche "pratico-processuale" dei *reports.* Se infatti si considera la varietà — stilistica, contenutistica, in una parola, qualitativa — e la diversa provenienza e paternità delle raccolte, redatte non solo da studenti, ma anche da più esperti *practicioners*, si comprende agevolmente come, in un sistema di diritto giurisprudenziale, conoscere l'*opinion* dei membri del *Bar* e del *Bench* fosse indubbiamente molto utile anche al *serjeant* e, al tempo stesso, al giudice. Il primo, infatti, avrebbe potuto approntare una più efficace difesa dei suoi assistiti, ed il secondo valutare e decidere i nuovi casi confortato dalle opinioni espresse in precedenza dai più illustri *lawyers* (47). A tal fine, possedere una o più raccolte di *law reports* appariva assolutamente indispensabile a tutti i membri della *legal profession*.

4. *I* reports *e lo sviluppo del* case-law.

Una domanda ha, fin dall'inizio, attraversato la storiografia sul *law*

Beginnings of English Law Reporting, in STEBBINGS, *Law Reporting in Britain* cit., p. 1 ss.; e, dello stesso autore, *Observing and Recording the Medieval Bar and Bench at Work*, Selden Society, London 1999.

(47) Ad ogni modo, come sarà chiarito più ampiamente nel paragrafo seguente, non è ancora possibile, per il periodo in esame, parlare di *binding force* del precedente.

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reporting: qual è il rapporto tra il *law reporting* e lo sviluppo della dottrina del precedente (48)?

Fin dalle prime ricerche aventi ad oggetto le raccolte di giurisprudenza, è stata messa in luce la varietà contenutistica dei *reports* (49), costituiti — coerentemente con il loro carattere "pratico-didascalico" — non solo dai casi annotati dai *reporters* a Westminster e successivamente trascritti nelle rispettive compilazioni, ma anche da *readings* e *moots* provenienti dagli *Inns of Court*, da *opinions* espresse da giudici illustri ed esperti avvocati, da estratti dal *record* ufficiale, da *quaestiones*, aneddoti, *dicta*, *memoranda* ed altre annotazioni di vario genere. Il *reporter* — studente, avvocato o giudice che fosse —, come già evidenziato, annotava tutto ciò che lo aveva maggiormente interessato (non necessariamente solo i casi dibattuti in tribunale) o che riteneva potesse essergli utile negli studi o nell'esercizio della professione forense utilizzando, a tale scopo, anche materiale proveniente da raccolte altrui.

Per ciò che concerne più specificamente il resoconto dei casi decisi (o comunque trattati) nelle corti di *common law*, esso si presenta a sua volta estremamente vario: se a volte sono riportati i fatti, gli *arguments* dei difensori, le *opinions* dei giudici e la *decision* finale, più spesso il *report* — talvolta talmente stringato da essere quasi del tutto inintelligibile — contiene soltanto il resoconto delle argomentazioni dei *serjeants* e delle opinioni dei giudici, omettendo totalmente la decisione finale.

Tali caratteristiche, ed in particolare la frequente assenza della *decision*, hanno spinto la storiografia più risalente, specie quella parte di essa che aveva messo in luce il carattere didascalico del *law reporting*, ad escludere che i *reports* fossero considerati una fonte di *authority* e che, quindi, almeno per quanto riguardava i medievali *Year Books*, non si potesse ancora parlare di un loro utilizzo come *precedents*. È stato infatti sottolineato come la citazione dei casi fosse negli *Year Books* piuttosto rara e, qualora presente, fondata più sulla memoria dei giudici e degli avvocati che sulla precisa indicazione di casi precedentemente decisi (50). Secondo questa interpretazione storiografica, « instruction

(48) Tale rapporto è stato specifico oggetto dei lavori di T.E. LEWIS, *The History of Judicial Precedent*, in "Law Quarterly Review", 182-183 (1930), 187 (1931), 190 (1932); e C.K. ALLEN, *Law in the Making*, Clarendon Press, Oxford 1927.

(49) Si veda, sul tema, già HOLDSWORTH, *A History* cit., II, p. 525 ss.; e WINFIELD, *The Chief Sources* cit., p. 155 ss..

(50) Il riferimento va anzitutto a MAITLAND, *Year Books of Edward II, 3 Edward II* cit., p. X ss.; BOLLAND, *The Year Books* cit., pp. 17-18; TURNER, *Year Books of Edward II, 4 Edward II, 1310-11* cit., pp. XIII-XV, — che però distingue tra citazione dei casi "a memoria" ed un più puntuale riferimento, a partire dai regni di Henry VII ed VIII, ai « livres de ley » — ; e, da ultimo, a PLUCKNETT, *Early English* cit., p. 102 ss.. Ma si veda anche la più recente storiografia sui primi *Year Books*: in particolare, BRAND, *The Beginnings* cit., p. 1 ss.; e *Observing and Recording* cit., pp. 22-23.

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for pleaders rather than the authoritative fixation of points of substantive law was the primary object of the reporters » (51). Il riferimento a casi decisi in passato, dunque, si spiegherebbe esclusivamente con il desiderio dei *lawyers* di evitare l'enunciazione di "norme" tra loro contraddittorie e con il tentativo di fissare, al contrario, principi tendenzialmente conformi a quanto già statuito in precedenza (52). Naturalmente, ciò non implicava affatto che gli avvocati *dovessero* citare i casi precedentemente decisi, o che i giudici *dovessero* fondare il loro giudizio su di essi.

Queste prime ipotesi sono state riprese dalle correnti storiografiche successive, che hanno posto al centro della loro indagine i *later Year Books* ed i *Named Reports*.

La storiografia, alla luce di più accurate e complete ricerche, grazie anche al crescente interesse attribuito alle fonti inedite, ha sostanzialmente confermato l'assenza della forza vincolante del precedente anche nei *reports* del quindicesimo secolo: la generica citazione dei casi precedentemente decisi, certamente ancora non vincolante, avrebbe avuto qui essenzialmente la funzione di garantire il *consensus* della *legal profession* e, ancor più, la coerenza e la continuità del *common law* (53).

Secondo questa prospettiva d'indagine, i *reports* erano concepiti, fondamentalmente, come *books of pleading* e non ancora come raccolte di *authorities*: solo a partire dalla prima metà del sedicesimo secolo, con i *Reports* di Dyer e, ancor più, di Plowden (54) e Coke (seconda metà del secolo), si sarebbe verificata una prima oscillazione verso l'affermazione della dottrina dello *stare decisis* (55).

Più precisamente, la più recente storiografia ha dimostrato come, per i *reports* di età *Tudor*, nonostante la ricorrente citazione di casi tratti dagli *Year Books*, non possa ancora parlarsi di *binding force* del precedente. È stato infatti evidenziato che le decisioni relative a questioni di diritto sostanziale erano, durante l'epoca in esame, piuttosto

(51) MAITLAND, *Year Books of Edward II, 1 & 2 Edward II* cit., p. XIV.

(52) In tale direzione interpretativa WINFIELD, *The Chief Sources* cit., p. 145, che sottolinea come spesso, negli *Year Bolks*, ricorrano espressioni del tipo: « This has been the common practice », « This has been the common opinion », « The law has always been so » o « This has already been adjudged ».

(53) Si vedano, a tal proposito, le puntuali osservazioni di IVES, *The Purpose and Making* cit., p. 69 ss., in cui l'autore afferma che « The later Year Books were extensions of the memory of the legal profession » (p. 70), e che « Memory supplies continuity » (p. 71). Considerazioni analoghe sono svolte dallo stesso autore in *The Common Lawyers of pre-reformation England*, Cambridge University Press 1983, p. 155 ss..

(54) Edmund Plowden fu il primo *reporter* ad inserire nella sua raccolta, pubblicata nel 1571 con il significativo titolo di *Comentaries ou Reportes*, (cfr. nota mº 17) esclusivamente i casi muniti della decisione finale (con l'ulteriore indicazione, inoltre, dei corrispondenti estratti dal *Record*).

(55) Per una trattazione più esaustiva dello sviluppo del *case-law* dagli *Year Books* ai giorni nostri, si veda il fondamentale lavoro di J.P. DAWSON, *The Oracles of the Law*, The University of Michigan Law School, Ann Arbor 1968.

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rare e, in un sistema procedurale orale caratterizzato dal c.d. « tentative pleading » (la discussione tenuta in udienza e finalizzata essenzialmente alla definizione dell'*issue* o *quaestio* da porre alla giuria), la *decision* finale molto spesso mancava del tutto. Inoltre, anche nel caso in cui essa fosse presente, difficilmente veniva indicata la motivazione (*reason* o *ratio decidendi*) che ne costituiva il fondamento.

Ciò che contava, per i *lawyers*, non era l'*authority* dei casi precedentemente decisi, ma il rispetto del « common learning » o della « common opinion » della *legal profession*, così come si erano sviluppati non solo e non tanto nelle corti di Westminster quanto, piuttosto, negli *Inns of Court* attraverso le *lectures*, i *moots* e gli altri *learning exercises* lì praticati (56). I *reporter*s, dunque, non consideravano i *reports* come raccolte di *precedents* da osservare, ma piuttosto come « manuals for pleaders, (...) books of possible moves in legal chess » (57).

Secondo tale paradigma interpretativo, solo sul finire del sedicesimo secolo, specie col passaggio dal sistema procedurale orale a quello scritto (il c.d. « paper pleading »), e con l'acquisizione da parte dei giudici di un più attivo ruolo decisionale, le cose sarebbero cambiate e l'attenzione dei *reporters* si sarebbe spostata dalla *discussione* del caso in tribunale alla *decisione* del tribunale (ed ai principi di diritto ad essa sottesi). Ed i *reports* avrebbero incominciato ad esser considerati, per la prima volta, fonte di *authority* (emblematicamente significativa risulta, a tal proposito, la "novità" dell'indicazione dell'identità del *reporter* nelle raccolte). Nello stesso tempo, l'avvento della stampa, la conseguente maggiore accuratezza dei *reports* e la più ampia circolazione degli stessi, avrebbero facilitato la citazione dei casi e contribuito ulteriormente all'affermazione della dottrina del precedente (58).

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(56) « We have made an error if we have treated the history of the common law solely as a history of decided cases. There is a whole world of law which never sees a courtroom »: così, BAKER, *Why the History* cit., p. 23, in cui il concetto di « common learning » è avvicinato alla *communis opinio jurisprudentium* romana; ancora, *The Third University* cit., p. 18 ss.; *English Law and the Renaissance*, in *The Legal Profession* cit., pp. 467-76; e *The Inns of Court and Legal Doctrine*, in *The Common Law Tradition: lawyers, books and the law*, The Hambledon Press, London — Rio Grande 2000, pp. 37-44. Per un quadro più particolareggiato, si veda anche J.H. BAKER, *The Law's Two Bodies*, Oxford University Press 2001; *Reports of Sir John Spelman* cit., p. CLIX ss.; e, più in generale, *An Introduction to English Legal History*, 2nd ed., Butterworths, London 1979, p. 169 ss. Analogamente, J.W. TUBBS, *The Common Law Mind*, The Johns Hopkins University Press, Baltimore and London 2000, p. 22 ss., parla di "rispetto" della « common erudition » da parte della *legal profession*.

(57) BAKER, *Records, Reports* cit., p. 42. Ancora, in *John Bryt's Reports and the Year Books of Henry IV*, in *The Common Law Tradition* cit., p. 187, l'autore definisce i *reports* « not primarily collections of decisions, but of procedural exchanges and bouts of tentative pleading ».

(58) (*ibidem*). Nello stesso senso, D. IBBETSON ed A. WIJFFELS, *Case Law in the Making: The Techniques and Methods of Judicial Records and Law Reports*, introduzione a WIJFFELS, *Case Law in the Making* cit., p. 28 ss.; ancora IBBETSON, *Report and Record* cit.,

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Nonostante il rapporto tra avvento della stampa e *law reporting* non sia stato indagato a fondo dalla storiografia, è a nostro avviso evidente che solo l'uniformità e la maggiore accuratezza delle raccolte a stampa, sostituitesi nel tempo ai manoscritti — naturalmente tutti diversi tra loro —, avrebbe consentito un più agevole reperimento ed una più esatta citazione dei casi precedentemente decisi. Fino a quel momento, data la difficoltà di individuare nei manoscritti in modo certo ed uniforme i casi citati, la teoria del precedente vincolante non avrebbe potuto affermarsi.

D'altro canto, va altresì rilevato che, se la *legal profession* avesse sentito l'esigenza di ancorare le nuove decisioni a principî giudizialmente espressi in precedenza, avrebbe probabilmente trovato il modo (per esempio, attraverso l'organizzazione di un sistema di produzione uniforme dei manoscritti, o a mezzo dell'apposizione di indici agli stessi) di assicurare la redazione e la circolazione di testi più accurati ed affidabili anche prima dell'avvento della stampa.

In estrema sintesi si può pertanto dire che, se l'emersione della dottrina del precedente è strettamente dipendente dalla maggiore accuratezza testuale, uniformità e leggibilità delle raccolte conseguenti all'avvento della stampa, è al tempo stesso vero — in un rapporto in cui causa ed effetto sono difficilmente distinguibili — che la maggiore accuratezza dei testi a stampa è strettamente connessa al ruolo di fonte di *authority* assunto dai *reports* nel tempo.

In realtà, la citazione dei casi è, ancora in età moderna, ad uno stato che potremmo definire "fluido", e la dottrina dello *stare decisis* sarà compiutamente sviluppata solo a cavallo tra diciottesimo e diciannovesimo secolo: nondimeno, se si evita di cercare nei *reports* risposte anacronisticamente conformi alla moderna teoria del precedente vincolante, è agevole comprendere come le radici del *case-law* inglese affondino già nei *reports* del tredicesimo secolo (59).

5. Year Books *e* Named Reports: *frattura o continuità?*

Il quadro storico relativo al *law reporting* è stato notevolmente "complicato", sul finire del quindicesimo secolo, dall'avvento della stampa, e dalle conseguenti modifiche subite dagli originari *reports* a seguito della sua diffusione.

I più recenti orientamenti storiografici, rimproverando alla storio-

p. 55 ss.; e, dello stesso, *Law Reporting* cit., p. 73 ss.. In verità, già W.S. HOLDSWORTH, *Some lessons from our legal history*, The Macmillan Company, New York 1928, p. 11 ss., pur basandosi sullo studio esclusivo delle raccolte a stampa, aveva posto l'accento sul rapporto tra mutamenti procedurali, "forma" dei *reports* ed affermazione della dottrina del precedente.

(59) Si vedano, in tale senso, le stimolanti osservazioni svolte da IVES, *The Purpose and Making* cit., p. 69 ss.; e *The Common Lawyers* cit., p. 155 ss..

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grafia più risalente di avere concentrato l'attenzione esclusivamente sulle fonti a stampa e di avere sostanzialmente ignorato il gran numero di manoscritti esistenti, hanno correttamente individuato la presenza di due diversi momenti caratterizzanti la storia dei *reports*: da un lato, quello della redazione delle compilazioni (sia *Year Books* che *Named Reports)*; dall'altro, quello della loro pubblicazione — solitamente di molto successiva — e conseguente manipolazione.

Le raccolte, infatti, venivano compilate — fin dal tredicesimo secolo — per l'uso personale del *reporter* e, almeno fino alla seconda metà del sedicesimo secolo, senza alcun intento di pubblicazione (60). Ciononostante, esse circolavano ampiamente tra gli appartenenti alla *legal profession*, grazie alle numerose "copie" redatte dai *lawyers*, interessati ad accaparrarsi i migliori *reports* in circolazione. In tal modo questi — moltiplicatisi in un grandissimo numero di manoscritti diversi, che non sempre ne riproducevano fedelmente il contenuto ma che, al contrario, contenevano numerose abbreviazioni, ripetizioni, omissioni o ulteriori annotazioni — subivano, lungo la strada, le più svariate modificazioni (61).

Ulteriori modifiche sarebbero state apportate alle compilazioni al momento della stampa (che ebbe inizio alla fine del quindicesimo secolo (62) e che, si badi bene, riguardò solo una parte dei manoscritti in circolazione): gli editori, infatti, interessati esclusivamente ai profitti derivanti dalla vendita di testi ampiamente richiesti dalla *legal profession*, a volte fondevano in un unico volume il contenuto di diversi manoscritti, a volte omettevano parti rilevanti degli stessi, e ciò senza mai preoccuparsi dell'accuratezza e dell'intelligibilità della riproduzione testuale e, spesso, nemmeno della provenienza e della paternità delle raccolte (63).

Proprio la stampa, dunque, ha avuto il risultato di "occultare" lo

(60) Già MAITLAND, *Year Books of Edward II, 2 & 3 Edward II* cit., p. X, a proposito dei primi *Year Books*, aveva affermato: « The first man who from time to time makes notes of the discussions that he hears in court is not thinking of posterity. He is thinking of himself and perhaps of a few friends ». Negli stessi termini, BOLLAND, *A Manual* cit., p. 58; e, da ultimo, PLUCKNETT, *Early English* cit., p. 108 ss..

(61) Per una più accurata descrizione di tale processo, cfr. MAITLAND, *Year Books of Edward II, 3 Edward II* cit., p. IX ss..

(62) In Inghilterra, il primo editore di testi giuridici sembra essere stato William Machlinia (1482-3), seguito — per citare solo i più importanti — da Richard Pynson (1493-1528), John Rastell (1517-1533), Robert Redman (1525-1540), William Powell (1547-1567) e Richard Tottell (che pubblicò, tra il 1553 e il 1591, ben duecentoventicinque edizioni di *Year Books*). La pubblicazione, tanto degli *Year Books* quanto dei *Named Reports*, sarebbe poi continuata in modo massiccio nel diciassettesimo secolo.

(63) Emblematica è, a questo proposito, la storia di Plowden che, pur avendo in un primo momento compilato la propria raccolta per uso personale e senza alcun intento di pubblicazione, fu poi costretto a darla alle stampe in quanto essa, caduta nelle mani di alcuni editori senza scrupolo, era sul punto di essere pubblicata — a danno e discredito dell'autore — senza alcuna revisione e correzione.

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stato originario dei *reports*, generando una notevole confusione testuale e dando vita a quella « hopeless mass of corruption » (64) che avrebbe per molti anni scoraggiato gli studiosi dall'occuparsi del *law reporting* e, successivamente, indotto la storiografia ad erronee o inesatte valutazioni.

Prescindendo da quanto già detto a proposito dell'origine dei *law reports* e della loro funzione, è necessario ribadire come appaia a nostro avviso indispensabile, per una corretta valutazione del fenomeno in questione, un continuo confronto tra i manoscritti — pubblicati o meno — e la successiva letteratura a stampa. Va altresì evidenziato come sia altrettanto necessario considerare le raccolte sotto un duplice aspetto: quello dell'iniziale originaria compilazione da parte dei *reporters*, e quello della "forma" in cui esse ci sono pervenute, assunta solamente in un momento — talvolta anche di molto — successivo.

Ciò premesso, si comprende agevolmente come le correnti storiografiche della prima metà del novecento, fuorviate da un'analisi incompleta dei *reports*, abbiano ipotizzato l'esistenza di una frattura tra i medievali *Year Books*, anonimi e redatti secondo un ordine cronologico annuale, e i più moderni *Private* o *Named Reports*, in cui per la prima volta compare l'identità del *reporter*, indicando nel 1535 la data della cessazione dei primi e della sostituzione degli stessi da parte dei secondi (65). Lo stesso Maitland, pur essendo stato sostanzialmente il primo a richiamare l'attenzione sui manoscritti degli *Year Books*, accolse la tesi della cesura tra *reports* medievali e raccolte moderne, mettendo addirittura in correlazione il presunto declino delle compilazioni medievali con una più generale "crisi" del *common law* e col conseguente pericolo di una "ricezione" del diritto romano in Inghilterra (66).

Se è vero che l'ultimo *Year Book* a stampa contiene casi risalenti al 1535, la più recente storiografia modernista, sulla base di più estese ricerche condotte, in particolare, sui manoscritti dei *later Year Books* (67), ha messo in dubbio l'esistenza di una frattura tra *reports* medievali e moderni, dimostrando ampiamente quanto essa sia illusoria.

In particolare, il nuovo approccio storiografico ha sottolineato

(64) F.W. MAITLAND, *The Collected Papers*, Cambridge University Press 1911, I, p. 484.

(65) Si veda, per tutti, WINFIELD, *The Chief Sources* cit., p. 171 ss.. Lo stesso HOLDSWORTH, *A History* cit., II, p. 525 ss., pur mettendo in luce le caratteristiche comuni a *Year Books* e *Named Reports* (origine analoga, circostanze della pubblicazione, varietà stilistica e contenutistica), distingue nettamente le raccolte medievali da quelle di età moderna.

(66) F.W. MAITLAND, *English Law and the Renaissance*, Cambridge University Press 1901. Per una critica ragionata della tesi di Maitland, si veda BAKER, *Reports of Sir John Spelman* cit., pp. XXIV-XXVIII.

(67) Si ricordino, a tal proposito, i pionieristici studi di SIMPSON, *Spelman's Reports* cit., p. 334 ss.; e *Keilwey's Reports* cit., p. 89 ss..

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come gli ultimi *Year Books* ed i primi *Named Reports* abbiano molto in comune e come il metodo seguito nella compilazione, l'abilità dei *reporters*, i contenuti e la funzione delle raccolte siano sostanzialmente analoghi. In realtà, la differenza appare riconducibile esclusivamente alla "forma" della pubblicazione (68): i *reports*, cioè, non sono più cronologicamente organizzati e distinti in base all'anno di regno del sovrano, ma si differenziano in base al nome di un *private* o *named reporter* al quale i casi (insieme ad altre annotazioni di vario genere) sono attribuiti. Secondo siffatto schema interpretativo, *Year Books* e *Named Reports* sarebbero, lungo tutta la prima età moderna, in gran parte contemporanei, ed è stata avanzata l'ipotesi che alcuni *private reports* possano essere stati addirittura utilizzati come "materiale" per gli stessi *Year Books*.

Alla luce delle considerazioni finora svolte, appare chiaro che, così come la continuità e l'uniformità degli *Year Books* a stampa erano state superficialmente ritenute dalla storiografia più risalente sicuro indizio di una produzione "ufficiale" o quantomeno "organizzata" dei *reports*; allo stesso modo, l'assenza di raccolte a stampa nei quaranta anni successivi al 1535 (69) è stata erroneamente scambiata dagli studiosi per "carenza" di *law reporting*, "fine" degli anonimi *Year Books* e successiva loro sostituzione da parte dei *Private* o *Named Reports.* In realtà, entrambi i fenomeni possono essere agevolmente interpretati come il prodotto della "forma" data ai *reports* dalle diverse modalità di stampa utilizzate dagli editori nel tempo. Nel primo caso, per assicurare ai *lawyers* raccolte quanto più complete possibili; nel secondo, per rispondere ai mutamenti procedurali ed alle conseguenti diverse esigenze della *legal profession*, ormai chiaramente interessata — in probabile correlazione con il maggior peso riconosciuto all'*authority* dei casi precedenti — anche all'identità dei *reporters*.

La storiografia contemporanea ha definitivamente dissipato ogni dubbio in proposito: non è possibile distinguere in modo netto tra *reports* medievali e raccolte moderne, e il 1535 non può essere consi-

(68) In tal senso, BAKER, *Reports of Sir John Spelman* cit., p. CLXIV ss.; *Records, Reports* cit., p. 31 ss.; e *John Bryt's Reports* cit., p. 187 ss.. Ancora, in *An Introduction* cit., p. 155, l'autore afferma che « The reports of the mid-Tudor period are in general indistinguishable from the "last" year-books save in the bibliographical particular that no one published them as year-books ». Nello stesso senso, SIMPSON, *Keilwey's Reports* cit., pp. 104-105, secondo il quale la differenza tra *Year Books* e *Named Reports* sarebbe solo "questione" di stampa; e ABBOTT, *Law Reporting* cit., p. 37, che sottolinea come « "Year Book" and "private" reporters were probably one and the same — but at different times in their careers ». Si vedano anche le brevi ma incisive notazioni di IVES, *The Purpose and Making* cit., p. 85 ss., che definisce gli *Year Books* una "creazione" degli editori.

(69) Precisamente, dal 1535 al 1571 (data della pubblicazione dei *Comentaries ou Reportes* di Edmund Plowden). Al contrario, proprio questi anni conobbero un'ampia produzione e circolazione di raccolte in manoscritto.

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derato l'anno della cessazione degli *Year Books*, ma esclusivamente dei *reports* stampati "sotto forma" di *Year Books*. Il *law reporting*, più in salute che mai, sarebbe continuato — naturalmente con i dovuti cambiamenti — fino ai giorni nostri.

6. *La riscoperta dei* Plea Rolls.

Un'importanza via via crescente hanno acquisito, nella più recente ricerca storica, i *records* ufficiali.

Se molti manoscritti degli *Year Books* e dei *Named Reports* sono andati perduti o distrutti — anche in seguito alla scoperta e alla diffusione della stampa, che probabilmente ne rese superfluo l'utilizzo — al contrario, i manoscritti dei *Plea Rolls* (o *rotuli placitorum*) sono conservati, pressoché integralmente, presso il *Public Record Office* di Londra. Nondimeno questi ultimi, contenenti il resoconto ufficiale dei casi discussi presso le corti centrali, redatti a partire dalla fine del dodicesimo secolo dai *clerks* in servizio presso di esse e conservati presso la *King's Treasure House* (70), sono stati notevolmente trascurati dalla storiografia.

Difatti, gli storici del diritto che, nella prima metà del secolo scorso, avevano compreso l'importanza ed il valore dei *reports*, probabilmente scoraggiati dalla enorme quantità dei "rotoli" di pergamena conservati presso l'archivio londinese e dalla notevole difficoltà di reperire informazioni utili alle loro ricerche in tale *mare magnum*, concentrarono i loro sforzi principalmente sugli *Year Books*, prestando scarsa attenzione ai *records* (71) ufficiali.

Le prime ricerche aventi ad oggetto non solo i *reports*, ma anche i *Plea Rolls*, condotte durante la prima metà del secolo scorso corso, hanno cercato innanzitutto di stabilirne la funzione. I *records* avevano carattere ufficiale ed "interno" all'amministrazione delle corti: essi — in latino e non in *law-french* come i *reports* — avevano, a differenza di questi ultimi, lo scopo di "registrare" sinteticamente i punti salienti nella trattazione dei casi (il tipo di *writ* utilizzato, la *narratio* o *declaration* dei fatti da parte dell'attore, il *placitum* o *defence* del convenuto, il raggiungimento dell'*exitus* o *issue*, il verdetto della giuria e l'eventuale decisione dei giudici) stabilendo, una volta per tutte, i diritti e i doveri delle parti in causa e garantendo, in tal modo, il pagamento delle imposte dovute dai litiganti alla corona.

Essi dunque, diversamente dai *reports*, non avevano la funzione di

(70) Questa, buia ed umida, si trovava al di sotto dell'*Exchequer Chamber* ed era conosciuta tra i *lawyers*, almeno a partire dal quattordicesimo secolo, come "the Hell".

(71) La parola "record", normalmente utilizzata in riferimento a tutti gli atti provenienti da una pubblica autorità, è qui riferita esclusivamente alle decisioni delle corti di *common law*.

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istruire i *lawyers* nell'"arte" del *pleading* processuale e non erano redatti per essere da loro utilizzati (72). I *legal practitioners*, infatti, difficilmente avevano la possibilità di consultare i *Plea Rolls* e, anche nei rari casi in cui fossero riusciti ad accedervi, non potevano reperirvi proprio ciò che maggiormente stava loro a cuore, e cioè i *legal arguments* utilizzati da giudici e avvocati nella discussione dei casi in tribunale. Proprio tali considerazioni hanno spinto alcuni studiosi ad ipotizzare che la compilazione degli *Year Books* abbia avuto inizio appunto per far fronte alla "insufficienza" dei *Plea Rolls* (73).

Solo a partire dagli anni sessanta e settanta, parallelamente ad un rinnovato interesse per le fonti manoscritte non solo medievali, ma anche moderne, la storiografia si è mossa nella direzione di una rivalutazione dei *records*, avendo compreso la fondamentale importanza del possibile contributo di questi ultimi alla ricostruzione della storia del *law reporting* e, più in generale, del *common law* (74).

Infatti, se è vero che i *Plea Rolls* contengono soltanto un sintetico resoconto dei casi trattati a Westminster, è stato evidenziato che essi, al tempo stesso, costituiscono una fonte preziosa di informazioni (date, luoghi, nomi dei contendenti) spesso del tutto assenti nei *reports*, eppure indispensabili per una esatta collocazione storica e una conseguente corretta interpretazione degli stessi. Inoltre, grazie all'indicazione sistematica — secondo uno schema stereotipato — delle diverse fasi processuali, i *records* ufficiali assumono grande importanza anche per una più precisa ricostruzione della procedura (e della sua evoluzione) in età medievale e moderna, ricostruzione difficilmente attuabile attraverso il solo esame dei *reports*, incentrati sulla *legal discussion* ma non sulle altre fasi processuali, spesso totalmente trascurate. È stato pertanto posto l'accento sulla necessità di procedere ad un utilizzo

(72) Vedi i brevi cenni sull'argomento in MAITLAND, *Year Books of Edward II, 1 & 2 Edward II* cit., p. X; F. POLLOCK, *A first Book of Jurisprudence*, Macmillan & Co., London 1911, pp. 288-89; W.C. BOLLAND, *Year Books of Edward II, 6 Edward II*, Selden Society, London 1927, p. X ss.; e, più ampiamente, *The Year Books* cit., pp. 27-30. Si veda, infine, anche WINFIELD, *The Chief Sources* cit., p. 126.

(73) Cfr., sul tema, HOLDSWORTH, *Some Lessons* cit., p. 11 ss.; e *Sources and Literature* cit., pp. 82-84. Il suggerimento di Holdsworth sembra essere stato accolto, molti anni più tardi, da A.W.B. SIMPSON, *Leading Cases in the Common Law*, Oxford University Press 1995, p. 2 ss..

(74) Così, ABBOTT, *Law Reporting* cit., p. 2 ss. che, pur concentrando principalmente l'attenzione sui *Named Reports*, ha sottolineato la necessità di approfondire lo studio dei *Plea Rolls* — decisamente trascurati dagli storici del diritto — a tali fini. Si veda anche l'introduzione di J. Baker a *Legal Records and the Historian*, Royal Historical Society, London 1978, p. 2 ss.; e, dello stesso autore, *Early Tudor Reports* cit., pp. 28-32; *Reports of Sir John Spelman* cit., pp. C-CIII; e *An Introduction* cit., pp. 152-53. Cfr., inoltre, IBBETSON, *Report and Record* cit., p. 55 ss.; e BRAND, *Observing and Recording* cit., p. 11 ss..

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congiunto di *records* e *reports*: i primi, contenenti « the barest facts » e « the outcome »; i secondi, « the oral debate » (75).

La più recente storiografia, sottolineando come estratti dei *Plea Rolls* siano talvolta citati nei *reports*, si è interrogata anche su un possibile utilizzo dei *records* come fonte di *precedent* (ancorché non ancora vincolante). Tuttavia, il fatto che questi ultimi fossero difficilmente accessibili ai *reporters* e, quindi, da loro scarsamente utilizzabili, e che non sempre la decisione finale vi fosse annotata, ha portato prevalentemente gli studiosi ad escludere che i *Plea Rolls* fossero ritenuti dai *lawyers* una fonte di *authority* — se non in casi eccezionalmente rari — e a ribadirne la funzione "amministrativa", interna alle corti (76).

Infine, se gli storici del diritto hanno rilevato l'importanza della ricerca relativa ai *records*, affermandone la necessità di un utilizzo congiunto con i *reports*, al tempo stesso non hanno mancato di sottolineare la grande difficoltà di consultazione dei numerosi e voluminosi *Plea Rolls*, dei quali non esiste ancora alcuna schedatura o indice completo (77), auspicandone la pubblicazione — quantomeno selettiva — o la riproduzione attraverso *microfilms* e *microfiches*. « Our plea-roll scholar needs a strong harm, a flexible neck and back, an immunity to dust and soot (...). Much of our legal history is still locked up (...). The next generation must not loose the keys » (78).

7. *Il "law reporting" in Europa: prime ipotesi per una comparazione.*

Gli anni ottanta hanno visto la storiografia anglosassone, tradizionalmente poco interessata alla storia del diritto d'oltre Manica (79),

(75) Vedi BAKER, *Records, Reports* cit., p. 35 e p. 36, in cui l'autore — nella prima appendice — mette a confronto il *record* e due diversi *reports* di un caso risalente alla fine del tredicesimo secolo. Allo stesso modo, in *The Common Law Courts of Medieval England: Year Books and Plea Rolls*, in WIJFFELS, *Case Law in the Making* cit., I, p. 39 ss., e II, p. 11 ss., Baker riproduce i *reports* ed i corrispondenti *records* di tre casi del quattordicesimo e di uno del sedicesimo secolo. Tale metodo, introdotto da Pike, è ancora oggi seguito dalla *Selden Society*.

(76) Cfr., in particolare, IBBETSON e WIJFFELS, *Case Law in the Making: The Techniques* cit., pp. 30-31.

(77) J.H. BAKER, *Case-Law: Reports and Records*, in *Anglo-American and Continental Legal History*, Duncker & Humblot, Berlin, 1985, p. 50, afferma che « the search for the record of a reported case is like looking for a needle in a haystack ». La stessa espressione è usata dall'autore in *Early Tudor Reports* cit., p. 29, in cui è evidenziato come i *records* del sedicesimo secolo, molto più numerosi degli *Year Books*, presentino ancora maggiori difficoltà.

(78) BAKER, *Why the History* cit., p. 16.

(79) Prima di tale epoca, se si eccettua un brevissimo riferimento alle raccolte continentali in MAITLAND, *Year Books of Edward II, 1 & 2 Edward II* cit., p. XIX; e PLUCKNETT, *Early English* cit., p. 102, è percepibile una certa chiusura nei confronti del

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aprirsi ad un confronto e ad una collaborazione con gli storici del diritto europei che hanno fatto oggetto dei loro studi le raccolte di giurisprudenza continentali (80). Nell'ambito di un più generale interesse "europeo" per la comparazione tra *common law* e *civil law* e, più in particolare, per la comparazione storica tra i due sistemi (81), gli storici del diritto che hanno posto al centro delle proprie ricerche il *law reporting* hanno iniziato a chiedersi se la tradizionale contrapposizione tra diritto continentale e diritto anglosassone non fosse il frutto di un'eccessiva semplificazione e non nascondesse più analogie di quanto creduto in passato (82).

Se appare innegabile il carattere sostanzialmente giurisprudenziale del *common law* e prevalentemente dottrinario dello *jus commune*, proprio l'esame delle raccolte di giurisprudenza, ampiamente circolanti — specie durante l'età moderna — tanto in Inghilterra quanto nell'Europa continentale, ha reso tale distinzione più labile, sfumandone i contorni.

La storiografia ha infatti sottolineato come il fenomeno del *law reporting* — con le dovute differenze — riguardasse l'intera Europa, ed ha addirittura individuato quattro diverse "tradizioni" europee nella

civil law tra gli storici del diritto inglese che si sono occupati di *law reporting*. Solo Hazeltine, nell'introduzione a BOLLAND, *A Manual* cit., p. 14, aveva auspicato una comparazione tra *reports* e raccolte continentali — utile, a suo avviso, anche ad una ricostruzione della storia della *legal profession*, tanto in Inghilterra, quanto sul Continente.

(80) Per ciò che più specificamente concerne la storiografia italiana in materia, è d'obbligo ricordare i fondamentali lavori di G. GORLA, *L'origine e l'autorità delle raccolte di giurisprudenza*, in "Annuario di Diritto Comparato e di Studi Legislativi", XLIV (1970), fasc. 1-2, pp. 4-23; e di M. ASCHERI, *Tribunali, giuristi e istituzioni dal medioevo all'età moderna*, Il Mulino, Bologna, 1989.

(81) Si vedano, sul tema, i pionieristici studi di DAWSON, *The Oracles*, op. cit.; e, con riferimento alla storiografia italiana, G. GORLA-G. MOCCIA, *A Revisiting of the Comparison between Continental Law and English Law (16th to 19th Cent.)*, in "Journal of Legal History", 2 (1981); G.GORLA, *Diritto comparato e diritto comune europeo*, Giuffrè, Milano, 1981; e *Il diritto comparato in Italia e nel "mondo occidentale" e una introduzione al "dialogo civil law-common law"*, Giuffrè, Milano, 1983. Frutto di questo nuovo generale interesse per gli studi storico-comparativi è la collana *Comparative Studies in Continental and Anglo-American Legal History — Vergleichende Untersuchungen zur kontinentaleuropäischen und anglo-amerikanischen Rechtsgeschichte*, Duncker & Humblot, Berlin 1985, i cui volumi I, V e XVII (in due parti) comprendono i contributi di alcuni tra i più insigni esperti in materia di raccolte di giurisprudenza inglesi e continentali. Il volume XVII, in particolare, è estremamente prezioso in quanto, nella seconda parte, riproduce dettagliatamente — mettendo, così, a confronto — interessanti esempi di fonti medievali e moderne, sia di *common law* che di diritto continentale.

(82) Cfr. BAKER, *Case-Law* cit., p. 49 ss.; e *English Law and the Renaissance* cit., pp. 468-476. Ancora, si veda la sua prefazione a *Judicial Records, Law Reports* cit., p. 5, in cui l'autore definisce la contrapposizione tra i due sistemi una « misleading over - simplification ». Nello stesso senso, IBBETSON e WIJFFELS, *Case Law in the Making: The Techniques* cit., p. 13 ss..

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storia della compilazione delle raccolte di giurisprudenza a cavallo tra medio evo ed età moderna: quella dei *reports* inglesi (*Year Books* e *Named Reports*); delle raccolte di decisioni del *Parlement* di Parigi; delle *decisiones* della *Rota* avignonese; e, infine, delle raccolte di *decisiones* dei Grandi Tribunali europei (83). Queste diverse "tradizioni", di cui è stata messa in luce, al tempo stesso, anche l'eterogeneità — specie per quanto riguarda la funzione, la forma ed i contenuti dei *reports* (84), caratteri strettamente connessi anche al diritto processuale locale ed al ruolo svolto dal potere giudiziario nei diversi ordinamenti — sono state pertanto collocate in una prospettiva più ampia ed inquadrate da un punto di vista che possiamo definire *europeo*.

La storiografia anglosassone ha incominciato non solo a porsi nuovi interrogativi a carattere comparativo — molti dei quali potranno trovare definitiva risposta soltanto con il proseguire della ricerca storico-comparativa su entrambe le sponde della Manica — ; ma anche a formulare alcune prime, ancora superficiali, ipotesi.

In particolare, è stato da più parti sottolineato come anche le raccolte continentali di *decisiones*, *consilia* o *arrêts*, ampiamente citate nei tribunali di tutta Europa, possano essere considerate, in senso ampio, *case-law*; e come anch'esse — a lungo frutto di iniziativa privata e caratterizzate da una grande varietà stilistica e contenutistica — fossero redatte, prevalentemente, da giudici ed avvocati per uso personale. È stato inoltre rilevato come, anche sul Continente, gli studenti di diritto e i praticanti fossero tenuti, durante l'età moderna, a conoscere la prassi giurisprudenziale dei più importanti tribunali. In sintesi, è stato definitivamente riconosciuto che « by the sixteenth century there was more law reporting on the Continent than in the home of the common law » (85).

Al tempo stesso, sono stati messi in luce anche alcuni tra i più evidenti elementi di differenziazione tra raccolte anglosassoni e raccolte continentali: il maggiore interesse per i *legal arguments*, con la frequente omissione della *decision*, nei *reports* e, al contrario, la presenza della *decisio* — generalmente priva, però, della motivazione — nelle raccolte di diritto comune. Il diverso spazio riservato ai fatti, indubbiamente minore nelle raccolte inglesi e maggiore in quelle continentali (probabilmente in correlazione con un diverso sistema procedurale che nel primo caso, assegnava alla giuria, e nel secondo, al giudice il compito di accertare la situazione fattuale). Il differente concetto di *authority*, ancorato al rispetto della *reason*, della consuetudine e del *common*

(83) In tal senso, BAKER, *Case-Law* cit., pp. 51-53.

(84) Si usa qui la parola "reports" in senso non tecnico, non riferita cioè esclusivamente alle raccolte di *common law* ma, più ampiamente, anche alle *decisiones* continentali.

(85) La frase è tratta dalla prefazione di Baker alla raccolta da lui stesso curata *Judicial Records, Law Reports* cit., p. 6.

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learning nel sistema di *common law* e legato piuttosto al "nome" ed al prestigio del *doctor*, interprete della volontà del sovrano, nel sistema di *ius commune* (86).

Appare chiaro come la ricerca storico-comparativa sul *law reporting* — inteso come fenomeno *europeo* — sia ancora in una fase iniziale e come tali primi importanti ed interessanti spunti necessitino di una più ampia indagine e di una più approfondita verifica che tenga conto delle ricerche e degli studi condotti, in materia di raccolte di giurisprudenza, dagli storici del diritto di tutta Europa. Ed appare assolutamente necessario, inoltre, che la ricerca abbia ad oggetto non solo le fonti a stampa (sulle quali, per lo più, la comparazione si è finora fondata (87)), ma anche quelle in manoscritto, indispensabili per la ricostruzione di un quadro d'insieme quanto più completo ed affidabile possibile.

Qual'era il rapporto tra i diversi sistemi processuali vigenti in Inghilterra e nel resto d'Europa e le raccolte di giurisprudenza? Quale il ruolo concreto del precedente? Se esso — così come è emerso alla luce delle ricerche finora condotte — non aveva un carattere fortemente "autorevole" né in Inghilterra (quantomeno non ancora), né sul Continente, su cosa si fondavano il *legal reasoning* e le decisioni dei giudici? E, ancora, come ha influito l'avvento e la diffusione della stampa sul "law reporting" in tutta Europa? Questi sono solo alcuni tra gli interrogativi più rilevanti che non hanno ancora trovato una risposta soddisfacente.

Solo ulteriori indagini — eventualmente svolte anche attraverso la collaborazione di studiosi provenienti da tradizioni storiografiche diverse — e, al tempo stesso, un'attenta riflessione ed un confronto accurato dei risultati raggiunti dalle ricerche finora condotte dagli storici del diritto su entrambe le sponde della Manica potrebbero consentirci di ridurre la distanza — frutto di una schematizzazione interpretativa eccessivamente rigida tradizionalmente tramandataci ed oggi divenuta sempre più difficilmente condivisibile ed adoperabile — tra *common law* e *civil law*.

8. *Conclusioni.*

Sebbene i principali risultati cui è pervenuta la più recente storiografia sul *law reporting* appaiano, allo stato attuale della ricerca, larga-

(86) Per ulteriori dettagli, ivi, pp. 9-10. Si veda inoltre IBBETSON e WIJFFELS, *Case Law in the Making: The Techniques* cit., p. 16 ss., per una sintetica, ma accurata disamina delle "tradizioni" continentale ed anglo-americana del "law reporting".

(87) Ne è esempio la raccolta a cura di WIJFFELS, *Case Law in the Making*, op. cit., la cui seconda parte, interamente dedicata alle fonti, riproduce pressoché totalmente fonti a stampa.

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mente condivisibili — specie per ciò che concerne la tesi dell'origine "pratico-didascalica" dei *reports* e l'affermazione dell'esistenza di una stretta connessione tra raccolte di giurisprudenza e *legal education* negli *Inns of Court* — diversi sono i temi che, a nostro avviso, necessitano di una più ampia ed approfondita riflessione.

Innanzitutto — e senza qui ripetere considerazioni già svolte in precedenza — è necessario sottolineare come non appaiano ancora del tutto soddisfacenti le conclusioni raggiunte dalla storiografia in relazione al rapporto tra *reports* e sviluppo della dottrina del precedente e, più specificamente, in ordine al ruolo svolto dall'*authority* nelle raccolte compilate a cavallo tra medio evo ed età moderna. In particolare, ci si chiede se questa relazione non sia stata finora spesso indagata proiettando al passato istanze anacronisticamente moderne, cercando cioè, prima negli *Year Books* e poi nei *Named Reports*, risposte conformi alla moderna concezione della *binding force* del precedente — o comunque da essa "influenzate".

Inoltre, nessuno studio sembra avere finora esaminato in modo esauriente e dettagliato quale è stato l'impatto dell'avvento della stampa sulla pratica del *law reporting*, quale il suo ruolo nel "passaggio" dagli *Year Books* ai *Named Reports*, e quali gli eventuali effetti prodotti dalla sua diffusione sull'affermazione della dottrina dello *stare decisis*.

Infine, ma non da ultimo, l'affascinante tema della comparazione tra *reports* e raccolte continentali di *decisiones,* sul quale la storiografia si è solo di recente soffermata, è un terreno d'indagine ancora largamente inesplorato: le prime ipotesi avanzate dalle più recenti correnti storiografiche, infatti, abbisognano di ulteriori ricerche ed approfondimenti per poter essere sviluppate ed eventualmente confermate.

È appena necessario ribadire che una risposta a tali numerosi interrogativi ancora aperti potrà essere trovata soltanto attraverso un più ampio ed approfondito studio delle fonti — molte delle quali, siano esse *reports* o *records*, sono ancora inedite. Appare pertanto oggi, in gran parte, ancora attuale l'invito della storiografia che, già agli inizi del secolo scorso, aveva richiamato l'attenzione sulla necessità di un approccio metodologico che contemplasse una edizione completa dei *reports*: nonostante molta strada in tale direzione sia stata fatta (specie attraverso il lavoro della *Selden Society*) e molto del materiale inedito pervenutoci sia stato pubblicato, l'opera è ancora lontana dall'essere completata. Eppure, solo un'accurata riproduzione — non necessariamente e non esclusivamente cartacea — delle raccolte inedite sparpagliate nelle biblioteche di mezzo mondo renderebbe la ricerca sul *law reporting* più agevole e spedita consentendo una più corretta lettura ed interpretazione del ruolo dei *reports* — depositari del diritto inglese e, al tempo stesso, artefici del suo sviluppo — nella storia del *common law*.

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FAUSTINO MARTÍNEZ MARTÍNEZ

DERECHO Y LITERATURA: RABELAIS O LA FORMULACIÓN LITERARIA DE UN NUEVO CAMINO JURÍDICO

En el siglo XVI, el agotamiento del modelo jurídico proporcionado por el "bartolismo" era evidente. El Derecho Común ha entrado en crisis (1). La mayor parte de los fundamentos de tipo intelectual sobre los que se había basado este método de investigación y razonamiento habían quedado superados por la evidencia de los nuevos tiempos y habían acabado desembocando en una serie de excesos que serán objeto de una profunda revisión (2). Los primeros pensadores que

(1) Vid. sobre la formación y evolución del Derecho Común las aportaciones clásicas de F. C. SAVIGNY, *Geschichte des römischen Rechts im Mittlealter*. Becker and Co., Wiesbaden-Biebrich, 1834, 7 tomos; E. BESTA, *Introduzione al Diritto Comune*. Giuffrè, Milán, 1938; G. ERMINI, *Corso di Diritto Comune. I. Genesi ed evoluzione storica. Elemento costitutivi. Fonti*. 2ª edición. Giuffrè, Milán, 1946; voz "Diritto Comune", en *Nuovo Digesto Italiano*. Unione Tipografico-Editrice Torinese, Turín, 1938. Tomo IV, pp. 970-971; y la misma voz en *Nuovissimo Digesto Italiano*. Unione Tipografico-Editrice Torinese, Turín, 1957. Tomo V, pp. 826-829; P. VINOGRADOFF, *Diritto romano nell'Europa medioevale*. Giuffrè. Milán, 1950; F. CALASSO, *Introduzione al Diritto Comune*. Giuffrè, Milán, 1951; y *Medio Evo del Diritto. I. Le fonti*. Giuffrè, Milán, 1954; P. KOSCHAKER, *Europa y el Derecho Romano*. Editorial Revista de Derecho Privado, Madrid, 1955; W. E. BRYNTESON, "Roman Law and legislation in the Middle Ages", en *Speculum. A journal of medieval studies*, vol. 41, 3 (julio, 1966), pp. 420-437; H. THIEME, voz "Gemeines Recht", en *Handwörterbuch zur deutschen Rechtsgeschichte*. Erich Schmidt Verlag, Berlín, 1971. Tomo I, col. 1.506-1.510; A. CAVANNA, *Storia del Diritto Moderno in Europa. I. Le fonti e il pensiero giuridico*. Giuffrè, Milán, 1979, pp. 21 ss.; V. PIANO MORTARI, *Gli inizi del Diritto moderno in Europa*. 2ª edición. Liguori, Nápoles, 1982; J. MERRYMAN, *La tradición jurídica romano-canónica*. 2ª edición. Fondo de Cultura Económica, México, 1993; E. CORTESE, *Il diritto nella storia medievale. II. Il basso medioevo*. Il Cigno Galileo Galilei Edizioni di Arte e Scienza, Roma, 1995; y *Le grandi linee della storia giuridica medievale*. Il Cigno Edizioni, Roma, 2001; M. BELLOMO, *La Europa del Derecho Común*. Il Cigno Galileo Galilei, Roma, 1996; F. WIEACKER, *Historia del Derecho Privado de la Edad Moderna*. Editorial Comares, Granada, 2000; H. J. BERMAN, *La formación de la tradición jurídica de Occidente*. Fondo de Cultura Económica, México, 2001; y P. G. STEIN, *El derecho romano en la historia de Europa. Historia de una cultura jurídica*. Siglo XXI de España Editores, Madrid, 2001. La producción de la doctrina jurisprudencial más relevante se puede consultar en H. COING (coord.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichtte. Erster Band. Mittelalter (1100-1500)*, C. H. Beck'sche Verlagsbuchhandlung, Munich, 1973.

(2) Este estilo tardío, desarrollado durante los siglos XV y siguientes, se caracte-

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merecen el calificativo de humanistas en cuanto anticipan el espíritu del Renacimiento, son expresivos en sus palabras. Dante se quejaba, a propósito de los glosadores y comentaristas, de su poco afán especulativo y de su excesivo apego al principio de autoridad. Petrarca y Bocaccio les recriminan su tendencia a encerrarse en un universo conceptual pleno de significaciones jurídicas dando la espalda a otras creaciones o realizaciones humanas que pudiesen tener trascendencia en aras de su superior conocimiento del mundo del derecho, así como el carácter pedestre, rústico, de su estilo literario, carente de elegancia y de eficacia. Giovanni Dominici y Angelo Angeli d'Aquila descubrían nuevos manuscritos de las obras justinianeas. Maffeo Veggio expresaba su preocupación por la excesiva oscuridad en la que se había sumido al derecho y defendía un estudio del derecho libre de glosas, de comentarios. Lorenzo Valla, por su parte, era partidario de una ampliación del campo de estudio con la consiguiente preocupación intelectual por otras disciplinas que pudiesen jugar un papel complementario como la oratoria o el estudio de las lenguas clásicas: era preciso observar y analizar el derecho romano desde otra perspectiva. No sólo lo exclusivamente jurídico. Otros campos podrían ayudar a iluminar este derecho ignoto en muchos aspectos aun para los mejores jurisperitos. Angelo Poliziano lleva a la práctica el deseo de Valla y comienza a estudiar, con su mente de filólogo, los manuscritos florentinos donde se recogían los principales textos romanos. Con él comienza propiamente la historia del derecho romano. Se había preparado el camino para una revolución metodológica inminente (3).

En el siglo XVI, el ambiente es parecido, si no más ácidamente crítico, si cabe todavía. En España, Juan Luis Vives se enfrenta abiertamente al sistema del Derecho Común, insultando a Accursio y a Bártolo por su oscuridad y cripticismo, con la intención de recuperar la inspiración filosófica de lo jurídico (4). Será un espejismo puesto que en

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rizó por cuatro notas: el predominio de la actividad forense frente a la docente; el distanciamiento progresivo de las fuentes romanas y canónicas; la búsqueda obsesiva del argumento de autoridad; y el refugio conservador en la "communis opinio", de acuerdo con F. TOMÁS y VALIENTE, *Manual de Historia del Derecho español*. 4ª edición. Editorial Tecnos, Madrid, 1997, pp. 298-310.

(3) Sobre esta corriente anterior al siglo XVI que podemos calificar como "prehumanistas", vid. L. CHIAPPELLI, "La polemica contro i legisti dei secoli XIV, XV e XVI", en *Archivio Giuridico*, vol. XXVI (1881), pp. 295-322; y "Firenze e la scienza del diritto nel periodo del rinascimento", en *Archivio Giuridico*, vol. XXVIII (1882), pp. 451-486; y P.F. GIRARD, "Les préliminaires de la renaissance du droit romain", en *Revue historique du droit français et étranger*. 4ª série, 1 (janvier-juin, 1922), pp. 5-46; Para la también llamada "Jurisprudencia Culta", vid. la síntesis bibliográfica que proporciona V. PIANO MORTARI, "Dialettica e giurisprudenza. Studio sui trattati di dialettica legale del sec. XVI", en *Diritto, Logica, Metodo nel secolo XVI*. Jovene Editore, Nápoles, 1978, pp. 121-124.

(4) Vid. J.A. MARAVALL, *Carlos V y el pensamiento político del Renacimiento*.

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los reinos peninsulares, salvo alguna excepción notable como es el caso de Antonio Agustín, el bartolismo seguirá su singladura sin prácticamente oposición, ni reacción alguna. Pero en la Europa continental la situación es de crítica constructiva, renovadora. Erasmo hace lo propio en los Países Bajos. En su *Elogio de la locura*, aparecido en 1511, podemos leer lo siguiente:

"Los abogados reclaman para sí el primer puesto entre la gente culta. Ninguna otra clase está más satisfecha de sí misma. No cesan de dar vueltas a la roca de Sísifo, ordenando más de seiscientas leyes con el mismo espíritu sin importarles si sirven para algo. Y viven amontonando glosa tras glosa. Y una opinión sobre otra, como para dar a entender que su profesión es la más difícil de todas. A sus ojos todo aquello que ofrece alguna dificultad o molestia es distinguido.

Añadamos a éstos el grupo de sofistas y dialécticos, gente más locuaz y escandalosa que los bronces de Dodona, capaces, cada uno de ellos, de competir en garrulería con veinte mujeres escogidas. Mejor les iría si a la charlatanería no añadieran un espíritu pendenciero. Son capaces de venirse a las manos por cosas tan nimias como el pelo de cabra, perdiendo en el ardor de la refriega el hilo de la verdad. Pero también a éstos les hace felices su amor propio. Con tres silogismos son capaces de contender desaforadamente contra cualquiera y sobre cualquier tema. Estentor que se les opusiera, su petulancia les haría invictos" (5).

Tomás Moro y Campanella propugnan en sus maravillosas utopías una reforma integral del sistema jurídico existente. Como sabemos las utopías hay que leerlas en su doble sentido: la propuesta de mundo ideal que ellas muestran es la proyección de los mejores deseos e ideales de sus autores, al mismo tiempo que aparece como denuncia clara contra la situación del momento en que se escribe (6). Así, Tomás Moro dice respecto a las leyes existentes en la isla de Utopía:

"Pocas son las leyes que tienen, pero suficientes para sus instituciones. Lo que critican primeramente en los demás pueblos es el número infinito de leyes e interpretaciones, que, con todo, jamás son suficientes. Consideran injusto en extremo encadenar a los hombres con tantas leyes, tan numerosas que es imposible leerlas todas, y tan oscuras que muy pocos pueden comprenderlas. Han suprimido así todos los abogados que defienden las causas, y en manera sutil disputan sobre las

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Centro de Estudios Políticos y Constitucionales, Madrid, 1999, pp. 179-190, en especial, pp. 182-183.

(5) Erasmo De Rotterdam, *Elogio de la locura*. Introducción, traducción y notas de Pedro Rodríguez Santidrián. Alianza Editorial, Madrid, 1998, § 51, pp. 106-107.

(6) Vid. L. Firpo, "Sfiducia nel diritto e riforma delle leggi nell'utopismo del Cinquecento", en *La storia del diritto nel quadro delle scienze storiche. Atti del Primo Congresso Internazionale della Società Italiana di Storia del Diritto*. Leo S. Olschki Editore, Florencia, 1966, pp. 459-467.

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leyes. La experiencia les enseñó que es preferible que cada cual defienda su pleito y exponga al juez lo que habría manifestado a su defensor. En esa forma evitan complicaciones, y es más fácil dilucidar la verdad. Mientras los litigantes hablan, sin todas las argucias que los defensores enseñan, el juez considera los argumentos y ayuda a los hombres de bien contra las calumnias de los artificiosos.

Difícil sería aplicar tales normas en otros países donde hay tantas leyes y su cumplimiento es tan complicado y difícil. Allí, en cambio, todos son jurisperitos, pues, como lo he dicho, las leyes son muy pocas, y su interpretación más simple pasa por ser la más equitativa.

Todas las leyes, como dicen, se promulgan para que cada cual sepa cómo ha de proceder; las interpretaciones más sutiles podrían sólo convenir a unos pocos (ya que son pocos los que pueden entenderlas). Indispensables son, pues, leyes cuyo sentido está al alcance de la mayoría. Con referencia al vulgo, que es esa mayoría, y el que mayor número de leyes necesita, la abundancia de ellas, cuya interpretación no alcanza nadie sino con gran inteligencia y largas controversias, equivale a la ausencia de leyes, puesto que su entendimiento no llega a comprenderlas, ni su vida, ocupada en el trabajo necesario, bastaría para ello" (7).

Tommaso Campanella exalta la simplicidad de las leyes de la *Ciudad del Sol*, respecto de las cuales proclama que son "pocas, breves, claras y están escritas en una tabla de bronce, colgada de los huecos del templo, es decir, entre las columnas". La sencillez de las mismas se extiende a su propia estructura lógica:

"Cada una de ellas contiene en estilo metafísico y breve las definiciones de las esencias de las cosas, o sea, qué es Dios, los ángeles, el mundo, las estrellas, el hombre, la fatalidad, la virtud, etc., todo ello, con un gran sentido. Están también indicadas las definiciones de todas las virtudes. El juez de cada virtud ocupa un asiento, llamado tribunal, colocado precisamente debajo de la columna en donde se halla la definición de la virtud que le corresponde juzgar. Para ejercer su función, se siente en él y, volviéndose al culpable, le dice: Hijo, has faltado a esta sagrada definición (por ejemplo, la de la magnanimidad, la de la beneficencia, etc.). La lee …, y, después de una discusión, le condena al castigo merecido por su delito (malos tratos, deshonor, soberbia, ingratitud, pereza, etc.). Las penas son verdaderas y eficaces medicinas que tienen más aspecto de amor que de castigo" (8).

Guillermo Budeo propone cambios en Francia en esa misma dirección novedosa: reclama la presencia de estudios humanísticos en el

(7) Tomás Moro, *Utopía*. 14ª edición. Editorial Porrúa, México, 2001. Libro II, pp. 84-85.

(8) Tommaso Campanella, *La imaginaria Ciudad del Sol (idea de una república filosófica)*, en el volumen *Utopías del Renacimiento*. Estudio preliminar de Eugenio Imaz. Fondo de Cultura Económica, México, 2001, pp. 185-186.

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campo jurídico hasta alcanzar un saber de corte universal (9). La necesidad de la reforma era sentida de un modo general en la práctica totalidad de los reinos europeos. Fue esta vez el país galo quien tomó la delantera al tradicional dominio itálico en la investigación jurídica, aunque el nuevo movimiento tuvo una proyección europea que hace que el calificativo "gálico" con el que se acompaña tradicionalmente esta denominación carezca de precisión y exactitud. Uno de sus iniciadores, Andrea Alciato, era de origen italiano. Ulrich Zasio, importante figura posterior, alemán. Se ha mantenido ese calificativo por cierta convención histórica no exenta de razón (puesto que fueron las universidades francesas y los docentes franceses quienes le dieron un impulso mayor), pero al mismo tiempo no debe olvidarse que también el "bartolismo" tuvo sus raíces en Italia para expandirse de una forma paulatina por toda Europa, hallándose en prácticamente cada nación europea figuras de gran relevancia y prestigio.

El "bartolismo jurídico" o *mos italicus* había agotado su yacimiento, entendiendo por tal su modo de obrar, su propia concepción del derecho y del método jurídico (10). Los postulados que habían defendido a ultranza habían quedado desacreditados por la realidad europea del momento. La práctica demostró la inoperancia de sus construcciones, la complejidad de las mismas, su descrédito, su alejamiento de la realidad cotidiana. Sus representantes habían visto en el derecho romano una suerte de ordenamiento jurídico de corte intemporal, eterno, con validez en todo momento y en todo lugar, lo cual chocaba abiertamente con una Europa que empezaba a gestar los modernos reinos sobre los que se construiría el poder estatal en la Edad Moderna. Frente a ese derecho único y uniforme, la realidad mostraba el cúmulo de derechos nacionales que hacían de ese ideal unitario una verdadera utopía al estilo renacentista. Debido a tal consideración eterna, los juristas procedieron a la aplicación de ese derecho a la realidad social con lo que la situación se hizo más compleja por la coexistencia de dos órdenes normativos de muy dispar procedencia y evolución intelectual. Ello provocó los correspondientes conflictos entre un derecho que avanzaba y otro derecho que se resistía a fallecer. Piénsese en el caso de Castilla, con ese pugna entre las Partidas y los fueros, la solución de compromiso de Alcalá y la necesaria solución de las Leyes de Toro con el fin de aclarar todo el panorama existente: la colisión entre sistemas.

(9) Vid. D.R. KELLEY, "Guillaume Budé and the first historical school of law", en *American Historical Review*, LXXII, 3 (abril, 1967), pp. 807-834; y V. PIANO MORTARI, "Studia humanitatis e scientia iuris in Guglielmo Budeo", en *Diritto, Logica, Metodo nel secolo XVI*, ed. cit., pp. 321-345.

(10) Vid., sobre el mismo, F. CARPINTERO BENÍTEZ, "Mos italicus, mos gallicus y el Humanismo racionalista. Una contribución a la historia de la metodología jurídica", en *Ius Commune*, VI (1977), pp. 113-121.

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El derecho romano era, para ellos, un derecho práctico de manera indiscutible, pero su empleo no exigía conocimientos especiales de tipo histórico, filológico, literario o filosófico. Se aceptaba la edición común de la obra justinianea, sin la menor crítica, olvidando que había sido una recopilación de textos romanos de diversas épocas, que había sufrido un peregrinaje altomedieval azaroso, que había recibido los embates lógicos de los glosadores y las construcciones pragmáticas de los comentaristas, en fin, que distaba mucho de ser ese cuerpo inmutable e intocable que algunos pretendían ver.

Por otra parte, los juristas se habían centrado exclusivamente en el mundo del derecho. Esto había supuesto una renuncia, no sabemos si querida o no, hacia cualquier otra forma de conocimiento, principal o auxiliar, de lo jurídico. Se ha denunciado su falta de conocimientos históricos que impidió que pudiese contemplar el derecho romano en una perspectiva temporal. Para Bártolo y sus seguidores, la obra de Justiniano era un regalo de Dios, recibido íntegramente y dispuesto para ser examinado. No había preocupación por la génesis de esas obras, por su trayectoria en el tiempo, por la corrupciones que pudiera haber sufrido tras varios siglos de peripecias. Se trataba de una creación cuasi-divina y al ser humano le quedaba exclusivamente la posibilidad de comentarla, sin cuestionar ninguna otra materia relacionada con la misma. Era una especie de dogma, de verdad de fe, de texto sagrado que solamente puede ser empleado, mas nunca cuestionado. La sumisión completa fue la regla general. La similitud con las Sagradas Escrituras, en cuanto que textos ambos revelados, no es casual, ni exagerada. Con ello se aseguraba una fidelidad sin límites al texto, aceptado sin el menor comentario crítico o dubitativo, sin la menor duda o vacilación.

Finalmente, el método de los juristas itálicos había desembocado en un casuismo excesivo, desaforado. Como resultado de la aplicación de las pautas de razonamiento aristotélico, se había conseguido desmenuzar cada argumento lógico, cada proposición jurídica hasta sus más pequeños elementos. Los casos, los textos eran fragmentados con una precisión quirúrgica digna de encomio a la búsqueda de la palabra, del adverbio, del calificativo, en el que pudiese hallarse la clave explicativa de todo el pasaje comentado. El camino lógico que se seguía era similar en todos los casos: división en "leges" o en "paragrapha" del texto romano analizado, inserción de un "summarium" con el esquema de las cuestiones que van a ser tratadas, con una numeración. El casuismo se tradujo en la ausencia de un orden en sus obras, que aparecen ante los ojos de un moderno espectador como una cascada de opiniones y razonamientos, porque su preocupación principal fue el análisis, nunca la síntesis. Por ese motivo, faltaron en sus obras exposiciones o visiones globales. Los casos prácticos, las cuestiones, se amontonaban a propósito de ciertos textos que servían muchas veces como excusas para

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desarrollar razonamientos alambicados y complejos. A ello debemos sumarle la excesiva farragosidad que provocó el abuso del recurso de autoridad hasta el punto que las obras de los juristas fueron compendios de las opiniones de otros doctores con la consiguiente eliminación de la originalidad y de la propia capacidad, inventiva e imaginación del autor de turno. Frente al método analítico-casuístico se opondría uno nuevo de corte sintético e histórico (11).

En la universidad francesa de Bourges va a inicarse un movimiento reformador que se opondrá punto por punto a los argumentos dominantes en la Europa renacentista. Se trata del conocido *mos gallicus* (por oposición al italiano) o simplemente el llamado "Humanismo Jurídico", puesto que aplica las notas singulares del Humanismo renacentista al campo del derecho (12). Alciato, Zasio, Cujas, Dionisio Godofredo, y Hugo Donello, y, en España, Nebrija y Antonio Agustín, son los más selectos representantes de esta nueva orientación metodológica que trata de superar, más que de derribar, el sistema clásico (13). ¿Cuál o

(11) Vid. V. PIANO MORTARI, "Considerazioni sugli scritti programmatici dei giuristi del secolo XVI", en *Diritto, Logica, Metodo nel secolo XVI*, ed. cit., pp. 267-300.

(12) Vid. F. CARPINTERO BENÍTEZ, "Mos italicus, mos gallicus y el Humanismo racionalista", pp. 124-135. El trabajo más completo sobre el particular es el de V. PIANO MORTARI, *Cinquecento GiuridicoFrancese. Lineamenti generali*. Liguori Editore, Nápoles, 1995, pp. 195 ss.. Otras visiones pueden consultarse en F. CALASSO, "Umanesimo giuridico", en *Introduzione al Diritto Comune*. Giuffrè, Milán, 1951, pp. 183-205; D. MAFFEI, *Gli inizi dell'umanesimo giuridico*. Giuffrè, Milán, 1956, pp. 61 ss.; G. KISCH, *Erasmus und die Jurisprudenz seiner Zeit. Studien zum humanisitischen Rechtsdenken*. Helbing & Lichtenhahn, Basilea, 1960, *passim*, y específicamente, pp. 381-403; R. ORESTANO, *Introduzione allo studio storico del diritto romano*. 2ª edición. G. Giappichelli Editore, Turín, 1963, *passim*; N. J. ESPINOSA GOMES DA SILVA, *Humanismo e Direito em Portugal no século XVI*. Universidade de Lisboa, Lisboa, 1964, pp. 11 ss.; las colaboraciones de los ya mencionados R. ORESTANO, "Diritto e storia nel pensiero giuridico del secolo XVI", en *La storia del diritto nel quadro delle scienze storiche*, ed. cit., pp. 389-415; y G. KISCH, "Die humanistische Jurisprudenz", en *ibidem*, pp. 468-490; M. VILLEY, *La formation de la pensée juridique moderne. Cours d'histoire de philosophie du droit*. 9ª edición revisada. Éditions Montchrestien, París, 1975, pp. 507 ss.; A. CAVANNA, *Storia del Diritto Moderno in Europa. I*, ed. cit., pp. 172 ss.; P.G. STEIN, "Legal Humanism and Legal Science", en *Tijdschrift voor Rechtsgeschiedenis*, LIV (1986), pp. 297-306; C.A. CANNATA, *Historia del ciencia jurídica europea*. Editorial Tecnos, Madrid, 1996, pp. 148-150; F. WIEACKER, *Historia del Derecho Privado de la Edad Moderna*. Editorial Comares, Granada, 2000, pp. 56-64; y A. M. HESPANHA, *Cultura jurídica europea. Síntesis de un milenio*. Editorial Tecnos, Madrid, 2002 pp. 139-142.

(13) Sin lugar a dudas y sin que esto suponga minusvalorar a otros egregios representantes, las dos figuras más excelsas de esta corriente jurídica fueron Jacobo Cujas (1520-1590) y Hugo Donello (1527-1591), el primero en el plano crítico-analítico, el segundo en el sistemático. Sobre los mismos, vid. V. PIANO MORTARI, *Cinquecento Giuridico Francese*, ed. cit., pp. 358-365 y pp. 368-374, respectivamente. El programa de Cujas, expuesto en una breve carta en la que hace un inventario de textos y libros que deben componer la biblioteca de un estudiante de derecho, puede consultarse en J. FLACH, "Cujas, les glossateurs et les bartolistes", en *Nouvelle Revue Historique de Droit Français et Étranger*, VII (1883), pp. 205-227. No todo fue unanimidad científica y

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cuáles fueron las direcciones que se siguieron? Precisamente las opuestas a las que imperaron en las centurias anteriores y que habían demostrado su agotamiento.

En primer lugar, se abandonó la consideración del *corpus* justinianeo como una obra definitiva, inmutable, sagrada. Los autores procedieron, con ese afán de conocimiento que caracterizó a los pensadores renacentistas, a una depuración histórica y filológica del derecho romano conocido. La historia y la filología pasan, pues, a un primer plano sin anular los conocimientos jurídicos inexcusables. Pero el razonamiento del que parten es tremendamente exacto: si se quiere conocer en profundidad el derecho romano, se debe partir primero de un conocimiento perfecto del latín, tanto del clásico como del vulgar que se hablaba en los estertores del Imperio, y, a continuación, examinar y estudiar la historia de Roma y su evolución. Solamente con estos dos instrumentos es posible abordar después con éxito una investigación jurídica con plenas garantías. La historia y la filología fueron la puerta que se abrió para que toda una serie de disciplinas, en principio alejadas de los campos jurídicos, fuesen aceptadas en el trabajo de estos juristas. La moral o la ética, la literatura en sus distintas ramas y estilos, la filosofía, fueron empleadas con profusión para ilustrar, glosar o explicar los nuevos trabajos acerca del derecho romano. Este conocimiento histórico y lingüístico no estaba del todo desencaminado. El estudio de un texto romano no podía realizarse aislando el mismo como en un laboratorio. Debía de tenerse en cuenta el contexto en el que había surgido, el ambiente que alumbró dicho fragmento normativo, y la expresión del mismo. Con lo primero, se conocería su génesis, las causas que lo motivaron y los efectos que produjo. Con lo segundo, se conseguiría saber cómo eran las expresiones, el lenguaje típico de un momento de la historia romana con la vista puesta en el descubrimiento de posibles interpolaciones, corrupciones, inserciones o comentarios, que desvirtuasen o alterasen el texto primigenio. Todo ello incardinado en una concepción de los estudios humanísiticos que consideraba necesaria la conexión estrecha entre todos los saberes (14). No se trata

laudatoria. Alberico Gentili, jurista italiano de la segunda mitad del siglo XVI, critica abiertamente a esta "jurisprudencia culta". Vid. G. ASTUTI, "Mos italicus e mos gallicus nei dialoghi *De iuris interprĕtibus* di Alberico Gentili", en *Rivista di Storia del Diritto Italiano*, XV (1937), pp. 149-207; y E. GARIN, "Leggi, diritto e storia nelle discussioni dei secoli XV e XVI", en *La storia del diritto nel quadro delle scienze storiche*, ed. cit., pp. 417-435.

(14) Esto provocó una pugna entre los criterios que debían estimarse preponderantes. Algunos otorgan primacía a los elementos históricos y filológicos, caso de Budeo, Hotman, Charonda, Duareno o Cagnolo. Otros reconstruyen el corpus justiniano a partir de criterios estrictamente jurídicos, sin el auxilio de otras disciplinas, como Baro, Cujas o Donello. Cfr. P. FIORELLI, "Giuristi e linguisti tra istituzione e storia", en *La storia del diritto nel quadro delle scienze storiche*, ed. cit., pp. 447-458; y F. CARPINTERO BENÍTEZ, "Mos italicus, mos gallicus y el Humanismo racionalista", pp. 126-127.

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solamente de recuperar la pureza de un derecho romano oculto bajo el manto de múltiples comentarios, alteraciones y deformaciones: se busca eso en aras de un objetivo final mucho más sublime cual era el de restaurar una cultura por la que se sentía verdadera pasión y a la que se tenía que acceder desde todas las perspectivas posibles. Como ha señalado acertadamente Piano Mortari, significó este esfuerzo de depuración filológica una forma de valoración nueva de la obra justinianea como un producto humano admirable, pero perteneciente a un determinado período histórico, abierto a una consideración que implícitamente disminuía su contenido metajurídico y eterno (15). Una primera depuración histórica y filológica de los textos jurídicos romanos constituye el necesario punto de partida para la construcción del universo jurídico propio sobre el que trabajar: se produce así una liberación del pesado yugo que constituían las glosas y los comentarios medievales, así como las correcciones introducidas en los propios textos clásicos por los compiladores justinianeos. Al estudio jurídico se le suma el estudio filológico, lingüístico, con la finalidad de encuadrar cada porción de los textos en su lugar adecuado y en su sentido originario, desprendiéndolo de toda suerte de corrupción provocada por la impericia de los juristas intermediarios. Su fruto se puede ver en las excelentes ediciones críticas debidas a muchos de estos autores como Jacobo Godofredo (Código Teodosiano) o Dionisio Godofredo (el *Corpus Iuris Civilis*).

Ese conocimiento suponía además la reivindicación del texto como punto de partida de todo trabajo jurídico. En efecto, las glosas y los comentarios habían conseguido el oscurecimiento de los textos hasta el punto que los autores procedían a trabajar sobre la base de los grandes aparatos debidos a los más selectos autores. El texto legal del que se partía era eliminado de cualquier tipo de examen. En consecuencia, el nuevo humanismo reivindicó el estudio de los textos teniendo en cuenta su propia literalidad, evitando en la medida de lo posible recurrir a los trabajos de otros autores como referencia. Con ello se daba el golpe de gracia al argumento de autoridad y la opinión común, como elementos claves del razonamiento jurídico. Se ponía de relieve así la capacidad del hombre para razonar por sí mismo, con la consecuente tendencia a evitar la excesiva dependencia férrea de los argumentos de otros escritores. En consonancia con el espíritu del Renacimiento y su marcado optimismo antropológico, se colocaba al hombre como medida de todas las cosas en el campo del derecho para su creación y para su interpretación. No se obviaba el juego de la razón, sino que, al contrario, se potenció su uso pero dentro de unos límites que evitasen las degeneraciones en que habían incurrido los juristas de épocas anteriores (16). Se prescindía conscientemente del pasado en aras del

(15) Cfr. V. Piano Mortari, *Cinquecento Giuridico Francese*, ed. cit., p. 196.

(16) Predominando más entre los autores alemanes que entre los franceses. Vid.

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mismo pasado, de la recuperación de una pureza interpretativa primigenia. Como ha destacado Francisco Carpintero, lo que en verdad se propusieron estos juristas era el redescubrimiento y la restauración del derecho romano, sepultado, corrompido y desordenado por obra y gracia de los propios compiladores justinianeos y, sobre todo, por la labor de los juristas de los siglos XIV, XV y XVI. Ello hace que las citas de los grandes juristas anteriores desaparezcan de sus obras, salvo para efectuar refutaciones, correcciones o simplemente insultar (17). Piano Mortari ha puesto de relieve que esta nueva forma de encarar los textos jurídicos originó una discusión vivaz sobre el efectivo carácter lógico del derecho justinianeo, contribuyendo a continuar una libre crítica del patrimonio jurídico tradicional y a afirmar el derecho y la posibilidad del pensamiento humano de construir una nueva ciencia del derecho sobre bases y criterios puramente racionales (18). Con ello se produjo el consecuente proceso de reforma de los estudios jurídicos, de la enseñanza que debía encaminarse, pues, a la exégesis del texto de la ley (no a los comentarios), para formar espíritus jurídicos tendentes a la síntesis y a la sistematización frente a la tendencia doctrinal y analítica de los comentaristas.

Por último, la forma. El estudio del derecho romano desde estas nuevas perspectivas debería traslucir en las propias construcciones de los autores. Frente al estilo rudimentario que habían conseguido crear los juristas al modo itálico, farragoso, oscuro, complejo, lleno de abreviaturas, superpuesto a lo esencial, sin diferenciar lo principal de lo secundario, el nuevo método permitirá la recuperación de un estilo literario, de un componente estético muy marcado en la propia exposición. La restauración del latín clásico supone la reivindicación de su utilidad para la jurisprudencia que gana con todo ello en claridad expositiva, incluso en simple belleza y delectación del lector diletante y del lector especialista. Pero hay más: se puede detectar una clara preocupación por el sistema, por la construcción ordenada del orden jurídico, inspirado en el idealismo platónico y en la legendaria obra de Cicerón (*De iure civili in artem redigendo*), que implica la crítica demoledora al atomismo, a la ausencia de método y al carácter analítico de los juristas de la época precedente. Las exposiciones de Donello o de Domat son claras muestras de este afán ordenador. Se recupera asimismo la atención por el derecho natural de carácter racionalista y sistemático. La influencia de la visión del derecho natural romano implicó una clara preocupación por los aspectos filosóficos y morales del saber jurídico: el jurista bien formado ha de saber las leyes, pero

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Piano Mortari, V., "Dialettica e giurisprudenza. Studio sui trattati di dialettica legale del sec. XVI", en *Diritto, Logica, Metodo nel secolo XVI*, ed. cit., pp. 117-264.

(17) Cfr. F. Carpintero Benítez, "Mos italicus, mos gallicus y el Humanismo racionalista", p. 125.

(18) Cfr. V. Piano Mortari, *Cinquecento Giuridico Francese*, ed. cit., p. 197.

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también ha de ser capaz de elaborar sus propias formulaciones acerca de la justicia y de la ley natural, como afirmaba Jean Bodin (19).

En ese convulso siglo XVI y precisamente en la Francia donde se comenzaba a gestar esta corriente, aparece la obra de un polémico escritor que causó un gran revuelo en las tranquilas conciencias francesas. François Rabelais publica su obra capital en sucesivas entregas (20), obra que se enmarca dentro de todo un movimiento europeo de literatura satírica de aventuras, en donde la narración de la vida de un ser excepcional (sea un pícaro, sea una saga de gigantes como en este caso), se emplea como excusa para trazar una radiografía de la sociedad del momento con la crítica acerada a todos los elementos que la componen. Es el papel que cumple el *Lazarillo de Tormes* en España, con su visión descarnada de una realidad sufriente y dolorosa, o el *Till Eulenspiegel* en Alemania. Pero en el caso francés, el autor es un hombre culto (21). No se trata de una obra anónima que recopila leyendas de personajes dotados de una inteligencia innata, inteligencia que se ve afilada por las propias necesidades que tienen que subvenir. Por eso, sus proyecciones intelectuales son mayores que en los otros dos

(19) Como advierte A. M. HESPANHA, *Cultura jurídica europea*, ed. cit., p. 141, se mostraron críticos con el derecho justinianeo en nombre de un pretendido derecho romano clásico, pero lo que verdaderamente les atraía era un derecho que respondiese a las preocupaciones de los filósofos y juristas de su tiempo, un derecho que "fuese sistematizable y reductible a dos o tres principios racionales adaptados a la cosmovisión de la época". Según su pensamiento, ese derecho con esas características había sido el derecho clásico, desfigurado y reducido luego por Justiniano y Triboniano, blanco de numerosos ataques. Sin esa corrupción, el derecho romano conservaría su carácter axiomático que se podría reducir a unos pocos principios racionales, como el *pacta sunt servanda* o el *neminem laedere*.

(20) Manejamos la siguiente edición: F. RABELAIS, *Gargantúa y Pantagruel*. 4ª edición. Editorial Porrúa, México, 1999. Acerca del papel que representan el autor y su obra en el contexto de la literatura francesa, vid. P. BRUNEL, *et alii*, *Histoire de la literature française. Tomo I. Du Moyen Âge au XVIII siècle*. Bordas, París, 1977, pp. 85-107; y J. DEL PRADO (coord.), *Historia de la literatura francesa*. Cátedra, Madrid, 1994, pp. 242-258.

(21) Referencias al mundo jurídico en la obra de Rabelais, vid. M. VILLEY, *La formation de la pensée juridique moderne*, ed. cit., pp. 515-516. Más en detalle, vid. J. PLATTARD, *La vie et l'oeuvre de Rabelais*. Boivin, París, 1939, pp. 10-18, p. 79 y pp. 92-93; R. MARICHAL, "Rabelais et la réforme de la justice", en *Bibliothèque d'Humanisme et Renaissance*, 14 (1952), pp. 176-192; A. LEFRANC, *Rabelais. Études sur Gargantua, Pantagruel, le Tiers Livre*. Éditions Albin Michel, París, 1953, pp. 340 ss.; E. NARDI, "Rabelais e il diritto romano", en *Studi Urbinati. Scienze giuridiche ed economiche*, 12 (1959-1960), pp. 37-68; y "Seigny Joan le fol e il fumo dell'arrosto", en *Studi in onore di Biondo Biondi*. Giuffrè, Milán, 1965. Tomo II, pp. 243-267; M. LAZARD, *Rabelais et la Renaissance*. Presses Universitaires de France, París, 1979, pp. 31-32; y *Rabelais: l'humaniste*. Hachette, París, 1993, pp. 99-103; D. DESROSIERS-BONIN, *Rabelais et l'humanisme civil*. Études Rabelaisiennes. Tomo XXVII. Librairie Doz, Ginebra, 1992, pp. 19 ss.; y D. VAN DER MERWE, "Making light of heavy weather: Francois Rabelais's deconstruction of scholastic legal science", en *Miscellanea Domenico Maffei dicata Historia-Ius-Studium*. Keip Verlag, Goldbach, 1995. Tomo II, pp. 233-253.

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ejemplos reseñados: las citas que hace, el manejo de fuentes, el empleo de otros idiomas, son muestras claras de esa superioridad intelectual, que no empece para observar un cierto componente popular en el tema principal del libro. Lo que sucede es que ese marchamo vulgar es pasado por el tamiz de una buena cabeza, sólidamente preparada, y una mejor pluma.

Nacido en la Turena, a fines del siglo XV, se sabe que Rabelais cursó estudios de derecho y de medicina, además de dedicarse a las más variopintas actividades (22), y que frecuentó entre 1520 y 1527 círculos de juristas, conociendo de cerca del derecho canónico en Poitiers. Esto tendrá su reflejo en las aventuras de Gargantúa y Pantagruel. François Rabelais ingresa joven en la orden franciscana, satirizada como todas las demás en su magna obra, para inicar sus estudios de griego en Fontenay. Allí mantiene correspondencia con Guillermo Budeo, iniciador del estilo jurisprudencial francés. Pasa en 1525 a la orden benedictina, viajando por el Poitou y el Périgord. Estudia medicina en Montpellier desde el año 1530, donde halla un gran renombre, lo mismo que en Lyon, a pesar de carecer del título. Parece ser que su conocimiento completo del mundo jurídico procederá de estas dos experiencias reseñadas: la lectura de las *Adnotationes* de Budeo a las Pandectas, y las amistades que frecuenta en Poitiers y en el Poitou, donde se inserta en un círculo de juristas prácticos con Tiraqueau a la cabeza. Pasa después a Italia, como médico personal del diplomático Jean de Bellay, a cuyo hermano, Guillaume, servirá más adelante. Vuelve a Francia y se doctora en medicina en el año 1537 (23).

Su obra capital seguirá la siguiente cronología: en 1532 aparece *Pantagruel* en Lyon, y en 1534, *Gargantúa* en la misma ciudad. El libro lleva la firma de Alcofribas Naser, anagrama del propio Rabelais. A pesar de la distancia temporal, este segundo libro es considerado, en buena lógica, como la primera parte. Habrán de pasar unos años para que en 1546 salga de la imprenta el tercer libro de *Pantagruel*, dedicado a Margarita de Navarra, condenado por la Sorbona por herejía, lo que forzó al autor a huir a Metz, de donde pasa a Lyon en donde aparecen

(22) Cfr. E. NARDI, "Rabelais e il diritto romano", p. 43. Enumera entre otros los siguientes oficios: médico privado, hospedero, soldado, médico personal y secretario particular de un alto prelado embajador en la Santa Sede, Jean du Bellay, y luego protegido del hermano de éste, Guillaume, editor de almanaques y de textos jurídicos de la Antigüedad, hermano menor franciscano, benedictino, canónigo, sacerdote, etc.

(23) Para la formación de Rabelais, vid. J. PLATTARD, *La vie et l'oeuvre de Rabelais*, ed. cit., *passim*; el estudio introductorio de A. FRANCE, "Vida de Rabelais", en *Gargantúa y Pantagruel*, ed. cit., pp. IX-LVIII; y J.-M. LACLAVENTINE, *Rabelais. La Devinière, ou le havre perdu*. Collection Maison d'Écrivain, St. Cyr-sur-Loire, 1992. Para el conocimiento del entorno en que nace su obra son indispensables las contribuciones de L. FEBVRE, *El problema de la incredulidad en el siglo XVI. La religión de Rabelais*. Akal Ediciones, Madrid, 1993; y M. BAJTIN, *La cultura popular en la Edad Media y en el Renacimiento. El contexto de François Rabelais*. Alianza Editorial, Madrid, 1998.

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los primeros capítulos del libro cuarto, en 1548. Muere Rabelais en el año 1553. En 1562 aparecen los dieciséis primeros capítulos del quinto libro, del que se duda si fue obra personal de Rabelais, que no se completará hasta el año 1654. Es muy probable, y así lo entiende la doctrina, que Rabelais dejase escritos algunos capítulos, los cuales fueron objeto de reelaboración por manos anónimas que trataron de aprovechar el increible tirón editorial de las entregas anteriores, de las que, se cuenta, se hicieron más ediciones que de la Biblia.

Con toda justicia, se ha dicho que la personalidad de Rabelais oscila entre la del gran humanista y la del narrador jocoso y mordaz, pleno de humor amargo y cruel, que emplea la narración en clave paródica para plantear los problemas más acuciantes de su tiempo. Contrario a todo tipo de dogmatismo, el rechazo al ascetismo y a la superstición le llevaron a criticar con fuerza a la Iglesia por sus métodos tradicionales de educación, de lo que podremos ver un claro ejemplo en la carta de Gargantúa. Separado tanto de católicos como de hugonotes, Rabelais se nos aparece como un Erasmo a la francesa, un espíritu libre, sin complejos, sabio hasta la raíz, conocedor de la ciencia y con una confianza ciega en la naturaleza del hombre, cuyos defectos sabe disculpar sin perjuicio de criticarlos con rabia y con fuerza. Su capacidad de saber se proyecta asimismo en el campo del derecho. No debemos olvidar sus estudios canónicos y su correspondencia con Budeo. Parece que tales episodios epistolares no fueron en balde. El autor es capaz de reproducir el estilo enrevesado de los juristas, al mismo tiempo que cita con profusión y acierto, en la mayor parte de los casos, textos de derecho romano, de derecho canónico, glosas y comentarios de procedencia dispar, en una acumulación de saber y erudición que debía ser muy propia del estilo del foro, de la misma forma que, imitando a la perfección el estilo de los juristas, es capaz de mimetizar su práctica con invenciones agudas e ingeniosas. Su obra aparece como una enciclopedia del saber del momento, pero una enciclopedia escrita con ironía, con ánimo satírico y paródico, en clave humorísitica. De un modo deliberado, la obra va a erigirse en la manifestación literaria del nuevo estilo jurisprudencial y en su mayor defensora.

La Francia del siglo XVI aparece afectada por los mismos problemas jurídicos que se detectan en otras zonas de Europa: la dispersión jurídica. Es conocida la tradicional división del reino en dos grandes regiones, calificadas respectivamente como de derecho consuetudinario, *les pays de droit coutumier* (el norte) y de derecho escrito, *les pays de droit écrit* (el sur), región esta última donde el predominio del derecho romano a través de sus versiones medievales había sido bastante intenso y continuado. De hecho es en la Provenza donde se observa un dinamismo elevado en los años previos al renacimiento boloñés con el empleo en diferentes obras de textos justinianeos y del

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derecho romano en general (24). Las fronteras entre ambas no eran del todo exactas pues la tradicional línea divisoria, presentaba notables excepciones, como la Auvernia, al sur de esa línea, con predominio del derecho consuetudinario, o Alsacia, al norte, país de derecho escrito (25). Estas regiones meridionales habían persistido en el uso del derecho romano de raíz teodosiana y se hallaban estrechamente ligadas al norte de Italia por cuestiones de proximidad geográfica, con la que comparten el movimiento de renacimiento político, económico y social de los siglos XI y XII. Aquí tuvieron el derecho romano justinianeo y el derecho canónico, el estatuto y la autoridad de Derecho Común, mientras que las costumbres y los derechos locales se consideraron como derechos particulares de tipo municipal. Los países de derecho consuetudinario muestran una separación del derecho romano en virtud del desarrollo de un florido conjunto de costumbres locales, de inspiración germánica. Cuando se ordenó que estas costumbres, inicialmente no plasmadas en ningún soporte físico, fueran redactadas por escrito, por Carlos VII en el año 1453, se planteó el problema de la supletoriedad jurídica, es decir, a qué derecho acudir cuando el consuetudinario no aportaba la solución concreta al caso planteado. Se habló de la costumbre regional o de la costumbre vecina, pero finalmente se acabaron apoyando en el prestigio del derecho justinianeo, no en su condición de derecho vigente, sino en su calidad de razón escrita. El derecho romano fue admitido, no sin encendidos debates doctrinales de corte jurídico y político, convirtiéndose en el Derecho Común de Francia, bien por haber influido en varias costumbres cuando ésta son puestas por escrito, bien a través de la práctica judicial de jueces y abogados, bien por medio de la interpretación oficial. La zona norte, pues, se apartaba, sin negarlo totalmente, del precedente romano, mientras que la zona sur se había convertido en un reducto donde persistió el derecho romano vulgarizado a través de la redacción visigoda del Código Teodosiano y donde fue posible la aparición de textos que manejaban con cierta profusión la compilación justinianea. Todos los inconvenientes de la diversidad jurídica hicieron conscientes a reyes y juristas de la necesidad de superación, caminando hacia un orden jurídico nuevo y uniforme (26). La diversidad jurídica heredada

(24) Vid. P. RICHÉ, "Enseignement du droit en Gaule du VI au XI siècle", en *Ius Romanum Medii Aevi. Pars I, 5, b bb*. Giuffrè, Milán, 1965; y A. GOURON, "Le science juridique française au XI et XII siècles: diffusion du droit de Justinien et influences canoniques jusqu' à Gratien", en *Ius Romanum Medii Aevi. Pars IV, d e*. Giuffrè, Milán, 1978.

(25) Una aproximación geográfica a las diferentes zonas consuetudinarias en M.F. LAFERRIÈRE, *Histoire du droit français*. Cotillon Éditeur, París, 1858. Tomo VI, pp. 425 ss..

(26) Recepción que se produce con altibajos debido a la renuencia de los monarcas franceses a reconocer la primacía del emperador aleman. Vid. E. CHENON, "Le droit romain à la Curia Regis de Philippe-Auguste à Philippe le Bel", en *Mélanges*

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del Medievo fue suplida merced al papel unificador que desempeñaron el derecho romano y el derecho canónico, impulsados en el seno de las principales universidades que pueblan el suelo galo, comenzando por la de Montpellier, fundada de acuerdo con la tradición por Placentino (27), a la que siguió toda una pléyade de centros de estudio. Las de París (a pesar de la prohibición de la enseñanza del derecho romano de Honorio III en 1219, levantada por Gregorio IX doce años después), Toulouse u Orleans, serán los frentes abiertos para la enseñanza y posterior aplicación de ese Derecho Común, concebido como "droit savant", como derecho sabio, siguiendo los esquemas prácticos desarrollados en otras naciones. Francia se convierte, de la misma manera que el resto de la Europa occidental, en territorio donde el Derecho Común consigue dominar el panorama jurídico (28).

La obra de Rabelais es esencialmente crítica con todos los estamentos de la sociedad francesa del siglo XVI. Con la hipérbole, la exageración, el exceso como pretextos, el novelista compone una sátira ejemplar donde coloca a cada uno en su sitio. Jueces, teólogos, oficiales del rey, nobles, clérigos, soldados, etc., todos van desfilando por las páginas de la inmortal obra de Rabelais y reciben su correspondiente dosis de humor amargo, de descripción crítica, de sutil y fina ironía. Los juristas no escapan al ácido sentido de la descripción desplegado por Rabelais, bien mediante imprecaciones personales que ponen de manifiesto su artera forma de actuar en el mundo judicial, bien a través de irónicas referencias a su modo de argumentar. Pero lo que queremos destacar de Rabelais no es simplemente su mirada crítica: es evidente que su enfrentamiento con el modo itálico ocupa buena parte de sus reflexiones y parodias, pero el autor es abanderado de una reforma sustancial del operar jurídico que se traduce en una propuesta de

Fitting. Sociètè Anonyme de l'Impremerie Générale du Midi, Montpellier, 1907. Tomo I, pp. 195-212.

(27) Vid. A. GOURON, "Les juristes de l'ecole de Montpellier", en *Ius Romanum Medii Aevi. Pars IV, 3 a*. Giuffrè, Milán, 1970.

(28) Vid. la visión general que suministran los tratados clásicos de historia del derecho francés acerca de las fuentes del derecho y de las relaciones entre costumbre, derecho escrito y derecho romano: E. GLASSON, *Histoire du droit et des institutions de la France*. Librairie Cotillon, París, 1891-1903. Tomo IV, pp. 14 ss.; y Tomo VIII, pp. 8 ss.; A. ESMEIN, *Cours élémentaire d'histoire du droit français*. 10ª edición. Librairie J. B. Sirey, París, 1910, pp. 708 ss.; A. CAVANNA, *Storia del Diritto Moderno in Europa. I*, ed. cit., pp. 391-409; F. OLIVIER-MARTIN, *Histoire du droit français des origines à la Révolution*. Éditions du Centre National de la Recherche Scientifique, París, 1992, pp. 109 ss.; J. BART, *Histoire du droit privé. De la chute de l'empire romain au XIX siècle*. Éditions Montchrestien, París, 1998, pp. 107-141; O. GUILLOT *et alii*, *Pouvoirs et institutions dans la France médiévale. Des temps féodaux aux temps de l'État*. 2ª edición. Armand Colin, París, 1998. Tomo II, pp. 60 ss.; J. ELLUL, *Histoire des institutions. Le Moyen Âge*. Quadrige / PUF, París, 1999, pp. 136-143; y B. BASDEVANT GAUDEMET, y J. GAUDEMET, *Introduction historique au droit. XIII-XX siècles*. Librairie Générale de Droit et de Jurisprudence. París, 2000, pp. 95 ss..

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cambios, de modificaciones en el saber y en el actuar de los jurisconsultos.

La historia de Gargantúa, publicada en el año 1534, dos años después del libro de Pantagruel, al que tiene que preceder desde el punto de vista lógico, sirve de pretexto para destacar un primer ejemplo de crítica: al inicio de la novela se cuenta cómo Gargantúa permaneció once meses en el vientre de su madre, con las lógicas consecuencias que en el orden legal ello comportaba a efectos de la legitimidad del descendiente. Problema jurídico y médico, al que Rabelais debe dar respuesta por ser titular de ambas condiciones. Veamos como se hace la parodia del modo escolástico (y, por ende, jurídico) de razonar a través de la cita de argumentos, de libros, autores, textos, acumulando material bibliográfico con la intención de hacer poderosa una afirmación totalmente imposible y ridícula. Al autor habla de todos estos autores como "locos" cuyo número no ha hecho más que aumentar por culpa de los juristas:

"Anitguos y respetables pantagruelistas han confirmado esto que yo digo y lo han declarado, no solamente posible, sino que han considerado legítimo al hijo que da a luz la mujer en el undécimo mes subsiguiente a la muerte de su marido.

Hipócrates, lib. De Alimento.

Plinio, lib. 7, cap. 5.

Plauto, In Cistellaria.

Marcus Varro, en su sátira titulada El testamento alegando la autoridad de Aristóteles.

Cesorino, lib. De Die Natali.

Aristóteles, lib. 7, caps. 3 y 4 de Natura animalium.

Gelius, lib. 3, cap. 16.

Servius, in Ecl. al exponer este verso de Virgilio: Matri longa decem, etc.

Y muchos otro locos, el número de los cuales ha sido aumentado por los legistas ff de Luis et legit … l. intestado & fin y in authent de Restitur et ea quae parit in XI mense.

Además con esto han embrollado también su estrafalaria ley Gallus ff de Lib. et post. Et l. septimo ff de Stat, homin., y muchas otras que ahora no quiero citar.

A favor de estas leyes ya pueden las mujeres viudas jugar todos los envites y todos los restos contra la continencia hasta dos meses después de la muerte de sus maridos" ([29]).

El método es citado en otro pasaje posterior cuando Rabelais confiesa su deseo de escribir en el futuro sobre un tema tan apasionante como los colores que existen en la naturaleza, basándose en argumentos filosóficos y en argumentos de autoridad ([30]).

([29]) *Gargantúa y Pantagruel*, ed. cit. Libro I, capítulo III, p. 11.

([30]) *Gargantúa y Pantagruel*, ed. cit. Libro I, capítulo IX, p. 21: "Sin embargo,

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El conocimiento del mundo del derecho es acreditado por algunas aisladas reflexiones al derecho de gentes y al derecho natural, por ejemplo, a propósito de las leyes del luto (31). Pero la crítica a los letrados no cesa. Los habitantes de París son considerados como buenos juristas, a la par que buenos juradores y algo presuntuosos (32). Los abogados se caracterizan por su apetito desmesurado por la riqueza y por el comer, como se afirma en otro pasaje. En una de las múltiples cenas que se suceden en la novela, el monje Juan des Entommeures, honrado por Gargantúa, afirma que "yo ya he cenado, pero por esto no comeré un punto menos; tengo el estómago cubierto de tachuelas como las botas de San Benito y siempre abierto como la bolsa de un abogado" (33). En un momento en que los protagonistas se dedican a hablar sin tomar las medidas urgentes que la situación requería, nuevamente el monje Juan afirma, parodiando ahora a los canonistas, "¿Es este momento de burlas? Os parecéis a los predicadores decretalistas (…)" (34).

En el segundo libro, dedicado a las aventuras de Pantagruel, la presencia de lo jurídico es mayor, entre otros motivos, porque el protagonista, hijo de Gargantúa, realizará estudios de derecho en varias universidades francesas, las más reputadas del momento. Es ésta la primera parte de la obra que se publicará en el año 1532, como ya hemos visto. En el *Prólogo*, aparece una primera mención al mundo del derecho. El autor, en su afán de hacer popular su obra, quiere que la misma se transmita "como si se tratara de una doctrina religiosa secreta". Pero existe un problema para ello: "(…) porque hay en esto más fruto de lo que piensan esa caterva de fanfarrones empingorotados,

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tengo esperanza de escribir algún día sobre esto más extensamente y demostrar, tanto por razones filosóficas, como por autoridades reconocidas y probadas, de gran antigüedad, cuáles y cuántos colores hay en la Naturaleza y lo que por cada uno de ellos puede ser representado, si Dios me conserva la médula del bonete, esto es, el jarro del vino, como le llamaba mi abuela".

(31) *Gargantúa y Pantagruel*, ed. cit. Libro I, capítulo X, p. 21: "Y no se debe esta significación a una imposición humana, instituida o promulgada, sino que nace del consentimiento de todo el mundo, como lo que los filósofos llaman jus gentium, vigente en todas las comarcas, pues demasiado sabéis que todos los pueblos, todas las naciones (excepto los antiguos siracusanos y algunos argivos que tenían el alma al revés), cuando quieren demostrar exteriormente su tristeza, llevan ropas negras y todos los duelos se representan por el color negro. El consentimiento universal, que no es hijo de un acuerdo y para el que la naturaleza no da argumento ni razón, pero que cada uno de pronto puede comprenderlo por sí mismo, sin ser instruido en ello por tercera persona, lo llamamos derecho natural".

(32) Puede que esos epítetos sean intrínsecos a todos los juristas. Vid. *Gargantúa y Pantagruel*, ed. cit. Libro I, capítulo XVII, p. 32: "Los parisienses que se componen de gentes de todos los países, y están hechos de piezas de todas las procedencias, son por naturaleza buenos juradores, buenos juristas y un poco despreocupados".

(33) *Gargantúa y Pantagruel*, ed. cit. Libro I, capítulo XXXIX, p. 64.

(34) *Gargantúa y Pantagruel*, ed. cit. Libro I, capítulo XLII, p. 69.

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que no entienden más de estos agradables entretenimientos que de lo que hace Raclet en el Instituto" (35), alusión a un conocido profesor de la época, Reneberto Raclif, de la universidad de Dole, cuyo conocimiento de la obra de Justiniano dejaba mucho que desear.

Una vez adolescente, Pantagruel comienza una peregrinación en busca del conocimiento, del saber jurídico. Poitiers, La Rochelle, Burdeos, Toulouse. Frecuenta varias universidades, dentro de las que debemos destacar la de Montpellier, donde comienza su periplo como jurista, a tenor de su propia confesión: "(…) y pasó a estudiar leyes; al ver que allí no había más que levantiscos y enredadores y una caterva de legistas, se marchó también" (36). Llega a Avignon, pasa por Valence y Angers, hasta que concluye su periplo en Bourges, el gran centro jurídico de la renovación francesa del momento. Ahí se da cuenta de que los libros jurídicos son auténticos desperdicios, no por su contenido, sino por la corrupción a que se ha visto sometida por la interpretación, cuyo ejemplo es la glosa de Accursio. Las palabras de Rabelais son lo suficientemente expresivas para abundar en comentarios. Reivindica el texto primigenio y abomina de todos cuantos comentarios se hayan efectuado a la ley romana:

"Pasó entonces a Bourges, y allí, durante largo tiempo y con gran aprovechamiento, estudió leyes. Algunas veces, decía que los libros de aquel estudio le parecían un hermoso ropaje de oro, triunfante y precioso a maravilla; pero bordado de mierda, porque en el mundo no hay libros tan hermosos, tan adornados, tan elegantes como los textos de las Pandectas; pero sus bordados, es decir, la glosa de Accurso, es tan desabrida, tan infame, tan punible, que no es más que suciedad y villanía" (37).

De Bourges marcha a Orleans, donde conoce a un joven que se licencia en Leyes, a pesar de no tener conocimiento alguno sobre la materia, lo cual es otra muestra de la inoperancia del sistema (38).

El tono jocoso se conserva cuando Pantagruel llega a París y tiene oportunidad de ver la biblioteca de San Víctor, antaño reputada como una de las más completas y célebres de Francia. Con mucho humor, Rabelais trastoca el título de muchos libros como los que siguen, en los que no faltan las referencias jurídicas: "Bragueta juris. Pantofla decretorum (…). Las Bambollas del Derecho (…). La Compulsa de los abogados, sobre la reforma de las grajeas. El Gato-azuzado de los

(35) *Gargantúa y Pantagruel*, ed. cit. Libro II, prólogo, p. 95.
(36) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo V, p. 105.
(37) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo V, p. 105.
(38) De este joven licenciado dice Rabelais, que "no conocía de la ciencia más que la portada, pero en cambio sabía muy bien bailar y jugar a la pelota, hizo el blasón y la divisa de los estudiantes de aquella Universidad: La pelota en la bragueta, / en la mano una raqueta, / una luz en la corneta, / dispuesto al baile el talón, / este es, doctor, tu blasón", en *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo V, p. 105.

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procuradores. Guisantes con tocino cum commento. Preclarisimi juris utriusque doctoris Maistre Pilloti Raquedenari, De bobelilandis glosse Accursiane baguenaudis repetitio enucidiluculidissima (…) Justiniano, De cagotis tollendis", parodia esta última de la ley *De caducis tollendis*, Código de Justiniano 6, 51 (39).

Pantagruel recibe, a renglón seguido, una carta de su padre Gargantúa. Éste encarna el modo clásico, memorístico del estudio, al que comienzan a llegar algunos aires nuevos de cambio. Tras afirmar que en la época presente, las facilidades para aprender son incomparablemente superiores a las de otros tiempos pretéritos porque se ha producido una recuperación de todos los saberes, en consonancia con el ideal renacentista (40), manifiesta la convicción de que su hijo aprenderá de memoria los textos legales al uso: "De derecho civil quiero que sepas todos los textos y los compulses y comentes con ayuda de la filosofía" (41). Por tanto, que se esfuerce en desarrollar el nuevo método de estudio que no consiste solamente en hacer un ejercicio memorístico, sino en reflexionar con filosofía, con criterio, con sentido, sobre aquello que se conoce. Una formación completa exige el conocimiento del derecho civil, colocado en un lugar análogo a las lenguas y a la historia (42), a las artes liberales (43), a las ciencias de la naturaleza (44),

(39) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo VII, pp. 108-110. Esta última ley de Justiniano es reiterada en Libro III, capítulo VIII, p. 186: "Esto es lo que dice el valiente Justiniano, lib IV, De cagotis tollendis, para colocar sumum bonum in braguibus et braguetis".

(40) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo VIII, p. 111 "Ahora todo el estudio se concentra en el conocimiento de las lenguas muertas: Griego, sin poseer el cual, es vergonzoso que un hombre se llame sabio; hebreo, caldeo y latín. Los impresos tan elegantes y correctos en uso hoy, que por inspiración divina se inventaron en mi tiempo, como por el contrario, la artillería por sugestión diabólica, hacen que todo el mundo esté lleno de sabios, de preceptores doctísimos, de librerías amplias, y tengo por seguro que ni en tiempo de Platón, ni de Cicerón, ni de Papiniano, había para el estudio la facilidad que hay ahora. No habrá en lo sucesivo quien antes de salir a plaza no se haya fortificado en la oficina de Minerva, y preveo que los vagabundos, los verdugos, los aventureros y los palafreneros de mañana, serán más ilustrados que los doctores y los predicadores de hoy".

(41) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo VIII, p. 112.

(42) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo VIII, p. 112: "Quiero que aprendas perfectamente las lenguas: primero el griego, como quería Quintiliano; después el latín; luego el hebreo para las Letras sagradas, y, por último, el caldeo y arábigo para el mismo objeto. Que formes tu estilo, en cuanto al griego a la manera de Platón; en cuanto al latín, a la de Cicerón. Que no haya historia que no conozcas, a lo cual te ayudará la cosmografía".

(43) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo VIII, p. 112: "De las artes liberales, geometría, aritmética te he dado nociones cuando eras pequeño, a la edad de cinco o seis años; sigue estudiándolas y aprende todos los cánones de las astronomía. Deja a un lado la astrología adivinatoria y el arte de Lullius, como cosas tontas y vanas".

(44) No figura en la edición manejada, pero sí en esta otra que asimismo hemos consultado *Gargantúa y Pantagruel*. Traducción de Teresa Suero y Jose María Clara-

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la medicina y la teología ([45]), así como otras disciplinas con un perfil más práctico, como la equitación o las armas, para convertirse así en "un pozo de ciencia", que no debe olvidar el componente religioso expresado en la frase "servir, amar y temer a Dios" y en el ejercicio de las correspondientes virtudes teologales, con la que concluye la epístola mencionada.

Llegamos así al capítulo X, el más interesante desde la perspectiva jurídica, cuyo título hace honor a ese interés despertado: "Pantagruel, en una controversia oscura y difícil, resuelve equitativamente y prueba con ello que su juicio es admirable". Siguiendo los consejos de su padre, Pantagruel adopta la prudencia, la sabiduría y la justicia como guías de su conducta, interviniendo en múltiples disputas doctrinales con gran juicio y excelente visión de los problemas debatidos, problemas que se extienden a todas las ramas del saber ([46]). No es extraño, pues, que fuese llamado para poner fin a un litigio casi eterno:

"Por entonces había pendiente en la corte un pleito seguido entre dos grandes señores, uno de los cuales era el señor Baiscul, como demandante, y en representación de la otra parte del señor Humeuesne. La controversia, desde el punto de vista del derecho, era difícil y ardua, y el parlamento tanto entendía de esto como de los dialectos alemanes. Dispuso el rey que se reunieran en asamblea los cuatro hombres más sabios y más elocuentes de todos los parlamentos de Francia, con el

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munda. Plaza y Janés Editores, S. A., Barcelona, 1989. Libro II, capítulo VIII, p. 225: "En cuanto al conocimiento de los hechos de la naturaleza, quiero que a él te entregues enteramente que no haya mar, río ni fuente cuyos peces no conozcas; que no te sean desconocidos los pájaros del aire, los árboles y arbustos de los bosques, todas las hierbas de la tierra, los metales escondidos en el seno de los abismos y la pedrerías de todo el Oriente y el Mediodía".

([45]) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo VIII, p. 112: "Después examina cuidadosamente los libros de los médicos griegos, árabes y latinos, sin despreciar los talmudistas y cabalistas, y por frecuentes anatomías, podrás adquirir conocimiento perfecto del organismo humano. Durante algunas horas del día, examina también los santos libros primero, en griego, el Nuevo Testamento y las Cartas de los Apóstoles; después, en hebreo, el Antiguo Testamento".

([46]) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo X, p. 115: "Pantagruel, atento a los encargos y admoniciones de su padre, quiso un día probar su saber; al efecto en todas las encrucijadas de la villa anunció conclusiones de todos los ramos del saber en número de mil setecientas sesenta y cuatro, tocando en ellas las más intrincadas dudas de todas las ciencias. En la calle de Teusse discutió con todos los profesores, maestros de arte y oradores, y los sentó a todos de culo. En la Sorbona, con los teólogos, por espacio de seis semanas durante cuatro horas, desde las doce hasta las seis de la tarde, con dos horas de intervalo para descansar y comer, pues no quiso privar a dichos teólogos sorbonistas de beber y repantigarse conforme a su costumbre. A estas sesiones asistían la mayor parte de los señores de la corte, maestros de respuestas, presidentes, consejeros, matemáticos, secretarios, abogados y otros más, con los regidores, médicos y canonistas; hombres en suma, a quienes no era fácil quitarles la carne de los dientes; pero no obstante sus ergos y sus falacias, a todos les puso el dedo en los labios y les probó palmariamente que no eran sino vanos enmucetados".

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Gran Consejo y los Rectores de las principales Universidades no sólo del reino, sino también de Italia y de Inglaterra, como Iaso, Pilippe Dece, Petrus de Petronibus y muchos otros portavalonas. Reunidos por espacio de cuarenta y seis semanas, no habían acertado a morder en el asunto para ajustarlo a derecho de ningún modo y estaban tan despechados y tan vencidos que se llenaban de vergüenza" (47).

El objeto del juicio y la defensa de las partes es lo de menos porque roza el absurdo en muchos caracteres, con citas inventadas, menciones a leyes inexistentes, etc., parodiando con acidez, sarcasmo e ironía el estilo de la curia impuesto por los juristas italianos. El lector puede hallar estas posturas en los capítulos XI y XII. El breve fragmento reproducido arriba nos ofrece algunos datos de interés respecto a la organización judicial francesa del siglo XVI, con el Gran Consejo, el Parlamento de París o los Parlamentos regionales (48), y las referencias a algunos juristas como Jasón de Maino, Felipe Decio y Pedro de Petronibus (49), quienes se ven incapaces de resolver el litigio. A través de ese caso concreto, se ve como el sistema fracasa y es necesario renovarlo.

Lo importante es la voz del juez. Las reflexiones que el propio Pantagruel nos brinda constituyen el ejemplo más depurado, literariamente hablando, del programa científico que se empezaba a defender en la Francia del siglo XVI que culminará en el *mos gallicus*. Tras ser propuesto por el señor de Douhet (quien ha sido identificado como un personaje real, consejero del Parlamento de Burdeos y magistrado en Poitiers), y observar los autos del proceso transportados mediante cuatro esforzados asnos, Pantagruel se pregunta si viven todavía los litigantes, cosa que no es baladí puesto que la prolongación de los pleitos podía dar lugar al fallecimiento de alguno de los interesados. Se le responde que sí y comienza la diatriba contra el "bartolismo jurí-

(47) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo X, p. 116.

(48) Vid. R. Mousnier, *Les institutions de la France sous la monarchie absolue, 1598-1789*. Presses Universitaires de France, París, 1974. Tomo II, pp. 85 ss. (para los Consejos) y pp. 253 ss. (para los Parlamentos).

(49) Juristas todos ellos de procedencia bartolista. Se trata de civilistas del siglo XV, pertenecientes a la corriente itálica de corte dogmático, lo que obedece a la crítica que el autor formula. Vid. F. Calasso, *Medio Evo del Diritto. I. Le fonti*. Giuffrè, Milán, 1954, p. 369. Jasón del Maino (1435-1519) escribió comentarios al Digesto y al Código; es tachado por Calasso de "volgarizzatore", al mismo tiempo que se le califica de jurista claro en cuanto al latín empleado, lo que será elogiado por Alciato, en *Medio Evo del Diritto. I. Le fonti*, ed. cit., p. 583; y Filippo Decio (1454-1535) fue civilista y canonista. Además de gozar de la protección de los Médici, dejó importantes y conocidos discípulos como el papa León X, César Borgia o Francesco Guicciardini, en *Medio Evo del Diritto. I. Le fonti*, ed. cit., p. 584. Ignoramos a quién se refiere Rabelais al aludir a Pedro de Petronibus, pues no tenemos constancia de ningún jurista coetáneo a los anteriores con este nombre. Pudiera ser una tal Pietro Antonio de Pietra (1512-1608), pero las fechas de su vida concuerdan poco con las de la obra de Rabelais y hacen difícil pensar que el autor se refiriese a él.

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dico". Primeramente, se explican los defectos del sistema del Derecho Común en los siguientes términos ya conocidos y asumidos: proliferación de citas y más citas, recurso a los autores, olvidando los textos primeros, la incomprensión de las leyes que se comentan, el oscurecimiento del derecho, su conversión en su saber arcano, oculto, distante del común de los hombres, entre otros muchos. Los comentaristas aludidos parecen ser los que tenían un mayor predicamento en la realidad práctica. A los nombres conocidos de Accursio, Bártolo y Baldo, se suman ahora Cépola, Paolo de Castro, Juan de Imola, Hipólito, el Abad Panormitano, Bertachin, Alejandro y un tal Curtius (50): "¿De qué diablo sirven entonces barullos de papeles y copias como me dais? ¿No es mejor que ver con los propios ojos, oír con los propios oídos el debate, que leer esas bagatelas, que no son sino engañifas, sutilezas diabólicas de Cépola y subversiones del Derecho? Estoy seguro de que vosotros y todos aquellos por cuyas manos ha pasado el pleito habéis encontrado y opuesto el pro y el contra, y en caso de que la controversia fuera fácil de juzgar y clara, la habéis oscurecido con razones irracionales, necedades y opiniones ineptas de Accurso, Baldo, Bartolo, Castro, Imola, Hipolytus, Panormo, Bartachin, Alejandro, Curtius y otros viejos mastines que jamás entendieron la ley más fácil de las Pandectas, que fueron otra cosa que ladrones de diezmos e ignorantes de todo lo necesario para la inteligencia de las leyes, porque no tenían conocimiento de las lenguas griega y latina y sí sólo de las gótica y bárbara" (51).

La solución de la ciencia jurídica pasa por una vuelta a los textos clásicos efectuada desde tres premisas: el conocimiento del latín y del griego, que ha de emplearse de un modo elegante y culto en la escritura, puesto que no será posible conocer en toda su profundidad y en toda su esencia las leyes romanas (algunos de cuyos fragmentos está en

(50) Conforme a los datos proporcionados por E. BESTA y P. DEL GIUDICE, *Storia del diritto italiano. Volume I. Parte Seconda*. Librería O. Gozzini, Florencia, 1969, *passim*, los autores mencionados son Bartolomeo Cipolla o Caepolla, civilista de la segunda mitad del siglo XV; Paolo de Castro (1394-1441), uno de los máximos representantes del comentario en la línea de Bártolo y de Baldo, de quien fue discípulo; Giovanni Nicoletti de Imola (muerto en 1436), civilista y canonista muy apreciado en su tiempo; Hipólito de Marsella (1450-1529), jurista francés especializado en derecho criminal; Niccolò Tedeschi, llamado el Abad Panormitano (muerto en 1453), uno de los más reputados canonistas junto a Giovanni Andrea; Giovanni Bertacchini (1448-1497), autor de un repertorio de derecho canónico de gran difusión; Alessandro Tartagna de Imola (1424-1477), civilista y canonista que comentó todo el Digesto, el Código y las Decretales; aunque hay otros juristas con el mismo nombre, creemos que la referencia se hace a éste por ser el de mayor prestigio y fama, en la línea de todos los demás que le acompañan. El "Curtius" que se menciona al final no figura en ningún repertorio al uso. Pudiera ser Curzio Rocco de Pavía (1470-1515), canonista que abordó el tema del patronato, o bien Francesco Corti (muerto en 1500).

(51) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo X, pp. 116-117.

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griego), si se desconoce la lengua madre que las alumbró y la evolución de la propia lengua. Como denuncia el propio autor, el oscurecimiento del mundo del derecho procede en parte de la incorporación sucesiva de notas, glosas y comentarios a los textos romanos que han acabado olvidándose. Se ha perdido la perspectiva de la labor interpretativa misma, se ha omitido la consulta directa al caudal que constituye los principales textos legales. Tanto es así que no se consideraba preciso tener nociones de latín clásico para acceder a los mismos. El discurso de Pantagruel opone a esta idea una clara renovación en la formación de los juristas que tiene que pasar necesariamente por el aprendizaje de la lengua latina (sobre todo, la clásica) y el griego, puesto que parte de la compilación justinianea está redactada en esta lengua (las Novelas). Al mismo tiempo, es preciso una renovación formal de corte literario, en el sentido de que las lenguas usadas por los juristas copien muchos de los estilos y recursos de la Antigüedad. No basta saber latín y leerlo: es preciso que se sepa escribir con elegancia, soltura, evitando cualquier suerte de vulgarización. Estas son las gráficas palabras de Pantagruel: "(…) porque no tenía conocimiento de las lenguas griega y latina y sí sólo de las gótica y bárbara. Las leyes siempre han sido tomadas primeramente del griego, según el testimonio de Ulpiano Posteriori de origine iuris y todas están llenas de sentencias y palabras griegas; después se tradujeron al latín en la forma más elegante y adornada por Salustio, Varrón, Cicerón, Séneca y Quintiliano. ¿Cómo entonces hubieran podido entender esos viejos resudosos el texto de las leyes si jamás vieron un libro en lengua latina, como claramente se deduce de su estilo, de pastor, campesino, marmitón o cocinero y no de jurisconsulto?" (52).

Al conocimiento filológico, se ha de añadir el conocimiento de la filosofía moral y natural de donde proceden las normas, lo cual supone tomar conocimiento de las principales corrientes filosóficas existentes en Roma a lo largo de todo el proceso de creación de su derecho. Todo ordenamiento jurídico es fruto de una juridificación de los valores éticos o morales que una sociedad defiende y encarna. Las normas romanas no son una excepción a esta regla. Si se quiere conocer realmente el espíritu de las leyes, el jurista deberá saber cuál o cuáles eran los principios que auspiciaban la creación de tal norma. Ello comporta retrotraer el análisis jurídico a las corrientes filosóficas que inspiraron a los legisladores. Piénsese, por poner algún ejemplo, en el componente cristiano que adquieren muchas normas romanas desde la época de Constantino, en el peso de la filosofía estoica, dentro de la que destacan algunos emperadores romanos, o de la filosofía neoplatónica. El conocimiento de esta parcela permitirá formular una visión más global y

(52) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo X, p. 117.

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completa del mundo romano. Conocer, en suma, la mentalidad que hizo surgir las normas: "Además, dado que las leyes han sido extraídas de la filosofía moral y natural, ¿cómo han de comprenderlas esos locos que no han estudiado más filosofía que mi mula?" (53).

Finalmente, las humanidades tienen también su lugar. No se puede conocer el derecho romano, si carecemos de datos y noticias acerca de la propia evolución de Roma, de su historia. Por eso, se ha calificado al Humanismo jurídico como un método histórico-crítico. El mundo del derecho comparte la nota, consustancial al ser humano, de la historicidad de todas sus manifestaciones culturales. El derecho es histórico, evolutivo, en continuo cambio y renovación. Si se considera una norma como simple producto atemporal, perdemos la capacidad de analizarla en todos sus extremos y queda reducida a una mera manifestación positiva. Mas es preciso ubicarla en su contexto histórico para saber cuáles son los elementos, fuerzas o poderes que la crearon, el por qué de tal creación, la forma de aplicarse en la práctica y los órganos que tenían encomendada tal función. En suma, el conocimiento de la historia de Roma es requisito indispensable para saber cómo fue realmente su derecho. Saber las etapas políticas por las que pasa el mundo latino (monarquía, república, imperio, etc.), son apoyos constantes para el jurista que, lejos de la erudición vana, se convierten en elementos decisivos para la labor de interpretación y de comprensión: "De humanidades, historia y conocimiento de la antigüedad están tan cargados como lo está de plumas un renacuajo, mientras que el derecho está saturado de ello y sin estas nociones no se puede comprender, como demostraré algún día más extensamente y por escrito" (54).

Pantagruel exige para intervenir como juez la quema de todos los papeles y la inmediata comparecencia de las partes a las que tomará declaración para decidir. A pesar del revuelo causado, Du Douhet, quien lo había propuesto para tal cargo, arropa al protagonista y destaca como todo lo afirmado es verdad: todos los registros, réplicas, respuestas, reproches, salutaciones y otras diablerías eran "sino subversiones del derecho para el alongamiento de los pleitos y que el demonio se los llevaría a todos si no procedían de otra manera según la equidad evangélica y filosófica", nueva manera de referirse al derecho canónico y al romano, despojados ya de las vestiduras de comentarios y glosas que los habían desdibujado (55). Tras oír los argumentos — absurdos, reiteramos, pues es el carácter ejemplificador del caso lo que hay que resaltar-, Pantagruel no se asusta y acude al ejemplo del Derecho

(53) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo X, p. 117.
(54) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo X, p. 117.
(55) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo X, p. 117.

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Común nuevamente. Lo embrollado del litigio no es nada comparado con ciertos textos romanos que los comentaristas se habían encargado de oscurecer (56). La sentencia que dicta, ejemplar, solemne, asimismo absurda, deja satisfechas a ambas partes y gozará de una gran éxito hasta el punto que lo comparan con Salomón. Tras haberle propuesto la presidencia del tribunal, nuestro héroe rechaza el ofrecimiento y pide a cambio, fiel a su espíritu, un poco de vino.

La propuesta de reforma de la aplicación del derecho había concluido. En otros fragmentos de la obra, se satiriza de nuevo de un modo sustancial y formal la praxis y el estilo de los comentaristas (57): el carácter de los legistas, que se inmiscuyen en toda clase de discusión hace que incluso opinen sobre el movimiento de los cuerpos (58) o sobre la interpretación de un gesto, en este caso, del famoso Panurgo, consistente en exhibir un cuerno de buey y dos piezas de madera (59).

En el Libro Tercero, aparecido en 1546, es un buen compendio del saber jurídico de Rabelais, a medio camino entre la simple erudición y la crítica sutil, consustancial a la obra que venimos comentando. Se recogen referencias a las leyes suntuarias de los romanos (60), alusiones a los glosadores (61), al estilo jurídico universitario (62), a Bártolo y a

(56) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo XIII, p. 122: "Pues bien, señores, si así os agrada, así lo haré — dijo Pantagruel-, pero no encuentro el caso tan difícil como vosotros. Vuestro párrafo Catón, la ley Frater, la ley Gallus, la ley Quinque pedum, la ley Vinum, la ley Si Dominus, la ley Mater, la ley Mulier bona, la ley Si quis, la ley Pomponius, la ley Fundii, la ley Eruptor, la ley Putor, la ley Venditor y tantas otras son mucho más difíciles en mi opinión". Se trata de alusiones a textos de la compilación justinianea, en su mayor parte acertadas y concordantes, es decir, no inventadas, salvo ejemplos jocosos.

(57) Cfr. E. Nardi, "Rabelais e il diritto romano", pp. 55-68.

(58) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo XVI, p. 130: "(…) y además el que, según los legistas, la agitación y el movimiento tienen por efecto el desarrollo".

(59) *Gargantúa y Pantagruel*, ed. cit. Libro II, capítulo XIX, p. 136: "Los teólogos, médicos y cirujanos allí presentes, pensaron que con este signo quería decir que su adversario tenía lepra; los consejeros, legistas y decretalistas supusieron que aludía a esta especie de felicidad humana que radica en el estado del leproso, como según se dice, sostenía Nuestro Señor". En la otra edición manejada, p. 275, figura la palabra "decretistas" en vez de "decretalistas".

(60) *Gargantúa y Pantagruel*, ed. cit. Libro III, capítulo II, p. 177: "En lugar de observar las leyes suntuarias y coenarias de los romanos, la ley Orchia, la Faima, la Didia, la Licinia, la Cornelia, la Lepidiana, la Antia, y las de los Corintios (…)".

(61) *Gargantúa y Pantagruel*, ed. cit. Libro III, capítulo XIV, p. 196: "Preguntadles a los señores clérigos, a los señores presidentes, a los señores consejeros, abogados, procuradores y otros glosadores de las venerables rúbricas de frigidis et maleficiatis".

(62) *Gargantúa y Pantagruel*, ed. cit. Libro III, capítulo XV, p. 198: "A ti te gustan las sopas de prima y yo prefiero las de liebre acompañadas de alguna ración de labrador salado en nueve lecciones"; y capítulo XVI, p. 200: "(…) son verdaderos perros de muestra, verdaderas rúbricas de derecho".

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Baldo (63), o a los juristas en general y su preocupación por la defensa de los intereses ajenos (64), entre otras muchas referencias. Destacan por su extensión y claridad el caso del Seigny Ioan (65) y el famoso proceso del juez Bridoye, con más de cien citas jurídicas, de las cuales setenta y seis se refieren a la derecho romano (66), donde a la vez se parodia la actividad del foro (67), o la crítica a Triboniano por el mal funcionamiento de la justicia (68).

En el Libro Cuarto, la renovación jurídica se puede observar tímidamente en la mención que el prólogo se hace a Tiraquelo, si bien es el derecho canónico quien tiene una presencia abundante (69). No se

(63) *Gargantúa y Pantagruel*, ed. cit. Libro III, capítulo XII, p. 192 (Baldo); y capítulo XIX, p. 204 (Bártolo).

(64) *Gargantúa y Pantagruel*, ed. cit. Libro III, capítulo XXIX, p. 225.

(65) *Gargantúa y Pantagruel*, ed. cit. Libro III, capítulo XXXVII, p. 239: "No me apartaré de la cuestión si os cuento lo que dice Yox. André, acerca de un canon de cierto rescripto de papel enviado al gobernador de La Rochela, y después de él Panormo en el mismo canon, Barbatias sobre las Pandectas, y recientemente Jasson en sus consejos, han reproducido acerca de Seigny Ioan, loco insigne de París, bisabuelo de Caillette". Los juristas aludidos son los ya conocidos Juan Andrés (Giovanni Andrea, canonista), el Abad Panormitano (Niccolò Tedeschi, canonista) y Jasón de Maino, de quienes ya hemos apuntado algunos datos, además de Andrea Barbazza da Messina, canonista del siglo XV. En profundidad sobre este caso, vid E. NARDI, "Seigny Joan le fol e il fumo dell'arrosto", en *Studi in onore di Biondo Biondi*. Tomo II, pp. 243-267.

(66) *Gargantúa y Pantagruel*, ed. cit. Libro III, capítulos XXXIX-XLIII, pp. 243-251. El juez Bridoye es el trasunto del canciller Du Poyet. El presidente del tribunal recibe el nombre de "Trinquamelle" (literalmente, rompe almendras), aunque pudiera tratarse de una deformación del nombre de Tiraqueau o Tiraquelo, jurista que fue protector de Rabelais y lugarteniente del baile de Fontenay-Le-Comte, entre otros cargos.

(67) *Gargantúa y Pantagruel*, ed. cit. Libro III, capítulo XXXIX, pp. 243-244: "Después de haber bien visto, revisto, leído, releído, paladeado y hojeado, los complementos, aditamentos, comparticiones, comisiones, informaciones, anteprocesos, producciones, alegaciones, interdictos, contradictos, respuestas, preguntas, réplicas, dúplicas, tríplicas, escrituras, reproches, gabelas, salutaciones, comprobaciones, confrontaciones, aclaraciones, libelos, rescriptos papales, cartas reales, compulsorias, declinatorias, anticipatorias, evocaciones, envíos, reenvíos, conclusiones, alegatos de no proceder, apuntamientos, textos, confesiones, exposiciones y otras grajeas y especias de una parte y otra, como debe hacer el buen juez (…)".

(68) *Gargantúa y Pantagruel*, ed. cit. Libro III, capítulo XLIV, p. 252: "Cierto es, sin embargo, que la dirección, en la judicatura actual, la ha trazado Triboniano, hombre miserable, infiel, bárbaro, tan maligno, tan perverso, tan avaro e inicuo, que vendía las leyes, edictos, rescriptos, constituciones y ordenanzas a la parte que le ofrecía más dinero. Así, con sus recortes, retazos y cabos sueltos, ha ido destruyendo y anulando la ley sana y principal, por miedo a que dicha ley y los libros de los antiguos jurisconsultos, dedicados a la exposición de las Doce Tablas y los edictos de los Pretores dieran a conocer al mundo su maldad. Por todo esto, sería mejor, es decir, menos mal vendría a los litigantes de caminar sobre abrojos que de entablar demandas sobre su derecho; así rogaba Catón en su tiempo y aconsejaba que fuera de abrojos el pavimento de los sitios en donde funcionaran los tribunales de justicia".

(69) Sorprende ver cómo Rabelais salva de la quema al derecho canónico.

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escatiman las críticas al mundo de los abogados (70). Finalmente, en el Libro Quinto aparecido póstumamente y de discutida paternidad, asimismo se recogen algunas nuevas menciones al derecho romano (71).

El afán cultural de Pantagruel permite expresar con claridad el ideario de los juristas "al modo gálico", con una preocupación constante por el derecho, pero sin descuidar los elementos filológicos, filosóficos, morales e históricos, que debían acompañar toda labor seria de investigación. La crítica en este caso se vio acompañada de un propuesta positiva, fruto del saber jurídico de su autor. Se denunció lo que fallaba en el orden jurídico, al mismo tiempo que se articulaban las medidas para hacer frente a esos defectos y solucionarlos. El Humanismo jurídico francés no tendría una supervivencia más allá del siglo XVI (72), pero sentó las bases para adherir al mundo jurídico todo el componente cultural de que es capaz el hombre en aras de la búsqueda de la justicia. Rabelais, por medio de Pantagruel, había definido el camino a seguir. Cujas y Donello, los dos representantes más señalados de esta corriente (73), harán honor al programa de trabajo que Rabelais había esbozado en su inmortal obra.

Probablemente, por su formación canonista, consideraba la supremacía de este cuerpo normativo frente al derecho romano y no lo consideraba tan respnsdale de la degradación del sistema por su contenido evangélico. Al mismo tiempo, siempre se consideró que el derecho canónico era el depositario de la equidad, gozando de una cierta supremacía moral sobre el derecho secular. Al llegar a la Isla de los Papimanes, es decir, personas obsesionadas por el papa y la Iglesia en general, se ve como este pueblo vive conforme al derecho canónico, con elogiosas palabras, en *Gargantúa y Pantagruel*, ed. cit. Libro IV, capítulo LI, p. 357: "¡Oh divinas Decretales! (…) ¡Oh seráfico Sexto! (…) ¡Oh querúbicas Clementinas! (…) ¡Oh extravagantes angélicas!". En Libro IV, capítulo LII, p. 358, se añade una mención laudatoria al Abad Panormitano de quien se dice que "jamás mintió". Más elogios al derecho canónico y a los canonistas, sobre todo decretalistas, en Libro IV, capítulo LIII, pp. 360-361. Es frecuente el empleo de neologismo para designar a los herejes, tales como "decretalífugo", "decretalición", "decretalicida", o, en otro sentido, "decretaliarca" para aludir a quien se gobierna por las normas canónicas a la perfección.

(70) *Gargantúa y Pantagruel*, ed. cit. Libro IV, prólogo, p. 282: "Estaba encantado del mismo modo y tan perfectamente como los abogados de ahora"; capítulo XII, pp. 304-305: "(…) cuando un monje, presbítero, usurero o abogado, quiere mal a cualquier gentilhombre de su país (…)".

(71) *Gargantúa y Pantagruel*, ed. cit. Libro V, capítulo X, p. 404; capítulo XLVI, p. 458. Cfr. E. Nardi, "Rabelais e il diritto romano", p. 46.

(72) Vid. V. Guizzi, "Il diritto comune in Francia nel XVII secolo. I giuristi alla ricerca di un sistema unitario", en *Tijdschrift voor Rechtsgeschiedenis*, XXXVII (1969), pp. 1-45.

(73) Referencias bibliográficas a ambos autores en H. Coing (coord.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. Zweiter Band. Neuere Zeit (1500-1800). Das Zeitalter des gemeinen Rechts.Erster Teilband*. C. H. Beck'sche Verlagsbuchhandlung, Munich, 1977, pp. 470-471.

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JOSÉ RAMÓN NARVÁEZ HERNÁNDEZ

¿FEDERALISMO ARTIFICIAL? LA HISTORIA DE LA CREACIÓN DE UNA ENTIDAD FEDERATIVA EN EL MÉXICO DECIMONÓNICO

> "El pueblo no puede ser libre y menos venturoso, por más que...millares de leyes proclamen derechos abstractos, teorías bellísimas pero impracticables."
>
> (Ponciano Arriaga, 1857)

1. *Premisas cinematográficas regionales.*

Cuando en 1925 Einsenstein fue avisado que no habría más presupuesto para realizar su *film* épico *¡Que Viva México!* y vio con tristeza que los rollos de película ya grabada quedaban secuestrados por sus financiadores norteamericanos, no se imaginó que casi cincuenta años más tarde sería vista en todo el mundo y que sería catalogada como una de sus mejores películas. Fue así que para generaciones después, fue viable observar el México que Einsenstein al inicio del siglo vio, nos interesa justamente aquella parte en la que describe el México que sufrió, el México antes de la Revolución de 1910, las escenas se realizan en los Llanos de Apan, estado de Hidalgo, describen la situación de abuso que el patrón infringía a sus peones en la hacienda de Tetlapayac. La historia es la siguiente: Uno de los peones debe presentar a su futura esposa al patrón, mientras ésta se encuentra ante el patrón, uno de los amigos de este abusa de ella, al reclamar el prometido lo acontecido, la muchacha es encerrada en una celda. Se sucede un intentó por liberarla, un tiroteo y el linchamiento del peón y de sus amigos por parte del caporal y ayudantes del patrón.

Hemos querido comenzar así este ensayo porqué en esos Llanos, en esa entidad federativa, vivían algunos de los terratenientes más poderosos del siglo XIX y su historia está ligada a la creación del estado de

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Hidalgo, en un México que intentaba justificar su Federalismo y fundarlo en la realidad económica y social del país. Una zona que a Einseinstein cautivó, quizá por ser la más representativa del sistema de caciquismo rural y que empujó a una nación a una guerra civil. Una entidad federativa que desgraciadamente es una de las más pobres de México. Desde hace algunos años hemos venido estudiando el caso porqué es un modo de comprobar la relaciones Derecho/Realidad social y Ley/Necesidad social. Es un modo de observar el nacimiento de creaciones legales que buscan cambiar la realidad, o que pueden ser la voluntad de unos cuantos, en dónde los grandes principios rectores del derecho moderno entran en crísis y se demuestran mitos.

2. *Hidalgo.*

La primera noticia del nombre del estado, la encontramos en una sesión del Constituyente de 1856, cuando Guillermo Prieto propone que el Estado de México se divida y que se formen dos nuevos estados con los nombres de los próceres mexicanos, héroes de la Independencia: José María Morelos y Pavón e Miguel Hidalgo y Costilla (1).

Hidalgo es ahora una entidad federativa, es decir (según la Constitución mexicana actual, artículo 40) un miembro de la federación con calidad de "Estado soberano" aunque para efectos prácticos, para la doctrina y para salvaguardar a la federación misma esta soberanía no equivale a la que tendría México como Federación, es así que al máximo tendrá alguna autonomía en algunos sectores y en otros depende de la federación, en este sentido el término soberano resulta sólo 'metafórico'. Como *estado*, tiene por tanto, su propia Constitución y sus poderes: ejecutivo, legislativo y judicial.

Hidalgo se encuentra en el centro geográfico de la república mexicana historicamente era centro minero, exportador de plata. Teniendo climas variables cuenta con una considerable biodiversidad, durante el siglo XIX se le reconoce como primer productor de maguey (planta cactácea) que servía para elaborar la bebida nacional conocida como pulque y la cuál se exportaba a otros estados de la república. Tal producción la suplió por la de la cebada y el grano, y en los últimos años está haya sido la actividad agricola primordial aunada al comercio, la producción de energía eléctrica y una refineria de petróleo importante.

Los pueblos interesados en formar un nuevo estado, contaban con una zona con el 17% de bosque y otro 33% de pastos, una población asentada en este sitio que en aquél entonces, era en su mayoría analfabeta y monolingüe del: otomí, nahuatl o mexicano y tepehuano.

(1) Valentín López González, *Como nació el estado de Morelos a la vida institucional, 1869*, Cuernavaca, Gobierno del estado de Morelos, Ediciones Centenario, 1968, p. 16.

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Sobre la situación económica del territorio años antes a su erección como estado el emperador Maximiliano de Hazburgo mandó elaborar un estudio a una comisión científica, pues tenía interés en conocer con detalle la riqueza de la llamada 'comarca minera' (2).

La historia de la erección del estado de Hidalgo está ligada a la creación de un camino carretero. Al llegar Manuel F. Soto a la gubernatura del estado de México (3), consideró conveniente mejorar las vías de comunicación; el verdadero motivo de la creación de estos caminos, que en el fondo podrían resultar un arma de dos filos para el objetivo perseguido: la creación de la nueva entidad federativa, en el cual estaba interesado el mismo Soto, (4) ello implicaba, por un lado, terminar con los problemas que tanto aquejaban a los escisionistas, y por otro, fortalecer la infraestructura de aquellos pueblos y fomentar su separación; Soto buscaba las dos cosas y no tuvo problema en llevar a cabo esta labor. Manuel F. Soto, antes diputado al Congreso Constituyente de 1857, siendo prefecto del distrito de Tulancingo, había comenzado abriendo un camino en esas demarcaciones y con la idea de hacer la ruta más cercana entre la capital del país y el oceano (5) proyecto en el que tenía gran interés Benito Juárez y que, desde la iniciativa de crear el estado de la Huasteca, se veía muy conveniente, pues facilitaba la salida al mar desde la Ciudad de México.

Después de ser magistrado del Tribunal Superior de Justicia, Manuel F. Soto ocupó el cargo de gobernador del Estado de México en 1861, año en el que contrató para construir un camino carretero, que viniendo desde Tuxpan, primer punto navegable y distante doce horas del puerto de Tampico, pasaría por Hidalgo. La Ciudad de México quedaría a 53 leguas del mar, más cerca respecto de Veracruz (6). Respecto del financiamiento de este camino carretero, se sabe que, no obstante los gastos que ascendían a 9 millones, fueron pagados sólo en un 20% de una partida desviada, correspondiente a la federación, y era aquella que concedía la ley de nacionalización de los bienes del clero, que era federal pero que en este caso se destinó a aquella obra concreta

(2) *Memoria de los trabajos ejecutados por la Comisión Científica de Pachuca en al año 1864*, J.M. Andrade y F. Escalante, 1865.

(3) Es también una entidad federativa, en aquél entonces llamado "el estado monstruo" por sus enormes dimensiones que llegaban de costa a costa. De la fragmentación de su territorio se obtuvieron los estados de Hidalgo, Morelos, Guerrero y Tlaxcala; además de la porción que sería asignada al Distrito Federal, Ciudad de México. Así el nombre 'México' viene utilizado tres veces de modo territorial: para el país, para el estado y para Ciudad capital.

(4) El 31 de octubre de 1855 el abogado Manuel Fernando Soto, nacido en Tulancingo en 1825, había escrito sobre la necesidad de crear un nuevo estado con el nombre de Iturbide. *Vid*, David Lugo Pérez , *Hidalgo, documentos para su creación*, comp. Pachuca, Ihdecis, 1994, p. 103.

(5) *Los moderados y el Estado de México*, *El Monitor*, México, 14 de abril de 1861.

(6) *Ibidem*.

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estatal; otra parte fue solventada por los municipios beneficiados y la restante, un poco sorprendente, fue un "donativo voluntario" (7) de Tomás Mancera (8) y la compañía Real del Monte, de Pachuca. Todas estas donaciones tenían un interés claro: años más tarde, en 1877, el hijo de Tomás Mancera, Gabriel siendo dueño de una importante compañía constructora adquiriría todos los derechos sobre la vía férrea Ometusco, Pachuca, Tulancingo, así como sobre otras importantes obras de infraestructura pública. Por lo que respecta a la Compañía minera, la razón quizá haya sido que los socios eran los principales promotores de este tipo de obras que fortalecían a Pachuca y la perfilaban como capital del futuro estado, por una simple razón, capacidad y liquidez de las clases dominantes.

El hecho de que fueran fondos federales implicó mucho, ya que existe la hipótesis de algunos historiadores mexiquenses como Mcgowan (9), que afirman que el gobierno federal era uno de los principales promotores de la desmembración del Estado de México, debido a su fuerza política.

Para 1865 quedaron conformadas las redes de comunicación más importantes, sobre todo para el comercio, y es así como se inaugura la carretera México-Tulancingo-Apan. En 1869 se puso gran énfasis en este tipo de trabajos y se concluyó la carretera que una a la capital del nuevo estado con la de la república (10).

3. *Descontento social y creación de estados.*

Una de las razones que se esgrimió siempre para crear un nuevo estado era aquél del descontento social, era una especie de chantaje, que parece ha sido no sólo usado en este caso sino en muchos otros para mover a una legislatura o a un gobierno a adoptar modificaciones que en momentos de paz sería dificil realizar.

El México emancipado vivió una serie de situaciones conflictivas entre miembros de los diferentes grupos sociales que generó la independencia; no había pasado mucho tiempo en que castas, hispanos y criollos habían disputado toda clase derechos y prerrogativas en el nuevo gobierno. Un Congreso Constituyente, en 1823-1824, intentó sin mucho éxito eliminar la discriminación social, que se heredaba del antiguo régimen. Se utilizó una formula sencilla, que fue intentar la

(7) "Los moderados y… op. cit..

(8) Su nombre completo José Tomás Mancera de San Vicente, nació en 1797 en Acaxochitlán, vecino de Tulancingo, ahora situado en el estado de Hidalgo. Casó con Dolores Paula Moro Vda. de Piña.

(9) *El Distrito Federal de dos leguas o cómo el Estado de México perdió su capital*, Zinacantepec, Gobierno del Estado de México-Colegio Mexiquense, 1991.

(10) Voz: *Historia de México*, *Enciclopedia Salvat*, México, Salvat, 1978, t. 10, p. 2145.

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homogeneización de los habitantes del territorio, esto originó el efecto inverso, porque curiosamente causó otra vez diferencias sociales, pues frente a condiciones iguales, era evidente que algunos obtendrían mejores derechos y posiciones, en menor tiempo y con relativa facilidad.

A la porción del actual estado de Hidalgo le tocó vivir esta diferenciación social, sobre todo en una esfera específica: la población indígena campesina, la cual se encontraba adscrita a una tierra que la mayoría de las veces no era de su propiedad, en ocasiones pertenecía a un rico hacendado y en otras consistía en una donación del gobierno. Sea cómo fuere, esta tierra nunca era del indígena, e impedía cualquier avance por parte de este sector de la población. Independientemente del poco esfuerzo que hayan hecho los indígenas campesinos del entonces Estado de México, es de notarse que el problema más eminente era el de emplear a tan importante sector poblacional, no obstante las políticas de los gobiernos mexiquenses fueron más bien tendientes a lo contrario.

Una palpable muestra de la precariedad económica que se vivía entre el campesinado se encuentra en los históricos cascos de las haciendas pulqueras de los Llanos de Apan, muchas de ellas hasta la fecha cuentan con los restos del *lugar de la raya* en donde los peones recibían su sueldo (la raya — propiamente un signo en un cuaderno —) que era un bono para comprar en la *tienda de raya*, sobra decir que el patrón aumentaba a conveniencia los precios lo que originaba deudas inconmensurables para los peones, deudas que además heredaba la generación siguiente (11).Todo esto obviamente causaba indignación en el campesinado y los llevaba a la violencia.

La desigualdad no sólo se dio en el ámbito económico sino que también se notó en restricciones de tipo político y en la administración de justicia. En el segundo caso los indígenas sufrían innumerables vejaciones, no necesariamente por acción de las autoridades sino más bien por omisión de éstas. Los administradores de las haciendas solían imponer penas a los indígenas (12), sin ningún derecho o a veces abusando del mismo, de estos actos las autoridades estaban conscientes. Por otro lado, los hacendados solían verse beneficiados por los tribunales; no fueron pocas las veces en que el dueño de la tierra presentaba un contrato firmado por sus peones y argumentaba que el pago anual había sido pactado y no podían estos exigir más pago que el realizado el primer domingo de Pascua (13). Otras veces, el caso era mucho más

(11) A grandes razgos es este el sistema denominado de *cacicazgo* y que por algunos autores es visto como el *feudo mexicano*. En la Hacienda de Tetlapayac einseinstiana, todavía se pueden observar los libros de cuentas con las rayas.

(12) Martha Baranda y Lía García, *Estado de México, una historia compartida*, México, Gobierno del Estado de México-Instituto José María Luis Mora, 1987, p. 187

(13) *Ibidem*.

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grave pues implicaba que todo un pueblo se quedara sin agua; así sucedió en el *Caso Ocotepec*, en el cual el famoso Andrés Quintana Roo demandó a los indígenas del pueblo de Almoloya en lo que hoy sería el municipio de Apan. El insurgente retirado pedía la posesión del manantial del "Huejocal" para el riego de su hacienda, contra documentos probatorios de posesión de los indígenas. La sentencia favoreció en último término al hacendado y aunque hubo protestas posteriores, el uso de la fuerza pública por parte del juez hizo que se diera la conformidad en las gentes de Almoloya (14).

Toda está presión originó enfrentamientos todo el Estado de México. En 1829 se dio la primera insurrección agraria llevada a cabo por Francisco Olaco quien convocaba a las gentes a formar un ejercito dándoles títulos militare (15). En 1834, dos curas de Ecatzingo, intentaron instituir una monarquía indígena con alguno de los descendientes de Moctezuma (16).

Unos meses antes de que el ejército norteamericano entrara a la ciudad de México se promulga el *Acta Constitutiva y de Reformas*, restableciéndose la Constitución de 1824. Esto provocó que muchos estados, entre ellos el de México, decretaran más desamortizaciones contra las comunidades indígenas, el argumento liberal era el de siempre: el progreso por el progreso, las comunidades indígenas eran anticuadas y debían asimilarse al resto de los ciudadanos del país. Se entenderá que cualquier ataque al patrimonio comunitario debía ser fieramente peleado por los indígenas, que se veían privados por el gobierno de sus bienes comunales, en los que se comprometían los patrimonios desamortizados de las familias de la población. Surgió un grupo de inconformes en la Sierra Gorda, al cuál no sólo se unieron indígenas sino también militares y autoridades civiles locales. Y aunque ostentaban doble bandera, pues también combatieron al ejército invasor de Estados Unidos de América, fueron tomados como rebeldes. Poco después, muchos de los pueblos del actual estado de Hidalgo se acogieron a un indulto otorgado por el gobierno federal. Algunos continuaron en la lucha, todavía en el año 1848 (17). Otro de los levantamientos se llevó acabo en Tula, en donde 20.000 indios otomíes organizaron un motín, el cual fue controlado en un principio por el prefecto del lugar, más tarde los indígenas tomaron la Hacienda de Pozos (18).

El aumento de impuestos fue una de las causas esgrimidas por los

(14) *Problema de Aguas en Almoloya*, *Boletín del Archivo General del Estado de México*, no. 8 (V-VIII) Toluca, AGEM, 1981, pp. 8-16.

(15) Ana LAU JAIVEN y Ximena SEPÚLVEDA OTAIZA, *Hidalgo, una historia compartida*, México, Instituto de Investigaciones Dr. José María Luis Mora, 1994, p. 124.

(16) *Idem*, p. 125.

(17) *Idem*, pp. 126 y 127.

(18) *Idem*, p. 129.

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peticionarios ante el Congreso Federal para la creación del nuevo estado, pero también fue motivo de diversos levantamientos e inconformidades. El 16 de octubre de 1847 se expidió una ley que, aunque suprimía las alcabalas, creaba ciertos impuestos directos; tres años más tarde en El Cardonal, un grupo de indígenas protestaron contra un impuesto, y el ejército aplacó a los descontentos (19). En 1852, el capitán retirado Ramón García Ugarte se pronunció en Huichapan, adhiriéndose al Plan de Jalisco, y prometía al campesinado, que si se unían a él se verían beneficiados con la supresión de impuestos que haría; cosa absurda, pues si lo conseguía, el beneficio sería para todos, no obstante lo apoyaron, entre ellos Vicente Lesca y Juan Villagrán (prócer hidalguense). Este grupo de líderes agrarios al verse acosados, huyeron dejando a cien indígenas con armas, los cuales continuaron en la lucha (20).

No sólo fueron los campesinos se inconformaron, también ricos hacendados, como don Antonio Tagle, quién se dedicaba al cultivo de maguey, no era contento de los cambios fiscales promovidos por el gobierno de Santa Anna que había comenzado con su mandato el día 20 de abril de 1853, y al frente de la Secretaría de Fomento, Colonización, Industria y Comercio puso a Lucas Alamán que en principio volvió a las viejas alcabalas.

Otros dos conflictos de importante magnitud fueron los de Tulancingo y Pachuca; en el primero. resaltó la figura del conservador Ignacio Gutiérrez, quién asoló los alrededores de estas dos ciudades inconformandose de la desamortización, y más delante de la constitución de 1857.

En 1860 fue tomada Pachuca por las tropas liberales, cuando se acercaba el final de la guerra de los Tres Años. Fue resguardo de los liberales durante la intervención francesa. Forey mandó a sus tropas para que tomaran Pachuca y Real del Monte. Por fin, Díaz derrotó en 1867 a Márquez, en San Lorenzo hoy municipio de Apan.

En 1868, Miguel Negrete inicia una revuelta en Tulancingo, por la cua Juárez tiene que suspender las garantías individuales en el estado de Hidalgo, tres años después de iniciada la revuelta. En cuanto a Pachuca, que estuvo en manos de los conservadores hasta el 3 de noviembre de 1868, las fuerzas liberales al mando de Rafael Cravioto, quien sería después gobernador hidalguense, lograron ocupar nuevamente la ciudad. No obstante persistieron las luchas en aquella región y en otras como Ixmiquilpan, Tulancingo y Tutotepec.

Por último, cabe señalar, los disturbios ocasionados por la intervención francesa, que originaron pareceres y sentires muy diversos,

(19) *Idem*, p. 130.

(20) Leticia Reina (coord.), *Las luchas populares en México en el siglo XIX*, México, CIESAS, 1983, p. 82, citado por Ana Lau Jaiven y Ximena Sepúlveda Otaiza, *Hidalgo, una historia compartida...*, op. cit., p. 124.

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mientras la gran mayoría se unía a la lucha, tal es el caso de Nicolás Romero, llamado "El León de las Montañas", originario de Nopala. Otros preferían el gobierno imperial, sobre todo por la seguridad que daba a sus propiedades, sin confiscaciones o desamortizaciones molestas. El ejemplo a lo anterior fue la población de Tulancingo, que a la toma de Pachuca, el 19 de junio de 1863 ([21]), sin ninguna oposición se unieron a la causa imperialista. Nadie imaginó que Maximiliano sería mucho más liberal que Juárez y que utilizaría la desamortización con mucha fuerza. Los motines, revueltas y conflictos se intensificaron, al grado tal que el 16 de enero de 1869 ([22]), mientras el primer gobernador hidalguense, entonces interino, celebraba su nombramiento, en un pueblo de la Huasteca se tomaba el edificio del gobierno local.

4. *Federalismo Méxicano y División territorial.*

El federalismo es un sistema de organización territorial en términos muy amplios, no obstante, implica algunas otras cosas como un pluralismo, una forma de convergencia de soberanías, una forma de control al poder del Estado, y hay quienes aseguran que hasta una cultura específica. Para teóricos como Loewenstein, el federalismo cambia de un Estado a otro, y aunque se les puede clasificar, nunca se puede asegurar que sean lo mismo ([23]).

El Federalismo mexicano es muy particular, porqué como es bien sabido su gran influencia viene del sistema norteamericano, no obstante el primer acercamiento haya sido Cadiz. Por otro lado es un federalismo 'construido', México adoptó el sistema y después hizo la división territorial, en estricto sentido jamás se 'federó' y quizá sea esta la razón por la cuál la división territorial fue un problema constante durante todo el siglo XIX y factor de conflicto de intereses hasta nuestros días. Sobre federalismo se ha escrito bastante pero sobre división territorial casi nada a pesar de que nuestro federalismo se base en ésta, en este punto la referencia obligada es a Edmundo O'Gorman ([24]) quién reconoce que esta historia en particular es "un laberinto extenso y complicado" ([25]).

En este tema, como en muchos otros de historia del derecho en México, se mezclan los viejos ordenamientos de la legislación indiana y los originados por la nación independiente. Durante el período virreinal el territorio se dividía de diferentes maneras, no contrapuestas sino

([21]) *Hidalgo, una historia...* op.cit., supra.
([22]) *Hidalgo, entre selvas...* op. cit..
([23]) Karl Loewenstein, *Teoría de la Constitución*, Barcelona, Ariel, 1976.
([24]) Edmundo O'Gorman, *Historia de las divisiones territoriales de México*, Porrúa México, 1966.
([25]) Edmundo O'Gorman, *Historia de las divisiones territoriales de México*, Porrúa México, 1966, p. 6.

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complementarias: Una de ella será la división eclesiástica, dentro de ésta encontramos las siguientes divisiones: división *jerárquica*, con la figura del provisor y organizada en cuatro provincias o mitras, estas eran: Michoacán, México, Mixtecas y Guazacualcos (26); división por *evangelización*, hecha en base a las provincias encomendadas a las órdenes religiosas; por último, la división *judicial*, que comprendía los distritos del tribunal del santo oficio.

La otra gran división territorial era la administrativo-judicial, dentro de ésta la más conocida fue la realizada para el establecimiento de audiencias, en el caso de la Nueva España, el treinta de julio de 1535 (27), y que se basaba, en gran parte, en la división eclesiástica. En principio se hablaba de *Distritos Judiciales de las Audiencias*, que eran en al inicio dos: México y Santiago de Guatemala (1543), (28) agregándose en 1548 la de "Guadalajara de la Galicia" (29), y de la cual funcionaba como tribunal de apelación la de México, en asuntos de más de quinientos pesos (30). Esta última segmentación a su vez se subdividida en gobiernos, corregimientos y alcaldías respectivamente (31).

No habrá ninguna exageración en decir que el reino de México fue el más importante, en primer lugar por ser ahí dónde se estableció la primera audiencia en su jurisdicción más tarde nacería el estado de Hidalgo. En algunos asuntos quedaban supeditadas las otras audiencias a la mexicana, y esto no es otra cosa que el reconocimiento de la costumbre que muchas veces hizo la Corona. Es por eso que no hemos hablado de un régimen colonia› (32), sino de un verdadero reino, virreino; en donde la forma de organización anterior al período hispánico fue reconocida, es decir, la organización azteca en el reino de México, y respectivamente dentro de éste como un antecedente reconocido por los mismos pueblos prehispánicos, de la región tolteca, en donde se asentaron los antecesores de los hidalguenses. Así se intentará argumentar por los defensores de la creación del estado de Hidalgo, de este modo no sería creación sino reconocimiento de derechos preexistentes.

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(26) Cfr. Real cédula original de veinte de febrero de 1534, foja 23, Ramo Reales Cédulas (AGN).

(27) Edmundo O'Gorman, *Historia de las divisiones territoriales de México*, México, Porrúa, 1979, p. 5 n. 4.

(28) *Recopilación de Indias*, libro II, título XV, ley 6.

(29) *Recopilación de Indias*, libro II, título XV, ley 7.

(30) Real Cédula original de ocho de diciembre de 1550 que modificó a una anterior en que el monto era de trescientos pesos. *Vid, Historia de las divisiones...*, p. 7 n. 14.

(31) *Recopilación de Indias*, libro II, título XV, ley 1.

(32) La Corona expresamente ordenó que no se utilizaran más los términos *conquista* y *colonia*, pues la Nueva España era un reino como lo era Castilla. *Vid*, respectivamente, las *Ordenanzas de Juan de Ovando*, de 13 de julio de 1573 y la Real cédula de 11 de junio de 1621.

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El reino de México para su organización fragmentó su administración en cinco provincias mayores: Tlaxcala, Puebla, Antequera, Michoacán y Méxic... (33). Esta división persistió hasta finales del siglo XVIII. Alejandro von Humboldt en su viaje al interior del país reconoce la división de provincias internas e intendencias (34). Para entonces la *Provincia de México*, se dividía en provincias menores, una de esta últimas (Meztitlán) correspondía al actual estado de Hidalgo.

Otro sistema fue el originado por la *Real ordenanza para el establecimiento e instrucción de intendentes de Ejército y Provincia en el Reino de la Nueva España* (35), para evitar el centralismo colonial. Las intendencias eran realmente los reinos. las provincias adquirieron el nombre de partidos y las alcaldías se conservaron, la intendencia de México, que es la que nos ocupa, contaba con alcaldías en su división interna, dentro de las cuales se reconocen los pueblos del estado de Hidalgo.

Esta ordenanza creo algunas figuras jurídicas territoriales tales como el *Municipio* término por el cuál debemos entender a aquella demarcación territorial "que cuenta con sus propias leyes", es decir con un estatuto de gobierno municipal; el *Ayuntamiento* es la "junta de personas destinadas para el gobierno económico-político de cada pueblo (concejo, cabildo o regimiento) se compone del *alcalde* o *justicia* y de los regidores, el nombramiento puede hacerse por insaculación o elección de vecinos. En las capitales de los departamentos, los puertos con 4.000 habitantes y los pueblos con 8.000 con juez de paz. La mayoría duran un año, otros excepcionalmente son perpetuos. Donde hay corregidor éste puede intervenir en el ayuntamiento. Hay un escribano y un síndico que vigila y ayuda al público. *Villa*, población con privilegios, es diferente de la aldea por que tiene jurisdicción propia.

En la convocatoria para las Cortes de Cádiz aparecieron los nombres de algunos mexicanos, que con mucho agrado concurrieron a

(33) Desde esta fecha puede hablarse del primer antecedente directo del estado de Hidalgo, la provincia mencionada tenía dentro de sus límites al actual estado.

(34) Alejandro von HUMBOLDT, *Ensayo político sobre el reino de la Nueva España*, México, Porrúa, 1992. Al explicar los caminos que salían de la intendencia de México en 1821 como "el de Pachuca que conduce a las célebres Minas del Real del Monte, por el cerro Ventoso, cubierto de robles, cipreses y rosales casi siempre con flores", p. 313.

(35) En palabras de Orozco y Berra y acerca de esta división nos dice "… fue mandada practicar en 1786, y en virtud de los artículos 57 y 58 de la Ordenanza, el virrey, conde de Revillagigedo, encargó al coronel de infantería D. Cárlos de Urrutia, que formara una carta general de la Nueva España. Formóla éste el año 1793, aprovechando no sólo los trabajos existentes, sino también otros nuevos recogidos por los comisionados que desde 1791 fueron nombrados para recoger el censo general de la colonia. La carta, primera que las nuevas divisiones polìticas es sin disputa la mejor de su clase…" *Apuntes para la historia de la geografia en México*, México, Imprenta de Francisco Díaz de León, 1881.

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la península ibérica a discutir sobre el futuro del reino, en España nuestros diputados observaron la organización territorial y les agradó desde entonces para importarla a Nueva España. Ramos Arizpe aseguraba que los conflictos sociales de 1810 en gran parte habían ocurrido por la mala organización territorial (36), el centralismo virreinal parecía dejar de atender muchas necesidades, de hecho en el siglo XVIII, las *provincias internas* habían sido creadas para evitar la dispersión. Pero los problemas son, desde entonces y hasta la segunda mitad del siglo XIX, los mismos: Lejanía de las oficinas de la administración pública, lejanía de los tribunales, condicionamiento presupuestal, falta de seguridad pública y falta de gobierno efectivo. Fue entonces que se propuso la institución de las *diputaciones provinciales* que intentaban lograr una mejor administración del territorio. La Constitución española de 1812 (37), en sus artículos 325 y 326, habla de dichas diputaciones en las que habría un *jefe superior* nombrado por el rey, un *presidente*, un *intendente* y siete individuos a manera de *Cabildo*; la diputación vería la distribución de las contribuciones, entre muchas otras cosas. La independencia que adquirieron las *diputaciones provinciales* sirvió, en opinión de algunos autores, como antecedente de nuestro federalismo, dichas provincias contaban con autonomía, las audiencias funcionaban en función de éstas, como 'última instancia'. El virrey operaría en esta nueva concepción polítca el máximo poder ejecutivo (38).

En cuanto a la división territorial, se continuó con la organización anterior, con el matiz adicional de reconocer las *provincias de oriente y occidente*, y la institución de las *diputaciones provinciales*. El liberalismo gaditano, que no modificó en mucho el régimen territorial, conservó una división que con esfuerzos fue tratándose de acoplar y acomodar a las necesidades de los habitantes de las nuevas demarcaciones territoriales. Apartir de esta fecha y hasta finales del siglo posterior se seguirá discurriendo sobre el *locus vivendi.*

En Apatzingan, el 22 de octubre de 1814 se expidió un importante decreto constitucional llamado *Decreto Constitucional para la Libertad de la América Mexicana*, mejor conocido como *Constitución de Apatzingán*. El artículo 42 explica la "división en provincias".

Durante la regencia posterior a la independencia, cuando gobernaba una *Junta provisional* de insignes personajes, los intentos legisla-

(36) *Proposiciones de D. Miguel Ramos Arizpe, diputado por Coahuila, leídas en la sesión del día 11 de octubre de 1811. México en las Cortes de Cádiz*, México, Empresas Editoriales, 1949, pp. 131 y 133.

(37) Artículo 10 de la Constitución política de la Monarquía Española, firmada el 18 de marzo de 1812 y promulgada y jurada el 19 del mismo mes y año en España y en Nueva España el 30 de septiembre del mismo año y refrendada en 1820.

(38) Aunque la tendencia del texto de la constitución de Cádiz fue en el sentido de eliminar esta institución, de hecho siguió existiendo, pero tan menguada que cuando Iturbide pide la abdicación a O'Donoju, esté no se niega.

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tivos eran: 'los de reconocer la costumbre de los pueblos en su organización territorial' así lo menciona la *Ley de bases para la convocatoria de Cortes* de 17 de noviembre de 1821, bases utilizadas por el primer constituyente mexicano. Durante el gobierno del imperio, el generalísimo Iturbide se expidió un decreto que arreglaba la administración militar, distribuyendo el territorio en cinco *capitanías generales*, tomando como base la última organización virreinal. La capitanía de México comprendía a Querétaro, Michoacán, el actual Hidalgo, y Guanajuato. Entonces el estado de México era una provincia con gran futuro debido a su auge comercial. Su capital era la misma Ciudad de México.

Con la entrada en vigor del *Acta Constitutiva de 1824* (39), el problema territorial se planteó en tres artículos — 6, 7 y 8 — sólo el 7 cambió respecto al proyecto, este artículo detallaba cuáles serían las partes integrantes de la federación que en el proyecto no eran aún claras; esto hace suponer un debate que podríamos llamar 'de escritorio' para organizar territorialmente a la nación. El artículo 6 se refiere a los "Estados libres, soberanos e independientes", y el 8, a la facultad del Congreso para modificar la división (40). Desde la elaboración del *Acta Constitutiva* se vio conveniente crear una Constitución, por lo que se nombró a una Comisión para tal efecto. El primer proyecto fue rechazado, en cambio el segundo fue aceptado unánimemente, en éste, el Estado de México era declarado entidad federativa, y se le instituían una legislatura local y una gubernatura, convirtiéndose así el Distrito Federal en entidad independiente (41). El artículo que contenía las partes integrantes de la federación era el 5^0, el cual enunciaba los estados y territorios pertenecientes a la joven nación (42). El término utilizado por el constituyente es el de "estado", influencia norteamericana del término *state* (43).

(39) Por una circular de Agustín de Iturbide se señalaron *capitanías generales de provincia*, las cuales eran: *Provincias internas de oriente y occidente*; Nueva Galicia, Zacatecas y San Luis Potosí; México, Querétaro, Valladolid y Guanajuato; Veracruz, Puebla, Oaxaca y Tabasco; y las jurisdicciones de Tlapa, Chilapa, Tixtla, Ajuchitlán, Ometepec, Tecpan, Jamiltepec y Tepoxcolula, en Miguel Domínguez, *La erección del Estado de Guerrero. Antecedentes históricos*, p. 77.

(40) Nótese que la división territorial era de vital importancia y por eso se encontraba en los primeros artículos.

(41) A través del decreto de 18 de noviembre de 1824 contenida en Dublán y Lozano, *Colección*, no. 438; el Congreso usando de sus facultades derivadas de la fracción XXVIII del artículo 50, eligió a la Ciudad de México como residencia de los supremos poderes, con un distrito contenido en un círculo, "cuyo centro sea la plaza mayor... y su radio de dos leguas".

(42) El territorio federal es también parte de la federación pero por sus características de posibl ingobernabilidad se hace depender directamente del poder federal, actualmente no existen más territorios en la constitución de 24 los territorios eran: Alta California, Baja California, Colima y Santa Fe de Nuevo México.

(43) Ya en la ley de 8 de enero de 1824 se habla de estados y no provincias. Lleva

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En 1824, a nivel local, se expidió en el nuevo Estado de México la *Ley orgánica provisional para el arreglo del gobierno interior del Estado*, (44) el artículo tercero establecía ocho distritos, encabezados por un prefecto con facultades gubernativas y económicas así como para la organización de los distritos o prefecturas, la imposición de multas, alcabalas y gabelas. El artículo 36 establecía las *prefecturas*. Los *distritos*, a su vez, se subdividían en *partidos*, cada uno encabezado por un *subprefecto*, con excepción del *partido* en el que estaba el *prefecto*, y en caso de ausencia lo suplía el último *alcalde de la municipalidad*, que no era otra cosa que el pueblo en el que se asentaba el partido y el siguiente nivel intermedio de organización territorial. (45) Las *perfecturas* a su vez se dividían en *subprefecturas*, como habrá alguno ya deducido de la existencia del *subprefecto*, Hidalgo estaba dividido en varias *prefecturas*. Esta organización es muy parecida a la establecida en el periodo borbónico, en dónde *prefecturas* y *subprefecturas* serían equivalentes a *intendencias* y *subdelegaciones* (46).

Para 1834 el Estado de México se dividía en *prefecturas* o *distritos*, divididos en su interior en *partidos*, y éstos a su vez en *pueblos*, en los que puede o no haber *ayuntamiento* o pertenecer o no a un *municipio*. Algunas poblaciones tenían el *status* de ciudades (dependiendo el número de habitantes), otras podían ser catalogadas como *villas*, *administraciones*, *lugares de rentas* o *curatos* (esto de acuerdo a la organización territorial eclesiástica) (47).

El 23 de octubre de 1835 se expide la *Ley de Bases para la Nueva Constitución*, proyecto centralista que pretendía un cambio integral desde el sistema político, pasando por la legislación y llegando a la organización territorial. Dicha ley en su artículo octavo establece como organización territorial la de los *departamentos*, muy propio del régimen central y de la figura de derecho administrativo conocida como *delegación*. Con la consigna de no perder el mando sobre los territorios, la constitución centralista fue concebida el 30 de diciembre de 1836 y llevó el nombre de *Bases y leyes constitucionales de la República mexicana*, que en sus dos primeros artículos indicaba la forma de organización territorial. Una ley publicada el mismo día que la constitución (cuestión que demuestra la importancia del tema) fijó los límites

el kilométrico nombre de *Ley para establecer las legislaturas constituyentes particulares en las provincias que han sido declaradas Estado de la Federación mexicana y que no las tiene establecidas*.

(44) Decreto número 18 de 6 de agosto de 1824.

(45) *Colección de Decretos del congreso Constitucional del estado Libre y Soberano de México, espedidas en su primera reunión, los años de 1824, 1825, 1826, 1827, y en su reinstalación en 1830*, vol. I, pp. 20-30.

(46) Georgina Moreno Coello, *El Estado de México, la historia de un proceso de definición territorial; 1824-1917*, México, UNAM, 1923, p. 45.

(47) Las diócesis a que podían pertenecer los curatos eran México, Puebla o Michoacán, que correspondían al territorio del entonces Estado de México.

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de los *departamentos*, éstos conservaron parecida estructura geográfica que la de los estados, siendo 24 los departamentos. Tejas (48) se separó de Coahuila; Aguascalientes, que tenía la vigilancia gubernamental, alcanzó su autonomía y, por último, los territorios de Nuevo México y las Californias se anexaron respectivamente a Colima y a la Alta y Baja Californias (49).

En cuanto al territorio del Estado de México, éste se convirtió en *departamento* el cuál se dividió en trece *distritos* (50). Los *distritos* se dividieron en *partidos*, que no fue otra cosa que una nueva denominación de las *prefecturas* que formaron los distritos y los *partidos* que siguieron siendo los mismos, esto en el caso del *departamento* de México (51).

A partir del 13 de junio de 1843 rigió para todo el país un nuevo ordenamiento, *Bases de Organización Política de la República Mexicana*, también de corte centralista. Ley muy importante a pesar de su corta vigencia de tres años. No cambió respecto al número y extensión de los *departamentos*, el único cambió sustancial se dio en el uniformar el trato hacia los *departamentos*, puesto que en 1836 existían algunos *departamentos* con *trato excepcional* y que no era otra cosa el que fueran considerados como *territorios* (52), los cuales debían tener una "sujeción más inmediata a las supremas autoridades" (53). Los niveles intermedios siguieron siendo los mismos: *distritos* y *partidos*. En el *departamento* de México no hubo ningún cambio digno de mención, pues el cambio territorial era de orden general, y el gobernador del departamento no consideró conveniente hacer ningún cambio respecto del tema que nos ocupa.

Otro documento constitucional para el país, en la constante lucha por definir el gobierno, fue el *Acta Constitutiva y de Reformas de los Estados Unidos Mexicanos* (54) de 1847, se volvía al régimen de 1824. Por un año se discutieron algunas reformas, y luego se dejaron por la

(48) Sólo pertenecía nominalmente, ya no se ejercía autoridad sobre ella a partir de la guerra de 1836 y el *Tratado de Velasco*. La cuestión quedó zanjada el 1^{0} de marzo de 1837 cuando el Congreso estadounidense reconoció a Texas.

(49) Esta división, que en la constitución citada aparecía como provisional, a partir del 30 de junio de 1838, por una ley de esta fecha, quedó como definitiva. *Vid*, Dublán y Lozano, *Colección*, op. cit., no. 1963.

(50) Disposiciones de la junta departamental no. 4. División del territorio del *Departamento* en trece *distritos* y subdivisión de estos en *partidos*, vol. II, pp. 396-398.

(51) Javier Romero Quiroz, *El Estado de México, marcos históricos y geográficos*, Gobierno del Estado de México, 1984, p. 60. Decreto de 22 de marzo de 1838.

(52) *Historia de las divisiones…*, op. cit., p. 95.

(53) Dublán y Lozano, op. cit., *Colección*, no. 2721.

(54) *Colección de Leyes Fundamentales que han regido en la república mexicana y de los planes que han tenido el mismo carácter desde el año 1821 hasta el de 1857*, Imp. Ignacio Cumplido, México, 1857, p. 308. Sobre este documento es importante el artículo 3^{0} que mencionaba: "Los distritos, ciudades y pueblos que se han separado de los Estados o Departamentos a que pertenecen, y los que se hayan constituido bajo una nueva forma política, volverán a su antiguo ser y demarcación, hasta que el gobierno,

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paz a causa de la guerra con Estados Unidos. En 1849 se tornó a la organización existente en 1836, es decir once *prefecturas* (55). Para 1852 existían sólo ocho *prefecturas* (56).

La dirección del país fue asumida nuevamente por un gobierno centralista en 1853, o mejor dicho terminó el corto periodo federalista para dar paso a la "serenísima" persona de Santa Anna, quién expidió las *Bases para la administración de la República, hasta la promulgación de la constitución*. (57) Nuevamente se reorganizó el territorio. Entonces había veintidós *departamentos*, seis *territorios* y un *distrito*. En lo correspondiente al Estado de México, permanecían las mismas *prefecturas* que ahora se llamarían *distritos*, seguirían existiendo los *partidos* y las *municipalidades*. El *distrito* es una organización meramente administrativa y creada para un mejor control político, las *municipalidades* implican el establecimiento de un cuerpo legislativo llamado *cabildo*, por lo que de las *municipalidades* podemos decir de eran verdadero 'nivel intermedio' y no simplemente una 'unidad administrativa', aunque para efectos territoriales fuera más pequeña la *municipalidad* que el *distrito*.

El decreto de 7 de septiembre de 1855, reconoce los límites que el estado tenía en 1827. Seis días más tarde se elabora el *Estatuto Provisional para el Gobierno Interior del Estado de México*, y se mencionan algunos cambios en cuanto a la organización territorial.

Regresando al plano nacional nos encontramos con el *Estatuto Orgánico Provisional de la República Mexicana* conocido como el *Código Lafragua*, nombre debido al redactor, (58) la división que preveía era de veintidós *departamentos*, seis *territorios* y un *distrito*. Los *departamentos* "se llamarán Estados".

5. *¿Creación o Reconocimiento? Bases para justificar un derecho adquirido.*

Antes de que analizemos como se construye un estado dentro de

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tomando en consideración las razones que alegaron para su agregación, provea lo que convenga al bienestar de la República...".

(55) Memoria de las secretarias de relaciones y guerra, justicia, negocios eclesiásticos e instrucción pública del Gobierno del Estado de México, leída a la honorable legislatura en las sesiones de los días 1^0 y 2^0 de mayo de 1849 por el secretario de esos ramos (anexo 5).

(56) Isidro A. MONTIEL, *Memoria de la Secretaría de relaciones y guerra del gobierno del Estado de México. Leída por el secretario del ramo en los días 29, 30 y 31 de marzo de 1852*, Anexo 1.

(57) Dublán y Lozano, *Col*., op. cit., no. 3807. Estas facultades las tenía el general López de Santa Anna por el plan de 6 de febrero de 1853.

(58) *Estatuto orgánico provisional* de 15 de mayo y expedido por Ignacio Comonfort, en: *Colección de Leyes Fundamentales Colección de Leyes Fundamentales que han regido en la república mexicana y de los planes que han tenido el mismo carácter desde el año 1821 hasta el de 1857*, Imp. Ignacio Cumplido, México, 1857, p. 323.

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otro estado en el sistema federal, digamos en desmérito del posible *federalismo artificial*, que el estado de Hidalgo contaba con algunos antecedentes históricos a considerar para demandar su reconocimiento como *entidad federativa*. Suele dársele en este sentido, el valor de prueba máxima al malestar social, pero este es muy facil de probarse, basta hacer una encuesta y nos encontraremos con un sin fin de quejas. Cuestión más interesante y ciertamente más dificil era (y es) la de probar la existencia de una *voluntad histórica social*, de ciertos pueblos interesados en conformar el territorio donde habitan, en un miembro de la federación mexicana. Veamos como se las ingeniaron los promotores del estado de Hidalgo para demostrar su *identidad comunal.*

Poco tiempo después de que el emperador Agustín I salió de México, en marzo de 1823, se instituyó el segundo Congreso Constituyente, y se erigió como Supremo Poder Ejecutivo a un triunvirato conformado por Nicolás Bravo, Guadalupe Victoria y Pedro Celestino Negrete; es en este periodo el Ayuntamiento de Huejutla, ahora estado de Hidalgo, envió al Poder Ejecutivo y al Congreso una propuesta para crear la *Provincia de la Huasteca*: "(Los habitantes de la Huasteca) acostumbrados a las rancias leyes con que han sido gobernados, a las restricciones que siempre se les han puesto para impedir los progresos y mantenerlos en la ignorancia más crasa, no sólo se les ha privado de los necesarios adelantos, sino que apáticos e indolentes, yacen en tal inacción que toca ya los términos de lo criminal... Siendo por otra parte estos pueblos, los que se han visto por los gobiernos anteriores con todo el abandono y arbitrariedad y el despotismo, que todo quiso convertirlo en su utilidad, despreciando la de sus gobernados: hallándose al mismo tiempo distantes de la Corte, y teniendo que ocurrir a ella para la decisión de sus negocios. ¿Qué vejaciones, qué atrasos no se han experimentado con tan dilatados viajes teniendo las más de las veces que sufrir todo el peso de la injusticia, por carecer de recursos para hacer patentes los fundamentos sólidos de una demanda? Así se ha visto la inocencia oprimida, la virtud confundida, con el vicio, erguida la cabeza de los poderosos, y sumidos en la miseria y escasez los infelices cuya justicia ha sido sofocada por la ambición y maldad de los gobernantes" ([59]). Si bien es cierto, la sustancia es poca y la concreción otro tanto, el antecedente es interesante, porque se solicita una cosa que está al alcance del legislador y del gobierno en un periodo justamente *constituyente*, pero tal vez el gobierno y el legislador entendieron que era mejor conservar la vieja división territorial y esperar 'tiempos más tranquilos'.

La propuesta de los pueblos de la Huasteca no solamente se rechazó, sino que fue atacada de inconstitucionalidad en sus raíces, de hecho nunca se realizó la proyectada "junta de todos los pueblos", pues

([59]) Ramo Historia; vol. 578-B, exp. 3, fojas 255 fr.-257 fr. AGN.

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el Supremo Poder Ejecutivo mandó disolver la reunión por conducto del gobierno de la Provincia de México a la de Veracruz. El argumento para esgrimir la ilegalidad de la reunión fue el de "la propensión a perturbar el orden público" (60). Todo se resolvió pacíficamente y la reunión no se realizó, pero Huejutla se mantuvo firme todavía durante algunos meses, pues como lo informó al supremo poder, la intención y voluntad popolares siguieron vivas, y éstas no podían ser tachadas de inconstitucionalidad. Es así como se mantuvo en correspondencia con provincias, pueblos y ayuntamientos, hasta la promulgación de la Constitución en 1824 (61).

Durante la elaboración del proyecto para la Constitución de 5 de febrero de 1857, se entablaron serias discusiones respecto al cómo debería quedar conformado el territorio mexicano, ahora que había una posibilidad de organizar mejor el mismo.

La proposición la había hecho con anterioridad el licenciado Manuel Fernando Soto, en 1855: un "nuevo estado", y en base a los intereses comunes de los distritos de Tuxpan, Tampico de Veracruz, Tancanhuitz, Huejutla y el sur de Tamaulipas. Este nuevo documento es mucho más audaz y completo que su antecesor elaborado por los pueblos de la Huasteca, aunque sigue en la misma línea respecto a la potencialidad económica de dichos pueblos. Serviría de base este escrito para el decreto de erección y sería objeto de múltiples discusiones. La solicitud hace en el proemio una relación histórica de los levantamientos originados por la no-creación del estado (o por lo menos así lo cree Soto); menciona así los levantamientos: del general Moctezuma en Tampico, en 1832, el del general Urrea en el mismo puerto, seis años más tarde, y el del coronel Casanova en 1852, en la Huasteca, nos habla del desechamiento neto de un proyecto para realizar un nuevo estado, presentado ante la Cámara de Diputados, un año antes. El escrito continua con la descripción de los elementos geoeconómicos, que unían a las regiones interesadas; explica cómo la erección en estado los haría altamente productivos, y describe la ganancia que obtendría cada distrito. No se menciona una sóla estadística, cuestión que observó críticamente el constituyente de 1857. En un segundo capítulo se describen los problemas que han sufrido los pueblos y que son como en todas las peticiones de erección, los problemas de administración

(60) Obviamente este argumento del gobierno federal carecía de sustento y de fundamento, y era más bien de índole político. La comunicación enviada a la sala capitular de Huejutla, venida de Veracruz, era un "parte militar" y no un escrito jurídico, como ahora lo entenderíamos. Pero debemos comprender que entonces el ejército gozaba de amplias facultades otorgadas por el ejecutivo.

(61) La Constitución a la que nos referíamos, cuando hablamos de inconstitucionalidad, era a la restablecida por el triunvirato a la caída de Iturbide, que sería más bien el proyecto elaborado en 1822 por el Primer Congreso Constituyente, el cuál fue suplido por la junta impuesta por el Imperio.

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pública, administración de justicia y comercio. La pretensión de Manuel Fernando Soto se basa en la idea de organizar una serie de caminos y *ramales* que permitan el paso de mercancías entre el puerto de Tampico, la Ciudad de México y el centro de la República. Un tercer capítulo refiere a los beneficios nacionales que generaría el nuevo estado:"1^0. La necesidad de erigir el nuevo estado inmediatamente, para ligar los intereses del centro de la República con la frontera, y evitar así la segregación de ésta. 2^0. La necesidad de erigirlo para impulsar la colonización extranjera. 3^0. La necesidad de erigirlo inmediatamente para evitar la guerra de castas" (62).

En las conclusiones, el licenciado Soto recalca los beneficios que obtendría la zona de la Huasteca y sus 300 mil habitantes. Curiosamente en el escrito no se menciona para nada el posible nombre del nuevo estado, las discusiones del Congreso extraordinario Constituyente daban ya por supuesto que el nombre sería el del primer emperador mexicano, Agustín de Iturbide, lo referente al nombre se verá a continuación.

El *Plan de Ayutla* se tradujo en el *Estatuto Orgánico Provisional* de 15 de mayo de 1856 y que legislativamente tenía por finalidad crear una nueva constitución. En 1856 comienza el proceso de elaboración de la Carta Magna, acuden Ponciano Arriaga, Melchor Ocampo, Valentín Gómez Farías, Santos Degollado (63), Francisco Zarco e Ignacio Vallarta. Por el Estado de México, además de los tres mencionados al principio, Guillermo Prieto, Manuel Fernando Soto, José Luis Revilla y Vicente Riva Palacio. Es importante hacer notar que de los trece diputados que llegaron a la presidencia, sólo cuatro no eran mexiquenses, además de que muchos de los diputados del Estado de México tenían ya en la mente la creación de un nuevo estado.

El tema fue ampliamente discutido en la sesión del 31 de mayo de 1856 el ministro de gobernación, el señor Lafragua, hablando sobre el estado de Iturbide prefirió no ahondar más en el mismo, por lo complicado del tema. En la sesión del 4 de julio, el señor Isidoro Olvera, diputado por el Estado de México, reitera la guerra de castas que se vivía en Yucatán e insta a que se agreguen al estado de Guerrero los territorios de Cuernavaca y Cuautla para evitar un enfrentamiento

(62) David Lugo Pérez (comp.), *Hidalgo, documentos para su creación*, Pachuca, IHDECIS, 1994. Sobre los argumentos esgrimidos por Soto cabe decir que se refería el primero, a las constantes quejas los estados de la frontera de estar completamente aislados y de los constantes levantamientos, el segundo, que entonces se creía que a imitación de Estados Unidos, las grandes porciones de territorio inhabitado podían ser llenadas con europeos que darían cohesión al territorio, y por último para evitar las luchas entre grupos indígenas y hacendados, en este punto se resalta el problema que representa en la administración de justicia la diferente gama de dialectos que existían y que los jueces desconocían.

(63) Fungieron como presidentes.

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parecido, y por la misma razón propone que se erija el estado de Iturbide. En la misma sesión, don Ponciano Arriaga dijo que desconocía la situación de los pueblos que conformarían el nuevo estado por lo que no estaba del todo convencido, pero que apoyaría el proyecto si veía su conveniencia. Tres días después, en otra sesión, el señor Ignacio Ramírez opinó que era tiempo ya de responder a las demandas de los pueblos de la Huasteca que solicitaron su independencia. En la sesión del 13 de diciembre, el mismo diputado, en una adición al dictamen de la Comisión de División Territorial, pidió se erigiera el estado de Iturbide. En la sesión del 15 de diciembre, el señor Díaz González dijo que tenían más derecho a erigirse como estado Cuautla y Cuernavaca que el del Valle, el de Iturbide o Tlaxcala. En la sesión del 16 de diciembre, se discutió el voto particular de Díaz González hecho el 27 del mes anterior como individuo de la Comisión de División Territorial. El cronista del Congreso, Francisco Zarco, salió en defensa de las ciudades de Pachuca y Tulancingo, de las cuales "…el estado más rico y poderoso de la República no puede cuidar…", refiriéndose al Estado de México. Ese día, la discusión se centró en el desechamiento del tema de la creación del nuevo estado, pero se estuvo de acuerdo por la mayoría que el Estado de México descuidaba a sus poblaciones (64).

A lo largo de estas sesiones del Congreso, se habló de dos conceptos: *La Comisión de División Territorial* y *los límites del estado de Querétaro*. La Comisión fue creada en el seno del Constituyente para resolver la interrogante de muchos legisladores sobre una mejor redistribución del territorio; el dictamen dado por esta Comisión fue el que originó los diversos debates, y resulta interesante, pues expresa el sentir ilustrado de aquella época de reconstrucción del federalismo: "la diversidad entre las demarcaciones administrativas, judiciales y religiosas, la circunstancia de encontrarse confundidos los límites políticos e indeterminados, los naturales, la posición excéntrica de algunas localidades de sus capitales y el considerable número de esas entidades, inconvenientes y anómalas, a las que impropiamente se ha dado el nombre de territorios, son otras tantas rémoras para el planteamiento de cualquier sistema constitutivo" (65). Nuestros legisladores comenzaron a darse cuenta que la "excesiva fidelidad" (66) en la copia de la constitución estadounidesne no había funcionado del todo, pues aquí la unión necesaria en el federalismo se dio a la fuerza.

En casi todas las discusiones tendientes a la creación, tanto del estado de Iturbide como al del Valle de México, se discutía también sí la residencia del Distrito Federal en Ciudad de México o debía cam-

(64) Francisco ZARCO, *Historia del Congreso Constituyente de 1857*, México, Tribunal Superior de Justicia del Distrito Federal, 1992.

(65) *Ibidem*.

(66) Crítica hecha en el Dictamen de la Comisión de División Territorial a la Constitución de 1824, *vid.* ZARCO, Francisco, op. cit..

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biarse a Querétaro y entonces disminuir el Estado de México aumentando el nuevo estado del Valle de México o creando el de Iturbide. Los debates más interesantes se dieron en el seno del Congreso cuando se discutían los artículos 49, 50 y 51 del proyecto que después fueron retirados. El artículo 49 correspondiente al 43 de la Constitución, enunciaba "Las partes integrantes de la Federación" (67).

Este artículo es el que iba a ser discutido una vez tenido el dictamen, y fue enviado al Congreso el 26 de noviembre por la *Comisión de División Territorial*. También se emitieron votos particulares y adendas a este dictamen, como la de Díaz González, en defensa del Estado de México, al que pretendían diseccionar. Su defensa resultó favorable, pues tuvo que pasar una década para que el "Estado coloso, el Estado monstruo" perdiera los territorios que formarían el estado de Hidalgo y el de Morelos. Los argumentos son interesantes: "...por economizarse hoy muchos gastos que son precisos en el régimen ordinario del Estado, no puede cubrirse el actual presupuesto… la paralización y trastornos que sufre el comercio por el odio que se le tiene en el estado al inmoral sistema de alcabalas...". Este reclamo hecho al Estado de México y del que se defiende Díaz era cotidiano, y se refería a un sobrante en la recaudación de impuestos hecha en 1852, que dio origen a una crítica por el despilfarro de los gobernantes mexiquenses, así, el diputado argumentó sobre la pobreza del estado y la cual se veía en sus caminos y poblados a "saber la miseria de …Tepeji del Río, Soyaniquilpam y Tula...". Este será un argumento a favor de la creación del estado de Hidalgo pues la pobreza se decía, era producto del olvido del gobierno estatal.

La tesis federalista va a quedar "definitivamente consagrada en la Constitución de 1857" (68), y aunque mas adelante analizaremos la creación de un estado en el contexto del sistema federal, será bueno mencionar desde ahora que la erección del de Hidalgo en 1869 fue realizada bajo esta Constitución. La exposición de motivos señala la importancia que tuvo este ordenamiento en la posibilidad de desterrar el sistema centralista que, en 1836 y 1843, aquejó a la República. "¿Qué prestigios podía tener en la actualidad una Constitución central, ni qué bienes había de dar al país este funesto sistema de gobierno, que se identifica con todas nuestras calamidades y desgracias (69)?" La lente con la que se veía la reforma era la del sistema estadounidense, a tal grado que, como ya se apuntó, se pensaba hacer una copia idéntica del sistema federal y crear una ciudad especial para hospedar la capital, quitando este rango a la ciudad de México. No pocas veces la discusión

(67) *Idem*, p. 318.

(68) Jacinto Faya Viesca, *El federalismo mexicano. Régimen constitucional del sistema federal*, México, INAP, 1988, p. 77.

(69) *Exposición de motivos de la Constitución Política mexicana de 1857*, citada en Jacinto Faya Viesca, *El federalismo mexicano*, op. cit., p. 76.

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giró en torno al cambio de los poderes federales y a la creación de nuevos estados, en cierto sentido, sonaba lógico intentar una copia estodundidense, pues se observaba el apogeo que la nación vecina iba adquiriendo, por otro lado la base de la reforma era la Constitución de 1824, que tenía todo el sello de las trece colonias. La crítica que aquí cabe hacerse es la aplicable a cualquier copia la falta de creatividad y el problema de la adptabilidad de una sociedad a un sistema a veces estrecho (70). La política tiene como particular elemento el uso de la prudencia ese "saber obrar", y a nuestros legisladores les faltó originalidad para crear, en un caso concreto como era nuestro país, un sistema concreto de gobierno y de organización política. (71) Mucho se ha dicho sobre el particular, pero lo que es evidente es que México no era un conjunto de colonias aisladas, sino una nación de privilegios y corporaciones (en el sentido más sociológico de la palabra). Encontramos en la Carta Magna del 57 el resultado de la eterna paradoja entre cambiar y subsistir, pero no debemos caer en maniqueísmos oficialistas, pues ni los conservadores omitieron el progreso, ni los liberales se despojaron en un instante del antiguo régimen. De ahí que la reforma tenga algo de bueno y algo de malo, el cambio de realidad era el objetivo de la Constitución de 1857, pero se excedió (72), porqué el derecho implica sociedad y ésta no cambia por que un ordenamiento lo diga (73).

También es cierto que la situación de aquel entonces era deplorable y era necesaria una transformación, pues no había en los pueblos más que "fuertes y multiplicadas gabelas, sin recibir jamás en cambio ningún género de protección ni beneficios, de que en tal sistema de gobierno, una gran capital lo absorbe todo, pero nada devuelve, dejando a las infelices poblaciones lejanas de la circunferencia entregadas a su propia suerte y olvidados en su miseria y abandono". (74) Estas palabras son las mismas esgrimidas por los defensores de la creación del estado de

(70) Sobre el problema de la adaptación de un ordenamiento extranjero a una sociedad diversa de aquella para la que fue creado, nuestro trabajo: *Recibir y Concebir el derecho en la historia,* en: Revista Telemática de Filosofía del Derecho, no. 7, España, año 2004, http://filosofiayderecho.com.

(71) Como un símil de lo que pasó en 1857 podemos decir que fue como lo que ocurriría si un médico recetara la misma medicina para un segundo paciente que tiene una enfermedad parecida a uno que le antecedió, el resultado podrá deducirse, y es que o tiene suerte el médico y le asienta bien el medicamento o le causa un daño. En mi opinión en México pasó lo segundo.

(72) Jorge CARPIZO, Conferencia: *Hacia una nueva constitucionalidad*, Instituto de Investigaciones Jurídicas de la UNAM, el 2 de febrero de 1999.

(73) La política debe ser ascendente, es decir, ir de los sistemas de organización social más simples a los más complejos, y de éstos al gobierno. El problema mexicano se ha llamado paternalismo, la política se hace en Palacio Nacional y los actos de gobierno se distribuyen más que para favorecer, para justificar. Si un plan nacional determina crear mercado en ciertos municipios convendría saber si no en algunos de esos municipios son más necesarios hospitales, y la única manera de saberlo es preguntarlo.

(74) *Exposición de motivos…*, op. cit., nota 103.

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Hidalgo, lo que nos hace pensar primero que era un sentir generalizado, y en segundo lugar, que se plasmó de alguna manera en el ordenamiento elaborado por el constituyente de 1856, aunque como ya vimos no se logró que en aquél documento se reflejara la realidad.

La creación jurídica de estados, ha sido vista por la doctrina como el punto de cosolidación del federalismo mexicano "(el) régimen federal adoptado en la Constitución de 1857 se fue consolidando, al menos en el aspecto jurídico-constitucional, mediante la asunción de dos modalidades: la creación de los Estados de Coahuila, Hidalgo y Morelos y el establecimiento del Senado…" (75). Es un modo en que el Federalismo artificial se justificó, permitiendo procesos democráticos (o por lo menos así nos lo hacen saber) en el que una sociedad organizada podía ser aceptada, con una personalidad jurídica propia y la con posibilidad de participar a su propio gobierno. Un trinomio que se expresa como: participación popular/republicanismo/federalismo democrático. En esta suerte de *teoría general de la erección de una entidad federativa*, se sostiene otra más conocida que se llama *teoría general del Estado*, él cuál se *constituye* y se *modifica* hacia su interior y que algunas veces observa momentos críticos que amenazan su existencia. Pero que deja ver también su vulnerabilidad y partes menos auténticas que rayan en la artificialidad. El qué una entidad federativa sea creada hace suponer que pueda existir un proceso similar para un Estado nacional, siempre y cuando no nos olvidemos los ingredientes necesarios: Población, territorio, gobierno, ley; agregaríamos como elementos fruto de este estudio: la identidad de grupo y la necesidad social y económica.

Los diputados al Congreso, Justino Fernández, José L. Revilla y Alejandro Garrido, formularon el 13 de noviembre de 1861 una propuesta a Benito Juárez. Era una petición en nombre de algunos de los pueblos del Estado de México y en el sentido de crear uno nuevo, pues es "una de las más justas y apremiantes exigencias de la época".

Los habitantes de las municipalidades del norte del Estado de México después de soportar una guerra civil que los había menguado económicamente, se quejan de tener muy poco que ver con su capital, en donde se quedan la mayoría de sus contribuciones, en cambio en sus poblados no se ve mejora alguna. Esta propuesta es ya constitucional y con el afán de llenar los requisitos que la Carta Magna solicitaba.

Más que una petición para la erección, es una petición de apoyo al presidente de la República, apoyo político, en información en cuanto a "datos estadísticos", y para que una vez creado el estado este lleve el nombre del *Padre de la Patria* (76). Esto nos hace pensar que el ejecutivo

(75) *El Federalismo…*, op. cit., p. 67.

(76) Miguel Hidalgo y Costilla, párroco criollo del pueblo de Dolores Hidalgo, Guanajuato, formaba parte de un grupo de ideólogos liberales de la independencia mexicana. Es considerado el precursor del movimiento independentista después del famoso *Grito de independencia*: La noche del 15 de septiembre de 1810, después de

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estaría muy bien informado, y es más, estaba de acuerdo con la erección. Por este hecho historiadores como McGowan han llegado a decir que la erección del estado de Hidalgo fue un ardid juarista, que tenía miedo del poder que ejercía el Estado de México sobre la capital como asiento de los poderes federales. Hemos de decir que además de ser inverosímil este argumento es atacable, primero por que antes de la creación del estado de Hidalgo, se tenía pensado el traspaso de los poderes de la federación a otro lugar y, por otro lado, la decisión de crear el estado de Hidalgo no fue voluntad presidencial, sino como lo muestran los cientos de cartas de los pueblos, el querer de la mayoría, y por razones que a simple vista resultan objetivas y lógicas.

A efectos de que la iniciativa de dividir el Estado de México fuera popular, se señala que un día determinado las municipalidades acudirían a una junta local con el fin de votar sobre la propuesta. El acudir en un día fijo evitaría cualquier presión de otro pueblo. La respuesta de los pueblos no se hizo esperar y hubo cartas de todos los interesados para la fundación de la nueva entidad. La sociedad estaba convencida, el Poder Ejecutivo también pero faltaba la parte más importante, convencer al Congreso, entonces lleno de espíritus críticos, tan rico en buenos pensadores por esos años. Pero esta discusión tendría que aplazarse hasta que Maximiliano cayera muerto en el Cerro de las Campanas en 1867.

Juárez resolvió la petición de los diputados hidalguenses, al día siguiente de hecha con una negativa rotunda. En cambio se apresta a dividir en villas el Estado de México. (77) Tenemos que esperar para tener un 'estado de Hidalgo'.

La caótica vida nacional de mitad del siglo XIX es determinante para el análisis de la conformación de muchas de nuestras instituciones. En aquel entonces se creó el juicio de amparo, comenzó la vida legislativa y se organizó la república. Brillaron entonces los literatos, letrados, políticos, diputados; las dificultades forjaron caracteres recios y críticos. Las dificultades a las que nos referimos no son otras que la inestabilidad que obligaba a las familias a moverse de un lado a otro

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sonar las campanas de la parroquia, sale a la plaza pública con un estandárte de la Virgen de Gudalupe y 'grita' una serie de consignas (hasta hoy en discusión) congregando a los indígenas del pueblo, se pone después en camino hacia Guanajuato para comenzar la lucha de independencia junto a los demás insurgentes que se encontraban en aquella ciudad, a su paso por cada pueblo, va reclutando personas para la lucha insurgente. Sin conocimientos militares va 'conquistando' diversos puntos del centro del país hasta que cae preso, y muere decapcitado. Estos acontecimientos desencadenaron la lucha de independencia que terminaría un siglo más tarde. La historia del *Padre Hidalgo*, es vista, aún si bien romanticamente, cómo la primera manifestación seria de independencia de los territorios bajo el dominio español.

(77) Valentín López González, *Cómo nació el estado de Morelos a la vida institucional. 1869*, Cuernavaca, Gobierno del Estado de Morelos, Ed. Centenario, 1968, p. 17.

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huyendo de las tropas, ya fueran interventoras o nacionales, pues implicaba requisas, robos, despojos, abusos; y todo en nombre de la guerra, en donde "todo se vale". Hidalgo entonces, era paso obligado hacia la capital, por lo que desde la intervención norteamericana el territorio hidalguense fue corredor militar. Ya en 1847, en Huejutla Francisco Garay había encabezado la línea de defensa contra el avance norteamericano exitosamente (78). Durante la intervención francesa es famosa la heroica defensa de los *chinacos*, guerrilla local que tras incendiar una cabaña en la que se hallaban las fuerzas francesas lograron el repliegue de la retaguardia y con esto un parcial pero honroso triunfo sobre el ejercito interventor, entonces el más poderoso del mundo (79).

Pero más que los logros militares, nos interesa la cuestión político territorial, cuestión de gran importancia en este recorrido histórico geográfico. Por decreto expedido el 7 de junio de 1862 se establece que el territorio del Estado de México formaría tres distritos para la mejor defensa y organización del territorio.

El segundo distrito quedó conformado como el actual estado de Hidalgo, por una razón práctica y sencilla, la igualdad de costumbres y la similitud de sus pobladores. El distrito militar tenía independencia fiscal y para efectos prácticos se le daba el tratamiento de estado y tomaba el nombre de su cabecera. Tendría como jefe de gobierno a un comandante; los dos primeros fueron Pedro Hinojosa y Manuel Fernando Soto, este último es aquel que hemos mencionado como promotor de la división del Estado de México y la creación del nuevo (80). El segundo distrito militar, al igual que los demás, tendría independencia administrativa y política, es decir que sus diputados los elegiría a través del voto, dependiendo del número de habitantes, que este caso era de 391, 907.

Es importante resaltar que cada distrito contaba con un Tribunal Superior de Justicia, por lo que la organización judicial la hacía cada distrito (81).

El decreto de 7 de junio de 1862 le concedió la posibilidad de elegir diputados (82), este decreto que en realidad es de un día anterior, aunque su publicación fue el día 7, reglamentaba sobre los once

(78) Ana Lau Jaiven y Ximena Sepúlveda Otaiza, *Hidalgo, una historia compartida*, op. cit., p. 115.

(79) Citado por Enrique Rivas Paniagua, *Hidalgo, entre selvas y milpas…*, Pachuca, SEP, 1987.

(80) No olvidemos que fue gobernador del Estado de México y diputado en el Constituyente de 1856.

(81) Juan Manuel Menes y Raúl Guerrero, *Historia de la administración de justicia en el estado de Hidalgo*, Pachuca, Gobierno del estado de Hidalgo, 1983, pp. 35.

(82) Dublan y Lozano, op. cit., no. 5654, pp. 474-475.

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cantones militares erigidos en decreto de 22 de mayo de 1862 (83), promulgado por el general Francisco Ortiz de Zárate, quien tenía facultades especiales, facultades que poseía también el general Felipe Berriozabal, y que otorgaba el ejecutivo por conducto de los ramos de Hacienda y Guerra y para defender al estado de las invasiones y conflictos populares (84).

La época que estamos narrando es una de las más ricas en acontecimientos y así mismo determinante para la creación del estado de Hidalgo. La riqueza de esta época se manifiesta en la literatura; así algunos autores plasmaron en sus obras la situación social que se vivía no sólo de manera general en el territorio nacional, sino concretamente en el Estado de México. Ignacio Manuel Altamirano refiriéndose a la prefectura de Yautepec en 1854 narra en su novela El Zarco: "Por aquel tiempo y en aquellas comarcas, tales hechos no eran, por desgracia, sino frecuentes. Los bandidos reinaban en paz, pero, en cambio, las tropas del gobierno, en caso de matar, mataban a los hombres de bien... estando el país de tal manera revuelto...que nadie sabía ya a quien apelar..." (85). El mismo autor cuenta en su novela llamada *Clemencia* las peripecias de una familia jaliciense que huye de las fuerzas francesas en 1863-64, y así dice de la situación: "... las legiones francesas, acompañadas de sus aliados mexicanos, avanzaban sobre poblaciones inermes que muchas veces se veían, obligadas por el terror, a recibirlos con arcos triunfales, y puede decirse que nuestros enemigos marchaban guiados por las columnas de polvo de nuestro ejercito que se replegaba delante de ellos" (86).

Los caminos eran malos y las lluvias los hacían intransitables. Esta falta de comunicaciones originó una independencia administrativa. Por lo que en 1862 para la defensa de la nación, el estado se partió en tres *distritos militares* y la organización interna fue sencilla y dio buenos resultados (87).

Un *distrito militar* no correspondía necesariamente a un estado, sino que era una forma de organización territorial que preveía la entonces Secretaria de Guerra para poder repeler los posibles ataques de los ejércitos invasores; cuando el gobierno civil se veía de alguna manera debilitado, y era muy común observar esto en el siglo XIX en todo el territorio nacional. A cargo del *distrito* estaba un *gobernador*, que podía ser un civil o un militar, pero que en su posición de "jefe

(83) Valentín López González, *Como nació el estado de Morelos*..., op. cit., *supra*, p. 21.

(84) *Ibidem.*

(85) Ignacio M. Altamirano, *El Zarco*, Porrúa, México, 196, p. 42, Col. "Sepan Cuantos", no. 61, p. 125.

(86) Ignacio M. Altamirano, *Clemencia*, Porrúa, México, 1973, p. 4, Col. "Sepan Cuantos", no. 62.

(87) Primero se dividieron en once *cantones*.

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supremo" de esa región adquiere, en el momento de su investidura, una *comandancia militar*. La organización judicial se conserva y sólo se fragmenta (88), al igual que las oficinas del fisco y los municipios. Acerca de los *distritos militares* como de las *comandancias* hay muy poco escrito, pues todo se manejaba a través de decretos y órdenes internas que se conservan en archivos militares.

El 19 de junio de 1863 una parte del ejército francés ocupó Pachuca y Tulancingo, y el año siguiente Maximiliano llegaba a costas mexicanas para iniciar su gobierno. No paso mucho tiempo para que el austríaco mostrara su fluctuante política.

El segundo imperio vino a reconocer muchas de las viejas formas de organización territorial. Manuel Orozco Berra entregó en 1865 un documento que planeaba dividir el territorio en 50 *departamentos*, y argüía tres elementos de división: Un mayor número de fracciones políticas; Respeto a los límites naturales; Posibilidad de subsistencia de la unidad territorial dividida (89).

Se intentaba, entonces, respetar la existencia de las regiones sancionadas legalmente, es así que para el Estado de México habría seis divisiones (90). Estos *departamentos* se dividirían en ocho *distritos* cada uno y estos a su vez en *municipalidades* (91).

En 1862 se erigió el estado de Campeche, que antes era un distrito que pertenecía a Yucatán (92), y por decreto de 26 de febrero de 1864, se divide Nuevo León, para dar origen a Coahuila, que el 18 de noviembre de 1868, se constituyó en un nuevo estado (93).

En 1866, el territorio del actual estado de Hidalgo pasó a manos de los republicanos, y en 1867, el resto del territorio nacional. Desde entonces las municipalidades prehidalguenses comenzaron nuevamente con sus ocursos, comunicados y peticiones para la erección del estado: la voluntad popular se manifestaba en este sentido. Ahora correspondía a quienes la encarnaban hacerla realidad.

6. *El federalismo y la constitución de nuevos estados.*

Durante gran parte del siglo XIX se dieron discusiones sobre el

(88) Es decir, que se conservan los mismos tribunales, con la peculiaridad de que se instituye, de no haberlo, un Tribunal Superior de Justicia.

(89) Georgina Moreno Coello, *El Estado de México*..., op. cit., supra, p. 137-138.

(90) Vicente Riva Palacio, *México a través de los siglos: historia general y completa del desenvolvimiento social, político, religioso y militar, artístico, científico y literario de México desde la antigüedad más remota hasta la época actual*, Ballesca, México, 1899, 5 vols., vol. V, p. 692.

(91) Edmundo O'Gorman, *Historia de las divisiones territoriales de México*, México, Porrúa, 1979, pp. 163-165.

(92) Dublán y Lozano, Col. 5563.

(93) Dublán y Lozano, Col. 6457.

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sistema de gobierno que nos habría de regir, y al final de las cuales, las armas decidieron que sería el *federalismo*, utilizado de manera clara desde el triunfo de la Constitución de 1857 pero que se fortalecería hasta la década de los 70' s, con la institución del Senado. Desde entonces, nuestra particular forma de organización estatal es la de una federación, lo que implica, entre muchas otras cosas, la coexistencia de dos órdenes jurídicos; una Constitución que establezca las bases sobre las cuales se desarrollará la vida política y todo el sistema social (94), órdenes jurídicos derivados, como lo son las constituciones de los estados miembros de la federación, sus leyes, sus propios poderes; autonomía de los estados miembros y mecanismos de preservación de la integridad del orden, que implica la participación de los estados en las reformas a la Constitución Federal y un sistema de resolución de conflictos de competencia (95).

Desde la Constitución de 1824 se planteó la posibilidad de que un sistema federal como el mexicano, pudiera erigir algunos territorios en estados (96) o agregarlos a los existentes. (97) En el caso de la región que nos ocupa, los pueblos del actual estado de Hidalgo enviaron comunicaciones al primer Congreso Constituyente para su erección como estado, pero otras zonas con más posibilidades económicas y en donde habría más interés desviaron su atención del estado de Hidalgo; de hecho sabemos que otros territorios como el de Guerrero, que eran de evidente conformación, tuvieron que esperar mejor oportunidad. Esta participación por crear una federación es mencionada en los discursos de M. Crescencio Rejón o el de fray Servando Teresa de Mier, en donde hablan expresamente de las misivas enviadas por los pueblos al Congreso, aunque el primero lo calificaba como una evidencia del deseo de las provincias de participar en la formación de un Estado y el segundo como una falsa democracia que no se sabía manejar.

El centralismo tuvo no sólo una, sino dos oportunidades de ser aplicado en México pero no se compara con los casi 130 años ininterrumpidos que mantiene el federalismo, aún si se quiere con todas sus

(94) En países con un régimen centralista no es necesaria una constitución escrita, porque sólo existe un orden jurídico que necesita de reglas en un solo sentido. En el sistema federal son dos los órdenes jurídicos y por eso se necesitan dos tipos de reglas.

(95) Cfr. José Gamas Torruco, *El federalismo mexicano*, México, SEP, 1975, Col. Sep/SETENTAS.

(96) La parte expositiva del proyecto de la Comisión de 19 de noviembre de 1823, que se encuentra en los debates del acta constitutiva de la federación, nos habla del espíritu federal y lo encierra en el principio general: "(los estados) ni fuesen tan pocos que por su extensión y riqueza pudiesen en breves años aspirar a constituirse en Naciones independientes, rompiendo el lazo federal, ni tantos, que por faltas de hombres y recursos viniese a hacer impracticable el sistema" en: Edmundo O'Gorman, *Historia de las divisiones territoriales de México,* México, Porrúa, 1979, p. 171, n. 5.

(97) Héctor Contreras Rodríguez, *El debate sobre el federalismo y centralismo*", México, Cámara de Diputados, 1971, p. 72.

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grandes deficiencias. Un análisis utilitarista podría hacer pensar que el *sistema federal* era justamente aquello que necesitaba México para conformarse como Estado moderno; de hecho si se leén las actuales críticas a nuestro federalismo, es muy raro que se encuentre alguna que vaya en el sentido de erradicarlo y volver al centralismo, es más bien el apunte sobre sus defectos en el plano municipal, fiscal y electoral, pero no en su esencia misma.

Hasta aquí queda claro que el federalismo mexicano es especial y tiene sus propias características. En el año 1868, cuando Benito Juárez volvió al gobierno después del segundo imperio y fue restituida la Constitución de 1857, comienza México a vivir su federalismo, que de facto se interrumpió con el porfiriato; no obstante, una muestra clara de que se intentaba dar el mejor cauce a nuestra forma de organización política es la petición de formar estados, entidades federativas, que dentro de la federación buscan mejorar su situación social y económica. En un inicio el federalismo mexicano se fundaba, o por lo menos así se decía, en la identidad social de un determinado grupo. Aunque pareciera en algunos casos que la afirmación de identidad de un grupo y por tanto la autonomía, fueran un ataque al federalismo, lo anterior en el caso que nos ocupa funcionó como pretexto o justificación, dentro del territorio del Estado de México existiría un grupo con determinadas características de identidad, con antecedentes históricos y cosas para probarlo, que buscaba se reconociera su organización dentro del marco del federalismo. La federación tendría entonces la obligación de estudiar el caso y ver si era viable la petición, pues podría iniciarse una división infinita de las entidades, cosa que un municipio fortalecido abatiría; y se deben prever los sistemas de resolución de conflictos que se originarán entre las partes resultantes. Es algo parecido a lo que ocurrió con las provincias al inicio de nuestro federalismo, eran territorios que iban a acoplarse a una organización común como lo era la federación, no es que se crearan o se formaran estados.

Hidalgo, era un territorio que quería ser estado, porque así había funcionado como corporación política, desde la formación del segundo distrito lo que ocurría era que el *Pacto federal* no le reconocía tal condición. La muestra más palpable era la capacidad de organización que adquirió siendo segundo distrito militar (98).

Una vez aclarado que fue muy sano para nuestro federalismo reconocer la calidad de estados a algunos territorios, como lo fueron en su caso Hidalgo y Morelos, sería pertinente a analizar, cuál es el *iter iuris* que se siguió, así como los actores, para lograr "*la división del Estado de México y la formación de uno nuevo con el nombre de Hidalgo*", nombre del expediente oficial, que en este caso funge como acta de nacimiento de nuestro estado.

(98) Decreto de 7 de junio de 1862. Benito Juárez, Dublán y Lozano, t. 9, p. 473.

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7. *Manual para formar un nuevo estado.*

De acuerdo al artículo 72, fracción tercera, de la Constitución de 1857, el territorio que quisiera formar un nuevo estado, debía cumplir ciertos requisitos: *"El Congreso tiene facultades:...* III. Para formar nuevos estados dentro de los límites de los existentes, siempre que lo pida una población de ochenta mil habitantes, justificando tener los elementos necesarios para proveer a su existencia política. Oirá en todo caso a las Legislaturas de cuyo territorio se trate, y su acuerdo sólo tendrá efecto, si lo ratifica la mayoría de las Legislaturas de los estados".

Se intentó llenar cada uno de los requisitos de manera exhaustiva, a pesar de las renuencias del poder ejecutivo federal y de la disidencia de los diputados mexiquenses. Poco interés mostró Benito Juárez, entonces presidente de la República posimperialista, ante las numerosas misivas que pedían la erección de los estados de Morelos y de Hidalgo; Juárez había decretado, no su reconocimiento sino el cese de los gobernantes de los distritos militares y la convocatoria a elecciones (99).

Las autoridades y los vecinos, enviaron un ocurso en 1868, es decir apenas terminada la guerra de intervención. En él se expusieron las siguientes razones: "...el retardo que sufren los negocios, ya civiles, ya criminales en la administración de justicia..., durante la intervención el distrito únicamente, contaba (en su ejercito) con trece mil hombres, muchos más que el propio Estado de México..., las rentas ascienden a cuarenta mil pesos mensuales... y la población es cerca de medio millón de habitantes" (100).

Dentro del Congreso debían participar dos comisiones específicas, la de gobernación y la de puntos constitucionales, la primera para analizar la erección del nuevo estado, y la segunda para hacer las reformas pertinentes en la constitución. Antes debía mediar una iniciativa de reforma que, en virtud del artículo 190 de la carta magna del 57: "... deberán estar suscritas por cinco diputados o iniciadas por el Gobierno, de acuerdo con su consejo, o por el tribunal superior en el ramo de justicia, siempre que estuviesen conformes las dos terceras partes de sus miembros presentes".

En este caso, la propuesta fue enviada a la Secretaría del Congreso de la Unión el 13 de diciembre de 1867, la cual remitía a la propuesta que mencionamos, hecha en 1862, en el mismo sentido, y en la cual se

(99) El decreto de 14 de agosto de 1867 de Benito Juàrez, convocaba a elecciones en el Estado de México y pedía el cese de los gobernadores de los distritos militares dentro de los 15 días siguientes. Para el 20 de noviembre de ese año debería de estar ya integrado el nuevo congreso local. López González, Valentín, Como nació el estado de Morelos..., op. cit., *supra*, p. 21.

(100) David Lugo Perez (comp.), *Hidalgo, documentos...*, op. cit., *supra*, p. 332.

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habían recogido cartas de la mayoría de los pueblos del estado a favor de la erección del estado de Hidalgo. Firman más de cinco diputados, entre ellos: Antonio Pérez de Tagle, (101) licenciado Manuel F. Soto (102), licenciado José L. Revilla, licenciado Cipriano Robert, licenciado Protasio Pérez de Tagle, M. Villamil, Agustín de la Peña Ramírez, A. Garrido, licenciado Justino Fernández, Juan Sánchez Azcona, Ismael Castelazo, Juan C. Doria (103), Atenógenes M. Guerrero, F. Mejía, A. Espejel y Blancas, Gabriel Mancera, licenciado Gabriel María de Islas, Juan Ramírez, Luis Medrano, Margarito García, José S. Unda, F. Castañeda, licenciado José Justo Benitez, Angulo Gudiño Gómez y R.G. Páez.

Sobre la discusión de las proposiciones, el artículo 109 constitucional señalaba: "El Congreso se limitará únicamente a declarar si las proposiciones merecen sujetarse a discusión y hará que se publiquen si las calificaren admisibles las dos terceras partes de los diputados presentes, reservándose su deliberación y resolución al Congreso siguiente".

Por tanto se hizo encargo a las citadas comisiones de que dictaminaran sobre las peticiones, tanto la reciente de 1867 como la de 1862, cabe mencionar que muchas de las cartas enviadas por los pueblos al Congreso, se habían extraviado y sólo se contaba con las publicadas en el *Diario Oficial*. Las comisiones de gobernación y puntos constitucionales consideraron que era pertinente pedir un informe al congreso local del Estado de México, pues así sería más fácil volver a reunir el expediente perdido.

Parece ser que la parte que estaba a favor de la división del Estado de México salió victoriosa en la legislatura mexiquense, puesto que el informe que se remite al Congreso general, no sólo contiene las copias de los documentos solicitados, sino que vuelve a hacerse todo un escrito detallado, para motivar y fundamentar la necesidad de la erección del nuevo estado. Quizá esta fue una de las oportunidades en que la división de poderes podría resultar, puesto que la legislatura del Estado de México habló de las fallas gubernativas que existían en materia de impuestos, seguridad pública, administración de justicia, mal aprovechamiento del presupuesto; y además agregó lo que denominaríamos

(101) Hermano de Protasio, dueño de una hacienda en los llanos de Apan y primer gobernador por elección del estado de Hidalgo. En 1876 en el mes de agosto, "ante la proximidad de los comicios, para fortalecer su posición, (Juárez) llamó a colaborar a políticos sumisos y adictos, y, desconfiando de algunos de sus colaboradores, reintegró el ministerio como sigue:... Antonio Tagle al frente del Ministerio de Fomento", cfr. voz: *Hidalgo*, *Historia de México*, México, Salvat, 1978, t. 10, p. 2154.

(102) Nació en Tulancingo en 1825, diputado al congreso constituyente de 1856-1857, magstrado de la Suprema Corte de Justicia del Estado de México, Gobrenador del Estado de México, estudió la carrera de abogado.

(103) Primer gobernador interino del estado de Hidalgo.

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elementos constitucionales, es decir desglosó el artículo 72 de la constitución, y consideró cumplidos los requisitos; calculan que la población alcanzaba los 502,125 habitantes, con base en el censo que cita Antonio García Cubas en 1854, y realiza una operación de actualización hacia 1868. La superficie sería de 1,300 leguas, es decir 7, 243 kilómetros cuadrados, un poco más del actual estado de Aguascalientes. El valor de la propiedad inmueble $ 21,470,699.00 (104), y los productos de los impuestos unos $ 328,254.00 (105).

Las discusiones en el congreso local, y en concreto en la reunión de las comisiones de gobernación y puntos constitucionales, fueron cerradas: la mitad estaba por la división y la otra mitad en contra; esto es congruente si tenemos en cuenta que la mitad de los diputados del entonces Estado de México pertenecían a los pueblos que querían formar los estados de Morelos e Hidalgo. Curiosamente la comisión citada envió dos informes contrapuestos al Congreso de la Unión, el 19 de febrero de 1868, uno a favor y otro en contra, pues algunos diputados se habían adelantado haciendo un informe con lo que los otros decían eran "documentos privados sin valor" la otra parte de diputados creía que era un ataque a la constitución local y no debía enviarse ningún informe. Finalmente, si se erigían los estados sería con o sin la venia del Estado de México, pues el artículo 72 de la Constitución federal sólo decía "se oirá" al estado a segregar, en este caso al estado de México, pero éste no tenía que aceptar necesariamente.

La sesión de discusiones y los informes tienen igual fecha, y en el segundo informe hubo una queja contra el congreso federal por el poco tiempo que se concedió al estado de México para dictaminar; decía el informe que siendo formalistas no se debería cumplir con la entrega del dictamen, porque el artículo 35, fracción 23, de la Constitución mexiquense obliga a cumplir las leyes del Congreso de la Unión, pero no los decretos; no obstante, ven conveniente analizar la cuestión y dejar atrás los formalismos, aunque consideran que fue muy poco tiempo del que dispusieron y que no se pudo discutir como se debía, y que quizá los pueblos pudieron meditarlo más a fondo (106). Con motivo de la división, se discute la vulnerabilidad de la Constitución, tanto en sentido material como en sentido formal, es decir, se atacaba de algún modo la rigidez del ordenamiento escrito y por otro lado se dividía a un estado, quizá en su perjuicio; esta era la inconformidad de algunos, pero ¿quién puede asegurar que una decisión legislativa será para bien o para mal?

Como ya se dijo, los requisitos que pedía la constitución de 1857

(104) Equivaldrían a unos 2.000.000.00 de dolares actuales.

(105) Juan Alberto Flores Álvarez (comp.), *Expediente sobre la división del Estado de México y formación de uno nuevo con el nombre de Hidalgo*, Pachuca, Universidad Autónoma de Hidalgo, 1986, pp. 31-53.

(106) *Idem*, p. 51.

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para la formación de estados se llenaban de manera amplia. En cuanto a población, se contaba con dos fuentes: la oficial, que había solicitado el gobierno federal a Joaquín Noriega, y la de Antonio García Cubas, que casi era igual en cifras respecto del Estado de México. Sólo que la primera se había realizado en 1854, por lo que el número de habitantes del segundo distrito del Estado de México era de 337,813, y la actualización se hacía con base en una presunción, pues en 1857 se pedía que para formar un distrito electoral debían ser 40,000 los habitantes, y entonces había nueve *distritos*. Más adelante, en el año 1861, aumentaron los *distritos* a once, por lo que se calculaba que la población sería de 440,000. La cifra es cuatro o cinco veces mayor de la solicitada constitucionalmente, de 80,000. La población total de la República mexicana en 1869 era de 8' 812,850; según H. W. Bates, (107) el Estado de México en 1868, año de las discusiones para la creación, era de 1' 212,970, según datos del *expediente de división*.

En cuanto a que tenía que ser presentada solicitud de manera expresa y formal, se hizo un paquete con las cartas de petición de cada pueblo o municipalidad, cartas que entre otras cosas, existían desde 1862.

Acerca de la viabilidad de *constituir* el nuevo estado, se exponían entre otras muchas, la subsistencia que logró el segundo distrito durante la intervención; con sus propias rentas y su buena estabilidad; además la similitud de costumbres, de clima, la identidad en la producción, la homogeneidad de los centros de consumo, los límites naturales. Todo perfilaba a la división, según decir del expediente (108).

Por fin, el 17 de marzo de 1868 la Comisión de gobernación y la de puntos constitucionales somete al Congreso de la Unión algunos acuerdos económicos que comienzan el procedimiento de erección.

1^0. Los pueblos "...que formaron el Segundo Distrito Militar en que fue dividido el Estado de México, por decreto de 7 de junio de 1862, se erigirá un nuevo estado soberano e independiente con el nombre de Hidalgo".

2^0. Este acuerdo se mandará a las legislaturas de los estados para el efecto que expresa la última parte de la fracción tercera del artículo 72 de la Constitución (de 1857).

Por último, la Constitución federal de 1857 dice en su artículo 193 "Las reformas o adiciones que después de oír el dictamen de la comisión respectiva admita el Congreso, previa discusión, por el voto de dos tercios de los diputados presentes, las publicarán los secretarios por la prensa con el dictamen; y el Congreso siguiente en el primer año de sus sesiones deliberará sobre ellas, exigiéndose para su aprobación el

(107) *Estadísticas históricas de México*, México, Instituto Nacional de Estadística Geografía e Inf., 1986, t. 2.

(108) Juan Alberto Flores Álvarez, *Expediente sobre la división...*, op. cit., *supra*, p. 98.

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que estén por la afirmativa las dos terceras partes de los diputados presentes".

Las comisiones unidas de puntos constitucionales y primera de gobernación concluyeron la segunda lectura del informe final necesario para la erección del estado, el 8 de diciembre de 1868, y tres días antes se había dado la primera lectura.

Este dictamen contiene la ratificación de algunas legislaturas de los estados, que hacían mayoría (109). Con esto finalizaba, por lo menos en el plano formal, el proceso constitucional para la creación de un estado. No obstante debían de proveerse los medios necesarios para la constitución material y habría de debatirse el dictamen mismo, cosa que no fue un simple trámite, sino que dio lugar a una pequeña lucha parlamentaria que enriquecería el proceso de erección de la nueva entidad federativa.

En enero de 1868 se abrió el expediente con la petición y, después de girar exhorto al Congreso local del Estado de México para pedir los debates locales referentes al segundo y tercer, distritos (110), las comisiones unidas de puntos constitucionales y gobernación inician un proceso de análisis y de debates que van a culminar en tres discursos dirigidos al Congreso, el último de ellos alcanzó gran fama por ser el emotivo fundamento para la erección, hablamos del discurso de Manuel Fernando Soto, tulancinguense y gobernador del Estado de México durante 1861 y cuyo apellido lleva la ciudad capital del actual estado de Hidalgo. En los debates figuran insignes personajes de la época: Protasio Tagle, Gabriel Mancera y Juan C. Doria, Guillermo Prieto, entre otros. El último debate mexiquense fue el de abril de 1868, fecha en la cual la comisión antes señalada, se dispone a dar su dictamen final; las lecturas fueron el 5 y 8 de diciembre de 1868, y conforme al acuerdo de mayo de ese mismo año se decreta la creación del estado de Hidalgo.

El 13 de mayo del año anterior a la erección del estado, el Congreso constitucional del Estado de México expide el decreto número 37 (111). Este decreto era el primer anuncio de los cambios que se avecinaban en el estado. En su artículo segundo se declara subsistente el distrito político y judicial de Tulancingo, con cabecera en el mismo Tulancingo de Bravo según el artículo 26; por lo tanto se reconocía la creación del distrito hecha el 16 de noviembre de 1867. En el tercero se declara subsistente el juzgado de primera instancia de Apan (112), "... con los

(109) *Idem*, p. 119.

(110) El tercer Distrito es el que formaría también, en 1869, el estado de Morelos.

(111) *Colección de decretos de los congresos constitucionales del Estado Libre y Soberano de México, que funcionaron en la primera época de la Federación: contiene también por vía de apéndice, las disposiciones espedidas (sic) en la época del centralismo*, Toluca, Imprenta de J. Quijano, 1850. Desde 1827 hasta 1897.

(112) Según el artículo 27, constaba de las municipalidades de Zempoala, Tepeapulco y Tlalnalapan, con cabecera en el mismo Apan.

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límites que ha tenido. Son válidas las actuaciones y fallos dictados por las autoridades judiciales de Apan." Una de las causas por las que se pedía la división del estado era la ineficacia en la administración de justicia, y este decreto trata de aminorar las críticas, pero también de algún modo anuncia la separación.

El artículo 18 del mencionado decreto es muy interesante: "...todas las solicitudes relativas a la división territorial, se presentarán al Congreso por conducto del Gobierno". Se anexarían: informes del ayuntamiento, solicitudes del jefe o jefes políticos, el de la junta menor de estadística, un censo, recursos con los que cuenta el distrito, pueblos que lo conformarían, haciendas que contiene en sus límites, así como los ranchos y rancherías. El expediente integrado se hizo publicar en un diario de gran circulación. Es muy evidente que esto perfila dos hipótesis, la primera, tratar de evitar una división territorial general, y la segunda, ir organizando el territorio en vistas de la misma división, ya casi evidente. Lo más probable es que ocurriera lo segundo, tanto por lo ya expuesto sobre los dictámenes del Congreso, como también porque se hubiera visto muy mal que se hiciera con otra finalidad, ya por los pueblos que habían solicitado la creación del estado de Hidalgo, ya por los diputados que se manifestaron en el mismo sentido.

Como es de suponerse, a cada acuerdo del Congreso debía preceder un debate. Así es como en la discusión de los meses de abril y mayo de 1868, varios diputados discutieron sobre los pormenores del asunto; posteriormente, ya aprobada la creación, hubo otros discursos en torno a la misma formación del estado. De este periodo hay dos discursos interesantes: el primero en contra de la erección y hecho por un diputado de apellido Montiel, y el segundo, a favor del diputado Hilarión Frías Soto ambos con fecha 21 de mayo. La crítica del primer discurso defiende los postulados que desde siempre tuvieron los defensores de la integridad mexiquense, es decir, que la división del estado es una maniobra gubernamental para disminuir el poder político del Estado de México, lo interesante es que agrega casos históricos en que, procediendo de igual manera, la federación ha dividido otros territorios. Menciona los entonces recientes casos de Campeche y Coahuila. Pero aún más interesante es que agrega un argumento jurídico nuevo, y es aquel por el cual considera que el artículo 72, fracción III, de la Constitución es insuficiente, pues el peticionario solamente "justificará" que tendrá los medios económicos e infraestructura para sostenerse, pero no especifica cómo se hará tal justificación, en pocas palabras: no se garantiza que el nuevo estado o que aquél dividido podrán subsistir (113).

Manuel Fernando Soto se pronuncia en la cámara el 1^{0} de diciem-

(113) Pantaleón TOVAR, *Historia Parlamentaria del Cuarto Congreso Constitucional*, México, Imprenta de I. Cumplido, 1873.

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bre de 1868, su discurso es enérgico, se apoya en el consenso y en la voluntad de la mayoría de los posibles afectados por la división. Quienes se oponen, dice, son aquellos que quieren el engrandecimiento de sus intereses pero olvidan el interés general, esto se debe a que eran unos cuantos los que se oponían a la erección y la mayoría de ellos eran de la capital del estado. Pero son más las razones a favor que considera Soto relevantes para la erección, que las que están en contra; por mencionar algunas, aduce: la defensa militar que realizaron los pobladores del segundo distrito en la intervención francesa (114), y la misma división para enfrentar a los franceses era una muestra clara de la necesidad de fraccionar al estado. Soto se dedica a apoyar la iniciativa del gobierno federal y no a promover una nueva, con lo que renuncia a sus iniciales pretenciones y sólo agrega y pule aquellas que hace circular en el congreso federal, dando por descontadas aquellas que están por demás demostradas. Expone después el proyecto de infraestructura en obras públicas que pesa sobre el segundo distrito, y considera que esta cuestión "no sólo es nacional, es también internacional", tal vez pensando a lo que en un futuro será la llamada *Autopista Panamericana* (115). En esta lucha parlamentaria que se desarrolla hacia el interior de la Comisión de puntos constitucionales, se ve un Soto que no intenta probar, sino convencer, pues lo que urge es que se apruebe el dictamen existente lo demás se vera 'en la marcha'.

Otro punto de vista a favor de la erección, es el discurso de Hilarión Frías Soto, diputado mexiquense que el 21 de mayo del 68 debate acerca de lo conveniente que sería formar el estado de Hidalgo. El discurso sigue el camino más sencillo y ataca el punto más débil de los opositores a la erección: el Estado de México no puede ya atender en ningún sentido a la porción que solicita la división. La justicia es lenta e ineficaz por la distancia, la política tributaria no funciona de regreso, pues sólo se recaban impuestos pero no se aprueban partidas, ni se obtiene ningún tipo de presupuesto para el segundo distrito, la seguridad pública no es posible pues no hay atención por parte de las autoridades competentes en razón de la distancia.

Existen dos sesiones de debates, la primera es del 31 de diciembre de 1868. Expone al comienzo el diputado Lama, quien plantea un grave problema y es que si se ha de crear un estado, entonces también debe preverse quién lo gobernará, pues dejárselo al poder ejecutivo implicaría una violación al *pacto federal* representado en el congreso. No olvidemos que uno de los argumentos que se manejan en la historia de

(114) "La Sierra Alta tiene la gloria de haber triunfado siempre de las mejores tropas del éjercito francés, austríaco y traidor, en la Candelaria, Tenango, Pahuatlán, Huautla, Tuto, la Encarnación y otros puntos, como el mineral del Monte, Ixmiquilpan y San Pedro; y todo esto se hizo también sin la unidad del Estado".

(115) Proyecto que más tarde pretendió y logró realizar un camino de alta afluencia que partía desde Panamá y llegaba hasta los Estados Unidos.

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la erección del estado, es que éste se creo por capricho de Benito Juárez, y aquí vemos una reacción a lo que se veía como una interferencia del titular del ejecutivo en un proceso propio del legislativo y por tanto una prueba de 'cierta saludable división de poderes'.

Sigue en el orden el diputado Fernández, quién intenta justificar los defectos del decreto de erección, pues dice que "la duración de esta situación es provisional". El diputado Frias y Soto lo apoya mencionando que el artículo 72 de la Constitución en su fracción 30, faculta al Congreso para expedir este tipo de decretos "provisionales". Después de otra réplica se somete al consenso y se declara con lugar a votarse el decreto (116).

El dictamen final de las comisiones unidas de gobernación y puntos constitucionales, presentado en la sesión de 5 de diciembre de 1868, en una primera lectura, y tres días después, la segunda, da por concluidos los trámites para la erección del estado. Al haber sido ratificado por la mayoría de las legislaturas de los estados, se discute sobre cómo habrá de nacer el estado. Se sabe ya que llevará el nombre del insurgente Miguel Hidalgo y Costilla, nombre que desde 1856, a instancias de Guillermo Prieto, se había tomado en cuenta para el momento de la erección. La extensión se determina en 20 813 Km^2, el 1.06% de la superficie total del país (117). Al norte colinda con San Luis Potosí, hacia el este las huastecas veracruzana e hidalguense se unen, y en esta misma dirección colinda con Puebla y Tlaxcala; al sur se encuentra el Estado de México, y al oeste, Querétaro. Se dividió en once distritos (118), y se designaría un gobernador provisional mientras se convocaba a elecciones.

El 15 de enero de 1869 se expidió el decreto que contiene la erección por órdenes del presidente de la república, Benito Juárez. El decreto dividía al estado en doce partidos (119) de 40,000 habitantes cada uno, aproximadamente. Tenía once distritos que agrupaban 46 municipalidades; en total el número de habitantes era de 422,818. Tenía el nuevo estado dieciséis administraciones de rentas, que eran las encargadas del cobro de impuestos. Contaría Hidalgo con doce juzgados de primera instancia, que eran los respectivos del territorio que se separaba del de México. Su propiedad raíz, es decir los inmuebles del

(116) Pantaleón TOVAR, op. cit. Tomo III pags. 912-914.

(117) En 1886 por un tratado de límites entre el estado de Querétaro y el de Hidalgo, este último cedió 64 Km^2 del municipio de Pisaflores, pero el tratado nunca llegó a aplicarse, y el municipio sigue siendo hasta la fecha hidalguense.

(118) El año siguiente al decreto se agregaron los distritos de Jacala y Metztitlán, y en 1871 Molango. Para 1891 se creó Tenango de Doria, por último, la división de 82 minucipios aumentó a 84 en la década de los ochenta del siglo XX y es como se encuentra ahora.

(119) Partido entonces era una división utilizada para efectos judiciales, pero por obvias razones de tiempo, es más bien partido electoral al que se refiere el decreto. Y así también lo menciona Teodomiro Manzano en sus *Anales*.

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estado, estaban valuados en $ 14' 827.291 pesos (120) y la producción asciendía a $ 251.942 pesos.

El decreto de erección contiene un solo artículo, sin embargo lo más discutido fueron los artículos transitorios, ahí encontramos debates y opiniones encontradas. El artículo Único es la Erección: creación o reconocimiento (depende como se vea) de la nueva entidad de la federación, señala los distritos y menciona, a grandes rasgos, el territorio y el nombre del nuevo estado de la federación. Los transitorios son los artículos que propiamente conformaran la *constitución* en el sentido formal, es decir, darán *forma* y contenido al acto de erección. En el primero el poder legislativo faculta al ejecutivo para elegir al gobernador provisional, quién deberá convocar a elecciones para todos los niveles dentro del estado. La legislación a aplicarse supletoriamente, mientras el futuro congreso se *constituyera*, sería la del Estado de México, aquí la supletoriedad era expresa y por lo pronto correcta, pues la otra posibilidad era sujetar al nuevo estado a las leyes federales, por razones prácticas era mejor sujetarse a una legislación conocida.

Otra curiosidad del decreto, y de este artículo 1^0 transitorio, era la facultad expresa al gobernador de poder hacer frente a los disturbios sociales, siempre y cuando no se llegara a la suspensión de garantías y previa autorización del presidente de la República, esto se entiende si se piensa que el estado de Hidalgo había sido erigido, en una fase de reconstrucción nacional y de desorden social, el gobierno de Juárez había experimentado ya el exilio, la guerra y la persecución; los temores no eran infundados. El artículo 2^0 transitorio prohíbe al gobernador provisional ser electo, se entiende que para el periodo siguiente, por principio democrático y para preservar la limpieza de las elecciones, si es que ésta era posible, lo cierto es que el gobernador provisional nunca contendió por la gobernatura. El tercer artículo organizaba el primer congreso local, con carácter de *constituyente* y *constitucional*, y les concedía el plazo improrrogable de un año, para presentar la *constitución estatal*; en este punto también sería supletoria la constitución mexiquense. El 4^0 se encarga del poder judicial; la elección de magistrados quedaba en manos del gobernador, hasta cinco de ellos para el Tribunal superior. Por último, este decreto menciona el cese de la representación en el congreso del Estado de México, por parte de los diputados de los distritos que correspondían al nuevo estado.

Después de la publicación del decreto, los futuros hidalguenses no se cruzaron de brazos sino que siguieron mandando comunicaciones con el fin de que el decreto se concretara con el envío del nombramiento de un gobernador, quién posteriormente convocaría a elecciones. También, como ya se mencionó, se dieron importantes discursos ante el Congreso, dos de ellos en contra, lo cual demuestra la gran

(120) Más o menos equivaldría a un 1.400.000 dolares.

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pugna por la erección, pues si bien ésta fue decretada, sólo lo fue con cinco votos a favor sobre aquellos en contra.

El primero de diciembre de 1868, el Congreso de la Unión había ya elaborado un proyecto de ley que contenía el decreto de erección, que en su texto como hemos dicho, contenía las disposiciones necesarias para la constitución del estado y para su organización política. Este proyecto fue ampliamente debatido en el dicho Congreso de la Unión, pues se decía por algunos diputados que en erecciones pasadas habían existido malas experiencias.

El diputado de apellido Lama, afirma que sería una contradicción crear un estado soberano, y en el mismo acto legislativo darle un gobernador a través del ejecutivo federal. Justino Fernández, (121) quien llegaría a gobernador del estado, responde que la organización contenida en el decreto, es provisional, pues "siempre es conveniente establecer algún orden". Guillermo Prieto opina en el mismo sentido que Fernández, y es que el Congreso tenía facultades para dar legislación al estado en génesis, y con ello no se vulnera la soberanía, pues era un estado que aun no nacía. Aunque parezca banal esta discusión tiene mucho trasfondo, se discute desde cuando se considera que ha sido *constituido* el estado, y es claro que esto lo hace el decreto, pero aquí, como en todo el orden jurídico, el derecho reconoce situaciones de hecho, como las características del territorio y de la población peticionaria, es el problema planteado por la modernidad que ha identificado al derecho con la ley, parece obvio decir que no son la misma cosa, pues bien, en este caso (y en muchos otros que llegan hasta nuestros días) no es muy clara la diferencia.

El estado fue erigido durante las sesiones de trabajo del Cuarto Congreso Constitucional, que abarca de 8 de diciembre de 1867 al 31 de mayo de 1869.

Según H. W. Bates, en 1869 la población total de todo el territorio mexicano era de 8,812,850 personas; Hidalgo contaba con 404,207 de ellas, y Pachuca, la capital, tendría 15,000 habitantes, según Teodomiro Manzano. Había quedado un rezago en los impuestos, y es así que el nuevo estado tenía desde su nacimiento una deuda de 34,000 pesos con el estado de México.

La fuerza de seguridad estaba muy menguada, había sólo 50 infantes radicados en Pachuca y 20 dragones, es decir hombres a caballo, en Actopan. Al final del gobierno de Doria había muchas más armas y 100 hombres en la infantería, 11 de artillería y 94 de caballería. No obstante, por ser insuficientes, el gobernador provisional mandó solicitar el reclutamiento de voluntarios para formar una guardia especial para "la paz pública, cuerpo que llegó a reunir a 7,166 hombres.

El 2 de julio de 1869 se instituyó el Tribunal Superior de Justicia

(121) Diputado propietario por el Estado de México en 1857.

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del estado de Hidalgo, que funcionó con la ley del Estado de México, hasta que tuvo su propia en 1873. Al momento de su creación, el Tribunal Superior tenía ya 400 causas pendientes, que eran las que correspondían de las respectivas del Estado de México (122).

Un grupo de notables de la ciudad de Pachuca se desplazaron a la de México para acompañar al coronel Juan C. Doria, (123) quien fuera electo como gobernador provisional del estado de Hidalgo. Mucho se discutió que el gobernador fuera electo por el presidente de la república, lo cierto es que ha su propuesta y con la aprobación del Congreso de la Unión, un liberal de confianza y discreto fue nombrado gobernador, en el debate quedó claro que alguien debía iniciar el gobierno y posteriormente convocar a elecciones y si bien es cierto que resulta impositivo que el presidente lo nombre, también es cierto que el Congreso lo aceptó.

El gobernador provisional tuvo mucho trabajo desde su llegada, seis días antes de la erección 40 pueblos del distrito de Pachuca en su mayoría, se levantan en armas pidiendo la devolución de sus terrenos. El mismo 16 de enero, algunos indígenas de los pueblos de Tenango y Tutotepec se apoderaron de la hacienda de Vaquerías, también pidiendo la restitución de sus tierras. Juan C. Doria llegó a Pachuca el día 27 de enero, ese mismo día se hace cargo del gobierno del estado. Nombra al licenciado Cipriano L. Robert secretario general, le acompañaban a su llegada, refiere Manzano, el ingeniero Gabriel Mancera y el licenciado Luis Revilla, quien fuera Diputado al Congreso de la Unión en 1857. Nombra jueces conciliadores propietarios.

El día 7 de febrero, Sosa, se pronunció en Apan, y llegó a poner en serios predicamentos al gobernador, pues atacó la ciudad de Pachuca el día 16 del mismo mes.

El 24 de marzo se expide la convocatoria para las elecciones de primer gobernador constitucional del estado.

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(122) Una breve reseña del poder judicial: en 1861 existía un sólo juzgado de letras y mixto en el territorio hidalguense, en el que se llevaban asuntos civiles y penales, junto la cárcel conocida con el nombre de La Nacional y que reunía presos de ambos sexos. En este año se vieron los grandes inconvenientes de tener un sólo tribunal, y se estableció otro con las mismas competencias, en 1863 se suspende este tribunal a causa de la intervención francesa. Durante el segundo imperio funcionaron dos tribunales superiores, en los departamentos de Tula y Tulancingo, respectivamente, que eran la segunda instancia en asuntos civiles y penales. En 1867, restablecida la república, se instauran nuevamente los dos juzgados de letras y mixtos. Por ley del 11 de julio de 1868 del Estado de México modifica la estructura judicial estableciendo dos salas para el tribunal superior de justicia y un fiscal para revisión de la administración de justicias. Guerrero Raúl GUERRERO y Juan Manuel Menes Llaguno, *Historia de la administración de justicia en el estado de Hidalgo,* Pachuca, Gobierno del estado, 1983.

(123) Durante el segundo periodo del Congreso de la Unión que comenzó el 1 de abril de 1868 encontramos como presidente del mismo a un tal Juan Doria. En el periodo siguiente, es decir el que comenzó el 16 de septiembre de 1868 encontramos a Justino Fernández, segundo gobernador constitucional del estado de Hidalgo.

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Este decreto organiza el sistema de *distritos electorales* y reglamenta la ley del 16 de enero; así se da cumplimiento a todo lo dispuesto por el Congreso de la Unión, para que en breve se cuente con un gobernador electo y un congreso local.

Son electos diputados el 16 de mayo de 1869, entre ellos inmiscuidos en las peticiones. Dos días después, el Congreso local ya instalado nombra gobernador al triunfador de la elección convocada por Juan C. Doria, él es el hacendado y diputado por el Congreso de la Unión, Antonio Tagle. En julio es nombrado primer juez de distrito. El día 15 de julio toman posesión los magistrados del primer Tribunal de Justicia del estado. En base a las reformas federales se instituye un fiscal. El 19 de julio fue designado el presidente del Tribunal Superior.

El 5 de febrero de 1870 se reciben en el congreso local tres proyectos de constitución, una elaborada por algunos letrados de la capital, un segundo proyecto de una minoría de la legislatura local y un último de una mayoría, el cual por obvias razones fue elegido para su estudio; el lunes 4 de abril de ese año se acepta por el congreso y es enviada al gobernador para su veto. La aprobación del poder ejecutivo se da el día 21 de mayo y ese mismo día se publica. Es una constitución preparada de acuerdo a la federal de 1857, con los mismos principios. Se dividía en siete títulos, con su parte dogmática, principios de soberanía, forma de gobierno, atribuciones de los órganos del estado y lo relativo a la hacienda pública. Al igual que la general, preveía la diputación permanente compuesta por tres diputados propietarios y dos suplentes. Un dato curioso es que añadía como un cuarto poder al municipal, cuestión que pasó a la Constitución de 14 de septiembre de 1894 y al proyecto de la de 1920.

Y así nació y comenzó a funcionar un estado dentro de otro estado.

8. *Conclusiones no cinematográficas federales.*

La creación jurídica de entidades federativas en México ha significado un proceso de adaptación de un federalismo no necesariamente auténtico, hasta el día de hoy observamos en México problemas de carácter territorial en la Frontera Sur, entre estados, todavía el siglo anterior se siguieron creando entidades, el Distrito Federal, hoy asentado en Ciudad de México está bajo estricta observación. Este es uno de esos fenómenos del derecho positivo en el que podemos verificar cómo en el derecho moderno se ha abierto una gran brecha entre mundo real y la realidad jurídica, el Estado moderno busca por todos los medios convertirse en el único creador de derecho, es por eso que el reconocerle a un hecho su existencia jurídica positiva a veces lleva a tensiones y esperas bastante largas. Se podría justificar al Estado en estas esperas porque es el modo de constatar su operatividad, o su validez pero entre

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la constatación y la certificación se da una vida intermedia que necesariamente es jurídica.

La cohesión jurídica, la identidad nacional no son cosas que pueda otorgar un documento legal, son los triunfos de una sociedad que ha entendido que en ellos se cifra su supervivencia como tal. En muchos países a pesar de tener años de aplicación un Código Civil son tantas las regiones en dónde siguen predominando reglamentos locales, fueros o usos y costumbres que positivamente no existen o no se les reconoce el valor que debieran tener. Es por eso comprensible que el *Federalismo* sea considerado como ideología, de corte iluminista, quizá el sistema federal es conveniente si se gesta y desarrolla en una sociedad que se ha perfilado hacia ese derrotero, pero el que sea impuesto ocasiona, como hemos visto, problemas de carácter práctico en donde 'la federación' no confía en sus federados, en dónde se sujeta a una nación a un sistema rígido para su mejor control político, en este sentido si que es iluminista y puede llegar a ser artificial.

En México ha jugado un papel importante el desarrollo de la identidad nacional porque eso ha permitido dar movilidad al federalismo, los pueblos, las organizaciones territoriales se han ido adaptando por su afección hacia la nación, a modo de adecuarse a las reglas del juego. Son pocos los movimientos escisionistas que se han visto en México, como también son pocos los regionalismos, esto ha favorecido a la construcción de una nación, más que de una federación.

Siempre tendremos necesidad de raíces y de identificarnos con la 'tierra de nuestros padres' la *patria*, pero no debe llegar a confundirse con nacionalismos hostiles que desembocan en racismo. Vivimos en un mundo que intentá imponernos una nacionalidad pero la libertad tendrá también que tener otros causes porque la busqueda de mejores oportunidades ha ocasionado la emigración y por tanto el cambio de nacionalidad. Lo que ahora debemos lograr es no crear excluídos, sino responsables de frente a la sociedad en la que cada uno deba participar. Sociedad que en un tiempo fue el estado de Hidalgo y buscó legitimarse a través de un procedimiento jurídico, porque las sociedades al igual que los seres humanos, necesitan garantías de su exitencia, porque es justamente esto lo que le solicitamos al derecho el que nos ayude a organizarnos y a vivir mejor en sociedad.

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Ragguagli fiorentini

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ATTIVITÀ DEL CENTRO DI STUDI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO NELL'ANNO ACCADEMICO 2002-2003

Sono stati graditi ospiti del 'Centro di studi per la storia del pensiero giuridico moderno' per un soggiorno di studio il prof. dr. Faustino MARTINEZ MARTINEZ della Università Complutense di Madrid, il Lic. Ramón NARVÁEZ HERNÁNDEZ della Universidad Nacional Autonoma de Mexico, il dott. Walber de MOURA AGRA dell'U.F.P.E, il prof. dr. Ricardo FONSECA della Universidade Federal do Paranà (Brasil) e il dott. Alejandro DIAZ MORENO dell'Universidad de Sevilla (Spagna).

Durante il 2003 sono stati pubblicati i due tomi del volume 31° dei 'Quaderni Fiorentini per la storia del pensiero giuridico moderno', dedicati a *L'ordine giuridico europeo: radici e prospettive,* nei quali si segnalano saggi di: FERRARESE, GROSSI, PADOA SCHIOPPA, D'ANDREA, DUSO, CASSESE, MALANDRINO, CANNIZZARO, FIORAVANTI, DE BENEDICTIS, BELLAMY, CASTIGLIONE, BERTI, MATTEI, SCIARRA, BERNARDI, SORDI, NÖRR, MANNONI, CLAVERO, RAMETTA, HYLAND. Nonché note critiche di VALLEJO, PIERGIOVANNI, VALLEJO GARCÍA-HEVIA, ITZCOVICH, ZAGREBELSKY, ZANICHELLI.

Il volume 31° dei '*Quaderni Fiorentini*' ed il tema dell' '*Ordine giuridico europeo'* sono stati al centro del Seminario di studi tenutosi il 12 dicembre 2003, al quale hanno partecipato come relatori: SCHIAVONE, CAPPELLINI, MARRAMAO, ZAGREBELSKY, RODOTÀ, GROSSI.

Durante l'anno 2003 è stato pubblicato nella 'Biblioteca' del 'Centro' il volume 63° della Collana: Mario PICCININI, *Tra legge e contratto. Una lettura di* Ancient Law *di Henry S. Maine.*

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PAOLO GROSSI

RICORDO DI ADRIANO CAVANNA (*)

1. Credo che la cifra identificatrice del personaggio Adriano Cavanna sia in un duplice atteggiamento in Lui perennemente congiunto: fierezza e saldezza nelle proprie posizioni; tensione all'ascolto, capacità di ascolto. Atteggiamento complesso, che, di primo acchito, può sembrare vistosamente contraddittorio, "Sono longobardi i Cavanna, nel senso di fieri e tenaci guerrieri": era frase usuale in Adriano, come ci riporta nel suo contributo alle onoranze il valentissimo e a lui carissimo allievo Stefano Solimano (1). Ma era fierezza nel testimoniare e difendere, magari con accanimento, le fondazioni di valori in cui fermamente credeva e su cui aveva costruito la sua vita di uomo e la sua personalità di studioso. Su di esse poggiava saldo né da esse si scostava, con la perizia del rocciatore provetto che sa distinguere la pietra compatta da quella friàbile.

Al di là di questo nodo stretto di valori, Cavanna era un lettore umile e attento, un instauratore di dialoghi, sempre alla ricerca di un altro — un altro stimabile e stimato — con cui operare continue verifiche. Specialmente sul terreno dei tanti problemi metodologici, didattici, strategici, che la storiografia giuridica si è trovata ad affrontare in Italia negli ultimi decennii, io ho sempre constatato in Lui un uomo in ascolto.

Non erano poche, soprattutto negli ultimi anni, le sintonie culturali con me e con la comunità di studio operante intorno ai

(*) Il testo, che qui si pubblica, rappresenta la redazione scritta dell'intervento orale da me pronunciato, sulla scorta di precise annotazioni, il giorno 27aprile 2004, nell'Aula Pio XI della Università Cattolica del Sacro Cuore in Milano, nell'àmbito della cerimonia di presentazione al pubblico degli 'Studi in ricordo di Adriano Cavanna.

(1) S. SOLIMANO, *Due popoli, due Codici. Il dibattito sull'unificazione del diritto civile tra lombardi e piemontesi alle soglie dell'unità*, in *Amicitiae pignus — Studi in ricordo di Adriano Cavanna*, Milano, Giuffrè, 2003, tomo terzo, p. 2095.

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'Quaderni fiorentini' ; ma c'erano anche dissensi, distesi però sempre in un colloquio dove era evidente il rispetto per l'interlocutore e la disponibilità a mutare avviso. In un momento, in cui vediamo serpeggiare intorno a noi intolleranze e settarismi, quella di Adriano non è una lezione deontologica di poco conto.

E il dialogo fra me e Lui era vivo, costante: l'ultimo avvenne nella antivigilia di Natale del 2001 (e può essermi testimone la Signora Anna Maria qui presente), quando, per corrispondere a una sua lunga lettera commentatrice di un mio estratto appena ricevuto, preferii — piuttosto che scriverGli — di telefonargli; e mi parlò sereno, controllato, lucidissimo, malgrado il male che lo consumava e di cui era cosciente, rinviando all'anno nuovo il proseguimento. Il 6 gennaio, alcuni giorni dopo, sarebbe morto.

2. È per tutto questo che sono lieto oggi di essere qui, in questo Ateneo che fu lungamente il Suo, gratissimo al Preside e alla Facoltà giuridica, gratissimo ai cari amici storici del diritto milanesi, per un invito che molto mi lusinga e mi soddisfa.

Non è, tuttavia, un cómpito facile al quale io e gli altri relatori siamo stati chiamati. La presente cerimonia non è una commemorazione, giacché siamo qui a far festa, pur nella mestizia del ricordo, per i tre sostanziosi volumi di onoranze rapidamente ed egregiamente organizzati e pubblicati a cura dell'Istituto di storia del diritto medievale e moderno dell'Università statale di Milano. Ma è chiaro che questi volumi sono per Lui, che tutti noi presenti siamo venuti per Lui e che Lui è il protagonista di questa affollatissima riunione.

Leggendo proprio i tre volumi nelle scorse settimane, mi son posto molte domande e sono affiorate al mio animo molte perplessità sul taglio che avrei dovuto dare alle mie parole, Un'unica risposta mi è sembrata plausibile: parlare di Adriano soprattutto sulla scorta degli scritti in Suo onore che più mi parevano puntuali per sottolinearne la personalità, quasi l'eco di Cavanna nelle pagine dei tre volumi. E così intenderei procedere, muovendo dal saggio con cui la trìade si apre, quello di Giulio Vismara, fondatore e guida della scuola storico-giuridica milanese, maestro diretto di Adriano nell'Ateneo pavese, saggio vibrato ma composto com'è nello stile del suo autore.

Vismara riesce ad offrire in non molte pagine un disegno essenziale di Cavanna storico del diritto, prendendo l'avvìo dal-

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l'opera scientifico-didattica espressiva più d'ogni altra della raggiunta maturità: la 'Storia del diritto moderno in Europa' (2).

I tratti, che ritengo pienamente condivisibili, di questo disegno sono — in sostanza — tre.

La straordinaria ampiezza dell'osservatorio storico-giuridico. Egli nasce alto-medievista, fornendo — lui 'longobardo' — alcuni approfondimenti che restano ormai acquisiti quali punti fermi nella nostra disciplina; innamorato di quella che soleva chiamare la *magistra barbaritas*, riesce in un ammirevole tentativo di comprensione e, quindi, di recupero storiografico al di fuori di risalenti ma persistenti luoghi comuni annidati nelle sabbie mobili del filo-romanesimo e del filo-germanesimo. Ma non mancano studii che lo vedono provetto maneggiatore delle non facili trame del diritto comune o della legislazione statutaria, per non parlare di ricerche amplissime che lo portano — soprattutto negli ultimi venti anni — al cuore dell'esperienza giuridica moderna e delle sue fonti (3). È un modello da additare ai nostri giovani, i quali, pur dàndoci spesso lavori di livello buono e anche eccellente, dimostrano però di trovarsi a loro agio in un terreno d'indagine assai più circoscritto, probabilmente nell'intento lodevole di rendere possibili scavi in profondità. Con il risultato negativo, però, che quella intestazione 'Storia del diritto medievale e moderno', sembrata a me e all'amico Padoa Schioppa come un'autentica conquista per la nostra disciplina, viene sempre più smentita da studiosi che, evitando la ben ardua esplorazione congiunta di due pianeti storici strutturalmente diversi quali 'medioevo' e 'modernità', sono e restano o medievisti o modernisti.

La cospicua attenzione che, nel Suo 'Manuale', Cavanna dèdica all'universo giuridico di 'common law'. Quando, nel 1992, io ebbi il piacere di invitarlo, insieme ad altri autori, a un Incontro fiorentino sull'insegnamento della allora 'Storia del diritto italiano', Egli vi tenne un intervento che a me parve obbiettivamente il più meditato e il più lungimirante, e sul quale dovremo tornare fra poco per la

(2) G. Vismara, *Per una storia del diritto moderno in Europa*, in *Amicitiae pignus*, cit., tomo primo.

(3) Possiamo rèndercene conto leggendo il nutrito elenco bibliografico in calce a: A. Padoa Schioppa, *Commemorazione di Adriano Cavanna*, in *Istituto Lombardo-Accademia di Scienze e Lettere- Rendiconti* — Parte generale, vol. 136 (2002).

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succosità di parecchi spunti. Parlò del Suo recente ' Manuale' e accennò alla estensione spaziale dello sguardo segnalata da Vismara, definendola senza mezzi termini "operazione didattica volutamente riparatoria ed emancipatoria" (4). Cultura non provinciale l'ha giustamente qualificata Vismara (5); ed è vero. Cavanna era, allora, il primo in Italia a gettare uno sguardo non episodico al di là del canale della Manica, anticipando quel rinnovamento della cultura storico-giuridica che ha trovato recentemente nella dialettica fra gli itinerarii di 'civil law' e di 'common law' arricchimenti cospicui.

Precisa ancora Vismara mettendo a fuoco un terzo tratto essenziale e, insieme, il metodo fatto proprio con assoluta persuasione da Adriano: nelle Sue pagine non v'era spazio né per una erudizione antiquaria fine a se stessa, né per sociologismi vaniloquenti (6). Avvertiva il Suo esser giurista; di più, un giurista che lavora in una comunità di giuristi, coi quali ha il dovere elementare di mettersi in costante dialogo.

3. A fondare questa persuasione ce n'era un'altra, profonda, tenace: essere il diritto non una dimensione di comandi, di sanzioni, di coazioni, una dimensione potestativa che inchioda una civiltà storica e la sòffoca come in un letto di costrizione, bensì realtà radicale, al cuore d'una civiltà, salvataggio storico di questa come ordinamento che le consente di svolgere appieno il proprio ruolo.

La visione della onticità del diritto, cioè del suo partecipare alla natura stessa della società, del suo esserne componente fisiologica e vitale, sorregge tutto il discorso storico-giuridico del Nostro. Al di sotto della superficie rissosa, incomposta,disordinata dell'effimero socio-politico, v'è — nel profondo — un ordine giuridico quale struttura portante, che le impedisce di ridursi alle sabbie mobili della quotidianità. Giovanni Chiodi suggella il suo contributo citando il frammento di chiusura del finissimo studio cavanniano su 'Tramonto e fine degli statuti lombardi', dove si contempla un

(4) *L'insegnamento della storia del diritto medievale e moderno — Strumenti, destinatari, prospettive* — Atti dell'Incontro di studio — Firenze, 6/7 novembre 1992, Milano, Giuffrè, 1993, p. 43.

(5) VISMARA, *Per una storia del diritto moderno in Europa*, cit., p. 21.

(6) VISMARA, *Per una storia del diritto moderno in Europa*, cit., p. 20.

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diritto che dispone di "sotterranee e sorprendenti forze di sopravvivenza e di continuità" (7).

È la consapevolezza che consente ad Adriano di rafforzarsi nella convinzione del rilievo insostituibile della storia del diritto, un rilievo non artificiosamente costruito da coloro che la coltivano, ma imposto dall'essere il diritto chiamato a fornire con le sue capacità ordinative il tessuto primario, quello più solido e più profondo, d'un corpo sociale. Ovviamente, il diritto che nasce dal costume e se ne impasta, che è esso stesso esperienza; non gli espedienti del potere politico con la sua pirotecnica di leggi e leggine improvvisate,claudicanti, sentite come una violenza dal comune cittadino che ne è vittima.

La storia del diritto quale banco di prova del durevole e dell'effimero, quale depositaria della lunga durata e quindi del senso della linea storica coinvolgente passato presente futuro; una storia del diritto che si impone per la sua valenza culturale ma anche per la carica di criticità che offre al cultore d'un diritto positivo, una storia del diritto che è al centro d'una Facoltà di Giurisprudenza, naturalmente, non per sopravvalutazione di chi professionalmente la esercita.

Floriana Colao, nel proprio contributo alle onoranze (8), riprende opportunissimamente una frase di Adriano illuminante per chiarirci bene la Sua autocoscienza di storico, del ruolo di ogni storico, della sua funzione critica e quindi propulsiva: la storia del diritto penale moderno gli appariva quale terreno decisivo "per una meditazione sui problemi del presente". Lo storico è tale perché guarda al passato con gli occhi del suo presente; sempre. Ma, in Cavanna, l'esser giurista, l'essere in dialogo con gli altri seduti alla mensa della scienza giuridica, gli consente di avvertire e di vivere in modo particolarmente forte la dialettica passato-presente.

Permettetemi di riprendere alcune Sue lucide testimonianze espresse in quell'Incontro fiorentino del'92, a cui partecipò con una presenza culturalmente notevolissima. Afferma, avvalorando quanto

(7) G. Chiodi, *Orgoglio proprietario e pregiudizio legalistico. Vincoli successori e interpretazione della legge nella Lombardia napoleonica*, in *Amicitiae pignus*, cit., tomo primo, p. 426.

(8) F. Colao *"Iustitia est anima civitatis". Note sugli studi sulla giustizia criminale toscana in età moderna*, in *Amicitiae pignus*, cit., tomo primo, p. 545.

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ha rilevato su di Lui Vismara più sopra citato: "lo storico del diritto, per suo statuto personale, non è né storico della società, né storico della politica, né filologo" (9). Cioè ha uno statuto epistemologico specifico, e pertanto autonomo, che non può essere inghiottito entro i genericismi della filologia o della storia socio-politica (come propose con voce presuntuosa, solitaria e fortunatamente inascoltata Arnaldo Momigliano in seno a un nostro Convegno di parecchi anni addietro).

Ancora: "egli non pospone l'oggetto della propria conoscenza — il diritto — al suo metodo conoscitivo. Egli è fondamentalmente un giurista" (10). Il richiamo è di indole squisitamente epistemologica, anche se di epistemologia elementarissima si tratta. È però fondamentale, e da esso Cavanna trae tre conseguenze, che mi preme di sottolineare: che "scienza giuridica e storia giuridica non sono separabili" (11), dove si percepisce limpida l'influenza del ripensamento metodologico di Orestano; che "il buon storico del diritto è colui che, da giurista, è in grado di richiamare il cultore del diritto positivo alla storicità del ragionamento giuridico" (12), ossia che egli ha una funzione critica accanto al giusprivatista e al giuspubblicista, o, come dissero una volta Max Ascoli e il nostro Bognetti per filosofo e storico del diritto, ha una impegnativa cura d'anime; che — terza conseguenza culturalmente davvero enorme — dal dialogo interdisciplinare all'interno dell'unica anche se composita scienza giuridica si ha il risultato della "storicizzazione del proprio sapere da parte del cultore del diritto positivo" (13).

4. Tutto bene, ma ad una condizione: che il dialogo ci sia e che non si constati, da una parte, lo storico immerso beato nel suo cantuccio umbràtile, e, dall'altra, il giuspositivista appagato dal culto praticistico del vigente; che il dialogo, se c'è, non avvenga tra sordi.

Cavanna sembra darci un insegnamento, su cui dovremmo oggi seriamente meditare, oggi che si sta, ohimè!, affievolendo la coscienza di quello statuto epistemologico di cui or ora si parlava; e

(9) *L'insegnamento della storia del diritto medievale e moderno*, cit., p. 36.
(10) *Loc. ult. cit.*.
(11) *L'insegnamento della storia del diritto medievale e moderno*, cit., p. 39.
(12) *Ibidem*, p. 38.
(13) *Loc. ult. cit.*.

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cioè che può fare adeguatamente, correttamente, storia del diritto solo colui che ha alle sue spalle una educazione giuridica e quindi una preparazione giuridica che gli consenta di individuare e definire la cifra del giuridico, immersa senza dubbio nel sociale, nell'economico, nel politico, ma con una sua inconfondibile autonomia. Altrimenti — giova ribadirlo — la storia giuridica si spenge nel magma della storia sociale con un autentico suicidio culturale per colui che la professa.

Cavanna sembra ammonirci che un letterato non può improvvisarsi giurista,e pertanto storico del diritto quale personaggio portatore di strumenti di conoscenza giuridica. Il rischio è inventare pseudo-scienziati che sfiorano dall'esterno l'esperienza giuridica, che sono incapaci di capirne e carpirne i molti nodi, che si lìmitano a fare mera erudizione (che,forse, meglio saprebbe fare il paleografo), mera filologia (che,forse, meglio saprebbe fare il filologo autentico), o, per quanto attiene allo studio delle personalità di giuristi, semplice prosopografia che tocca solo dall'esterno la loro operosità senza potersi addentrare al cuore della loro vicenda intellettuale.

Cavanna ha dato sangue e concretezza a questa impostazione, scendendo – Lui, storico del diritto giurista — sul terreno degli istituti, volendo cimentarsi e misurarsi — raccogliendo un messaggio che gli veniva dal suo maestro Giulio Vismara e dai condiscepoli della scuola milanese — sul terreno degli istituti. Questi, formando il tessuto con cui prassi legislazione scienza órdinano e articolano l'esperienza socioeconomica, costituiscono il vero terreno d'elezione per lo storico del diritto, ed è il terreno che certi improvvisatori disdegnano perché mette impietosamente in evidenza vizii e carenze di colui che tenta di esplorarlo.

Cavanna lo ha fatto egregiamente soprattutto nel campo del diritto penale, e ne dànno testimonianza nei volumi di onoranze proprio i cultori di diritto penale positivo con cui Egli era in costante dialogo. Mario Romano, insigne penalista, chiama il Nostro "illustre criminalista" (14) quasi per sottolineare che lo ha sentito sodale e compagno in un comune banco di lavoro, e insiste nel suo contri-

(14) M. ROMANO, *Razionalità, Codice e sanzioni penali*, in *Amicitiae pignus*, cit., tomo terzo, p. 1886.

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buto sul senso della storicità del diritto, merito indubbio del dialogo fecondo instaurato in questa Facoltà tra penalista e storico del diritto penale.

Non posso qui omettere il riferimento alle pagine di un altro penalista, collega di Adriano nella Università Cattolica, Gabrio Forti, che traccia del nostro Onorato un disegno al cui centro v'è proprio la fertilità di un colloquio tra personaggi che non solo non sono sordi ma che, al contrario, si intendono perfettamente nel loro comune linguaggio e nel loro comune ideario. Credo di dovergli dare spazio, giacché sono righe che colgono nel segno. Tratteggiando un ritratto di Adriano, così scrive Forti: "così saldo nelle sue solidità terragnole, nelle sue convinzioni etiche, eppure così agile e flessuoso nel valicare le asperità rocciose e abbracciare con sguardo acuto, dall'alto — ma solo dopo averle strenuamente affrontate — le mobili vastità del reale, interpretava magistralmente il ruolo dello storico, che è soprattutto quello di districare l'intreccio di essere e divenire che avvince ogni soluzione giuridica" (15).

Ciascuno di noi — credo — sarebbe lieto di meritare un simile spassionato elogio da parte di un cultore del diritto positivo; ed è lampante che Cavanna, in seno alla Sua Facoltà, non si rannicchiava quasi estraneo — come tanti di noi — nel cantuccio più umbràtile. Quanto scrive Forti, pregevole anche stilisticamente in un ritratto che appaia lo scienziato indagatore al rocciatore coraggioso di tanti picchi alpini, è però culturalmente significativo: il penalista ha afferrato bene il messaggio dello storico, ed è giunto alla convinta certezza che ogni situazione giuridica è avvinta nell'intreccio fra essere e divenire, si connota cioè per una ineliminabile storicità.

La cura d'anime ha conseguito un risultato culturalmente rilevantissimo, conquistando il giuspenalista alla elementare ma formidabile verità della storicità delle regole giuridiche.

5. Ma torniamo ancora al testo di Vismara, che ci offre un canovaccio prezioso. Vi è posto in luce un altro aspetto della storiografia messa in atto da Cavanna: la preferenza accordata al pensiero giuridico quale fonte particolarmente espressiva. E Vismara aggiunge, puntua-

(15) G. Forti, *La 'corruzione privata' : spunti comparatistici e storico-sociali per una riflessione politico-criminale*, in *Amicitiae pignus*, cit., tomo secondo, p. 1023.

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lizzando: perché l'insistere sulla dimensione scientifica del diritto, sul suo diventare anche pensiero, gli consentiva di cogliere una dimensione tendenzialmente universale, dove si pèrdono le miserie del particolare e si ha più chiaro il tessuto universale a cui sempre aspira la scienza (16).

Identico è il rilievo fatto, nel suo contributo alle onoranze, da Luigi Lombardi Vallauri, interlocutore privilegiato di Cavanna quale autore di un libro meritatamente fortunato, secondo cui il Nostro è "il più esplicito tra gli storici del diritto comune europeo nel concepirlo e costruirlo come diritto giurisprudenziale" (17).

Lo stesso Cavanna, parlando del suo 'Manuale' nel più volte da me ricordato Incontro fiorentino del'92, ce ne dà una sorta di interpretazione autentica; Egli ha svolto "la trattazione seguendo una direttiva privilegiata: quella della storia della giurisprudenza; storia delle operazioni intellettuali dei giuristi e dei loro prodotti" (18).

Non un rigurgito di formalismo, non il gusto dell'astrattezza caro a tanti giuristi, ma piuttosto il tentativo di ritrovare grazie alla dimensione scientifica del diritto armonie, congiunzioni, comunioni perdute nel divenire della vicenda storica. Cavanna, sottolineando nel passato il ruolo e il tessuto unificante del pensiero giuridico, sembrava indicare anche una strada da battere per riconquistare oggi e vieppiù domani l'unità perduta a causa di tante sovranità particolari, di tanti particolarismi legislativi, di tante frontiere giuridiche innalzate dai poteri politici sovrani. Presagio di uno studioso lungimirante, che possiede con grande vigilanza il senso della linea storica.

Oggi, che assistiamo a una costruzione difficile dell'Europa politica e giuridica per colpa delle posizioni egoistiche degli Stati chiamati a formarla, è con soddisfazione (almeno da parte mia) che assistiamo a un fenomeno tutto nuovo e profondamente consolante: scienziati di varii paesi, uniti dalla consapevolezza del ruolo propulsivo e anticipatorio della scienza, uniti anche dalla coscienza del ruolo

(16) VISMARA, *Per una storia del diritto moderno in Europa*, cit., passim ma soprattutto p. 9.

(17) L. LOMBARDI VALLAURI, *Riforma: per quale giurista?*, in *Amicitiae pignus*, cit., tomo secondo, p. 1355.

(18) *L'insegnamento della storia del diritto medievale e moderno*, cit., p. 40.

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fattivo della scienza giuridica ormai ben lontana dai vecchi servaggi esegetici, al di fuori di ogni promozione e protezione degli Stati o della Comunità interstatuale, si è data a individuare e fissare principii di diritto privato che possano servire da base per negozii transnazionali. Un fiorire di attività scientifica, cui la prassi economica non è stata sorda, e anche il primo abbozzo di un tessuto giuridico europeo; mi fa piacere di rilevare qui che uno degli artefici di tali 'Principles' in tema di contratti è proprio il collega ed amico Carlo Castronovo, che siede a questo tavolo e che ha egregiamente rappresentato in questo tìaso sapienziale la cultura giuridica italiana.

Risveglio scientifico significativo e riacquisizione di un ruolo determinante, che la scienza ha avuto in un passato remoto forgiando sostanzialmente intiere esperienze giuridiche come la romana e la medievale. E qui cade acconcio riprendere il riferimento sopracitato di Lombardi Vallauri e sottolineare l'acutezza delle diagnosi storiografiche di Cavanna; lo riprendo con un risalente ma vivo ricordo fiorentino.

6. Il 16 febbraio 1978 Adriano fu da me invitato a parlare in seno al 'Circolo toscano di diritto romano e storia del diritto', una istituzione spontanea operante nel nostro Istituto (poi Dipartimento) universitario, che aveva allora una attività vivace di incontri e di dibattiti. Egli scelse come tema il ruolo del giurista nella formazione del diritto comune medievale. La Sua esposizione — lo rammento benissimo — fu ammirevole e ammirata, poiché in essa furono discusse con esemplare serenità le molte pubblicazioni sul tema emerse in quel torno di anni; e dette occasione a una dibattito vivacissimo; sarebbe divenuta, di lì a poco, il testo altrettanto ammirevole pubblicato in 'Studia et documenta'. La conclusione era questa, che trascrivo dal saggio a stampa: "una visione che valuti risolutamente l'eminente momento giurisprudenziale di questo diritto, traendo ogni illuminante conseguenza dal riconoscimento del ruolo che il corpo dei giuristi dotti svolse sul doppio binario della libertà interpretativa e dell'autorità individuale e di ceto, nella creazione del diritto oggettivo e nella complessiva fondazione e promozione dell'ordinamento stesso" (19).

(19) A. Cavanna, *Il ruolo del giurista nell'età del diritto comune (Un'occasione di*

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Con intuizione pronta, propria dello storico autentico, Cavanna coglieva il nascere e il dipanarsi di un grande diritto giurisprudenziale. Vorrei invitare a rileggere questa meditata conclusione chi, proprio in queste onoranze, ribadisce l'immagine di un medioevo 'legislativo' e di un ceto di giuristi vincolato — in quanto *interpretes* — al testo normativo (20). Certo che di *interpretatio* si trattava! Non abbiamo bisogno di chicchessìa a ricordàrcelo. Glossatori e commentatori giustamente chiamiamo i nostri *doctores*. Il diritto che andavan costruendo non è un cumulo di opinioni al vento ma di interpretazioni formalmente vincolate a un testo autorevole. Nella sua solitudine — la solitudine derivante dall'essere, quello medievale, un diritto senza Stato — la scienza giuridica ha bisogno di un momento autoritativo su cui poggiare.

Il vero problema storico-giuridico è la qualità della sua *interpretatio*, la considerazione che essa ebbe della *lex*, ossia la libertà d'azione intellettuale che essa si prese rispetto al precetto contenuto nella *lex*. La sua, quando ce ne fu necessità, non fu esegesi o fu esegesi soltanto formale. La sua non si ridusse ad attività meramente logica, ma fu — nella sostanza — autentico atto di volontà, fu *interpretatio* nel senso più alto di intermediazione fra legge vecchia e bisogni nuovi (21).

Se ne ha la dimostrazione scendendo al terreno con cui dovrebbe misurarsi ogni storico del diritto, e cioè quello degli istituti: è qui che risulta evidente la giurisprudenzialità del diritto medievale; sono i *nova negotia* il vero banco di prova della *interpretatio* medievale, quei *nova negotia* espressione di una società tanto diversa da quella dei classici e dei bizantini. Basti pensare alla sostanziale libertà con cui essi, sempre sulla base formale di testi romani e sotto la protezione formale di quelli, edificano quel sistema di *dominia* e

riflessione sull'identità del giurista di oggi), in *Studia et documenta historiae et iuris*, XLIV (1978), p. 100. Si noti come fosse sempre costante in Cavanna la dialettica passato/presente.

(20) U. PETRONIO, *Giuristi e giudici tra scoperta e invenzione del diritto in età moderna*, in *Amicitiae pignus*, cit., tomo terzo, p. 1824.

(21) Si lèggano, a conferma, le dense pagine del paragrafo del 'Manuale' cavanniano dedicato a ' Il diritto comune considerato come diritto giurisprudenziale' (cfr. *Storia del diritto moderno in Europa — Le fonti e il pensiero giuridico*, Milano, Giuffrè, 1979, p. 97 ss..

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di situazioni reali, di cui il loro mondo aveva un maledetto bisogno e che gli autorevoli testi antichi assolutamente non legittimavano.

Ma occorre occhi per vedere, occhi che non si arrestano alle superfici formali ma sanno cogliere il non facile messaggio cifrato delle fonti. E questo vorrei raccomandare ai giovani che vedo numerosi in questa sala, senza fare gli inconcludenti e inopportuni sfoggi letterarii di qualcuno, ma richiamandomi a quel sapere intuitivo, che è la vera risorsa dello storico. Lo storico ha l'esigenza vitale di intuizioni scaturenti dal linguaggio sostanziale delle fonti e non di spirito di geometria, considerato che la società è l'opposto di un complesso freddo e statico di dati geometrici. Anche su questo punto la testimonianza di Cavanna fu esemplare, e ai nostri giovani come esempio la addito.

7. Debbo avviarmi alla conclusione, poiché il tempo stringe, ma non voglio omettere di far cenno a un'altra visione penetrante del nostro Onorato, che è messa in luce nel saggio di un altro caro allievo di Adriano, Roberto Isotton; "concerne il ruolo di assoluta centralità che la legge viene ad assumere nel contesto storico della Francia rivoluzionaria" (22).

Si attua a fine Settecento, secondo la visione condivisibile di Cavanna, "un evento epocale a indefinita produttività nell'immaginario collettivo". Sono, queste, parole che non possiamo ancora leggere, giacché Isotton le ha tratte dal manoscritto, tuttora inedito ma di prossima pubblicazione, del secondo volume del 'Manuale', la cui redazione è stata fortunatamente ultimata nel momento immediatamente antecedente la morte. Cavanna, in una diàgnosi serenamente obbiettiva, coglieva nella matura età moderna l'espressione di quello che io ho chiamato e continuo a chiamare assolutismo giuridico, malgrado il fastidio che tale sintagma reca a qualche orecchio.

Un momento di émpito legalistico e una serrata, per così dire, sul piano delle fonti. Al sommo di questo capitale rivolgimento, il Codice, fonte novissima per il nuovo diritto, manifestazione compiuta del controllo che il potere politico attua in ogni zona del

(22) R. Isotton, *Brevi note sul 'Plan d'éducation nationale' di Michel Lepeletier de Saint-Fargeaux*, in *Amicitiae pignus*, cit., tomo secondo, p. 1247.

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diritto, a cominciare dal diritto privato, dal diritto della vita quotidiana dei cittadini. Il Codice simbolo del nuovo, fonte di qualità tutta nuova, segno di discontinuità rispetto al passato, malgrado gli sforzi infruttuosi di chi — penso per semplice smania di originalità — lo vorrebbe in un *continuum* col passato sistema delle fonti.

Debbo chiudere esprimendo un duplice sentimento di rammarico.

Per il grande lavoro interrotto nella redazione del 'Manuale' ; ma qui mi sorregge la speranza che Adriano abbia potuto quasi completare la sua fatica e che si possa contare in una prossima pubblicazione. Sarà una proficua lettura non solo per i giovani ma soprattutto per quei colleghi che sembrano non avere occhi per vedere (o, se hanno occhi, si rifiutano di usarli).

Per la grave perdita, che questa morte rapace ha causato non soltanto all'affettuosa armonia della famiglia, ma anche allo sviluppo dei nostri studii: da Adriano potevamo (e dovevamo) attenderci chiarimenti definitivi sui nodi più irrisolti della storiografia giuridica medievale e moderna. Dobbiamo però — questo sì — esserGli grati per il ricco patrimonio culturale che è riuscito a lasciarci in eredità.

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