ALBUM

HELEN MAUD CAM

* *

STUDIES PRESENTED TO THE
INTERNATIONAL COMMISSION
FOR THE HISTORY OF REPRESENTATIVE
AND PARLIAMENTARY INSTITUTIONS

XXIV

ETUDES PRESENTEES A LA
COMMISSION INTERNATIONALE
POUR L'HISTOIRE DES ASSEMBLÉES D'ÉTATS

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COMMISSION INTERNATIONALE POUR L'HISTOIRE DES ASSEMBLEES D'ETATS

I. *Histoire des Assemblées d'états,* avec une préface de A. COVILLE, dans *Bulletin of the International Committee of Historical Sciences,* t. IX, fasc. IV, n° 37, 1937, p. 409-473. Épuisé.

1. H. M. CAM, *Recent Books in English on the Parliamentary Institutions of the British Isles in the middle ages,* p. 413-418;
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V. C. J. Joset, *Les villes au Pays de Luxembourg (1196-1383),* dans *Université de Louvain. Recueil de Travaux d'Histoire et de Philologie,* 3e série, 5me fasc. Louvain, 1940. In-8°, 236 p. et une carte hors-texte. Épuisé.

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VII. *L'organisation corporative du Moyen Age à la fin de l'Ancien Régime,* avec une préface de E. Lousse, dans *Université de Louvain. Recueil de Travaux d'Histoire et de Philologie,* 3e série, 18me fasc. Louvain, 1943. In-8°, XVI-296 p. fr. b. 250.—

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XI. *IXe Congrès international des Sciences historiques, Paris, 1950, IXth International Congress for Historical Sciences,* dans *Université de Louvain. Recueil de Travaux d'Histoire et de Philologie*, 3e série, 45me fasc. Louvain, 1952. In-8°, 280 p. fr. b. 325.—

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1. R. S. Hoyt, *Recent Publications in the United States and Canada on the History of Western Representative Institutions before the French Revolution*, p. 356-377;
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XXI. J. Russell Major, *The Deputies to the Estates General in Renaissance France*. Madison, 1960. In-8°, 210 p. Doll. 6,50

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1961

I

Modificazioni strutturali dell'Assemblea nazionale langobarda nel secolo VIII,

DI

CARLO GUIDO MOR,
Università di Padova.

Il problema dell'assemblea nazionale langobarda é stato tanto studiato, a partire dall'aureo libretto di Schupfer di un secolo fa fino al recente studio di Morossi, che é del 1936 (1), che parrebbe impossibile cavar fuori qualche cosa di nuovo. Tuttavia mi sforzerò di prospettare qualche soluzione non dico proprio inedita, ma un poco più precisa, restando nel breve cerchio degli ultimi settanta-ottanta anni del regno langobardo indipendente.

Il capitolo 386 dell'Editto di Rotari, punto di partenza di tutti coloro che si sono occupati dell'assemblea langobarda, afferma che il nuovo corpo di leggi fu elaborato *pari consilio parique consensum cum primatos iudices cunctosque felicissimum exercitum nostrum,* e nessuno ha dubitato mai, nè io dubito, che alla rassegna generale dell'esercito, dopo la campagna del 643, sia stato presentato il testo di legge. Anzi recentissimamente Bognetti, da quel finissimo conoscitore del mondo langobardo che é, suggestivamente ha indicato il come e il perché si é avuta questa solenne e generale assemblea (2), legata ancora, dunque, alla antica tradizione del popolo, piccolo di numero e vivente su un territorio ristretto, che interviene personalmente a decidere sui maggiori negozi della «natio». «Gairethinx» nel vero e proprio significato etimologico della parola, per cui chi é «exercitalis» é anche il portatore di diritti politici, e chi assiste all'assemblea con voto deliberante non può che esser uomo dell'esercito. Così come ancora oggi, nel cantone di Appenzell, il vicino si reca all'assemblea paesana munito di una vecchia spada ... che probabilmente non solo non sa adoperare, ma che gli dà maledettamente fastidio ! Però nel capitolo citato c'é già una distinzione: staccati dal «cunctum felicissimum exercitum» vi sono i «primores iudices», una categoria di persone preminenti su tutti gli altri, vale a dire — come cercai di dimostrare dieci anni fa — quelle persone che esercitano una giurisdizione sui territori maggiori in cui si divi-

(1) F. Schupfer, *Delle istituzioni politiche longobardiche,* Firenze, 1863, p. 339 e segg.; C. Morossi, *L'assemblea nazionale del regno longobardo-italico,* in *Riv. Stor. Dir. Ital.,* IX, 1936, p. 248, che cita tutta la letteratura precedente. Dopo questo lavoro mi pare che non sià uscito più alcun altro scritto speciale sull'argomento.

(2) G. P. Bognetti, *L'Editto di Rotari come espediente politico di una monarchia barbarica,* in *Studi in onore di G. M. De Francesco,* Milano, 1957, II, p. 235.

deva il regno, duchi e gastaldi con poteri ducali (qualcuno li chiama «gastaldi civitatis» ma l'espressione mi pare equivoca) ([8]). Ai quali aggiungerò, proprio per le loro attribuzioni giurisdizionali, anche quei gastaldi regi che esistevano, dal tempo di Autari, in ciascun ducato, e che non sono soltanto gli amministratori del patrimonio regio, ma esercitano pure una attività non puramente disciplinare. Infatti se poniamo a confronto i due capitoli Roth. 23-24, risulta evidente l'attività giurisdizionale del gastaldo regio in ogni ducato.

23 *Si Dux exercitalem suum molestaverit iniuste, Gastaldius eum solatiet, quousque veritatem suam inveniat, et in praesentiam Regis, aut certe apud ducem suum ad iustitiam perducat.*

24 *Si quis Gastaldius exercitalem suum molestaverit contra rationem, Dux eum solaciet, quousque veritatem suam inveniat.*

Se, infatti, il dux é il giudicante che tutti conosciamo, per il fatto che le stessissime parole sono usate per il gastaldo regio si deve dedurre che anche questi era giudicante per rapporto a coloro che erano legati alla camera regia, e mi vien voglia di precisare ch'egli era il giudicante di tutti gli arimanni dislocati in ogni ducato, dato che appunto il capitolo 24 parla esclusivamente di «exercitales».

Questa é la ragione per cui, nell'Editto rotariano, si parla sempre di «iudices» quando si vuol indicare le persone che esercitano un potere territorialmente definito, ed evidentemente i «primores iudices» del capitolo 386 sono da individuare proprio in questa categoria di persone, che sono anche i capi militari dei contingenti che formano il felicissimo esercito nazionale.

Venticinque anni dopo, 668, Grimoaldo poneva la prima aggiunta alla legge fondamentale del popolo langobardo *per suggestione iudicum omniumque consensu*. La situazione non era mutata, i giudici sono quelli che conosciamo già, gli «omnes» possono essere benissimo i costituenti l'esercito nazionale.

Paolo Diacono, però, ci avverte che nel 662-63 qualche cosa di nuovo era avvenuto (*Hist. Lang.*, V. I): dopo il suo consolidamento sul trono, Grimoaldo *Beneventanum vero exercitum, cuius auxilio regnum adeptus erat, multis dotatum muneribus remisit ad propria. Aliquantos tamen ex eis secum habitaturos retenuit, largissimas eis tribuens possessiones.*

([8]) C. G. Mor, *I gastaldi con poteri ducali*, in *Atti I Congr. Intern. Studi Langobardi*, Spoleto, 1952, p. 409.

Quando, parecchi anni fa, ci fu a Spoleto una epica lotta tra Ganshof e Sanchez Albornoz circa l'origine del feudo, se franco o visigoto, Bognetti — sempre lui! — allègò questo testo paolino per insinuare abilmente che forse anche presso i Langobardi ci fu qualche cosa di simile al «beneficium» franco e allo «stipendium» visigoto, mentre io allegai un diploma di Adaloaldo per Bobbio in cui si ricordava il «beneficium» del generale Sundrarit su una parte di Salsomaggiore (4). Riconosco che é molto più importante il passo paolino, perché ci mette sott'occhio il formarsi di una classe di «fideles» non legata all'ordinamento territoriale, cioé non duchi né gastaldi regi locali. E in tanta penuria di documenti, questa notizia é uno sprazzo di luce.

Liutprando, con la sua intensa e quasi annuale attività legislativa, ci dà molte indicazioni sulla composizione dell'assemblea, ed il Morossi ne ha redatto un completo quadro sinottico, Gli «iudices» sono sempre presenti: solo nell'anno VIII l'indicazione non é così, diciamo, canonica: *una cum inlustribus veris obtimatibus meis Neustriae, Austriae et Tusciae partibus,* ma credo che abbia ragione Morossi di classificare questi «obtimates» fra i giudici.

Non é il caso di accennare ad un problema collaterale, cioé alla divisione del Regno in tre regioni (Austria, Neustria e Tuscia) che interessa solo l'organizzazione generale dello stato, ma non ha, mi sembra, alcun riflesso sull'Assemblea; tanto più che questa tripartizione, se compare riferita più spesso ai giudici (nei prologhi degli anni I, V, VIII e XVII) una volta é connessa a un'altra categoria di persone che fanno ufficialmente la loro comparsa, con posto distinto, proprio a partire dal I anno di Liutprando: i *fideles.*

Ne troviamo sicuramente accertata la presenza nei prologhi dell' anno I, IX, XII, XIV, XVI, XXI, XXIII, e potremmo conchiudere tranquillamente ch'essi furono sempre presenti e formarono un gruppo a sè, non confondendosi con gli «iudices» nè con la massa del popolo.

Così nel prologo degli anni I e VIII leggiamo la precisa ripartizione: *una cum omnibus iudicibus tam de Austriae et Neustriae partibus nec non et de Tusciae finibus — vel cum reliquis fedelibus meis langobardis — et cuncto populo adsistente* e: *una cum illustribus*

(4) Questo particolare non appare dai verbali delle sedute (*I problemi della civiltà carolingia,* Spoleto, 1954, p. 147-57), ma il mio ricordo personale si appoggia a miei appunti di quei giorni.

veris obtimatibus meis Austriae et Tusciae partibus — vel universis nobilibus langobardis — asistente omni populo.

Che i nobiles di quest'ultimo prologo siano i fideles degli altri non vi può esser alcun dubbio, così come, abbiamo visto, «optimates» sono detti i giudici. Più tardi, nei prologhi delle leggi di Ratchis (745 e 746) e di Astolfo (750-755) non si fa più parola dei «fideles», ma in contrapposto ai giudici si menzionano solo i «langobardi adstantes» (Ratchis 746) e i langobardi «universarum provinciarum» (Ahist. 750). Questo, però, non ci autorizza a conchiudere che, dopo Liutprando, siano scomparsi i fideles come classe a sé stante nel complesso dell'Assemblea: infatti anche i prologhi liutprandini dell'anno V, XI e XIX, menzionano solo i giudici e i «ceteri langobardi» o i «reliqui langobardi».

Chi sono questi fideles che evidentemente non esercitano un ufficio territoriale ? La risposta é piuttosto difficile da dare, attesa la genericità della locuzione. Potremmo pensare, prima di tutto, ai funzionari di corte: al maiordomus Ambrosius che troviamo attivo nella ben nota contesa fra i vescovi di Siena e di Arezzo, come presidente di un collegio giudicante; a qualche «notarius domini regis», come Gunteram, che in qualità di missus compie l'inquisitio della stessa contesa, o come Ultianus messo regio alla divisione territoriale dei vescovadi di Lucca e di Pistoia; ai capi degli actores regis; a qualche maestro della scuola palatina. Poi a quei gruppi fluttuanti di fideles, di grandi proprietari terrieri, sul tipo dei beneficiati di Grimoaldo. E' più che mai plausibile pensare che, nelle convulse vicende del primo decennio del secolo VIII Ragimperto o Ariperto II da un lato, Ansprando dall'altro si siano procurati degli aderenti offrendo cariche e benefici, e che nell'altalenare delle fortune alcuni siano saliti, altri scesi, acquistando o perdendo le donazioni ed i favori regi.

Sempre il nostro Bognetti ha presentato la felice congettura che alcuni di quei transpadani che si trovano menzionati come abitanti in Toscana non siano sempre degli emigrati volontari, ma possano anche far parte dei nuclei arimannici spostati dal nord al centro d'Italia per sostituire arimanni poco sicuri per la loro adesione al partito avverso. Od anche gente esiliata da una regione all'altra.

Uno di questi fideles, libero e forse nobile, lo conosciamo attraverso il racconto di Paolo Diacono, Sesuald, il pedagogo del giovane duca Romualdo di Benevento, che pagò con la vita la sua fedeltà al re ed al suo allievo (*Hist. Langob.*, V. 8). Ma accanto a questi ci furono

altri fideles, provenienti da un ambiente diverso da quello tipicamente langobardo: l'ecclesiastico.

Il Morossi é rimasto in dubbio, pur accettando il fatto documentato, del 754, di Valperto, vescovo di Lucca, «comandato dal re a partire per l'esercito». E giustamente ha concluso che se il vescovo partecipava all'esercito, doveva, quindi, partecipare all'Assemblea ([5]).

Per conto mio direi che se ecclesiastici fecero parte del consesso langobardo, non fu tanto perché capi di diocesi o di abbazia — cioé non per il titolo dell'ufficio — ma proprio perché in qualche modo entrati nel circolo dei fideles, quindi a titolo personale. E l'idea mi viene dall'osservare come ad alcuni vescovi siano deferite certe funzioni statali, specialmente nel campo giudiziario.

I documenti sono pochissimi: ma questa é proprio la caratteristica di questo secolo VIII, che é già un paradiso rispetto al vuoto dei secoli precedenti. Raccogliamo, dunque, quel poco che possiamo trovare, e stimiamoci fortunati.

715, luglio 5. S. Genesio in Vallari ([6]).

«*Ex iussione domni excellentissimi Liutprandi regis, dum coniunxissemus nos sanctissimi Teudaldus Vesolane ecclesie episcopus et Maximus Pisane ecclesie nec non et Spetiosus Florentine ecclesie adque Talesperianus Lucensis episcopus... ibique residentes una cum misso excellentissimo domno Liutprando regis nomine Gunteram notario* [quello dell'inquisitio] *venerunt in nostris presentia*» i due vescovi di Siena e di Arezzo «*altercationem inter se abentes*». Si riferiscono i termini della lite e si fa riferimento all'inquisitio. «*Ad hec autem omnia nos superscripti Teudoaldus, Maximus, Spetiosus, Talesperianus episcopus una cum presbiteros nostros venerandos viros* [in numero di dieci] *et reliquis sacerdotibus circumstantibus audientis,* FECIMUS IPSAM INQUISITIONEM, *et manus de ipsos presbiteros, qui nunc vivi sunt et eorum qui transierunt,* SED ET EPISTOLA IUDICE SENENSIUM *civitatis sive episcoporum ecclesie Senensium* RELEGERE... IDEO IUSTUM ATQUE RECTUM PLACUIT ut... proinde DECREVIMUS... et finita est intentio».

716, febbraio, S. Pietro in Neure ([7]).

«*Dum ex iussione domni praecellentissimi Liutprandi regis coniun-*

([5]) C. MOROSSI, *op. cit.*, p. 281.
([6]) L. SCHIAPARELLI, *Codice Diplomatico Longobardo*, Roma, 1929, I, n. 20.
([7]) *Ibid.*, n. 21.

xisse ego Ultianus notarius et missus domni regis» per decidere la questione dei confini fra i vescovadi di Lucca e Pistoia «*et iam inivi coniunxissemus ego qui supra Ultianus una cum Spetiuso episcopo et Walpert duci, Alahis gastaldio vel aliis singulis circumstantibus... unde nos* SUPRASCRIPTI IUDICES DECREVIMUS» di deferire al rappresentante di Lucca un giuramento assertorio. (Specioso é il vescovo di Firenze).

753, agosto, Rièti ([8]).

«*Dum resideremus nos vir venerabilis Teuto episcopus, Probatus et Piero gastaldius, Adreald sculdahis, Godenisius actionarius*» e altri, si dibatte una causa di proprietà fra Mauro chierico el'abate di Farfa. «*Tum nos* IAMDICTI IUDICES *dum cognovissemus*» che il casale in questione era stato donato a Farfa dal dura Lupo e confermato dal re «*paruit nobis rectum* ET ITA DECREVIMUS» di deferire il giuramento assertorio.

761, febbraio, Rieti ([9]).

«*Dum nos Gisolphus dux coniunxissemus in civitatem Reatinam et residente una cum Gumpert misso domini regis atque* RELIQUIS NOSTRIS IUDICIBUS, *hoc est viro venerabile Teutone aepiscopo, Alfrid gastaldio de Reate, Heleutherio de Noceria gastaldio, Aldone sculdahis, Martiniano vel Hisimundo sculdahis vel Citerisus et plurimis adstantibus proprias singulorum hominum decidendas intentiones ...*»

771, giugno 26, Lucca ([10]).

«*Notitiam iudicati qualiter venit ante me Peredeo in dei nomine episcopo*» Alitruda col figlio minorenne Atriperto e Pietro chierico «*cum sacram iussionem excellentissimi domni mei regis, in qua contenebatur quod ipsi interpellassent excellentiam regni*» per la questione dell'investitura di una chiesa al minorenne Atriperto, poi revocata dal vescovo, e complicato da una non ortodossa intesa della signora Alitruda col cognato Pietro, chierico ed amministratore della chiesa pel minorenne. Il re «*nobis demandavit ut deberemus talem hominem previdere, Deum timentem, qui causa eius* [di Atriperto] *peragere deberet... et deberemus causa ipsa inquirere et*

([8]) *Il Regesto di Farfa* (ed. GIORGI-BALZANI), Roma, 1897, vol. II, p. 44, n. XXXIX.

([9]) *Ibid.*, II, p. 52, n. LIV.

([10]) *Cod. dipl. long.*, II, n. 255.

iudicare qualiter lex...» E dopo aver visti i documenti e sentite testimonianze, il vescovo emette la sua sentenza.

773, maggio, Valva ([11]).

Notizia «*qualiter in praesentia venerabilis Gumperti episcopi, Theudati sculdahis, Leoniani sculdahis, Arcinaldi de Balba... et aliorum circumstantium*» si è dibattuto un processo fra l'abate di Farfa e un carto Taso. Uditi i testi vien loro deferito il giuramento di conferma e «*in presentia* SUPRASCRIPTORUM IUDICUM *s. Dei Evangelia venerunt*», per cui Taso rinuncia alla pretesa.

Questa rassegna, forse un po arida, ci mette, però, davanti ad un fatto assai interessante, e cioé che i vescovi, a partire dal regno di Liutprando, vengono chiamati a far parte del corpo giudicante, sia come assessori, sia come giudici delegati, sia — e ciò é ancor più significativo — come presidenti del placito.

Ma naturalmente questi «iudices», come quasi costantemente sono chiamati, non sono da confondere con quelli noti nell'Editto, giudici territoriali, come i duchi e assimilati. Sono giudici, diciamo così, occasionali, giudici senza giurisdizione, ma che per il fatto di essere in un particolare rapporto con il re, possono venir incaricati di speciali missioni e vedersi concesso l'esercizio di qualche frazione della tipica attività regia, come appunto il render giustizia.

Il problema, però, si amplia se vogliamo andare più a fondo. Non é forse esatto dire che i vescovi sono giudici senza giurisdizione territoriale. Certo negli esempi che ora abbiamo sott'occhio — salvo la questione lucchese del 773 i cui elementi giuridici sono complicati, poiché vi entrano aspetti privatistici (come la nomina di un tutore), beneficiali (provvista di un beneficio minore) e morali (la discutibile condotta della madre e di Pietro chierico) — nessuno può dar sostegno alla conclusione di un intervento episcopale «ratione territorii» o «jurisdictionis».

Ma che qualche giurisdizione il vescovo la esercitasse, almeno nell' ambito dei possessi dell'episcopato e sugli uomini ivi residenti, si può indirettamente dedurre dal noto documento del 754, il testamento del vescovo Valprando di Lucca.

Che si tatti di un «fidelis» del re é palese: *Certus sum ego Vual-*

([11]) *Reg. Farf.*, II, p. 78, n. XCII.

prand in Dei nomine episcopus, quia ex iussione domni nostri Aistulfi regis directus sum in exercito ambulandum cun ipso ([12]).
La formula «in exercito ambulandum» é, a quanto pare, ormai consacrata dall'uso; nel 755, agosto, «*Gaiprand, vir devotus*», da Griciano in quel di Lucca, fa una donazione alla sua chiesa di S. Frediano motivandola così: *manifestus sum ego . . . quia in exercito ad Francia iteratus sum ambulandum* ([13]), e quattordici anni dopo un tale Domnolino di Pisa fa una donazione generale alla sorella perché *dispositum sum iter in exercito* ([14]). Può essere che il vescovo di Lucca fosse stato «richiamato» personalmente alle armi, naturalmente non come un exercitalis qualunque, del tipo degli ultimi due toscani, ma per il servizio di cappellano regio o qualche cosa di simile, ma é molto più persuasivo pensare che all'esercito ci andasse guidando il contingenti di soldati tratto fra i coltivatori delle proprietà dell'episcopato lucchese. Ma anche se vi fosse andato a titolo personalissimo, ciò confermerebbe ancor più quel concetto di «fidelitas» che importava «consilium et auxilium».

E poiché non era certamente l'unico caso di mobilitazione di ecclesiastici, avvalora ancor di più la congettura che l'elemento ecclesiastico abbia preso posto nell'Assemblea nella categoria dei fideles.

Un altro esempio lo abbiamo, verso il 750. Al suo ritorno da Roma, Ratchis, ancora re, ma già monaco, aveva nel suo seguito Erfo, abate di Sesto in Silvis (Friuli), al quale commise la cura della fondazione del monastero di S. Salvatore di M. Amiata, di cui Erfo fu il primo abate proprio per ordine del re monaco. E' vero che Erfo doveva esser in qualche modo legato a Ratchis fin da quando egli era duca del Friuli; ma la «Fundatio monasterii S. Salvatoris Montisamiate» dice chiaramente che a controllare il miracolo del globo ardente, Ratchis inviò laici ed ecclesiastici del suo seguito; e non saranno stati semplici cappellani o l'abate, sia pure un amico, di un piccolo monastero friulano ([15]).

Siamo sempre nel campo delle congetture, lo so, ma per il secolo VIII non c'é quasi altro mezzo per camminare !

Dunque laici con uffici di corte ed ecclesiastici, e fra questi pro-

([12]) *Cod. dipl. long.*, I, n. 114.
([13]) *Ibid.*, I, n. 117.
([14]) *Ibid.*, II, n. 230.
([15]) Per qualche particolare rimando ad un mio scrittarello comparso in una rivista friulana (*Ce Fasta ?*, XXXII, 1956) dal titolo: *La monacazione di Ratchis e la diaspora monastica friulana.*

babilmente tutti i vescovi e qualche abate. Se anche il solito pasticcione Benedetto da S. Andrea del Soratte raccozza delle voci mal intese e peggio digerite, in fondo in fondo non aveva torto di parlare di «sinodi» a proposito delle Assemblee del regno, perché vi partecipava veramente una bella aliquota di ecclesiastici: solo che aveva il torto di non tener conto dei laici, che per lo meno erano in numero doppio!

Circa l'attività dell'Assemblea, non dirò molto, perché sostanzialmente tutto é stato classificato e discusso bene dal Morossi. Però devo precisare un punto che stranamente gli é sfuggito, a proposito della legislazione.

C'é un suggestivo accenno di Liutprando, nel prologo alle leggi dell'anno XIV (726). Ricordata la venuta dei giudici e fedeli dalle varie regioni, continua: *et haec omnia inter se conlocuti sunt, et nobis renuntiantes, nobiscum pariter statuerunt atque difinierunt et cum praesentaliter fuissent capitula ista relicta, omnibus placuerunt et preventes adsensum statuerunt nobiscum ut nihilominus per ordinem scriberentur.* Quell' *haec omnia* che inizia la narrativa della formazione della legge si riferisce al principio della motivazione della nuova attività legislativa, cioé al periodo iniziale *Nunc quidem eo quod multae causae ad definiendum incognitae erant, quia alii per consuitutinem, alii per arbitrium iudicare estimabant, ita previdemus ut nullus error esse deberet, sed omnibus manifesta clariscere lex.*

L'iter legislativo non é, dunque, così semplice come di solito si dice: proposizione del testo di legge già bello e pronto ed accettazione, ma é tutto il rovescio: proposizione di un progetto di capitoli e discussione in Assemblea, si direbbe assente il re — *inter eos collocuti sunt* —; redazione di un progetto da sottoporre al re, e nuova discussione fra re, giudici e fideles, e infine approvazione della redazione definitiva concordata fra questi due fattori della legislazione.

Da questo punto di vista, pertanto, l'Assemblea ancora nel secolo VIII esercita una funzione di primaria importanza, limitatrice dell' assolutismo regio — ma possiamo parlare di assolutismo langobardo? — e probabilmente, anzi, stimolatrice dell'attività legislativa. Questo, sia pur alla lontana, spiega l'atteggiamento dell'Assemblea italica dei secoli seguenti, dal IX al principio del XI, e certi suoi impennamenti, come il rifiuto opposto a Lotario di accogliere integralmente la collezione dei capitolari d'Ansegiso di Fontanella, e l'opposizione, alla fine del X secolo, alla nuova forma di legislazione

che voleva imporre Ottone III. «*Inter eos collocuti*»: forse é per questo che la legislazione del secolo VIII é più aperta al diritto giustinianeo che non quella rotariana, e sente le influenze del diritto canonico. Fra i fideles che «conloquebantur» c'erano in misura non esigua gli ecclesiastici che ne sapevano qualche cosa di più dei duchi e dei gastaldi, e potevano dare certe direttive.

Ma questo é un discorso che va fatto in altra sede, anche se non con minor noia di chi legge !

C. G. Mor.

II

Representation in the Administrative Practice of Anglo-Norman England,

BY

ROBERT S. HOYT,
University of Minnesota.

In a celebrated passage — one that is, perhaps, more celebrated than actually helpful — the author of the Dialogue of the Exchequer describes how the Domesday survey was made by counties, hundreds, and hides. And then in answer to the obvious question from his interrogator as to what they are, he observes, *ruricole melius hoc norunt* («country-folk know better about that») (1). It is doubtful that the author intended any allusion to the sworn inquest as it was employed in the Domesday survey; but it is suggestive that this remark, which is strictly irrelevant to what precedes and follows, was dropped immediately after the description of Domesday Book. It serves to remind us that one of the strongest motives for the origin and growth of representative institutions was the desire by the government for accurate information, while the specific means of determining the accuracy of such information was the use of a jury which could speak authoritatively for the locality — shire, hundred, or vill — which it represented before officials of the central or local government. This main point needs no emphasis or elaboration. The jury in England was the oldest and, some would argue, the most important root of later representative institutions. From this root, representation grew out of administrative practice and the needs of the government, unaided by any theory or concern for the rights or needs of the governed.

And yet it is interesting that the term «representation» does not occur frequently in juxtaposition with the term «administration». Instead we usually associate «representation» with politics, assemblies, granting of taxes, or constitutional government in the sense of limited monarchy or popular democracy. To illustrate my point, a student first taking up the study of medieval English administrative history could do no better than to read Professor Chrimes' *Introduction to the Administrative History of Mediaeval England* (2) and then turn to the monumental *Chapters in Mediaeval*

(1) *The Course of the Exchequer by Richard, Son of Nigel,* tr. and ed. Charles Johnson; Edinburgh, 1950, p. 64.

(2) S. B. Chrimes, *An Introduction to the Administrative History of Mediaeval England,* 2nd rev. ed., Oxford, 1959.

Administrative History by Tout (8). But if he consults either the seven-page index of Professor Chrimes' brief survey or the 316 pages of the exhaustive index in volume VI of Tout's *Chapters*, he will not find the word «representation». Part of the reason, of course, is that administrative history tends to concentrate on the offices and institutions of central government; and these are not conceived primarily as representing the ruler in any special way but as actually constituting the administrative authority of the central power. The process by which the central power grows, in the eleventh and twelfth centuries, is in essence simply the expansion and increase of activities and of officials, both of which extend royal authority beyond the range of government that the king alone could possibly take charge of personally. There is no contemporary theory involved in the process — for the beginnings of any theoretical explanations of the king's administrative authority we must wait until the thirteenth century — but in fact the activities of the Anglo-Norman justiciars and *legati* or those of the household and Exchequer are all performed, just as the officials and their offices exist, by virtue of delegation of authority from the king whom they represent. Such delegation of authority might be called «representation from above», in contrast with the later and familiar representation of administrative areas, or communities, or groups of subjects which, in relation to the king, is representation from below. The former is conceivable without the latter, but representation of areas, communities or groups of people is historically if not logically inconceivable without the growth of central institutions that call forth such representation.

Thus to account for representation in the administrative practice of Anglo-Norman England we must consider, first, that which arises from delegation of the king's authority — representation *of* the king towards his subjects and resulting in decisions or actions on the king's behalf; and second, representation that arises by royal command — representation *of* local administrative districts toward the government concerning information on the basis of which decisions might be made or actions taken. And finally there is a third way in which the royal government employed representation as an administrative device. This kind of representation also

(8) T. F. Tout, *Chapters in the Administrative History of Mediaeval England*, 6 vols., Manchester, 1920-33.

arose from royal command, but the unit represented was not the local geographical administrative area but rather the feudal unit of the honor or fief, for which the lord was treated as the representative of his vassals or tenants. The information provided or the actions taken by the lord were considered by the royal government to be binding on the lord's tenants.

In the time available this afternoon it is impossible to review all of the evidence for these three kinds of representation in the administrative practice of Anglo-Norman England. I shall confine my remarks, therefore, to a few observations on the nature of administrative representation under these three heads.

I

Although the office of justiciar had emerged by the end of the Anglo-Norman period, the variety of descriptive terms applied to the men who were supposed by later chroniclers or by modern historians to have held the office is itself a warning against reading back into the reign of the Conqueror or of Rufus, or the early years of Henry I, the existence of a distinct office of the central government. The great men in whom the king had trust and to whom the king delegated duties, either in his absence while in Normandy or for convenience, are variously styled. For example, Lanfranc was *princeps et custos Angliae* while the king was in Normandy, and Geoffrey of Coutances is described at one point in his career as one who «took the place of the king and held his justice» (4). In every instance of such delegation of authority the important point to notice is the *ad hoc* character of the authority delegated. Essentially, each of the great magnates so described is simply the king's representative, a viceroy in the general sense of that term. «King's representative» is the genus of which «justiciar» or «chief justiciar» is a species that only appears later. And contemporaries seemed more impressed with the fact that such men represented the king than with the question as to whether they

(4) John Le Patourel, *The Reports of the Trial on Penenden Heath*, in *Studies in Medieval History Presented to Frederick Maurice Powicke*, edd. R. W. Hunt, W. A. Pantin and R. W. Southern, Oxford, 1948, p. 23; and see F. J. West, *An Early Justiciar's Writ*, in *Speculum*, XXXIV, 1959, 631-38.

held an official position in the government with the title of justiciar. The generic descriptive titles most frequently applied to these representatives of the king for specific purposes were *legati regis* or *barones regis*.

One area of administrative work in which the king used his *legati* or *barones* in preference to his own personal supervision was the hearing and determining of important claims or pleas concerning land and jurisdiction. Thus at the great trial on Penenden Heath, in which archbishop Lanfranc successfully proved his right to lands and jurisdiction which had been taken unjustly from his predecessors, Geoffrey of Coutances presided over an extraordinary session of the county court, afforced by Englishmen who were skilled in the ancient laws and customs, not only from Kent but from other counties ([5]). Although this trial is the «best documented» of the reign, several other great pleas involving claims both to land and to jurisdiction were held in the reign of William the Conqueror, all of which follow a similar pattern: a special meeting of a county court, or sometimes several county courts meeting jointly, presided over by a special representative of the king — in this work Geoffrey of Coutances and the king's half-brother Odo, bishop of Bayeux, are prominent — and afforced by the presence of abbots or sheriffs or landowners (French and English) who would not normally be expected to attend a meeting of the court. For some of these pleas there survive contemporary or later accounts ([6]), for others the only trace is an allusion in Domesday Book. For example, there is the case of Alveston, in Warwickshire, concerning which bishop Wulfstan of Worcester tells the Domesday commissioners that he made good his claims to the land in a plea before queen Mathilda in the presence of four counties and thereof he has the writs of king William and the testimony of the county of Warwick ([7]). In

([5]) «Anglos in antiquis legibus et consuetudinibus peritos ... Et alii aliorum comitatuum homines etiam cum toto isto comitatu, multe & magne auctoritatis uiri francigene scilicet & angli». LE PATOUREL, *op. cit.*, pp. 22 f.

([6]) See references in D. C. DOUGLAS, *Odo, Lanfranc, and the Domesday Survey*, in *Historical Essays in Honour of James Tait*, edd. J. G. EDWARDS, V. H. GALBRAITH, and E. F. JACOB, Manchester, 1933, pp. 47-57, and in *English Historical Documents*, vol. II, edd. D. C. DOUGLAS and G. W. GREENAWAY, London, 1953, pp. 449-52.

([7]) «Wlstanus autem episcopus dicit se hanc terram deplacitasse coram regina Mathilde in presentia .IIIIor. uicecomitatuum et inde habet breues regis Willelmi et testimonium comitatus Waruuic». *Domesday Book*, 4 vols., edd. Abraham

this entry Domesday Book purports to quote Wulfstan; in the entry concerning Bengeworth, in Worcestershire, Domesday makes a flat statement of fact: «Abbot Walter proved his right to these five hides at Ildeberga in (a court of) four shires before the bishop of Bayeux and other barons of the king» ([8]). That joint meetings of more than one county court could be summoned for administrative as well as judicial purposes, by *legati regis* directly representing the king and thus superior to individual sheriffs who normally would preside, is also illustrated by the Domesday section on the customs of Nottinghamshire and Derbyshire where the testimony of the two shire courts is specifically called to witness ([9]).

All these instances (and many others could be quoted) provide evidence that for most judicial and administrative work the king did not normally preside or participate personally but rather through his *legati* or *barones* or «justices». For the most part these *legati* or other representatives are names and little more. A chronicle or the Pipe Roll of 1130 may record the fact of one presiding at a case or another hanging thieves in great number, but as persons we know little about such men as Remigius, bishop of Lincoln, Henry de Ferrers, Adam, brother of Eudo Dapifer, and their fellows on the Domesday circuits and we know much less than we should like even about such great men as Geoffrey, bishop of Coutances, and Odo, earl of Kent and bishop of Bayeux.

Taking these king's representatives, these *legati regis*, as a whole group, their greatest achievement in the Anglo-Norman period was the monumental survey whose results are preserved in Domesday Book and a few related texts. The great record reveals more about Anglo-Norman England than any medieval text does for any other period or other country. But its authors hardly ever allude to themselves in the tens of thousands of statements made about the land and its people. The *legati* in Surrey are guilty of a momentary lapse when they describe an anamolous situation whose origin or terms and conditions they admit «we do not know» ([10]). In the Derby survey a *legatus* or his clerk has noted that the name of the present tenant

FARLEY and Sir Henry ELLIS, Record Commission, n.p., 1783 and 1816, I, f° 238 b.

([8]) «Has .v. hidas diratiocinauit Walterus abbas ad Ildebergam in .IIII. sciris coram episcopo Baiocensi et aliis baronibus regis». *D.B.*, I, f° 175 b.

([9]) *Ibid.*, f° 280.

([10]) *Ibid.*, f° 36.

is missing, and has written in the margin «I don't know whose» ([11]). At the end of a complicated description of the royal manor of Hatfield, the legati add: «Afterward we recovered half a hide...» ([12]). In another Essex entry, having mentioned the testimony of the hundred as to the status of land before and after 1066, which now was taken from a manor unjustly, the *legati* state «we commanded that this usurpation be taken into the king's hand» ([13]). And in a Suffolk entry after noting some changes of jurisdiction and land they add, «concerning that we have seen (the king's) writ» ([14]). There may be a few other verbs in Domesday Book in the first person plural, but in all I doubt the number exceeds a dozen. References within Domesday throw little more light on how the *legati* represented the king in the administrative process of extracting the information from his subjects. From what has already been quoted and from a few other casual remarks, it is clear that the *legati* could and did exercise judicial authority for the king when conditions warranted. For example, in the records of usurpations or claims that are appended to the surveys of Essex, Norfolk, and Suffolk, land is frequently said to be in the king's hand, but in one instance the land was «in the king's hand before these pleas were held» ([15]). This off-hand remark tells us much more about the nature of the authority of the *legati* than the more dramatic accounts in Exon Domesday which tell of judicial action taken in particular instances — and thus leaving us to wonder whether they were especially noticed because exceptional ([16]).

II

When we turn from representatives of the king toward his subjects to representatives of the shires, hundreds, and vills in the Anglo-Norman period, we are confronted with what might be termed an abundance of evidence that tells us little. The most celebrated

([11]) *Ibid.*, f° 277 b.
([12]) *D.B.*, II, f° 2 b.
([13]) *Ibid.*, f° 94 b.
([14]) *Ibid.*, f° 413 b.
([15]) «In manu regis priusquam hec placita fierent». *Ibid.*, f° 99 b.
([16]) *D.B.*, IV, f°s 117 (p. 107) and 178 b (p. 165).

text is the preamble to the *Inquisitio Eliensis* ([17]) whose crucial first sentence defies literal translation but at the same time makes clear that the *barones regis* gathered information on oath from the sheriff, and from the tenants-in-chief and their French tenants, as well as from the hundred courts which — as this rather ungrammatical statement seems to imply — are supposed to consist of the priest, the reeve, and six villeins from each vill in the hundred. Immediately after the preamble there comes a list of seventeen hundreds or double-hundreds for each of which the names of the men who gave sworn evidence are set forth. Presumably it is men such as these that Domesday refers to when it calls to witness the testimony of the hundred. If so, it would appear that the function of the priest, the reeve, and the six villeins was to speak only for and about the vill they represent, not about the hundred. And we are left to speculate as to how the eight men on each hundred jury were supposed to ascertain true answers to the heads of inquiry listed in the rest of the Ely preamble. In any case it seems utterly incredible that the eight-man jury of the Ely Inquest was (except by mere chance) qualified to produce the detailed information that makes up the substance of Domesday Book. The sheriff (for the royal demesne) and the lords of the manors within a county, either personally or through their subordinate officials or servants, could produce this information; on the other hand, it is likely that much of the information was known to the priest, the reeve, and the six villeins, though I would doubt that they should have been considered qualified to speak about manorial values.

The great majority of Domesday references to the testimony of the hundred or county (i.e., to court or jury that spoke for hundred or county) relate to disputes or allegations concerning the tenure of property or rights of jurisdiction, not to the substance of the inquiry as detailed in the Ely preamble or as given by Domesday itself in entry after entry on almost every folio. The *clamores* and *invasiones* of Exchequer and Little Domesday, and the *terrae occupatae* of Exon Domesday, repeatedly illustrate my point; but by nature those entries relate primarily to disputes and thus the references to county or hundred court would have to relate to disputes. However, if we turn to the several score of references to either

([17]) William STUBBS, *Select Charters*, 9th ed., ed. H. W. C. DAVIS, Oxford, 1929, p. 101.

county or hundred in particular entries we find the same to be true. I cannot here recite all this evidence. Let me instead indicate its nature by a few examples. In Kent, testimony concerning a claim by the canons of St. Martin against Hugh de Montfort is given by «the hundred and the burgesses of Dover and the men of the Abbot of St. Augustine and Eastry lathe», in Hampshire the king's reeves have unjustly taken land from a manor of the archbishop of York, «as the hundred says», in Hertfordshire a hide and a virgate on the fee of Odo of Bayeux could not be sold without the lord's license, «as the shire court testifies», in the same county the men of count Eustace claim a small tenement of which they were seized for two years «after the count came to that honor, as the men of the hundred testify», and in Worcestershire king Edward gave the manor of Pershore to the church of St. Peter of Westminster «as quit and free of any claim as if he himself held it in his demesne, by the witness of the whole county» ([18]).

One final example I cannot resist quoting in full, for it comes as a shock to anyone who reads through the Domesday fees of lay tenants-in-chief in the Worcestershire survey. After entry on entry containing the usual straightforward statistical information, the following paragraph is appended to the first entry under the fee of William fitz Ansculf:

> The same Wulfwine bought this manor from the bishop of Chester for three lives. When he was ill and had come to the end of his life, he called (to him) his son, bishop Li, and his wife and several of his friends and said: 'Hearken ye, my friends. I desire that my wife hold this land which I bought from the church so long as she lives; and after her death let the church from which I received it receive it back; and let him who takes it from the church be excommunicate'.
>
> That this was so is testified by the better men of the whole county ([19]).

I do not think it too bold to suggest that this paragraph does not derive from oral testimony presented by a suitor of the county

([18]) *D.B.*, I, f^{os} 13, 42, 134, 138 b, and 174 b. In the light of these references, the judicial nature of the Domesday jury, as implied by the heading of the Lincolnshire *Clamores*, seems all the more convincing: «Clamores quae sunt in Sudtreding Lincoliae, et concordia eorum per homines qui iurauerunt». *D.B.*, I, f° 375.

([19]) *Ibid.*, I, f° 177.

court or by a jury representing the county. No one stood up before the Domesday *legati regis* and, speaking for the better men of the county, recited this charming tale. Someone representing the bishop of Chester, of course, very probably introduced this information in the form of a written document that may have been read aloud. The function of the county court was to pronounce upon such evidence, not to produce it in the first place. And when we consider the consistent similarity between references to county courts and hundred courts (or men of the hundred sworn to give evidence), the same conclusion seems inevitable for the hundred. The Domesday *legati* did not seek from the hundred court or jury the basic information that constitutes the substance of Domesday Book; rather, they sought confirmation of, or a pronouncement for or against, information already obtained. The hundred jury or hundred court or county court was nonetheless representative, but the function it served was that of speaking for the hundred or county on disputed points, instead of trying to accomplish what even the primitive government of William the Conqueror could recognize as impossible, viz., supplying the enormous quantity of facts and figures that occur in entry after entry throughout Domesday Book.

If this interpretation of the nature of the Domesday references to hundred and county is correct, it will contribute to our understanding of a passage in the *Leges Henrici Primi* ([20]) that has a direct bearing on representation in the administrative practice of Anglo-Norman England, as well as making the *Inquisitio Eliensis* more intelligible than heretofore. The latter, in its preamble, brings together as if equivalent sources of information 1) sheriffs, 2) tenants-in-chief and their sub-tenants, and 3) the priest, reeve, and six villeins of each vill of every hundred. Then, as if to defy both logic and common sense, it proceeds to give the names of men who make up the juries of hundreds — thus implying that these juries produce information rather than passing judgment on it. Since the rest of the Domesday evidence refutes this implication, and assigns to these juries the function of passing judgment on information supplied by others, then the equivalence between lords of manors and the priest-reeve-villeins as sources of information is clearly established. Thus the Domesday evidence is brought closely in touch with the evidence of the *Leges Henrici Primi,* which also equates

([20]) *Select Charters,* p. 124.

for purposes of participating in the shire court the lord (or his steward) and the-reeve-the-priest-and-four-of-the-better-men of a vill of that lord.

III

Turning now to the third form of representation, what might be called feudal representation, it is well to note that there is nothing exceptional or extraordinary in the use of vassals to collect information. The enormous mass of information collected in the Domesday survey is unique, but the process of its collection, at least in part, directly from tenants-in-chief was not. I doubt that anyone participating in the «deep speech at Gloucester» on Christmas in 1085 was aware of the administrative history of the later Carolingians, but in the year 869 Charles the Bald made a survey of the holdings of his ecclesiastical and lay tenants that may be classified as a rudimentary sort of Domesday survey. The chronicler tells us that Charles sent letters throughout his realm ordering his bishops and abbots to send him written lists concerning their honors and how many *mansi* each had; similar lists concerning the benefices of his counts and vassals were to be drawn up in writing and sent to the king. The purpose was the assessment of labor services and materials for the building of a fortress ([21]).

Eighty years after the Domesday survey, Henry II collected information directly from his tenants-in-chief concerning the enfeoffment of knights on their honors. The returns were sent in, in writing — the *Cartae Baronum* of 1166. In this administrative transaction, the only use of the royal machinery of government was the employment of sheriffs to notify each tenant-in-chief to send in his return on or before a given day.

In contrast with these simple events, the administrative effort involved in the Domesday survey was complicated and multiple. Indeed, Domesday is to be compared not with them so much as with a modern census, such as the United States census of 1960 in which — to quote the words of the bishop of Hereford writing about the Domesday survey — «other investigators followed the

([21]) *Annales Bertiniani*, s.a. 869 (ed. G. Waitz, *Scriptores Rerum Germanicarum in usum scholarum*, Hanover, 1883), p. 38.

first ones» ([22]) in order to check the accuracy and correct mistakes of the initial gathering of data. Bishop Robert's account is silent about how the information in 1086 was first compiled; and so are all the other accounts, including the Ely preamble discussed above and the preamble to the first part of the Feudal Book of Abbot Baldwin. The administrative process probably involved the total machinery of local and central government, but in addition there must have been written returns from many (possibly the majority) of the tenants-in-chief. Evidence for this is scattered throughout Domesday Book. It is implied by the reference to the oaths of all the barons and their Frenchmen in the Ely preamble; it is not unreasonable to suppose that the little story reciting Wulfwine's nuncupative will, attested by the better men of the whole county of Worcester, originally reached the Domesday *legati* as part of a written return from the bishop of Chester. And in the preamble to Baldwin's Feudal Book it is stated that the *descriptio* of all of England was made «according to the oaths which nearly every inhabitant of this land swore whereby each person told the truth when questioned about his own land and substance and concerning those of others who dwelt in his neighborhood» ([23]).

From the point of view of administrative practice, then, the Domesday survey made use of feudal representation, in which lords spoke for their honors and fees. Their tenants were bound as much by what their lords returned as they were by the hundred and county courts, or juries representing these courts, in attesting to the truth of one or another allegation in a dispute. One final bit of evidence may now be called to witness: the *Leges Henrici Primi* again conforms with the conclusions reached from a review of the Domesday evidence. «If any of the king's barons or the man of another lord should be present according to law at the county court, he shall be able to speak for all the land (and its inhabitants) which he holds in demesne in that county; and in the same manner his steward may speak of present lawfully» ([24]). Here at the level of local government a feudal lord represents rights and interests in property and men which might be scattered over several hundreds. The unit is a feudal unit, the spokesman its feudal lord.

([22]) *Select Charters*, p. 95.

([23]) D. C. Douglas, ed., *Feudal Documents from the Abbey of Bury St. Edmunds*, in *British Academy Records*, vol. VIII, London, 1932, p. 3.

([24]) *Select Charters*, p. 124.

In conclusion, I think the general point necessary to stress is the complexity and flexibility of Anglo-Norman royal administration, i.e., its ability to employ procedures involving representation both from above and below, and its use of established institutions like the hundred and county as well as new devices such as representation of the vill or representation which I have called feudal. Finally, its impressive achievement is unequalled by any other medieval administrative system. The achievement is well known; what we are still trying to learn in detail is how it was accomplished.

R. S. Hoyt.

III

Concilia and Capetian Assemblies, 1179-1230,

BY

GAVIN I. LANGMUIR,
Stanford University.

The study of Capetian assemblies has advanced little since the fundamental work of Achille Luchaire (1). Lot and Fawtier, recognizing that fact, could only incorporate Luchaire's conclusions of 1891 in their work published in 1958. On the same note of desperation, they added that the history of Capetian assemblies seems almost impossible to write, even for a period as late as the reign of St. Louis; the outcome could only be a list of assemblies and conclusions about them too vague to be significant (2). Yet if historical research has value even when it produces only partial answers to partial questions, then perhaps Lot and Fawtier are too pessimistic. Since this article, however, will present another list and further vague conclusions, it would be unwise to insist that too much ground can be gained, although the attempt ought to be made.

It is on the whole true that we know little of the method of convocation, the composition, and the procedure of Capetian assemblies, as Lot and Fawtier have pointed out; but these are not the only problems that may be investigated. Possibly a more valuable preliminary question might be: what do we mean by Capetian assemblies ? Were all assemblies at which the king was present the same in form and purpose, and, if not, what were the characteristics of the different types ? Froidevaux, operating under the disadvantage of discussing medieval terminology in the academic Latin of the late nineteenth century, listed ninety-one assemblies for the reign of Philip Augustus, ending with the funeral ceremonies of that king (3). His definition of an assembly — or *concilium* — was apparently any occasion on which the king held discussions with a group of any size or composition, or was surrounded, alive or dead, by such a group for ceremonial purposes.

(1) *Histoire des institutions monarchiques,* 2nd ed., Paris, 1891, I, 246-276: *Manuel des institutions françaises,* Paris, 1892, pp. 491-502.

Abbreviations used: *HF* for *Recueil des historiens des Gaules et de la France,* Paris, 1738; *MGH* for *Monumenta Germaniae historica,* Hanover, 1826; *SHF* for the *Société de l'histoire de France*; *RS* for the *Rolls Series.*

(2) F. Lot and R. Fawtier, *Histoire des institutions françaises au moyen âge,* Paris, 1957-1958, II, 548-549.

(3) H. Froidevaux, *De regiis conciliis, Philippo II Augusto regnante, habitis,* Paris, 1891, pp. 19, 20, and Appendix.

Petit-Dutaillis objected to Froidevaux's allinclusive and undifferentiated list and proposed criteria of his own for «les véritables assemblées royales». Only assemblies which were exclusively French, over which the king presided, and which were in Petit-Dutaillis's judgment political in function should be included. Judicial meetings not concerned with regalian rights should be excluded because they developed into a separate institution and would have existed whether or not there had been «political» assemblies, while those concerned with regalian rights would be included because of their political overtones. Diplomatic parleys with rulers of other areas should be excluded because they continued long after the Capetian political assemblies had disappeared, and because such interviews took place in all the states of the world. Ceremonies and festive occasions, with the exception of certain acts of homage deemed of political importance, should also be excluded. On this arbitrary basis, Petit-Dutaillis was able to uncover the amazing total of twenty-five royal assemblies for the three years' reign of Louis VIII, ranging from an assembly whose only known business was recognition of certain royal rights by the burgesses of Saint-Quentin to the assembly at which Louis decided to undertake his final Albigensian crusade ([4]).

The obvious question would seem to be what Petit-Dutaillis understood by «royal assemblies». Were the assemblies that he listed an institution of the period or an aggregation of his own creation ? At first sight his attempt to define and distinguish different types of meetings at which the king was present seems a distinct improvement over Froidevaux's omnium gatherum, but further examination raises doubts. Whereas Froidevaux's list at least has the merit of inclusiveness, one has the uneasy impression that Petit-Dutaillis's list depends more on categories and antitheses of nineteenth-century political science — national sovereignty and international relations, law and politics, state and society — than on distinctions perceptible in his evidence ([5]). If the exclusion of diplomatic parleys might be

([4]) C. PETIT-DUTAILLIS, *Etude sur la vie et le règne de Louis VIII, 1187-1226*, Paris, 1894, pp. 341-343, and Appendix IV.

([5]) H. G. RICHARDSON, *The Origins of Parliament*, in *Transactions of the Royal Historical Society*, Fourth Series, XI, 1928, 149: «Nor can we impose our own categories upon mediaeval institutions and give and refuse the name of parliament because some assembly fulfils or fails to fulfil some fancied requirement imagined by a later age». For a fuller discussion of this problem, see O. BRUNNER, *Land und Herrschaft*, 4th ed., Vienna, 1959, pp. 111-164.

understandable in a discussion of the assemblies of a nation-state, it makes little sense for a period in which parleys were possibly the most frequent occasions on which the king took counsel with large numbers of his barons on questions of war, peace, and truce (6). If the division of judicial actions into political and nonpolitical may be useful when there are separate institutions of administrative or constitutional law, it makes less sense for a period when law was above politics.

Petit-Dutaillis's «royal assemblies" were collected primarily on the basis of his judgment of political importance, aided by his historical hindsight which revealed what kinds of meetings would become institutions separate from national assemblies. Yet to make the best of both worlds and to avoid the methodological fallacy of creating thirteenth-century institutions in the nineteenth century, he equated his conception of royal assemblies with thirteenth-century conceptions by a flat assertion:

> The very vague character of this institution can be seen at the outset from the way in which it was designated. It had as yet no generic name. The word *concilium* was employed by preference: that is the term used by the chronicler of Tours (7).

Although Petit-Dutaillis's stated criteria for royal assemblies are *a priori* rather than based on the evidence, this assertion would be acceptable if, as the statement implies, *concilium* was used in connection with at least all the types of meeting that he included and with the majority of meetings listed, even if it was not used for every meeting listed. In fact, *concilium* was used to designate only seven of the twenty-five assemblies he included (8). Also, as we shall try to show, the term *concilium* was used with surprising consistency in the period covered by Froidevaux and Petit-Dutaillis's lists to refer to one type of assembly and not to others. Yet Petit-Dutaillis's list includes meetings for which *concilium* was not used throughout this period. His effort to make thirteenth-century conceptions coincide with his conception of political institutions pre-

(6) See below n. 137.

(7) *Louis VIII*, p. 341; cf. C. PETIT-DUTAILLIS, *La monarchie féodale en France et en Angleterre*, in *Evolution de l'humanité*, XLI, Paris, 1933, pp. 262-263.

(8) *Louis VIII*, Appendix IV, nos viii, xi, xii, xvi-xviii, xx.

sented the thirteenth century posthumously with an institution it had never known, a peculiar composite of thirteenth-century events and nineteenth-century conceptions.

Part of this confusion may have arisen from the fact that French historians, conscious that they are discussing a period in which royal consultations were not highly defined, have preferred to use the vague and not specifically medieval term «assemblies», with its weaker institutional connotations, instead of medieval terms such as *concilium* or council, which would imply the existence of definite institutions ([9]). So far as there has been an attempt to give assemblies an institutional basis, it has been done by identifying all royal consultations with the *curia regis* ([10]). Thus «royal assemblies» is simply a convenient term whereby historians can refer to meetings at which the king was present without implying that they were a distinct historical institution. When Petit-Dutaillis attempted to define «royal assemblies» as an historical institution, he was able largely to disregard medieval usage and define the term as he pleased because it had no specific meaning for the thirteenth century, and there was no such institution.

What Petit-Dutaillis might have done was to examine medieval language to discover whether contemporaries perceived any of these assemblies as a separate institution, and to use their distinctions as a basis for his definition ([11]). Such use of medieval terms for assemblies, however, has been a tradition of English not of French historiography. English historians speak of the great council (*magnum concilium*) as an institution in England at the beginning of the thirteenth century, usually in the sense of a session of the king's daily counsellors and officials afforced by a large number of magnates,

([9]) E.g., LUCHAIRE, *Histoire des institutions*, I, 253-276; E. CHÉNON, *Histoire générale du droit français*, Paris, 1926-1929, I, 521-522; F. OLIVIER-MARTIN, *Histoire du droit français des origines à la Révolution*, Paris, 1948, pp. 221-224; LOT and FAWTIER, *Histoire des institutions*, II, 547-550.

([10]) See my *Counsel and Capetian Assemblies*, in *Studies presented to the International Commission for the History of Representative and Parliamentary Institutions*, XVIII, 1958, 21-25.

([11]) PETIT-DUTAILLIS noticed that the term *curia regis* had a restricted meaning, but failed to analyze the term *concilium* in the same way: *Louis VIII*, p. 348; cf. OLIVIER-MARTIN, *Histoire du droit*, p. 222: «Les contemporains ne faisaient guère de discrimination entre les diverses délibérations de la cour. On peut cependant discerner assez bien les attributions politiques de la cour du roi et ses attributions judiciaires . . .»

although Wilkinson, following in the footsteps of Stubbs, has adamantly denied that the great council was an expansion of the small council and sees it rather as a continuation of the tradition of the Witan ([12]). Historians of French institutions although also confronted with chronicles and documents in which *concilium* is used for large royal-baronial consultations, as Petit-Dutaillis noted, have not taken over the medieval term for their own use.

The different conditions in medieval England and France, particularly the slower development of central institutions in France, may be the reason for the difference in the description of assemblies by English and French historians. Yet given the community of language and to a considerable extent of experience in England and Northern France around 1200, this divergence of scholarly judgment or attitude seems curious. Was the great council an institution in England and not in France ? Are both the English and French chronicles and the English historians implying a degree of institutionalization and formalization of terminology contradicted by the events ? Or are French historians, less interested in «national councils» ([13]) and more determined to lay all upon the king, concentrating too heavily on the monarchy and overlooking an institution which in fact existed ?

An answer to these questions would require an examination of both English and French assemblies. In this article only French developments will be dealt with, and it will be suggested that there were secular assemblies, frequently called *concilia,* that did have characteristics which differentiated them from other kinds of royal assemblies, but that, although *concilium* was used with amazing consistency to refer to these assemblies, it was neither the only term used nor the term used by the majority of the participants. It would appear that these assemblies were not a highly defined insti-

([12]) E.g., J. E. A. JOLLIFFE, *The Constitutional History of Medieval England,* 3rd ed., London, 1954, pp. 179-180; G. O. SAYLES, *The Medieval Foundations of England,* rev. ed., Philadelphia, 1950, p. 306; Sir Maurice POWICKE, *The Thirteenth Century,* in *Oxford History of England,* Oxford, 1953, pp. 67, 78; B. LYON, *A Constitutional and Legal History of Medieval England,* New York, 1960, pp. 142-148, 245-250; J. F. BALDWIN, *The King's Council in England during the Middle Ages,* Oxford, 1913, pp. 3-4, 10-12; cf. B. WILKINSON, *The Constitutional History of England 1216-1399,* London, 1948-1958, III, 46-47, 120-121, 265-269.

([13]) W. STUBBS, *The Constitutional History of England,* I, 6th ed., Oxford, 1903, 604 ff.

tution, nor widely enough recognized as a distinct institution to have received a generally acknowledged name, yet had sufficiently marked characteristics of their own to be perceived as a distinct institution by at least some contemporaries.

I

In the half-century before the appearance of the term *parlamentum* in official records in the 1230's, which indicates the beginning of a new stage of institutional development, the term *concilium* was used rarely for secular assemblies in France, but almost consistently ([14]) to designate a particular form of royal-baronial consultation: a large assembly of magnates, lay and spiritual, specially convoked by the king for the sole or primary purpose of taking counsel on important problems of general concern, particularly problems for which the king sought unusual aid from his barons. There are only sixteen instances that I have noticed of assemblies of this type between 1179 and 1230 that are referred to by the term *concilium* in at least one contemporary document or chronicle, although there are other assemblies with apparently the same characteristics for which the term was not used ([15]).

(1) The assembly convoked (*convocavit*) by Louis VII, which met at Paris towards the end of April 1179 to assent to Philip Augustus's association in the kingship, is the first in this period to be called a *concilium*, as it is by Rigord. It is said to have been composed of «all» the archbishops, bishops, abbots, and barons of the whole kingdom, and it was probably in fact a very large assembly because of the importance of the occasion ([16]). Although deliberation was doubtless highly formal on this occasion, it is the only known purpose of the assembly. The assembly convoked for Philip's coronation on November 1, 1179, although equally impressive, was not called a *concilium*

([14]) Exceptions discussed below pp. 46-47.

([15]) Roman numerals will be used for assemblies which were called *concilia*; Arabic numerals will be used for similar assemblies for which the term was not used, discussed below pp. *55-56*.

([16]) *Œuvres de Rigord et Guillaume le Breton*, ed. H. F. DELABORDE (*SHF*, Paris, 1882-1885), I, 10; W. WALKER, *On the Increase of Royal Power under Philip Augustus 1179-1223*, Leipzig, 1888, p. 5; A. CARTELLIERI, *Philipp II. August*, Leipzig, 1899-1922, I, 31, n. 2.

by Rigord or others apparently because it had not been convoked to deliberate ([17]).

(II) In 1185, after the arrival of Heraclius, patriarch of Jerusalem, Philip convoked a *generale concilium* of «all» the archbishops, bishops, and princes of his land at Paris. The assembly was celebrated («celebrato autem cum illis communi concilio») in the second week of March 1185 and discussed aid for the Holy Land and, possibly, Philip's plan to attack the count of Flanders ([18]). Stephen, abbot of Sainte-Geneviève, later bishop of Tournai, expert in canon law and certainly acquainted with secular practice, wrote a letter for Philip Augustus to Lucius III apparently referring to this assembly ([19]). He states that the assembly was composed of the archbishops, bishops, and barons of the king and was convoked to deliberate on the needs of the kingdom, but he calls the assembly a *generalis conventus*, not a *concilium*. Whether or not he is referring to the assembly of 1185, his letter is the best evidence of official terminology at the time and strongly suggests that *concilium* had no clear official status for large, convoked, deliberative assemblies.

Philip's deliberation with the barons of the army assembled at Compiègne to attack Flanders, little more than a month later, between April 21 and 31, 1185, although called a *concilium generale* by Froidevaux in 1891, was not called a *concilium* by any contemporary writer, again apparently because the barons had been convoked for the army and not primarily for deliberation ([20]). For the same reason, the king's consultation with the barons of the army

([17]) RIGORD, *ed. cit.*, I, 12; WILLIAM THE BRETON, *ed. cit.*, II, 16; GILBERT OF MONS, *La chronique de Gislebert de Mons*, ed. L. VANDERKINDERE (Commission royale d'histoire: recueil de textes, Brussels, 1904), p. 127; ANONYMOUS OF LAON, *Chronicon universale*, ed. A. CARTELLIERI, Leipzig, 1909, p. 30; CONTINUATOR OF ANCHIN, *Sigeberti continuatio Aquincinctina*, ed. D. L. C. BETHMANN, *MGH Scriptores*, VI, 418; *Gesta regis Henrici secundi Benedicti abbatis*, ed. W. STUBBS (*RS*, London, 1867), I, 243.

([18]) RIGORD, *ed. cit.*, I, 47; FROIDEVAUX, *Conciliis*, no. 14; CARTELLIERI, *Philipp II.*, II, 22; cf. F. A. CAZEL, Jr., *The Tax of 1185 in Aid of the Holy Land*, in *Speculum*, XXX, 1955, 390. This assembly, like several others on our list, is included in C. J. HEFELE, *Histoire des conciles*, ed. and tr. H. LECLERCQ, V-2, Paris, 1913, p. 1128.

([19]) H. F. DELABORDE and C. PETIT-DUTAILLIS, *Recueil des actes de Philippe-Auguste*, Paris, 1916-1943, I, no. 136; CARTELLIERI, *Philipp II.*, I, Appendix 14.

([20]) FROIDEVAUX, *Conciliis*, no. 15; CARTELLIERI, *Philipp II.*, I, 174; RIGORD, *ed. cit.*, I, 41 and n. 3.

near Boves in the summer of 1185, at which the king was advised to make peace, was not called a *concilium* ([21]).

Rigord mentions that in 1186, before August 25, Philip Augustus convoked «archiepiscopos, episcopos, et principes regni majores quorum consilio et sapientia in negotiis suis pertractandis frequentis uti consueverat», to discuss the proposed marriage of his sister Margaret to Bela king of Hungary. Cartellieri describes the meeting as a Reichstag, but Rigord does not use *concilium* for it, probably because he considered the assembly too small to merit the title ([22]). For whereas he says that «all» the magnates were present at the three assemblies he calls *concilia* ([23]) in this instance he seems to have chosen his language carefully to indicate a more restricted group of influential counsellors. Nor was Margaret's marriage of the same importance to the barons as the subjects discussed in Rigord's three *concilia* ([24]).

(III) Although the heavily attended and widely reported parley of January 21, 1188, at which Philip and Henry II took the cross and measures for the crusade were agreed upon, was called a *colloquium* by at least ten chroniclers and a *concilium* by none ([25]), the assembly celebrated at Paris towards the end of March 1188, to which «all» the archbishops, bishops, abbots, and barons of the whole kingdom were convoked, and at which many took the cross and the Saladin Tithe was decreed, was called a *concilium* by two chroniclers and a *generale concilium* by Rigord. Robert of Auxerre contented himself with mentioning that the tithe was decreed according to the counsel of the king and the magnates ([26]). Even as

([21]) *Ibid.*, I, 43; GILBERT OF MONS, pp. 182-185.

([22]) RIGORD, *ed. cit.*, I, 67; CARTELLIERI, *Philipp II.*, I, 230.

([23]) Assemblies I-III.

([24]) But cf. OLIVIER-MARTIN, *Histoire du droit*, p. 222; and L. DESLISLE, *Catalogue des actes de Philippe-Auguste*, Paris, 1856, no. 124.

([25]) RIGORD, *ed. cit.*, I, 83-84; WILLIAM THE BRETON, *ed. cit.*, I, 187; GILBERT OF MONS, p. 206; ROBERT OF AUXERRE, *Chronicon*, ed. O. HOLDER-EGGER, *MGH, Scriptores*, XXVI, 253; *Gesta regis Henrici*, II, 29-30; ROGER OF HOWDEN, *Chronica*, ed. W. STUBBS (*RS*, London, 1868-1871), II, 334-335; Ralph DE DICETO, *Ymagines historiarum*, ed. W. STUBBS (*RS*, London, 1876), II, 51; GERVASE OF CANTERBURY, *The Historical Works*, ed. W. STUBBS (*RS*, London, 1879-1880), I, 406; GERALD OF WALES, *Opera*, ed. J. S. BREWER et al. (*RS*, London, 1861-1891), VIII, 240; ROGER OF WENDOVER, *Flores historiarum*, ed. H. G. HEWLETT (*RS*, London, 1886-1889), I, 143; FROIDEVAUX, *Conciliis*, no. 23; CARTELLIERI, *Philipp II.*, I, 269.

([26]) RIGORD, *ed. cit.*, I, 84; WILLIAM THE BRETON, *ed. cit.*, I, 187; WILLIAM OF

important an assembly as this could be simply described by a reasonably informed person as the performance of a function, a taking of counsel, without any perception of the assembly as an institution.

(IV) The *Gesta regis* and Roger of Hoveden mention an assembly at Paris in October 1189, at which Philip and the counts and barons of his whole kingdom decided and promised to be at Vezelay for the crusade on April 1, 1190, and at which the revocation of the Saladin Tithe may have been decided ([27]). They call the assembly *generale concilium suum*. Their information presumably comes from Philip's letters informing Richard of the promise; but since we have only Philip's preliminary letter ([28]) asking Richard to make a similar promise and do not have Philip's letters patent containing the promise, we cannot know whether these letters included the term. It is more probable that the English chroniclers, following the terminology they frequently used for English assemblies, automatically referred to the French assembly by the term they used for Richard's assembly.

Cartellieri calls the assembly at which Philip's divorce from Ingeburge was pronounced on November 5, 1193, a *Reichsversammlung* ([29]). Granted that it is difficult at times to distinguish between ecclesiastical and secular assemblies, it still seems misleading to suggest that this assembly, over which the archbishop of Reims, legate in his own province, presided, and which dealt with a matter within ecclesiastical jurisdiction, was a royal or secular assembly. The assembly is not called a *concilium* in the chronicles, but even if it were, it would not belong in our list any more than the legatine council (*concilium*) at Paris of May 7, 1196, or the legatine council at Dijon of December 6, 1199, or the legatine council at Soissons

ANDRES, *Chronica*, ed. J. HELLER, *MGH, Scriptores*, XXIV, 719; ROBERT OF AUXERRE, *MGH, Scriptores*, XXVI, 253; FROIDEVAUX, *Conciliis*, no. 24; CARTELLIERI, *Philipp II.*, II, 63. HEFELE-LECLERCQ, *Histoire des conciles*, V-2, 1142, speak of a synod.

([27]) *Gesta regis Henrici*, II, 92-93; HOVEDEN, III, 19; DELABORDE, *Recueil*, I, no. 252.

([28]) *Ibid.*, I, no. 267.

([29]) CARTELLIERI, *Philipp II.*, III, 66; FROIDEVAUX, *Conciliis*, no. 46; RIGORD, *ed. cit.*, I, 125; *Gesta Innocentii papae III*, in *Rerum Italicarum Scriptores*, ed. L. A. MURATORI, III-1, Milan, 1723, p. 204. The CONTINUATOR OF ANCHIN, *MGH, Scriptores*, VI, 431, treats the proceedings very informally and speaks of the king's having a *colloquium* with his archbishops, bishops, and barons.

in March 1201, all of which dealt with the same problem ([30]).

(V) The next use of *concilium* for this type of secular assembly is by Innocent III for the assembly at Mantes of August 22, 1203, which dealt with Innocent's effort to make peace between Philip and John. Philip had told the legate, Gerold abbot of Casmari, that he did not want to give a final answer to the pope until he had consulted his magnates ([31]). Some magnates were consulted before August 22 ([32]), and then the assembly celebrated at Mantes supported the royal position that feudal matters did not fall under papal jurisdiction. It should, however, be noticed that Rigord uses none of his usual language for an important assembly, only mentioning that the royal reply was agreed to by the bishops, abbots, and barons. Perhaps the assembly was smaller than Innocent, who believed that the prelates and other magnates had been convoked, assumed or had been led to believe by Philip's letters, which we do not have. We only know for certain of the presence of seven magnates at Mantes ([33]). Yet if Rigord does not speak of «all» the magnates, he does mention the presence of abbots which strongly suggests a special convocation. At the very least, Innocent's use of *concilium* is consistent with the other uses that we have noticed.

Froidevaux speaks of a *concilium* at Chinon in 1205, which also dealt with ecclesiastical claims. No chronicler mentions the meeting, and all our knowledge of it comes from baronial letters supporting the king's position against the pope, as in 1203. We have only the letters of the butler, Robert of Courtenai, of the counts of Sancerre, Auxerre, Nevers, and le Perche, and of Guy of Dampierre, although these letters speak of «alii barones regni Francie» ([34]). No term is used for the meeting in the letters, and we cannot tell whether it was a large convoked assembly. Since *concilium* was not used for the meeting, it does not belong in this list, nor, since we do not know that it was either a large or a convoked assembly, can we

([30]) RIGORD, *ed. cit.*, I, 125, 147, 149; CARTELLIERI, *Philipp II.*, III, 130; IV, 26, 68; FROIDEVAUX, *Conciliis*, no. 64.

([31]) *Letter of Innocent III*, *HF*, XIX, 440-441; RIGORD, *ed. cit.*, I, 158; FROIDEVAUX, *Conciliis*, no. 69.

([32]) *Layettes du Trésor des Chartes*, ed. A. TEULET et al., Paris, 1863-1909, I, nos. 678, 683-685. CARTELLIERI, *Philipp II.*, IV, 164-165, speaks of an assembly at Le Vaudreuil on the basis of two of these baronial letters.

([33]) *Layettes*, I, nos. 686-692; DELABORDE, *Recueil*, II, no. 759.

([34]) *Layettes*, I, nos. 762-767; FROIDEVAUX, *Conciliis*, no. 70; CARTELLIERI, *Philipp II.*, IV, 225; cf. PETIT-DUTAILLIS, *Monarchie féodale*, p. 262.

assert that it was an assembly similar to those called *concilia,* as we can for certain other assemblies for which the term was not used.

Peter of Vaux-de-Cernay alone describes two assemblies which seem to have had the same characteristics as those called *concilia,* but he calls them *colloquia.* Peter speaks of a *sollempne colloquium* celebrated by Philip with the duke of Burgundy, the counts of Nevers and Saint-Pol, and many other nobles and prelates on May 1, 1209, at which the Albigensian business was discussed ([35]). The only other evidence of this meeting is the Villeneuve ordinance on sub-infeudation — which Peter may have seen — from which we know that the duke of Burgundy, the counts of Nevers, Saint-Pol, and Boulogne, Guy of Dampierre, and many other magnates were present; no term for the assembly appears in the ordinance ([36]). This assembly was almost certainly specially convoked in order to deliberate on these matters, for the knighting of Louis of France, «cum tanta solemnitate et conventu magnatum regni», took place later at Compiègne at Pentecost, May 17, 1209 ([37]). The deliberation seems to have been separated intentionally from the ceremonial occasion.

Peter also describes a *generale colloquium,* to which Philip convoked his barons, which was celebrated on March 3, 1213, decided matters pertaining to Louis's projected Albigensian crusade, and fixed the date of departure at April 21 ([38]). No other northern chronicler mentions this important assembly, although William the Breton's mention of the large numbers who took the cross suggests that it was a large assembly ([39]). This seems clearly to have been the sort of assembly that Rigord and William the Breton called *concilia.* These two assemblies of which Peter informs us show that, as we might expect, well-informed chroniclers could overlook important assemblies. More important, since Peter's uncle, Guy of Carcassonne, was present at the 1213 assembly ([40]), Peter's use of *colloquium* strongly suggests that *concilium* was not recognized

([35]) PETER OF VAUX-DE-CERNAY, *Historia Albigensis,* ed. P. GUÉBIN and E. LYON (*SHF,* Paris, 1925-1939), I, 72-75.

([36]) *Layettes,* I, no. 873; FROIDEVAUX, *Conciliis,* no. 72.

([37]) *Ibid.,* no. 73; CARTELLIERI, *Philipp II.,* IV, 285; PETIT-DUTAILLIS, *Louis VIII,* p. 11; WILLIAM THE BRETON, *ed. cit.,* I, 226.

([38]) PETER OF VAUX-DE-CERNAY, *II,* 110, 113; FROIDEVAUX, *Conciliis,* no. 78; CARTELLIERI, *Philipp II.,* IV, 343.

([39]) *Ed. cit.,* I, 258.

([40]) PETER OF VAUX-DE-CERNAY, II, 111, n. 3.

in informed circles as the one official term for this sort of assembly.

(VI) *Concilium* was used by William the Breton for the very similar assembly of April 8, 1213, little more than a month later, at Soissons, to which Philip convoked «all» the magnates of the kingdom in order to discuss and gain assent for the proposed invasion of England ([41]). There is no doubt that this widely reported assembly was suddenly convoked specially for deliberation and consent. The decision to invade upset the plans for Louis's departure to the south made only a month previously. The Anonymous of Béthune comments on the suddenness of the decision; and William the Breton's statement that Soissons was a convenient place to assemble the barons, counts, dukes, chiefs, bishops, and abbots who gave their consent to the invasion suggests a special and widespread convocation, as does the Continuator of Auxerre's reference to a multitude of magnates. It is therefore interesting that, although Aubrey of Troisfontaines — who copies William the Breton — also calls this imposing assembly a *consilium*, other chroniclers call it a *tractatus*, *concio*, or *parlement* ([42]). Once more it seems clear that *concilium* was by no means a widely acknowledged term for these assemblies, and it seems probable that the term did not appear in the summons to the assembly.

When, a month and a half later, Philip and his army had assembled at Gravelines on May 22, 1213, to invade England, the legate Pandulf arrived to forbid the expedition in the pope's name. After consultation with the barons of the army «from all provinces of the kingdom», Philip then decided to attack Ferrand of Flanders who had refused his support. The consultation must have been large, but William the Breton, who had used *concilium* for the assembly that decided to invade England, did not use the term for this consultation which decided to invade Flanders instead ([43]). Again the

([41]) WILLIAM THE BRETON, *ed. cit.*, I, 245; DELISLE, *Catalogue*, nos. 1437-1439; FROIDEVAUX, *Conciliis*, no. 79; CARTELLIERI, *Philipp II.*, IV, 346 ff.

([42]) CONTINUATOR OF ROBERT OF AUXERRE, *MGH, Scriptores*, XXVI, 279; ANONYMOUS OF LAON, p. 73; ANONYMOUS OF BÉTHUNE, *Chronique*, *HF*, XXIV, 764-765; *Histoire des ducs de Normandie et des rois d'Angleterre*, ed. F. MICHEL (*SHF*, Paris, 1840), p. 120; WILLIAM THE BRETON, *ed. cit.*, II, 254-257; AUBREY OF TROISFONTAINES, *Chronica*, ed. P. SCHEFFER-BOICHORST, *MGH, Scriptores*, XXIII, 897; RALPH OF COGGESHALL, *Chronicon Anglicanum*, ed. J. STEVENSON (*RS*, London, 1875), p. 166.

([43]) WILLIAM THE BRETON, *ed. cit.*, I, 249-250; FROIDEVAUX, *Conciliis*, no. 82; CARTELLIERI, *Philipp II.*, IV, 363-364.

reason would seem to be that the barons had not been convoked specially for deliberation but were already assembled for the army.

The meeting at Melun on April 25 and 26, 1216, at which the legate Guala warned Philip and Louis not to attack John, a vassal of the pope, is called a *Reichsversammlung* by Cartellieri (44). Yet it probably does not belong in our list even though it was called a *concilium* by two contemporaries, for it was apparently an ecclesiastical not a secular assembly. Gervase, abbot of Prémontré, mentioned in a letter to Innocent III that the *concilium* at Melun was solemnly celebrated on the arrival of the archbishop of Tyre, who was commissioned to preach the crusade; Gervase is apparently speaking of a Church council (45). Walter of Coventry says that the *concilium* at Melun, which he mistakenly places in 1217, was convoked by papal messengers to lay an interdict on Philip's lands; he also thinks it was a Church council (46). William the Breton calls the assembly a *synodus* and only mentions the presence of *universi primates regni* who decided that they would not consider the king excommunicated until they were more certain of the pope's will; it was an ecclesiastical assembly for William also (47).

Roger of Wendover gives a fuller and somewhat conflicting account based on information from Louis's entourage. With his customary reliability, Roger places the encounter with the legate at Laon, possibly confusing it with an assembly of 1217. He does not suggest that the interview took place in a formal assembly, but describes it as a *colloquium,* apparently in the sense of a diplomatic discussion, which was carried on in the presence of an unspecified number of magnates, and he adds that the legate left the *curia* in wrath (48). Louis's tendencious letter to the monks of St. Augustine's, Canterbury, also simply says that Guala came to Philip and that Louis had his case presented «in presentia prelatorum et magnatum Francie» (49). The letter does not use a term for the

(44) *Ibid.*, IV, 518ff; FROIDEVAUX, *Conciliis*, no. 85; PETIT-DUTAILLIS, *Louis VIII*, p. 74 ff.; cf. *Monarchie féodale*, p. 262.

(45) *HF*, XIX, 604-605.

(46) WALTER OF COVENTRY, *The Historical Collections*, ed. W. STUBBS (*RS*, London, 1872-1873), II, 235.

(47) *Ed. cit.*, I, 308.

(48) WENDOVER, II, 176-180.

(49) C. BÉMONT, *De Johanne cognomine sine Terra*, Paris, 1884, Appendix posterior.

meeting or suggest that the interview had occurred at a special assembly.

It sounds very much as if Philip and his entourage had proceeded from Pont-de-l'Arche, where Simon de Montfort had done homage between the 10th and 25th of April ([50]), to Melun in order to be present at an ecclesiastical council ([51]) which was to discuss crusading problems, and as if Guala had also gone there to promulgate his threat of excommunication in the presence of the assembled ecclesiastics. Whatever the facts of the case, this instance shows that it may sometimes be difficult to distinguish between ecclesiastical and secular assemblies, because terms borrowed for secular purposes from more highly defined Church institutions, such as *concilium*, inevitably became ambigious. This evidence does suggest, however, that chroniclers were more likely to use a term with definite institutional connotations if they thought an ecclesiastical assembly had taken place.

(VII) Only Walter of Coventry reports that a *concilium* of magnates was convoked by Philip at Laon about March 5, 1217, in connection with Louis's English campaign; and there is no documentary evidence that Philip was at Laon in 1217 ([52]). But whether or not such an assembly occurred, this use of *concilium* is consistent with the other instances examined.

(VIII) The last assembly of Philip Augustus's reign to be called a *concilium* was convoked in the last year of his life and may never have met as an assembly because of his death. The evidence is far from clear. On May 1, 1223, the legate Conrad of Portua wrote that a royal messenger had brought the welcome news that the king had convoked the prelates and barons of the kingdom to Melun to treat concerning the Albigensian problem. Although Philip was in Melun in June, there is no evidence that an assembly was held ([53]). Ralph of Coggeshall informs us that the legate Conrad held the council at Sens, which he had convoked for July 6, and that Philip

([50]) DELISLE, *Catalogue*, nos. 1660, 1661; PETER OF VAUX-DE-CERNAY, II, 265 and n. 4; cf. C. PETIT-DUTAILLIS, *Le déshéritement de Jean sans Terre*, Paris, 1925, p. 34 and n. 1.

([51]) See J. D. MANSI, *Sacrorum conciliorum nova et amplissima collectio*, Venice, 1759-1798, XXII, col. 1087; HEFELE-LECLERCQ, *Histoire des conciles*, V-2, 1399-1400.

([52]) WALTER OF COVENTRY, II, 235; DELISLE, *Catalogue*, p. cix.

([53]) *Layettes*, I, no. 1577; CARTELLIERI, *Philipp II.*, IV, 563.

about the same time had a *colloquium* with many noble princes at Pacy ([54]). Then, according to William the Breton, Philip moved from Pacy to Paris *ad concilium* ([55]). Since Conrad had held his legatine council, this can presumably only refer to a royal assembly ([56]). Philip died on July 14, the day after the trip, and the assembly was not held, but it was considered providential that the lay magnates and almost all the prelates, who had expected to celebrate the *concilium* at Paris, were present to honour Philip at his death ([57]). The presence of the lay magnates would seem to confirm that this was a secular assembly. Apparently a large assembly had been specially convoked to deal with the Albigensian problem after the legate had discussed that problem in a legatine council.

The coronation of Louis VIII, like that of Philip Augustus, was not called a *concilium* ([58]). The assembly of November 8, 1223, at which Henry III's demand for the return of the Angevin fiefs was discussed and an ordinance on the Jews promulgated, was not called a *concilium* despite its importance and the presence of at least twenty-four magnates, probably for the simple reason that no chronicler mentions it. No term is used for the assembly in the ordinance itself ([59]). Similarly no chronicler describes the assembly held by Louis at the end of January or the beginning of February 1224 at Paris where Louis stated his conditions for leading another Albigensian crusade; and Louis's letter to Honorius III uses no term for the assembly, only mentioning that Louis had taken counsel with his prelates and barons ([60]).

(IX) The first use of *concilium* for an assembly of Louis VIII is for the assembly celebrated at Paris on May 5, 1224, at which

([54]) Convocation of the council by Conrad of Porto, *HF*, XVII, 757; RALPH OF COGGESHALL, p. 195. Philippe MOUSKET, *Chronique rimée*, ed. M. REIFFENBERG, in *Collection de chroniques belges*, Brussels, 1836-1845, II, 420, clearly believes that the legatine council was held at Sens.

([55]) WILLIAM THE BRETON, *ed. cit.*, II, 369.

([56]) Cf. HEFELE-LECLERCQ, *Histoire des conciles*, V-2, 1440.

([57]) WILLIAM THE BRETON, *ed. cit.*, II, 372.

([58]) WILLIAM OF ANDRES, *MGH, Scriptores*, XXIV, 763; ANONYMOUS OF TOURS, *Chronicon Turonense*, *HF*, XVIII, 304; PETIT-DUTAILLIS, *Louis VIII*, p. 222.

([59]) *Ibid.*, Appendix IV, no. 3; *Layettes*, II, no. 1610; RALPH OF COGGESHALL, p. 197.

([60]) PETIT-DUTAILLIS, *Louis VIII*, Appendix IV, no. 6; C. DEVIC and J. VAISSETE, *Histoire générale de Languedoc*, new. ed., Toulouse, 1874-1889, VIII, 790, 792.

he revoked his decision to fight the Albigensians immediately and refused to renew the truce with England. Although the Anonymous of Tours and the chancery of Henry III called the meeting a *concilium* (61), Louis's own letters to Honorius III use no term but assert that «all» the prelates and barons of France were present (62). Since the army to attack Poitou did not assemble until June 24th, the assembly was apparently purely consultative in purpose.

Our knowledge of the next four «*concilia*» is slight and depends primarily on the very scanty evidence of the Anonymous of Tours. (X) On December 7, 1224, Louis celebrated a *concilium* at Paris, «and much business of the kingdom was discussed there» (63). Since Savari de Mauléon did homage to Louis at Christmas (64), there is the possibility that the deliberation was kept separate from the festive and ceremonial occasion. (XI) On May 15, 1225, Louis celebrated a *concilium* at Paris, in the presence of the legate Romanus, at which the Albigensian problem, relations with Henry III, and much other business of the kingdom was discussed (65). (XII) A *concilium* convoked by Louis met on July 21, 1225, at which the viscount of Thouars and others did homage to the king in the presence of Romanus and English messengers, and there was presumably discussion of a truce with England (66). (XIII) On November 8, 1225, a *concilium* convoked by Louis at Melun, composed of the archbishops, bishops, and barons of France, discussed ecclesiastical jurisdiction, the proposed truce with England, and the Albigensian business in the presence of Romanus (67).

(XIV) After the legatine council at Bourges on November 30, 1225, had refused Raymond VII of Toulouse's plea for absolution, Louis (and Romanus according to the Anonymous of Tours) cel-

(61) ANONYMOUS OF TOURS, *HF*, XVIII, 305; T. RYMER, *Foedera* (Record Commission, London, 1816-1830), I-1, 174; MOUSKET, II, 446; PETIT-DUTAILLIS, *Louis VIII*, Appendix IV, no. 8.

(62) *HF*, XVII, 303-304; *HF*, XIX, 760.

(63) PETIT-DUTAILLIS, *Louis VIII*, Appendix IV, no. 11; ANONYMOUS OF TOURS, *HF*, XVIII, 307.

(64) *Ibid.*

(65) *Ibid.*, 308; PETIT-DUTAILLIS, *Louis VIII*, Appendix IV, no. 12.

(66) ANONYMOUS OF TOURS, *HF*, XVIII, 308; PETIT-DUTAILLIS, *Louis VIII*, Appendix IV, no. 16.

(67) ANONYMOUS OF TOURS, *HF*, XVIII, 309; *Layettes*, II, no. 1734; PETIT-DUTAILLIS, *Louis VIII*, Appendix IV, no. 17; HEFELE-LECLERCQ, *Histoire des conciles*, V-2, 1442.

ebrated a *generale concilium* at Paris on January 28, 1226. The legate excommunicated Raymond and his supporters; Amauri de Montfort surrendered his rights in Raymond's lands to Louis; and two days later, after careful consultation, the king «and almost all of the bishops and barons of the kingdom» took the cross ([68]). Declarations pertinent to the crusade show that there were present at least five archbishops, eleven bishops, and twenty-nine principal barons ([69]). Although there might be some question as to whether this was properly a secular assembly ([70]), since the Anonymous of Tours suggests that both Louis and the legate presided, the assembly was almost certainly convoked by the king and not by the legate, who had held his council on the subject two months earlier. But if this can be counted as a secular assembly, it is another example of the difficulty of distinguishing between ecclesiastical and secular assemblies, especially between legatine councils and royal assemblies, that we have observed before in connection with Philip Augustus's divorce and the 1216 assembly at Melun.

(XV) The *concilium* of bishops and barons convoked by Louis at Paris on March 29, 1226, discussed the Albigensian campaign and confirmed the decision that the army would assemble on May 17th at Bourges ([71]). It is once more significant that, when the Anonymous of Tours mentions the consultation of the magnates assembled at Bourges for the crusade on May 17, at which much was decided according to the counsel of the bishops and princes, he did not call it a *concilium* despite his obvious predilection for that term ([72]). Nor is the assembly at Pamiers in October 1226, at which Louis, according to the counsel of the legate and «all» the prelates and barons of *Francia* in the army, decreed measures against excommunicates, called a *concilium* ([73]).

(XVI) No *concilia* are mentioned for the early unsettled years of Louis IX's reign until the assembly of December 1230 at which

([68]) ANONYMOUS OF TOURS, *HF*, XVIII, 311; MOUSKET, II, 488; PETIT-DUTAILLIS, *Louis VIII*, Appendix IV, no. 18.

([69]) *Layettes*, II, nos. 1742, 1743.

([70]) «une grande réunion, moitié parlement, moitié concile»: HEFELE-LECLERCQ, *Histoire des conciles*, V-2, 1451.

([71]) ANONYMOUS OF TOURS, *HF*, XVIII, 313; PETIT-DUTAILLIS, *Louis VIII*, Appendix IV, no. 20; HEFELE-LECLERCQ, *Histoire des conciles*, V-2, 1451-1452.

([72]) ANONYMOUS OF TOURS, *HF*, XVIII, 314.

([73]) WILLIAM OF PUY-LAURENT, *Historia Albigensium*, *HF*, XIX, 217; MANSI, *Conciliorum amplissima collectio*, XXIII, col. 21.

an ordinance on the Jews was promulgated in the presence of at least seventeen important magnates ([74]). And with that assembly we have covered a halfcentury of this usage of *consilium*.

We have found that *concilium* was used for sixteen assemblies with common features in this period. And if we do not include the cases in which a writer uses *concilium* more than once for the same assembly, the term is used in this context some twenty-one times. Exceptions to this usage are rare; I have only noticed two instances in which French sources use *concilium* for other secular meetings, in both cases for diplomatic parleys. The Continuator of Anchin refers to a meeting between Philip Augustus and John, presumably the meeting of August 16-18, 1199, as a *concilium* «in marchis utriusque regni». Since this chronicler's normal term for such meetings is *colloquium*, one can only hazard the guess that the presence of «a multitude of bishops, abbots, counts, priors, provosts, and an infinite multitude of men of both orders» led him to use a more impressive term ([75]). Similarly the Anonymous of Tours uses *concilium* once for the particularly impressive diplomatic parley between Louis VIII and Frederick II's young son, Henry VII, on November 19, 1224 ([76]). These rare exceptions suggest that if *concilium* was used out of its normal context ([77]), it was employed to indicate and dignify a specially convoked and impressive meeting at which important discussions took place.

The same variant usage can be found in English chronicles. In the *Gesta regis Henrici*, Roger of Howden uses *concilium* once and *colloquium* three times to refer to the parley of April 27, 1181, between Philip and Henry II, possibly because the discussion concerned the Holy Land, and the Templars and Hospitallers presented papal letters asking for the king's help. Significantly, when he copied this

([74]) AUBREY OF TROISFONTAINES, *MGH, Scriptores*, XXIII, 927; *Layettes*, II, no. 2083.

([75]) CONTINUATOR OF ANCHIN, *MGH, Scriptores*, VI, 435; cf. *ibid.*, 409, 413, 420, 422, 434, 436.

([76]) ANONYMOUS OF TOURS, *HF*, XVIII, 306.

([77]) Cf. AUBREY OF TROISFONTAINES, *MGH, Scriptores*, XXIII, 914: «Apud Montempessulanum . . . de mandato domini pape fuit concilium seu colloquium ab universis fere prelatis totius provincie pro facto Albigensium celebratum, ubi affuerunt comes Tolosanus Raymundus et Rogerius Bernardi comes Fuxensis et vicecomes Biterrensis . . . et hereticorum infinita multitudo, querentium ita pacem facere . . .» The diplomatic aspect of this council apparently accounts for the expression, «concilium seu colloquium».

passage in the *Chronica*, Roger changed *concilium* to *colloquium*, making the terminology consistent within the passage and consistent with his normal usage ([78]). In the *Gesta* Roger also uses *colloquium* twice and *concilium* once for the first parley, on July 22, 1189, of Philip Augustus and Richard after Henry II's death, at which Philip invested Richard in his French lands and terms of peace were agreed upon. In the *Chronica* Roger corrected the passage by simply omitting the term *concilium* ([79]). He was clearly of the opinion that *concilium* was not normally or properly used for this kind of meeting, and our examination of the use of *concilium* agrees with his opinion.

II

With the knowledge that *concilium* was not normally applied simply to any kind of secular assembly, we may now examine more closely the assemblies for which it was used to discover whether their resemblance to each other depends on superficial similarities or on marked characteristics of size, summons, purpose, and function.

Contemporaries were impressed by the size of these assemblies, however inaccurately they may have estimated the numbers present, and however impossible it is for us to discover who and how many were present. Whenever there is more than a cursory indication of attendance, the presence of large numbers is stressed. Rigord and William the Breton speak of «all» the magnates as being present at four of these assemblies ([80]). Louis VIII says that «all» the prelates and barons of France were present at the assembly of May 5, 1224 ([81]). When the Anonymous of Tours says that «almost all of the bishops and barons of the kingdom» took the cross at the assembly of January 1226, we know that at least five archbishops, eleven bishops, and twenty-nine principal barons were present ([82]). We also know that at least seventeen of the more important secular magnates were present at the assembly of December 1230 ([83]).

([78]) *Gesta regis Henrici*, I, 272, 276; HOWDEN, II, 255.
([79]) *Gesta regis Henrici*, II, 74-75; HOWDEN, III, 4.
([80]) Assemblies I-III, VI.
([81]) Assembly IX.
([82]) Assembly XIV.
([83]) Assembly XVI.

Although chroniclers sometimes used the more impressive term *generale concilium*, *generale* was apparently used impressionistically to suggest unusual importance and size, not to distinguish between different institutional forms. We find *generale concilium* and *concilium* alone used for the same assembly by different chroniclers (84). Although Rigord uses the more impressive language for the three assemblies he calls *concilia*, William the Breton uses only *concilium* for the large and important assembly of 1213 for the invasion of England at which, he says, «all» the magnates were present (85). The papal chancery and the chancery of Henry III also use *concilium* without any adjective (86). *Generale concilium* and *concilium* were not used to distinguish between large assemblies and a small body of intimate counsellors; with or without an adjective, *concilium* in this period seems normally to have meant a large convoked assembly like a Church council (87).

Size along would lead us to suspect that these assemblies were specially convoked; and the use of *convocare* in ten of the sixteen instances is evidence not only of the fact of convocation but of the importance of that action to those who recorded the fact (88). The use of *celebrare* in connection with six of these assemblies also suggests unusually important occasions to which large numbers had been summoned (89). Written summonses were employed at a much earlier date, and Nicholas of Brai, despite his epic style, twice takes the trouble to mention that French assemblies were convoked by writing between 1223 and 1226, and once he speaks meticulously of the English magnates as being summoned «scriptis pendente sigillo» (90). Unfortunately none of the summonses to

(84) Assembly III.

(85) Assemblies I-III, VI.

(86) Assemblies V, IX.

(87) See the summons to a *concilium* in John's reign quoted below n. 106; also *Patent Rolls 1216-1232*, London, 1901-1903, I, 99, 103-104, where *concilium* is also used without an adjective; cf. *ibid.*, I, 109, 113, 186, 190, 193, etc. for the use of *consilium* for the smaller body. Although the ANONYMOUS OF BÉTHUNE speaks of Philip Augustus's intimate counsellors as *son consel*, he uses *parlement* for a large assembly discussing the same problem: *Histoire des rois d'Angleterre*, p. 120.

(88) Assemblies I-III, V-VIII, XII, XIV, XV.

(89) Assemblies II, III, V, IX-XI.

(90) LUCHAIRE, *Histoire des institutions*, I, 260-261; NICHOLAS OF BRAI, *Gesta Ludovici VIII*, *HF*, XVII, 319, 330, 340.

French assemblies in this period are extant. The apparent paraphrase of such a summons by Conrad of Porto suggests that the magnates were summoned to treat (*ad tractandum*) concerning some important problem, and echoes of such summonses may perhaps be seen in two passages of the Anonymous of Tours ([91]). There is no indication that any term was used in the summonses. Although Stephen of Tournai called an assembly a *generalis conventus* when writing for the king about 1185, no other French royal letter uses any term for assemblies; there are only references to the councel of the magnates ([92]).

The special characteristic of these summonses, in contrast to other royal summonses, would seem to have been that they convoked the magnates solely for deliberation, to treat, to give counsel, concerning some important problem. Summonses gave the time and place and the purpose of the convocation ([93]), and, so far as we can see, *concilium* was only applied by contemporaries to assemblies which had been summoned solely for deliberation. Although magnates were frequently summoned for other purposes, to ceremonial occasions, the army, or diplomatic parleys, and there was frequently discussion on those occasions, contemporaries did not call them *concilia.* Widely reported coronations were not called *concilia* ([94]). Although the Soissons assembly of 1213 for the invasion of England was called *concilium,* the large meeting of the barons assembled with the army of 1213 which decided to invade Flanders instead was not so called ([95]). The most widely reported diplomatic parley with religious overtones was that at which Philip Augustus and Henry II took the cross on January 21, 1188, but that was called a *colloquium* by ten writers and a *concilium* by none ([96]). Perhaps the most formally recorded judicial occasion in this period was the judgment between Blanche of Champagne and Erard of Brienne at Melun in July 1216,

([91]) *Layettes,* I, no. 1577: «... convocatis prelatis et baronibus regni vestri apud Meledunum, ad tractandum super remedio et succursu terre....»; ANONYMOUS OF TOURS, *HF,* XVIII, 307: «In octavis vero Sancti Andreae Ludovicus Rex Parisius concilium celebravit, ibique multa de regni negotia sunt tractata»; *ibid.,* 308.

([92]) DELABORDE, *Recueil,* I, no. 136; *HF,* XVII, 304; *HF,* XIX, 760.

([93]) LUCHAIRE, *Histoire des institutions,* I, 260-261.

([94]) See above n. 17.

([95]) See above pp. 41-42.

([96]) See above n. 25.

but only the term *curia* appears in that context ([97]). And we might add that *curia* does not appear in connection with any of the sixteen deliberations that we have listed. The assemblies sometimes called *concilia* were not summoned for festive purposes, for fighting, for protection and the guarantee of truces or peaces, or for judgment, but to give counsel on, and sometimes to give consent to, proposed policy on important problems.

The subjects discussed in these assemblies were sporadic problems of unusual interest which required or made advisable the convocation of as many of the magnates as possible: association in the kingship, the organization of royal or princely crusades, papal intervention in the campaign against John, invasion of England, discussions of peace, and important legislation. Most of these matters needed baronial cooperation; a surprising number depended upon baronial consent. However formal the barons' consent to Philip Augustus's association in the kingship, Rigord speaks of their counsel and will ([98]). The possibility of a crusade of any size in 1185, although not realized, depended upon baronial consent, as is true of the crusade and Saladin Tithe in 1188 ([99]). In 1203, Philip so wanted baronial support against Innocent III that he obtained the written consent of the more important barons to his policy ([100]). In 1213, Philip had to have baronial consent for his unprecedented plan of invading England and obtained oaths from the barons that they would fulfill their promises. The Anonymous of Béthune and William the Breton mention their consent explicitly ([101]). The assemblies of 1223, 1224, 1225, and 1226, which dealt with the Albigensian crusade, also dealt with policies that required baronial cooperation and consent, however willingly granted ([102]). At the assembly of January 28, 1226, when the decision to undertake the

([97]) *Layettes*, I, nos. 1182-1189.

([98]) Assembly I.

([99]) Assemblies II, III.

([100]) Assembly V.

([101]) Assembly VI; ANONYMOUS OF BÉTHUNE, *HF*, XXIV, *765*: «Puis manda ses haus homes à parlement, et lor monstra son afaire, et lor requist qu'il alaissent en Engleterre od lui por le règne conquerre. Tuit li otroièrent, fors Ferrans, li cuens de Flandres . . .»; WILLIAM THE BRETON, *ed. cit.*, I, 245: «Ibidem igitur tractatum fuit de transfretando in Angliam, et placuit sermo iste baronibus universis, et spoponderunt auxilium et quod etiam personaliter transfretarent cum ipso».

([102]) Assemblies VIII, IX, XI, XIII-XV.

campaign was finally made, twenty-nine magnates stated that, «... we have approved and counselled him to undertake the Albigensian business, and we promise on the faith we owe him that we will aid him in good faith as our liege lord until the conclusion of that business or as long as he labours in that business» ([108]). The ordinance on the Jews of 1230 also required the consent of many magnates ([104]). Occasions on which the king sought formal baronial consent were rare and would attract notice, and such consent seems to have been sought in these large specially convoked assemblies. Other business was discussed at these assemblies, such as truces or war with English kings or setting the date of crusades, which did not require baronial consent, but would certainly be aided by willing baronial cooperation best obtained in such assemblies ([105]).

Since these assemblies called *concilia* were unusually large assemblies specially convoked by the king solely or primarily to discuss important problems for which the king sought baronial cooperation and frequently baronial consent, they did have marked characteristics by which they could be distinguished from other royal-baronial consultations and other meetings at which the king was present. Kings recognized these features in practice by summoning such assemblies, and French and English chronicles and the chanceries of Innocent III and Henry III perceived them as a separate institution, at least in the sense that they referred to them as *concilia*, a word with distinct institutional connotations. Legal recognition of these assemblies as a distinct institution is more difficult to demonstrate. So far as we can see, the only characteristic which might be considered to give them a legal basis is to be found in the royal summons to attend solely *ad tractandum*, provided that we are correct in assuming, in the absence of examples, that this was the form of summons, and that it was only used for this kind of assembly ([106]). These assemblies were, then, an institution of the

([108]) *Layettes*, II, no. 1742.

([104]) See my «*Judei nostri*» *and Capetian Legislation*, in *Traditio*, XVI, 1960, 201-239.

([105]) Assemblies IX, XI-XIII.

([106]) Cf. W. STUBBS, *Select Charters*, ed. H. W. C. DAVIS, 9th ed., Oxford, 1942, p. 277: «... sitis ad nos apud Londonias die Dominica proxima ante Ascensionem Domini, nobiscum tractaturi de magnis et arduis negotiis nostris et communi regni nostri utilitate ... vos etiam ex parte nostra et vestra abbates et priores conventuales ... citari faciatis ut concilio praedicto nobiscum inter-

period, although ill-defined, for they had special characteristics, were perceived by at least certain people as a separate institution, and may have had a tenuous legal basis as a distinct institution.

III

While these assemblies had distinctive characteristics and had been given a distinguishing name, *concilia*, by certain people, nevertheless they do not seem to have been widely recognized as a distinct institution. Certainly they had not attracted sufficient attention to have received a generally accepted or commonly used name, which means that there were probably more assemblies of this type than the sixteen called *concilia* in the extant evidence. As we have seen, Stephen of Tournai, writing for the king, speaks of a *generalis conventus*; the Anonymous of Laon uses *concio* for the Soissons assembly of 1213; and Peter of Vaux-de-Cernay employs *sollempne* or *generale colloquium* for two assemblies apparently identical to those called *concilia* ([107]). On the other hand, Louis VIII's letters use no term at all, and chroniclers will also refer to these assemblies without using a term. Although certain well-informed people used *concilium* with remarkable consistency, that term had neither gained general currency nor, so far as we can see, become the accepted official terminology for this type of assembly. Apparently many men were still more concerned with the function of taking counsel performed at these assemblies than with their institutional form.

That these assemblies were not widely recognized and clearly perceived as a separate institution is even more apparent from the vernacular terminology. Discussions in assemblies were conducted in the vernacular, and most of the men who participated in these assemblies and influenced their development had little if any knowledge of Latin. They were, therefore, less likely to be directly influenced by ecclesiastical institutional conceptions and more likely to view these assemblies simply as more impressive occasions on which the king took counsel. As we might expect, although *concilium* was the most precise Latin term for deliberative assemblies,

sint...» If French summonses ever used *concilium* the legal position would be clearer.

([107]) See above nn. 19, 35, 38, 42.

and the most frequently used single term, that usage had not seriously influenced vernacular usage, for *concile* is hardly ever used for secular assemblies in vernacular accounts.

Concile appears in two early vernacular accounts. Jordan Fantosmes, a cleric, probably chancellor of the diocese of Winchester and almost certainly of Poitevin origin, speaks of a *grant concile* of Louis VII, and that is his only use of the term; a similar assembly of William of Scotland is called a *plenier parlement* ([108]). Ambroise was a minstrel from Normandy who took part in the Third Crusade, and although his account is mostly concerned with the crusade, there is evidence that he was familiar with conditions in northern France and probably present at assemblies at which preliminaries for the crusade were arranged ([109]). Ambroise uses *concille* three times for deliberative assemblies of the crusaders and once for a parley between opposed parties. But he also uses *parlement* twice for deliberations and four times for parleys. Although he uses *concille* more often for deliberations than *parlement*, his choice of language is not the result of problems of rhyme or apparently of meaning, since *parlement* is used exclusively in approximately the first third of his work, *concille* in the next third, and *parlement* again in the last third ([110])! A later poet, Philippe Mousket from Tournai, uses *concille* four times for ecclesiastical councils between 1179 and 1242, and only once for a secular deliberation. But in the latter case the term is apparently used for reasons of rhyme, and *parlement* is used for the same assembly, apparently as the preferred term. This seems confirmed by the fact that in the same period, Philippe uses *parlement* three times for deliberations of groups with a common purpose, seven times for meetings of hostile parties, and once in an ambiguous context ([111]). Clearly his preference is to use *concille* for ecclesiastical assemblies and *parlement* for secular assemblies of all sorts.

([108]) Jordan FANTOSMES, *Chronique de la guerre entre les Anglois et les Ecossois en 1173 et 1174*, in *Chronicles of the Reigns of Stephen, Henry II, and Richard I*, ed. R. HOWLETT (*RS*, London, 1884-1889), III, lxi-lxvi, 204, 226.

([109]) J. G. EDWARDS, The *Itinerarium Regis Ricardi* and the *Estoire de la guerre sainte*, in *Historical Essays in Honour of James Tait*, Manchester, 1933, 59-77.

([110]) AMBROISE, *L'estoire de la guerre sainte*, ed. G. PARIS (*SHF*, Paris, 1840), cols. 4-5, 18, 48, 135, 139, 147, 187-188, 207-208, 254, 303.

([111]) MOUSKET, II, 262, 336, 352, 393, 419-420, 446, 460, 470, 475, 478-479, 487, 572, 573, 638.

In four other vernacular accounts, *concile* is never used for a secular assembly. The Anonymous of Béthune from the Artois and the Norman biographer of William the Marshal never use *concile* for secular assemblies, their term is *parlement* which they use both for deliberations and parleys ([112]). More significantly, two members of the knightly class never use *concile* in this way. The simple knight, Robert of Clari from the Amienois, uses no terms for meetings at all and apparently had no conception of the institutional nature of any of the meetings which he described; he simply saw that men assembled to speak together, to take counsel ([113]). Villehardouin from Champagne, thoroughly acquainted with feudal practice, uses *parlement* for both deliberations and parleys, but never *concile* ([114]).

Not surprisingly, vernacular terminology was less sophisticated than Latin terminology; where the latter normally distinguishes between two kinds of meeting by using *colloquium* for parleys and *concilium* for large convoked deliberations, the former usually employs one term for both. Only one of the sixteen assemblies that we have listed is clearly given a name in a vernacular account, but it is *parlement* and not *concile* that the Anonymous of Béthune uses for the Soissons assembly of 1213, the term that he, Ambroise, the biographer of the Marshal, and Mousket also use for parleys between Philip Augustus and the Angevins ([115]). This vernacular terminology strongly suggests that barons of the period did not normally associate these impressive secular deliberations with the institutional model of Church councils. And since *parlement* began to win its way into Latin as *parlamentum* towards the end of the

([112]) ANONYMOUS OF BÉTHUNE, *HF*, XXIV, *759*, *765*, *770*; *Histoire des rois d'Angleterre*, pp. 34, 42, *79*, 120, *125*, *145*, *149*, *176*, 199, 200, 204; *L'histoire de Guillaume le Maréchal*, ed. P. MEYER (*SHF*, Paris, 1891), I, *26*, *264*, *266*, 293, 301, 322-325; II, 21, *46*, *68*, 129, 273, 279.

([113]) ROBERT OF CLARI, *La conquête de Constantinople*, ed. P. LAUER (*Les classiques français du moyen âge*, Paris, 1924), nos. 2-6, 10-13, *15*-17, 43-44, etc.

([114]) GEOFFREY OF VILLEHARDOUIN, *La conquête de Constantinople*, ed. E. FARAL (*Les classiques de l'histoire de France*, vols. 18 and 19, Paris, 1938-1939), nos. 11, 40, 94, 116, 129, 147, *196*, 210, 224, 239, *256*, *258*, 299, *497*.

([115]) ANONYMOUS OF BÉTHUNE, *HF*, XXIV, *765*, *759*; AMBROISE, cols. 4-5; *L'histoire de Guillaume le Maréchal*, I, 264, 266-280, 291, 293-295, 322-325; MOUSKET, II, 262. MOUSKET, II, 446, speaks of the assembly of May 5, 1224, as a *parlement*, but he also uses *concile* in this context, apparently for reasons of rhyme.

period with which we are concerned, this divergence of Latin and vernacular usage and the victory of the vernacular term may indicate that, although the churchmen who used *concilium* were more sensitive to institutional development and differentiation, the ecclesiastical connotations of the term they used increasingly failed to correspond with the conceptions of the majority of men who participated in and influenced the development of these secular assemblies.

The diversity of Latin and vernacular terminology for these assemblies means that the term *concilium* is not a reliable guide to all the assemblies of this type mentioned in the evidence. If we look for assemblies which were not called *concilia* but possessed apparently similar characteristics, we may, with greater or lesser assurance, add five more assemblies of this type to our list.

(1) Although Rigord only says that Philip Augustus convoked his friends and familiars at Paris in June 1190 to provide for the government of the kingdom during his absence on the crusade, another account, possibly based on a contemporary account, says that a *generalis conventus* — the term used by Stephen of Tournai about this time — of nobles, burgesses, and ecclesiastics was assembled for this purpose ([116]). Inclusion of this assembly is dubious since Rigord mentioned it but did not call it a *concilium,* and only indicated a limited attendance; but since the assembly may have been larger than Rigord suggested, it should tentatively be included. (2) Peter of Vaux-de-Cernay alone describes the important assembly of May 1, 1209, at which the Villeneuve ordinance on subinfeudation was laid down and the Albigensian business discussed, which he calls a *sollempne colloquium.* His description of the attendance and the importance of the subjects discussed suggest a specially convoked assembly ([117]). (3) Similarly only Peter describes what he calls a *generale colloquium* of March 3, 1213, to which the barons were convoked and at which Louis's proposed Albigensian crusade was discussed and recruited ([118]). (4) Louis VIII's assembly at Paris on November 8, 1223, at which an ordinance on the Jews was established and there was discussion of Henry III's demands for the return of

([116]) RIGORD, *ed. cit.*, I, 100; *MS, Mazarin,* no. 2017, quoted in CARTELLIERI, *Phillip II.*, II, 283; see also *ibid.*, II, 274 ff.

([117]) See above nn. 35, 36.

([118]) See above nn. 38, 39.

the conquered Angevin lands, included at least twenty-four magnates who had apparently only been convoked for this deliberation a month after Louis's coronation ([119]). Although no chronicler describes this assembly, it seems to have been identical to assemblies that the Anonymous of Tours and Aubrey of Troisfontaines called *concilia* ([120]). (5) Similarly, the assembly at the end of January or the beginning of February 1224, at which Louis, after consultation with his prelates and barons, laid down his conditions for leading an Albigensian crusade, seems little different from assemblies which the Anonymous of Tours did mention and call *concilia* ([121]).

With the possible exception of the first, these five assemblies are apparently similar to those referred to as *concilia*, although these five may have been smaller, since the presence of «all» or «almost all» the barons of the kingdom is not mentioned for any of them. But if these five did not differ in form and summons from those called *concilia*, then we have a total of twenty-one assemblies of this type irregularly distributed over fifty-two years for which we have reasonably good evidence. More might have to be included if the evidence were more satisfactory ([122]), yet we do have evidence of such assemblies in connection with most of the major developments of the period. It seems probable that the bulk of these impressive assemblies have left sufficient traces for us to locate them, if not to describe them as fully as we would like.

It is conceivable that similar, possibly smaller, assemblies of this type were summoned fairly regularly, although only the larger and more important were mentioned in the documents or described in the chronicles. Yet there seems little warrant for this argument from silence. If we put to one side the numerous occasions on which magnates were summoned for other functions (to fight, to buttress the king at diplomatic interviews, or to swell ceremonies), the only reason to expect that deliberations were summoned with considerable

([119]) See above n. 59.

([120]) Cf. assemblies IX, XIII, XVI.

([121]) See above n. 60.

([122]) E.g., Peter archbishop of Sens' letter of April 20, 1220, to the archbishop of Reims, M. QUANTIN, *Cartulaire général de l'Yonne*, Auxerre, 1854-1872, III, no. 254: «Ad quod ipse nobis respondit quod super hoc nobis ullatenus non responderet, donec cum baronibus suis, quos ad parlamentum convocaverat, consilium habuisset». Other evidence of this assembly is lacking, and it is not noticed by Froidevaux or Cartellieri.

regularity is the assumption that these assemblies must be associated or identified with the king's court conceived of as a defined and organized institution with regular sessions in which the magnates participated. But that assumption seems untenable in view of the fact that in this period there seem to have been no regular sessions of the court either for festive or judicial purposes.

In the twelfth century there were regular assemblages of barons at the king's court on the principal festivals of the Church year: the Purification, Easter, Pentecost, and All Saints' Day ([123]). But these seem to have died out by the thirteenth century. In England regular summonses to feasts at court were discontinued early in Henry II's reign; in France they may have continued into the late twelfth century, although that is doubtful ([124]). I have not noticed any evidence that the practice was alive in the thirteenth century. Festive courts, therefore, could not be the basis for regular deliberations. Nor could the development of royal justice as yet provide such a basis, for the end of regular festive courts did not coincide with the beginning of regular meetings of the king's court as a court of law. Despite the implications of Philip Augustus's provisions for the government of the kingdom in 1190, there do not seem to have been regular judicial sessions until 1247 or 1250 ([125]). In any case, since magnates were playing an ever smaller part in royal justice, judicial matters would not necessitate regular convocation of many magnates ([126]). Nor do judicial matters seem to have been dealt with in the assemblies with which we are concerned. The important judgment, supported by many magnates, of Erard of Brienne's claim to Champagne was in July 1216 far from any great feast, was not called a *concilium* and does not coincide with any known assembly summoned to deliberate on policy ([127]). And although the term *curia regis* was used almost exclusively in this period in connection with royal judicial assemblies, it does not appear in connection with any of our twenty-one assemblies despite its convenient precision.

If we turn to the assemblies themselves, we cannot but be struck

([123]) LOT and FAWTIER, *Histoire des institutions*, II, 299-300.

([124]) RICHARDSON, *loc. cit.*, above n. 4, p. 152.

([125]) LUCHAIRE, *Histoire des institutions*, I, 310; PETIT-DUTAILLIS, *Louis VIII*, pp. 351-355; LOT and FAWTIER, *Histoire des institutions*, II, 332.

([126]) *Ibid.*, II, 299-300; LUCHAIRE, *Histoire des institutions*, I, 318-324.

([127]) See above n. 97.

by their irregularity. Although the great Church festivals afforded a convenient time which would avoid possible misunderstandings of date, twelve of our twenty-one assemblies did not meet within a week of one of the four major feasts ([128]). Five did meet within a week of a feast, three before and two after, but in one of these cases the assembly was summoned unexpectedly only a month after a previous assembly ([129]). It is possible but uncertain that three more of the twenty-one met within a week of a feast, for we only know the month in which they met ([130]). Although in Louis VIII's reign, the summons of three assemblies a year in 1224 and 1225 suggests an attempt at regularity, only three of these occurred within a week of a feast — and they were different feasts ([131]). Five of Louis's nine assemblies of this type did meet within a week of a feast, one before Pentecost, two about the Purification, and two on the octave of All Saints', but those near the Purification were in 1224 and 1226, while those on the octave of All Saints' were in 1223 and 1225 ([132]). We can only echo Petit-Dutaillis's judgment that Louis had decidedly ceased to convoke assemblies at fixed dates ([133]). So far as we can see, these assemblies were only convoked irregularly as need arose.

IV

Why was this type of assembly convoked ? In general the answer would seem to be that these assemblies were convoked when strong kings sought to pursue policies, religious or secular, which were beyond the resources immediately at royal command but could be implemented if the barons would cooperate and consent to give unusual support.

Of the eleven assemblies from 1179 to the end of Philip's reign, at least six were concerned with crusades ([134]) ; only five dealt with matters more immediately pertaining to Philip's secular policies ([135]).

([128]) Assemblies II, III, V, VII-X, XII, XV; 1-3.
([129]) Assemblies VI, XI, XIII, XIV; 4, 5.
([130]) Assemblies I, IV, XVI.
([131]) Assemblies XI, XIII; 5.
([132]) Assemblies XI, XIII, XIV; 4, 5.
([133]) Petit-Dutaillis, *Louis VIII*, p. 344.
([134]) Assemblies II-IV, VIII; 1, 3.
([135]) Assemblies I, V VI, VII; 2.

When we deduct from these latter the two assemblies that dealt with Philip's association in the kingship and legislation on subinfeudation, we are left with only three assemblies which discussed problems arising from Philip's great efforts to increase royal power: the dubious assembly of 1203 concerned with papal intervention in the campaign against John, the assembly of April 1213 for the invasion of England, and the dubious assembly of 1217 apparently connected with Louis's invasion of England. The small number of assemblies unconnected with crusades is largely explained by the fact that almost all of Philip's projected campaigns were at least nominally intended to protect royal rights within France, and were campaigns for which the king could command feudal service. The issue of service outside of the kingdom, raised in the «Unknown Charter of Liberties» of the English barons, only arose in France with the projected invasion of England; and the emphasis in the chronicles on baronial consent to Philip's request for aid on that occasion suggests the rarity of such a demand ([186]). Except for ecclesiastical intervention and the unprecedented project of invading England, Philip Augustus was able to increase royal power without asking for unusual aid from his barons.

Another reason for the small number of Philip's assemblies that did not discuss crusades is that assemblies of this type were not the most frequent form of royal-baronial consultation in this period. There were more than fifty parleys with enemies, usually referred to as *colloquia* or *parlements*, at which Philip took counsel on questions of war, truce, peace, and alliances, with magnates who were either already present in the army or had been convoked to give the king an impressive entourage in the face of his enemies and to serve as guarantors for any truce or peace that might be reached ([187]). There were also the numerous councils of war which

([186]) W. S. McKechnie, *Magna Carta*, 2nd ed., Glasgow, 1914, Appendix IV, c. 7; and see above n. 101; cf. Lot and Fawtier, *Histoire des institutions*, II, 170-171, 177, 517-518, 550; B. Lyon, *From Fief to Indenture*, Cambridge, Mass., 1957, p. 210.

([187]) E.g., Cartellieri, *Philipp II.*, 73, 98 n. 4, 103 n. 3, 124, 140, 146, 168, 171, 175, 185, 187, 225, 242, 257, 260, 263, 269, 281, 289, 291, 297, 298, 309, 315; II, 92, 95; III, 8, 10, 14, 92, 97, 109, 112, 116, 119, 159, 162, 196; IV, 11, 13, 36, 37, 75, 100, 104, 245; F. L. Ganshof, *Le moyen âge*, in *Histoire des relations internationales*, ed. P. Renouvin, I, (Paris, 1953), pp. 120-121, 130-132; *Histoire de Guillaume le Maréchal*, I, 272, 323; II, 56; Rigord, *ed. cit.*, I, 43; Gervase of Canterbury, I, 373: Howeden, III, 304.

inevitably accompanied Philip's many campaigns. It was in these consultations, not in those called *concilia*, that Philip most frequently took counsel with his barons on problems stemming from his aggressive policy towards the counts of Flanders and the kings of England, and maintained touch with his magnates.

If these perpetual parleys help to explain why Philip rarely needed to convoke special deliberative assemblies, the disappearance of such parleys was likely to affect the form of royal-baronial consultations in Louis VIII's reign. For after 1206, after the conquest of the Angevin lands north of the Loire, the parleys on the borders of the Ile-de-France ceased almost entirely; and except for the flurry of activity from 1212 to 1214, the major opportunity for frequent royal-baronial consultations had ended. The cessation of campaigns in France until 1224, Prince Louis's invasion of England, and the minority of Henry III prevented personal interviews of the French and English kings surrounded by their supporters, and henceforth, symbolic of the increasing centralization of government, diplomatic relations were conducted primarily through messengers and proctors ([138]).

When Louis VIII came to the throne, relations with Henry III became worse and papal pressure for an Albigensian crusade increased. Frequent royal-baronial consultations reappeared, but the discussions which had occurred at border parleys now tended to be conducted in specially convoked deliberations. In comparison to the eleven assemblies of the type with which we are concerned in Philip's long reign (including the assembly for his association in the kingship), there were nine such assemblies in Louis VIII's three years' reign. The Albigensian crusade was discussed in six ([139]); relations with Henry III were dealt with in five ([140]); legislation on the Jews was promulgated in one; and ecclesiastical jurisdiction was discussed in another ([141]). As in Philip's reign, crusading problems were the most frequent single subject of deliberation, but unlike in Philip's reign, the other major subject was truce and war with the king of England, which had previously been discussed in border parleys. The impending Albigensian crusade, more a royal campaign

([138]) E.g., *Patent Rolls*, I, 201, 412, 484, 552, 579-580, 601.
([139]) Assemblies IX, XI, XIII-XV; 5.
([140]) Assemblies IX, XI-XIII; 4.
([141]) Assemblies XIII; 4.

than a crusade ([142]), and the cessation of personal interviews between the kings of France and England adequately account for the surprising number of specially convoked deliberations in Louis VIII's short but highly active reign.

The beginning of Louis IX's reign was troubled by revolt and invasion, with important magnates refusing even to come to his coronation. Blanche of Castille was in no position to convoke large assemblies. But when all the rebels save Peter of Dreux had been temporarily subdued and the English forces had left France, Blanche, in Louis's name, could and did summon the assembly of December 1230, with which our list ends, at which legislation on the Jews was promulgated ([143]).

Clearly the majority of the twenty-one assemblies that we have listed were convoked to deal with unusual and occasional problems rather than with routine matters. The problems of Christendom were the most frequent topic. Almost incessant pleas for aid against the Moslems or the Albigensians stimulated the convocation of at least twelve of these assemblies. They had to be convoked because, although royal crusades had important secular as well as religious implications, their recruitment depended upon the willingness of individual magnates to take the cross, and the king could not command men to assume that obligation. Ecclesiastical intervention in matters deemed secular by the king was the topic of only two of these assemblies, which dealt with Innocent III's intervention in 1213 and with the limits of ecclesiastical jurisdiction in 1225. In these instances also the king could not command his barons to oppose the pope or the Church, although he might well gain support by an appeal to their anticlerical sentiments in a large assembly.

Remarkably few of the twenty-one assemblies dealt with policies pertaining to the secular organization of the kingdom and its relations with other secular powers that required baronial consent. The outstanding example is the 1213 assembly for the invasion of England. Three assemblies dealt with legislation which required consent. ([144]). And consent to association in the kingship was asked for the last time.

([142]) ANONYMOUS OF TOURS, *HF*, XVIII, 314: «Rex vero a multis qui ei debebant exercitum, recepit pecuniam infinitam, alios secum duxit renitentes admodum et invitos . . .»; and see above n. 103.

([143]) Assembly XVI.

([144]) Assemblies XVI; 2, 4.

Although more routine matters for which baronial consent was unnecessary may have been dealt with in the assemblies of Philip Augustus's reign, they only appear prominently in the assemblies of Louis VIII's reign after the cessation of border parleys had all but eliminated that type of royal-baronial consultation. Yet of the five assemblies of Louis's reign which discussed relations with Henry III, four also discussed the Albigensian problem or legislation, matters for which an assembly was more necessary.

These assemblies were an expression of emergency, aggression, and innovation which strained royal resources, not of stability and peace. Their development and further definition depended upon the continuance of such conditions. For they were not closely connected with the development of the royal administrative and judicial system. Not only, so far as we know, had administrative and judicial matters not been discussed in these assemblies, but the irregularity of the assemblies does not coincide with the steady growth of royal administration and judicial action. Certainly that growth, the increasing centralization of government, and the handling of diplomatic matters at the centre instead of on the border would encourage more frequent and regular convocation of certain people for the convenience of royal government, would encourage the development of the thirteenth-century Parlements, but it would not necessarily mean the increasingly regular convocation of large numbers of magnates to consent to unusual burdens because of royal need.

If St. Louis's crusades would tend to keep alive the tradition of such convocations, his abhorrence of war between Christians, his good relations with the papacy, his refusal to follow counsel on foreign policy, and his devotion to justice would not provoke the emergencies that had been the basis of this type of royal-baronial consultation. In England the policies and demands of the monarchy in the thirteenth century were to provoke severe crises which strengthened baronial influence in royal decisions, linked in one assembly people convoked because of royal necessity and people convoked for royal convenience, and produced a single institution in which the king gave justice and the community gave consent. In France, it seems that Philip Augustus's legalism and St. Louis's respect for rights and pacific policy, by avoiding emergencies and unusual demands which needed baronial consent, prevented the further development of the ill-defined institution through which that consent had been obtained, and ensured that Parlement would be

a thoroughly royal institution, not an institution in which the will of other members of the kingdom found expression ([145]). The fourteenth-century experiments in summoning assemblies to consent to unusual obligations ([146]) were, at least in part, a consequence of the failure of the thirteenth-century institution to develop as an integral part of royal government.

G. I. LANGMUIR.

([145]) OLIVIER-MARTIN, *Histoire du droit*, pp. 228-331; LOT and FAWTIER, *Histoire des institutions*, II, 333.

([146]) Cf. C. H. TAYLOR, *Assemblies of Towns and War Subsidy*, in J. R. STRAYER and C. H. TAYLOR, *Studies in Early French Taxation*, Cambridge, Mass., 1939, pp. 170-171.

IV

Carlo I d'Angiò e il primo Parlamento generale del suo Regno,

DI

EGILDO GENTILE (†),
Ispettore Centrale On.
degli Archivi di Stato.

I. — Accolti l'invito e i patti di Clemente IV, ricevuta l'investitura e la corona in Roma e prestato il giuramento di fedeltà al pontefice, che intanto bandiva una nuova crociata contro re Manfredi, Carlo d'Angiò, accompagnato dai voti della parte guelfa di tutta Italia, mosse felicemente alla conquista del regno di Sicilia e di Puglia, e, compiuta nel 1266 l'impresa militare con la sconfitta dello svevo e della parte che lo seguiva, cercò con sentenze di morte ed esìli di provvedere alla tranquillità del regno; poi, volgendo le sue cure ai bisogni della corona, gravata dai patti e dalle spese della conquista, iniziò le riforme e si dié ad escogitare tutti i mezzi adatti a far denaro. L'espediente dei prestiti era comodo ed egli vi ricorreva, ma, alla fine, bisognava pure trarre dal regno il denaro per pagarli. Non bastando gli aggravi che aveva a mano a mano escogitati, decise d'imporre la *colletta* o *sovvenzione generale* ed inviò, nel dicembre 1266, nelle diverse province del regno, particolari commissari per le opportune istruzioni sull'applicazione dell'imposta e speciali legati a trattarne, fra tanti altri affari, col pontefice. Ma questi, informato del patente malumore del popolo, che minacciava di tramutarsi in aperta ribellione, si affrettò a significare la sua chiara opposizione; al vescovo di Albano Rodolfo Caprari, suo legato presso re Carlo, diede innanzi tutto opportune istruzioni e, smentendo la voce che egli avesse approvata la nuova imposta, dichiarò di avere risposto ai regi ambasciatori che per imporre la sovvenzione generale doveva il re prima convocare i prelati, i baroni e i rappresentanti delle università e richiederne il consenso e che era stato informato che già molti sentivano, nell'anima esasperata, la provocazione a ribellarsi contro il re, il quale nella sua sorte avrebbe anche travolto gl'interessi della Chiesa. Rispondendo poi direttamente il 6 febbraio 1267 a re Carlo, così gli espresse il suo ammonimento: *Scribimus te, videlicet praelatis et baronibus et locorum communitatibus convocatis, tuae necessitatis instantiam et utilitatem deffensionis eorum debere patienter exponere et de ipsorum ordinare consensu quale tibi a tuis impenderetur auxilium, quo contentus et aliis tuis iuribus, eos in sua dimitteres libertate.* Ma il principio già accolto in Italia e consacrato nella sentenza data dalla Dieta dell'Impero a Worms il 1° maggio 1231, di dovere i principi invocare il consenso dei rappresentanti dei sudditi

per la imposizione di nuovi pesi, non poteva piacere all'Angioino, non conciliandosi coi caratteri di conquista insiti nell'impresa con la quale aveva preso possesso del regno.

Alcuni giorni dopo dalle rimonstranze del pontefice, il 15 febbraio 1267, re Carlo emanò uno statuto col quale, allo scopo di concedere largamente a tutti i suoi fedeli del regno la pace e la giustizia e impedire che dai giustizieri o dagli altri ufficiali fossero oppressi, istituì la *Curia generale*. Due volte l'anno, il 1° di maggio e di novembre, dovevano convenire alla sua presenza tutti i giustizieri per rispondere alle querele, che tutti potevano esporre contro di loro e contro i loro dipendenti e che egli avrebbe definite con procedura sommaria e senza forme giudiziarie; dovevano pure intervenire tutti i secreti e gli altri regi amministratori per dare i conti e rispondere alle eventuali querele.

Da una espressione generica ed incidentale dello statuto appariva subordinatamente una funzione più ampia della *Curia,* alla quale si riferisce l'inciso *in qua tractetur de hiis que nobis placuerint et de bono statu regni*; ma preciso e nettamente delimitato ne risultava ed in effetti venne seguito lo scopo, che era quello della proposizione delle querele e della reddizione dei conti.

E' facile riconoscere che la *Curia generale* fu istituita, particolarmente nella periodicità delle adunanze, sulla traccia delle *Curie generali* dello Svevo (1); questi, sebbene a solo scopo di solennità, fece posto in esse, oltre che ai prelati e baroni, anche ai rappresentanti delle università, Carlo d'Angiò invece, nonostante gli ammonimenti di papa Clemente, e pur riserbandosi di trattare affari del buono stato del regno, esclude dalle sue assemblee ogni rappresentanza delle tre classi, manifestando in tal modo, nel suo dispotismo, la recisa avversione alla forma di simili adunanze. Solo dopo i gravi avvenimenti del *Vespro di Sicilia,* prelati, baroni e rappresentanti dei comuni furono chiamati, nel marzo 1283, a comporre un parlamento generale *pro pacifico statu regni* (2).

(1) Delle *curie solenni* di Federico II v. particolari notizie in E. GENTILE, *La Curia generale del regno di Carlo I d'Angiò,* in *Bollettino n. 2 della Comm. per la pubbl. degli atti delle assemblee costituzionali italiane dal medioevo al 1831, Accademia dei Lincei, 1917.*

(2) Della citata memoria relativa alla *Curia generale* mi sono largamente valso in questo 1° capitolo del presente studio.

II. — Il parlamento generale del 1283, celebrato dopo lungo periodo di aperta avversione di re Carlo ad un tal genere di assemblee, rappresenta una svolta negli istituti costituzionali del regno, a corollario di straordinari avvenimenti, dei quali è d'uopo qui innanzi tutto tener conto in una piuttosto lunga relazione, per quanto sommaria, lasciandone alle cronache la particolareggiata narrazione.

La politica di conquista, seguita da re Carlo con rigore e crudeltà, valse presto ad alienargli l'animo dei regnicoli, cancellando le illusioni concepite nella mutazione di dominio. A taciti lamenti e sorde mormorazioni seguirono disperati propositi di liberazione, che menarono alla più ovvia risoluzione, d'invitare Corradino, ultimo discendente di casa sveva, a scacciare i francesi e ricuperare il regno come signoria a lui legittimamente spettante. Lettere segrete, méssi vari e formali ambascerie gli furono inviate; e il giovane principe, poco più che quindicenne, imbevuto di spirito guerriero e bramoso di comando e di gloria, accolse con entusiasmo l'invito e, nonostante l'opposizione della madre, Elisabetta di Baviera, sulla fine del 1267, con parecchie migliaia di cavalli e di fanti e seguito dal giovane Federico duca d'Austria, per la via di Trento scese in Italia. Da Verona passò a Pavia, che al pari di Verona era ghibellina, e, senza alcuna opposizione delle città di parte guelfa, per la via di Genova si portò a Savona, ove s'imbarcò sulle navi pisane, ed ai primi di aprile giunse a Pisa, accolto festosamente dai cittadini, che gli offrirono per l'impresa il valido aiuto della loro flotta. Da Pisa era passato a Siena quando le compagnie d'armi di due capitani, di molta stima di re Carlo, furono sgominate, mentre tentavano presso Arezzo d'impedire il passaggio alle sue truppe. Il felice successo dell'avanzata, che, nonostante le scomuniche di papa Clemente IV, procedeva senza ostacoli, favorita dai ghibellini delle città italiane, e un proclama col quale, querelandosi fra l'altro contro i romani pontefici, che tanto avevano avversata la casa sveva, Corradino invitava i suoi devoti a dargli mano nel ricupero del regno avito, riuscirono notevolmente a sollevare lo spirito delle popolazioni. Non poche città del continente e dell'isola di Sicilia si sollevarono, e re Carlo, impegnato a reprimere le ribellioni e specialmente nell'assedio di Lucera, non era libero di correre ad arrestare il progresso delle truppe nemiche; ma quando seppe che da Roma, risalendo per le montagne di Abruzzo, erano penetrate nel regno, lasciò ad altri le cure della repressione dei

ribelli e da Capua mosse con le sue truppe, seguito per sua fortuna dal vecchio Alardo (3), verso l'Abruzzo.

Il poderoso esercito di Corradino con i più lieti presagi si schierò nella pianura di Tagliacozzo e il 23 agosto 1268 attaccò il non meno agguerrito esercito angioino, e la vittoria dapprima fu sua; ma per la strategia suggerita dal vecchio Alardo che, accanto al re Carlo, da un poggio spiava l'esito della battaglia, non riuscì a coglierne il frutto poiché le sue schiere, già disordinate nell'euforia della vittoria, assalite di sorpresa da uno squadrone delle truppe nemiche, lasciate in riserva in una valle, furono disperse. Lo stesso Corradino e molti dei suoi aiutanti, baroni del regno e ghibellini di altre province, che stanchi ed oppressi dal caldo estivo avevano smesso gli elmi, vedendo il mutamento di scena e l'impossibilità di resistere, cercarono salvezza nella fuga. Corradino, Federico duca d'Austria ed altri, travestiti, presero la via della campagna romana; ma, arrivati ad Astura e riconosciuti, furono da uno dei Frangipane, nobili romani, padroni di quel castello, consegnati a re Carlo, che il 29 ottobre in piazza del Mercato in Napoli, a colmo delle sue crudeltà, li fece decapitare (4).

Rimaneva, superstite della casa sveva, la figlia di re Manfredi, Costanza, sposa di re Pietro d'Aragona, sul quale, come rappresentante per diritto maritale della consorte, si appuntarono le speranze di una riscossa. Se ne fece araldo Giovanni da Procida, nobile salernitano, già assai stimato da Federico II per le molte sue virtù, alle quali aggiungeva una somma perizia nella medicina. Per il tenace attaccamento alla casa sveva gli erano stati confiscati dall'Angioino feudi ed altri beni, e, poiché non poteva rimanere sicuro nel regno, ne andò in Aragona, ove, bene accolto e colmato di favori e doni, concepì, per remunerare la liberalità di re Pietro, il proposito di aiutarlo a recuperare l'ambito regno di Puglia e di Sicilia; ma, parendogli troppo arduo ricacciare anche dal continente re Carlo, che aveva posto la sua sede in Napoli ed era sostenuto dai suoi baroni, arricchiti di feudi nelle province, concentrò le sue mire sull'isola di Sicilia. Travestito viaggiò più volte tra la Provenza, la detta isola

(3) Alard de Saint-Valéry, che Dante ricorda nel canto 28° dell'Inferno.

(4) Nel 1847 Massimiliano principe ereditario di Baviera fece erigere nella chiesa del Carmine, presso la piazza del Mercato, un monumento marmoreo con la statua di Corradino e con due bassorilievi nel piedistallo, rappresentanti l'uno il congedo dalla madre, l'altro il distacco dal compagno di supplizio Federico di Baden, come tutto si ammira, ancora oggi, nella detta chiesa.

ed altri luoghi, visitando anche l'imperatore di Costantinopoli Michele Paleologo, aperto nemico di re Carlo, ed abilmente operò per procurare a re Pietro aiuti di danaro ed armi; particolarmente riuscì a ordire la trama della sollevazione che poi si disse *del Vespro di Sicilia* e nella quale a Palermo e in altre terre dell'isola si fece strage di migliaia di francesi. Re Carlo, avuta notizia della sollevazione, súbito da Orvieto, ove si trovava presso il pontefice, tornò nel regno e, trovando già in ordine l'armata destinata contro il Paleologo, fece vela verso la Sicilia e cinse di assedio Messina con tanto vigore che gli abitanti si sarebbero súbito arresi, se egli avesse accolta l'unica condizione, da loro posta, di aver salva la vita. Durava ancora la disperata resistenza allorquando re Pietro, che per dissimulare le sue effettive intenzioni navigava nel canale di Sicilia, assalendo le coste d'Africa, si affrettò a raggiungere l'isola e ad inviare il famoso capitano Ruggiero di Lauria a fare guardia con la sua flotta perché dalla costa calabra non passasse vettovaglia alcuna al campo francese in Messina. Resa critica la posizione delle sue truppe, Carlo tolse l'assedio e passò in Calabria presso Reggio. Frattanto Ruggiero di Lauria, come le cronache riferiscono, ne assaliva la flotta, ne prendeva trenta galee e mandava in fiamme più di ottanta navigli.

Da documenti risulta che re Carlo il 29 settembre era già passato da Messina a Reggio, ove rimase fino al 12 gennaio 1283; in quel giorno appunto comunicò ai giustizieri e ad altre autorità che, dovendosi recare a Bordeaux in Guascogna per sostenere il duello al quale aveva sfidato Pietro d'Aragona, aveva istituito quale suo vicario generale nel regno, in sua assenza, il figliuolo Carlo ([5]). Frattanto i catalani, che avevano espugnata la guarnigione di Catona, sita di fronte a Messina ed occupato altri luoghi della costa calabra, cominciavano ad infestare i dintorni di Reggio ([6]).

III. — Il principe Carlo si vide allora costretto a spostare il suo accampamento; ma, prima di lasciare Reggio, pur tra le cure belliche, il 28 gennaio indisse un parlamento generale per il 25 marzo ([7]); indi, considerando che re Pietro, già arrivato a Messina, poteva avere

([5]) Cfr. C. Minieri Riccio, *Il regno di Carlo I d'Angiò*, Napoli, 1875. — Il duello fu fissato per il 1° giugno a Bordeaux, che faceva allora parte del dominio inglese, ma per circostanze indipendenti da Carlo non avvenne.

([6]) Ho tratto le notizie di questo capitolo dalle antiche cronache, specialmente da A. Di Costanzo, *Istoria del regno di Napoli*, nella collezione del *Gravier*, Napoli, 1769.

([7]) Allegati A, B.

agio di passare sulle coste del continente, prudentemente ai primi di febbraio levò le tende [8], e per vie impervie della zona occidentale calabra marciò a grandi giornate verso Terranova, ove sostando tenne consiglio con gli alti ufficiali del suo séguito [9]. Continuando la marcia, il 12 febbraio era già di stanza nella vasta pianura di S. Martino, solcata dal corso del fiume Marro [10]; ivi, dopo la precipitosa e faticosa ritirata, le truppe, attendate lungo le rive del fiume, poterono trovar ristoro. In quella pianura convennero, il 25 marzo 1283, prelati, baroni e rappresentanti delle università o comunità del regno per tenere parlamento alla presenza del vicario generale e dei suoi consiglieri.

Come innanzi ho accennato, prima di allontanarsi da Reggio, il principe Carlo, nella sua qualità di vicario, pur tra le gravi cure militari, adempiendo ad una funzione altamente politica, aveva indetto, il 28 gennaio, un parlamento, da celebrarsi il 25 marzo, *in die Annunciationis beate Marie Virginis,* ed aveva invitato la università di Napoli a inviare otto rappresentanti o deputati e le altre università ad inviarne quattro, *de melioribus et sufficientioribus viris,* a porgergli consiglio, *ad prebendum... consilium,* per correggere nel regno i passati errori, anteriori alla spedizione diretta contro i ribelli della Sicilia, *pro corrigendo omne male actum in hoc regno ante passagium nostrum in Sicilia contra hostes et rebelles regios,* ed invitò pure prelati, cònti, baroni e feudatari, *quod veniant ad parlamentum generale celebrandum in die Annunciationis.* Il 12 febbraio dall'accampamento della pianura di S. Martino aveva dipoi partecipato ai cittadini napoletani, patrizi e popolani, la sua ritirata da Reggio e dato l'annunzio del consiglio tenuto a Terranova (oggi Taurianova), al quale avevano, fra gli altri, preso parte i cònti di Alençon, Borgogna, Squillace, Acerra e Catanzaro, e non vi ha dubbio che, oltre la trattazione dei capitoli da proporre al parlamento, sia stato allora determinato il luogo della convocazione, che diede nome al parlamento stesso, generalmente poi denominato *della pianura di S. Martino.* Da questo parlamento comincia e, più di ogni virtù militare, rifulge la saggia opera politica di governo del principe

(8) Il 14 febbraio re Pietro entrava a Reggio.

(9) Cfr. C. MINIERI RICCIO, *op. cit.*

(10) Il fiume Marro con le sue copiose acque, alimentate dai vari affluenti, scorrendo poi attraverso il distretto di Palmi, va a sboccare nel Tirreno presso Gioia Tauro.

Carlo, costantemente poi seguita durante il suo regno, nel rispetto del voto dei fedeli sudditi.

Già Carlo I, a meno di due mesi dalla data del *Vespro*, si era affrettato il 10 giugno 1282 a sanzionare e rendere a tutti note con un editto, definito irrefragabile, nuove costituzioni per la buona amministrazione del regno ([11]). Contenevano principalmente norme concernenti la condotta dei funzionari ed ufficiali addetti alla pubblica amministrazione e relativi obblighi, responsabilità e penalità, fra l'altro, nella procedura della tortura e dei giudizi; esplicitamente veniva confermata la costituzione di Federico II sulla pena degli omicidi clandestini, e, da ultimo, in un lungo capitolo erano ristrette e delimitate le facoltà dei *terrerii* (*videlicet comites, barones, et feudatarii, tam ultramontani quam latini*) e veniva loro ingiunto di ridurre al primitivo stato i territori feudali eventualmente accresciuti con usurpazioni di terreni limitrofi.

Le nuove regie costituzioni, compilate per la buona amministrazione del regno sulla traccia delle leggi normanno-sveve e pubblicate a distanza di meno di due mesi dagli avvenimenti del *Vespro*, miravano a sgravare i sudditi dalle oppressioni che avevano dato esca alle ribellioni. Spetta però al figliuolo, quasi trentenne ([12]), di re Carlo il merito di avere promulgato, per primo, col voto dei fedeli sudditi, un complesso di leggi fondamentali, che nelle province di qua dal Faro, integrando con saggio ed opportuno intendimento le costituzioni paterne, in correlazione con altre preesistenti leggi e consuetudini rimaste in vigore, attivarono l'amministrazione del regno, come è agevole rilevare dai numerosi documenti posteriori che all'applicazione di esse si riferiscono.

Desideriis hactenus non minus immensis quam arduis noster spiritus laboravit è l'inizio del proemio, nel quale il buon principe si affretta ad esprimere l'ansia di risollevare con la laboriosa sua opera legislativa il regno da una ignominiosa schiavitù, *noster spiritus laboravit assidue ut peculiare d. patris nostri predictumque hereditarium nostrum regnum ... ab institutionum labe servilium nostra, parta laboribus, lege resurgeret* ([13]). Seguono al lungo proemio i singoli capitoli, che sotto il titolo *Privilegia et immunitates* ([14]), ven-

([11]) Cfr. TRIFONE, *op. cit.*, pp. 76-93.

([12]) La sua nascità si fa risalire al 1254.

([13]) Cfr. TRIFONE, *op. cit.*, pp. 93-105.

([14]) Tolgo dai codici il titolo, che però manca nelle copie tratte dai registri

gono raggruppati e distinti in tre classi e cioè *a*) delle chiese e persone ecclesiastiche, *b*) dei cònti, baroni e feudatari, e *c*) dei cittadini borghesi ed altri uomini di qua dal Faro.

Particolarmente si riferiscono ai seguenti oggetti.

a) Conservazione di privilegi ed immunità alle chiese ed alle persone ecclesiastiche — Riconoscimento di prestazioni — Privilegi giurisdizionali — Esenzioni da obblighi di ospitalità — Divieto a chiunque d'ingerirsi nelle cose ecclesiastiche — Esenzioni fiscali — Donazioni — Esenzioni pei vassalli delle chiese — Altri privilegi — Gli scomunicati — Rispetto dei funzionari alle cose ecclesiastiche — Divieto d'ingerirsi nei delitti ecclesiastici — Benefici doganali — Giurisdizione civile pei vassalli delle chiese — Privilegi sui debitori e sui vassalli — Giudei vassalli.

b) Servizio gratuito dei feudatari — Assenso nei matrimoni — Facoltà di chiedere un moderato adiutorio — Giudizio di pari — Esenzioni da servizi indecorosi.

c) Disposizioni in materia fiscale — Provvedimenti sulla monetazione — Omicidi clandestini — Libertà dei matrimoni — Valutazione delle accuse dei carcerieri — Perchè il Fisco possa impadronirsi delle cose su cui vanta diritti — Incarichi di pubblici servizi — Divieto di esigere oltre il dovuto per scrittura di sentenze — Irresponsabilità delle università nei furti — Esenzione delle università dalle spese pei versamenti dei tesorieri — Modo di provvedere alle vettovaglie della corte e del suo sèguito — Diritti pel regio sigillo — Divieto ai funzionari regi di acquisti nella propria circoscrizione — Matrimoni delle figlie dei traditori — Diritto di sigillo per lettere dei giudici e dei maestri giurati — Diritti dei carcerieri — Ufficio di maestro giurato — Obblighi dei giustizieri e di altri funzionari alla cessazione del loro ufficio — Esenzione delle donne dalle condanne dei mariti — Costruzione e riparazione delle navi — Contributi delle università per la riparazione dei castelli — Inchiesta sulle foreste antiche — Vigilanza sui mercati — Osservanza delle costituzioni di re Carlo e dei capitoli del parlamento della pianura di S. Martino e relativi provvedimenti.

Vasta e complessa ne appare la materia, trattata in forma non perfettamente organica, intesa però tutta a soddisfare le esigenze politiche e sociali del regno e principalmente le ragioni della Santa Sede e i bisogni del popolo, insofferente di dominio. Purtroppo dei nostri parlamenti mancano i verbali o *processus*, che permetterebbero di riconoscere l'effettiva e peculiare partecipazione dei convocati; ma non è dubbio che il principe Carlo abbia tenuto conto del loro voto nei capitoli che dichiarava dati alla luce *de consilio prelatorum, comitum, baronum, civium multorumque proborum, parlamento in S. Martini planitie celebrato* ([15]). Né mai egli venne meno a tale

della Cancelleria Angioina. Di queste mi sono valso in un lavoro di controllo e ne farò tesoro se mi sarà possibile pubblicare la raccolta generale degli atti superstiti dei parlamenti angioini.

([15]) TRIFONE, *op. cit.*, p. 105.

norma costituzionale nei parlamenti del suo regno, anzi talvolta esplicitamente, come, ad esempio, nei capitoli *Regina iustitie,* èditi nel parlamento del 1296, ne affermò la preventiva discussione, *sanctiones redigi fecimus . . ., multiplici prelatorum ipsorum, comitum, baronum et sapientum discussione prehabita* ([16]).

Promossa da re Carlo o dal suo vicario l'opera dei capitoli innanzi descritti, è da ritenere che essi siano stati elaborati da Sparano di Bari, professore di diritto civile e maestro razionale della Magna Curia, quale è definito in un documento del 25 aprile 1283. Ordinariamente era compito dei protonotarii la compilazione delle leggi, e lo Sparano protonotario è qualificato da un antico scrittore ([17]), contro l'opinione di qualche altro, che lo considera semplicemente logoteta ([18]). Tenendo conto però che dai documenti egli risulta quale unico giureconsulto al sèguito e fra i consiglieri del vicario e ne sottoscriveva gli atti e, d'altra parte, levate le tende e ripigliata la marcia da S. Martino, fu il 25 aprile, da Nicotera, inviato, insieme col vescovo di Troia e col milite Giovanni de Barris, a riferire al papa le decisioni del parlamento ([19]), non è concepibile che sia rimasto estraneo e non abbia in alcun modo preso parte, a titolo personale o per *interim,* alla compilazione di quelle leggi.

Seguirono opportune inchieste, disposte dallo stesso vicario per l'osservanza sia delle nuove costituzioni paterne che dei capitoli del parlamento da lui celebrato, ma, per ragione di limitazione di spazio, converrà trattarne in uno studio a parte.

E. GENTILE.

([16]) Cfr. TRIFONE, *op. cit.*, p. 120, e GENTILE, *Data controversa di un parlamento generale di Carlo II d'Angiò,* in *Calabria Nobilissima,* XIII, n. 37, a. 1959.

([17]) Il Vincenti, nel *Teatro degli uomini illustri che furono protonatarii nel Regno di Napoli,* Napoli, 1607, riferisce: «Per li registri di Carlo I si vede Sperano capo di tutti i Tribunali nelli contati di Provenza et Forcalquerio, e nel Regno, Giudice della Gran Corte et Protonotario, honorato col titolo di *vir nobilis*».

([18]) MINIERI RICCIO, *I grandi ufficiali del regno di Sicilia durante il regno di Carlo I d'Angiò,* Napoli, 1872, p. 130, «Alla morte di Roberto da Bari (1270), logoteta e protonotario del regno, re Carlo I non volle dargli successore ma invece divise quelli uffizi ed interinamente fece esercitare quello di logoteta a Sparano, il quale nel settembre 1283 già firmava le lettere regie, e l'altro di Protonotario a Bartolomeo di Capua».

([19]) Allegato *C.*

Allegato A

1283, gennaio 28, Reggio — Invito alla università di Napoli per la convocazione del parlamento generale indetto per il 25 marzo.

Doc. già esistente nel registro della Cancelleria Angioina 1283 — (da tempo perduto) — *Testo* da MINIERI RICCIO, *Notizie storiche tratte da 62 registri angioini*, Napoli, 1877, p. 155.

Universitati Neapolis provisio quod eligat octo viros de melioribus et sufficientioribus, qui una cum aliis viribus aliarum terrarum huius regni etc. veniant in die Annunciationis beate Marie Virginis ad prebendum nobis consilium pro corrigendo omne male actum in hoc regno ante passagium nostrum in Sicilia contra hostes et rebelles regios, quia inter d. regem patrem nostrum et regem Aragonum, qui insulam Sicilie sic hostiliter, proditorie et fraudolenter intravit, pugna in Burdegali in Wasconia sit indicta, et prima die proximi venientis mensis iunii terminanda sit, et idem genitor noster, qui iam, ad eundum ad partes illas, iter arripuit, nos suum in toto regno Sicilie vicarium dimisit. — Datum Regii, anno domini 1283, die 28 ianuarii, XI° inditionis.

Allegato B

1283, gennaio 28, Reggio — Invito alle università delle terre del regno ed ai prelati e feudatari per la convocazione del parlamento generale indetto per il 25 marzo.

Doc. già esistente nella Cancelleria Angioina, nel registro 47, 1284 A, ff. 3-4, risultati poi mancanti. — *Testo* da MINIERI RICCIO, *Il regno di Carlo I d'Angiò dal 2 gennaio 1273 al 31 dicembre 1283*, Firenze, 1880, p. 3.

Carlo principe di Salerno, vicario del regno, scrive a tutte le università del reame quod quelibet ipsarum eligat et mittat quatuor de melioribus et sufficientioribus viris earundem terrarum, quia parlamentum generale congregare disposuimus pro pacifico statu regni, quia inter d. regem patrem nostrum et regem Aragonum, qui insulam Sicilie sic hostiliter sicque proditorie ac fraudolenter intravit, pugna sit indicta Burdegali in Wasconia, primo die proximo venientis iunii terminanda, idemque genitor noster ad partes illas iter arripuit. *Nel medesimo tempo fa ordine a tutti i prelati, conti, baroni e feudatari del reame* quod veniant ad parlamentum generale celebrandum in die Annunciationis beate Virginis.

Allegato C

1283, aprile 25, Nicotera — Carlo vicario del regno partecipa al pontefice Martino IV, a mezzo del vescovo di Troia, del milite Giovanni de Barris e di Sparano di Bari, professore di diritto civile e maestro razionale della Magna Curia, l'avvenuta celebrazione del parlamento della pianura di S. Martino.

Doc. già esistente nella Cancelleria Angioina, nel registro 1283 — (da tempo perduto) — *Testo* da MINIERI RICCIO, *Notizie storiche innanzi*, cit., p. 155.

SS. d. Martino sacrosancte Romane et universalis Ecclesie summo pontifici littera, in qua dicit celebrasse generale parlamentum solemne in planitie S. Martini, intervenientibus prelatis, comitibus, baronibus et feudatariis ac sindicis universitatum huius regni, in quo, inter alia, promisit observare usum seu statum quem rex Guillielmus secundus observabat, secundum declarationem, expositionem et ordinationem a clementia dicti summi pontificis impetrandas, pro qua mittimus fratrem R[ainerium] Troianum episcopum, d. Iohannem de Barris militem et d. Sparanum de Baro, iuris civilis professorem et Magne Curie magistrum rationalem, consiliarios, familiares. — Datum Nicotere, 25 aprelis, XI° inditionis.

V

El Régimen político territorial en la Obra de Pere Albert (Siglo XIII),

POR

JOSÉ ANTONIO MARAVALL,
Catedrático de la Universidad de Madrid.

En el paso del régimen feudal al régimen corporativo de base territorial, tal como ha sido expuesto por E. Lousse (1), se encuentran en España dos figuras, interesantes en la Historia de nuestro pensamiento político, que nos ofrecen, en el plano doctrinal, un claro testimonio de ese proceso histórico: el rey Alfonso X, que dirigió la redacción de *Las Partidas*, y el jurista barcelonés, Pere Albert, que escribió unos comentarios, interpretando y completando el cuerpo legal de los *Usatges*. Ese paso de un tipo de organización político-social a otro, se da en España con características análogas a las del resto de Europa, si bien con la forzosa diferencia a que da lugar el hecho conocido de que el feudalismo no determinara entre nosotros una estructura social plenamente definida, sino que subsistiera siempre una potestad real de carácter público y superior, y junto a ella, o debajo de ella, una población de propietarios libres.

De todas formas, hubo un suficiente desarrollo de las instituciones de carácter feudal para que en un momento dado se produjera la transformación del orden jurídico que aquéllas constituían, reemplazado por el que se fundaba en la nueva idea romanística de «corpus». Y esa transformación es la que advertimos, del lado castellano, en la magna obra de Alfonso X; y del lado catalán, en la del jurista Pere Albert. No queremos decir con esto que las obras de uno y otro sean equivalentes, ni siquiera semejantes en su conjunto, pero pertenecen muy señaladamente a un mismo momento histórico y en relación con él tienen la misma significación.

Aunque uno sea rey de Castilla y el otro, según parece resultar de los escasos datos biográficos que de él quedan, un experto en materias jurídicas que ejercía funciones de letrado en Barcelona, la obra de ambos pertenece al tipo del «derecho de juristas». Es cierto que la obra de Alfonso X, cualquiera que sea su rico contenido doctrinal, pretende ser un conjunto de leyes, distribuídas en títulos y libros, o *Partidas*, al modo de los códigos de la época; también la obra de Pere Albert se compone de unos comentarios a otros

(1) E. Lousse, *La Société d'Ancien Régime*, 2ª ed., Lovaina, 1952; Idem, *Organização e Representação corporativas* (Plano de Formação social e corporativa. «Biblioteca social e corporativa». Publicação nº 14. Collecção I — Estudos — Série B, nº 2). S.l.n.d. [Lisboa, 1960], 240 p.

preceptos legales que pretenden valer formalmente como normas positivas. Sin embargo, ni una ni otra alcanzaron de momento — incluso la que surgió como obra de un rey — caracter propiamente legal, y solo a través de la práctica lograron convertirse en algo así como los llamados «books of authority». Ambas obras acabaron, más tarde, transformándose en derecho positivo, al recibir la sanción real, la *Partidas* en el Ordenamiento de Alcalá (1348) y las *Commemoraçions* en Cortes de Monzón de 1470, incluyéndose desde entonces en las compilaciones oficiales de derecho catalán de 1492, 1588 y 1704 (2).

Materia principal de la obra de Pedro Albert la constituyen ciertos aspectos de la vida feudal: relaciones entre señores y vasallos, tenencia de castillos, posición de los alodios incluídos en una zona de jurisdicción señorial, etc., etc. Y el interés de esa obra está precisamente en que refiriéndose a materia tan tipicamente feudal y pretendiéndose en

(2) Pere Albert fué canónigo de Barcelona y vivía entre 1233 y 1261, manteniendo relación con los grandes juristas catalanes de la época: el canonista San Raimundo de Peñafort y el obispo Vidal de Canyellas, autor del famoso *Vidal Maior*, recientemente publicado por G. TILANDER (Lund, 1959), Figuro Albert en la corte de Jaime I, según Miret y Sans. Escribió la obra a que acquí nos referimos y que lleva el título de *Commemoracions*, llamada también, por lo menos parte de ella, *Costumas generals de Cathalunya*. Se conserva en numerosos manuscritos, en catalán y en latín. El manuscrito catalán de Vich, editado por Gudiol, no puede ser, según éste, posterior a la segunda mitad del siglo XIII, por el papel y el carácter de la letra. Tampoco puede ser anterior, puesto que comprende referencias no solo a los *Usatges* de Ramón Berenguer I, sino a otros que pertenecen al tiempo de Pedro II y Jaime I (Ver J. GUDIOL, *Traduccio del Usatges, les mes antigues Constitucions de Catalunya y les Costumes de Pere Albert*, en *Annuari de l'Institut d'Estudis Cataláns*, 1907). En 1933, ROVIRA ARMENGOL, al publicar en la colección «Els nostres classics» una edición de los *Usatges de Barcelona*, incorporó al volumen el texto de las *Commemoracions*, según el citado manuscrito de Vich, completado por los de París y el Escorial. Son éstas las dos ediciones que hemos tenido presentes. Para la versión latina nos hemos servido del texto dado por el jurista Juan SOCARRATS, que lo comentó, a medidados del siglo XV, en su obra *In tractatum Petri Alberti de consuetudinibus Cathaloniae inter dominos et vasallos commentarii*, citamos por la edición posterior de Lugduni, 1551.

Según Socarrats, algunas de las costumbres recogidas en las *Commemoracions* fueron compiladas y comentadas con posteriori a Pedro Albert, por Beltrán de Ceva y Jacobo Vianyla, doctores catalanes. Pero Brocá sostiene que ambos vivieron en el siglo XIV y son incuestionablemente posteriores a la compilación y redacción de las *Commemoracions*. De Bertrandus DE CEVA se conservan en el Escorial unas *Consuetudines Catholoniae* que son unos comentarios a la obra de Pedro Albert y, por tanto, diferentes de ésta (ver BROCÁ, *Historia del Derecho de Cataluña*, Barcelona, 1918, vol. I, pag. 275).

ella fijar jurídicamente estos aspectos de la feudalidad, el sistema expuesto resulta profundamente alterado por las ideas nuevas que, con su mentalidad de jurista de la época, introduce el autor, ideas que responden, como es fácil adivinar, a la influencia del romanismo, triunfante en su tiempo.

Romanismo no es, sin más, Derecho romano, sino el modo como éste influye y es visto por las mentes europeas de la Edad Media. Este Derecho romano, en casos como el de Pedro Albert — y también en el de Alfonso X —, no es concebido como un Derecho imperial. Consideramos que el ejemplo de nuestro autor echa por tierra la tesis de Koschaker. Según éste, «aunque el Derecho romano hubiera sido mil veces más perfecto de lo que en realidad fué, no hubiera acudido un solo estudiante a oir a los glosadores en Bolonia si aquel Derecho no hubiera sido, al propio tiempo, el Derecho del *Imperium Romanum*», y pretende que por nadie se llegue «a poner en duda que los glosadores concibieron el Derecho del *Corpus iuris* como Derecho del sucesor de este *Imperium*, esto es, del *Sacrum Imperium* encarnado en el emperador alemán» ([3]). Es posible que para los que estrictamente pueden llamarse glosadores, y dentro de ellos para el reducido grupo de los italianos y teutónicos, sea cierto lo que asegura Koschaker. Pero junto a esto, hubo otros muchos que estudiaron el Derecho romano y se sirvieron de él, con plena independencia de su carácter imperial, sin referencia alguna a la tradición y pretensiones jurídicas del Imperio. Probablemente no vieron en ese Derecho romano más que un modo de pensar y una técnica jurídica que les permitía interpretar los hechos que presenciaban, más en armonía con la nueva mentalidad. De la misma manera que el teólogo se sirvió del *corpus* aristotélico para interpretar una «naturaleza» que descubría ante sus ojos, el jurista que contemplaba el orto de unas formas que no eran ya las de la pura tradición feudal, se sirvió del Derecho romano para interpretar estos nuevos aspectos de la vida política.

Resulta que esos primeros introductores del romanismo, en su nueva versión, escriben en lengua vulgar. Tal es el caso de Alfonso X que construye por primera vez la más grande *Summa* jurídica que vería la Europa medieval en lengua romance. Probablemente, tal fué también el caso de Pedro Albert. Por lo menos, sus *Commemoraçions* aparecen en catalán en pleno siglo XIII y entre los más antiguos manuscritos conservados de su obra predominan los de lengua catalana.

([3]) *Europa y el Derecho Romano*, trad. española, Madrid, 1955, pag. 131 y 136.

No hay en el texto de Pedro Albert mención de leyes imperiales, ni alusión a una jurisdicción imperial. En Alfonso X la referencia al Emperador tan solo sirve para señalar que en su jurisdicción y en las de los reyes se trata de esferas separadas, independientes y de valor equivalente en el plano del Derecho. En cambio, en las «*Commemoracions*» el Derecho aparece referido desde el primer momento a un territorio políticamente definido y que de suyo tiene un carácter parcial y limitado. No se trata ya de la vieja cuestión de la territorialidad o personalidad de un ordenamiento jurídico; sino de algo más, de que ahora el territorio aparece como la unidad de un espacio caracterizado políticamente. De ahí que quizá en el texto de Pedro Albert sea la primera vez que aparece en una obra jurídica el entonces reciente corónimo de Cataluña.

Recogeremos algunos datos de cómo se presenta ese proceso del régimen territorial. Si, como sostiene Hintze, la articulación de la potestad sobre personas y territorio es una característica de la Historia europea, en Aragón se encuentra uno de los primeros testimonios de esta novedad. En el testamento de Alfonso I redactado ante Bayona, en octubre de 1131, se hace esta interesante diferenciación: «His tribus totum regnum meo concedo, dominatum quoque, quem habeo in tota terra regni mei, principatum quoque et ius quod habeo in omnibus hominibus terre mee» (4).

Antes de que transcurra un siglo vemos cómo esa base territorial, deja de ser un mero espacio físico para convertirse en un territorio definido, de modo que no es indiferente a un poder político tener una u otra base espacial, sino que es esencial para él, determinante de su propio ser, su radicación sobre un territorio propio e incambiable, que se ha formado en un lento proceso de unificación, en el que ha sido configurada también en unidad la comunidad humana a la que pertenece. Y así, Jaime I se dirige a las autoridades dependientes de él, aludiéndolas por esa caracterización territorial: el Rey emite su mandato a todos sus vicarios y bailíos «per totam Cataloniam constitutis» (5). La conciencia de esa relación, entre poder, territorio y comunidad, se nos revela en un pasaje de la «Crónica particular de Alfonso X», escrita a mediados del siglo XIV por Sánchez de Valladolid, cuando nos cuenta que los pueblos y nobles,

(4) *Liber Feudorum Maior*, ed. preparada por F. MIGUEL, Barcelona, 1945, vol. I, pag. 11.

(5) *Cartulario de San Cugat*, ed. preparada por RIUS SERRA, vol. III, documentos nos 1305 y 1318, correspondientes a los años 1232 y 1233.

rebeldes contra el rey, protestando de donaciones hechas por ésta a gentes extrañas al reino, le pedían «que la tierra que la dé a los de Castilla e de León, e a los otros que les faga bien del aver de su arca» ([6]). El que podemos llamar «principio territorial» del orden político europeo queda claramente ejemplificado, en su proceso histórico de formación, en esos tres textos. Y a esta línea evolutiva responde en su fecha el pensamiento de Pedro Albert.

Lousse ha expuesto cómo, bajo un mismo príncipe territorial, empiezan a concentrarse los señoríos, según un movimiento contínuo que tiene lugar en los siglos XII y XIII. Esto se produce conforme a procedimientos muy variados. Pero «a través del abigarramiento de formas aparece por doquier el principio de unidad: la sumisión de un cierto número de señoríos, antes prácticamente independientes unos de otros, a un solo y mismo príncipe territorial» ([7]). El hecho tiene lugar en Cataluña antes del tiempo indicado — y todavía el fenómeno es más temprano en Castilla. El conde de Barcelona ha sometido a la unidad de su potestad la mayor parte de los primitivos condados pirenaicos, antes de que termine el siglo XI.

Este proceso se desarrolla en el plano de las instituciones feudales, para acabar transcendiéndolas. La posibilidad de organizar jurídicamente esa transformación es lo que el Derecho romano proporcionó a los juristas que en la época se ocuparon de pensar y escribir sobre tales cuestiones, tratando de mantener un orden legal. Ese Derecho romano, al poner a los juristas en posesión de una mejor y más rica tecnica, les permitió precisar y perfeccionar las instituciones de la feudalidad, pero echó a bajo el feudalismo como principio estructurador de la sociedad ([8]).

No basta con decir que la influencia del Derecho romano se produce siempre en el sentido de concentración de poder y de impulso al proceso de desarrollo y consolidación de las formas políticas modernas. En otro aspecto, el romanismo actuó en consolidación de formas feudales. Los procesos históricos ni son tan sencillos ni tan unívocos. De la misma manera a como las tendencias de hegemonía que llevan a la constitución de los grandes reinos territoriales, se sirven de formas feudales, de modo tal que, cuando el feudalismo se emplea desde arriba, opera en un sentido de centralización y con-

([6]) B.A.E., vol. LXVI, pag. 30.

([7]) *Ob. cit.*, pag. 91.

([8]) Hago la distinción entre feudalidad y feudalismo en la forma que me ha sido sugerida por GANSHOF, *Qu'est-ce que la feudalité*, Bruselas, 1947, pags 12-13.

centración de poder (Hintze), en el romanismo no cabe ver tan solo la vigorización que proporciona al poder monárquico, sino también su papel en la consolidación de instituciones feudales. La teoría feudal ha sido reconstruída con materiales del Derecho romano y por romanistas en los siglos XIII al XVI. Concretamente, la distinción entre *dominium directum* y *dominium utile,* permitió sistematizar la división vertical o jerarquizada de la propiedad, característica del feudalismo.

Al terminar el siglo XII, las instituciones feudales no habían sido sólidamente sistematizadas para subsister por sí mismas. Las variedades y transformaciones eran frecuentes. Pero los romanistas les aplicaron, en tantas obras de Derecho feudal que ellos escriben, su nueva técnica y convierten las que habían sido relaciones personales vacilantes e imprecisas, en verdaderos derechos reales sobre las tierras, que adquieren una gran estabilidad. Propiamente, esta influencia no se produce en la esfera política, aunque no dejó de tener en esta su repercusión, hasta el punto de que los derechos piramidalmente construídos sobre las tierras, subsistieron varios siglos y solo serán abolidos — para establecer por fin el sentido indivisible y absoluto de la propiedad, característico del Derecho romano, por obra del movimiento político que lleva a la Revolución francesa (9).

A esto responde exactamente la obra de Pedro Albert: sus *Comentarios* dieron precisión y estabilidad a instituciones del Derecho catalán, de procedencia feudal, a las que, en esas condiciones, aseguró una larga persistencia, de manera que, como dijimos, la obra de este jurista, convertida en texto de derecho positivo, figura todavía, como ordenamiento vigente, en compilaciones del siglo XVIII.

Pero esas instituciones feudales que la técnica del romanismo ha consolidado para tan largo tiempo, subsisten desprendidas de la ordenación del feudalismo y se entretejen en una formación política nueva. También a esto responde con toda claridad la obra de Pedro Albert. Frente al estado de desmembración del poder a que practicamente lleva la fórmula del feudalismo — cualquiera que haya sido su significación originaria — surge ahore el poder de un príncipe que se levanta sobre los otros. Un jurista español que trabajó en Italia y que volvió a su tierra para ser obispo, Vicente Hispano, escribió en las primeras décadas del siglo XIII: «in eodem loco duas pares

(9) MEYNAL, *Derecho romano*, en el vol. *El legado de la Edad Media,* trad. esp., Madrid, 1944, pags. 519 y ss.

iurisdictiones esse non possunt» ([10]). Y la manera de hacer eficaz este principio, que la conciencia de la época empieza a reclamar en todas partes, es construir un poder unitario y superior en el ámbito de cada una de las nuevas formaciones políticas territoriales. A esto corresponde en Pedro Albert la figura del *princeps terrae*, decisiva en su concepción jurídico-política.

Se ha hablado siempre del problema del feudalismo en Cataluña, diferenciándolo del modo en que se da en el resto de España, y afirmando que en aquélla se desarrolla plenamente el sistema social feudal. Pero aunque pueda hablarse — y determinar la medida de esto corresponde a los historiadores del Derecho — de un mayor grado de desenvolvimiento de las instituciones feudales en Cataluña, para que un régimen de pleno feudalismo se expandiera en ella no dejarían de ser obstáculo una serie de hechos que en Cataluña se dan: el gran número de propietarios alodiales que descubrimos en los diplomas de sus Cartularios; la gran importancia política y económica, desde muy pronto, de la ciudad de Barcelona, y de algún otro centro urbano — lo cual es siempre un decisivo factor contra el predominio del feudalismo; la subsistencia, como en ciertas partes de Italia y de Provenza, del Derecho romano, no solo en la vida práctica, sino doctrinalmente, y no ya en la línea de una concepción imperial tradicional — en cuyo ámbito se desarrolla el feudalismo — sino de una concepción particular, de lo que constituye un interesante ejemplo la presencia de juristas como el conocido Homobonus de Barcelona ([11]); finalmente, la existencia de una empresa pública y común, esto es, la participación en la guerra contra los moros ([12]) — y sabido es que la idea de una guerra pública es también un factor contra las formas políticas del feudalismo.

Por eso Pedro Albert, si nos ofrece un cuadro muy vigoroso y preciso de instituciones del Derecho feudal — aspecto que en los

([10]) Citado por MOCHI ONORI, *Fonti canonistiche dell'idea moderna dello Stato*, Milán, 1951, pag. 263.

([11]) Ver VALLS TABERNER, *El Liber judicum popularis de Homobonus de Barcelona*, en *Anuario de Historia del Derecho Español*, II, 1925, pags. 200 y ss. — Fuera de Italia y muy particularmente en España, la influencia del Derecho romano no se da siempre en limitación del «ius proprium» y a favor del «ius commune», sino que actúa fortaleciendo el particularismo jurídico del reino. En tal sentido, habría que rectificar la tesis de CALASSO en su espléndida obra, *Medio Evo del Diritto*, Milán, 1954, pags. 453 y ss.

([12]) Sobre estos temas puede verse mi obra *El concepto de España en la Edad Media*, Madrid, 1954.

libros de juristas podemos apreciar hasta el siglo XVIII —, lo que tiene de interesante es que ese conjunto de relaciones particulares se apoya en un orden político de preminencia y superioridad de un príncipe, sobro todo un ámbito territorial politicamente caracterizado como base de un pueblo: Cataluña. En fechas próximas al autor, en el norte de Francia, Beaumanoir ha formulado el tan conocido aforismo: «chascuns barons est souverains en sa baronie». En cambio, en Cataluña, a pesar de la fuerte tradición condal, a pesar de que con los comienzos del régimen señorial se ha intensificado y se ha dado valor político a la leyenda de «los nou barons» ([13]), sin embargo, para Pedro Albert no hay más que una instancia superior: la del principe de la tierra — y «tierra» quiere decir aquí «pais», con una connotación geográfico-política muy clara ([14]).

Brocá, en las breves referencias dedicadas al autor que comentamos, dijo de él: «basó su trabajo en los *Usatges,* dándoles amplitud en cuanto enaltecen al Príncipe» ([15]). Y éste es, como llevamos dicho, el «princeps terrae», según la versión latina ([16]), o el «princep de la terra», de la versión catalana ([17]). Lo que vertía a su vez Socarrats, en su comentario, siguiendo el precedente de los manuscritos latinos, por «patria» — y aclarando su sentido en un inciso, porque a comienzos del XV este concepto todavía es bastante nuevo, añadía: «dicitur enim propria patria in qua sum natus» ([18]). Esa correspondencia había sido ya vista por Alfonso X, quien para hacerla comprender había escrito: «tierra que dicen en latin patria» (Partida I[a], tit. I, ley 2[a]).

Ese príncipe de la tierra se llama así porque la tierra, en cierta

([13]) Ver COLL. ALLENTORN, *La llegenda d'Otger Cataló y els nou barons,* Barcelona, 1947-1948.

([14]) La obra comprende incluso una definición geográfica de ese ámbito — ver pag. 180 de la ed. de ROVIRA, y pag. 331 de la de GUDIOL. Es constante la referencia: «e axi se usa per tota Cathalunya», fórmula que coincide con la que antes vimos usada por Jaime I, ambas expresión de las nuevas concepciones de la época.

([15]) *Historia del Derecho de Cataluña,* Barcelona, 1918, vol. I, pag. 275. De la labor de Albert, dice Brocá: conocía el Derecho romano y junto al derecho consuetudinario catalán utilizó las constituciones fridericianas y el Derecho feudal común.

([16]) Ver en la ed. de SOCARRATS, pag. 404 — fragmento correspondiente al texto original.

([17]) Ed. ROVIRA, pag. 184; ed. GUDIOL, p. 332.

([18]) Ed. cit., pag. 373.

forma, le pertenece en su totalidad; pero también porque él pertenece a la tierra. Y esto quiere decir que la persona del príncipe no es como la de otro señor particular, sino que por pertenecer a todos es una persona pública: «lo Princep ho son veguer es comuna persona a tots los habitadors en aquesta terra» ([19]), y el texto latino: «princeps vel eius vicarius est communis persona omnibus habitatoribus in hac patria» ([20]).

Solo el Príncipe — o quien inmediatamente le represente, y en tanto que lo represente, — pertenece a la comunidad y solo al Príncipe pertenece el todo de la república. Esta pertenencia hay que entenderla referida a la jurisdicción. Por eso, la del Príncipe es jurisdicción general y superior a cualquier otro vínculo. Por eso, se afirma de sus vasallos y aún de aquéllos que no son sus vasallos — cosa que no puede decirse de ningún otro señor — que todos los del reino son «homes del Princep». Y Pere Albert lo explica así: «son dits esser en poder del Princep per rahon de general jurisdiccio que ha en son regne, cor en tots homes del regne seu a mer imperi, cor totes coses que són e-l regne són del rey quant a jurisdiccio» ([21]). Solo el príncipe posee un «ius generalis iurisdictionis». Solo en relación a él puede hablarse de la «generalis iurisdictio quam habet in regno suo» — frase en la que parece descubrise un eco de la fórmula del «rex imperator in regno suo», tan usada también por Alfonso X.

Tal es la superioridad que sobre todos posee el Príncipe, que Albert nos sorprenderá usando reiteradamente — según la versión en romance de su obra — la expresión de «senyor sobirá» que se repite en el texto con la mayor frecuencia. La versión latina dice «superior dominus» ([22]). Como es sabido, la voz «soberano» aparece en el siglo XIII. En España se encuentra en Gonzalo de Berceo ([23]). En Italia, la emplea Dante ([24]). En Francia, ya hemos visto que Beaumanoir la refiere a cada barón, en la medida en que es superior en su

([19]) Ed. ROVIRA, pag. 158; ed. GUDIOL, pag. 323.

([20]) Pag. 183 de SOCARRATS.

([21]) Ed. ROVIRA, pag. 185, y ed. GUDIOL, pag. 332. El texto latino dice: «Nam in omnibus hominibus regni sui habet imperium. Omnia enim quae sunt in regno, sunt regis quantum ad iurisdictionem», ed. SOCARRATS, p. 404.

([22]) Ver pags. 101, 110, 130, 424, etc. de la ed. de SOCARRATS.

([23]) *Sacrificio de la misa*, 229. — Ver BOGGS y otros, *Tentative Dictionary of Medieval Spanish*.

([24]) Aplicada a Dios (Paradiso, XXVI, 48), a Homero como poeta (*Inferno*, IV, 88) etc. Sin duda que en Italia se encuentran muchas menciones anteriores.

baronía ([25]). El uso que de ella hace Pedro Albert, según los propios manuscritos del siglo XIII, es frecuentísimo, y además es interesante comprobar en él que la reserva al Príncipe general y supremo, no atribuyéndola ni siquiera a su representate o delegado más directo, el cual puede participar, como ya vimos en ciertos aspectos, de la condición pública y común de la persona del Príncipe, pero nunca es, como en cambio lo es éste siempre, «senyor sobirá».

Ya hemos visto antes cómo al Principe corresponde el «mero imperio», sobre todos los hombres de la tierra. Ciertamente, el señor de vasallos tiene amplios derechos jurisdiccionales, pero ni aún sobre aquel que es «hombre ligio» suyo, tiene una potestad comparable a la del Príncipe: «No és, emperò, a entendre que per açó aquell senyor haya en aquell seu hom soliu mixt e mer imperi, axí como lo Princeps de la terra, jatsie que haya en ell jurisdictió e en las suas cosas, axi con dit es» ([26]). Por eso, sin necesidad de hacerlo constar en ningún contrato vasallático, la superioridad del Principe queda a salvo: contra él no tienen valor las obligaciones de ayuda militar entre otros señores y sus vasallos, ni aún en el caso de «homenatge soliu» porque también entonces «aquel qui ha general jurisdictió es entés exceptat, car contra aquel no és tengut ajudar son senyor» ([27]). Al ricohombre que en la tierra se levante contra el Príncipe — y ya no valen los casos y formas que preveía como legítimos el Derecho feudal — nadie debe ayudarle, porque aquel incurre en «crim de lesa magestat» ([28]). De ahí que Socarrats afirmara, siguiendo el hilo de la doctrina que comentaba, «dominus rex maior est in regno suo quocumque comite regni sui, quia non recognoscit superiorem» ([29]). Como es sabido, el Derecho feudal referirá el crimen de lesa majestad únicamente a la autoridad imperial, muestra de superioridad que se atribuyen ahora esos Reyes de Aragón, cuya potestad trata de elaborar jurídicamente Albert. De acuerdo con esto, podrá decir

([25]) *Coutumes de Beauvoisis*, n[os] 1043; ver M. DAVID, *La souveraineté et les limites juridiques du pouvoir monarchique du IX[e] au XV[e] siècle*, Paris, 1954.

([26]) El texto que acabamos de citar no figura ya en el manuscrito de Vich, que dió Gudiol. ROVIRA lo toma de la versión de las *Constuticions de Catalunya* — ver pag. 195. En la versión latina, ed. de SOCARRATS, pag. 446, y commentario en pag. 448.

([27]) Ed. ROVIRA, pag. 171; ed. GUDIOL, pag. 328. Texto latino, en SOCARRATS, pag. 305. Socarrats apostilla: «Vasallus contra patriam dominum iuvare non tenetur», pag. 305 á 308, en donde cita como apoyo a Baldo.

([28]) Ed. ROVIRA, pag. 185; ed. GUDIOL, pag. 332.

([29]) Pag. 419, del comentario.

Socarrats: «quae authoritas igitur potest esse maior quam dominorum Regum ? Certe nulla» ([80]). Pedro Albert había perfilado la figura de los Reyes que, de hecho y de derecho, poseen plena superioridad, y es perfectamente lógico que su comentarista Socarrats, para interpretar esa doctrina, acudiera a la fórmula, difundida bajo la autoridad de Bartolo, acerca de los príncipes «superiorem non recognoscentes» ([81]).

Esta teoría del poder real lleva a Pedro Albert, superando una vez más el nivel histórico del feudalismo, a concebir la guerra — o por lo menos, cierta especie de guerra — como una empresa pública. Al margen de las relaciones vasalláticas del Derecho feudal, la guerra contra los sarracenos, según Albert, solo corresponde a reyes superiores, esto es, a reyes como los de Aragón, Castilla, Francia o algún otro semejante. Y para ello el Rey puede mandar no solo a los que le están obligados por razón de vasallaje, sino a cuantos por pertenecer al reino — el cual aparece, por tanto, como una comunidad —, están obligados a su rey por razón de naturaleza — «por manar a sos vassals o a altres homes seus naturals» ([82]). Y de aquí que Albert llegue a la formulación de un deber militar general, fundado en el deber común de defensa de la tierra, principio que se halla también en Alfonso X (Partida II, tit. XIX, ley 3ª). «Los homes son tenguts — afirma Albert — combatre per la terra e obeir al rey». Y aquí alcanza toda su fuerza el principio de la superioridad del poder real: «a mayor seyoria, son escusats de la menor seyoria a seguir», y en su virtud «són tenguts los dits homes a obeir en aytal cas al rey et no al comte», hasta el punto de que en derecho está obligado el hombre, para defender a sutierra y al rey, a guerrear contra su propio padre y matarle en batalla ([83]).

Fijémonos, finalmente, en cuál es la razón de esta superioridad y ello nos hará comprender hasta dónde alcanza la concepción «pública» de la vida política en Albert. Ello también nos permitirá verificar la medida en que Albert se ha apartado de la concepción política del feudalismo, no por la aplicación de unos preceptos concretos tomados del Derecho romano, sino por el espíritu del ro-

([80]) Pag. 2 que corresponde a la introducción.

([81]) Ver ERCOLE, *Da Bartolo all'Althusio*, Florencia, 1932.

([82]) Ed. ROVIRA, pag. 183; ed. GUDIOL, pag. 331. «Omnes homines suis naturalibus», dice el texto latino, y Socarrats, repitiendo la frase en su comentario, escribe: «omnes homines huius patriae», pags. 356.

([83]) Ed. ROVIRA, pag. 187; ed. GUDIOL, pag. 333.

manismo, congruente con la nueva situación histórica que en la baja Edad Media se constituye. A causa de ésta se fué a buscar en la herencia de Roma las ideas político-jurídicas que se necesitaban en el nuevo régimen de los grandes reinos territoriales.

El fundamento de esa superioridad del poder del Príncipe, en el nuevo orden de la Sociedad política entendida como un «corpus» está en que procede «per rahó de pública utilitat», ya que siempre «es preferida utilitad publica més que privat» — con lo que la distinción clásica entre lo público y lo privado aparece renovada desde su misma base. Por eso, es superior el rey y su supremacía posee fuerza de obligar sobre cualquier otro vínculo de dependencia: «car lo rey cita los homes que el regne no sia subyugat o que no perda aytal terra; e apela 'ls per profit de la terra e ben public del regne seu, del qual porta administració». De esa manera, «lo rey fa el manament per rahó de profit public, e profit public val més que privat» ([84]).

El podor del Principe de la tierra es superior, en consecuencia, a cualquier otro, porque posee un carácter «público», y le corresponde gozar de la superioridad que en todo caso tiene lo público sobre lo privado. Pero en razón de esta misma distinción fundamental, es posible limitar o mejor circunscribir su superioridad, porque el rey no tiene sobre su reino un derecho de propiedad, fundado en títulos de derecho privado, sino que sobre el tal reino tan solo «porta administració», en una acepción de esta última palabra mucho más amplia, sin duda, que la que hoy posee, pero siempre limitada a relaciones de derecho público.

J. A. MARAVALL.

([84]) «Quia pública utilitas praeferenda est privata», dice el texto latino, según Socarrats. En él se usan expresiones como «defendendo patriam», «ut pro patria pugnetur», «propter bona patriae, sive propter publicum bonum regni», etc. — ver pags. 417 y 418 de la ed. cit.

VI

That the Statute of York of 1322 is no longer ambiguous,

BY

DIONNA CLEMENTI,
Lecturer in History, Queen Mary College, University of London.

There has always been a strong tradition that it was possible for a living man to lay, at a given point in time, an unquiet spirit by listening with understanding to what it had to say to him. It now seems that in this respect the appropriate moment has come in the case of the much discussed (1) final clauses of Edward II's statute of York of 1322, which read:

«Acorde est et establi au dit parlement par nostre seignur le roi et par les ditz prelatz countes et barons et tote la commune du roialme a cel parlement assemblez, qe totes les choses par les ditz ordenours ordenees et contenues en les dites ordenances desoremes pur le temps avenir cessent et perdent noun force vertu et effect a touz jours, les estatutz et establissementz faitz duement par nostre seignur le roi et ses auncestres avaunt les dites ordenaunces demorauntz en lour force:

Et qe desore james en nul temps nule manere des ordenaunces ne purveaunces faites par les suggetz nostre seignur le roi ou de ses heirs, par quele poair ou commission qe ceo soit, sur le poair real de nostre seignur le roi ou de ses heirs, ou countre lestat nostre dit seignur le roi ou de ses heirs, ou countre lestat de la coronne, soient nulles et de nule manere de value ne de force:

Mes les choses qe serount a establir pur lestat de nostre seignur le roi et de ses heirs, et pur lestat du roialme et du poeple, soient tretes accordees establies en parlementz par nostre seignur le roi et par lassent des prelatz countes et barons et la communalte du roialme, auxint come ad este acustume cea enarere» (2).

It appears that the present time is appropriate for a full understanding of these words, because very judicious work on the reign of Henry III has culminated in a clearer understanding of the executive powers (3) of the crown, so that a firm point of departure

(1) For a summary of previous interpretations v. G. LAPSLEY, *The interpretation of the statute of York, 1322,* in *English Historical Review,* 1941, 22 ff; and for a more recent comment, M. MCKISACK, *The Fourteenth Century* (*Oxford History of England*), Oxford, 1959, 71 f.

(2) LAPSLEY, *op. cit.*, 50; *Statutes of the Realm* (Record Commission) I, 189. Hereafter cited as S.R.

(3) The nearest Anglo-French term for executive authority seems to be

is now available from which to approach Edward II's statute (4). The essence of this bridgehead is an exact appreciation of the fact that there were certain types of business, which in king Henry's opinion and that of his baronage required attention from *consilio tocius regni nostri* (5), while for lesser matters the king, or the king and his small council, were sufficient. It is now clear that the government and the baronage, that is to say the executive and the legislature, both of them authorities in which the king played the leading role, were in general agreement on this point although there were at times considerable differences of opinion concerning the line of demarcation dividing the two types of work. The classical example of this difficulty comes from Matthew Paris, who noted that in 1253 king Henry wished to follow Savoyard example, by providing an additional ruling in his instructions for the maintenance of the peace, to enable a person robbed to obtain redress from those who had failed in their duty to take adequate action against the thieves. In the king's opinion the government was at liberty to effect the change forthwith, but the new regulation immediately provoked strong opposition and it had to be withdrawn: *praesertim cum tanta legis permutatio sine communi assensu barnagii minime valuisset* (6). Moreover when the ruling ultimately became part of the law of the land in 1285, it was as a section of Edward I's statute of Winchester (7) passed in time of parliament.

It follows that the distinction between the legislative and executive functions of government was self evident to Matthew Paris and his contemporaries. Presumably because the administration of England was, during their day, in an elementary stage of development, so

«seignurie» v. Edward I, *Articuli super cartas*, S.R. I, 141 «En totes les choses desusdites, e chescune de eles, voet le Roi, e entent il, et soen consail et touz ceus qui a cest ordenement furent, qe le droit et la seignurie de sa coroune savez lui soient par tout». The translation provided in *Statutes of the Realm* reads prerogative, but that word at this early date has the modern sense of the priority due to the crown's affairs when business is in process of being transacted v. examples from the *Rotuli parliamentorum* I, 117/1 (1293); 274/1 (1308) cited in the *Oxford Dictionary*, also *ibid.*, 71/1.

(4) M. Powicke, *King Henry III and the Lord Edward*, Oxford, 1947, 1, chapter 8.

(5) *Close Rolls*, 1243, 66.

(6) *Chronica Majora* (Rolls Series), London, 1880, V, 369; cf. Pollock & Maitland, *History of English Law*, Cambridge, 1923, I, 181.

(7) S.R., I, 96, cl. 2.

that the fundamental twofold nature of the power of government was little overlaid and those who ran might read, that the essence of this work consisted in the balance struck at any given moment between the duties of the executive and legislative authorities. Fundamentally of course this is always the case, for no ruler, however absolute, is wholly free from the pressure of public opinion, since even in the USSR certain types of business are submitted, at least formally, to the supreme Soviet. On the other hand, however powerful the authority of the legislature may be, it must perforce delegate matters requiring routine or emergency action to the executive. As government is also essentially a practical art, it is hardly surprising to find that this separation of authority is as a rule better understood by those actually engaged in the work rather than by those whose function it is merely to describe or endure the process. It is certain that king Henry was, from personal experience, well aware of the twofold division of labour inherent in the nature of government and similarly his baronage was well versed in the matter, if only because of the marked resemblance, during this period, between the administration of a barony and that of a kingdom. In consequence they wasted no time in discussing the government's right to exercise executive powers but they joined issue on the heart of the matter, namely the line of division separating the spheres of the two authorities. In facing this problem both sides were in agreement that previous usage was the necessary starting point for the argument and they were also well aware that the correct balance could only be struck satisfactorily in a council of the whole realm, because it was only on such occasions that the executive and the legislature found themselves in each other's presence. But by 1254 it was also apparent that the lords lay and ecclesiastical no longer represented the whole realm, for when they had been summoned for this purpose, by king Henry's regents, they had declared that they could not answer for the men of the shires, or for the lesser clergy ([8]). In consequence during the following reign a legal theory had been evolved, in the royal writs instructing the shires and boroughs to send two knights or two burgesses to such councils, by which these men were held to share with the king

([8]) *Royal Letters*, ed. W. W. SHIRLEY (Rolls Series), London, 1866, II, 101 f.; cf. M. POWICKE, *The Thirteenth Century* (*Oxford History of England*), Oxford, 1953, 117, note 1.

and the magnates the responsibility for shaping the common counsel, while as lawful attorneys for their fellows their consent bound those they represented to abide by the decisions they had shared in making ([9]). The commons therefore during Edward I's reign had become, from the point of view of the crown a necessary part of a council of the whole realm.

On this showing the meaning of the last sentence of our statute of York is no longer ambiguous, for it simply states that matters of sufficient importance to require the attention of the king and a council of the whole realm — «les choses qe serount a establir pur lestat ([10]) de nostre seignur le roi et de ses heirs, et pur lestat du poeple» — will be dealt with by the king in time of parliament, in a council of the whole realm consisting of «prelatz, countes et barons et la communalte du roialme». The crucial question, namely what matters were to be considered of sufficient importance to deserve this treatment, is met in the last phrase: «auxint come este acustume cea enarere» — as hath been accustomed heretofore — or in a modern paraphrase the king's executive powers are to be as heretofore. Since the main object of the statute of 1322 was to abolish the ordinances of 1311, as the clear statement of the first of the final clauses shows, it is possible to provide a comparatively precise account of the restrictions on the royal executive powers, whose disappearance was implied in this phrase, because several of the ordinances had required that certain types of business should be submitted to the «comun assent» of the king's «barnage, e ceo en parlement». Edward had, for instance, agreed not to go to war, or leave the country, or appoint regents, chancellors, chief justices, treasurers or barons of the Exchequer, stewards of his Household, keepers or controllers of his Wardrobe or his privy seal, escheators, clerks of Common Bench, wardens of ports or castles upon the sea, or ministers in Gascony, Ireland and Scotland until he had obtained the approval of his legislature in time of parliament. The crown had also been placed under obligation not to manipulate the coinage without parliament's assistance and there had been an undertaking to summon that august assembly at least once a year; in addition on all occasions when a parliament met a committee was to be

([9]) J. G. EDWARDS, *The Plena Potestas of English parliamentary representatives*, in *Oxford Essays presented to H. E. Salter*, Oxford, 1934.

([10]) Lestat = welfare; cf. LAPSLEY, *op. cit.*, 41.

appointed to hear and settle complaints made against the royal ministers ([11]). At York therefore Edward was not reassuring the country, as Professor Johnstone ([12]) has suggested, but stating firmly to a council of the whole realm that he had resumed the untrammelled use of his royal executive powers; a policy fully consonant with the dominant position he had achieved by his recent victory at Boroughbridge. Moreover it was expressly stated, in the second of the final clauses, that the royal executive power could not be limited henceforward by the unilateral action of the king's subjects.

Such an interpretation therefore fits very easily not only the wording of the statute but also the political situation of 1322, whereas previous attempts have largely left this second factor unaccounted for, as Mr. Lapsley has had occasion to remark ([13]). It has the further merit of crediting the king and his advisers with precisely the conceptions of government likely to take shape in the minds of men actually engaged on this type of work and it is at the same time sufficiently comprehensive to include, or explain, the varying alternative suggestions previously put forward by well informed scholars ([14]). Nevertheless one obvious objection springs to mind, namely that there was time in plenty between Henry III's reign and Edward II's for the fundamental distinction between the executive and legislative functions of government to have blurred in men's minds, for it could be urged that this aspect of the matter was less evident to the Englishmen of 1322 than it had been to Henry III and his contemporaries.

On general grounds the answer to this criticism is that the development of the government of England was, even in the fourteenth century in too elementary a stage for such a fundamental point to be easily overlooked. But conveniently enough there is as well direct evidence that this was not the case, which precedes our statute by a bare four years. It can be found in the indenture of Leake ([15]), of August 1318, in a reference to «tutes chose qe a charge facent qe se porrount et deverount faire sains parlement».

([11]) *S.R.*, I, 159, n^os 9, 14, 15, 16, 29, 30.

([12]) *Cambridge Medieval History*, Cambridge, 1932, VII, 425.

([13]) LAPSLEY, *op. cit.*, 414.

([14]) For a summary of these v. LAPSLEY, *op. cit.*, 22.

([15]) An agreement made between the king and his cousin the duke of Lancaster, for its text v. *Rotuli Parliamentorum*, ed. J. STRACHEY and others, London, 1767, I, 453 f.

The terms of the agreement then go on to provide that in dealing with such matters the king is to have the assistance of a standing council consisting of 2 bishops, 1 earl, 1 baron and one baron or banneret from the household of the earl of Lancaster «a deliverer et conseiller en due manere fur totes busoignes chargeauntz q̄ le Roi avera a faire, et q̄ se porount ou devrount delivrer sanz parlement, tant; autrefoitz en parlement soit autrement ordiene, issint q̄ rienz de ceux choses soit delivers saunz le conseil et l'assent des prelatz, countes, et autres q̄ ensi demoreynt pres du Roi....»

It would therefore appear that the unquiet spirit of the statute of York of 1322 should now depart releasing historical energies for «fresh woods and pastures new».

D. CLEMENTI.

VII

Q.o.t., Principe fondamental de la Démocratie et du Consentement, au XIV^e^ siècle,

PAR

ANTONIO MARONGIU,
Professeur à l'Université de Pise.

L'acquisition de connaissances nouvelles engendre des problèmes nouveaux et aboutit irrésistiblement à de nouvelles études.

Ce n'est plus le cas d'insister ou de revenir ici sur le succès, sans doute considérable, des recherches récentes conduites, par nous aussi bien que par d'autres, depuis un peu plus de dix ans au sujet de la diffusion et de l'importance de la maxime *Q.o.t.* considérée comme principe politique (principe du consentement, selon l'expression de Miss Clarke, ou, d'une manière plus générale, principe de la démocratie).

On se bornera ici à citer, parmi les principaux témoignages de ce progrès, l'étude et la vision d'ensemble de quatre événements d'une grande importance (et l'examen des documents relatifs) c'est-à-dire:

1) la convocation de la curie générale de l'empire en 1222 décidée de concert par le pape Honorius III et l'empereur Frédéric II de Souabe;
2) une convocation analogue de la part du même empereur en 1244;
3) la convocation de la curie impériale de Nuremberg en 1274 de la part du «roi des Romains» Rodolphe de Habsbourg;
4) l'ordre, *writ*, de convocation de la part du roi Edouard I^{er} d'Angleterre du fameux parlement de novembre 1295.

Vous vous souvenez sans doute de l'importance, à vrai dire excessive, que W. Stubbs avait pensé attribuer au dernier de ces célèbres documents, ne connaissant pas les trois précédents, arrêté qu'il était dans l'opinion que c'était effectivement au roi anglais que revenait le mérite d'avoir transformé le *Q.o.t.* «from a mere legal maxim into a great and constitutional principle».

C'est ce progrès de nos connaissances, aussi bien que le désir d'apporter quelque contribution à cette réunion, qui m'ont poussé à rechercher encore et à suivre, même pour le quatorzième siècle, la trace de ce principe si clair et si accessible à tout le monde. Il ne s'agit que d'une tentative, je dirais presque d'une exploration, dont j'ai quelque hésitation à vous présenter les premiers résultats.

Il est probable qu'on les trouvera non moins intéressants que lacuneux. Qui sait enfin si quelqu'un d'entre vous ne voudra m'aider de ses conseils ou de ses indications à atteindre un relèvement plus organisé et moins morcelé ?

En effet, cette recherche est bien moins facile qu'elle ne le semble. Au fur et à mesure que du haut moyen âge on avance vers des siècles plus proches, les données d'une éventuelle connaissance deviennent, il est vrai, plus nombreuses mais aussi plus clairsemées et plus difficiles à relater. En m'adressant en qualité d'homme d'études à des savants collègues, je dirai en un mot que pour chacun des siècles les plus proches nous avons au sens absolu plus de connaissances que pour les autres, tandis que cela n'est pas toujours vrai si l'on s'en rapporte à la quantité des éléments de connaissance dont il n'est pas interdit, ni même téméraire, de supposer qu'ils aient pu exister.

Ainsi que dans les essais auxquels je viens de faire allusion, et suivant l'esprit du programme de travail de notre Commission, je vais m'occuper, ce qui est bien naturel, du *Q.o.t.* comme principe politique. Sa valeur en tant que principe juridique de droit privé, de droit processuel et de droit canonique, nous laisse, au moins pour le moment, indifférents, même s'il ne nous est pas permis d'ignorer que la «glose ordinaire» aux *Décretales* du pape Innocent III en donne une détermination qui est aussi une sorte de restriction. En effet, par un coup de plume on ne peut plus efficace, on y précise (et c'est par là que le *Q.o.t.* sera inséré comme principe actif dans l'actuel C.J.C., c. 101, § I, n. 2) que l'on doit soumettre à la délibération et au consentement de la totalité seulement ce qui touche la totalité des personnes d'une manière directe et personnelle (*uti singuli*) et non les particuliers en tant que membres d'une personnalité collective ou collectivité organisée (*uti universi*). La formulation actuelle est en effet la suivante: *Quod autem omnes, uti singulos, tangit, ab omnibus probari debet.*

Naturellement, l'analyse des témoignages que nous avons recueillis doit être adhérente à la réalité historique considérée, à la vie réelle; il faut ainsi vérifier, même à la lumière du droit public comparé, la validité, ou plutôt la latitude, de la sphère d'application du critère en question dans les différents secteurs des délibérations collectives. J'ai apporté ces précisions par rapport aux doutes soulevés par les interprètes à l'égard des raisons, ou mieux encore des buts, auxquels le roi anglais Edouard I[er] visait par sa convocation. En face de Stubbs et en contraste avec lui pour l'attribution au souverain anglais d'une priorité d'ordre constitutionnel, on soutient par d'autres (C. H. McIlwain et G. Haskins) qu'il s'agit, il est vrai, d'une nouveauté,

mais bornée au secteur de l'imposition tributaire. En tout cas, il ne s'agissait point d'une nouveauté quelconque.

Le premier en ordre chronologique, des rapports doctrinaux du XIV° siècle reconnaissant l'autorité du principe est toujours (en l'état actuel de nos études) celui que nous donne Guillaume Durand Jr, neveu de ce célèbre *Speculator*, dans son traité *De modo generalis concilii tenendi et de corruptelis in ecclesia reformandis*. Sous sa plume ce principe acquiert une importance exceptionnelle: il prend la valeur de justification et de fondement de la théorie conciliaire dans sa signification la plus large, d'après laquelle c'est au concile œcumenique, supérieur au pape, aux rois, aux princes, que serait confié le pouvoir suprême pour ce qui concerne la doctrine chrétienne et la discipline ecclésiastique. *Contra... concilia et iura* (les *iura* délibérés par les conciles?) *nihil possunt dominus papa et reges ac principes de novo statuere, vel concedere, nisi generali concilio convocato, quum illud quod omnes tangit secundum iuris utriusque regulam, ab omnibus debeat communiter approbari.* Une affirmation si assurée du principe démocratique était et devait rester vraiment une exception. On peut fixer une date plus sûre pour ce qui concerne la réception de notre principe de la part de Marsile de Padoue, puisque le *Defensor pacis* était déjà terminé dès le 24 juin 1324. L'une des propositions fondamentales du grand ouvrage politique en question c'est que la loi doit prendre vie de la volonté populaire, c'est-à-dire de la *civium universitas*, ou de la *valentior pars* de celle-ci. Voilà deux de ses passages dans leur intégralité.

1) *Que ... omnium possunt tangere commodum et incommodum ab omnibus sciri debent et audiri ut commodum assequi et oppositum repellere possint*;

2) *illius veritas cercius iudicatur, et ipsius communis utilitas diligencius iudicatur, ad quod tota intendit civium universitas intellectu et affectu.* Il me semble résulter de là d'une manière claire et indiscutable non seulement le manque de fondement de l'opinion que Marsile, «tout enfermé dans la pensée d'Aristote», ignore le *Q.o.t.*, mais encore le poids que le padouan attribue au critère dont nous nous occupons. Plus encore, il l'adopte non pour la raison que d'autres l'ont soutenu de leur autorité, mais parce qu'il en reconnaît lui même l'utilité et qu'il le trouve convenable. Il le développe et en présente une libre élaboration, sans s'attacher ni s'arrêter à la formule stéréotypée. C'est là un grand et décisif démenti à ceux qui ont arbitrairement jugé le *Q.o.t.* une fleur de rhétorique et rien de plus.

Mais voilà encore un autre grand penseur et politique, toujours du XIV° siècle, le savant et subtil bachelier d'Oxford, ce *venerabilis inceptor,* Guillaume d'Ockam. Il puise son expérience personnelle, aussi bien que la figure idéale de l'organisation politique et religieuse, dans le système constitutionnel du royaume anglais. Il soutient l'institution d'un concile, ou parlement, qui doit être l'expression directe ou indirecte (il admet la présence des *procuratores et alii gerentes*) des membres de la Chrétienté; des laïques aussi bien que des ecclésiastiques, étant les uns et les autres également intéressés et «*quod omnes tangit ab omnibus tractari et approbari debet*». De telle manière et dans cet esprit l'assemblée pourra, à son avis, remplir son rôle de représenter et de défendre en face du titulaire du pouvoir le plus élevé, les intérêts des membres de la collectivité et pourvoir, le cas échéant, à des réformes. En outre il aurait été possible de réaliser ce qu'il appelait *principatus ministrativus,* c'est-à-dire la monarchie constitutionnelle, qu'il oppose, et que, naturellement, il préfère, à l'état absolu, qu'il appelle *principatus dominativus,* ou même *principatus bestiarum.*

Le *Q.o.t.* est donc le fondement de la collectivité la mieux organisée, dans laquelle le souverain, ou bien le pouvoir public en général, peut exiger des citoyens ce qui est strictement nécessaire pour l'accomplissement de ses finalités institutionnelles sans les priver de leur liberté, de leurs biens, de leurs droits.

Mais ce n'est pas là tout: chez le franciscain non conformiste le principe de la démocratie et du consentement se fond avec celui de la représentation. Sauf le principe de la participation universelle, l'impossibilité matérielle de la présence de chacun à la grande assemblée fait surgir la fonction et la nécessité des représentants populaires munis nécessairement d'un mandat. Il est fâcheux que l'auteur (Guillaume, d'ailleurs, n'est pas un juriste) omet d'éclaircir sa pensée sur la manière de réaliser et de rendre juridiquement explicable et efficace une telle représentance, ayant égard surtout à son fonctionnement, dans le but de mettre un remède à l'inconvénient, que lui même dénonce, de l'impossibilité d'une intervention directe au concile de tous les ecclésiastiques et de tous les laïques. Certes, si la représentation avait été pour lui (déduit notre savant collègue G. de Lagarde), non une délégation collective, mais seulement une «délégation individuelle des membres de la communauté», tout son discours n'aurait eu d'autre conclusion qu'une obscure aporie.

Indépendamment de cela, le *Dialogus de potestate imperiali et*

papali place le *Q.o.t.* parmi les principes fondamentaux de la vie sociale, non seulement à un point de vue purement structural, mais ayant justement égard à sa valeur morale et politique. S'il faut se pourvoir sur le point et le cas d'un pape hérétique, la décision y relative doit être prise non par de petits comités particuliers, mais par la collectivité:

«*Quod omnes tangit, ab omnibus tractari debet: sed causa papae haeretici omnes tangit Christianos. Ergo per omnes Christianos vel congregationem, cuiusmodi est concilium generale, tractari debet!*»

Encore, Guillaume ne s'arrête-t-il pas là. Le *Q.o.t* n'est pas seulement un principe de procédure mais de vie, il est plus qu'une simple règle de droit humain et positif. C'est un principe de droit naturel, de droit divin, car il prescrit que les chefs de la société doivent être élus par les membres mêmes de la collectivité:

«*universitati mortalium nullus praefici debet nisi per electionem et consensum eorum; quod omnes tangit debet tractari per omnes, quod autem aliquis praefici aliis, omnes tangit, igitur per omnes tractari debet*». Peut-on avoir une expression plus claire de démocratie ?

Ce même principe paraît peu de temps après, peut-être un peu avant 1340, dans l'œuvre politique *De iuribus regni et imperii Romanorum* d'un autre défenseur de l'idéal démocratique, l'allemand Lupold von Bebenburg. Pour lui, aussi bien que pour Guillaume d'Ockam, le *Q.o.t.* est un principe de justice naturelle:

«*Aequitas et ratio naturalis dictat apud omnes, quod, quando per aliquod factum praeiudicatur pluribus, quod id per omnes illos comprobari debebit et sic illud videtur esse de iure gentium*».

Deux conséquences se dégagent de là:

1) que «*quilibet populus carens rege potest regem eligere de iure gentium*»;

2) que le roi doit gouverner dans les choses essentielles, c'est-à-dire dans les affaires qui intéressent la collectivité, avec le consentement et la collaboration du peuple.

La philosophie politique reçoit un élan considérable, à ce moment-là par la querelle conciliaire et par la lutte entre la papauté d'Avignon et Louis de Bavière, qui s'était couronné lui même empereur à Rome. Ces études sont toutefois cultivées largement et atteignent un développement considérable même en Espagne. L'inspiration en est ici multiple: classique (biblique, romaine et grecque) et contemporaine. L'un des principaux représentants de ce mouvement est

le célèbre Alvaro Pelayo qui, à Bologne, a été le disciple du grand canoniste Guido da Baisio (le fameux Archidiacre) et qui a eu des rapports directs entre autres avec un autre juriste bolonais très apprécié, Jean d'André. Il demeura longtemps et à plusieurs reprises en Italie et il revêtit même une charge importante à la curie pontificale d'Avignon. Le plus répandu de ses écrits est peut-être le *De planctu Ecclesiae*. En vue de notre recherche, ce qui nous intéresse davantage c'est cependant un écrit politico-pédagogique composé entre 1341 et 1344, qui a été étudié entre autres par R. Scholz: le *Speculum regum*. Surtout là où il traite *de malis regibus et principibus* et où il considère le caractère de leurs erreurs et de leurs abus (*in quibus peccant*). En effet, il est opposé à ce que les souverains s'aventurent à décider tout seuls (*sensu proprio*) ou rien que dans un petit conseil (*cum paucis assessoribus*), des actes et des problèmes les plus graves du royaume. Même, affirme-t-il, il faut que toute décision soit prise avec la majorité:

«*quia maiora negocia regni expediunt sensu proprio vel cum paucis suis asessoribus, cum tamen maiorem partem regni super hoc eorum interest et quod omnes tangit ab omnibus debet aprobari*».

C'est là l'essentiel: ce qui intéresse tout le monde ne peut être décidé sans la participation de chacun.

L'on retrouve, quinze ans après, la même doctrine dans le traité *De vita, moribus et regimine principum* de l'Infant Pierre, fils de Jacques II d'Aragon et oncle de Pierre IV le Cérémonieux. Cet essai ne vise pas la fonction législative, ou gouvernementale ou fiscale, comme il en est des exemples que l'on vient de citer, mais l'éventualité d'une déclaration de guerre, d'une guerre juste, cela va sans dire. Son discours commence par des références bibliques et culturelles; il culmine dans le principe politique que nous étudions. Isodore, dit-il, dans son 9° livre des *Etymologies* nous apprend que pour conduire les guerres avec succès, il faut le conseil d'un grand nombre de gens, et surtout des gens les plus puissants et les plus autoritaires, ainsi qu'il est confirmé par l'enseignement et par l'exemple des saints et des savants de l'antiquité. L'une des opinions les plus constantes et les plus répandues de l'antiquité est contenue dans l'arrêt *Quod omnes tangit ab omnibus debet comprobari*. Puisque, en effet, les avantages et les maux de la guerre atteignent, selon toute évidence, non seulement le roi, mais la collectivité (*Rempublicam regni*) du pays, il s'ensuit que la guerre ne peut être entreprise ni accomplie sans le conseil de ceux que la chose (*negotium*) touche, ni sans le

secours de ceux qui devront la combattre et supporter avec leur commandant et souverain le poids et le feu de la guerre elle-même.

Trente ans plus tard, exactement en 1392, cette conception de l'Infant aragonais reparaît chez François Eximeniç, écrivain encyclopédique que Ferran Valls Taberner a jugé «la figura de mes relleu que apareix en la historia de les doctrines del dret public à Catalunya en la transiciò dels segles XIV-XV». Non, pourtant, dans son traité célèbre le *Crestiá* ou bien dans le *dotzen libre,* très répandu, de ce même ouvrage (c'est le *Libre de regiment de princeps e de communitats*), où il exprime véritablement ce qu'il y a de meilleur de ses considérations et de ses doctrines: mais bien dans une lettre qu'il adresse de Valence à l'Infant Martin, en train de se rendre en Sicile pour assumer le gouvernement de ce pays. Il écrivait en effet à ce jeune prince: «Senyor, vos placia esser amador de las communitatz e de la cosa publica e de non pendra guerra sens lur consentiment». Même à son avis, la guerre était donc la chose qui exigeait surtout la consultation et le consentement. Il ne se rapporte toutefois au «*Quod omnis tangit*» que par sous-entendu. Pour retrouver ce dernier, et toujours en Espagne, il faut retourner au *Rimado de Palacio* de l'aventureux Pedro Lopez de Ayala; ainsi que le titre l'indique, il s'agit d'une composition en vers (à vrai dire assez longue). Sous la rubrique *Del governamiento de la Republica,* cet écrivain recommande sans cesse au souverain de consulter, avant d'agir, le plus grand nombre de gens: *Do ha muchas cabeças ha,* dit-il, *mas entendimiento.* Il insiste sur l'utilité du Conseil (w. 286 sv.):

«E sean con el rey al consejo llegados
Perlados, cavalleros, doctores e letrados
Buenos omes de villas, que hay muchos onrrados
E pues a todos atanne, todos sean llamados».

Ce dernier vers n'est, en toute évidence, que la traduction en vers du *Q.o.t.*

Entre celui-ci et le *De concordantia catholica* de Nicolas de Cues, (qui dépasse notre XIV^e siècle) où le *Q.o.t.* reparaît, pour ainsi dire, en triomphateur, nous avons encore des témoignages d'un grand relief, surtout dans le domaine de l'histoire des institutions. Quelques-uns sont biens connus, relevés comme ils ont été par feu Miss Clarke.

En Angleterre, par exemple, après le parlement de Westminster de 1332, les procureurs du clergé cessent d'être convoqués et, par conséquent, de constituer un «état» ou groupe parlementaire: leurs subventions au roi sont octroyées désormais par des assemblées par-

ticulières, les *convocations*. Au mois de septembre 1336, pourtant, le clergé mineur anglais est convoqué par l'archevêque de Canterbury dans les deux sièges les plus proches de Nottingham et de Leicester, chacune des deux provinces ecclésiastiques ayant le sien. Le *writ* archiépiscopal en enregistre en même temps la ratification aussi bien qu'une variante de la formule traditionnelle, en disant, au sujet des assemblées, que les questions qui *omnes tangant per omnes debeant pertractari.* Mais la grande valeur du principe avait été mise en avant au moment de la promulgation des *Nouvelles Ordenances* de 1311, qui avaient été lues et jurées dans toutes les villes après qu'elles avaient été *quasi ab omnibus communiter accepta... et approbata.* La Chronique de Malmesbury (à l'époque d'Édouard II, peu après 1325) en enregistrait l'annonce et en même temps répétait la fameuse devise: *Quod omnes tangit, ab omnibus debet approbari.* En effet, cette année 1311 avait représenté un tournant dans l'histoire de l'institution parlementaire anglaise. Pour ce qui est du *Q.o.t.* il est seulement sous-entendu, et non exprimé, dans le célèbre statut de York de 1322, dont on a tant discuté les implications et la valeur historique. On ne va pas entrer dans la polémique si on ne se permet non plus d'affirmer, ou de démentir, que le statut contient ou confirme, implicitement, le *Q.o.t.* Son texte français était le suivant:

«Mes les choses que serrount a establir pour l'estat du roialme et due poeple, soient tretes, accordees, establies en Parlementz, por nostre seigneur le roi, et par l'assent des prelatz, countes et barouns et la communaulte du roialme: auxint come ad este acustume cea enarere».

Le principe du consentement général était, de la sorte, définitivement sanctionné sans spécifications, ni exceptions.

Sous d'autres cieux, en Italie, un cardinal, qui avait été auparavant modérateur, aux ordres du roi Alphonse XI, du royaume de Castille, le présente encore une fois, ouvertement, comme un principe de droit financier. Il s'agit d'une des nombreuses dispositions contenues dans les constitutions de l'Eglise pour la Marche d'Ancône et que l'on a nommées, d'après le nom de ce cardinal législateur (Don Gil, en latin Aegidius, d'Albornoz), *Constitutiones Aegidianae.* Dans la rubrique *De statutis et ordinamentis terrarum,* ces constitutions entendent éliminer ou réduire les nouvelles apparences de tyrannie jaillissant ça et là et l'exploitation des citoyens de la part des administrateurs et de seigneurs plus ou moins légitimes. On y ordon-

ne, en effet, que ce que *universitates et singuli* paient sous la forme et sous le nom de collectes, et de *tributa* en général, soit exclusivement employé pour l'utilité générale, *quia,* dit le texte législatif, *interest locupletes habere subiectos sicut rationi congruit ut quod omnes tangit ab omnibus approbetur* . . .

Mais d'après ce qu'il nous a été possible de constater, la preuve la plus solennelle et la plus digne d'être remarquée, de la persistance et des répercussions du principe qui nous intéresse, à travers le XIV^e siècle, on la trouve au Portugal. Le fait se rattache au souvenir d'un des plus grands événements de l'histoire lusitane, les *Cortes* de Coimbra de 1385, récemment évoquées par notre collègue Marcello Caetano. De cette session parlementaire il est résulté, au Portugal, non seulement une nouvelle dynastie et l'avènement au trône de D. João I, le populaire «Mestre de Avis», mais surtout un nouveau régime politique, un régime constitutionnel. La composition de ces *Cortes* est d'ailleurs connue. Y ont participé les représentants du haut clergé, soixante-douze *hidalgos* et les procureurs des cités ou villes. Les trois groupes participèrent également aux travaux et aux délibérations dans des séances, les unes distinctes et d'autres en commun. Laissons de côté, ici, la nature et la valeur des décisions (élections et acclamations) des assemblées qui acclament un nouveau roi: en effet, ici les membres avaient déclaré et concédé au prince de s'appeler roi (*quod ipse nominaret se regem*) et le problème était plus ou moins sciemment cantonné. La détermination commune et concordante du changement des règles de la succession au trône avait été précédée, d'abord, par l'insurrection, qui est le tréfonds de la nouveauté constitutionnelle, et en second lieu par la présentation et discussion en parlement des *capitulos de agravamento* (les «cahiers de doléances» de la terminologie française), contre le mauvais gouvernement du feu roi Ferdinand. Les représentants des villes s'étaient plaints, particulièrement, de ce:

1) que le roi se fût entouré de mauvais conseillers;

2) qu'il n'eût pas prêté l'oreille aux plaintes et aux réclamations populaires et qu'il eût, au contraire, décidé de problèmes d'une si grande importance pour la collectivité, comme la guerre et la réforme monétaire, sans en avoir discuté avec les *Cortes*. La décision parlementaire elle-même se présente inspirée à de telles remontrances et requêtes d'une manière directe et nécessaire, ou, mieux encore, immédiate; elle en reproduit en effet l'ordre et le ton.

Le passage qui nous intéresse le plus directement pour la réaffirmation de la valeur, non seulement morale, mais encore pragmatique

et effective du principe, plus qu'un élément d'une série, se présente comme une note qualificative et directrice du texte complexif. Au fond, les vœux des *Cortes* se proposaient d'affronter et de résoudre le problème de la vie en commun du peuple portugais et du titulaire du pouvoir politique suprême. Mais avant d'être un principe d'action politique, il avait été le principe de l'être et de la pensée en des termes de collectivité organisée et dans le rôle représentatif des mêmes *Cortes* lusitanes. Celles-ci déclaraient à ce moment, ou plutôt répétaient à la manière de conclusion et de sanction de leurs discussions, que: *Hé direito que as cousas, que a todos pertenencem e de que todos senten carrego, sejam a ello chamado.* On allait encore plus loin: on remarquait pour le passé que *desto forom os povos destes Reynos privados* et on voulait, pour le futur, que le principe ne fût plus oublié. Le Roi répondait en des termes circonstanciés et chargés de réalité. En tant que titulaire du pouvoir il défendait son pouvoir et ses paroles, quoique polies, et jusqu'à un certain point condescendantes, manquaient toutefois du sens de l'ensemble et du total: il voulait donner satisfaction aux *Cortes*; il promettait; mais il ne renonçait pas d'une façon formelle à se choisir lui-même la femme qu'il aurait dû épouser. Sur ce point donc il n'avait aucune intention de céder, car, disait-il, *os casamentos devem em si ser livres, que outro si os Reys dante El em casar foram livres, e por estas razoens El nom se obrigará nem prometerá* . . . absolument rien, mais il fera simplement connaître son intention, quand le moment sera venu. Pour le reste, sa réponse est également claire: la guerre en acte est une guerre de défense et les autres guerres ne seront point entreprises sans le consentement des *Cortes* (ou des *povos*). Quant aux affaires de la paix, c'est-à-dire au gouvernement de la chose publique, lui, quand il y aura quelque chose de semblable à décider (*que hé compridorio*), il convoquera les peuples *para com seu acordo delles tomar aquello que for seu serviço e pela honra delles todos.* Avec tout cela, et pour tout cela, le *Q.o.t.* se présentait — tout comme réellement il était — à sa place, surtout dans ce qu'on appelle le monde immense des idées, c'est-à-dire des théories et des doctrines de la politique et du droit public: ou bien comme l'une de ces propositions normatives, qui, pour être traduites en règles de conduite, demandent à être complétées dans leurs éléments constitutifs, par les législateurs.

D'ailleurs — et je le dis seulement à un égard, pour ainsi dire, classificatoire — les personnages que nous avons rappelés étaient tous, quoique non complètement étrangers au monde du droit, et du droit

canonique en particulier, des non-juristes. Ils reconnaissaient l'importance du *Q.o.t.*, mais ils n'avaient pas, certes, l'autorité de poser notre principe sur le même plan, non seulement de validité, mais d'efficacité normative, où les législateurs seulement auraient pu le poser. Ce sont là surtout des témoins, des interprètes, de la pensée de leur époque, particulièrement sensibles et d'une haute valeur historique et humaine. Ils étaient encore, ainsi que leur siècle, au-dedans du moyen âge, partagés et pour ainsi dire divisés entre la survivance de l'idéal de la souveraineté toujours en contact avec le peuple et l'idéal opposé et antithétique d'une monarchie qui, tout en ayant d'abord reçu son pouvoir du peuple, voulait être pleine et absolue, en dehors de tout lien juridique.

Sur le plan de la polémique politique, le *Q.o.t.* était aux yeux des défenseurs de la tradition, un bien précieux à garder et à transmettre à la postérité; pour les zélateurs du pouvoir, au contraire, notre principe représentait un idéal chimérique et assez dangereux, inspirant peut-être une certaine crainte: il fallait le traiter en passant, sans avoir l'air ni de le nier, ni de le combattre. Sur le plan de la réalité politique et administrative, il restait un excellent mot d'ordre aussi bien que l'expression d'une direction politique faite de sagesse, de concorde, de collaboration. La valeur effectivement reconnue au *Q.o.t.* reflétait enfin le degré de concentration de l'autorité dans les pouvoirs suprêmes de l'Etat, à l'égard des différents éléments de la structure politique et sociale de la collectivité.

A. Marongiu.

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VIII

The Mediaeval Irish Chancery,

BY

JOCELYN OTWAY-RUTHVEN,
University of Dublin.

Little published work exists on the institutions of mediaeval Ireland, and it seems worth making an attempt to outline the development of the chancery, which, though based on the English model, was necessarily on a smaller and less elaborate scale. The repeated losses of records which have so complicated the task of the Irish historian make it impossible to hope that we can ever reconstruct it in full detail — in particular no single roll of the Irish chancery survived the destruction of 1922 — but it remains possible to recover a fair amount of information, and this paper is offered as a first sketch, which may later be filled in.

The Irish exchequer, which had certainly been organized before 1200 (1), appears to have been the first administrative department of the Anglo-Irish government, though no doubt the justiciars who administered the country had their own clerks. But the English chancery was still in the twelfth century so intimately connected with the royal household that we need not be surprised that it does not seem to have been copied in Ireland till 1232, when the English chancellor, Ralph Neville, bishop of Chichester, was granted the chancery of Ireland to hold for life, with all the liberties and free customs thereto belonging (2). The writ speaks as if the chancery already existed, but probably there was in fact only some sort of writing office, possibly, as Richardson and Sayles suggest, in connection with the exchequer (3). Neville nominated a deputy to execute the office in his place: having taken oath he was to have free administration of the office of chancery and the seal with which the affairs of the king and of the land of Ireland are transacted (4); he was to be present at the councils of the justiciar and the management of the king's affairs; he was to have a clerk at the exchequer of Dublin to keep a counter-roll, and a clerk at the assises before the justiciar to keep a roll *de banco* and writs

(1) *Rotuli Chartorum*, ed. T. D. HARDY (Record Commissioners, 1837), p. 61b.
(2) *Close Rolls, 1231-4*, pp. 112-3.
(3) H. G. RICHARDSON and G. O. SAYLES, *The Irish Parliament in the Middle Ages* (University of Pennsylvania Press, 1952), pp. 23-4.
(4) *Close Rolls, loc. cit.*

of pleas, as the chancellor had in England (5). After 1244, when, on the death of Neville, his deputy, Robert Luttrell, was continued as chancellor, the Irish chancery had a continuous existence, independent of the English chancery (6). It should, however, be observed that this did not mean that the English great seal ceased to have validity in Ireland: as a seal in direct contact with the king it had exactly the same validity in Ireland as in England. Thus in 1339 the king addressed letters close to the escheator of Kilkenny ordering him to deliver to the bishop of Ossory the temporalities of his bishopric: the sheriff had been ordered to do so by writ under the great seal used in England, and had refused to receive or execute the writ, 'asserting that he will not execute it unless it comes from the chancery of Ireland under the seal used there, at which the king is much angered, chiefly because all his subjects are bound by their allegiance to obey his orders under the great seal of England' (7). It was however, felt to be proper that at any rate writs of course in Irish affairs should issue from the Irish chancery: when in 1305 Nigel le Brun as executor of a will petitioned for a writ of the English chancery against the testator's bailiff the answer was *Quod sequatur versus eum per breve de cancellaria Hiberniae si sibi viderit expedire* (8).

The organization of the Irish chancery during the thirteenth century is very obscure. The custody of the rolls seems to have been irregular (9), and in 1300 all the records of the time of the then chancellor up to that year were accidentally burnt in a great fire

(5) This strongly suggests, though it does not prove, that a royal seal, distinct from that of the exchequer, already existed in Ireland.

(6) Lists of chancellors and keepers of the rolls are given in F. ELRINGTON BALL, *The Judges in Ireland* (New York, 1927, 2 vols.), and more detailed lists of all Irish officials for the period 1272-1377 by H. G. RICHARDSON and G. O. SAYLES will shortly be published by the Irish MSS Commission. Lists of chancery officials for the period 1377-1485, which expand those given by ELRINGTON BALL, appear below, pp. 131-138.

(7) *Cal[endar of] Close Rolls, 1339-41*, p. 259.

(8) F. W. MAITLAND, *Memoranda de Parliamento* (Rolls Series, 1893), p. 239. Cf. *Cal. Close Rolls, 1374-77*, pp. 481-2, and *Cal[endar of] Justiciary Rolls, [Ireland], 1305-7*, ed. J. MILLS, London, 1914, pp. 74-8.

(9) C. 1285 it was alleged that 'as to the rolls of the justiciar and chancellor ... it is found that the justiciar has retained those rolls in his chamber for two years at his will ... of the rolls of Fromund le Brun, the chancellor'. (Chancellor *c.* 1260-1283). (H. S. SWEETMAN, *C[alandar of] D[ocuments relating to] I[reland]* (London, 1875-86, 5 vols.), III, p. 5).

at St. Mary's abbey, Dublin. What remained was delivered to Walter de Thornbury, the new chancellor, in 1309 by the late chancellor's executors: it included only one roll earlier than 1300, and it would appear that whatever had happened to the bulk of the thirteenth century chancery records they had not been in the chancellor's custody ([10]). By the early nineteenth century, when the remaining chancery rolls were calendared for the Record Commissioners, further substantial losses had occurred, and the destruction of our public records in 1922 has left this brief Latin calendar of a mere fragment of the records of the mediaeval chancery, all later than 1300, as our main guide to the manner in which it conducted its business.

We know, therefore, almost nothing of the development of the Irish chancery in its early days. It is clear that there was a good deal of exchequer influence, and that a clerk could easily pass from one department to the other ([11]). Even as late as 1392 Richard Wals, parson of Carlow, says in a petition that *il ad travaille en le service nostre seigneur le roy en son chancellerie et eschequer Dirland par ces xl. anns et plus* ([12]). But our first positive statement comes from *c.* 1285 when it was alleged that 'in the chancery there is now only one clerk, John Esturmy, who knows little of the chancery. Writs issuing are reproved in the common pleas and elsewhere as wanting in matter and form; there is a very great want there of clerks knowing the form of chancery; and therefore the justices of the common pleas have supplicated the king to provide better in these matters' ([13]). Although the register of writs had been transmitted to Ireland in 1227 ([14]), in 1254 the king sent his justices of Ireland a transcript of a writ out of the Irish chancery which

([10]) *Cal*[*endarium*] *Rot*[*ulorum*] *Pat*[*entium*] *et Claus*[*orum Hiberniae*], ed. E. TRESHAM (Record Commissioners, 1828), p. 12, no. 416. There are certainly some inaccuracies in this. Thus the close roll calendared as that of 10 Edward II seems to be that of 10 Edward III, while the close roll calendared as that of 9 Henry VI probably belongs to 9 Henry V.

([11]) Many of the early chancellors had had previous connections with the exchequer. See ELRINGTON BALL, *loc. cit.*

([12]) [*A Roll of the Proceedings of the King's*] *Council in Ireland*, ed. J. GRAVES (Rolls Series, 1877), pp. 11-12.

([13]) *C.D.I.*, III, no 2.

([14]) F. POLLOCK and F. W. MAITLAND, *The History of English Law* (Cambridge, 1923), pp. 170-1.

did not accord with the course of the English chancery, ordering them not to proceed on this writ, but to cause one to issue according to English form (15). It was perhaps as a result of such complaints that an English chancery clerk, Robert de Haliwell, was sent to Ireland under Edward I: in 1304 the king ordered that as he had served him well in the chancery of England and of Ireland and elsewhere he was to be replaced and retained in as good estate in the chancery of England, in table and court, as he had in the time when John de Langton was chancellor (16). At least one other English clerk, Henry de Thrapston, served in the Irish chancery in this period (17). But again, *c.* 1333, the Irish council represented to the king that 'en votre chauncellerie Dirlaunde il ny ad forsqe un clerc et un clerionnet, mes nul de eux sciet riens qui appent al office du roule, ne nule busoigne apoy que soit hors de cours exploiter en la place, ne brief duement faire, dont votre corone ad sentu trop grantz desheritesons et damages; et votre chaunceller, qad porte uncore la charge des tieux briefs faire, ne pust cele charge ovesqe les auters charges qil ad entour voz grosses busoignes endurer, par qoi il busoigne que ascun sachant clerc del office des roules, et de faire briefs de fourme a luy commaundez, soit hastivement envoiez en Irlaunde' (18). But still in 1356 we hear that Walter de Wygan *per multos annos propter clericorum cancellarie paucitatem graviter laborasset* (19).

By this time, however, it is clear that the organization of the chancery had been considerably developed. The office of keeper of the rolls existed in Ireland at the time of the Bruce invasion (1315-18), for in 1323 the Irish treasurer and chamberlains were ordered to deliver to the Irish chancellor 'all rolls, writs, inquisitions and memoranda of the chancery of Ireland of the king's time and of the time of his progenitors, to wit those that Walter de Kynefare, late keeper of the rolls of said chancery, delivered to the treasurer

(15) *Close Rolls, 123-4*, p. 114.

(16) *Calendar of Chancery Warrants*, p. 233. Haliwell was described as the Irish chancellor's clerk in 1298. *C.D.I.* IV, no. 508.

(17) *C.D.I.*, IV, no. 720. Cf. *Cal[endar of] Pat[ent] Rolls, 1292-1301*, p. 241.

(18) *Council in Ireland*, p. 320. The editor dated this document *c.* 1345 because of the reference to the mainpernors of the earl of Desmond, whose recognisances were estreated in that year, but the recognisances had been executed in 1333, and the passage on the chancery can hardly belong to any later date. (*Ib.*, pp. liii-iv and below, p. 123).

(19) *Cal. Rot. Pat. et Claus.*, p. 67, n° 145.

and chamberlains when the king's Scotch enemies were in that land, to be kept by the chancellor to make execution and other things pertaining to the office of chancellor' ([20]). This sounds as if the office had been allowed to lapse, but in 1324 William de Bardelby was keeper of the rolls, and held the office till 1333, when Edmund de Grymmesby, the first of a series of English chancery clerks who appeared in Ireland as keepers of the rolls during the century, was appointed ([21]). It is not clear whether Grymmesby ever took up office: Bardelby was still described as keeper in August 1334, and was still working in the chancery in 1335 ([22]), but Robert de Hemmyngburgh, another English chancery clerk, appointed in 1337, certainly did act, and we may take it that the office was effectively organized after this date. Hemmyngburgh brought with him another chancery clerk, William de Drayton, who continued to appear in the Irish chancery till 1359, to serve under him, while Henry Gilofre of Leicester, probably the Henry de Leycestre who became keeper of the rolls in 1364, came over with Thomas de Cotyngham in 1356 ([23]).

The office of keeper of the hanaper does not appear in the surviving records till considerably later, though of course this cannot be taken to prove that it did not exist. But the first clerk of the hanaper to be named is Nicholas Hotot, who petitioned for remuneration for his service as clerk of the hanaper and had a writ of *allocate* on March 6, 1382, by which time he had been superseded ([24]). Several of the fourteenth century clerks of the hanaper later became keepers of the rolls ([25]). The clerk of the crown in chancery does not seem to be mentioned till 1382 ([26]); in 1481 he was described as 'clerk of the crown of our sovereign lord the king of his chancery and of his parliament of his land of Ireland' ([27]).

([20]) *Cal. Close Rolls, 1323-7*, pp. 10-11.

([21]) *Cal. Rot. Pat. et Claus.*, p. 31, no. 51; *Cal. Pat. Rolls, 1330-34*, p. 470; *Cal. Close Rolls, 1333-7*, p. 158.

([22]) *Cal. Rot. Pat. et Claus.*, p. 38, no. 12; p. 41, no. 24.

([23]) *Cal. Pat. Rolls, 1334-8*, pp. 515, 517; *ib. 1354-8*, p. 433.

([24]) *Cal. Rot. Pat. et Claus.*, p. 111, nos. 55-7; p. 112, no. 95; p. 117, no. 45. He was to be allowed £ 4 19 s. 4 d., which suggests that he had been in the office for at least a year, for in 1425 the annual fee was £ 5. (*Ib.*, p. 239, no. 10).

([25]) See lists below, pp. 136, 137.

([26]) *Cal. Rot. Pat. et Claus.*, p. 111, no. 57.

([27]) *Statute Rolls [of the Parliament of Ireland], Edward IV*, part II, ed. J. F. MORRISSEY (Dublin, 1939), p. 886.

Beyond these named officials it is very difficult to discern anything of the organization of the chancery staff. We cannot tell whether or not there was anything corresponding to the ordered hierarchy of the first and second grade clerks of the English chancery. No more than two or at the most three clerks of chancery ever occur by name at any one time, and though there must have been others who are not named it is clear that the whole structure must have been smaller and less elaborate than that of the English chancery. The name which appears on a chancery writ up to the middle of the fifteenth century is as often as not that of the keeper of the rolls, or of a clerk who will shortly become keeper of the rolls, but other names occur, including, between 1427 and 1443, that of Thomas Broun, clerk of the crown under Henry IV, Henry V and Henry VI ([28]). The names of the clerks who appear from time to time as being granted rewards for their 'tres grandes travalx en escrivant diverses briefs combien des parlements come des conseiles as diverses seignours Dirland' or 'for their expenses in following the justiciar and chancellor and writing commissions and writs touching the king and the business of Ireland' do not appear on the writs: they were clearly persons of inferior status, receiving no regular salary ([29]).

The regular salary of the chancellor himself throughout the period was £ 40 ([30]). In addition, however, he had in the thirteenth and fourteenth centuries the issues of the seal: this is stated *c.* 1285, and when John Larcher was appointed in 1346 the patent expressly stated that he was to have the issues of the seal 'as other chancellors there have used to have' ([31]). The issues of the seal continued to be

([28]) A few original writs have survived among the Ormond deeds (*Cal[endar of] Ormond Deeds*, ed. E. CURTIS, 6 vols. (Dublin, 1932-43), the Dowdall deeds (*Calendar of Dowdall Deeds*, ed. C. MACNEILL and J. OTWAY-RUTHVEN, Dublin, 1960), and in more scattered sources, while a number are fully transcribed in the registers of the archbishops of Armagh.

([29]) *Council in Ireland*, pp. 89-90; *Cal. Rot. Pat et Claus.*, p. 45, no. 68; p. 58, no. 1; p. 150, no. 7; p. 240, no. 50; p. 245, nos. 20-21; p. 247, no. 43; p. 263, no. 12. The only exception seems to be Hugh Wogan, whose name appears on a good many writs between 1443 and 1451, when he was clerk of the crown, and who had a reward for his labour in the chancery in writing *necessaria regem tangencia* in 1440. (*Ibid.*, p. 263, no. 5).

([30]) *C.D.I.*, II-IV, *passim*; *Cal. Rot. Pat. et Claus.*, p. 12, no. 25; p. 38, no. 39; p. 243, no. 11, and *passim*.

([31]) *C.D.I.*, III, no. 2; *Cal. Pat. Rolls, 1345-8*, pp. 211-12.

specified in patents till the end of the century, but when in 1395 the bishop of Meath was appointed the king reserved to himself 'all issues and profits of the great seal, there usually received heretofore by the chancellors', granting the chancellor instead an annual sum of £ 80 for the expenses of his establishment ([32]). In 1399 he was granted instead the accustomed fee and 10 s. daily at the exchequer of Ireland, and subsequent grants of wages 'for the support of the clerks of the chancery, servants and horses' vary from 5 s. a day to 10 s., though in 1461 John Dynham was granted only £ 53 6 s. 8 d. a year 'for the maintenance of the clerks of the chancery of Ireland' ([33]). What this involved is stated in 1395 to be that the chancellor 'is now required by ordinance of the king and council to find a keeper of the rolls of chancery and other clerks for the said chancery, and to have them at his table, and whilst they are on eyre to find the cost of their horses, one clerk being assigned by the chancellor as keeper of the hanaper' ([34]). This obligation cannot have been entirely new: the assumption made when William de Whithurst was appointed as keeper of the rolls in 1346 was apparently that the chancellor was bound to maintain him ([35]).

In addition to the normal fees and wages of his office, the chancellor, since like every other official in Ireland he not infrequently found himself engaged in warlike operations, might be in receipt of wages for the maintenance of men-at-arms, light horsemen (hobelars) and archers. Thus in 1364 the appointment of Robert de Assheton as chancellor provides that 'because he must often ride at war with the king's son, Lionel duke of Clarence, lieutenant in that land, in his progresses, and at other times by himself, he may retain six men-at-arms and twelve mounted archers at the king's wages usual in that land', to be paid by the treasurer ([36]). In 1370 John de Botheby, then chancellor, had a similar grant 'for as long as he shall be in that office and the war there shall last' ([37]). In 1368 the chancellor was actually taken prisoner by rebels in the

([32]) *Ibid., 1391-6*, p. 602.

([33]) *Ibid., 1399-1401*, p. 112; *1408-13*, p. 282; *1452-61*, p. 641; *Cal. Rot. Pat. et Claus.*, p. 185, no. 68(d); p. 198, no. 16; p. 224, nos. 15-16; p. 225, no. 28; p. 239, no. 5; p. 243, no. 10; p. 245, no. 6; p. 251, no. 5.

([34]) *Cal. Pat. Rolls, 1391-6*, p. 602.

([35]) *Ibid., 1345-8*, pp. 158-9, and see below, p. 126.

([36]) *Ibid., 1364-9*, p. 25.

([37]) *Ibid., 1367-70*, pp. 450-1.

marshes of Carbury, co. Kildare, though the great seal seems to have been saved ([38]). These military considerations no doubt explain why the prior of the Hospitallers was so often appointed as chancellor. And finally, the chancellor could of course rely on presents of all kinds, from the 5 marks for wine given by the prior and convent of Christ Church cathedral, Dublin, in 1339 to the 10 marks of annual fee for life granted to Sir Roland Fitz Eustace when he was chancellor by Octavian, archbishop of Armagh, 'pur la liberte du dit Octavian et pur le bone counseill du dit Roulande empense et de estre empense al dit primate' ([39]).

The fee of the keeper of the rolls seems to have been at first a matter of considerable uncertainty. When Edmund de Grymmesby was appointed in 1333 the king, 'wishing to ascertain what yearly fee such a keeper ought and was wont to receive, and if the fee ought reasonably to suffice for the said keeper', ordered the justiciar, chancellor and treasurer to inform him on this ([40]). But in 1346, when William de Whithurst was appointed, the king was still 'not fully informed how much others have used to receive for this custody' and ordered that 'if the chancellor of Ireland be not willing to receive him with as many men and horses at the charges of the chancellor as others who have stood in the office before these times have had at such charges, the said William shall have £20 at the exchequer of Ireland, half at Michaelmas and half at Easter, out of the yearly fee which the chancellor receives at that exchequer by reason of his office'. In either case William was to have 'the fee pertaining to him by reason of the enrolment of charters and other memoranda relating to his office' ([41]). This seems to have fixed the fee (which does not seem to have been deducted from the chancellor's fee in practice): Thomas de Cotyngham was granted only 20 marks in 1356 ([42]), but all subsequent grants are of a fee of £20: the additional 10 marks granted to Robert de Faryngtoun in 1395 does not seem to have been continued for his successors ([43]).

([38]) *Jacobi Grace, Kilkenniensis, Annales Hiberniae*, ed. R. BUTLER (Dublin, 1842), p. 154.

([39]) *The Account Roll of Holy Trinity*, ed. J. MILLS (Dublin, 1891), p. 18; *Statute Rolls, Edward IV*, part II, p. 844.

([40]) *Cal. Close Rolls, 1333-7*, p. 158.

([41]) *Cal. Pat. Rolls, 1345-8*, pp. 158-9.

([42]) *Ibid., 1354-8*, pp. 432-3.

([43]) *Cal. Rot. Pat. et Claus.*, p. 80, no. 1; p. 83, no. 12; p. 85, no. 13; p. 122,

In addition to fees, the keepers of the rolls were also normally granted benefices. When appointed keeper of the great seal in the chancellor's absence, as he often was, his fee was appropriately increased.

The usual fees of the clerk of the hanaper are mentioned from 1398 on, but it is not till 1425 that we find a definite statement that they are 100 s. a year ([44]), and they do not seem to have varied during the century, though no doubt there were unspecified perquisites. The fee of the clerk of the crown was 10 marks a year in 1402, and this too seems to have remained unchanged during the century ([45]). As to the lesser clerks, they seem to have depended on rewards granted from time to time, though no doubt they too had perquisites, might be granted benefices, and they could count on gifts from time to time. Thus in 1345 William de Drayton, clerk of the chancery, had 3 s. 4 d. of the gift of the prior of Christchurch *pro consilio suo et auxilia pro quodam brevi perquirendo habendis* ([46]).

How far the chancery had any fixed headquarters during this period it is difficult to say. Certainly it was more often than not in Dublin, and a petition which should probably be assigned to *c.* 1320 complains that the citizens of Dublin *par lour hastiuesse demeysne* to resist the Scots 'fesoyent arder le maner le roi pres du chastel de Dyuelyn dehors les murs ou les playdes de tote la terre soleynt tout temps estre tenuz auxi bien les playdes la chef justice et du baunk come del escheker et du meisme la counte et la place de la chauncellerie, par quoy les playdes de cheskune place de la dite terre sont tenuz en diuers luyes en la dite ville de Diuelyn, issint qe nul ministre poet venir ne conseiler od autre en diuers caas cant busoygne le demaunde sicome il soleyent et deuereynt faire par reison' ([47]). But in practice the chancery was endlessly itinerant, as is shown not only by the places at which writs are dated, but also by entries showing that, for instance, the seneschal of Christchurch rode to Drogheda in 1345 *pro uno brevi de super modo et causa ad cancellarium tunc ibidem petendo*; that John Wytecod, bishop of Cloyne

no. 3; p. 151, no. 3; *Cal. Pat. Rolls, 1461-7*, p. 26; *Statute Rolls, Edward IV*, part II, p. 60.

([44]) *Cal. Rot. Pat. et Claus.*, p. 239, no. 10.

([45]) *Ibid.*, p. 202, no. 22.

([46]) *Account Roll of Holy Trinity*, p. 94. For Drayton, see above, p. 123.

([47]) Public Record Office, London, S.C. 8/118/5881.

(1351-61), 'fuit apud Cork cum Justiciario domini Regis, et intravit cancellariam, ubi invenit clericos scribentes processum de Dromor'; that in 1377 John Walshe of the Island exhibited an instrument in the chancery at Cork to be enrolled; and that in 1393 a case was pleaded in the chancery at Kilmallock ([48]). But there was perhaps a certain tendency to settle down in the fifteenth century, and in any case in the fifteenth century the area effectively controlled by the Dublin government was reduced to the counties in the immediate neighbourhood of Dublin.

The itinerant nature of the chancery produced, in Ireland as in England, its own difficulties. In Ireland, however, there was no such development of other seals as took place in England, for the English small seals originated in the royal household, and the constantly changing chief governors of Ireland could obviously produce nothing of the kind. It is true that in 1405 we find a reference in English letters close to the great or petty seal of Ireland ([49]), but there seems to be no evidence that such a seal ever really existed. When we find notes of warranty on surviving chancery instruments they are *per billam Johannis de Bermyngham comitis Loueth justiciarii Hibernie* (1322-1323) ([50]); by bill of privy seal of the deputy (1464) ([51]); the justiciar's privy seal attached to a petition (1446) ([52]). In 1343 Christchurch paid 2 s. *privato clerico domini justiciarii pro j billa, clericis cancellarii directa, de supersedeas* ([53]). As for the courts of law, the problem of judicial writs was met at least from 1375 not by providing them with their own seals as in England, but by authorising the judges to issue them without seals, reserving the fee for the seal to the chancellor or the hanaper ([54]). Earlier it would seem that some writs had been issued under the exchequer seal, for in 1351 the treasurer and chancellor of the Dublin exchequer were ordered 'not to seal any judicial writs of any of the king's pleas in Ireland, except those which touch the pleas of the said exchequer,

([48]) *Account Roll of Holy Trinity*, p. 93; *Rotulus Pipae Clonensis*, ed. R. CAULFIELD (Cork, 1859), p. 35; *Cal. Rot. Pat. et Claus.*, p. 102, no. 83; *Council in Ireland*, pp. 202-4.

([49]) *Cal. Close Rolls, 1402-5*, pp. 419-20.

([50]) *Cal. Rot. Pat. et Claus.*, p. 36, no. 84.

([51]) *Statute Rolls, Edward IV*, part. II, p. 448.

([52]) *Ibid.*, p. 558.

([53]) *Account Roll of Holy Trinity*, p. 44.

([54]) *Cal. Rot. Pat. et Claus.*, p. 94, no. 154; p. 137, no. 230; p. 141, nos. 208-209; p. 176, no. 160; p. 203, no. 38.

with the exchequer seal, while the great seal of the chancery there is within twenty miles of the exchequer, but to permit the chancellor to have the sealing of such writs, as is customary in the chancery of England' ([55]). In 1395 it was ordered that the chancellor should remain in Dublin except in case of emergency: if he should be obliged to leave Dublin to attend on the lieutenant or justiciar he might, if prevented from doing so by infirmity or other cause, send the great seal to them 'by some sufficient person for whom he will answer for doing and executing what he himself would do if personally present' ([56]). In practice, the chancellor seems, however, to have continued to itinerate as before ([57]), and was, moreover, not infrequently absent from Ireland, having been sent as a messenger to the king in England, or for some other reason. On such occasions he appointed a deputy — often the keeper of the rolls — and the custom of Ireland, accepted by the king, was that if the appointment lapsed for any reason the office of chancellor automatically became vacant. Master Thomas Chace had to be reappointed in November 1436 because his deputy had died while he was in attendance on the king and council in England ([58]). Deputies were also appointed when the chancellor, though in Ireland, was for any reason unable to attend to his duties ([59]).

Since all the records of the Irish chancery have been destroyed there is little that can be said of them with certainty. It is, however, clear that there was never the elaborate subdivision of rolls that developed in England. When the surviving records of the chancery were listed in 1309 we hear of only two classes of rolls, patent and close, and the calendar printed in 1828 makes it clear that these remained the only rolls throughout the middle ages ([60]). The close rolls contain a very large number of writs of *liberate* throughout the period; that of 1343-1344 has almost the character of a plea roll ([61]). The patent rolls are more normal, but that of 1407-1408

([55]) *Cal. Close Rolls, 1349-54*, p. 293.

([56]) *Cal. Pat. Rolls, 1391-6*, p. 607.

([57]) *Cal. Rot. Pat. et Claus.*, p. 158, no. 112; P. H. Hore, [*History of the Town and County of Wexford*]. *Ferns* ... (London, 1911), p. 212, citing the Memoranda Roll of Trinity term, II Henry IV: the bishop of Ferns has gone into Munster in his capacity of chancellor, taking the great seal with him.

([58]) *Cal. Pat. Rolls, 1436-41*, p. 28; *Cal. Rot. Pat. et Claus.*, p. 219, no. 49.

([59]) *Ibid.*, p. 155, nos. 62-3; p. 172, no. 14; p. 180, no. 1.

([60]) *Ibid.*, p. 12, no. 416.

([61]) *Ibid.*, pp. 43-5, *passim*. This roll is for two regnal years.

was, if the calendar is to be trusted, in great part a fine roll (62). Besides the rolls there were files of the justiciar's bills, and of escheator's inquisitions and other miscellaneous matter (63). In 1372 the keeper of the rolls had a grant *pro quadam arca precii 5 marcarum rotulos et alia memoranda cancellarii nuper deferente, et pro cariagio eorum* (64).

The development of the jurisdictional powers of the Irish chancellor seems to have begun before the end of the thirteenth century. In 1299 in a case in which three men were charged with fraudulent assay 'because the last two are foreigners, and the justice cannot at present have leisure to take inquisition, it is agreed that the chancellor, at a certain day and place when he shall have leisure for it, shall take inquisition in presence of the parties, and do justice in the matter; and shall certify to the justiciar as quickly as he can' (65). In 1327 Matthew Rynger came into the chancery at Kilkenny, seeking to replevy certain lands taken into the king's hand, though the case then seems to have been referred to the common bench (66). But later in the century such cases were finally decided in the chancery, and no doubt formed the main part of its judicial business at this period (67). Petitions to the lieutenant and council were, as in England, sometimes referred to the chancery, and might, as in England, be heard there before the common law judges (68). There does not seem to be any sign of the development of a strictly equitable jurisdiction during the middle ages, but the surviving records are far too scanty to enable us to speak with any certainty on this point.

It is possible that a more thorough search of unprinted materials than has been possible for the purposes of this paper may enable us to fill up some of the obvious gaps in this account of the Irish chancery, but the loss of records has been so great that many questions will always remain unanswered. But at least this paper may serve as a starting point for further work.

(62) *Ibid.*, p. 188.
(63) *Ibid.*, p. 12, no. 416.
(64) *Ibid.*, p. 83, no. 97.
(65) *Cal. Justic. Rolls, 1295-1303*, p. 268.
(66) *Cal. Rot. Pat. et Claus.*, p. 35, no. 66.
(67) *Ibid.*, pp. 43-5, *passim*; *Cal. Close Rolls, 1354-60*, pp. 459-60.
(68) *Cal. Ormond Deeds*, III, pp. 361-2.

I

Chancellors of Ireland, 1377-1485 (1)

1377, Aug. 20 Alexander de Balscote, bishop of Ossory (2).
1377, Sept. 26 Robert de Wikeford, archbishop of Dublin (3).
1378, Dec. 15 *Robert de Sutton, keeper of the rolls, keeper* (4).
1380, April 8 John Gilbert, bishop of Hereford (5).
1380, May 8 John de Colton, dean of Dublin (6).
1381, Nov. 26 William Tany, prior of the Hospital (7).
1383, June 27 Ralph Cheyny, kt. (8).
1384, Sept. 10 Robert de Wikeford, archbishop of Dublin (9).
1385, March 8 Alexander de Balscote, bishop of Ossory (10).
Deputy: Thomas de Everdoun (11).
1388, April 26 *Robert de Preston, kt., keeper* (12).
Deputies: Christopher de Preston and Robert Sutton, clerk (13).
1389, Aug. 27 Alexander de Balscote, bishop of Meath (14).

(1) Keepers of the great seal, appointed when no chancellor existed, are shown in italics. The dates given are those of appointment; the date of taking up office (given when ascertainable) might be some months later. The list of deputies is certainly very incomplete, but it seems worth naming them where possible. Brief biographies of most of the chancellors and keepers of the rolls are given by Elrington Ball, *The Judges in Ireland*, *loc. cit.*

(2) *Cal. Pat. Rolls, 1377-81*, p. 18.

(3) *Ibid.*, p. 27.

(4) *Cal. Close Rolls, 1377-81*, p. 168.

(5) *Cal. Pat. Rolls, 1377-81*, p. 459.

(6) *Ibid.*, p. 463.

(7) *Ibid., 1381-5*, p. 56. He took oath on Feb. 15, 1382, and received the seal on Feb. 19 (*Cal. Rot. Pat. et Claus.*, p. 111, nos. 83-5; p. 117, no. 39).

(8) *Cal. Pat. Rolls, 1381-5*, p. 292.

(9) *Ibid.*, p. 455. He received the seal on Nov. 8 (*Cal. Rot. Pat. et Claus.*, p. 120, nos. 41-4).

(10) *Cal. Pat. Rolls, 1381-5*, p. 532. He received the seal on April 12 (*Cal. Rot. Pat. et Claus.*, p. 129, no. 21).

(11) Appointed on Jan. 12, 1386, to keep the seal in the absence of the chancellor, who left for England on Jan. 20. Robert Sutton was first appointed (*Cal. Rot. Pat. et Claus.*, p. 124, nos. 78-9; p. 125, no. 136).

(12) *Cal. Pat. Rolls, 1385-9*, p. 438.

(13) Described as Preston's deputies in May, 1389 (*Cal. Rot. Pat. et Claus.*, p. 142, no. 252).

(14) *Cal. Pat. Rolls*, 1388-92, p. 109. He was sworn on Oct. 25 (*Cal. Rot. Pat. et Claus.*, p. 144, no. 79).

1391, Sept. 11	*Robert de Preston, kt., keeper* (15).
1392, Feb. 28	Robert Waldby, archbishop of Dublin (16). Deputy: Robert Sutton, keeper of the rolls (17).
1393, May 29	Richard Northalis, bishop of Ossory (18).
1394, July 1	*Robert Sutton, keeper of the rolls, keeper* (19).
1395	Robert Waldby, archbishop of Dublin. Deputy: Robert de Faryngtoun, keeper of the rolls (20).
1395, June 10	Alexander de Balscote, bishop of Meath (21).
1395, June 19	*Thomas Everdoun and John de Kirkeby, keepers* (22).
1397	Robert Braybrooke, bishop of London (23).
1397, Oct. 17	*Robert de Sutton, king's clerk, keeper* (23).
1398, April 24	Thomas Cranley, archbishop of Dublin (24). Deputy: Thomas Bache, archdeacon of Meath (25).
1399, Nov. 18	Alexander de Balscote, bishop of Meath (26). Deputy: John Kyrkeby, keeper of the rolls (27).
1401, July 4	Thomas Cranley, archbishop of Dublin (28). Deputies: Thomas de Everdon, keeper of the rolls (in 1402). Robert Sutton, keeper of the rolls (in 1406) (29).

(15) *Cal. Pat. Rolls, 1388-92*, p. 474. He was sworn on Oct. 3 (*Cal. Rot. Pat. et Claus.*, p. 148, nos. 46-7).

(16) *Cal. Pat. Rolls, 1391-6*, pp. 51, 115.

(17) *Council in Ireland*, pp. 46, 226.

(18) *Cal. Pat. Rolls. 1391-6*, p. 276.

(19) *Ibid.*, p. 449.

(20) There is no patent, but Faryngtoun was appointed as his deputy during his absence from April 11 to April 18 (*Cal. Rot. Pat. et Claus.*, p. 153, no. 24; p. 155, nos. 62-3).

(21) *Cal. Pat. Rolls, 1391-6*, p. 582. He received the seal on Aug. 1 (*Cal. Rot. Pat. et Claus.*, p. 152, nos. 46-8).

(22) *Ibid.*, p. 152, no. 42. Balscote's appointment cannot have been known in Ireland at this date.

(23) Braybrooke's patent does not seem to have survived, but Sutton was appointed to keep the seal till he could go to Ireland (*Cal. Pat. Rolls, 1396-9*, p. 246).

(24) *Ibid.*, p. 344. He remained in office till Jan. 4, 1400 (*Ibid., 1399-1401*, p. 479).

(25) *Ibid., 1396-9*, p. 346.

(26) *Cal. Pat. Rolls, 1399-1401*, p. 112. He died on Nov. 10, 1400.

(27) *Cal. Rot. Pat. et Claus.*, p. 158, no. 112.

(28) *Cal. Pat. Rolls, 1399-1401*, p. 512.

(29) *Cal. Rot. Pat. et Claus.*, p. 172, no. 14; p. 180, no. 1; p. 184, no. 126.

1406, July 14 Laurence Merbury, kt. ([30]).
1407, June 28 *Robert Sutton, keeper of the rolls, keeper* ([31]).
1410, March 18 Patrick Barrett, bishop of Ferns ([32]).
Deputy: Robert Sutton, keeper of the rolls ([33]).
1413, April 20 Thomas Cranley, archbishop of Dublin ([34]).
1414, March 2 Laurence Merbury, kt. ([35]).
Deputy: Hugh Banent (or Bavent) ([36]).
1421, Aug. 21 William fitz Thomas, prior of the Hospital ([37]).
1422 William Yonge, archdeacon of Meath ([38]).
1422, Oct. 4 Laurence Merbury, kt. ([39]).
Deputy: Richard Sydgreve ([40]).
1423, May 19 Richard Talbot, archbishop of Dublin ([41]).
1424-5 William fitz Thomas, prior of the Hospital ([42]).
1426, Sept. Richard fitz Eustace, kt. ([43]).
1426, Oct. 23 Richard Talbot, archbishop of Dublin ([44]).

([30]) *Cal. Pat. Rolls, 1405-8*, p. 203. He received the seal on Sept. 5 (*Cal. Rot. Pat. et Claus.*, p. 184, no. 126).

([31]) *Cal. Pat. Rolls, 1405-8*, p. 342.

([32]) *Ibid., 1408-13*, p. 282.

([33]) He appears as deputy in Trinity term, 1410, and in May, 1412 (HORE, *Ferns*, pp. 210, n. 4, 212; *Cal. Rot. Pat. et Claus.*, p. 199, no. 99).

([34]) *Cal. Pat. Rolls, 1413-16*, p. 90.

([35]) *Ibid.*, p. 163. He was sworn and received the seal on Sept. 18 (*Cal. Rot. Pat. et Claus.*, p. 205, nos. 61-3).

([36]) He was appointed on March 21 as deputy during Merbury's absence in England till Aug. 1 (*Cal. Rot. Pat. et Claus.*, p. 218, no. 27).

([37]) Appointed by the lieutenant and council on the grounds that, as Merbury was still absent and the appointment of his deputy had lapsed, the office was vacant. Merbury was reappointed by English letters patent on the same day, but this does not seem to have taken effect. Fitz Thomas was sworn on Aug. 25 and received the seal on Aug. 28 (*Cal. Rot. Pat. et Claus.*, p. 219, no. 49; *Cal. Pat. Rolls, 1416-22*, p. 394).

([38]) He appears as chancellor in 1 Henry VI (*Cal. Rot. Pat. et Claus.*, p. 224, no. 15).

([39]) *Cal. Pat. Rolls, 1422-9*, p. 3.

([40]) *Cal. Rot. Pat. et Claus.*, p. 225, no. 27; p. 228, no. 74.

([41]) *Cal. Pat. Rolls, 1422-9*, p. 103.

([42]) He appears as chancellor in 1424 or 1425, and seems to have held office till Sept. 10, 1426 (*Cal. Rot. Pat. et Claus.*, p. 239, no. 5; p. 224, no. 35).

([43]) *Ibid.*, p. 243, no. 9.

([44]) *Cal. Pat. Rolls, 1422-4*, p. 379. He was sworn on Jan. 12, 1427 (*Cal. Rot. Pat. et Claus.*, p. 245, no. 5).

1430, Feb. 26 Master Thomas Chace ([45]).
Deputies: Thomas Straunge, kt. (in 1435); James Cornewalsh (in 1440) ([46]).

1442, Aug. 7 Richard Talbot, archbishop of Dublin ([47]).

1443, March 4 Richard Wogan, chaplain ([48]).
Deputies: Robert Dyke, archdeacon of Dublin; William Chevir ([49]).

1446, Aug. 12 John Talbot, kt. ([50]).
Deputies: Robert Dyke, archdeacon of Dublin (Jan. 1447) ([51]). Thomas Talbot, kt., prior of the Hospital (Nov. 10, 1451) ([52]). William Welles, kt. (Aug. 29, 1454) ([53]). Michael Tregury, archbishop of Dublin (April 5, 1458) ([54]).

1460, Feb. 24 Edmund, earl of Rutland ([55]).

1460, Nov. 5 John Dynham, esq. ([56]).
Deputy: Robert Preston, kt. ([57]).

1461, July 18 William Welles, kt. ([58]).

([45]) *Cal. Pat. Rolls, 1429-36*, p. 49. He received the seal in Oct. (*Cal. Rot. Pat. et Claus.*, p. 253, no. 18). He was reappointed in 1436 and 1438 (*Cal. Pat. Rolls, 1436-41*, pp. 28, 151).

([46]) *Cal. Rot. Pat. et Claus.*, p. 257, no. 57; *Cal. Ormond Deeds*, III, p. 119.

([47]) *Cal. Pat. Rolls, 1441-6*, p. 91.

([48]) *Ibid.*, p. 126.

([49]) In 1444 Dyke was said to have been deputy chancellor on various occasions: this may have been for archbishop Talbot. Chevir was deputy in August, 1444 (*Cal. Ormond Deeds*, III, pp. 143, 158).

([50]) *Cal. Pat. Rolls, 1441-6*, p. 91. He succeeded his father as earl of Shrewsbury, and died 10 July, 1460. He was granted the office for life; on April 5, 1448, Thomas Fitz Gerald, prior of the Hospital, had a grant of it in reversion, but this never took effect (*ibid., 1446-52*, p. 167).

([51]) *Statute Rolls [of the Parliament of Ireland], Henry VI*, ed. H. F. BERRY, (Dublin, 1910), p. 59.

([52]) *Cal. Pat. Rolls, 1446-52*, p. 560.

([53]) *Ibid., 1452-61*, p. 179.

([54]) *Cal. Close Rolls, 1454-61*, p. 289.

([55]) *Statutes, Henry VI*, pp. 747-9.

([56]) *Cal. Pat. Rolls, 1452-61*, p. 640. This was ratified by Irish letters patent of May 2, 1461 (*Cal. Rot. Pat. et Claus.*, p. 268, no. 43).

([57]) *Ibid.*, p. 268, nos. 45-6.

([58]) *Cal. Pat. Rolls, 1461-7*, p. 21. He died late in 1463.

1464, Jan. 25	Thomas Fitz Maurice, earl of Kildare ([59]).
1464, Jan. 31	John Tiptoft, earl of Worcester ([60]).
1472, April	Roland Fitz Eustace, kt. ([61]).
1474, Aug. 5	Gilbert Debenham, kt. ([62]).
1476	Roland Fitz Eustace, kt. ([63]).
1478, Feb. 15	Master Richard Martyn ([64]).
1479, Oct. 5	William Sherwood, bishop of Meath ([65]).
1482	*Walter Champfleur, abbot of St. Mary's, keeper* ([66]).
1483, Jan. 11	Robert de St. Lawrence, Lord of Howth ([67]).
1483	Thomas Fitz Gerald, kt. ([68]).

II

Keepers of the Rolls of Chancery

1377, Oct. 5	Robert Sutton ([69]).
1386, Jan. 15	Thomas de Everdoun ([70]).
1386, Sept. 19	Robert Sutton ([71]).

([59]) *Statute Rolls, Edward IV*, I, p. 167. This was an Irish grant for life: he certainly acted for a time.

([60]) *Cal. Pat. Rolls, 1461-7*, p. 294.

([61]) *Statute Rolls, Edward IV*, II, pp. 22-4. This was an Irish grant in survivorship with John Tapton, clerk.

([62]) *Cal. Pat. Rolls, 1467-77*, p. 461.

([63]) This is the date given by Elrington Ball: the patent seems to be lost, but he was certainly in office for the next few years (*Statute Rolls, Edward IV*, II, *passim*).

([64]) *Cal. Pat. Rolls, 1476-85*, p. 65. It is not clear that this grant ever took effect.

([65]) *Ibid.*, p. 164. He died on Dec. 3, 1482.

([66]) This date is given by Elrington Ball without a reference: Ware's note on him says simply that while abbot *factus interim ad tempus magni sigilli Hiberniae custos* (*Chartularies of St. Mary's Abbey, Dublin*, ed. J. T. GILBERT (2 vols., Rolls Series, 1884), i, p. 379; ii, pp. 38-9.

([67]) *Cal. Pat. Rolls, 1476-85*, p. 335. The grant was repeated on May 20 and July 12 (*ibid.*, pp. 348, 363).

([68]) The patent seems to be lost, but he was certainly chancellor under Richard III. See D. BRYAN, *Gerald FitzGerald. The Great Earl of Kildare* (Dublin and Cork, 1933), pp. 85-7, quoting unpublished transcripts of the Irish statute rolls.

([69]) *Cal. Pat. Rolls, 1377-81*, p. 27. This was a reappointment.

([71]) *Cal. Rot. Pat. et Claus.*, p. 124, nos. 80-82. He was sworn on Jan. 20.

([70]) *Ibid.*, p. 131, no. 33.

1395, Jan. 15	Robert de Faryngtoun ([72]).
1395, June 18	John de Kirkeby ([73]).
1395, July 10	Robert Sutton ([74]).
1398, Sept. 26	John Kirkeby ([75]).
1402, Jan. 10	Thomas Everdon ([76]).
1404, May 6	Robert de Sutton ([77]).
	Deputies: John Passavaunt and William Sutton (June 2, 1423) ([78]).
1437, July 13	Robert Dyke ([79]).
1438, Jan. 1	John Forthey ([80]).
1448, Nov. 17	Robert Dyke ([81]).
1450, Aug. 14	John Chevir ([82]).
1460	Thomas Colt ([83]).
1461, Jan. 15	Amaury de St. Lawrence ([84]).
1461, May 2	Patrick Cogley ([85]).
1461, Aug. 4	Peter Trevers ([86]).
1464, Sept. 10	Thomas Colt ([87]).
1467, Sept. 7	William Norys, kt. ([88]).
1471, Sept. 10	Thomas Douedall ([89]).

([72]) *Ibid.*, p. 151, no. 3.
([73]) *Ibid.*, p. 152, no. 41.
([74]) *Cal. Pat. Rolls, 1391-6*, p. 599.
([75]) *Ibid., 1396-9*, p. 414. He was reappointed on Oct. 20, 1399 (*ibid., 1399-1401*, p. 113).
([76]) *Cal. Rot. Pat. et Claus.*, p. 162, no. 73.
([77]) *Cal. Pat. Rolls, 1401-5*, p. 389. He was reappointed in 1422 and 1423 (*ibid., 1422-9*, pp. 62, 79).
([78]) *Cal. Rot. Pat. et Claus.*, p. 226, no. 18.
([79]) *Cal. Pat. Rolls, 1436-41*, p. 70.
([80]) *Ibid.*, p. 143.
([81]) *Ibid., 1446-52*, p. 205.
([82]) *Ibid.*, p. 404. The original grant was under the Irish seal.
([83]) He was in office in this year (*Statute Rolls, Henry VI*, p. 725).
([84]) *Cal. Pat. Rolls, 1452-61*, p. 639.
([85]) *Cal. Rot. Pat. et Claus.*, p. 268, nos. 35-6. He was sworn on May 19.
([86]) *Cal. Pat. Rolls, 1461-7*, p. 26. He was sworn on Sept. 20 (*Cal. Rot. Pat. et Claus.*, p. 268, no. 13).
([87]) *Cal. Pat. Rolls, 1461-7*, p. 329.
([88]) *Ibid., 1467-77*, p. 34.
([89]) *Statute Rolls, Edward IV*, I, pp. 735-7.

III

Clerks of the Hanaper

1381 (?)	Nicholas Hotot ([90]).
1382, Jan. 11	Richard Carran ([91]).
1382, Jan. 28	Thomas Talbot ([92]).
1382, March 8	John de Newport ([93]).
(1386, Feb. 12)	John Bykeley ([94]).
1386, Oct. 21	Robert Sutton ([95]).
1388, July 8	Robert de Huntyngdon ([96]).
1390, Feb. 8	Robert Sutton ([97]).
(1393, Jan. 26)	Thomas Everdoun ([98]).
(1395, April 12)	Robert Claydoun ([99]).
1398, Sept. 20	John Maufeld ([100]).
1399, Oct. 20	Hugh Bavent ([101]).
1410, June 4	John Passavaunt ([102]).
1425, July 16	Stephen Roche ([103]).
1435, Feb. 8	William Sutton ([104]).

([90]) On March 6, 1382, Hotot was granted a sum which suggests that he had held the office for about a year (*Cal. Rot. Pat et Claus.*, p. 117, no. 45, and see above, p. 49).

([91]) *Cal. Rot. Pat. et Claus.*, p. 111, no. 55.

([92]) *Ibid.*, p. 111, no. 57.

([93]) *Ibid.*, p. 112, no. 95.

([94]) He was in office at this date (*Cal. Pat. Rolls, 1385-9*, p. 443).

([95]) *Cal. Rot. Pat. et Claus.*, p. 131, no. 41.

([96]) *Ibid.*, p. 138, no. 27.

([97]) *Ibid.*, p. 144, no. 107.

([98]) He was in office at this date (*Council in Ireland*, p. 112).

([99]) He was in office at this date (*Cal. Rot. Pat. et Claus.*, p. 155, nos. 60-61).

([100]) *Cal. Pat. Rolls, 1396-9*, p. 411.

([101]) *Ibid., 1399-1401*, p. 113.

([102]) Appointed on the resignation of Bavent (*Cal. Rot. Pat. et Claus.*, p. 195, no. 23; p. 196, no. 59). This was confirmed on Jan. 26, 1414, and again by English letters patent 'in consideration of his great labours in the Irish chancery since the coronation of Henry IV'. (*Cal. Pat. Rolls, 1422-9*, p. 67).

([103]) Appointed on the death of Passavaunt. Repeated Sept. 7, 1425 (*Cal. Rot. Pat. et Claus.*, p. 237, no. 86; p. 239, no. 10; p. 243, no. 13).

([104]) He was sworn on April 4 (*Cal. Rot. Pat. et Claus.*, p. 256, nos. 27-8).

1439, July 29	Thomas Beltoft
	John Bolt ([105]).
(1441, June 28)	Adam Veldon ([106]).
1454, Nov. 22	James Prendregaste alias Collyn ([107]).
1459, March 1	Patrick Cogly ([108]).
(1468)	James Prendregast alias Collyn ([109]).
(1479)	Richard Nangle ([110]).

IV

Clerk of the Crown in Chancery

1382, Jan. 12	Thomas Talbot ([111]).
1402, Jan. 12	Thomas Browne ([112]).
1443, June 20	Hugh Wogan ([113]).
(1461, June 20)	Patrick Cogly ([114]).

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([105]) *Cal. Pat. Rolls, 1436-41*, pp. 301, 414. Bolt seems to have been at work in July, 1444 (*Calendar of the Register of Archbishop Swayne*, ed. D. A. CHART, Belfast, 1935, p. 191).

([106]) He was in office on this date (*Cal. Rot. Pat. et Claus.*, p. 264, no. 53).

([107]) *Statute Rolls, Henry VI*, pp. 325-7. This was a grant for life.

([108]) *Cal. Pat. Rolls, 1452-61*, p. 482.

([109]) He was in office in this year (*Statute Rolls, Edward IV*, I, p. 540).

([110]) He was in office in this year (*ibid.*, II, p. 688).

([111]) *Cal. Rot. Pat. et Claus.*, p. 111, no. 57.

([112]) He was appointed for life and was still in office in May, 1428 (*ibid.*, p. 162, no. 69; p. 202, no. 22; p. 245, no. 7).

([113]) *Statute Rolls, Henry VI*, pp. 71-3. This was a grant for life. He was still in office in 1460 (*ibid.*, p. 727).

([114]) He was in office on this date, but the Irish patent granting him the office for life is dated Sept. 7, 1461 (*Cal. Rot. Pat. et Claus.*, p. 268, no. 42; *Statute Rolls, Edward IV*, I, p. 277). He still held the office in 1481 (*ibid.*, II, p. 886).

IX

The English Parliament and the French Estates-General in the Middle Ages,

BY

A. R. MYERS,
Univ. of Liverpool.

Comparisons can be stimulating — especially comparisons between communities which have exercised much influence on each other and yet have remained very different in important respects. Such communities are England and France; and few aspects of their histories present a more striking contrast than the divergent fates of the English parliament and the French estates-general. Various observers, both English and French, have been struck by the similarities between the two institutions at the end of the thirteenth century (1). Yet by the end of the fifteenth century the differences were very marked, even if the similarities were not as negligible as is sometimes supposed. What were the factors which caused this great divergence?

To obtain an exhaustive answer one would have to take into account the whole history of both countries during these centuries. Every king played his part, all the principal actors exerted an influence. Even ordinary members of each assembly contributed to the eventual result, as did the wealth of political events and the complicated social structure of each country. Yet we need not be defeated by the mass of detail, for there are some guiding lines to be discerned.

First, the relative size of the two kingdoms was of great importance. Not only was the population of France more than thrice that of England but the area of the French state was nearly four times as great. It was hard enough for representatives of Devon or Yorkshire to travel to Westminster, and to experience identity of interests when they came together. It was more difficult still for men of Languedoc or Brittany, Béarn or Flanders, to journey to Paris, Tours or Orléans, or, indeed, to feel, until the end of the middle ages and beyond, that they belonged to the same nation as the French, who spoke a different language from the Bretons or the Provençals, and appeared to them for long as foes and conquerors.

Closely allied to this factor, but nevertheless distinct, is the fact

(1) E.g. T. F. Tout, *France and England: Their relations in the Middle Ages and now*, M.U.P., 1922, p. 99: R. Fawtier, *Parlement d'Angleterre et Etats Généraux de France au Moyen Age*, in *Comptes Rendus de l'Académie des Inscriptions et Belles-Lettres*, 1953, p. 277.

that the effective unity of England began some centuries earlier than that of France (2). The tenth-century kings of England organized most of the realm into shires and hundreds which, by making use wherever possible of traditional folk law and older traditions and by meeting successfully contemporary problems of government, soon took firm root in English society; and the shires in particular became the framework for genuine communities. Such an organization not only strengthened royal authority throughout the realm but cut across the stratification of society. The strong rule of the Norman conquerors brutally welded England into a still closer unity, and the royal power was strengthened where it had hitherto been weak, especially in the north. The results were important for the evolution of parliament. As Professor Cam has so well said (3): «Owing to the circumstances of the Norman conquest, which wedded military efficiency to the fairly advanced institutions of the Anglo-Saxon monarchy, England had something like one hundred years' start of France in the evolution of a royal administrative system. Neither the great feudatories who confronted the Capetian dynasty, nor the imperfectly feudalized regionalisms of the Empire, were present to impede the growth of Anglo-Norman and Angevin authority». One might add that the power of the Norman and Angevin kings helped to knit together English society not only territorially but in depth. Even if Orderic Vitalis exaggerated when he described Henry I as raising councillors from the dust, the English kings enjoyed to an unusual extent the power to add to the aristocracy by rewarding *ministeriales* through the exercise of the rights of the Crown and the feudal overlord. Together with the greater peacefulness of England under strong rule, which lessened the confidence and the authority of the military classes, this custom fostered an unusual compactness and fluidity in English society. Add to this the extraordinary power of the English kings over the Church and the towns, and the growth of the common law, available

(2) «The fate of institutions thus depended not only on a variety of situations and of persons, but on the hour, day, or year in which decisions must be made». C. Robbins, *Why the English Parliament survived the Age of Absolutism: Some Explanations offered by Writers of the 17th and 18th centuries*, V. Coincidence in Time, in *Studies presented to the International Commission for the History of Representative and Parliamentary Institutions, Rome, 1955*, Louvain, 1958, p. 213.

(3) *Representation in Medieval England*, in *History*, XXXVIII, 1953, 15.

to all free subjects of the king, and one can see that the development of self-conscious and well-organized estates or Stände was likely to be neither early nor pronounced in England.

The effects of these differences of geographical, political, and social background were already apparent in the reigns of Edward I and Philip the Fair. It is significant that, numerous as were the representative assemblies of Edward I, only once were they summoned to meet on a regional basis, and then only in exceptional circumstances. In 1282 Edward was fully engaged in completing his conquest in Wales; yet he needed money urgently. And so he ordered the sheriffs of the 32 southern counties and the sheriffs of the five (4) northern counties to cause knights and burgesses from these shires to assemble at Northampton and York respectively, to see what subsidy they would grant. It is true that fleeting glimpses of regional separatism appear from time to time in the English parliament, and when in 1399 the various estates renounced their allegiance to the deposed Richard II, the «bachelors and commons» of the North and of the South were separately represented (5). As late as 1492 the men of Lancaster successfully pleaded that as their county was a county palatine and their knights of the shire had been absent from parliament when an act prejudicial to the jurisdictions of the county palatine had been passed, that act should be repealed, so far as Lancashire was concerned (6). But the rarity of such instances emphasizes the comparatively strong unity of English sentiment and English representation — a unity which was also a strength.

This cohesion was not only territorial but social. The authority of the English crown meant that the aspect of the English parliament as an assembly of estates was muted in expression, and late to emerge as a conscious sentiment. In the thirteenth century the magnates might claim to represent the community of the realm; but the summons to parliament were based on the royal selection of individual barons. The bishops and abbots were not allowed to appear in parliament in the role of representatives of a clerical estate; and indeed they for their part preferred this role to be played by the

(4) Excluding the counties of Durham and Chester, which as exempt jurisdictions were not represented, these northern shires were: Yorkshire, Lancashire, Comberland, Westmoreland, Northumberland.

(5) *Rot. Parl.*, III, 424.

(6) *Rot. Parl.*, VI, 457.

Convocations of Canterbury and York. And it was to be of great importance for the future, as Stubbs perceived, that the knights represented, not the lesser nobility, but the community of the shire. This was, it is true, a focus of local feeling and particularism; but it was also a very active unit of royal administration. Hence the knights in parliament were to be drawn, not towards the higher nobility with which their class was, socially, so closely linked, but towards the burgesses; for both knights and burgesses were representatives of communities confronted by frequent and pressing royal demands. It has long been recognized that the fusion of the knights and burgesses to form one house was another source of strength to the English parliament. Now, thanks to the work of Professor Roskell ([7]), we know that the invasion of borough seats by country gentry was well under way by 1422, thus helping to consolidate the Commons in personnel as well as in function.

The estates-general of Edward I's time, on the other hand, necessarily reflected the more hierarchical society of the France of Philip the Fair, and the much weaker and more recent cohesion of the French kingdom. In France the nobles and clergy were much more conscious of their separate and privileged position and their apartness from the third estate. These divisions continued during the fourteenth century; and the early defection of the nobles and clergy from the reform movement of Étienne Marcel and the third estate, between 1355 and 1358 ([8]), is in striking contrast to the mutual support given by lords and commons in the English parliament in various upheavals of that century, e.g. the revolutions of 1327 and 1399 and the political crises of 1341, 1376, and 1388. Less frequently stressed, but perhaps even more important, is the fact that the estates-general as a whole reflected, and continued to reflect, the particularism of France. The different structure of the two countries can be seen in the striking contrast presented by two almost contemporary outbreaks of the nobility against the monarchy. In England the Ordinances of 1311 were formulated on a nation-wide basis and were presented and answered in parliament. In France the revolts against Philip the Fair in 1314 made no use of the estates-general and were settled by separate charters of liberties for the

([7]) *The Commons in the Parlement of 1422*, M.U.P., 1954.

([8]) Cf. G. Lefèvre, *Étienne Marcel et le Paris des Marchands au XIV^e siècle*, Paris, 1927.

various provinces and fiefs — Languedoc, Brittany, Burgundy, Artois, Picardy, Champagne, Auvergne, Normandy ([9]). Provincial particularism was, and long remained, strong in France; and though the feeling of national unity was to be much strengthened by the Hundred Years War, it found expression, not in any clamour for the prestige and power of the estates-general, but in loyalty to the person of the king. Until the early fifteenth century the meetings of the estates-general did not even include representatives of the whole of France but only of the Langue d'Oil. The Midi was much more interested in the estates of Languedoc, which retained their vigour in the seventeenth and eighteenth centuries, when the estates-general had fallen into disuse ([10]). Even in the North the estates-general had powerful competitors for interest and devotion in provincial estates, such as those of Normandy ([11]) or Champagne, and even more those of outlying provinces with strong and separatist traditions, such as Brittany and Burgundy.

These weaknesses were strikingly apparent in the estates-general of 1355-8 which seemed for a time to be winning such a resounding success. Not only did the assembly represent the Langue d'Oil alone, but the driving force for reform came essentially from Paris, and the Dauphin was eventually able to use to good effect the resentment of the provinces against the turbulence of the capital ([12]). Moreover, the strength of action of the estates-general rested fundamentally on the third estate. As noted above, the nobles and clergy deserted the movement at an early stage. Within the third estate resistance depended essentially on the merchants of Paris, of whom many of the other deputies became increasingly jealous. This was far too narrow a basis on which to oppose the monarchy, with its formidable traditions and machinery, and its already powerful magnetism as an object of loyalty and reverence. After 1358 the monarchy was too

([9]) Cf. A. ARTONNE, *Le mouvement de 1314 et les chartes provinciales de 1315*, Paris, 1912, 236 pp., Université de Paris, Bibliothèque de la Faculté des Lettres.

([10]) It is significant that only at the fourth attempt did Charles VII succeed in making Languedoc send representatives to sit with those of the Langue d'Oil.

([11]) Cf. A. COVILLE, *Les états de Normandie. Leurs origines et leur développement au XIV^e siècle*, Paris, 1894. The estates of Normandy were especially important in the reign of John II and the early years of Charles VI (*ibid.*, pp. 65-105, 244-245). It is interesting to notice that the Estates of Normandy traced their origin to the «Charte normande» of 1315 (*ibid.*, pp. 41-54, 241).

([12]) Cf. R. DELACHENAL, *Histoire de Charles V*, I, 1909.

suspicious of the potentialities of the estates-general to want frequent meetings, which were in any case largely rendered unnecessary by the existence of the provincial estates. Hence the feeling of corporate unity, of the advantage of working with experienced colleagues, the improvement in methods of conducting business, did not take root and grow, as they did with the lords and commons of the frequently summoned English parliaments of the late fourteenth and early fifteenth centuries.

Even in the estates-general of Tours in 1484 the separatist tendencies were too strong; and this is all the more remarkable at a time when the rapid increase in the powers of the monarchy was unmistakable and alarming, when the oppressions of Louis XI were still vivid in everyone's memory, and when the Beaujeus were in a difficult position and prepared to be conciliatory. Moreover, this was the most genuinely national assembly yet held in France, for Flanders, Burgundy, Dauphiny, Provence and Roussillon sent deputies for the first time. Thanks to Jehan Masselin ([13]) we have a fuller description of this meeting than of any other assembly of the estates-general in the middle ages; and as we read his pages, the divisions soon became painfully apparent. Nobles and clergy drew apart from the third estate in some parts of France during the elections preceding the assembly; and provincial particularism was still so strong that the assembly soon divided itself into six sections, based on the historic provinces of France ([14]). These sections struggled so long and so strenuously with each other, to secure the maximum representation on the deputation which parleyed with the government and to obtain the minimum allocation in the distribution of the taille, that the government eventually wearied of their disputes. The wrangling between the representatives of the various provinces and also between the three estates had caused so much bad blood that it was safe for the Beaujeus to dismiss the assembly. The government

([13]) J. MASSELIN, *Journal des États-Généraux de France tenus à Tours en 1484 sous le règne de Charles VIII*, Paris, 1835.

([14]) These sections were (1) «Paris», which included Picardy, Champagne, Vermandois, Senlis, Sens, Meaux, Melun, Montargis, Chartres, L'Orléanais, Le Nivernais, L'Auxerrois, Le Mâconnais, and Mantes; (2) the Duchy and County of Burgundy, Charolais, Bar-sur-Seine; (3) Normandy, Alençon, Perche, Pontoise, Chaumont, and Magny; (4) Aquitaine, Armagnac, Foix, L'Agenais, Périgord, Quercy; (5) Languedoc, Dauphiné, Provence, Roussillon, Cerdagne; (6) Langue d'Oil which included Berry, Poitou, Anjou, Maine, Touraine, Auvergne, Bourbon, Forez, Beaujolais, Lyon, Angoumois, Saintonge, La Rochelle (*op. cit.*, p. 66).

was so disillusioned by the behaviour of the estates and so alarmed by their demands ([15]) that no further regular and full meeting of the estates-general was to take place for another seventy-six years. It is significant that Masselin, who appears to have striven so hard for the unity and success of this assembly, nevertheless describes the six regional sections as «nations», and has to admit and even to stress their acrimonious rivalries ([16]).

While the weakness of the estates-general became more apparent, the English parliament was gathering strength. Partly because the English monarchy had, at an earlier date than the French, gained power for itself and cohesion for the country, opposition developed, not on a regional basis, with demands for provincial privileges, but, from Magna Carta onwards, in the form of nation-wide demands. The set-backs to the monarchy in the reigns of John and Henry III were followed by still greater reverses in the fourteenth century. This gave the magnates and commons opportunities to enhance their position — the magnates to claim a dominant role in parliament and the royal council, and the commons to assert a right of criticism and to claim an exclusive parliamentary control of taxation. The depositions of Edward II and, still more, of Richard II were at once a blow to the prestige and power of the crown, and an increase of strength for the elements of which parliament was composed.

The strength of the English parliament and the weakness of the French estates-general were both furthered by the Hundred Years War. The scale of the conflict necessitated the raising of larger sums than ever before; and as other sources of supply failed one after another, Edward III was driven to ask parliament repeatedly for supplies and eventually to accept its reiterated demands for the sole control of taxation. As the war was fought on foreign soil, the Commons felt that it was within their power to give or withhold supplies and that they could afford the luxury of criticism, sometimes quite severe in the form of impeachment as in 1376 or 1450, if the war was going very badly. Moreover, the need to secure the

([15]) The principal demands were of two kinds: (1) outspoken criticisms of various kinds on the conduct of the government, such as its extravagance, venality, injustice, pluralism, oppression, interference with trade, (2) demands for control of expenditure by being told the estimates for the coming year and by voting the taille for only two years.

([16]) Languedoc was throughout suspicious of the Langue d'Oil in general and of Paris in particular (e.g. MASSELIN, *op. cit.*, p. 163).

co-operation in the war efforts of all the politically powerful classes forced the king, even an Edward III or a Henry V, to make important concessions to the lords as well as the commons ([17]).

For France, however, the Hundred Years War was of more crucial importance, a war fought on her own soil, menacing the prosperity, the integrity, and eventually the very independence of the kingdom. Hence, in times of crisis, such as 1356 and 1413 ([18]), when discontent with the government seemed to give the estates-general the chance to assert itself, Frenchmen could not and would not afford the luxury of opposing the monarchy, the great focus of unity; in each case the estates-general — or, rather, the violent Parisian minority of it — failed and the crown triumphed. Unlike English monarchy of the fourteenth and fifteenth centuries, the French kings never suffered deposition or had their legitimacy called into question. The one apparent exception, that of the repudiation of the Dauphin by Charles VI and Isabeau de Bavière is really evidence to the contrary; for, generally speaking, Frenchmen refused to accept the Treaty of Troyes and rallied to the support of the «King of Bourges», in spite of his doubts and his obvious weaknesses. Moreover, the sense of loyalty, quickened by the prolonged and grave English menace, was powerfully reinforced by the growing influence of Roman law and the mounting authority of the king in the work of government. From the disasters of the war waged against Henry V and Bedford the monarchy alone survived as an effective institution, rejuvenated and strengthened by its success. It may be, as M. Garillot has argued ([19]), that the estates-general of 1439 did not, as commonly thought, yield to the monarchy the right of levying the taille without consent in the future; but it is clear that there was no force of public opinion behind the claims of the estates-general of 1439 and 1440. After an ineffective protest on the part of some of the nobility in 1441, there was no opposition, so far as we know, in 1445 when Charles VII created a permanent standing army for the popular objects of getting rid of the écorcheurs, restoring order, and driving

([17]) Such as the right of the lords to be regarded preeminently as the King's councillors in parliament, definitely superior to any royal officials, whether administrative or judicial, who might be present.

([18]) Cf. A. Coville, *Les Cabochiens et l'Ordonnance de 1413*, Paris, 1888, and A. Coville, *L'Ordonnance Cabochienne*, Paris, 1891, p.v.

([19]) J. Garillot, *Les états généraux de 1439*, Nancy, 1947, esp. pp. 39 ff.

the English out of France, and thenceforward levied a taille of at least 1,200,000 livres a year for its support.

From this time onwards the monarchy held all the trump cards. The rights of the estates aroused little popular interest; and when in 1484 the estates-general of Tours demanded a drastic reduction in the taille and the summons of another meeting of the estates in two years time to legalize the continued levy of the tax, these demands were widely regarded, not as a defence of constitutional liberties, but as a tiresome and factious opposition to the crown. The Beaujeus quietly ignored these demands; and there was soon little protest and no effective opposition. Too much is sometimes made of the assertions of sixteenth and early seventeenth century writers like Loyseau ([20]) that the estates-general had a constitutional right to a limited participation in the government of France, e.g. if French territory was to be permanently alienated; for even these views, restricted as they were, were legalistic and out of date. In this matter Sir John Fortescue seems to have had a much firmer grasp of realities. For him, writing in the 1470s, after several years' residence in France, that realm was already an absolute monarchy, in which the estates-general had in practice withered away during the Hundred Years War ([21]). By contrast he saw England as a limited monarchy in which the king might neither make new laws nor levy taxes without the assent of parliament.

In so far as any possibility of constitutional opposition survived in France by the end of the fifteenth century, it was to be found, not in the estates-general, but in two other kinds of institution, the provincial estates ([22]) and the parlements ([23]). Considerable checks on government could come from estates like those of Burgundy which by 1500 had won the right not only to vote taxes but to

([20]) Cfr. A. ESMEIN, *L'inaliénabilité du domaine de la Couronne devant les États Généraux du XVI^e siècle*, in *Festschrift Otto Gierke zum siebzigsten Geburtstag*, Weimar, 1911, pp. 361-381, esp. pp. 368 ff.

([21]) Cf. J. FORTESCUE, *The Governance of England*, ed. C. PLUMMER, 1883, esp. chapters I, III, IV.

([22]) Cf. H. PRENTOUT, *Les états provinciaux en France*, in *Bulletin of the International Committee of Historical Sciences*, I, 632-647.

([23]) Cf. F. AUBERT, *Histoire du Parlement de Paris* (1250-1515), 2 vols., Paris, 1894, esp. vol. I, pp. 347-364; F. LOT & R. FAWTIER, *Histoire des Institutions françaises au Moyen Age*, II, 1958, 332-508.

supervise their collection and expenditure ([24]), those of Brittany which in the eighteenth century still jealously guarded their rights, under the treaty of 1499, to meet every two years and to authorize any taxes which the king might wish to levy in the duchy ([25]), or those of Languedoc, still meeting almost annually in the eighteenth century, whose organization and powers could arouse the admiration of reformers like Mirabeau and Necker, even at the end of the ancien régime ([26]). Moreover, the Parlement of Paris, and even those of the provinces, could on occasion offer to the monarchy a strong passive resistance, in the name of the law or the rights of the crown ([27]).

It is striking that the English parliament should by the end of the fifteenth century have diverged so markedly from the French parlements. The role of the English parliament, as a judicial body, a court of law, even in the early days, has, thanks to the persuasive expositions of historians like Maitland, Pollard, McIlwain, Richardson and Sayles, probably been overstressed. The early rolls of parliament recorded only judicial requests and decisions; but that does not mean that its political, administrative, legislative, and financial functions were for contemporaries any the less important. As Sir Goronwy Edwards has said of the early English parliaments: «Parliament was an omnicompetent organ of government at the summit of lay affairs in England» ([28]). The comparatively ancient strength of the English monarchy, the greater unity of the English realm, together with Edmund I's determination to avoid, if possible, a recurrence of the troubles of his father's reign, all combined to produce assemblies whose participants were brought, by royal insistence, in touch with the very heart of government — the decision of important questions of policy, the exercise of discretion. Even the

([24]) Cf. J. Billioud, *Les états de Bourgogne aux XIV^e et XV^e siècles*, Dijon, 1922, esp. pp. 108-262.

([25]) Cf. E. Durtelle de Saint-Sauveur, *Histoire de Bretagne*, Rennes, 1935, II, 190; A. Rebillon, *Les états de Bretagne de 1661 à 1789*, Paris, 1932, Part II, chapter 2-8.

([26]) Cf. E. Appolis, *Les états de Languedoc au XVIII^e siècle. Comparaison avec les états de Bretagne*, in *L'organisation corporative du moyen âge à la fin de l'ancien régime*, Louvain, 1937, II, 131-148. Cf. also E. Appolis, *Les Etats de Languedoc et les Routes royales au XVIII^e siècle*, in *Studies presented to the International Commission for the History of Representative and Parliamentary Institutions, Rome, 1955*, pp. 217-236.

([27]) Cf. E. Margis, *Histoire du Parlement de Paris*, tome I, 1913, p. 655.

([28]) *Justice in early English parliaments*, in *B.I.H.R.*, XXVII, 1954, 53.

knights and the burgesses, humble as was their role as yet, were, by the latter part of the reign, ordered to come with plenary powers ([29]). It is a sign of the weaker position of the French kings at the end of the 13th century, and of the particularism of the French provinces, that the French monarchy could not normally insist that deputies to the estates-general should all have full powers. On the contrary, they were usually delegates with limited mandates, who had to refer back to their constituents if any new and unexpected demands should be made upon them ([30]). The central role of parliaments in the government of Edward I meant not only that parliament had an omnicompetence, under royal direction, but that the royal council kept a firm hold on the answering of petitions and the making of judicial decisions ([31]). There was therefore no opportunity for parliament to develop, as did the French parlement, as a professional and judicial offshoot of the king's council concentrating on its role as the highest court of law in the land and in this manner acting as a check on the increasingly powerful monarchy ([32]). Then in the reigns of Edward II and Edward III the waning of royal initiative in parliament and the strengthening of aristocratic influence reduced any chance that might have remained for parliament to have turned into a parlement. Under the stress of the events of the fourteenth

([29]) Cf. J. G. EDWARDS, *The Plena Potestas of English Parliamentary Representations*, in *Oxford essays in medieval history* presented to H. E. SALTER, Oxford, 1934, pp. 141 ff. Cf. R. F. TREHARNE, *The Nature of Parliament in the Reign of Henry III*, in *E.H.R.*, LXXIV, 1959, esp. p. 610, where he says of parliament in the reign of Edward I: «Despite the immensely important growth of the judicial and financial aspects of parliaments in his reign, it remained what it had been from the first, an essentially political assembly».

([30]) Cf. G. PICOT, *Histoire des États Généraux*, V, Paris, 1888, 146; cf. also G. PICOT, *Le droit électoral de l'ancienne France: Les élections aux États Généraux dans les provinces de 1302 à 1614*, Paris, 1874; also VIOLLET, *op. cit.*, III, 197-99; also E. CHÉNON, *Histoire générale du droit français public et privé*, Paris, 1926-1929, I, 833-34; II, 427-29; also J. RUSSELL MAJOR, *The Deputies of the Estates-General in Renaissance France*, Madison, 1960, p. 8.

([31]) Cf. T. F. T. PLUCKNETT, *Parliament*, in *The English Government at Work, 1327-1336*, I, ed. J. F. WILLARD & W. A. MORRIS, 1940, 113.

([32]) Cf. F. LOT and R. FAWTIER, *Histoire des Institutions françaises au Moyen Age*, II, 1958, 506. It is fair to note that the original link between the parlement and the états-généraux only slowly disappeared during the course of the fourteenth century. Cf. H. HERVIEU, *Recherches sur les premiers états généraux*, Paris, 1879, pp. 59, 60; F. AUBERT, *Le parlement de Paris, de Philippe le Bel à Charles VII*, Paris, 1890, p. 194, 195.

century there was an increase in importance of the political, legislative, and financial functions of the English parliament and a dwindling of its judicial activity. The failure of Richard II to recover the royal initiative in parliament meant that, so far from it becoming a specialized judicial department of royal administration, it was growing into a partner in the supreme activities of royal government, changing the highest authority in the realm from the king alone to the king in parliament. By the fifteenth century the knights and burgesses could claim ([33]) that their *plena potestas*, originally assumed by royal command, entitled them to speak fully on behalf of all the communities of England.

Yet one must not overstress the aspect of the opposition to, or limitation of the crown by, the English parliament at the end of the middle ages. Parliament had by this time met so frequently and had such important powers and traditions that the king could scarcely ignore it or work without it, hence he had to think of ways of managing it, of guiding its work without arousing suspicion or hostility. To a large extent the Yorkists and early Tudors were successul in this. And so, whereas French rulers of the late fifteenth and early sixteenth centuries viewed the estates-general with hostility ([34]), so that no full and regular meeting of the assembly took place between 1484 and 1560, the English parliament became more important than ever during this period. Henry VII could use it for controlling over-mighty subjects and Henry VIII could make it his prime instrument in carrying through the Henrician Reformation. In 1543 he is reputed to have made his celebrated declaration to members of parliament: «We at no time stand so highly in our estate royal as in time of parliament, wherein we as head and you as members are conjoined and knit together in one body politic» ([35]).

It is true that in 1560 some of the French king's councillors could advise the king to summon the estates-general in order, as they represented, to strengthen the monarchy; but their view of its

([33]) S. B. CHRIMES, *English Constitutional Ideas in the Fifteenth Century*, 1936, pp. 130-132; also G. POST, *Plena Potestas and Consent in Medieval Assemblies*, in *Traditio*, I, 1943, p. 405, note 19.

([34]) J. RUSSELL MAJOR has stressed the persistence of consultation and consent in the government of France during this period (*Representative Institutions in Renaissance France, 1421-1559*, Madison, 1960, pp. 117-147); but such consultation as these was took place in provincial estates or assemblies of restricted composition.

([35]) R. HOLINSHED, *Chronicles*, ed. H. ELLIS, 1807-8, III, 956.

functions diverged widely from the doctrines about the role of parliament which had become established in England. Thus the most eloquent advocate of this policy, Charles de Marillac, Archbishop of Vienne, could assert, as an obvious truth, that «the king is the sole author of the law and to him alone belongs the right to command»; and this is in line with the ideas of contemporary French jurists ([86]). Jean Bodin, who tended to minimize the real power of even the English parliament, was quite clear that France was a monarchy pure and simple, in which the sole function of «les assemblées des estats qui se font en ce royaume» was to present «requestes et supplications à leur prince en toute humilité, sans avoir aucune puissance de rien commander, ni décerner, ni voix délibérative; ains ce qu'il plaist au roy consentir ou dissentir, commander ou défendre, est tenu pour loy» ([87]). We must, it is true, remember the importance of the prerogatives still claimed and asserted by Queen Elizabeth I in relation to her parliaments; nevertheless it is a far cry from the views of de Marillac or Bodin about the role of the estates-general to the conceptions of contemporary Englishmen about the function of parliament. There is, for example, a very different atmosphere in Sir Thomas Smith's description of the part played in English government by parliament, beginning with his confident assertion that «The most high and absolute power of the realme of Englande consisteth in the Parliament» ([88]). These important differences are grounded upon the whole divergent history of the English parliament and the French estates-general in the middle ages.

A. R. MYERS.

([86]) J. RUSSELL MAJOR, *The Estates-General of 1560*, Princeton, 1951, pp. 33, 36.

([87]) A. MARONGIU, *Jean Bodin et les Assemblées d'états*, in *Études présentées à la Commission internationale pour l'Histoire des Assemblées d'états*, tome XX, Louvain, 1959, pp. 28, 30. Cf. W. F. CHURCH, *Constitutional Thought in Sixteenth-Century France*, Cambridge, 1941, pp. 163, 243.

([88]) Sir Thomas SMITH, *De Republica Anglorum*, Cambridge, 1906, pp. 48-58.

X

Medieval Constitutionalism: a Balance of Power,

BY

BRYCE LYON,
University of California.

In the domain of medieval history and, to a lesser extent, in every domain of history nineteenth-century historians were all but unanimous in avowing their noblest task to be the reconstruction and portrayal of the institutions of their countries. And though most historians — whether English, French, German, Belgian, or Italian — agreed with William Stubbs that «the history of institutions cannot be mastered, — can scarcely be approached —, without an effort», they felt compelled to labor in sources that offered «little of the narrative incident or of the picturesque grouping which constitutes the charm of history in general» because they subscribed to the historical faith of their age that «the roots of the present lie deep in the past, and nothing in the past is dead to the man who would learn how the present comes to be what it is» (1). They firmly believed that only by this history, whatever its label — constitutional history, *Verfassungsgeschichte*, or *institutions politiques* — could they plumb for the secrets of the French Revolution and for the causes of national unification, parliamentary government, liberalism, and other political developments that dominated nineteenth-century Europe (2).

From their vantage point of the middle-twentieth century present historians incline to be less enthusiastic about institutional history but most still confess its utility and acknowledge their debt to the early masters who formulated the problems and charted the course of the meticulous research that has revised and supplemented the great works of such scholars as William Stubbs, Georg Waitz, and Paul Viollet (3). Such modern publications as *The English Government at Work* and *Histoire des institutions françaises au moyen âge* are evidence of the continued and shifting interest in medieval

(1) W. Stubbs, *The Constitutional History of England*, I, 6th ed., Oxford, 1903, p. iii.

(2) The noble value and utility of institutional history is eloquently expressed by A. Thierry in the preface to his *Essai sur l'histoire du tiers état*, new ed., Paris, 1853, pp. 1-8.

(3) W. Stubbs, *The Constitutional History of England*, I-III, 1st ed., Oxford, 1874-1878; G. Waitz, *Deutsche Verfassungsgeschichte*, I-VIII, Kiel, 1874-1885; P. Viollet, *Histoire des institutions politiques et administratives de la France*, I-III, Paris, 1890-1903.

institutions (4). There are books enough to engage for years the attention of anyone curious to know how the medieval institutions of western Europe developed, how they functioned, and how they changed. It is soon apparent, moreover, to one reading in this area of history that of all medieval institutions those of a representative nature, the so-called national assemblies, have been subjected to the most extensive and concentrated research. The corpus of learned literature on representative assemblies in England, France, Germany, Italy, Spain, and the Low Countries is formidable; no one need remain unenlightened as to how these institutions took root or what role they fulfilled in the medieval state (5). And yet few indeed have been the historians who, looking further, have wondered at and tried to explain why of all the medieval representative assemblies only that of the English parliament survived the Middle Ages and went on to make England the first and most successful European constitutional state. To be sure, each country has had its historians who have advanced explanations for the failure or success of a particular medieval national assembly but, regrettably, explanations based almost solely on lessons derived from their own national history and pervaded by a seemingly willful disregard of what was happening to similar assemblies in other areas of western Europe (6). What

(4) *The English Government at Work, 1327-1336*, I-III, ed. J. F. WILLARD, W. A. MORRIS, J. R. STRAYER, and W. H. DUNHAM, JR., Cambridge, Mass., 1940-1950; *Histoire des institutions françaises au moyen âge*, I-II, ed. F. LOT and R. FAWTIER, Paris, 1957-1958.

(5) For an admirable discussion of this work see H. M. CAM, A. MARONGIU, and G. STÖKL, *Recent Work and Present Views on the Origins and Development of Representative Assemblies*, in *Relazioni del X Congresso Internazionale di Scienze Storiche (Roma 4-11 Settembre 1955)*, Florence, 1955. One should also consult the volumes which have appeared since 1937 in *Etudes présentées à la Commission Internationale pour l'Histoire des Assemblées d'Etats*.

(6) It should be pointed out, however, that Stubbs devoted a short section comparing parliament to the continental assemblies (*Const. Hist.*, II, 4th ed., Oxford, 1896, pp. 166-214). More recent but brief comparative studies have been done by C. H. MCILWAIN, *Medieval Estates*, in *The Cambridge Medieval History*, VII, Cambridge, 1932, pp. 664-715; R. FAWTIER, *L'Europe Occidentale de 1270 à 1328*, in *Histoire du moyen âge*, VI, Paris, 1940, pp. 233-259, *Parlement d'Angleterre et états généraux de France au moyen âge*, in *Académie des Inscriptions et Belles-Lettres. Comptes rendus*, 1953, pp. 275-284; E. LOUSSE, *La formation des états dans la société européenne du moyen âge et l'apparition des assemblées d'états. Questions de faits et de méthodes*, in *Bulletin of the International Committee of Historical Sciences*, V, i, 1933, pp. 85-96, *Het ontstaan van de*

follows is a brief *tour d'horizon* of medieval representative assemblies with suggestions as to why they succeeded or failed.

Upon surveying the imposing number of books and articles on the English medieval parliament that have appeared since William Stubbs wrote his three monumental volumes on constitutional history in the 1870's, one is impressed by the thoroughness with which historians have studied the origin, nature, and functions of parliament; surely it has been the most studied of all medieval institutions (7). But such a survey places in bas relief the very few historians who have seen the need to explain why parliament continued to flourish and to become a permanent institution of the realm. Actually only one serious effort has been devoted to fathoming the success of parliament, and this by Stubbs, whose views on parliament have for some fifty years been deemed antiquated and unrealistic by numerous scholars. We are all familiar with his explanation for the origin of parliament and with his opinions on the nature and role of parliament in the fourteenth and fifteenth centuries (8). We know that much of the Stubbsian «system» has been repudiated by historians during the last half century (9). We know also that his explanation for the origin of parliament goes no farther towards explaining the success of English medieval constitutionalism than do dozens of other theories

Middeleeuwse Standencolleges. Schrijvers en Methoden, in *Historisch Tijdschrift*, XIV, 1935, pp. 201-243, *Parlementarisme ou corporatisme ? Les origines des assemblées d'états*, in *Revue historique de droit français et étranger*, XIV, 4th ser., 1935, pp. 683-706, *La société d'ancien régime*, Louvain, 1943. See also the remarks of R. H. LORD, *The Parliaments of the Middle Ages and the Early Modern Period*, in *The Catholic Historical Review*, XVI, 1930, pp. 125-144. The most learned comparative study of medieval institutions, which includes sections on representative assemblies, is that of H. MITTEIS, *Der Staat des Hohen Mittelalters*, 3rd ed., Weimar, 1948. See also O. HINTZE, *Typologie der ständischen Verfassungen des Abendlandes*, in *Historische Zeitschrift*, CXLI, 1929, pp. 229-248, and *Weltgeschichtliche Bedingungen der Repräsentativverfassung*, in *Hist. Zeit.*, CXLIII, 1930, pp. 1-47. There should be more of these comparative studies, for which an eloquent plea was made over thirty years ago by M. BLOCH, *Pour une histoire comparée des sociétés européennes*, in *Revue de synthèse historique*, XLVI, 1928, pp. 15-50.

(7) See the lucid survey of the principal works on parliament by G. TEMPLEMAN, *The History of Parliament to 1400 in the Light of Modern Research*, in *University of Birmingham Historical Journal*, I, 1948, pp. 202-231.

(8) The account of Stubbs is in *Const. Hist.*, II, chaps. xiv-xv.

(9) Among these historians have been Petit-Dutaillis, Maitland, McIlwain, Richardson, Sayles, Wilkinson, Powicke, Plucknett, and G. L. Haskins.

on parliament. What is unique, however, with Stubbs is the relation he saw between local units of English government and parliament. The emphasis placed upon this relation indicates his deep comprehension of English politics and his keen scent for the quarry ([10]).

Having drawn his master plan for the rise of parliament in the thirteenth century, Stubbs argued that the phrase *quod omnes tangit ab omnibus approbetur* appearing in the writs of summons for the Model Parliament of 1295 was a résumé of the political policy of Edward I. To summon representatives of the counties and boroughs to parliament was but to implement this theory or political idea. Stubbs believed that the county court was already a little parliament. Here periodically assembled various classes of freemen of the county. And these men were representatives of someone or something. This system of representation long employed for local county government was but appropriated by Edward I and used for the governance of the realm. By summoning to a parliament of the realm representatives of the county gentry and of the burgesses of the boroughs, he transformed little county parliaments into large national parliaments. Such was the Model Parliament of 1295. By this time, so Stubbs believed, the leading elements of the realm were sufficiently unified and trained in local government as to participate in national politics. This, Edward I apparently perceived and therefore summoned the first, second, and third estates to national assemblies in order to assume with him a responsibility for the governance of the realm ([11]).

What Stubbs sensed but did not elaborate upon was the fundamental importance of the relation between king and estates of the realm — the high clergy, the lay baronage, and the third estate. Without really saying so, he was nevertheless suggesting that the English parliament functioned successfully because in the critical period of its formation — 1215 to 1399 — there was a balance of power, especially among king, baronage, and third estate. To paraphrase the ancient Greek political thinkers, such was the balance of power that no king, however capable and powerful, could become a tyrant. The barons, though they tried repeatedly, could not transform the government into an oligarchy; the commons, though they labored hard to make the representative element of parliament

([10]) For a fine evaluation of Stubbs' contributions to constitutional history see H. M. CAM, *Stubbs Seventy Years After*, in *The Cambridge Historical Journal*, IX, 1948, pp. 129-147; J. G. EDWARDS, *William Stubbs*, London, 1952.

([11]) Stubbs developed these ideas in *Const. Hist.*, II, chaps. xiv-xv.

— the House of Commons — the sovereign power, could not change the government into a democracy, much less an ochlocracy. Thus checked and checkmated the great trinity of English government gave and took, cooperated and compromised themselves into a state of constitutionalism that neither the fifteenth century of wars, nor the Tudors, nor the Stuarts could destroy. A constitutional mode of government was in England to stay.

While the theory of Stubbs that county parliaments coalesced into a national parliament under the guiding genius of Edward I is not historically defensible, the balanced relations he saw among king, baronage, and commons is of real merit and is entitled to serious reflection. English history, at least since 1066, was endowed by fortune with an exceptionally delicate balance of political power. In the Norman and Angevin period when England's need was for powerful and centralized government to combat the centrifugal forces that often accompanied feudalism the kings gave their realm the centralized institutions and law that became common to all the kingdom. By the middle of the twelfth century a royal financial department, a law, a local system of administration, and a military organization were common to the realm and were directed by professional administrators selected by the kings ([12]). Early, therefore, England was a unified community of the realm in which the kings and their government maintained effective control over the feudal vassals who, instead of opposing efficient government, were compelled to strengthen it by their services. On the other hand, the feudal aristocrats did not become so anemic that they lost the will or ability to bridle despotism; for this they did when John pushed Angevin efficiency too far. Magna Carta, a feudal document, expressed the feudal ideal that both lord and vassal are under law and bound to honor mutual obligations ([13]). Down to 1215 England was characterized by strong central government which could have become absolute but did not because held in check by a yet vigorous feudal baronage.

Meanwhile there were important economic and social developments.

([12]) For a good account of English government in the twelfth century see A. L. POOLE, *From Domesday Book to Magna Carta, 1087-1216*, 2nd ed., Oxford, 1955; J. E. A. JOLLIFFE, *Angevin Kingship*, Oxford, 1955.

([13]) See the remarks of F. W. MAITLAND, *The History of English Law*, I, 2nd ed., Cambridge, 1899, pp. 171-173; G. O. SAYLES, *The Medieval Foundations of England*, rev. ed., London, 1950, pp. 399-408.

By the middle of the eleventh century the economic revival in western Europe had stimulated the rise of trade and commerce which in turn contributed to the rise of towns and bourgeois inhabitants (14). In the late eleventh and throughout the twelfth century the practical bourgeois were winning economic, legal, and social privileges that indeed freed them from the seignorial routine of the countryside but did not give them self-government (15). It was the 1190's before London permanently became a commune, that is, obtained the right of self-government, and it was the thirteenth century before boroughs achieved the political powers that have for so long characterized them (16). Compared to many areas of the Continent municipal growth was retarded. This seems to be explained by the slower commercial and industrial development of England as well as by the fearful reluctance of the Angevin kings to give the bourgeois too much power (17). Like the feudal aristocrats, the burgesses were kept in check and did not become a force in national politics until the later thirteenth and early fourteenth centuries. Yet the kings could not ignore the bourgeoisie because its financial resources increasingly had to be tapped. There thus arose a give-and-take on both sides that is well seen in the transactions accompanying individual royal

(14) H. PIRENNE, *Les villes du moyen âge*, Brussels, 1927. See also the remarks of M. POSTAN in *The Cambridge Economic History of Europe*, II, Cambridge, 1952, pp. 155-191.

(15) C. STEPHENSON, *Borough and Town*, Cambridge, Mass., 1933, pp. 120-151; J. TAIT, *The Medieval English Borough*, Manchester, 1936, pp. 113-177.

(16) C. STEPHENSON, *Borough and Town*, pp. 152-185; J. TAIT, *Medieval English Borough*, pp. 177-220; M. WEINBAUM, *Verfassungsgeschichte Londons, 1066-1268*, Stuttgart, 1929.

(17) In speaking of the political and economic development of England in the eleventh and twelfth centuries Miss Cam has written: «But if England is administratively and politically ahead of the continent, she is economically behind. She has her commercial and industrial features . . . but compared with the ferment in the valleys of the Po, the Rhine and the Scheldt, or even in northern France, her urban and industrial developments are on a small scale» (*The Theory and Practice of Representation in Medieval England*, in *History*, XXXVIII, new ser., 1953, p. 15). See also POSTAN, in *Camb. Ec. Hist.*, II, pp. 232-251; E. CARUS-WILSON, in *Camb. Ec. Hist.*, II, pp. 413-428. For the slow political development of the boroughs in the twelfth century see STEPHENSON, *Borough and Town*, pp. 152-185. A. L. Poole has said that «the urban policy of Henry II was strictly conservative; he shared the current idea that commune breathed revolution, and was chary of granting to the boroughs any considerable measure of independence» (*From Domesday Book to Magna Carta*, p. 68).

negotiation with the boroughs in the twelfth and thirteenth centuries for tallages, aids, and *dona* ([18]).

The thirteenth century witnessed the last key development in the political configuration that preceded the formation of parliament — the separation of the great feudal aristocrats (the barons) from the lesser aristocrats. The former became the lords, who first received individual writs of summons to great council or parliament and then eventually came to attend by prescriptive and heritable right. They became the House of Lords. Blocked from sitting in that body, the petty aristocrats — the knights and squires —, by virtue of common political and economic interests, coalesced with the burgesses of the boroughs; they were summoned to parliament to represent the counties, and eventually the burgesses were summoned to represent the boroughs ([19]). Thus arose the House of Commons. Working together in parliament, the representatives of town and country developed an entente that broke down the traditional sharp division between rural and urban society. By the middle of the fourteenth century the money of the knights and burgesses was so often needed that they regularly attended parliament. Though king and lords still held most of the political power, the commons held the economic power and could not be deprived of participating in national politics. By the end of the fourteenth century such a political balance of power had been achieved that no element of it could be disbanded.

The kings, particularly the Norman and Angevin, had by political and military ability hammered out a strong, unified, and centralized state that provided the broad foundation essential for constitutional growth. Feudal war was almost nonexistent; king and vassal had learned how to get along and to compromise. This peace and stability enabled the towns and their bourgeois to develop into a powerful element of the realm. But having forged the most effective state of western Europe, the kings found themselves stuck with their

([18]) STEPHENSON, *Borough and Town*, pp. 160-166, *The Aids of the English Boroughs*, in *The English Historical Review*, XXXIV, 1919, pp. 457-475, *Taxation and Representation in the Middle Ages*, in *Anniversary Essays in Mediaeval History by Students of Charles Homer Haskins*, Boston, 1929, pp. 291-312; S. K. MITCHELL, *Taxation in Medieval England*, ed. S. PAINTER, New Haven, 1951; R. S. HOYT, *The Royal Demesne in English Constitutional History: 1066-1272*, Ithaca, 1950, pp. 107-124.

([19]) STUBBS, *Const. Hist.*, II, pp. 193-198; CAM, in *History*, XXXVIII, new ser., pp. 22-23.

handiwork. In a unified state with common services and interests the great feudal aristocrats learned cooperation on a national level and so, too, did the knights and burgesses. Both elements became such powerful national pressure groups that the kings could neither destroy them nor get along without them. And neither pressure group, however much it disliked the other, could overthrow it. Often the two groups cooperated in opposition to the king. Sometimes the king cooperated with one element against the other. But no member of the trinity could win real ascendancy. The early strong kings and central government in a unified realm produced the type of feudal aristocracy and third estate that characterized England in the thirteenth and fourteenth centuries. Three national elements balanced themselves off and had to make the best of their inextricable triangle in parliament. Each, to protect its interests and to win something for itself, had to have parliament. Though most men in the late fourteenth century would readily admit that sovereign power still resided in the king, parliament was in fact such a sovereign fellow that it dominated lords, commons, and king ([20]). A constitutional leviathan had been produced which has, ever since, happily tyrannized the English people.

Our examination of the English parliament has led to the observation that its success stemmed from fortuitous political and economic developments which, by the early fourteenth century, produced a balance of power among king, lords, and commons. But we cannot make any valid claim that a political balance of power was an essential element for enduring medieval constitutional government until we have tested the suggestion in various areas on the Continent.

During the eleventh and twelfth centuries when strong central government and territorial unity were developed by the Norman

([20]) J. R. Strayer has written that «England developed parliamentary government because her early kings were strong. ... The strong English kings prevented the formation of provinces and forced the whole country to accept the authority of the central assembly which was part of their government» (J. R. STRAYER and C. H. TAYLOR, *Studies in Early French Taxation*, Cambridge, Mass., 1939, p. 94). See also Strayer's remarks in *Taxation and Community in Wales and Ireland, 1272-1327*, in *Mediaeval Representation in Theory and Practice: Essays by American Members of the International Commission for the History of Representative and Parliamentary Institutions*, Cambridge, Mass., 1954, pp. 410-416. For the development of a common spirit of the realm (community of the realm) which centered in parliament see CAM, *The Legislators of Medieval England*, in *The Proceedings of the British Academy*, XXXI, 1945, pp. 1-24.

and Angevin kings in England the reverse process was at work in Germany. The investiture struggle and the preoccupation of the German emperors with Italian interests produced anemic central government and territorial disunity ([21]). The complete orientation of Frederick II's political interests towards Italy and Sicily marked the final act in the swift drift towards impotency of central authority and the atomization of Germany into a mosaic of petty political units all striving for self-sufficiency. The local princes and barons had triumphed and were to retain their political pre-eminence to the end of the medieval period ([22]).

While Germany was falling victim to princely particularism its towns were enjoying a more dynamic economic development than those of other areas of western Europe with the exception of Flan-

([21]) The nineteenth-century assertion that imperial political interests in Italy were inimical to the development of strong central government in Germany has for some time been considered inaccurate by various German scholars and particularly by G. BARRACLOUGH who has argued «that Germany itself derived concrete benefits as well as prestige from its association with Italy in the empire» (*The Origins of Modern Germany*, rev. ed., Oxford, 1949, p. 69). Perhaps Germany derived some benefits from the preoccupations of her rulers with Italian politics but she certainly would have derived greater benefits from rulers who concentrated on consolidating their authority in Germany. Where this was done by the Norman and Angevin kings and by the twelfth-century Capetians, strong states arose. For good evaluations of the learned German debate on the subject see F. R. SCHNEIDER, *Die neueren Anschauungen der deutschen Historiker über die deutsche Kaiserpolitik des Mittelalters*, Weimar, 1942, and *Universalstaat oder Nationalstaat. Die Streitschriften von Heinrich v. Sybel und Julius Ficker zur deutschen Kaiserpolitik des Mittelalters*, Innsbruck, 1941; H. HOSTENKAMP, *Die Kampffronten in der deutschen Historiographie bei der Behandlung der mittelalterlichen Kaiserpolitik seit v. Sybel und Ficker bis zum Weltkrieg*, Cologne, 1934. Certainly no one can disagree with Barraclough's assertion that the investiture struggle's heritage to Germany was territorial disunity, particularism, and the unlimited sovereignty of the princes (*Origins of Modern Germany*, pp. 146-147).

([22]) Barraclough concludes that «Germany was condemned for centuries to decentralization and disunion and to the evils which went with decentralization and the unchecked conflicts of competing interests» (*Origins of Modern Germany*, p. 246). After commenting upon the political decentralization that followed Frederick II's death, Mitteis concludes that no political element for all of Germany could unite and work for its political welfare. He writes: «Darin liegt die Besonderheit die den deutschen Reichstag vom englischen Parlament grundsätzlich scheidet: Niemals war er die Vertretung der Nation als solcher, stets nur das Organ einer selbständigen Fürstengruppe, der genau soviel, wenn nicht mehr Bedeutung zukam als der Zentralgewalt» (*Der Staat des Hohen Mittelalters*, p. 417). See also J. W. THOMPSON, *Feudal Germany*, Chicago, 1928, p. 359.

town and country such as there was in England; there could be only division. Even locally no form of constitutionalism could survive in Germany; the territorial prince emerged supreme and arbitrary on the eve of the Reformation.

Deprived of early strong central government and territorial unity, medieval Germany had no opportunity to develop constitutional government. The emperors became first the servants of the princes and then of the princes and the towns. Cooperation among the princes was impossible because they were competitors for territorial political power. A like competition existed among the towns. And, of course, both princes and towns competed against each other. On a local level where the ingredients for constitutional government were at one time present, the balance of power was soon upset by the strife between town and country. So rapid and so independent had been the economic and political development of the towns that they could not be assimilated and the countryside could not keep pace with them. The swift tempo of German urban growth in a setting of sluggish agrarian life and of splintered political authority resulted in severe maladjustment. Without a strong guiding central authority to control and channel these forces, political life in medieval Germany developed in the only way it could.

South of the Alps in Italy and Sicily a study of the relevant institutions results in conclusions almost identical to those obtained for Germany. During the first half of the thirteenth century the enlightened and vigorous rule of Frederick II created the strong central government and territorial unity essential for the growth of a nobility and of a bourgeoisie, each with the opportunity for developing unity in its own ranks and cooperation with the other. Earlier than most of his medieval brethren Frederick II ordered his rich towns to send representatives to consult with the nobles and clergy in a national assembly. Notable were the assemblies of 1232, 1234, and 1240 ([28]). But Frederick II, busied with other numerous preoccupations, convened too few of these assemblies to provide the tradition and experience necessary to demonstrate their political utility. In any event, the dismal end of the Hohenstaufen in southern Italy

([28]) For these assemblies of Frederick II and for a comprehensive treatment of representative assemblies in Italy see A. MARONGIU, *L'Istituto parlamentare in Italia dalle origini al 1500*, Rome, 1949. See also MCILWAIN, in *Camb. Med. Hist.*, VII, pp. 704-705.

and Sicily precluded the growth there of large scale constitutional government. Even though the succeeding Aragonese rulers introduced an assembly modeled after that of their *cortes*, southern Italy and Sicily were too much victimized by military anarchy and particularism to enable such an assembly to function effectively ([29]). And though during the thirteenth, fourteenth, and fifteenth centuries there were assemblies in the Papal States and the duchy of Savoy which included the third estate, they were usually provincial and pitifully deficient in the power necessary to oppose the will of the ruler. In Savoy, where the general assembly was more characteristic, it must be noted that it resembled the *Landtage* of the small German principalities. Given the kaleidoscopic political terrain that characterized the rest of Lombardy and Tuscany, it could never grow into an assembly embracing the Italian peninsula ([30]). The lesson derived from Italy, as from Germany, is that there must be a unified state controlled by strong central authority in order for constitutionalism to take root and to grow. Political anarchy and particularism do not breed constitutional government; the ruler cannot be pushed around at will by the nobles and the towns. To speak of national assemblies in these two regions, therefore, is scarcely legitimate.

The failure of the estates general in France is a knottier problem.

([29]) Italian particularism was so enervating politically that it even destroyed the unity of small regions. So little could the classes unite that it was simple for absolutistic princes to suppress effective political opposition to their despotic programs. See especially MARONGIU, *Autonomia e Soggezione degli «Stati» in Italia durante il XVI et il XVII seculo*, in *Etudes présentées à la Commission internationale pour l'Histoire des Assemblées d'états*, XI, 1952, pp. 133-144; P. S. LEICHT, *Parlamento Friulano*, in *Atti delle assemblee costituzionali italiane dal medio evo al 1831*, ser. I, sez. 6, Bologna, 1917, pp. ix-clxxxi.

([30]) See the penetrating observations of H. G. KOENIGSBERGER on the failure of constitutional government in his article *The Parliament of Piedmont during the Renaissance, 1460-1560*, in *Etudes*, XI, 1952, pp. 69-122. Koenigsberger observes that «when, in the age of Lorenzo the Magnificent, the civilization of the Renaissance reached its most dazzling heights, and when the influence of Italian political institutions and practices began to make its greatest impact on the non-Italian world, only three Italian parliaments had survived. As the transalpine monarchies followed the Italian states on the road to despotism, their representative assemblies were defeated and abolished; or they decayed, until they became mere ghosts of their former selves» (p. 70). For the assemblies of the Papal States see G. ERMINI, *I parlamenti dello Stato della Chiesa dalle origini al periodo albornoziano*, Rome, 1930. For the recent studies dealing with the assemblies under Aragonese domination, see the references in CAM, *Recent Work on Representative Assemblies*, pp. 69-71.

Historians have devoted greater effort to it, concentrating especially upon comparing the fortunes of the estates general and the English parliament and upon uncovering the reasons for the failure of constitutionalism in France. That the institutional development of France lagged about a century behind that of England is generally agreed. France under Philip Augustus was about as advanced as England under Henry I. The France of Philip the Fair can be compared to the England of Henry III ([81]). Why, then, if French institutions around 1300 were on a par with those of England in the thirteenth century when parliament was successfully taking form, did the estates general, for all practical purposes, cease to exist during the reign of Charles V and thereby open the door for France to become an absolute monarchy ?

Of the numerous explanations given for the failure of the estates general probably those closest to the truth have been offered by Robert Fawtier ([82]). In his opinion the greatest obstacle to the success of a national assembly was the size of France, the largest of the medieval kingdoms. In this great realm trips to Paris were too long and too costly. Few men relished the inconvenience and danger of such a trip and none wished to be absent for long periods from their daily occupations. Travel was not such an obstacle in the smaller compact realm of England. Compared to England, France was so large and so loosely organized locally that no king had any precise knowledge of the number of towns and parishes or of the exact administrative extent of the *bailliages* and *sénéchaussées*. Compared to English local government that of France was vague and amoebic. Even if a general assembly including representatives from all the realm had been held, no building in Paris could have accommodated such a body. Moreover, with the different dialects in France, such a meeting would have had difficulty conducting its business. Then, too, by the early fourteenth century, the Capetians, majestic sovereigns buttressed by great power accrued over the centuries, were regarded with awe by distant subjects who felt that they would be

([81]) The tempo of development of English and French institutions can be followed in C. PETIT-DUTAILLIS, *La monarchie féodale en France et en Angleterre, X^e-XIII^e siècle*, Paris, 1933.

([82]) FAWTIER, in *Académie des Inscriptions et Belles-Lettres. Comptes rendus*, 1953, pp. 275-284. See also his comments in *Histoire des institutions françaises au moyen âge*, II, pp. 547 ff., and *Les Capétiens et la France*, Paris, 1942, pp. 5-107.

dealing with personages possessed of divine strength. They knew that in an assembly before the king they faced a *fait accompli*; they would have to support a policy already determined or consent to a tax already expected. The long legitimacy of the Capetians provided the greatest buttress for their power; the English kings with their history of disputed successions had no such support. And, finally, the French kings early saw that they could accomplish their business with the realm more effectively through local regional assemblies and avoid the risk of showing their subjects what strength lay in a large number of men consulting together in a unified assembly of the realm.

Fawtier has given a penetrating analysis of the failure of constitutional government in France. What alone one might regret is that he did not emphasize the ever mighty French king with no effective opposition. In England, though the Norman and early Angevin kings had been extremely powerful, the united feudal aristocracy had blocked their advance to absolutism. In Germany and southern Italy the kings and emperors had seldom been powerful enough to wield effective authority. In France throughout the long period extending from Hugh Capet to Philip the Fair when the Capetians were expanding their authority and pushing the borders of the Ile de France outward to form a greater France, the one institution common to the various counties and duchies absorbed was kingship. There was no common law, no uniform administrative system. From area to area custom, law, and institutions varied; in each was a high degree of provincialism ([38]). It is a tribute to the Capetians that except for a few peripheral areas they were ultimately successful in unifying France.

When by the reign of Philip the Fair this had been accomplished, military, political, and financial necessity compelled Philip to do what was being done by rulers throughout western Europe — convene assemblies which, in order to secure united backing for opposition to the papacy, for fighting the Flemish, and for votes of supply, included the third estate along with the customary first two. Whereas it has traditionally been asserted that the first such general assembly — the estates general — composed of the three estates of the realm

([38]) This institutional diversity and provincialism can be studied in the excellent chapters found in LOT and FAWTIER, *Histoire des institutions françaises au moyen âge*, vol. I.

convened on 10 April 1302, and that similar general assemblies continued to be a frequent and normal method for the kings to consult with the realm down to the reign of Charles V, this opinion is no longer held by scholars who have recently worked on French assemblies in the first half of the fourteenth century ([34]). Fawtier, who has broken most sharply with the old view, has avowed that the only truly national estates general of medieval France was that of 1484 at Tours. To support this pronouncement he argues with some justification that of the estates general convened, few included the three estates from all districts of France, few included a broad representation of the towns, and only rarely did the estates general control supply, initiate and pass legislation, receive general concessions, and give counsel that influenced royal policy. Most of this, Fawtier contends, was done locally by regional assemblies (*états provinciaux*) which soon became the preferred method of the kings and estates of the realm to transact their affairs ([35]).

Perhaps Fawtier has gone too far in denying the name estates general (*états généraux*) and a national character to the general assemblies of the fourteenth and fifteenth centuries, but he certainly is right in declaring that the three estates, especially the third, had little influence in these assemblies and that most consultation was done locally in provincial estates. It was on a local level that the kings secured their taxes and dealt with legal, military, and administrative affairs ([36]). On those infrequent occasions when a general assembly

([34]) See especially STRAYER and TAYLOR, *Studies in Early French Taxation;* TAYLOR, *The Assembly of 1312 at Lyon-Vienne*, in *Etudes d'histoire dédiées à la mémoire de Henri Pirenne*, Brussels, 1937, pp. 337-349, *An Assembly of French Towns in March, 1318*, in *Speculum*, XIII, 1938, pp. 295-303, *Assemblies of French Towns in 1316*, in *Speculum*, XIV, pp. 275-299, and *The Composition of Baronial Assemblies in France, 1315-1320*, in *Mediaeval Representation in Theory and Practice*, pp. 433-459. See also E. PERROY, *La guerre de Cent ans*, Paris, 1945, p. 77.

([35]) FAWTIER, *Histoire des institutions françaises au moyen âge*, II, pp. 547-577. Referring to the assembly of 1484 Fawtier writes: «Nous constatons d'abord que cette assemblée a, pour la première fois, un caractère véritablement national puisque l'on y vit siéger des représentants de provinces qui n'y députaient pas d'habitude... Les Etats Généraux de 1484 sont bien des Etats Généraux du royaume de France» (p. 573).

([36]) For these *états provinciaux* or *états particuliers* see, for example, A. COVILLE, *Recherches sur les états de Normandie pendant la première moitié du XIV^e siècle*, in *Annales de la Faculté des Lettres de Caen*, I, 1885, pp. 1-24, and *Les états de Normandie. Leurs origines et leur développement au XIV^e siècle*, Paris, 1894;

was convened or when general assemblies were held for northern France (*États de Langue d'Oïl*) and southern France (*États de Langue d'Oc*) the royal purpose seems to have been to obtain the unified backing of the realm and to propagandize the royal policy and need for supply so that the estates could return to their localities and in provincial assemblies obtain the necessary support and money. The general assembly was but a sort of preliminary conference which organized the work that ultimately was accomplished locally ([37]).

The failure of France to develop an estates general into an effective institution of the realm may never be satisfactorily explained, but we may be certain of one reason, that the kings wanted no part in the development of an assembly such as the English parliament for they had too often witnessed the strength of that body and the unfortunate consequences for their royal brothers. This lack of enthusiasm by the kings is not surprising, but why did not the three estates, who must also have been familiar with parliament, work for a similar political solution in France ? Undoubtedly the main reason is that the nobility and third estate were too weak and inexperienced to make a success of an undertaking that embraced all the realm. The experience of the nobles and prelates in cooperation and opposition to the king had always been on a local level and they could not transfer it to a national level ([38]). Their customs, charters

P. DOGNON, *Les institutions politiques et administratives du Pays de Languedoc*, Toulouse, 1895, pp. 469-544; A. DUSSERT, *Les états du Dauphiné (XIV^e siècle-1559)*, I-III, Grenoble, 1915-1923; J. BILLIOUD, *Les états de Bourgogne aux XIV^e et XV^e siècles*, Dijon, 1922; E. DELCAMBRE, *Les états du Velay des origines à 1642*, Saint-Etienne, 1938, and *Les origines des états du Velay*, in *Etudes*, III, 1939, pp. 157-162; F. DUMONT, *La noblesse et les états particuliers français*, in *Etudes*, XI, 1952, pp. 147-156; H. PRENTOUT, *Les états provinciaux de Normandie*, I, Caen, 1925.

([37]) This point is emphasized both by STRAYER and TAYLOR in *Studies in Early French Taxation*. Strayer writes that «consent of regional assemblies, even if more concessions were granted, was not enough. Consent of local assemblies still had to be secured and they imposed new conditions» (p. 72). See also his remarks on pp. 82-85. Taylor suggests that the French kings used «central assemblies as a prelude to local negotiations», that central assemblies were «instruments through which the king could get in touch with public opinion in preparation for carrying out difficult national policies», and that central assemblies were used «as a medium for reaching, testing and forming public opinion» (pp. 154, 168-169).

([38]) Fawtier states: «Et il n'y a pas non plus en France d'opposition baronniale. Il n'y en a pas parce que, jamais, il n'a été possible de réunir en un seul lieu tout le baronnage français. Il était trop nombreux; il avait des origines ethniques

of privileges, and mentality were local. Though the French towns had obtained a greater measure of political freedom earlier than the English boroughs, they were handicapped by provincialism. It was unthinkable that the towns of Poitou would cooperate with towns of Anjou, of Normandy, or of Toulouse; their tradition of urban particularism and protectionism was too strongly ingrained. Unthinkable also was any entente between the towns and the nobles; the chasm between town and country was as wide as that in Germany ([39]).

In France, unified bit by bit over a period of three hundred years, an *esprit* of the community of the realm could not exist. England, it will be remembered, was unified in 1066. The French kings of the fourteenth century, seeing the inherent danger of large general assemblies, used this regional and class particularism to good advantage; they played region against region and estate against estate, and secured their supply from provincial estates. As the feudal movements between 1314 and 1316 so graphically demonstrate, the nobles were incapable of organizing more than provincial leagues. Few, even, were the leagues that could suppress their localism long enough to unite in a common front against the last Capetians. There was no rapport between nobles and townsmen; they detested each other. In vain, therefore, did the leagues of Burgundy, Champagne, Normandy, Languedoc, and others protest against royal autocracy. Their revolt was completely broken; all that the nobles received for their trouble were local charters giving them vague and worthless concessions ([40]). French kingship by the year 1314 had become too

et topographiques trop diverses» (*Académie des inscriptions et belles-lettres. Comptes rendus*, 1953, p. 282).

([39]) FAWTIER: «Il y a en France des classes bien tranchées. Il n'y a pas d'intermédiaire entre la noblesse et la bourgeoisie. Ces classes sont opposées les unes aux autres, et il n'y a point pour elles d'occasion de se rencontrer, de voir que, parfois, leurs intérêts pourraient être les mêmes en face de la royauté» (*Ibid.*, p. 283).

([40]) The most comprehensive study of these movements is by A. ARTONNE, *Le mouvement de 1314 et les chartes provinciales de 1315*, Paris, 1912. See also Ch.-V. LANGLOIS, in *Histoire de France*, III, ii, Paris, 1901, pp. 265-282; C. DUFAYARD, *La réaction féodale sous les fils de Philippe le Bel*, in *Revue historique*, LIV-LV, 1894, pp. 241-272, 241-290; J. PETIT, *Charles de Valois (1270-1325)*, Paris, 1900, pp. 127-196. Fawtier remarks that the French kings «ont profité du particularisme de cette noblesse, qui s'est contentée de chartes locales et n'a pas su exiger une Grande Charte de ses libertés. Ils ont profité de son manque d'esprit

powerful to be shaken by loosely organized and uncooperative feudal leagues. And yet an English king, equally powerful, had been decisively defeated in 1215 by the baronage of the realm and forced to grant a charter of general privileges that embraced all the realm.

Even the opportunities afforded by the financial and military strains of the Hundred Years' War to force some form of effective control upon the Valois kings were frittered away. At the nadir of its reputation in 1356 after the disaster of Poitiers, the Valois dynasty was still able to defeat the attempts to pare down its ancient prerogatives. Despite the early constructive work of the large assembly of estates from northern France which resulted in the *Grande Ordonnance,* the constitutional government envisaged never had the opportunity to function. At Toulouse the *États de Langue d'Oc* remained docile and were used by the dauphin Charles to counter the opposition of the northern estates. Eventually he was able to convoke and muster support from small provincial assemblies in the areas around Paris. Early the nobles and prelates lost interest in reform and deserted the Paris assembly. Next, many of the third estate became lethargic, leaving control in the hands of the Parisians. Among all classes, on all social, economic, and political levels, and in all regions there was nothing but fission ([41]). The divisions of France were so sharply etched that the Parisians made no serious attempt to embarrass the dauphin by supporting the peasants of northeastern France who had been driven to revolt by their desperate social and economic condition ([42]). Finally the Parisians splintered and only Étienne Marcel and a few stalwarts were left. His violent death symbolized the end of the experiment to control the king and the triumph of royal absolutism. There was in France no balance of power; all power resided in the king.

politique. Ils ont utilisé enfin le loyalisme monarchique des classes populaires» (*Les Capétiens et la France,* p. 43).

([41]) For the most recent and penetrating remarks on these events see FAWTIER, *Histoire des institutions françaises au moyen âge,* I, pp. 563-570. See also A. COVILLE, in *Histoire de France,* IV, i, Paris, 1911, pp. 98-144, and *Les états-généraux de 1332 et 1357,* in *Le moyen âge,* VI, 1893, pp. 57-63; E. FARAL, *Robert le Coq et les états généraux d'octobre 1356,* in *Revue historique de droits français et étranger,* XXIV, 4th ser., 1945, pp. 171-214.

([42]) Coville notes that after the Parisians had made a few contacts with the *Jacques* they suddenly withdrew their support and returned to Paris («les bourgeois ne se souciaient point de prolonger le contact avec leurs rudes alliés», in *Histoire de France,* IV, i, p. 135).

Although we could extend our investigation further to the remarkable *cortes* of Castile and Aragon and probe into the reasons for their retreat before royal absolutism, we can better observe how a balance of power influenced the course of medieval government by turning to the history of the Low Country states of Flanders and Brabant.

In the twelfth century few states of western Europe could boast a more efficient government or richer economy than the county of Flanders. It was a miniature kingdom long unified under able and strong counts who had introduced efficient comital institutions common to the compact little state ([43]). There is enough evidence to argue that as early as the first quarter of the twelfth century the leading towns had a sense of the «community of the realm». In times of political and military crisis there was a common bond among such towns as Ypres, Ghent, Bruges, and St. Omer. Their's was a remarkable entente during the political crisis of 1127-1128 when uncertainty over the successor for the murdered Count Charles the Good caused Louis VI of France to intervene with his candidate William Clito and brought on civil war ([44]). Though there was less agreement among the feudal aristocrats, they too demonstrated a solidarity. Galbert de Bruges, the perceptive historian of these events, frequently refers to these communities of the county, to the common deliberations and actions of the nobles and the towns ([45]). By the

([43]) H. PIRENNE, *Histoire de Belgique*, I, 5th ed., Brussels, 1929, pp. 103-132; F. L. GANSHOF, *La Flandre sous les premiers comtes*, 3rd ed., Brussels, 1949, pp. 11-57, 97-111; J. DHONDT, *Korte Geschiedenis van het Ontstaan van het Graafschap Vlaanderen*, 2nd ed., Brussels, 1943, and *Vlaanderen van Arnulf de Grote tot Willem Clito, 918-1128*, in *Algemene Geschiedenis der Nederlanden*, II, Antwerp, 1950, pp. 66-93.

([44]) See especially J. DHONDT, *«Ordres» ou «puissances», l'exemple des états de Flandre*, in *Annales. Economies, sociétés, civilisations*, V, 1950, pp. 289-305. Dhondt writes that «les villes formeront une nouvelle ligue jurée — à laquelle adhéreront d'ailleurs, pour des motifs personnels, certains des barons... Tout d'abord, nous voyons qu'il se constitue des groupements, des ligues, en vue d'une intervention dans la politique générale du comté» (p. 293). See also GANSHOF, *Le roi de France en Flandre en 1127 et 1128*, in *Revue historique de droit français et étranger*, XXVII, 1949, pp. 204-228, and *Le droit urbain en Flandre au début de la première phase de son histoire (1127)*, in *Tijdschrift voor Rechtsgeschiedenis*, XIX, 1951, pp. 387-416.

([45]) This development of political cooperation and unity among the Flemish nobility and towns has been discussed in the excellent study of DHONDT, *Les origines des états de Flandre*, in *Anciens pays et Assemblées d'états*, I, Louvain, 1950,

first quarter of the twelfth century there were in Flanders two powerful political communities — the nobles and the towns — which checked each other's power and which had the strength to restrict comital authority. Under the vigorous Alsatian house which ruled Flanders for the rest of the century there were in the county three powerful forces which provided a political balance of power; it was during this time that Flanders attained her greatest eminence in the Middle Ages ([46]).

There was, however, no bridge of feeling or understanding between towns and countryside or between towns and feudal aristocracy. Bitter were the divisions between urban and rural inhabitant. The phenomenally swift rise of the towns to economic and political power soon outpaced the economy of the countryside thus making them arrogant, protectionist, and exclusive. There was in the making that maladjustment so characteristic of Germany. In this throbbing land of commerce and industry the townsmen could not understand the mentality of a fast sinking feudal aristocracy. And the nobles observed with greed and bitterness the ascending power of the *nouveaux riches*. Much better were the relations of the towns with the counts, who adhered to an enlightened policy of granting them social, economic, legal, and political privileges. Throughout the twelfth century the cooperation between towns and counts was remarkable ([47]).

In the thirteenth century internal political conditions changed rapidly. The rulers of Flanders were either weak countesses or incompetent counts bullied by the French kings. The Flemish nobility

pp. 5-52. There are numerous references to the political cooperation of nobles and towns by Galbert de Bruges. See *Histoire du meurtre de Charles le Bon*, ed. H. PIRENNE, Paris, 1891: «Nam ex civitatibus Flandriæ et castris burgenses stabant in eadem securitate et amicitia ad invicem, ut nihil in electione nisi communiter consentirent aut contradicerent. Qua in re burgenses nostri non sine Gendensium consilio agebant... Igitur concorditer actum est inter nostros et Gendenses de receptione novi electi, ut susciperent eum in consulem et terrae totius advocatum» (p. 84). For other references see pp. 138-140, 142, 148, 151.

([46]) Dhondt draws attention to this balance of power: «Pour la première fois depuis les premiers temps du comté, il règne entre les différentes 'puissances' en Flandre (comte, noblesse, villes) un équilibre favorable au comte, qui s'appuie sur la chevalerie affaiblie, contre la puissance grandissante mais non encore triomphante des villes» (*Anciens pays et Assemblées d'états*, I, p. 20). Dhondt suggests that under the counts Thierry and Philip of Alsace the «puissance comtale et puissance urbaine sont en équilibre» (*Annales*, V, 1950, p. 295).

([47]) PIRENNE, *Histoire de Belgique*, I, pp. 205-208.

had almost vanished as an estate owing to the precipitate decline of feudalism and seignorialism before the onrush of industry and trade. Without a noble estate to rely upon in case of need, and no longer able or strong, the Flemish rulers had to deal with a group of towns whose power steadily increased in the thirteenth century and whose goal in the late thirteenth and early fourteenth centuries was to win a political independence that would make them like the free cities of Germany or the Italian city-states. In the thirteenth century the six great communes of Flanders — Ghent, Bruges, Ypres, St. Omer, Lille, and Douai — virtually controlled the counts and countesses and forced political policies upon them. There had, in effect, arisen a fourth political power — six over-mighty towns — which proceeded to destroy the twelfth-century balance of power. In this position the towns relentlessly opposed each other for economic and political advantage and upon occasion even sacrificed Flemish interest to the French kings to gain selfish objectives. As the principal and almost sole source of financial supply, the towns struck hard bargains with the counts who became puppets in their hands. Comital requests for extraordinary taxation resulted each time in more political power and independence for the towns ([48]). Until the dukes of Burgundy with the support of the French kings obtained the county of Flanders in 1384, the towns were the real masters and, given more time, would have converted Flanders into a mosaic of petty city-states ([49]).

What seems apparent, if this analysis of Flemish history is accurate, is that the advanced economy of Flanders stimulated the growth of urban life too fast for it to be properly assimilated. The second estate had virtually disappeared from the stage of history by 1200 and the counts, like Frankenstein, having nurtured their urban

([48]) DHONDT, in *Anciens pays et Assemblées d'états*, I, pp. 27, 29: «Mais les villes ne se contenteront de rien moins que de la plus large autonomie possible, de la domination même de la Flandre. Et le prince n'a pas le choix ! . . . Les chefs-villes tendront maintenant à l'indépendance totale». See also Dhondt's comments in *Annales*, V, 1950, pp. 295 ff.; PIRENNE, *Histoire de Belgique*, I, pp. 376-426; H. VAN WERVEKE, in *Algemene Geschiedenis der Nederlanden*, II, pp. 313-337; H. NOWÉ, *La bataille des éperons d'or*, Brussels, 1945, pp. 9-61.

([49]) During the first part of the fourteenth century Ypres, Ghent and Bruges were so powerful that «le comté de Flandre tendait à se démembrer en trois républiques urbaines composées chacune d'une des chefs-villes et du territoire voisin» (DHONDT, in *Anciens pays et Assemblées d'états*, I, p. 31). See also PIRENNE, *Histoire de Belgique*, II, 4th ed., Brussels, 1947, pp. 74 ff.

monsters, could no longer control them. Whereas in the twelfth century, when it was not necessary for the counts to call comital assemblies to secure supply, a sort of balance of power existed, in the thirteenth century, when the counts were isolated and had to ask for extraordinary taxation, they were pitted against the all-powerful towns, which were beyond negotiation and control.

While the swift flow of economic life rendered impossible a balance of power and produced an urban monopoly of power in Flanders, in the duchy of Brabant, less advantageously located for trade, history moved at a slower pace. Brabançonne economic development lagged far behind that of Flanders; not until the fourteenth century did such towns as Brussels, Louvain, and Antwerp begin to compete with the Flemish communes ([50]). The economic growth of these towns paralleled that of the English boroughs, which did not become centers of large-scale industry until the decisive growth of cloth production in the second half of the fourteenth century. Meanwhile, the dukes of Brabant retained a strong grip over a relatively well-organized administration and the feudal aristocracy retained its strength well into the fourteenth century. Except for some territory won in the late thirteenth century — the so-called Pays d'Outre Meuse — the duchy had long been a unified state ([51]). Like England, then, Brabant had astute rulers with authority, a strong feudal aristocracy, and a middle class that slowly but steadily achieved economic and political power. At the outset of the fourteenth century there was a political balance of power in Brabant. But at this point the dukes had to make the first demands for large sums of money from their subjects.

By the early fourteenth century Duke John II was enmeshed in the same financial difficulties as his English, German, French, and Flemish brethren. Deeply in debt to Italian bankers, he finally became insolvent and defaulted on his debts. Now his subjects also suffered; the creditors began to seize their property and rents and to confiscate their cloth and wool ([52]). Faced with financial ruin,

([50]) PIRENNE, *Histoire de Belgique*, II, pp. 48-56. Pirenne writes: «A mesure que l'on s'avance vers les bords de la mer, dans la Belgique du moyen âge, le mouvement économique croît en intensité comme en étendue» (p. 55).

([51]) PIRENNE, *Histoire de Belgique*, I, pp. 244-253; P. BONENFANT, in *Algemene Geschiedenis der Nederlanden*, II, pp. 256-268.

([52]) PIRENNE, *Histoire de Belgique*, II, pp. 154-155; VAN WERVEKE, in *Algemene Geschiedenis der Nederlanden*, III, Antwerp, 1951, pp. 165-168.

the nobles and men of the towns collaborated and agreed to pay off the ducal creditors in return for certain concessions that would give them a share in the government and reaffirm certain cherished privileges. Thus Duke John II was forced to grant the Charter of Cortenberg in 1312. Of the concessions made to the nobles and bourgeois most important was the promise that all new laws and amendments would be made only with the advice and consent of a council of the good men of the land which was to be composed of nobles and bourgeois from the leading towns of Brabant. The decisions of the council were to be sovereign; if the duke failed to abide by them, both nobles and bourgeois could renounce their allegiance and use force to obtain right and law ([53]). Two years later further concessions in the form of the Walloon and Flemish Charters gave the council the power to approve ducal councillors and to examine ducal receipts and expenditures ([54]). Then in 1356 the joint rulers Jeanne and Wenceslas were forced to concede the *Joyeuse Entrée*, a group of privileges which in the history of Belgium became almost as fundamental to her law and constitution as did Magna Carta for England. By this grant the council of nobles and bourgeois received control over war, alliances, ducal appointments, legislation, and taxation. Subsequent dukes confirmed the *Joyeuse Entrée*. The Burgundian dukes accepted it when they acquired the duchy of Brabant in the fifteenth century, and even the Habsburgs had to swear to uphold it ([55]).

By the early fifteenth century the council of nobles and bourgeois

([53]) The principal study on the Charter of Cortenberg is by J. VAN DER STRAETEN, *Het Charter en de Raad van Kortenberg*, I-II, Louvain, 1952. See also his résumé of this work entitled *Une charte de pays. La charte de Cortenberg en Brabant*, in *Schweizer Beiträge zur allgemeinen Geschichte*, XII, 1954, pp. 149-161. The other pertinent study is by P. GORISSEN, *Het Parlement en de Raad van Kortenberg*, Louvain, 1956.

([54]) PIRENNE, *Histoire de Belgique*, II, pp. 157-158; VAN WERVEKE, in *Algemene Geschiedenis der Nederlanden*, III, p. 168; E. LOUSSE, *Les deux chartes romanes brabançonnes du 12 juillet 1314*, in *Bulletin de la commission royale d'histoire*, XCVI, 1932, pp. 1-47.

([55]) For the events leading up to the *Joyeuse Entrée* see PIRENNE, *Histoire de Belgique*, II, pp. 159-160; VAN WERVEKE, in *Algemene Geschiedenis der Nederlanden*, III, pp. 169-170. For the text of the *Joyeuse Entrée* see R. VAN BRAGT, *De Blijde Inkomst van de Hertogen van Brabant Johanna en Wenceslas (3 Januari 1356)*, in *Anciens pays et Assemblées d'états*, XIII, Louvain, 1956. See also LOUSSE, *La Joyeuse Entrée brabançonne du 3 janvier 1356*, in *Schweizer Beiträge zur allgemeinen Geschichte*, X, 1952, pp. 139-162.

had been transformed into the estates (*Staeten*) of Brabant, in which the representatives of the towns assumed a leading role ([56]). The *Joyeuse Entrée* with its form of constitutional government was gradually extended over the sprawling Low Country state that Duke Philip the Good forged in the fifteenth century ([57]). Brussels became his capital and here assembled an estates general for all the Low Countries; here the dukes and the assembly worked within the framework of the principles of the *Joyeuse Entrée*. Philip the Good and Charles the Rash used the estates general to break down the particularism of their conglomerate state ([58]). Though such Habsburg rulers as Philip II often violated the constitutional principles of the *Joyeuse Entrée*, legislating and taxing without the consent of the estates, they could never destroy the estates general. The Austrian Habsburgs had to negotiate with the estates of the ten southern provinces. It was Joseph II's attempt to suppress the estates and to annul the *Joyeuse Entrée* that sparked the Brabançonne Revolution of 1787-1790 ([59]). After the Revolution of 1830 when the members

([56]) PIRENNE, *Histoire de Belgique*, II, p. 160.

([57]) PIRENNE, *Histoire de Belgique*, II, pp. 235-311; VAN WERVEKE, in *Algemene Geschiedenis der Nederlanden*, III, pp. 253-271; P. BONENFANT, *Philippe le Bon*, Brussels, 1944. R. van Bragt emphasizes the decisive influence of the institutions of Brabant throughout the Low Country state forged by Philip the Good: «De centraliserende politiek van de Boergondiërs, van Spanje en van Oostenrijk ten spijt, heeft het oude hertogdom inderdaad tot het einde van het ancien régime toe de andere provincies door zijn voorrechten afgunstig gemaakt. Meer dan overal elders werden hier de nationale *costuymen* door de centrale bevelen ontzien. Geen der provinciale raden evenaardde in daadwerkelijk prestige de Soevereine Raad van Brabant» (*De Blijde Inkomst*, pp. 5-6).

([58]) PIRENNE, *Histoire de Belgique*, II, pp. 408-411. See also the remarks of J. CUVELIER, *Actes des états généraux des anciens Pays-Bas*, I, Brussels, 1948, p. xii.

([59]) The influence of the *Joyeuse Entrée* can be followed in PIRENNE, *Histoire de Belgique*, V, 2nd ed., Brussels, 1926, pp. 381-502; GORISSEN, *De Prelaten van Brabant onder Karel V (1515-1544)*, Louvain, 1953, pp. 8, 12-13, 20-21, 27, 35, 43, 49, 51 ff.; M. GACHARD, *Mémoire sur la composition et les attributions des anciens états de Brabant*, in *Nouveaux mémoires de l'académie royale des sciences et belles-lettres de Bruxelles*, XVI, 1843, pp. 15, 22-27; S. TASSIER, *Les démocrates belges de 1789. Etude sur le Vonckisme et la révolution brabançonne*, Brussels, 1930; A. CAUCHIE, *Le comte L. C. M. de Barbiano di Belgiojoso et ses papiers d'Etat conservés à Milan. Contribution à l'histoire des réformes de Joseph II en Belgique*, in *Bulletin de la commission royale d'histoire*, LXXXI, 1912, pp. 242 ff.; P. A. M. GEURTS, *Het beroep op de Blijde Inkomste in de Pamfletten uit de Tachtigjarige Oorlog*, in *Anciens pays et Assemblées d'états*, XVI, Louvain, 1958, pp. 3-15; J. W. BOSCH, *De Sporen van de Blijde Inkomst in de Hervormingsplannen van het*

of the Belgian congress assembled to draw up a constitution for the new Belgian state, the principles of the *Joyeuse Entrée* were remembered and inscribed into the new constitution ([60]).

Though more feeble than English constitutionalism and though lacking the opportunity for independent growth, Brabançonne constitutionalism flourished in the fourteenth and fifteenth centuries and bequeathed so strong a heritage to the southern provinces in the succeeding centuries that no amount of Habsburg despotism could destroy it. The *Joyeuse Entrée* became the battle cry of the Brabançonne Revolution just as Magna Carta became the symbol of parliamentary opposition to the Stuarts in the seventeenth century. In medieval Brabant and in medieval England only an extraordinary political balance of power among ruler, nobles, and third estate explains the success of parliament and the estates general.

What this brief comparative study seems to indicate is that a fortuitous combination of political and economic forces was basically responsible for the constitutional fortunes of the various states of medieval western Europe. It is certainly unrealistic, at least for the Middle Ages, to argue that some people had a greater capacity and flair for creating and supporting constitutional government than others. Surely few historians would care to support Stubbs in his assertion that the growth of the English constitution can be attributed to the «national character» of the English people, an assertion which is, in effect, another way of saying that English institutions are the result of Anglo-Saxon political genius ([61]).

The facts, which no amount of finely spun political, economic, or legal theory can sophisticate, say that in 1066 England was happily unified under able kings who imposed strong centralized government upon the realm. In this large political community the feudal aristo-

Strafproces op het einde der XVIII^e Eeuw, in *Anc. Pays et Assem. d'états*, XVI, pp. 67-84; G. VAN DIEVOET, *L'empereur Joseph II et la Joyeuse Entrée de Brabant. Les dernières années de la constitution brabançonne*, in *Anc. pays et Assem. d'états*, XVI, pp. 89-140; A. VRANCKX, *De Blijde Inkomst van 3 Januari 1356 en ons Publiek Recht*, in *Anc. pays et Assem. d'états*, XVI, pp. 145-164.

([60]) R. VAN BRAGT, *De Blijde Inkomst*, p. 7: «Het belang der Blijde Inkomst moge blijken vooreerst uit haar lang bestaan: haar einde viel samen met dat van het ancien régime. Haar faam was buiten de grenzen verspreid ... In 1830 inspireerde de Belgische wetgever zich op haar». See B. LYON, *Fact and Fiction in English and Belgian Constitutional Law*, in *Medievalia et Humanistica*, X, 1956, pp. 82-101.

([61]) STUBBS, *Const. Hist.*, I, 6th ed., Oxford, 1903, pp. 1-11.

cracy was too strong to be destroyed and too weak to destroy strong government. It was, however, unified and powerful enough to block the ultimate goal of the Angevins-despotism. Meanwhile the English economy dictated so gradual a growth in the political and economic stature of the burgesses that their dynamic force, instead of destroying effective government as it did in Flanders and to some extent in Germany and Italy, was assimilated into the national political scheme of the thirteenth century. The success of English and Brabançonne constitutionalism depended upon chance, political and economic chance, that produced a balance of power in the body politic which was indeed the *sine qua non* of medieval constitutionalism.

B. LYON.

XI

Ständische Einungsversuche in den mitteldeutschen Territorien am Ausgang des Mittelalters,

VON

HERBERT HELBIG,
Professor an der Freien Universität Berlin.

Als, ebenfalls in Innsbruck (1), in einer Zeit lebhafter Diskussion über die Entwicklung ständischer und parlamentarischer Institutionen, der namhafte österreichische Rechtshistoriker Arnold v. Luschin vor mehr als sechzig Jahren seinen nachmals auch von der internationalen Forschung stark beachteten Vortrag über die Anfänge der Landstände hielt (2), ging er mit keinem Wort auf das Problem der ständischen Einungen ein. Dabei hatte nur knapp drei Jahrzehnte vorher Otto v. Gierke im ersten Band seines breit angelegten Werkes über dat deutsche Genossenschaftsrecht die landständischen Korporationen als im Kern freie Einungen erklärt, entstanden aus dem freiwilligen und beschworenen Zusammenschluß der einzelnen Standesgruppen eines Territoriums (3). Das Einungswesen wurde richtig erkannt als der gewiß nicht allein wirksame Faktor, aber als eine wesentlich und bestimmend mitwirkende Voraussetzung für die Umbildung der Territorien in Landesstaaten. Das bedeutete, daß solchen Einungen insgesamt eine ganz entscheidende Rolle zugemessen wurde, für die Entwicklung der landständischen Verfassungen wie für die Ansätze zur Gestaltung des frühneuzeitlichen Staates. Georg. v. Below hat dieser Bewertung der spätmittelalterlichen Ständeeinungen entschieden widersprochen, sowohl in seinem methodisch vorbildlichen Aufsatz über die landständische Verfassung in Jülich und Berg (4), wie in der etwas jüngeren Untersuchung über System und Bedeutung der landständischen Verfassung (5), die bis heute die einzige größere Darstellung der verschiedenen Formen ständischer Vertretung in den deutschen Territorien

(1) Vortrag auf der Tagung der Internationalen Kommission für Geschichte der Ständeversammlungen und der parlamentarischen Institutionen am 7. September 1959 in Innsbruck.

(2) Vortrag auf der 4. Versammlung deutscher Historiker am 12. September 1896, gedruckt *Hist. Zs.*, 78, 1897, S. 427 ff.

(3) O. v. GIERKE, *Das deutsche Genossenschaftsrecht*, Bd. 1: *Rechtsgeschichte der deutschen Genossenschaft*, 1868, Nachdruck 1954, S. 534 ff.

(4) G. v. BELOW, *Die landständische Verfassung in Jülich und Berg bis zum Jahre 1511*, in *Zs. d. Bergischen Geschichtsvereins*, 21, 1885, S. 173 ff.; 22, 1886, S. 1 ff.

(5) DERS., *Territorium und Stadt, Aufsätze zur deutschen Verfassungs-, Verwaltungs- u. Wirtschaftsgeschichte*, 1900, S. 163 ff., 1923², S. 53 ff.

geblieben ist. Below sah in den Einungen der Landstände nur ein formales Element, zwangläufig geschlossen zum Schutz und zur Erweiterung althergebrachter Rechte und Freiheiten für die Standeskorporation wie für ihre einzelnen Mitglieder. Er setzte deshalb dem Gierkeschen Begriff der freien Einung den des Zwangsverbandes gegenüber und bestritt seinen Anteil an der Begründung der landständischen Verfassung (6). Luschin machte sich Belows Auffassung zu eigen und ging deshalb in dem erwähnten Vortrag auf die Problematik des ständischen Einungswesens nicht ein.

Im Weitergang der Forschung hat man sich zwar über die grundsätzliche Bedeutung der landständischen Verfassung wiederholt Gedanken gemacht, ohne jedoch durch genügende Interpretation der landesgeschichtlichen Quellen und vergleichende Betrachtungen im einzelnen festzustellen, inwieweit in den vielen verschieden strukturierten deutschen territorialständischen Vertretungen die Einungsversuche oder die vollzogenen Einungen auf die Ausbildung der Verfassungen eingewirkt haben. Zweifellos bedeutete es einen Fortschritt, als Hans Spangenberg auf Grund großzügig vergleichender Untersuchungen der inneren Vorgänge in den deutschen Territorien vor einer Unterschätzung des Anteils der Landesfürsten warnte und ihre durchaus aktive Mitwirkung bei der Bildung ständiger ständischer Versammlungen, die zu verfassungsgebenden Körperschaften wurden, betonte (7). Man übersah nicht, daß sich seit dem Ende des 13. Jahrhunderts in vielen Territorien, am häufigsten in Bayern, die Stände zu Einungen zusammenschlossen, um sich gemeinsam gegen Maßnahmen der Landesherren zu schützen, gegen Steuerforderungen, Münzverschlechterungen, Landesteilungen, und bestritt auch nicht, daß sich die Stände durch ihr Auftreten gegen die oft nur allzusehr persönliche Interessen verfolgende Politik der Fürsten Verdienste um das Land erworben haben. Es zeigte sich aber ebenso deutlich, daß die Haltung der Stände, die in die im Aufbau begriffenen Landesstaaten hineinwuchsen, der fürstlichen Herrschaft gegenüber, weitgehend durch deren Vorgehen bestimmt worden ist.

In jüngerer Zeit ist die Diskussion hauptsächlich um den dualistischen Charakter der landständischen Verfassung geführt worden,

(6) *Jülich und Berg*, 1886, S. 62 ff.; *Landständische Verfassung*, 1900, S. 174, Anm. 1, S. 228 ff., 1923, S. 59, Anm. 2, S. 106 f.; Ders., *Der deutsche Staat des Mittelalters*, 1914, S. 270 ff.

(7) H. Spangenberg, *Vom Lehnsstaat zum Ständestaat, ein Beitrag zur Entstehung der landständischen Verfassung*, 1912, S. 116 ff., bes. S. 147.

um die Prüfung der Frage, inwieweit die Landstände überhaupt als Vertretung des ganzen Landes angesprochen werden können oder nicht. Dabei ist von Otto Brunner gezeigt worden, daß die Stände, wenn sie die Belange des Landes wahrnahmen, als «Landschaft» schlechthin galten, selbst das Land darstellten (8). Der Begriff des Landes als «eines Gemeinwesens mit selbständigen Interessen gegenüber dem privatrechtlichen Eigentumsbegriff des Fürstenhauses» (9) ist durch ihr Auftreten überhaupt erst ausgeformt und in dem uns geläufigen Sinn verstanden worden. Freilich sind auch da Einschränkungen zu machen. Vor allem ist festzustellen, daß das «Land» noch auf lange Zeit hinaus nicht als feststehender Begriff galt. So erschienen bei den bekannten Bedeverträgen der Markgrafen von Brandenburg 1280/81 die Stände nicht in Vertretung des gesamten Markenbereiches, sie waren auch nicht geschlossen nach den alten Landschaften — Altmark, Havelland und Priegnitz — aufgeboten. Ihre Anwesenheit regelte sich vielmehr nach der Zugehörigkeit zu den Herrschaftsbereichen der beiden Fürsten, die 1268 die Mark ohne Rücksicht auf die alten historischen Länder in zwei dynastische Linien geteilt hatten (10). Ebenso wurde die Sonderung der Herrschaftsbereiche der Markgrafen von Meißen aus dem Hause Wettin 1382 nicht in Anlehnung an die alten Länder Meißen, Thüringen und Osterland vorgenommen, und sie erfolgte auch ohne Rücksicht auf die in ihnen ansässigen Stände allein nach dem fürstlichen Willen der meißnischen Markgrafen (11). Mannschaft und Städte wurden nach dem Teilungsvertrag zur Huldigung an die Partei gewiesen, der sie zugefallen waren. Die Wettiner verpflichteten sich dabei als Vertragspartner, Widerstrebende gemeinsam zum Gehorsam zu bringen. Unzweifelhaft ging die Aufnahme dieser Bestimmung auf die Unzufriedenheit zurück, die sich infolge der Teilung bei den Ständen der einzelnen Landschaften bemerkbar machte. Sie fühlten sich bereits so zusammengehörig und als «Landschaft», daß die willkür-

(8) O. Brunner, *Land und Herrschaft, Grundfragen der territorialen Verfassungsgeschichte Südostdeutschlands im Mittelalter*, 1939, 1942², S. 465 ff., 1959⁴, S. 413 ff.

(9) F. Hartung, *Deutsche Verfassungsgeschichte vom 15. Jahrhundert bis zur Gegenwart*, 1933⁴, S. 36, 1950⁵, S. 93.

(10) H. Spangenberg, S. 47 f.; F. Hartung, *Herrschaftsverträge und ständischer Dualismus in deutschen Territorien*, in *Schweizer Beitr. z. Allgem. Geschichte*, 10, 1952, S. 166 f.

(11) H. Beschorner, *Die Chemnitzer Teilung der Wettinischen Lande von 1382*, in *Neues Archiv f. sächsische Geschichte*, 54, 1933, S. 135 ff.

liche, von den Fürsten allein beschlossene Trennung ihre Mißstimmung hervorrufen mußte. Im allgemeinen vermochten zwar die Stände der deutschen Territorien altüberkommene Rechte sich zu sichern, auch neue zu erwerben, der Adel durch die Gerichts-, Grund- oder Gutsherrschaft über die Hintersassen, die Städte durch die Selbstregierung, mit diesen Rechten als Ausdruck der angestrebten «Freiheit» begnügten sie sich aber in der Regel. Vorrechte einer ständischen Mitregierung im Landesstaat gingen, wenn sie tatsächlich von den Fürsten gewährt worden waren, meistens bis zum Ausgang des 15. Jahrhunderts wieder verloren. Nur am Recht der Steuerbewilligung hielten die Stände fest. Nach allgemeiner Auffassung werden die durch die ständischen Einungen und die Politik der Landstände angestrebten Ziele als wenig fortschrittlich und in die Zukunft weisend beurteilt.

Dieses bekannte und anerkannte Bild vom Wesen und Wirken der Stände im Mittelalter hat Werner Näf in mehreren seiner jüngeren Arbeiten ([12]), vor allem in einem seiner letzten Aufsätze ([13]) insofern anders gedeutet, als er grundlegend für den Staat der frühen Neuzeit den Dualismus wertet und in diesem Zusammenhang einigen nach ständischen Einungen zustandegekommenen Verträgen zwischen Landesherrn und Ständen deutscher Territorien besondere Bedeutung zumißt. Er sieht darin den Ausdruck einer sowohl konservativ-defensiven wie progressiv-offensiven Zielstrebigkeit ständischer Bestrebungen und sucht die Initiative für die rechtliche Gestaltung territorialständischer Verhältnisse gegenüber der Herrschergewalt bei den Ständen. Nach seiner Auffassung war die Tendenz der Entwicklung einerseits rechtssichernd und rechtsstärkend, andererseits durch die Abwehr von Willkür, durch die Kontrolle der Rechtsübung und die Setzung neuen Rechtes in gemeinsamer Zusammenarbeit zwischen Fürst und Ständen auch weiterbildend in dem Sinne, daß die Stände durch Einungen und Verträge mit den fürstlichen Landesherren eine politische Rolle zu spielen begannen. Im Ergebnis, so meint Näf, wäre von den Ständen nicht Standespolitik, sondern Staatspolitik betrieben worden. Er

([12]) W. Näf, *Der geschichtliche Aufbau des modernen Staates*, in *Staat und Staatsgedanke*, 1935, S. 29 ff.; Ders., *Die Epochen der neueren Geschichte*, 1945, Kapitel *Staatstypen und Staatsindividuen*; Ders., *Herrschaftsverträge und die Lehre vom Herrschaftsvertrag*, in *Schweizer Beitr. z. Allg. Geschichte*, 7, 1949, S. 26 ff.

([13]) Ders., *Frühformen des «Modernen Staates» im Spätmittelalter*, in *Hist. Zs*, 171, 1951, S. 225 ff.

kam zu seiner Auffassung durch die Deutung des sachlichen Inhaltes einer Anzahl derartiger Herrschaftsverträge. Aber nach neuer Analyse derselben und unter Berücksichtigung ihrer Entstehung im Gange der ständischen Entwicklung in den behandelten Territorien hat sich Fritz Hartung Näf nicht angeschlossen ([14]). Einungen und Verträge sind ihm zufolge in erster Linie zum Schutz der ständischen Freiheit und Unabhängigkeit geschlossen worden, vielfach über die Grenzen des eigenen Territoriums hinausgreifend und in der egoistischen Verfolgung von Standesinteressen konsequent bis zur Gefährdung des werdenden Staates. Diese Haltung der deutschen Landstände, die im 15. Jahrhundert deutlich faßbar wird, ist nicht verwunderlich. Hatten doch schon die Einungen des 13. Jahrhunderts deutlich die Tendenz gezeigt, an Stelle der königlichen Landfriedenshoheit die Handhabung des Landfriedens in die Gewalt der Reichsstände und Städte zu bringen. Im folgenden Jahrhundert waren dann vielfach Landfriedenseinungen aus territorialen Interessen geschlossen worden ([15]). Adlige und Städte hatten sich mit wachsender Beteiligung und im Gegensatz zu den Bestimmungen der Goldenen Bulle in Bündnissen vereint, wogegen sich das schwache Königtum seinerseits mit Landfriedensgesetzen nicht durchsetzen konnte. Sein Einsatz zu Gunsten der Städte hätte Bruch mit den Fürsten bedeutet, doch war wie sie auch der König im Bereich seiner Hausmachtbesitzungen Landesherr und zugleich mit ihnen in territorialen Interessen befangen ([16]). Diese Vorgänge schwächten die Widerstandskraft des Reiches, außerdem wirkten sie sich in den Ländern aus, wo die Haltung der Reichsstände, Fürsten und Reichsstädte, gegenüber der königlichen Zentralgewalt Nachahmung fand in der Einstellung der Landstände zu ihren fürstlichen Landesherren. Richtet man außerdem den Blick auf die Vielschichtigkeit der deutschen Ständevertretungen, dann ist kaum anzunehmen, daß ihren Mitgliedern mehr als Standespolitik zu treiben möglich war, schwerlich schon Staatspolitik wie Näf meint. Die Landstände erschöpften sich im Kampf um ihre Privilegien ([17]). Diese Feststellung bestätigte

([14]) Ausführlich hat er in dem Anm. 10 zitierten Aufsatz dazu Stellung genommen.

([15]) H. Angermeier, *Die Funktion der Einung im 14. Jahrhundert*, in Zs. f. *bayerische Landesgeschichte*, 20, 1957, S. 475 ff.

([16]) H. Helbig, *Reich, Territorialstaaten und deutsche Einheit im Spätmittelalter*, in *Die deutsche Einheit als Problem der europäischen Geschichte*, 1960, S. 87.

([17]) H. Mitteis, *Deutsche Rechtsgeschichte*, 1954[3], S. 139 f. Im gleichen Sinne

auch eine Untersuchung der ständischen Entwicklung in den mitteldeutschen Territorien Thüringen und Meißen-Sachsen ([18]). Sie führte außerdem zu der Überzeugung, daß ständische Einungsversuche und Verträge zwischen Landständen und fürstlichen Landesherrn vor allem von ihrer verfassungsrechtlichen Nachwirkung her bewertet werden müssen. Unter dieser Sicht erscheint ihre Bedeutung ebenfalls gering; die weitergehende Auffassung Näfs sollte deshalb wenigstens nicht verallgemeinert werden. Diese auf Einungen und Herrschaftsverträge bezogene Einschränkung gilt gewiß nicht, was ausdrücklich betont werden soll, für das Ständewesen schlechthin. Die Anwesenheit der Landstände allein genügte als Gegengewicht gegen eine zu stark anwachsende fürstliche Alleinherrschaft, und wenn auch ihrem Eingreifen in die Belange des Landesstaates die Stetigkeit fehlte, so bewahrten sie doch das Bewußtsein, ein Teil des Landes zu sein und dieses mit tragen zu helfen. Insofern haben sie eine wichtige historische Rolle gespielt, unterschiedlich stark in den einzelnen Ländern ([19]), aber insgesamt bestrebt, ihre alten Gewohnheitsrechte sich nicht schmälern zu lassen und dadurch zwangläufig zu Hütern der Tradition bestellt.

Weniger im Hinblick auf das Einungswesen und neuere deutsche ständegeschichtliche Untersuchungen, als vielmehr auf breiterer Ebene in Auseinandersetzung mit den Vorträgen, die auf dem internationalen Historikertag in Rom 1955 von Mitgliedern der Kommission für die Geschichte des Ständewesens und des Parlamentarismus gehalten und unter der Redaktion von Helen M. Cam und Antonio Marongiu veröffentlicht worden sind ([20]), wie gegen grundsätzliche Methoden und Ergebnisse stände- und parlamentsgeschichtlicher Forschungen in der westlichen Welt, ist jüngst Kritik aus

äußerten sich H. M. CAM und A. MARONGIU, *Recent work and present views on the origins and development of representative assemblies*, in *Relazioni del X Congresso Internazionale di Scienze Storiche*, I, 1955, S. 101.

([18]) H. HELBIG, *Der wettinische Ständestaat. Untersuchungen zur Geschichte des Ständewesens und der landständischen Verfassung in Mitteldeutschland bis 1485*, 1955, S. 388 ff.

([19]) Die jüngste Darstellung über die Länder Württemberg, Hessen, Sachsen, Rheinland-Pfalz und Bayern, nach vorliegendem Schrifttum, bietet F. L. CARSTEN, *Princes and Parliaments in Germany from the Fifteenth to the Eighteenth Century*, Oxford, 1959. Das Schlußkapitel seines Buches erschien in deutscher Übersetzung, *Die deutschen Landstände und der Aufstieg der Fürsten*, in *Welt als Geschichte*, 20, 1960, S. 16 ff.

([20]) S. Anm. 17.

dialektischer und sozialökonomischer Sicht vorgetragen worden (21). Der Einwand der jungen, im Kollektiv arbeitenden Kritiker gipfelt in der Feststellung, daß die Stände als Repräsentanten der im Feudalstaat wirkenden bevorrechteten Klassen, Adel und Bürgertum, ausschließlich in ihrem Wirken auf Beschränkung der immer mächtiger werdenden fürstlichen Zentralgewalt gesehen würden. Dadurch komme die innere Funktion der Ständestaaten nicht zum Ausdruck, und es reiche auch nicht aus, wenn die großen Linien der Ständestaatsproblematik klarer herausgearbeitet werden sollen, lediglich sozialen Faktoren eine stärkere Beachtung zu schenken. Es sei zu beachten, daß in der Anfangszeit der Repräsentativversammlungen «breitere Schichten der mittelalterlichen Bevölkerung sich zu neuen Formen der Freiheit emporarbeiten und emporkämpfen, daß neue Möglichkeiten des sozialen Aufstiegs sich eröffnen und genutzt werden». Außer dieser allgemeinen, längst bekannten Feststellung vermögen diese Kritiker eigene, die Forschung weiterführende Gesichtspunkte freilich nicht vorzutragen. Sie verweisen stattdessen auf die Äußerung von François Olivier-Martin: «La nation est organisée sur un double plan, le plan social et le plan territorial» (22). Hier liegt in der Tat ein Ansatzpunkt (23), der geeignet erscheint, weiter voranzukommen. Es erhebt sich allerdings die Frage, ob die Quellen genügend aussagekräftig sind, um Aufkommen und Ursachen sozialer Probleme im Zusammenwirken von Ständen und Landesherrn verfolgen zu können.

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Hier soll ein Versuch in dieser Richtung im Zusammenhang mit einer Darstellung der Entwicklung des ständischen Einungswesens in den mitteldeutschen Territorien Thüringen und Meißen-Sachsen

(21) Th. Büttner, G. Heitz und H. Pannach, *Neuere Arbeiten und gegenwärtige Ansichten über Ursprung und Entwicklung der Repräsentativversammlung*, in *Wiss. Zs. d. Karl-Marx-Univ. Leipzig*, Jg. 7, 1957/58 (gesellschafts- u. sprachwiss. Reihe), S. 289 ff.

(22) Fr. Olivier-Martin, *Histoire du droit français*, Paris, 1948, S. 357.

(23) Gerade in den jüngeren Arbeiten der Internat. Komm. für Geschichte des Ständewesens und des Parlamentarismus ist der Nachdruck auf die soziale und wirtschaftliche Seite des Ständetums gelegt worden, s. *Études présentées*, XI, die Vorträge aus diesem Kreis auf dem 9. Internat. Historikerkongreß 1950 in Paris enthalten. Dazu G. Oestreich, in *HZ.*, 182, 1956, S. 582 ff.

unternommen werden ([24]). Wie in anderen Territorien ist auch in diesen Gebieten von einem engeren Zusammenhalt der Stände untereinander in der älteren Zeit nichts zu bemerken. Ihre verschiedene soziale Stellung, durch Beruf und Lebensweise aufgerichtet, bewirkte die Trennung, die noch dadurch verschärft wurde, daß sie nach verschiedenem Recht lebten, nach Lehn- und Landrecht, nach kirchlichem und Weichbildrecht. Andererseits bewirkte dieser durch lange historische Entwicklung eingetretene Zustand, daß sich die Glieder eines Standes, wenigstens bis zu einem gewissen Grade, zusammenfanden und zusammengehörig fühlten. Denn je schroffer sich die Gegensätze zwischen Geistlichkeit, Ritterschaft und Bürgertum herausgebildet hatten, umso stärker wuchs innerhalb dieser ständischen Gruppen das Bewußtsein der Zusammengehörigkeit. Im einzelnen war freilich die Festigkeit des Zusammenhanges sehr verschieden. Zuerst und am stärksten trat er bei der Ritterschaft entgegen, die durch das persönliche Dienstverhältnis zum Markgrafen untereinander gebunden wurde. Sie war, vor allem seit dem 13. Jahrhundert, aus den beiden Gruppen der freien Vasallen und der Ministerialen entstanden, indem die erste in der zweiten aufging und sich nur in Thüringen, weniger in den unmittelbaren Herrschaftsbereichen der wettinischen Markgrafen einige Inhaber von Grafschaften Selbständigkeit und rechtliche Unabhängigkeit bewahrten. — Die Städte bildeten keine derartig geschlossene Standesgruppe. Zwar stellte jede städtische Gemeinde für sich ein Ganzes dar, nach außen vertreten durch den Rat, doch fehlte der korporative Zusammenschluß, welcher die Städte dem Markgrafen als Einheit gegenübergestellt hätte. Was formal fehlte, ersetzte eine mehr empfundene als äußerlich zum Ausdruck gebrachte Gemeinschaft. Sie war begründet durch gleiche Lebensgewohnheiten und durch gleiches Recht, durch untereinander verbindende Erwerbsinteressen und gemeinsamen Dienst bei Heerfahrten. In der zweiten Hälfte des 15. Jahrhunderts war die Bevölkerungszahl der wettinischen Städte noch gering. Freiberg, die volkreichste unter ihnen, dürfte im Mittelalter kaum jemals viel mehr als 5000 Einwohner gehabt haben, 1474 hatte es nach einer schweren Feuersbrunst und einer Seuche nur etwas über 4000 Einwohner. Dem kam Leipzig mit etwa 3700 Bewohnern am nächsten, dann folgten Dresden mit 3200,

([24]) Die Belege für die landständische Entwicklung und die Einungsversuche finden sich in dem Anm. 18 genannten Buch des Verfassers.

Chemnitz, Oschatz und Großenhain mit 2000-3000, Pegau, Mittweida, Rochlitz, Döbeln mit 1000-2000 Stadtbewohnern ([25]). Bestanden auch mancherlei soziale und rechtliche Unterschiede in den Städten, so waren doch ihre Bürgerschaften am ehesten in der Lage, den Anforderungen der Landesherren nach ständigen Renten, Anleihen und Umlagen nachzukommen, ganz abgesehen von der Bede, der meist schon früh in bestimmter Höhe festgesetzen Jahresrente. Diese ordentliche Steuer war hauptsächlich mit Anlaß, wenn die Städte, die sich bis in das 15. Jahrhundert von den allgemeinen Landesangelegenheiten ferngehalten hatten, sich immer mehr an den ständischen Einungsbestrebungen beteiligten. Trotz ihrer bedeutenden Stellung haben jedoch im Wirkungsbereich der Markgrafen von Meißen Städtebündnisse wie in den benachbarten brandenburgischen Gebieten und in der Oberlausitz niemals eine Rolle gespielt. — Die Bischöfe der Diözesen Meißen, Merseburg und Naumburg gehörten zu den Reichsständen, aber ihre unmittelbaren Beziehungen zum Reich waren immer mehr dahingeschwunden. Äußerlich zeigte sich das an den nachlassenden Besuchen der Reichstage, wozu sie die schlechter werdende Finanzlage ihrer Stifter zwang wie auch die Einsicht, weit mehr als dem Reiche den Wettinern als Landstand verpflichtet zu sein. Selbst von der päpstlichen Kanzlei wurden seit der Wende vom 14. zum 15 Jahrhundert die Stiftsgebiete zum dominium der Markgrafen von Meißen gerechnet, und diese verfügten in ihren Landesteilungen über die Bistumsländereien wie über die eigenen Herrschaftsbereiche. Gleichwohl kümmerten sich die Bischöfe um die allgemeinen Landesangelegenheiten nur insoweit, als sie unmittelbar davon betroffen wurden. Selbst traten sie lediglich dann hervor, wenn sie eine Bestätigung ihrer Privilegien nachsuchten. Es ist bezeichnend für ihre Zurückhaltung im wettinischen Landesstaat, daß sie an den fürstlichen Teilungen des 14. Jahrhunderts nicht Anteil nahmen und erstmals 1415 als mithandelnd an einer solchen erwähnt werden. Für den von den Markgrafen den Bistümern gewährten Schutz spielte die Heeresfolge eine große

([25]) Die Zahlen dürften noch um einiges höher liegen, weil in sie die Geistlichkeit und die Bewohner der Schloßbezirke, Freihöfe und sonstiger innerhalb der Städte befindlichen Immunitäten nicht einbezogen wurden. Sie gehen auf Erhebungen über die Anzahl der Ansässigen zurück, die 1474 auf Befehl der Wettiner angestellt wurden, aber nur noch teilweise erhalten sind. Dazu s. H. Ermisch, *Zur Statistik der sächsichen Städte im Jahre 1474*, in *Neues Archiv f. sächs. Geschichte*, 11, 1890, S. 145 ff.

Rolle. Bereits 1436 entsprach im Bistum Meißen diese Dienstpflicht ganz der von Grafen und Ritterschaft. Die finanziellen Leistungen beruhten zunächst auf freiwilligem Emtgegenkommen, doch stellten die Markgrafen seit dem 14. Jahrhundert keine Reverse mehr aus, die diese Freiwilligkeit betonten. Schließlich wurden den geistlichen Gebieten Steuern ohne Vorverhandlungen auferlegt, so daß den Bischöfen nichts anderes übrig blieb, als die Erhebungsbefehle an Geistliche und stiftische Lehnsleute weiterzugeben. 1436 unterlagen die Bistümer der gleichen Bedepflicht wie die Ritterschaft. Die Selbständigkeit der Bischöfe wurde auch dadurch beeinträchtigt, daß sie größtenteils aus der wettinischen Ritterschaft stammten und sich aus familiären Rücksichten schwer den Wünschen der Landesherren widersetzen konnten, oft auch vor ihrer Erhebung in fürstlichen Diensten gestanden hatten und nicht selten noch als Bischöfe weiter tätig blieben als Kanzler, Räte oder Gesandte der Markgrafen. Bis in die zweite Hälfte des 15. Jahrhunderts sind auch die Klöster dem landesherrlichen Einfluß erlegen.

Einfluß auf Beschlüsse und Forderungen der Landesfürsten gewann zuerst die Ritterschaft. Ihr enges Verhältnis zu diesen band sie auch stärker und verpflichtete sie zu größeren Leistungen als die anderen Stände. Vor allem war der Ritterschaft als dem berufsmäßigen Kriegerstand eine tatsächliche Macht in die Hände gegeben, der von den Dienstherren Rechnung getragen werden mußte, weil ihre politische Stellung gegenüber anderen Landesfürsten in erster Linie von der Stärke ihrer Heeresaufgebote, mithin von der Zahl ihrer Vasallen und Dienstmannen abhängig blieb. Der ritterschaftliche Standeskreis nahm außerdem Anteil an der landesherrlichen Zentralverwaltung, seitdem im letzten Viertel des 13. Jahrhunderts die Anfänge zu einem ständigen Hofrat gelegt wurden. Seine Tätigkeit tritt in der Folge in stetig steigendem Maße entgegen, beim Abschluß bedeutungsvoller Verträge und Bündnisse, auch bei weniger wichtigen Vereinbarungen, bei Erwerb und Veräußerung von Gebietsteilen, Belehnungen und Schieden über Streitigkeiten. Dabei erscheinen die Mitglieder des Hofrates als die eigentlichen Träger der Verwaltungsgeschäfte, und bis ins ausgehende 15. Jahrhundert kamen sie fast ausschließlich aus den Kreisen des niederen Lehnsadels ([26]). Seit etwa 1320 begegnen jedoch unter den Räten

([26]) H. St. BRATHER, *Die Verwaltungsreformen am kursächsischen Hofe, im ausgehenden 15. Jahrhundert,* in *Archivar und Historiker,* Festschr. f. H. O. MEISNER, Berlin, 1956, S. 254 ff., bes. S. 269.

auch Angehörige gräflicher und altfreier Herrengeschlechter. Wenn die Markgrafen von Meißen, gerade in der Zeit einer nachdrücklich in Anspruch genommenen Landeshoheit, die Beratung durch diese Herren, die wenigstens teilweise noch ihnen konkurrierende Gewalten verkörperten, nicht für bedenklich hielten, so zeigt das, wie sehr die Landesherrschaft der Wettiner damals schon gefestigt gewesen ist. Dagegen hat die Tätigkeit der Geistlichen in ihrem Hofrat nie eine Rolle gespielt.

Neben dieses engere, ständige Regierungsorgan, zu dem sich der Hofrat immer mehr entwickelte, trat als weiterer Kreis gelegentlicher Berater eine größere Zahl Räte «von Haus aus». Sie behielten ihren Wohnsitz auf ihren Gütern, standen aber, solange es noch keine festen Residenzen gab und die Wettiner dauernd durch ihre Lande zogen, diesen vorübergehend oder für eine längere Zeitdauer zur Beratung zur Verfügung. Zu dieser Tätigkeit sind die Amtsträger der fürstlichen Lokalverwaltung, Lehnsleute, Vertreter der Städte und Geistliche herangezogen worden, die, vertraut mit den örtlichen Verhältnissen, die Fürsten über diese unterrichten konnten und ihnen dadurch eine dauernde Verbindung mit allen Teilen ihrer Lande verschafften. Die sich dadurch bietende Einflußnahme auf die landesherrlichen Entscheidungen scheint beträchtlich gewesen zu sein, kann aber im einzelnen nicht mehr, höchstens nach ihren allgemeinen Tendenzen festgestellt werden ([27]). Gelegentlich ist die Ansicht ausgesprochen worden, diesem weiteren Kreis von Räten wäre als Vertretern des Landes die Aufgabe der Vermittlung zwischen den beiden Faktoren des Staatslebens dieser Zeit, der Landesherrschaft und den Ständen, zugefallen und er sei angehalten worden, die Interessen der hinter ihm stehenden Standesgenossen zu vertreten. Aber die Annahme, daß die Mitglieder des engeren und weiteren Hofrates nicht nur vom Landesherrn zu Beratern eingesetzt, sondern auch von unten her als Vermittler benutzt wurden, findet aus ihrer Tätigkeit in den wettinischen Landen keine Bestätigung. Natürlich sind über diesen Kreis persönliche Belange an den Landesherrn herangetragen worden, aber für die Gesamtheit ständischer Gruppen aufzutreten fehlte die Voraussetzung, der korporative Zusammenschluß aller Angehörigen eines Standes. Nicht einmal als Zeichen des wachsenden Einflusses der Ritterschaft ist die Tätigkeit des fürstlichen Rates aufzufassen. Der Hofrat war ein Werkzeug

([27]) Ebda., S. 262.

der Landesherren, die in der Wahl ihrer Räte völlig unbeschränkt blieben. Die Entstehung des weiteren Rates erklärt sich aus der Notwendigkeit, den Markgrafen bei der Erledigung ihrer Landesangelegenheiten zu helfen, ihnen Unterstützung zu bieten. Ursprünglich war jeder Lehnsmann verpflichtet, seinem Herrn auf Erfordern Rat zu erteilen. Diese Pflicht ihrer Lehnsleute ist von den Markgrafen von Meißen immer wieder betont und bis um die Mitte des 15. Jahrhunderts in Anspruch genommen worden. Trotzdem ist nicht zu verkennen, daß es dem Hofrat gelang, zu einer dem Lande dienlichen Unabhängigkeit zu kommen, die es ihm schon zu Beginn des 14. Jahrhunderts möglich machte, unter gewissen Voraussetzungen die landesherrliche Verfügungsfreiheit über staatliche Einnahmen zu beschränken.

Anlaß dazu gaben die Mahnungen an die Markgrafen, zum «allgemeinen Besten» des Landes zu regieren, Anregungen und Forderungen, von größeren Teilen der Landesinsassen vorgebracht, wenn Versammlungen der Ritterschaft eines Landesteils, der Geistlichkeit auf Diözesansynoden oder von Vertretern der Städte stattfanden, ohne daß schon feste Zusammenschlüsse der einzelnen Stände bestanden hätten. Die Quellen für diese frühe Entwicklung sind zu dürftig, um ihre Ansätze deutlich überblicken zu können. Immerhin zeichnet sich der so geschilderte Gang doch faßbar ab. Aus dem beiläufigen Eingreifen von Mitgliedern der einzelnen Standesgruppen erwuchs allmählich eine Gewohnheit, aus dieser wurde ein Rechtsanspruch, der die Existenz ständischer Organisationsformen bestätigte. In anderen Territorien haben kriegerische Verwicklungen, Unmündigkeit der zur Regierung gekommenen Fürsten und Auseinandersetzungen zwischen den Angehörigen eines fürstlichen Hauses den Landesadel, der sich während solcher Vorgänge seiner Macht bewußt geworden war, korporativ zusammengeführt. In den Gebieten der Wettiner fehlten derartige Ereignisse nicht, aber es ist nicht festzustellen, daß dadurch der Einfluß der Ritterschaft gefördert worden wäre. Erstmals faßbar wird 1387 in einem Erbvertrag zwischen den Brüdern Wilhelm und Balthasar von Meißen für den Fall der Regierungsunfähigkeit eines der beiden die Einsetzung eines ritterschaftlichen Ausschusses vorgesehen zur Wahrung der Interessen des Landes. Der Plan ist nicht verwirklicht worden. Doch begegnet bei dieser Gelegenheit zum ersten Mal der Begriff «Landschaft» in dem Sinne von «Landstandschaft», worunter die Stände eines Landes zu verstehen sind, die «gemeine Land-

schaft». Gemessen an den Verhältnissen in Brandenburg und anderen Territorien war das Verhältnis zwischen den Ständen in den meißnischen Landen und den Markgrafen ungewöhnlich günstig, hauptsächlich deshalb, weil die Wettiner in den ersten beiden Jahrhunderten ihrer Herrschaft nicht die drückendste Sorge anderer Landesfürsten kannten, die Geldnot. Durch die Ausbeutung der Silberadern des Erzgebirges befanden sie sich gegenüber den meisten Landesherren im Reich finanziell sehr im Vorteil. Mit dem Nachlassen der Erzfündigkeit und gleichzeitig einsetzenden erheblichen Verpflichtungen wuchs jedoch seit der Mitte des 14. Jahrhunderts auch ihr Geldbedarf beträchtlich. Die Wettiner sahen sich deshalb gezwungen, die bis dahin auf gelegentliches Anfordern freiwillig gezahlten Beihilfen auf einen immer größer werdenden Kreis der Stände auszudehnen, sie schließlich in ihrer Gesamtheit um Steuerhilfe zu bitten. 1376 bewilligten erstmals Adel, Städte und Geistlichkeit zusammen eine außerordentliche Steuer, aber nur innerhalb eines kleinen Teilgebietes des wettinischen Herrschaftsbereiches, in der Vogtei Meißen. 1385 erfolgte dasselbe im Gesamtgebiet eines der fürstlichen Brüder. Auch später ist nur der eine oder andere Stand von den Fürsten angesprochen worden, weil ihnen das bequemer erschien. Aber die wachsenden finanziellen Schwierigkeiten zwangen sie schließlich, sich an das ganze Land zu wenden. Verhandlungen mit der Gesamtheit der Stände waren indessen praktisch nur durchführbar, indem diese zu Beratungen zusammen kamen. Das hatte die bedeutsame Folge, daß sie zueinander in enge Berührung traten und sich als Ganzes dem Landesherrn gegenübergestellt sahen. Im empfindlichsten Punkt, dem finanzieller Anforderungen, wurde ihnen ihre Interessengemeinschaft zum Bewußtsein gebracht. Wie das in anderen Territorien auch immer wieder zu beobachten ist, waren die Stände ängstlich bemüht, zu verhüten, daß eine einmal gewährte Beisteuer Dauereinrichtung wurde. Sie haben sich deshalb die Freiwilligkeit ihrer Abgaben stets verbriefen lassen. Wenn es nicht zu vermeiden war, daß die Fürsten von Zeit zu Zeit neue Forderungen stellten, so blieben diese doch von der Bewilligung der Stände abhängig, ohne die keine neue Steuer ausgeschrieben werden konnte. Ergab sich für die Fürsten die Notwendigkeit, die Stände zu Beratungen über die Finanzlage des Landes berufen und an ihr Recht zur Steuerbewilligung appellieren zu müssen, so stärkte das zwangsläufig das ständische Zusammengehörigkeitsgefühl und das Bewußtsein des Verantwortlichkeit. Die Stände verlangten nunmehr von

den Fürsten, das ihnen bewilligte Geld nur zum Besten des Landes auszugeben, woraus sich die Forderung nach Rechenschaftsablage und Sicherheiten über seine rechtmäßige Verwendung ergab. Aus dem Recht der Geldbewilligung entwickelte sich somit ein weiteres, das der Finanzkontrolle. Dazu kam es aber erst in späterer Zeit.

Trotz mehrfacher Landesteilungen blieb bis in die ersten Jahrzehnte des 15. Jahrhunderts der allein ausschlaggebende Herrschaftsanspruch der Markgrafen unbestritten. Die Stände spielten neben ihnen nur eine sekundäre Rolle. Mit der Huldigung von 1428 bahnte sich jedoch ein Wandel dieses Zustandes an. Erstmals erschien auf der aus diesem Anlaß einberufenen Landesversammlung neben Adel und Städten die Geistlichkeit, und auf ihr traten die drei Stände miteinander in Verbindung, um über die den Fürsten vorzutragenden Beschwerden zu verhandeln. Dabei ist es aufschlußreich zu beobachten, daß noch nicht eine Gesamttagung der Landstände erfolgte, die Vertreter der drei Stände vielmehr gesondert nach den einzelnen Landesteilen — Meißen, Thüringen, Osterland und Kurfürstentum Sachsen — zusammentraten. Sie reichten auch nicht eine gemeinsam abgesprochene Eingabe an den neuen Landesherrn und sein Brüder ein, sondern handelten einzeln für die genannten Landschaften. In ein entscheidendes und bis zu einem gewissen Grade abschließendes Stadium trat die landständische Entwicklung in diesen mitteldeutschen Territorien 1438, indem die Bildung einer landständischen Genossenschaft erfolgte. Den Anlaß dazu boten die durch die Husitenkriege entstandenen hohen Ausgaben, weshalb die Fürsten neue Geldforderungen stellen mußten, wobei sie, um ihr Ziel zu erreichen, den Ständen die Kontrolle über die eingegangenen Gelder anboten. Diese machten selbstverständlich von dem Angebot Gebrauch, und so kam es erstmals zur Einsetzung eines achtköpfigen ständischen Kontrollausschusses, zu dem die vier beteiligten Landschaften je einen Vertreter von Ritterschaft und Städten stellten. Die in den Landesteilen eingegangenen Gelder wurden vierteljährlich von dieser Kommission und den Bürgermeistern der Städte Leipzig, Wittenberg und Torgau im Beisein von vier fürstlichen Räten abgerechnet. Durch einen Revers der Fürsten war dieses Abkommen auch von ihrer Seite anerkannt worden. Wichtig ist bei dieser Steuerbewilligung, die für zwei Jahre Gültigkeit haben sollte, daß die Stände versuchten, die Erhebungen nicht zu einer Dauereinrichtung werden zu lassen. Deshalb beschlossen Vertreter des Herrenstandes, der Ritterschaft und der Städte, sich

fest miteinander zu verbinden, um gemeinsam den Landesherren entgegenzutreten, wenn etwa von diesen nach Ablauf der bewilligten Frist von zwei Jahren die Beibehaltung der Steuer gefordert werden würde. Die Stände haben von ihrem Entschluß die Fürsten verständigt, worauf diese mit dem Einverständnis ihrer Räte die Einwilligung zu dieser Verbindung der Stände gaben. Die Einung ist daraufhin in feierlicher Weise vollzogen und beschworen worden. Die Stände haben über ihren Zusammenschluß und den damit verfolgten Zweck eine Urkunde ausgefertigt, die sie zur weiteren Sicherheit von den Fürsten in deren Garantierevers aufnehmen ließen ([28]).

Die Einung der Stände in den meißnisch-thüringischen Landen, innerlich längst vorbereitet und 1438 vollzogen, ist deshalb von besonderem Interesse, weil sie auf der Grundlage einer urkundlichen Vereinbarung vollzogen wurde. Bekanntlich ist das verhältnismäßig selten der Fall gewesen. Die Geistlichkeit fehlte allerdings bei diesem Zusammenschluß. Für die weitere Entwicklung war das freilich ohne Belang, denn bekanntlich hat sie nur in einem Teil der deutschen Territorien Anschluß an die landständischen Vertretungen gefunden. Die auf eigene Initiative der Stände 1438 in den wettinischen Gebieten gebildete landständische Korporation vertrat das «Land» gegenüber der Regierung, den Fürsten und dem Hofrat. Als deren Vertragspartner nennt der ständische Bundesbrief formelhaft Grafen, Herren, Ritter, Städte und «inwoner gemeinlichin» der wettinischen Länder Sachsen, Meißen, Osterland, Vogtland und Franken ([29]). Natürlich waren nur Vertreter der einzelnen Stände an der Einung beteiligt gewesen, die Geistlichkeit hatte sich von ihr ferngehalten und Angehörige der bäuerlichen Schicht waren dazu

([28]) Kurfürst Friedrich von Sachsen und sein Bruder Markgraf Wilhelm von Meißen bestätigten: «ab aber wir ... eyne ungewonliche sture als die obingeschrebin zciese ader der gliche ader sust einscherley ander nüwekeite ... von unsern obingeschrebin landen furdern würden, ... so mogin sich dieselbin unsere lande von sollicher ungewonlichir stüre und nüwekeit wegin und nicht anders miteinander vertragin, zcu sampne setzin und sich eins sollichin gein uns ader unsern erbin ader nachkomen schutczin und ufhalden». C. D. v. WITZLEBEN, *Die Entstehung der konstitutionellen Verfassung des Königreichs Sachsen*, Leipzig, 1881, S. 33 f.

([29]) Die beim Abschluß der Einung 1438 vertretenen Stände Frankens gehörten zu dem Teil des Landes, der 1353 durch die Heirat der Katharina von Henneberg mit Markgraf Friedrich III. von Meißen an diesen gekommen war. 1445 wurden diese fränkischen Besitzungen der Wettiner mit Thüringen vereinigt.

nicht berufen worden, sie galten als vertreten durch ihre Grund- und Gerichtsherren. So ist die Aufzählung der Stände und die Bezugnahme auf alle Bewohner der genannten mitteldeutschen Lande wirklich ein Ausdruck dafür, daß die Standesmitglieder, die beim Abschluß des Bundes anwesend waren, für die Gesamtheit handelten und als Repräsentanten der «Landschaft» galten. Die Fürsten teilten diese Auffassung. In ihrem Gegenrevers bestätigten sie die Bewilligung der Steuer durch alle Untertanen und erklärten, ihren «Landen» die Einung gestattet zu haben. Rechtskraft zu selbständigem Handeln sollte die Vereinigung freilich erst dann erhalten, wenn sich die Fürsten nicht an die gegebenen Zusagen halten würden. Die Zuständigkeit der Stände blieb demnach an diese Voraussetzung gebunden und sie blieb weiterhin zunächst eingeschränkt auf das finanzielle Gebiet. Das vermag jedoch die Bedeutung der Bildung eines ständischen Interessenverbandes nicht abzuschwächen. Der Umfang des Wirkungskreises der so entstandenen und von den Fürsten bestätigten Landesvertretung war nicht so entscheidend wie die Tatsache der Vereinigung selbst. Eine Erweiterung ihrer Zuständigkeit und Befugnisse konnte die weitere Entwicklung bringen. Bekanntlich ist in manchen Territorien von den Fürsten auf einen Zusammenschluß der Stände hingewirkt worden, um diese stärker an die Landesangelegenheiten heranzuführen. Die Wettiner haben lediglich die Finanzkontrolle angeboten, die Einung ging auf die Stände selbst zurück, die sich 1438 in einem konstituierenden Akt zusammenschlossen. Auch das hat es in vielen anderen Territorien nicht gegeben, in denen sich trotz fehlender formaler Einung eine landständische Verfassung herausbildete. Diese Vereinigung von 1438 kann deshalb nicht aufgefaßt werden als der Beginn der landständischen Entwicklung in den mitteldeutschen Herrschaftsbereichen der Wettiner. Sie bildete vielmehr den Abschluß ihres ersten Abschnittes, in dem die Stände des Landes zu Landständen wurden, die einzelnen privilegierten Klassen der Bevölkerung zu einer, durch Interessengemeinschaft verbundenen, die Lande vertretenden Körperschaft zusammenwuchsen. Auch das hatte sich vor 1438 bereits angebahnt. Aber in diesem Jahr fand die Entwicklung ihren äußeren Abschluß durch die Einung, bestätigt durch den ständischen Bundesbrief und den landesfürstlichen Garantierevers, welche somit als die konstituierenden Urkunden der landständischen Verfassung in den meißnisch-sächsischen Ländern Mitteldeutschlands angesehen werden können.

Als nur wenige Jahre später, 1445, infolge einer unvermeidlich gewordenen Landesteilung zwischen den Brüdern Kurfürst Friedrich und Wilhelm ernste Schwierigkeiten drohten, schlossen sich Friedrichs Stände zu einem Landfriedensbund zusammen ([30]). Die Initiative dazu ging von ihnen selbst, nicht von ihrem fürstlichen Herrn aus. Während sonst bei Bünden dieser Art sich meistens nur Gruppen eines Standes vereinigten, Städte oder Ritter, wobei der Kreis der Vereinigten oft über die Grenzen eines Territoriums hinauswuchs, lag hier der Fall anders. Neben den Bischöfen von Meißen, Merseburg und Naumburg sowie den Äbten der wichtigsten in diesen Diözesen gelegenen Klöster, verbanden sich 12 Mitglieder des Herrenstandes, über 100 landsässige Ritter und 37 Städte der Länder Meißen, Osterland, Vogtland und des wettinischen Anteils von Franken. Die Stände des Kurfürstentums Sachsen waren nicht vertreten, weil dieses Land nicht in die Teilung der thüringisch-meißnischen Territorien einbezogen wurde. Auffällig an diesem Landfriedensbund ist die geschlossene Teilnahme der Geistlichkeit sowie die der Herren edelfreier Abkunft (nobiles), die bisher in Rücksicht auf ihre unmittelbare Reichsstandschaft eine Zurechnung zu den Landständen stets zu vermeiden gesucht hatten. Zu den vertragschließenden Adligen gehörten ebenso fürstliche Räte wie andere an den Teilungsverhandlungen Bevollmächtigte. Die von allen Mitgliedern dieser Landfriedensvereinigung unterzeichnete Bundesakte brachte zum Ausdruck, daß Eintracht und Friede, die den vereinigten Landen zu Ansehen verholfen hatten, durch die Auseinandersetzungen der fürstlichen Brüder gestört worden seien und Krieg drohe. Als Vertreter der Stände hielten sie sich für am meisten befugt, diesen Streit zu schlichten und in die bevorstehende Teilung der Länder einzugreifen. Sollten durch solche Maßnahmen einzelne von ihnen oder sie als Gesamtheit von einer der streitenden Parteien Nachteile erleiden, verpflichteten sie sich als Verbündete, den Betroffenen Beistand zu leisten oder sich insgesamt gegen den Angreifer zur Wehr zu setzen. Dieser Landfriedensbund von 1445 ging in der Zielsetzung über die ständische Einung von 1438 hinaus. War damals die Vereinigung als ständische Interessengemeinschaft gegen neue Steuerforderungen der Landesherren zustandegekommen, so richtete sie sich diesmal, von Vertretern aller Stände beschworen,

([30]) Die Bundesurkunde vom 29. XI. 1445 findet sich, in teilweise fehlerhaftem Abdruck, bei v. WITZLEBEN, S. 312 ff.

nicht nur gegen Friedensstörer, sondern auch gegen eine unangemessene Teilung der Lande, wodurch die in ihren Grenzen gebildeten Standeskreise zerrissen zu werden drohten. Die Einung von 1445 bedeutete auch insofern einen Fortschritt, als man offenbar bemüht gewesen ist, diesem Bunde eine möglichst feste Organisation zu geben. Um das zu erreichen, wurde ein ständiger Ausschuß von vier Obmännern eingesetzt, die jährlich neu gewählt werden mußten. Für die Finanzierung dieser Bundesgeschäftsführung wurde jedes Ständemitglied nach seinem Vermögen beitragspflichtig gemacht. Über die Tätigkeit dieses Landfriedensbundes ist freilich nicht viel zu sagen, da er sich zwar in aller Form konstituiert hat, aber niemals aktiv tätig geworden ist, weil unmittelbar darauf die Teilung der wettinischen Länder durch einen Machtspruch von drei fürstlichen Schiedsrichtern, des Erzbischofs von Magdeburg, des Markgrafen von Brandenburg und des Landgrafen von Hessen, die dazu von den Ständen aufgefordert worden waren, zum Abschluß kam. Meißen mit seinen Beilanden und Thüringen gingen fortan ihre eigenen Wege, zumal, nach vorübergehender Wiedervereinigung des wettinischen Gesamtbesitzes 1482 bis 1485, die Hauptteilung des letztgenannten Jahres die Trennung verewigte.

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Gerade während dieser Zeit, in der zweiten Hälfte des 15. Jahrhunderts, haben die Bemühungen der Lanstände, Anteil an den großen politischen Entscheidungen über die Entwicklung ihrer Lande zu nehmen, sichtlich nachgelassen. Was ihnen unmittelbar wichtig schien, das Recht der Steuerbewilligung, hatten sie 1438 erreicht, sie haben es sich immer wieder bestätigen lassen, sind aber über diese Forderung nicht hinausgegangen oder haben weitere Ansprüche gegenüber den Landesherrn nicht durchsetzen können. Zwar ist ihnen 1458 und wieder 1466 zugesichert worden, daß sie sich versammeln und um ihren Rat gefragt werden sollten, wenn im Fall eines bevorstehenden Krieges die Fürsten die Hilfe des Landes in Anspruch nehmen müßten. Diese Zusage blieb aber politisch ohne Bedeutung, weil sich die Wettiner nicht an sie hielten und die Stände sich damit abfanden. Das war nicht verwunderlich, weil die Stände, ganz im konservativen Denken befangen, keine neuen, in die Zukunft weisenden Ideen und Pläne zu entwickeln vermoch-

ten. So mußte der Aufschwung ständischer Regsamkeit, wie er vor der Mitte des 15. Jahrhunderts eingesetzt hatte, wieder erlahmen. Zu den Verhandlungen des Jahres 1445 waren die Stände in großer Zahl erschienen, in den folgenden Jahren begnügten sie sich mit einer Vertretung durch Ausschüsse von wechselnder Mitgliederzahl. Die ständischen Einungen, ohnehin nur geschlossen, um, wesentlich aus eigenem Interesse, begrenzte Ziele kurzfristig zu erreichen, verloren dadurch an politischem Gewicht. Es ist bezeichnend, daß die Organisation einer landständischen Körperschaft bis 1485 zu keinem festen Abschluß kam. Auch gab es keine bestimmte Regelung, in welcher Stärke die einzelnen Stände zu den Landtagen entboten werden sollten. Ohne Ausnahme genossen Grafen und Herren das Recht der Landstandschaft. Auch bei den Bischöfen war das nicht zweifelhaft, doch wurden nur die Äbte einiger, keineswegs aller Klöster zu den Landesversammlungen berufen, aus denen sich die Einrichtung der Landtage entwickelte. Von der Ritterschaft kamen die den Landesherren unmittelbar unterstehenden Schriftsassen dazu, doch blieb die Auswahl der über die Ämter einzuladenden ritterlichen Amtssassen und Städte lange schwankend. Zu festeren Formen des Geschäftsverkehrs zwischen der Regierung und den Ständen ist es erst im 16. Jahrhundert gekommen.

Der Rückgang des Einungswesens in den wettinischen Gebieten besagt aber nicht, daß sich die Stände auf die Bewilligung von Steuern beschränkt und die Gestaltung der Landesangelegenheiten den Fürsten und ihren Räten überlassen hätten. Ihre korporative Einwirkung hat sich vielmehr auf die verschiedensten Seiten des staatlichen Lebens erstreckt, wie den im 15. Jahrhundert erlassenen Landesordnungen zu entnehmen ist ([81]). Unter diesen ist die 1446 während der Regierung des Herzogs Wilhelm für seinen Herrschaftsbereich, Thüringen und Osterland, in Kraft gesetzte eine der ältesten in Deutschland. Sie wurde unmittelbar nach der Landesteilung abgesprochen, auf Forderung und unter Mithilfe der thüringischen Stände, so daß sie geradezu als Regierungsprogramm gelten mußte. Herzog und Stände verpflichteten sich, jährlich zu einem feststehenden Termin die Landesordnung im Ämtern, Dörfern und Städten verlesen zu lassen und Amtleute, Schultheißen, Richter und Bürger-

([81]) K. Jagen, *Die thüringische Landesordnung von 1446*, (Diss. Leipzig), 1951; G. Richter, *Die ernestinischen Landesordnungen mit besonderer Berücksichtigung der Entwicklung im Herzogtum Sachsen-Weimar*, (Diss. Jena), 1956. Die beiden Arbeiten liegen nur im Manuskript vor.

meister auf sie zu vereidigen. Die Einhaltung der Bestimmungen hatte ein Ausschuß von vier Personen zu überwachen, von denen je eine vom Herzog, von Grafen und Herren, von der Ritterschaft und von den Städten ernannt werden sollte. Die Geistlichkeit war an der Abfassung der Landesordnung nicht beteiligt, deren Bestimmungen sich auch teilweise gegen sie richteten. Die Amtszeit dieses Kontrollausschusses währte ein Jahr, er mußte nach Pfingsten und in November zusammentreten, bei Mißständen gegebenenfalls Gegenmaßnahmen anordnen und konnte, wenn es nötig schien, Herzog und Stände zur Hilfe anfordern. Die Zuständigkeit dieses Vierer-Rates ging so weit, daß er befugt war, Artikel der Landesordnung, die er für überholt ansah, abändern oder sogar streichen zu lassen, nur mit der Einschränkung, bei besonders wichtigen Artikeln zur Beratung und Beschlußfassung je zwei Vertreter des Herzogs und der drei ständischen Gruppen, Herren, Ritterschaft und Städte, hinzuzuziehen. Geht schon aus der Zusammensetzung dieses Ausschusses das Übergewicht der Stände hervor, so läßt sich auch aus den Bestimmungen der Landesordnung ermessen, daß sie die wirtschaftlichen und sozialen Belange nach ständischen Vorstellungen zu gestalten suchten. Gewiß ist die erste thüringische Landesordnung nicht ausschließlich im Interesse der Stände aufgestellt worden, sie diente ebenso den Bedürfnissen des fürstlichen Landesherrn, doch läßt das zwischen beiden in Form einer Einung geschlossene Abkommen, das der Beachtung und dem Schutz der Landesordnung dienen sollte, keinen Zweifel daran, daß ihre Bestimmungen mindestens im gleichen Maße den Wünschen der Stände entsprechen mußten.

Ihre Forderungen erstreckten sich auf eine Vereinheitlichung des Gerichtswesens im Lande, auf Beschränkung der geistlichen Gerichtsbarkeit und anderer Sonderrechte, wie sie vor allem Erfurt und den Reichsstädten Mühlhausen und Nordhausen zustanden. Das Verbot, Prozesse vor auswärtigen Gerichten austragen zu lassen oder an solche Appellationen zu richten, sollte der Ausdehnung der landesherrlichen Gerichtsbarkeit dienen und gleichzeitig die Einnahmen aus Gerichtskosten und Bussgeldern in den Gerichten der gräflichen Herrschaften und des niederen grundbesitzenden Adels erhöhen. Solche Tendenzen sind gewiß um die Mitte des 15. Jahrhunderts auch in anderen Territorien zu beobachten, auffällig ist für Thüringen nur die Schärfe der Verordnungen, mit der Herzog und Stände ihre Absicht durchzusetzen hofften. Das Vorgehen der Thüringer scheiterte zwar an dem entschiedenen Widerstand des

Bischofs von Naumburg und des Erzbischofs von Mainz, glückte aber in der Auseinandersetzung mit den Reichsstädten. So gelang doch die Ausdehnung der landesherrlichen Gerichtsbarkeit in erheblichem Maße, zumal auch die Entscheidung über strittige Prozeßurteile in den herrschaftlichen Gerichten dem Herzog vorbehalten bleiben sollte. Damit wurden zweifellos das wettinische Thüringen und die zahlreich eingestreuten Herrschaften und Gebiete mit eigener Gerichtsbarkeit zu einem einheitlichen Rechtsverband zusammengefügt. Eine wichtige Voraussetzung für den Aufbau des Verwaltungsapparates im frühneuzeitlichen Staat ist damit geschaffen worden.

Weitere landesherrlich-ständische Maßnahmen erstreckten sich auf die wirtschaftlichen und sozialen Zustände im Lande. Husitenkriege, Fehden, Hungersnöte und Seuchen hatten die inneren Verhältnisse zerrüttet, die Wirtschaft verschuldet. Den Notstand zu beseitigen, hofften die Gesetzgeber in der Hauptsache auf Kosten des vierten Standes, der Bauernschaft, erreichen zu können, indem ihr Einschränkungen der Lebensweise vorgeschrieben wurden. Von Grund auf konnte ihre wirtschaftliche Lage allerdings nicht gebessert werden, wenn, was zweifellos der Fall war, die Bestimmungen der Landesordnung nur darauf abzielten, die steigenden Ansprüche der Lebenshaltung als unvereinbar mit der Zugehörigkeit zu der in ihren Rechten am meisten beschränkten Bevölkerungsschicht zu erklären und Übertretungen unter Strafe stellten. Und wenn zum Schutz des Absatzes der landeseigenen Textilproduktion der Städte die Einfuhr ausländischer Tuche und feiner Webwaren in dieser Landesordnung eingeschränkt wurde, spielte neben anderen Gesichtspunkten auch die Absicht eine Rolle, die althergebrachten Trachten als Kennzeichen ständischer Unterschiede erhalten zu wissen. Der Bauer sollte sich nicht nach städtischer Art kleiden, nur so konnte man die für Bauern, Knechte und sonstiges Gesinde erlassenen Kleidervorschriften deuten, deren Bestimmungen nicht für die Bürger der Städte und für andere Stände galten. Man verstand es nicht, die auf Landesherrn und Stände eindrängenden sozialen Probleme grundsätzlich zu lösen, wenn von vornherein zäh daran festgehalten wurde, äußerliche Kennzeichen ständischen Unterschieds aufrecht zu erhalten, obwohl die sich verändernden wirtschaftlichen Verhältnisse auch die ständische Schichtung zu verwischen begannen.

Der in der thüringischen Landesordnung von 1446 gemeinsam

von Fürst und Ständen angestrebte Versuch, regulierend und fördernd in ihrem Sinne auf die wirtschaftlichen und sozialen Verhältnisse im Lande einzuwirken, ist nicht mehr als ein erster Ansatz gewesen. Fortschrittlicher in mancher Hinsicht erweist sich die im meißnischen Herrschaftsbereich der Brüder Kurfürst Ernst und Herzog Albrecht 1482 erlassene Landesordnung. Sie zeigt aber auch die zugunsten der Fürsten veränderte Situation, nachdem die Stände das ihrer Einungsbewegung zugrunde liegende korporative Gemeinschaftsbewußtsein sich nicht weiter nutzbar zu machen verstanden hatten. Die Präambel der jüngeren Landesordnung bringt die neue Staatsauffassung deutlich zum Ausdruck: Mißstände abzustellen durch den Erlaß von Satzungen ist allein Pflicht und Recht der Fürsten, denen die Stände ihre Beschwerden vortragen sollen. Aktiv mithandelnd an der Gesetzgebung werden sie nicht mehr beteiligt. Neu an den Bestimmungen dieser Landesordnung ist die Festsetzung des Arbeitslohnes für Werkleute und Dienstboten, wobei der Stellung und den Fähigkeiten der Arbeitnehmer Rechnung getragen wurde. Bei Lohnüberhöhungen machten sich diese, aber auch die Dienstherren straffällig. Ein Stellungswechsel war nur mit Erlaubnis der Herrschaft möglich, und entlassenes Gesinde mußte sich innerhalb von zwölf Tagen einen neuen Arbeitsplatz suchen. Der Zwang zur Arbeit blieb eine Selbstverständlichkeit, und die Bestimmungen über die werktätige Bevölkerung wurden einseitig zum Vorteil der Dienstherren erlassen. Auf der anderen Seite konnten die genauen Festsetzungen über Lohn und Arbeitsverhältnisse auch zu einer Einschränkung herrschaftlicher Willkür führen. Während jedoch die Verfügungen der Landesordnung von 1446 fast ausschließlich dem Adel zugute kamen, ist 1482 die Stellung der Städte gegen diesen ganz erheblich gestärkt worden, indem die Fürsten eine bürgerlich-handwerkliche Tätigkeit auf dem Lande, von wenigen und unbedeutenden Ausnahmen abgesehen, verboten. Zwar glaubte auch noch am Ausgang des 15. Jahrhunderts der Gesetzgeber, Verschuldung und Armut seiner Landesinsassen verhindern zu können durch den Erlaß von Strafbestimmungen gegen den Aufwand in der Lebenshaltung. Aber nunmehr wurden doch die Angehörigen aller Stände angesprochen und ihnen, entsprechend abgestuft, Einschränkungen auferlegt, von denen sich nur der Landesherr selbst ausnahm. Gleichwohl können gerade diese Anordnungen nicht darüber hinwegtäuschen, daß die landesherrliche Gesetzgebung, die nur Auswüchse bekämpfte, den bestehenden Zuständen Rechnung

trug und die altüberlieferte ständische und soziale Gliederung der Bevölkerung schützend zu erhalten suchte.

Es fehlt noch weithin an vergleichenden Untersuchungen über die Abhängigkeit solcher Landesordnungen untereinander, an Studien über das Einströmen von Anregungen aus anderen Territorien und über die Hintergründe der im einzelnen in diesen Ordnungen verfügten Bestimmungen, um ihren Quellenwert für ständegeschichtliche Forschungen recht einschätzen zu können. Zum mindesten bedarf der Anteil von Fürsten und Ständen an dieser Form landesherrschaftlicher Gesetzgebung eingehender Klärung.

In den mitteldeutschen Territorien zeigt sich jedenfalls, daß die Versuche zu ständischer Einung, in aller Form beschlossen und verbrieft, keine entscheidende Bedeutung gewonnen haben. Doch ist eine Einflußnahme der Stände auf die innere Entwicklung der Landesangelegenheiten nicht zu verkennen, und sie darf nicht unterschätzt werden. Was künftig not tut, ist eine Überprüfung des Anteils der ständischen Mitarbeit im werdenden Landesstaat nach ihrem wirklichen und dauernden Gehalt. Wo pochen die Stände auf ihren Versammlungen auf alte Rechte, wo hingegen weisen die von ihnen geäußerten Gedanken wirklich in die Zukunft, und wie sind dabei die einzelnen Standeskreise vertreten gewesen? Vergleichende Untersuchungen dieser Art sollten künftiger Forschung die Mühe wert sein, um das Wesen des spätmittelalterlichen Ständestaates noch besser verstehen zu lernen, als das, trotz aller schon geleisteten Arbeit, bis jetzt der Fall ist.

H. Helbig.

XII

The Powers of Deputies in sixteenth century Assemblies,

BY

H. G. KOENIGSBERGER,
*University of Nottingham**.

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Historians have, for a long time, recognised and discussed the importance of the problem of the powers of the deputies in medieval representative assemblies (2). Much less, however, is known about this problem in the sixteenth century. Neither in England nor in France did the question become controversial in the sixteenth century, and this may well be the reason for its comparative neglect. The English members of Parliament had, for a long time, enjoyed the exercice of *plena potestas*, the right to take decisions without referring back to their constituents. England had become a political unit earlier than most other European countries. English towns, with the single exception of London, were smaller and politically weaker than the great cities of Italy, Germany, the Netherlands and Spain. From the fifteenth century onwards, perhaps even earlier, the gentry had increasingly taken over the representation of the towns in Parliament (3) and in the sixteenth century country gentlemen made up the great majority of the members (4). While their interests were often local or regional, they represented not so much the borough corporations as the landowning classes. The influence of the great landed families over county and borough elections, and the absence of a clear dividing line between the gentry and the nobility, made for a remarkable homogeneity in the composition and the interests of the House of Commons at least, when compared with Continental assemblies. Where the greatest men of the county were themselves either members of the House of Lords or of the House of Commons or where, through influence and patronage, they could get their relatives, friends and clients elected, there was clearly every advantage in having full powers. To whom, indeed, could members of Parliament have wanted to refer back when they, or their patrons in the Lords, were themselves their most powerful constituents ?

Many of the boroughs, it is true, did not elect residents or even

(2) E.g. G. Post, *Plena Potestas and Consent in Medieval Assemblies*, in *Traditio*, I, New York, 1943, and bibliographical references there.

(3) J. S. Roskell, *The Commons in the Parliament of 1422*, Manchester, 1954, ch. VII.

(4) J. E. Neale, *The Elizabethan House of Commons*, London, 1949, p. 147.

local men, and this tendency to elect outsiders increased in the fifteenth and sixteenth centuries. But this happened mainly in the smaller boroughs which came to prefer members who could serve for reduced wages or for none at all (5). Since the end of the thirteenth century it had been generally accepted that the members of Parliament represented the community of the shire or the borough, and beyond that the community of the whole realm of England, and that in consequence, their decisions were binding upon every one (6). As Sir Thomas Smith put it, in his *De Republica Anglorum*, published in 1583: Parliament «representeth and hath the power of the whole realm both the head and the bodie. For everie Englishman is entended to bee there present, either in person or by procuration and attornies, of what preheminence, state, dignitie, or qualitie soever he be, from the Prince (be he King or Queene) to the lowest person of Englande. And the consent of the Parliament is taken to be everie mans consent» (7). If, by the fifteenth and sixteenth century, many borough members no longer had much direct connection with the borough they represented, or if, as sometimes happened, the sheriffs returned members without any election at all, then such phenomena were regarded as minor blemishes of an otherwise excellent and well-tried system. The leading families in the counties profited by having more parliamentary seats available. The great boroughs like London or Norwich were not affected. The smaller boroughs which were not prepared to pay the costs of their own representation in Parliament were not likely to put up a fight to restrict the powers of their representatives.

At the same time, it suited the crown to deal with an assembly which could take rapid and binding decisions. Whatever the origins of *plena potestas*, by the sixteenth century only legal pedants were likely to worry whether this principle implied «political and sovereign consent» or «judicial conciliar consent to the decisions of the prince and his high court and council» (8). The question had

(5) ROSKELL, *The Commons*, pp. 141 ff.

(6) J. G. EDWARDS, *The 'Plena Potestas' of English Parliamentary Representatives*, in *Oxford Essays in Medieval History Presented to H. E. Salter*, Oxford, 1934, p. 151.

(7) Quoted in *ibid.*, p. 153.

(8) For this important medieval distinction cf. POST, *Plena Potestas and Consent*, pp. 407 ff.

become one of political and administrative convenience and its constitutional implications were hardly considered. This attitude is very plain in Elizabeth's instructions to the earl of Leicester when she sent him to the Netherlands, in December 1585. The queen and her advisers knew, of course, that the deputies to the States General of the United Provinces did not enjoy full powers and had to refer all important matters to their constituents. Obviously, the system was not designed for taking speedy decisions, so necessary in war-time. Leicester was therefore instructed «to deale with the states that, for avoidinge the confusion which soe manie councelles doe breed, they wold make choice of a lesse nomber of wise, discreete and well affected persons, to whom the direction of matters of policie maie be committed and for cutting of the tediousness and delaies in matters of councell, to move them, that the deputies of the severall provinces maie have authoritie to consult and conclude and cutt of the often references to the particular (i.e. provincial) states» ([9]). The advice was admirable but, as we shall see, remarkably naïve.

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It is more difficult to see why in France the question of the powers of deputies to the States General should not have become a problem in the sixteenth century. The French deputies were not as homogeneous a group as the English members of Parliament. They were sent to the States General by a bewildering variety of local and provincial authorities and assemblies and by an even more bewildering variety of electoral procedures. Owing to the size of France and to the surviving provincial autonomies the interests of the deputies of the third estate were much more purely and self-consciously local and provincial than those of the members of the House of Commons. Yet, no one seems to have thought, as a matter of principle, that the deputies should not have full powers to discuss and decide the issues which the government wanted to put before them. The deputies received instructions or *cahiers* from the bailiwicks they represented. If the deputies failed to obey

([9]) J. Bruce, *Correspondence of Robert Dudley, Earl of Leycester*, London, 1844, p. 13. Quoted also in J. Huges, *Het Leven en Bedrijf van Mr. Franchois Vranck*, The Hague, 1909, p. 45.

these instructions they might find that their salaries were cut out or that the bailiwicks disavowed them altogether.

Yet, this did not happen very often. In general, the bailiwicks expected their deputies to present their *cahiers* but otherwise left them wide powers, to discuss and decide the issues which the king put before them, to negotiate with other deputies and to accept the rule of the majority. One naturally expected one's deputies not to be over-enthusiastic about increased taxation. Taxes voted in the States General would still have to be approved in the provincial assemblies and by the privileged towns. There was thus no need to be unduly concerned about the action of the deputies. Moreover, these deputies, like the English members of Parliament, were themselves often enough the leaders of the local and provincial communities ([10]). Perhaps even more important was the infrequency of the meetings of the French States General in the sixteenth century. There was too little chance for the relations between crown and deputies to crystallise around certain recurring problems. Each of the relatively rare assemblies of the States General was concerned only with the immediate crisis which had led to its summons. The crown made little attempt to build the States General into its governmental system. Owing to the large number of deputies involved it could not think of wholesale bribery, as the Castilian government could when faced with only 36 deputies of 18 towns. Since the French crown did not seriously threaten the independence of the deputies, their constituents had no need to limit their powers.

The full powers of the French deputies to the States General were therefore different from those enjoyed by English members of Parliament. They were, in fact, largely a sham. The French deputies could take decisions without referring to their constituents, but they could not legally bind their constituents by their decisions. Not surprisingly, the French crown showed little enthusiasm for regular meetings of the States General. They were expensive and difficult to manage and, at best, they gave little more than a moral backing to a tax proposal by the government. The particular form of full powers enjoyed by the deputies therefore, did nothing to strenghten the political position of the States General of France.

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([10]) For this and the preceding points cf. J. RUSSELL MAJOR, *The Deputies to the Estates General in Renaissance France*, Madison, 1960, pp. 5 ff.

The situation was very different in the Habsburg states of Spain and the Netherlands. In both countries the third estate was represented, in Spain in the Cortes and in the Netherlands in the provincial and general estates, by a limited number of towns anxious to defend their autonomy against the encroachments of the centralised royal administration ([11]). In both countries the crown was consistently using the assemblies to obtain financial aid; in both, the third estate which had to foot the bill as consistently, tried to whittle down the crown's demands. In consequence, the struggle over taxation between government and assemblies became a permanent feature of the political life of Spain and, even more, of the Netherlands. The Habsburg governments, in their relations with their representative assemblies, were therefore bound to have two tactical objects in view. The first was to ensure that the members of these assemblies should have full powers to discuss and grant the crown's financial demands; the other, arising out of the first, was to have assemblies whose members were open to persuasion. These objects could not always be pursued openly and consistently; but government policy always tended in this direction. Conversely, the towns were bound to pursue diametrically opposed objectives. While they were often willing to grant the government's demands, especially for defence, they usually thought these demands too high and they were most anxious not to grant them too hastily, nor without a *quid pro quo* in the form of the redress of their grievances. For this purpose it was essential that their deputies should be able and willing to say no. Just as in England, the question of the powers of the deputies was therefore eminently one of practical politics; only it had not yet been solved to the satisfaction of all parties, as had happened in England during the middle ages.

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It was in Castile, the largest of the kingdoms under the Spanish crown, that the problem of the powers of deputies led to the most dramatic developments. Throughout the fifteenth century, the kings of Castile had sought to extend their influence over the Cortes. As early as 1422, they paid the salaries and expenses of the

([11]) Some towns in the States General, e.g. Malines and Lille-Douai-Orchies, were representing not so much the third estate as whole provinces or sovereign titles of the prince.

deputies of the towns. In 1480 four *cuentos* (i.e. million) maravedís were allocated for this purpose (12). The distribution of this sum was in the hands of some of the deputies; but the government could, and did, interfere by cutting the salaries of those deputies who opposed its policy. The Cortes of 1480 passed an Act of Resumption which enabled the crown to repossess itself of alienated crown domain to an estimated value of 30 million maravedís a year (13). It meant that 13⅓ per cent of this sum had to be cast on the parliamentary waters. But, since the crown obtained for it not a once-for-all tax but a permanent revenue of 30 million, the court felt, no doubt, that this was a good investment. In 1499, and again in 1506, the crown insisted that deputies be granted full powers by their constituents (14). But the struggles for the Castilian succession, after the death of Isabella the Catholic, in 1504, seriously weakened the position of the crown. The royal position deteriorated further during the eighteen months between the death of Ferdinand of Aragon (January 1516) and the arrival in Spain of his heir, Charles of Burgundy (the later Charles V). Despite the efforts of the regent, Cardinal Ximénes de Cisneros, to uphold the power of the government and protect the rights of the crown, Spain became almost unmanageable. All the old feuds between the different Spanish kingdoms, between the towns and the nobles, and between different noble families broke out again and there was growing resentment at the prospect of a foreign succession. Castilian temper did not improve at the sight of their new king, an ungainly and inexperienced youth who did not speak Spanish and seemed to be surrounded by Burgundian advisers. Sober Castilian caballeros resented Charles's Burgundian court and the much-exaggerated plunder of his Flemish favourites and Spanish hangers-on. The Cortes of Valladolid, in February 1518, paid him homage and gave him a *servicio* of 600,000 ducats, payable over three years. But they also presented far-reaching demands and were outspoken in their counsel and criticism (15).

(12) There were 375 maravedís to the ducat.

(13) R. B. MERRIMAN, *The Rise of the Spanish Empire*, vol. II, New York, 1918, p. 106.

(14) J. BERNAYS, *Zur inneren Entwicklung Castiliens unter Karl V*, in *Deutsche Zeitschrift für Geschichtswissenschaft*, I, Freiburg, 1899, pp. 382 ff.

(15) Cf. my chapter *The Empire of Charles V in Europe*, in *New Cambridge Modern History*, II, Cambridge, 1958, pp. 304 f.

Charles spent the next two years in Aragon and Catalonia, and his renewed absence added to the distrust and resentment felt in Castile. In the late summer of 1519 news reached Spain that he had been elected emperor. He would have to go to Germany, as soon as possible, and he would need money. There was no question of getting it from Aragon and Catalonia. In their Cortes, the principle of redress of grievances before supply was firmly established. Hence, as the shocked Venetian ambassador, Contarini, reported, «every cobbler, blacksmith or similar person had the right to hold up everything until he was satisfied» ([16]). It had already taken much longer than in Castile to get even the coronation grants from Aragon and Catalonia. In any case, these kingdoms were small and poor. The money would have to come from Castile.

It was obvious to the court, that, with the country in such a hostile temper, this was not going to be easy. The 1518 grant had not yet expired, and the king had promised not to ask for another one until it did. He could plead necessity, but there had been no time to prepare public opinion about the imperial election. Many traditionalists in Castile — and most Castilians were traditionalists — resented their king's chasing after foreign titles and feared that it would lead to long absences and neglect of their country. More than ever it was necessary to have a friendly Cortes, able to take quick decisions.

Charles's chief advisers, the Netherlander Guillaume de Croy, lord of Chièvres, and the Piedmontese Mercurino di Gattinara, were experienced and astute politicians. The tactics they now adopted were brilliant. Their only mistake was to misjudge the length to which the opposition would be willing to go. This mistake nearly cost Charles his throne.

On 12 February 1520, Charles V summoned each of the 18 cities who were traditionally represented in the Cortes, to send their customary two deputies to the Gallician town of Santiago. The town councils were to elect these deputies according to custom and give them full powers to decide matters for the service of God and the king ([17]). To make certain that all the towns observed this command, a model formula of the powers to be granted was enclosed.

([16]) E. ALBÈRI, *Relazioni degli Ambasciatori Veneti al Senato durante il secolo decimosesto*, Florence, 1858, etc., Ser. 1, vol. II, p. 30.

([17]) *Cortes de los Antiguos Reinos de Leon y Castilla*, IV, Madrid, 1882, pp. 285 ff.

The town councils were to oblige themselves «to keep, maintain, fulfil *and pay*, and to hold firm, acceptable, stable and valid, for now and for ever afterwards, as if we ourselves (i.e. the town councils) had done and granted it supposing we ourselves had been present», everything their *procuradores* might decide ([18]).

Neither in the summons nor in the model of powers to be granted to the *procuradores*, i.e. the deputies, was there any mention of precedents for this royal requirement of a *plena potestas*, for the deputies. Perhaps there were too many recent precedents the other way. On 11 March, the royal judge in Burgos (*juez de residencia*) wrote to Charles that the town council would have granted all his financial demands, but that they had not willingly given free powers to grant what His Majesty might demand, for they knew that the deputies obtained favours (*mercedes*), a percentage from the grant given by the kingdom. At the time of the Catholic Queen, he continued, full powers for deputies had been introduced; but they had caused disputes in the Cortes which had to be remedied by instructions limiting these powers. If full powers were now reintroduced, they would be perpetual, they would take away the power of the kingdom, and they would be much resented. «If Your Majesty wants this», he concluded, «there would, in the end, be no one who would ever dare to contradict you, for Your Majesty is such a great and so feared a prince» ([19]).

If this was the attitude of Burgos with its rich wool merchants, who were the class who most immediately benefited by the Flemish connection of their royal house, the attitude of Toledo and most other towns, with no such special interests, was likely to be openly hostile. Peter Martyr, the shrewd Italian humanist who knew Spain well, warned Gattinara, on 1 March 1520; «Everywhere there is nothing but maledictions; people protest that to call the Cortes in Santiago, empowered only to obey the king's command, is to filch their freedom and to order what one orders from a chattel slave». Even in Burgos, he pointed out, the regidors of the council had been bribed by the Burgalese bishop Mota, of Badajoz, «in order to flatter the emperor and the goat (i.e. Chièvres)» ([20]). Martyr

([18]) *Ibid.*, p. 289. My italics.

([19]) D. DANVILA, *Historia crítica y documentada de las comunidades de Castilla*, I, Madrid, 1897, p. 310. Also quoted in H. L. SEAVER, *The Great Revolt in Castile*, London, 1929, pp. 70 f.

([20]) SEAVER, *The Great Revolt*, pp. 64 f.

at least had no doubt that full powers for the deputies implied the previous consent of their constituents to everything the king might demand.

In the towns, the feuds and faction fights were becoming increasingly bitter. Their origins had often been private and local. Now they merged with the quarrels between the royalist and anti-royalist parties. When the Cortes assembled in Santiago, on 31 March, Castile was already on the edge of revolt. Only the towns dominated by the royalists, Burgos, Seville and Granada, had given their *procuradores* what the government had demanded: *carte blanche* ([21]). The Salamanca deputies were rejected because their credentials were considered defective. Toledo was not represented because the lot had fallen on royalist councillors to represent the city, and they had refused to accept the restrictions which the majority of the town council had insisted on imposing on their powers ([22]). Toledo, moreover, had previously sent a deputation to court, to present to Charles the grievances of the kingdom caused by his proposed departure to Germany. This deputation, together with the rejected Salamancans, now registered a formal protest against the validity of any acts in the Cortes in which their cities were not represented. Chièvres countered this threat by promptly exiling the Toledans to their fiefs in remote parts of Spain ([23]).

On 1 April it became clear how little support the government had in the Cortes. Only Burgos, Granada and Seville accepted Gattinara's tax proposals. Avila asked for further discussion. Valladolid, Jaén, Murcia, Toro, Segovia, Zamora, Guadalajara, Soria, Cuenca and Madrid, all, more or less emphatically, supported the proposals of Léon and Córdova, that the towns' petitions must be considered before the government proposals ([24]). It was the classic gambit of insisting on redress of grievances before supply. But it was precisely such a situation that Chièvres and Gattinara had envisaged when they had insisted on full powers for the deputies. Before the session had opened, they had sought to isolate the *procuradores* even further by requiring them to take an oath of secrecy about all proceedings in the Cortes. Already on the afternoon of 1 April some of the opposition deputies began to waver. Over Easter,

([21]) *Ibid.*, p. 71.
([22]) *Ibid.*, p. 74.
([23]) *Ibid.*, p. 69.
([24]) *Ibid.*, p. 75.

Gattinara adjourned the Cortes to Coruña where the court was already embarking. By 22 April he had induced Avila, Cuenca, Guadalajara, Segovia and Soria to join with the original three, Burgos, Granada and Seville, in supporting the proposed taxes. The deputies of Jaén, Murcia and Madrid were divided and did not vote ([25]).

Gattinara had achieved this success simply enough. Granada and Seville were granted considerable sums in tax relief, and at least ten of the deputies obtained sums varying from 100 to 600 ducats each, as well as offices and honours. The money for these bribes was to come from the new *servicio* which they had voted ([26]). For those *procuradores* who still felt scruples about the undertakings they had given to their home towns, there was a royal writ which, on the basis of «the absolute royal power», annulled all such undertakings and pledges ([27]).

It was a most dramatic and sinister demonstration of the way in which the crown could exploit the *plena potestas* of both unscrupulous and weak deputies. But, in the peculiar circumstances of 1520, it was not successful. Gattinara had blatantly overplayed his hand and had still failed to take enough tricks to win the game. The deputies of León, Córdova, Zamora, Toro and Valladolid had maintained their opposition, even if somewhat ambiguously in the case of Valladolid whose deputies were among those bribed by the court. Jaén, Madrid and Murcia remained divided ([28]). It had to be assumed that Toledo and Salamanca would remain hostile. As Charles's fleet weighed anchor, on 20 May 1520, the revolution in Castile had already begun.

No one in Spain, not even Charles's own council, thought that the new taxes were legal or that they could be collected. Riots broke out in Toledo, Madrid, Zamora, Segovia, Cuenca and even in Burgos, and popular juntas took over the government of the cities. Mobs burnt the houses of the deputies who had voted for the new taxes. If they did not yet know the details of the bribes, no doubt they guessed at them, as indeed everyone did. One of the Segovia deputies was rash enough to face the crowd. They dragged him out of the city and hanged him by his feet.

([25]) *Ibid.*, pp. 76 ff.
([26]) *Ibid.*, pp. 80 ff.
([27]) *Ibid.*, p. 76.
([28]) *Ibid.*, pp. 76 ff.

The royal attack on the independence of the Cortes had sparked off the revolt; but the leaders of the Comunero movement did not try to set up parliamentary government in Castile. In the *capítulos* they sent to Charles V, on 20 October 1520, they demanded that the new *servicio* should not be collected; that in any future Cortes the king should not send the cities orders about the powers of their deputies, and that the cities themselves should pay their own deputies; that the deputies should not receive any grant or favour (*merced*) for themselves or their relatives, on pain of death and confiscation of their property — if the king granted this, it would be something of a moral justification for the mob violence against the Coruña deputies — and that, finally, the cities should have the right, on their own initiative, to assemble the Cortes every three years, freely to discuss all matters relating to the benefit of the crown and the kingdom ([29]).

Some of these demands, especially the right of free assembly, went beyond anything that the towns had previously enjoyed or that the crown had ever acknowledged. But they were essentially conservative and defensive at least in intention. The Comuneros did not even propose an extension of the representation in Cortes beyond that of the privileged 18 towns. The question of popular sovereignty, or even of the sovereignty of the communes, did not arise and was not discussed. On the contrary. They demanded that the king, «from his absolute royal power and having no earthly superior», should consent to their *capítulos* as perpetual laws of the kingdom, nor should he ask the pope to release him from his oath. The subjects, in good Spanish tradition, reserved for themselves the right of resistance if the king should revoke these laws ([30]).

The demands and arguments thus remained on a traditional and on a severely practical plane. The actions of the movement, however, were openly revolutionary. They had to be, if even the most conservative part of the Comunero programme was to be achieved. The rebellious towns, led by Toledo, formed a league and set up a *junta* that was in effect a revolutionary government. The royal forces were quite inadequate to resist the movement. Most of the

([29]) The *capítulos* are printed in A. DE SANTA CRUZ, *Crónica del Emperador Carlos V*, vol. I, Madrid, 1920, pp. 297-328.

([30]) *Ibid.*, pp. 327 f.

Castilian nobility had not forgiven the king his Flemish councillors and their alleged plunder. They felt affronted by the appointment of a foreigner, Adrian of Utrecht, as regent. Even the appointment, as co-regents, of the Admiral and the Constable of Castile, did not immediately persuade them to help the king. But in the winter of 1520/21 radical and popular elements in the towns were more and more gaining the upper hand. They spread the revolt to the estates of the nobility and, for the first time, the nobles felt alarmed. Their old antagonism against the towns flared up again. In the towns one after another of the moderate leaders of the Comunero movement deserted to the royalists. A respectable movement in defence of the liberties of the towns and the Cortes was turning into a social revolution, and the urban nobility would have nothing more to do with it. In the spring of 1521, the nobles raised an army of their own and routed the Comunero forces at Villalar (23 April 1521). Valladolid and the other towns of northern Castile immediately submitted to the king; only Toledo, the prime mover of the revolt, held out until October 1521.

The defeat of the Comunero movement in 1521 was, inevitably, also a defeat for the Cortes. The crown did not have to enunciate any new principles. The towns had lost the ability and the will to resist. Their deputies now had to present their full powers, and deputies' salaries were to be paid from the taxes they voted. In the Cortes of Toledo, in 1525, Alonso de Cespedes, *procurador* of Seville, protested; but his was a protest only about the division of the four *cuentos* of maravedís voted for the salaries. The deputies had no power to divide this sum, he argued, for no one could grant anything to himself. But his colleague from Seville dissociated himself from this view. He had no instructions to the contrary, he said, and he saw no reason to refuse a *merced* granted by the king. The deputies of the other towns rounded on Cespedes. The grant of the four *cuentos* was an old practice, they said, and many of the *procuradores* were either not paid at all by their cities or not paid sufficiently to meet the heavy expenses of their journey. Cespedes himself received four ducats a day from Seville, more than they would get from the division of the four million maravedís ([81]). And so the

([81]) British Museum, Ms. Add. 9930. *Colección de Cortes*, XVI, fos. 245-47. 18th century copy. At 375 maravedís to the ducat, the 4 *cuentos*, or 4,000,000, came to $10{,}666^{2}/_{3}$ ducats. Hence, if the division had been an equal one, which

matter went through. But even in this debate it was not taken for granted that the deputies necessarily had full powers. The immediate argument was clinched less by an appeal to principle than by a smear on the man who had raised the matter.

Full powers did not prevent the deputies from receiving instructions from their constituents: the grievances, protests and proposals on all matters, financial, economic, political and religious, which they presented at every meeting of the Cortes. But the crown usually refused attempts to revive the principle of redress of grievances before supply, and it granted or refused petitions as it saw fit. Even if the government did accept the petitions first, as it did in 1525 in order to get a quick vote on the taxes, it no longer made any difference. The government simply did not act on the petitions it had allowed. The next Cortes, in 1528, then started with a demand for the execution of accepted petitions. The government simply ignored this demand, like the petitions themselves ([32]). The steep rate of increase in parliamentary taxation in Castile during the sixteenth century is a measure of the crown's success in its efforts to make the Cortes into a pliable instrument of its own will ([33]).

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It may be that Chièvres was one of those conservatives — the duke of Alva was certainly another — who approved of a degree of autocracy for the government of a foreign country which he would not have tolerated in his own. At any rate, he never tried the gambit of demanding full powers for delegates in the Netherlands assemblies. If in the Netherlands the problem never took as dramatic a turn as it did in Castile in 1520, it played just as important a rôle in the parliamentary politics of that country ([34]).

was not necessarily the case, each of the 36 deputies would have got 296.3 ducats. If the deputies claimed that this was less than 4 ducats a day, the Cortes and the journeys to and from its meeting place would have had to last more than 74 days.

([32]) BERNAYS, *Zur inneren Entwicklung Castiliens*, p. 387.

([33]) KOENIGSBERGER, *The Empire of Charles V*, in *New Cambridge Modern History*, II, pp. 320 ff.

([34]) For the origin and structure of the States General cf. my *The States General of the Netherlands before the Revolt*, in *Studies presented to the Interna-*

In the Netherlands it was firmly established that the representatives of the towns (who were the ones most immediately touched by proposed taxes) would generally have powers only to listen to government proposals and then report back to their constituents, usually their town councils. They then returned to the assembly with further instructions. But this was rarely the end of the matter. The instructions, even of the deputies of any one province, were not always similar. In almost every assembly some would grant less than the government had asked for. Then those who had already agreed to the full demand withdrew their assent because they had been instructed to agree only if all other members agreed. There followed then a period of negotiations and haggling, and, frequently, the deputies were sent home a second or even third time to obtain further instructions.

For the government the system was a great waste of time and of nervous energy. From the fifteenth century onwards, exasperated ministers therefore tried to induce towns and provincial assemblies to grant their representatives full powers, at least for decisions on specific government proposals ([35]). Sometimes, the initiative came from the provinces themselves. Thus, in the States General of Brussels, in March 1537, Tournai demanded that all deputies should come with full powers ([36]). Tournai was at that time threatened by a French invasion and was therefore anxious for the government to obtain rapid help from the other provinces. But, until the beginning of Philip II's reign, Netherlands governments never seriously attacked the problem as one of principle. The case of Mons is a good example.

At Brussels, in December 1514, the emperor Maximilian I, guardian of the young archduke Charles (later Charles V), asked the States General for an *aide* of 500,000 florins, besides another 100,000 for the dowry of the archduchess Isabella, and also the expenses for a guard of 500 men-at-arms for Charles. Maximilian had never been known for the modesty of his financial demands, but the Netherlanders had, from long experience, learnt how to

tional Commission for the History of Representative and Parliamentary Institutions, XVIII, Louvain, 1958, pp. 144 ff.

([35]) *Ibid.*, pp. 146 ff.

([36]) A. Jacopsz., *Prothocolle van alle de Reysen . . . gedaen zedert ick de Stede Aemstelredamme gediendt heb gehadt . . .*, Ms. in Amsterdams Stadsarchief, transcript by E. van Bienna, pt. 2, f° 295.

handle him. The high nobility, led by Chièvres, were anxious to obtain Maximilian's consent for declaring Charles of age and thus bring to an end the regency of Charles's aunt, Margaret of Austria. They were powerful in the estates of Brabant, and it seems not unlikely that it was their influence which induced the deputies of Brabant to propose that, since the emperor would have to be paid something, the States General should agree immediately to grant him 100,000 florins. From previous experience they knew that Maximilian would be content to take what he could get. The Brabant proposal was accepted by the deputies of the other provinces, apparently without reference back to their constituents ([37]). But the town council of Mons in Hainault decided that there was no precedent for such a decision and refused to be bound by it ([38]). The governor of Hainault then tried to arrange the matter amicably, promising remission of certain duties to Mons; but he also threatened that Charles, the nobles and the ducal council would not suffer the town council's arrogance if they persisted in their refusal ([39]). On 13 January 1515 the town council of Mons was still discussing the matter when a government bailiff appeared and demanded immediate payment of Mons's share of the 100,000 florins. The councillors protested and tried to stall him, but the next day he ordered ten of them to remain in the town-hall until the city's share of 2000 fl. had been paid ([40]). The Mons deputies in Brussels then talked to Chièvres who promised to smooth the matter over if Mons paid 1000 fl. immediately and the rest as part of the *aide* they would grant to Charles on his first state visit to Hainault. After some hesitation Mons agreed to this proposal, specifying, however, that the 1000 fl. were to be regarded as a pure gift ([41]).

At no time during this dispute did the government insist on the *a priori* binding force of the vote of the deputies in the States General. They only argued that Mons should accept the vote as a loyal city, since none of the other towns, whether in Hainault or in the other provinces, had made difficulties. They put pressure

([37]) Report by the deputies of Mons, 11 December 1514. Brussels ARCHIVES GÉNÉRALES DU ROYAUME, transcript from ARCHIVES COMMUNALES DE MONS, 5e registre, f° 141.

([38]) Decision of the council, 30 Dec. 1514. *Ibid.*, f° 144.

([39]) The deputies to the council of Mons, 1 Jan. 1515. *Ibid.*, f° 145.

([40]) *Ibid.*, f° 148.

([41]) *Ibid.* f^{os} 148-52.

on Mons over the actual payment, but not over the question of principle: the right to contract out of a grant which they had not empowered their deputies to vote for.

Successive Netherlands governments were not at all certain, in fact, that they wanted the deputies to have full powers. The advantages were obvious, but there were also disadvantages. If one of the important delegations, Flanders or Brabant, for instance, opposed a grant, it might well persuade others to do the same ([42]). Mary of Hungary, Charles V's sister and governor-general from 1531 to 1555, was particularly anxious to avoid joint discussions, for, as she wrote to Charles, «there are always those who will put it into other people's heads that promises made to them in the past have not been kept» ([43]). The revolt of Ghent in 1539 — essentially a tax-paying strike — showed the danger of such influence. In 1540, Charles V therefore ordered that henceforth three of the four «members» of Flanders (Ghent, Bruges, Ypres and the group of small West-Flemish towns called the Franc of Bruges) could overrule the fourth. This ordinance, however, left out of account the other small towns and *châtellenies* in Flanders who traditionally had a right to be consulted about taxation even though, in practice, they generally voted with the big towns. Just because of this, it might well work to the detriment of the government if they were not consulted; it was never with them that resistance to government proposals originated. In 1542, Mary therefore ordered that the representatives of the small towns and *châtellenies* were not to consult with those of Ghent, but only to listen to the government proposals, report home and then bring their answers. As the eighteenth century writer Zaman pointed out, this made a joint agreement on a government proposal virtually impossible and, in practice, left the four «members» of Flanders with even greater powers than before, since they had to draw up the agreement on the government proposals ([44]). If one imagined the English House of Commons no longer allowed to debate, Zaman argued, and the rank and file members, after once stating their opinion, leaving the act to be

([42]) For examples cf. KOENIGSBERGER, *The States General of the Netherlands*, p. 151.

([43]) Mary to Charles, 4 Jan. 1536. Brussels ARCH. GÉN. DU ROY, *Papiers d'Etat* 49, f° 4.

([44]) P. DE ZAMAN, *Exposition des Trois Etats du Pais et Comté de Flandre*, Ghent, 1711, pp. 217 ff.

drafted by the M.P.'s for London, Bristol, Cambridge and Wales, then the representatives of these four would soon have complete control over the House. In just such a way, he claimed, the four «members» of Flanders were able to impose themselves on the small towns ([45]). Zaman was wrong in thinking that the preponderance of the four «members» of Flanders in matters of taxation dated from the ordinance of 1542. It had effectively existed much earlier. But the ordinance clinched it, and Zaman was correct in his appreciation of the dilemma in which the Netherlands government found itself in the question of the powers of deputies.

In practice, the deputies had to be allowed a certain degree of initiative, for otherwise no agreement could ever have been reached at all. The deputies of the smaller provinces were often specifically instructed to vote with the majority or to discuss a common policy with the deputies of Flanders and Brabant ([46]). As long as money was not involved, the patricians who dominated the town councils were generous over the powers they granted their deputies ([47]).

Underlying the problem of the powers of the deputies was the subjects' fundamental distrust of their government's intentions. After a particularly bitter debate on defence expenditure in the assembly of the estates of Holland, in November 1523, the deputies of Leiden said bluntly that those who brought reports of government promises were liars. «This was as much as to say that princes are liars, promising much and doing nothing», the secretary of Amsterdam, Andries Jacopszoon, noted in his diary. Jacopszoon does not sound as if he was shocked by such a sentiment ([48]). There were obvious objections to being represented by some one who held a government office. Albert de Loo, the advocate of Holland, was also an imperial councillor and the estates tried to have him dismissed «since he has to keep his oath both to the emperor and to the estates, and often he has to speak against the emperor and does so with fear» ([49]). Sir Roger Owen, M.P. in 1614, made the same point when he said: «King's livery hindereth their sight». *Journal of the House of Commons*, I, p. 456.

([45]) *Ibid.*, p. 224.

([46]) Cf. KOENIGSBERGER, *The States General of the Netherlands*, pp. 150 f.

([47]) L. WILS, *De Werking van de Staten van Brabant, omstreeks 1550-1650*, in *Anciens Pays et Assemblées d'Etats*, V, Louvain, 1953, pp. 11 ff.

([48]) JACOPSZ., *Prothocolle*, pt. 1, f° 59.

([49]) 22 Jan. 1523. *Ibid.*, f° 4.

Even where no divided loyalties were involved, it took a great deal of courage for a deputy to stand up to the government. For what was a burgomaster or secretary of a Dutch town, compared with the great lords and councillors at the court in Brussels ? He was not even a gentleman, as most of the members of the English House of Commons were, after the gentry had taken over the majority of the borough seats. In 1530, the representatives of Amsterdam, the burgomasters Boelenszoon and Banninck, had to tell the governor of Holland, the count of Hoochstraten, that there was little chance of meeting his tax proposals unless the government upheld Amsterdam's privilege of free grain export. The governor flew into a rage and threatened to flatten Boelenszoon and Banninck like dogs ([50]). This outburst was neither his first nor his last. A choleric old gentleman, he had little understanding of economic matters — a serious handicap, this, for a governor of a commercial province. His relations with Banninck were particularly bad. «I shall be governor when you are no longer Banninck», Jacopszoon reports him as spluttering, when what he meant to say was «when you are no longer burgomaster». The matter was serious, however, for there was a good deal of aristocratic solidarity against the pretensions of commoners. The counts of Nassau and Buren, and the lord of Brederode were heard to remark that they would not have suffered a man like Banninck in one of their own towns. Master Vincent, one of the councillors, had to intervene for the burgomaster and make his peace with the lords ([51]).

Banninck and the other bourgeois deputies would have been in an intolerable position if they had had to speak only for themselves. In the circumstances, they could plead their instructions and stand firm in the knowledge that the government would not lightly offend a powerful city, however much individual ministers might personally detest its representatives. The aldermen and burgomasters in the town councils found it easier, for their part, to be brave among friends and within the familiar walls of their own town halls than in the daunting presence of the governor-general and her court. Although the same deputies were often sent to the provincial and general assemblies, there was too much jealousy between town and town, and between province and province, for

([50]) 11 Febr. 1530. *Ibid.*, f[os] 127 f.
([51]) 5-7 June 1535. *Ibid.*, f[os] 209 f.

a strong enough feeling of solidarity to grow among the deputies which would give them the sense of protection which the growth of such a feeling gave to the members of the English Parliament.

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The restrictions which the estates imposed on the powers of their deputies were a very useful weapon in the defence of local and provincial privileges and in the struggle to keep down the rate of taxation. But would these restrictions still be useful when the estates themselves became responsible for the government of the country? When in the summer of 1576, after the collapse of Spanish authority in the Netherlands, the States General found itself in this position, nobody had as yet thought about this question. Holland and Zealand had been in a state rebellion since 1572, and the Spaniards had failed to subdue them. When Philip II's governor-general died, in March 1576, the unpaid Spanish regiments mutined. Effective government ceased almost completely. The estates of Brabant began to raise troops of their own and on 4 September 1576, these troops arrested the Spaniards and their sympathisers in the Council of State. The estates of Brabant then summoned the States General to meet in Brussels.

The States General was confronted with the urgent task of concluding peace with the rebellious provinces of Holland and Zealand and with protecting the country from the mutinous Spanish soldiers and getting them out of the country. It was necessary to raise troops and therefore to impose taxes and collect money.

In Brussels, the purged Council of State and many of the deputies quickly appreciated the constitutional implications of these problems. Brabant and Hainault were the first provinces to grant their deputies full powers. On 30 September 1576 they sent the Seigneur de Courteville to the estates of Flanders with the request that the Flemish deputies be given sufficient powers ([52]). Flanders, like Brabant, was threatened by the Spanish soldiery and seems to have quickly complied with the request. In the other provinces, the old suspicions and habits of thought were not so easily discarded. When

([52]) N. Japikse, *Resolutiën der Staten-Generaal van 1576 tot 1609*, I, The Hague, 1915, p. 9, n. 1.

the deputies of Namur, Artois, Lille-Douai-Orchies, Malines, Utrecht, Tournai and Valenciennes presented their powers, they were found insufficient ([53]). Throughout October 1576 the Council of State and the States General as a whole both negotiated with these provinces to persuade them to give their deputies sufficient powers at least for the conclusion of the Pacification of Ghent, i.e. the peace with Holland and Zealand. In the end, most of them agreed, often after heated discussion. But many, like Artois, would grant full powers only for the political questions of the Pacification and the expulsion of the Spaniards. On financial matters they would not budge: their deputies would have to refer back all tax proposals ([54]).

It was not long before the Council of State and the States General found themselves haggling with the separate provinces almost as the governor-generals had done before the revolt ([55]). Don John of Austria, the new governor-general, did his best to discredit the States General by assuring the provinces that he had nothing to do with the new taxes which were the work of the ambitious politicians in Brussels. He, the King's legitimate representative, only wanted to restore the old privileges ([56]). When, in March 1577, the States General made regulations for its own procedure, with the avowed purpose of speeding up its business, the question of the powers of the deputies was not even mentioned ([57]). The provinces had rebelled against Spain to preserve their liberties. Yet, to carry on the war against Spain they needed a representative assembly able to take effective decisions and this meant giving up some of the very liberties for which they were fighting. The southern provinces never fully resolved this dilemma. As the prince of Orange said, in 1579, the deputies at the States General were not councellors gathered together to discuss the common weal, but advocates of their own provinces and towns, whose interests they tried to further even if that meant the ruin of the other provinces ([58]). In this respect, the

([53]) *Ibid.*, pp. 9 ff.

([54]) C. HIRSCHAUER, *Les Etats d'Artois de leurs origines à l'occupation française*, I, Paris-Brussels, 1923, p. 257.

([55]) JAPIKSE, *Resolutiën*, I, pp. 120 ff.

([56]) HIRSCHAUER, *Les Etats d'Artois*, I, pp. 259 ff.

([57]) L. P. GACHARD, *Actes des Etats Généraux des Pays-Bas, 1575-1585*, I, Brussels, 1861, p. 440.

([58]) R. FRUIN, *Geschiedenis der Staatsinstellingen in Nederland*, ed. H. T. COLENBRANDER, The Hague, 1922, p. 183.

Union of Arras (the union of the southern, Catholic provinces which returned to their old allegiance to Philip II) was a reaction against the attempt to introduce full powers for the deputies of the States General at the expense of the powers of the towns and provinces. In this respect, too, Don John of Austria and his successor, the duke of Parma, were right when they claimed that they wanted to restore the old privileges. When Secretary de Moy, of Antwerp, wrote a treatise on the States General and the estates of Brabant, about 1595, he described the powers of the deputies exactly as they had been before the revolt ([59]). But, by that time, these privileges had become almost irrelevant. The States General of the southern provinces could do little more than fight ineffective rear-guard actions against the financial demands of a now all-powerfull government.

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In Holland and Zealand the problem of the powers of deputies and of effective government by an assembly of estates had arisen already in 1572 when the cities of these provinces had opened their gates to the Sea Beggars. In September 1573 the representatives of the nobles and towns of Holland began to discuss the problem formally and, on 1 February 1574, they passed a resolution on their own constitution. The deputies were to take an oath that, in all matters concerning the welfare of the country, they were to «advise and decide in such a way as, according to their reason and right conscience, they should find for the general weal, without affection, favour or disfavour, to particular towns or persons». Decisions were to be taken by majority vote, except that no one was to be forced to consent to taxes or contributions against his will. In case of disagreement, the prince of Orange, as governor of the province, and members of the Council of Holland whom he deputed for the purpose were to arbitrate ([60]).

([59]) H. DE MOY, *Tractaet van Beden by den hertogen van Brabant gedaen aen Staeten General oft van Brabant* . . ., f° 5, Antwerp, Stadsarchief MS. 18th century copy.

([60]) P. BOR, *Oorspronck, begin ende vervolgh der Nederlantsche Oorlogen*, I, Amsterdam, 1621, book 7, f° 7. Partly quoted in S. VAN SLINGELANDT, *Staatkundige Geschriften*, I, Amsterdam, 1784, pp. 108 f.

Clearly, this ordinance was open to conflicting interpretations. It did not attempt to define the powers of deputies, except in financial matters. But, if it did not specifically endow deputies with powers beyond those given them by their constituents, it could be, and was in fact, interpreted as doing this. Orange managed to make the system work, because of his position as governor of the provinces and, more importantly, because he was generally trusted. In the Articles of Union which Holland, Zealand and West-Friesland concluded in 1575, at least one difficult point was cleared up when the provinces agreed that resolutions taken by the estates in common should have binding force, and that if any one of the allies refused to be bound by them, he should be compelled to do so by the others ([61]). Even so, the insistence of the towns on withholding from their deputies full powers in financial matters still led to much friction with the prince. In practice, it was the prince's skill in handling the estates which overcame the inherent difficulties of the system. Thomas Wilkes, Leicester's representative in The Hague in 1587, has left us an account of William's methods: «He always entertained some five or six of the most credit; the needy ones with pensions, the rest with presents, and all with calling them to his table and society. Through these he wrought upon the rest, and there was nothing handled in their assemblies but he knew of it beforehand». When he had anything to propose, he always consulted with these persons «whether the matter would pass or be impugned». He knew the arguments that would be brought against his propositions and came «armed with the answers and counter-reasons to the wonderful admiration of all, and so prevailed» ([62]).

Perhaps those who told Wilkes about Orange's methods deliberately exaggerated his political virtuosity and its effectiveness, calculating, quite correctly, that when Wilkes wrote to the queen, he would point the contrast with Leicester's political ineptitude and advise her to emulate the prince. The Dutch certainly did not fail to give Leicester his chance, though it was not entirely Leicester's fault that he failed to take it.

([61]) Articulen van Verbondt tusschen de Landen ende Steden, onder gehoorsaemheydt des Princen van Orange, als Stadthouder ende Capiteyn Generael over Hollandt, Zeelandt end West-Vrieslant ... para 9. *Holland Staten Resolutien 1575*, p. 246.

([62]) Wilkes to Elizabeth I, 12 July, 1587. *Calendar of State Papers Foreign*, XXI, Pt. 3. April-December 1587. London, 1929, p. 164.

The assassination of Orange, in Delft on 10 July 1584, had shocked the States General and, more especially, the estates of Holland, into an immediate reappraisal of the constitutional problem. The States General was in session in Delft on that very day and immediately wrote to the members of the Union of Utrecht, requestioning them to despatch deputies with full powers to take decisions on the government of the country ([63]). The estates of Holland and Zealand wrote in the same sense to Utrecht inviting its deputies to a separate meeting of representatives of the three provinces. In Utrecht, however, anti-Holland feeling was strong. On 15 July the estates of Utrecht instructed their deputies at The Hague that they should object to absolute powers for deputies in the negotiations about the confirmation of the Union of Utrecht. The estates of Utrecht did not think it suitable, in the prevailing circumstances and in such an important matter, to give anyone absolute power to decide on the government of the country, so ran the instructions. «Not only was this not suitable for the estates, but in the aforesaid country (of Utrecht) nobody could be found of sufficient intelligence to be allowed to exercise such absolute powers». The deputies should only consult with those of Holland and Zealand and with those of the neighbouring provinces, and then refer their proposals back to their own estates ([64]).

Nevertheless, there was general agreement to continue the Union of Utrecht, i.e. the union of all provinces which had abjured their allegiance to Philip II. Holland, Zealand and Utrecht still had their separate assembly and a common council, and the States General as a whole appears to have been willing to accept the leadership of this group of provinces. After heated debates, the States General on 18 August 1584, accepted the *acte van vereeninge*, the act of union by which the Union of Utrecht was formally confirmed and a new council of state was created as the highest executive organ of the Union. Orange's son, the young Maurice of Nassau, was invited to become the first councillor ([65]).

([63]) J. HUIZINGA, *De Vergadering der Staten-Generaal op 10 Juli 1584 na den noen*, in *Bijdragen voor Vaderlandsche Geschiedenis en Oudheidkunde*, ser. 4, vol. 6, The Hague, 1907, p. 368.

([64]) 15 July 1584 (o.s.) Instructie voor den edelen ... Meester Floris Heermade, etc. M. L. VAN DEVENTER, *Gedenkstukken van Johan van Oldenbarnevelt*, I, The Hague, 1860, pp. 50 ff.

([65]) L. DELFOS, *Die Anfänge der Utrechter Union 1577-1587*, in *Historische Studien*, Heft 375, Berlin, 1941, pp. 260 ff.

The central government of the Union of Utrecht was now at least formally stronger than it had ever been before. During the debates of the provincial estates and of the States General, in July and August of 1584 most of the deputies had enjoyed full powers. Otherwise they would not have been able to resolve so quickly the political and constitutional crisis caused by the death of the prince of Orange. But no one had suggested that the deputies should enjoy such powers permanently. Very soon the estates of Holland even showed themselves unwilling to abide by their own resolutions of 1574 and 1575: that majority votes were to be binding in all matters except taxation.

They debated the problem in February and March of 1585. It was agreed that deputies should always present their instructions and powers. They were to swear to uphold all privileges, laws and customs of the country, «in so far as these should not be prejudicial to the privileges and laws of individual towns». They were «to help to further all matters concerning the whole country ... and decide as they were instructed by their principals (i.e. their constituents) and, moreover, to serve in all matters according to their reason and conscience for the common welfare». They were also to keep all discussions secret — except from their principals ([66]).

This masterpiece of constitutional obscurity proved eminently acceptable to all parties. It tilted back the balance of power in favour of the town councils; but it still left a good deal of elbow-room for skilful politicians, like Oldenbarnevelt, whose influence was strong both in their own town council and in the assembly. It proved, however, much more difficult to come to an agreement on the question of majority votes. Up to this time, no member of the estates could be forced to accept majority decisions in financial matters. This immunity was now extended to cover religious and constitutional matters and questions of war and peace, «and similar important matters concerning the state of the country». But if in such cases there was a two thirds majority for a proposal, the matter was to go to arbitration before a neutral commission nominated by the estates ([67]). Gouda immediately protested that they would not be bound by a two thirds majority, nor by arbitration, in the proposal to offer the sovereignty over the provinces to the

([66]) *Holland Staten Resolutien 1585*, pp. 110 ff.
([67]) *Ibid.*, pp. 113 f.

king of France ([68]). Amsterdam went further and threatened to withdraw altogether if the two thirds majority rule was applied to financial matters ([69]). Faced with this ultimatum by the greatest town of the province the assembly committed several members of the Council of Holland to go to Amsterdam and try to win over the city fathers ([70]). There is no evidence that the commission was successful, and the matter was left undecided.

In the meantime, further and even more important decisions had to be taken. The duke of Parma was closing in on Antwerp, and the military position of the Union was rapidly deteriorating. On 11 May 1585 the States General of the provinces constituting the Union of Utrecht resolved to offer the sovereignty to Elizabeth I ([71]). Gouda had given its deputies to the estates of Holland powers to discuss requests for help from England. But when the question of sovereignty came up for discussion the magistrates of the city ordered the deputies to return home. Again the estates of Holland sent a commission but Gouda remained unmoved. In the formal offer of sovereignty to Elizabeth by the estates of Holland, Gouda was not mentioned with the other cities ([72]).

We now know that Gouda's attitude was due to the Catholic and Spanish sympathies of its magistrates ([73]). Contemporaries knew it, too, no doubt, although this explanation is not even hinted at in the official resolutions of the estates of Holland. At least one of Gouda's representatives in the estates of Holland, the pensionary Franchois Vranck, certainly did not share the Spanish sympathies of his town council. Once more it is clear that there were very good practical reasons, and in this case rather sinister ones, why a town should want to restrict the powers of its deputies to commit it to resolutions of the assembly of estates. If the estates were doubtful as to the powers they would allow their deputies, they were still convinced that only a strong central government could retrieve the desperate military situation. When Leicester arrived in the Netherlands, in December 1585, the States General made him governor-general and, in February 1586, gave him greater powers than

([68]) *Ibid.*, p. 110.
([69]) *Ibid.*, pp. 165 ff.
([70]) *Ibid.*, p. 165.
([71]) *Ibid.*, pp. 268 f.
([72]) J. Huges, *Mr. Franchois Vranck*, pp. 42 f.
([73]) A. M. van der Woude, *De Goudse Magistraat en de Strijd tegen de Koning*, in *Bijdragen voor Geschiedenis der Nederlanden*, XIII, No. 2, 1958, pp. 101-7.

they had been willing to allow any of his predecessors, including even the great prince of Orange (74).

The constitutional position of the States General and its deputies, however, as well as that of the provincial estates, was obscure in the extreme. Leicester certainly did not understand it, any more than he understood all the other confused political problems of the Netherlands. Soon he was quarrelling violently with the estates of Holland which thereupon tried their best to limit his powers (75). In March 1587, while Leicester was back in England, Thomas Wilkes, the English representative at The Hague, tried to clarify the position in a memorandum addressed, in French, to the States General and the estates of Holland. «La souveraineté, à faulte du Prince légittime, appartient au peuple», Wilkes wrote, «et non à vous, Messieurs, qui n'estez que serviteurs ministres et deputez du dit peuple et avez toutes vos commissions et instructions limitées, non seullement au temps mais aussy aux affaires, . . .» Sovereignty, he continued, was limited neither in power nor in time (76), and the deputies of the States General did not represent this sovereignty, for the people had given the general and absolute government to His Excellency (i.e. Leicester) to exercise it as sovereign power. He was the guardian of this sovereignty until the prince or the people chose to revoke it. In the state of the United Provinces there was, in fact, only the people who could do this. According to the principle of common law, that only he who has given power can take it back (*quo jure quid statuitur eodem jure tolli debet*), only the people, the masters of the deputies in the provincial estates and in the States General, and not these deputies themselves, could take any power away from the governor-general. The deputies had not received any such commission. They had either not understood this position, Wilkes concluded triumphantly, or they were guilty of the crime of disobedience (77).

For the first time in the long history of the problem of the powers of the deputies in the Netherlands, some one had tried to argue it

(74) P. Geyl, *The Revolt of the Netherlands* (1555-1609), 2nd ed., London, 1958, p. 203.

(75) Cf. my *Western Europe and the Power of Spain*, in *New Cambridge Modern History*, III, ch. IX, C.

(76) Cf. J. Bodin, *Les Six Livres de la République*, I, VIII, Paris, 1583, pp. 122 ff.

(77) Quoted in Huges, *Mr. Franchois Vranck*, pp. 69 f.

on the basis of political and legal principles and to link it systematically with a theory of sovereignty. There is some irony in the fact that it should have been a foreigner, and an Englishman at that, even if his theory of sovereignty was no more than a pastiche of Bodin's. Previous arguments with Wilkes had already led some deputies of the estates of Holland to claim sovereignty for the estates ([78]). Now Wilkes had forced them to define their position. They entrusted Franchois Vranck, the pensionary of Gouda, with drawing up a reply. Vranck's long justification was to become the basis of Netherlands political thought for a long time ([79]).

Vranck argued that sovereignty in Holland and Zealand did not reside in the common people, as Wilkes had maintained, nor in the 30 or 40 persons assembled at the meetings of the estates. Holland and Zealand had been ruled for 800 years by counts and countesses to whom the nobles and towns, i.e. the estates, had entrusted the sovereignty. In cases of minority or other incapacity of the ruler, the estates had exercised this sovereignty by appointing guardians. The origins of the present wars (i.e. against Spain), whatever people had said about them, were due to Philip II's attempt to introduce Spanish and other foreign soldiery into the country and force it to do what the estates had not approved. The towns were governed by councils constituted of the most notable persons of the whole community, anything from 24 to 40. These bodies (*vroedschappen*) were as old as the towns themselves and their members took their oaths to the cities and not to the prince. They served for life and filled vacancies by co-option. They elected the burgomasters and other magistrates. These councils and the nobles, therefore represented the whole state. They sent their deputies to the meetings of the estates of Holland with such powers and resolutions as they judged to be for the service of the country. Besides, for the duration of the war, the deputies were empowered «to discuss and resolve on all matters concerning the welfare and the preservation of the state». Their authority derived from the com-

([78]) Wilkes to Leicester, 22 March 1587. H. BRUGMANS, *Correspondentie van Robert Dudley, Graaf van Leyster, 1585-88*, pt. 1, in *Werken ... Historisch Genootschap ... Utrecht*, Ser. 3, No. 57, Utrecht, 1931, pp. 145 ff. Also quoted in HUGES, *Mr. Franchois Vranck*, p. 72.

([79]) It is printed in BOR, *Oorspronck*, III, book 22, f[os] 49-54, and partly in HUGES, *Mr. Franchois Vranck*, pp. 75 ff. It is also summarised by GROTIUS, *Verantwoordingh van de Wettelijke Regieringh van Hollandt*, Paris, 1622, p. 8.

missions granted them by their principals with whom they must keep in constant touch during the assemblies and by whom they could be called to account if they did not carry out their instructions. «For what is the power of a prince, unless indeed he were a tyrant», Vranck concluded his argument, «without a good understanding with his subjects ? What understanding can he have, what support can he draw from them, if he lets himself be persuaded to become a partisan against the estates who represent the community or, to speak more clearly, against his own people ? And secondly, how can the state continue to exist if it could happen that the community should be persuaded to become a partisan against the estates, that is, against the nobles, the magistrates and the councils of the towns ?» ([80]).

Vranck's knowledge and use of history was certainly highly dubious. His argument that the *vroedschappen,* the urban oligarchies in their town councils, represented the whole community was quite arbitrary, and his peroration was mere rhetoric. But he had produced a masterly description of the facts of the political situation in Holland and of the true seat of authority and, consequently, of sovereignty. There was a respectable medieval tradition for the grounding of rights in custom and in actual practice, and this empirical and conservative tradition remained alive and important in Europe. Burke might well have approved of Vranck.

Wilkes certainly seems to have been impressed. At any rate, by July 1587, he had retreated far from his unaccustomed rôle of a Bodinian political theorist. He wrote to the queen that, if she refused the proffered sovereignty for herself, she would think that it should «remain with such as now, by the laws of those countries, do retain the same, which is not the common people, as some are persuaded, but in the *Vroetschap,* who are the chiefest burgers in the cities and out of whom are drawn the magistrates and out of them the persons called the Estates. This *Vroedschap* are most jealous of their liberties and privileges for defence whereof they now make war against their lawful sovereign and charge themselves with impositions which no prince could force them to» ([81]). Considering Wilkes's former arguments, both to Leicester and the Estates of

([80]) Bor, *Oorspronck,* III, book 22, f° 50.

([81]) Wilkes to Elizabeth, 12 July 1587. *C.S.P. Foreign,* XXI, pt. 3, April-December 1587, p. 163. Same letter as cited p. 234, n. 62.

Holland, this was certainly cool, and it may have been just as well that the Dutch did not see the remark about their making war against their lawful sovereign. But Wilkes was a realist and he appreciated that Vranck had given him an accurate picture of the actual political situation.

Vranck had been very precise about the problem of sovereignty. He had been much less so about the powers of the deputies in the estates of Holland. He was clear, just as Wilkes had been, that they derived their powers from their constituents and that they were bound by their instructions; but nobody had ever doubted that. The question was rather, how much discretionary power the deputies were to be allowed and how far their decisions were to be accepted as binding in those «matters concerning the welfare and preservation of the state», of which Vranck had spoken but which he did not define. But, once the theory of the sovereignty of the estates of Holland and of the other provinces in the Union was accepted — and the States General itself reiterated it, in 1621 ([82]) — a theory such as the English theory of the sovereignty of the «king in Parliament» could not develop. The question of the powers of the deputies and of the binding force of decisions remained what it had been all along: a matter of practical politics, to be decided in accordance with the willingness of the members of the estates to trust one another and the central government of the Union at any particular time.

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The problem of the powers of the deputies in sixteenth century assemblies was not an abstruse and theoretical question. It was a practical problem, at the very heart of the conflict between monarchy and estates. In France it did not become a live issue because this conflict was fought in terms of a struggle, not between the crown and the States General, but between the crown and highly organised political-religious parties. In England, owing to its different social structure and the unusually great power of the crown in the middle ages, the question of the powers of members of Parliament had been settled already at the end of the 13th century.

([82]) GROTIUS (H. DE GROOT), *Verantwoordingh*, p. 8.

In the sixteenth century it was therefore not a subject for conflict. Nevertheless, it coloured the whole history of the relations between crown and parliament. For the crown it meant that Parliament, with its highly developed *esprit de corps* and its sophisticated committee procedure, was a much more useful instrument of taxation and legislation than the continental assemblies with their cumbrous procedure of referring back all government proposals to the individual provinces and towns. But it also meant that Parliament could become a much more formidable instrument of opposition to the crown; for the crown, unlike the governments of the Netherlands, could never by-pass Parliament by negotiating directly with shires and boroughs. The Habsburg governments of the Netherlands were fully alive to the possible dangers of such a pattern — more so, perhaps, than the Tudor governments of England, which never looked beyond the advantages of the full powers of members of Parliament.

In the Netherlands and in Spain the problem of full powers had not been settled by the beginning of the sixteenth century, and, in both countries, it remained a fruitful source of conflict. Neither crown nor estates bothered about the theoretical implications of sovereignty which the question involved; but both were highly conscious of its practical importance. In Castile the conflict over the powers of deputies was one of the immediate causes of the revolt of the Comuneros, in 1520. But the Comuneros did not think of the Cortes as an alternative government to the crown, nor even as its partner. They were therefore content with the purely defensive demand for the strict limitation of the powers of deputies. When the rebellion was defeated and the will to resist the crown had been broken, the monarchy, on its side, did not have to abolish the Cortes. To get what it wanted, it only had to insist on full powers for deputies who could be bribed or bullied into acquiescence in its demands.

In the Netherlands the state had only recently been formed by the union of independent duchies and counties under the House of Burgundy. The towns had kept their autonomy and a tradition of resistance to the demands of their princes. As in Spain, the limitation of the powers of their deputies was a defensive weapon. During the rebellion against Philip II, the estates became directly responsible for the government of the country. Immediately it became clear that the deputies would have to have far greater powers

of decision than they had been allowed hitherto. This was regarded as an unfortunate necessity. One might argue about it in detail, but it did not alter the accepted principles of representation. It was realised only gradually that these principles themselves were involved. The debates about the form of government which followed the death of William the Silent showed the beginnings of this realisation. But it was the English intervention in the Netherlands, the ambiguous position of the earl of Leicester, and the political theories propounded by Thomas Wilkes which finally forced the estates of Holland to produce a comprehensive analysis of the principles on which they based their actions and authority. Even then, there remained the old reluctance to argue the question dogmatically. Franchois Vranck said nothing about natural law or natural rights. He developed a purely historical theory of sovereignty and he firmly put the deputies of the estates of Holland in their place, as mere delegates of the regent class, the nobles and patricians who ran the towns. From them alone the deputies received their powers and authority. But the extent of these powers he left vague. That was still only a practical problem. Vranck and the rest of the regent class of the Netherlands thought it best to leave it to their own common sense and practical experience.

H. G. KOENIGSBERGER.

XIII

The Loss of Royal Initiative and the Decay of the Estates General in France, 1421-1615,

BY

J. RUSSELL MAJOR,
Emory University.

In 1924 Professor Wallace Notestein read a paper before the British Academy in which he described how the members of the House of Commons won the initiative from the crown during the reign of James I (1). It was a technical, detailed study of parliamentary procedure, but it was fraught with significance. He showed us how the Tudors ensured a cooperative Parliament through the activities of their councillors and how a combination of circumstances permitted the more independently minded members of the Commons in the early sixteen hundreds to escape the tutelage of the crown (2).

During this period, Parliament learned to function efficiently as a result of procedures and precedents established and tested by constant use. At the same time, the English people came to look upon Parliament as a partner in the government so that when the great split came in the mid-seventeenth century, there was an institution capable of challenging the position of the crown, and though Parliament faltered badly in its first effort to govern, it was slowly able to assume control of affairs after 1688. The Tudor monarchs had unwittingly aided an institution that could and did provide an alternative to royal absolutism.

Let us now travel across the channel to France. Here we find the Valois-Bourbon monarchs struggling with much the same problems as their Tudor-Stuart contemporaries. Occasionally during the Wars of Religion and again in 1614 the kings turned to the Estates General, but at no point did that institution prove to be a satisfactory instrument for their policy. These opportunities were equally wasted from the standpoint of those who advocated a more important role

(1) The research for this article was made possible by generous assistance from a Fulbright Fellowship, a John Simon Guggenheim Memorial Fellowship, a three year Faculty Research Fellowship of the Social Science Research Council, and Emory University. It was read in a slightly different form at the American Historical Association on December 29, 1956 in a session sponsored by the American Committee of the International Commission for the History of Representative and Parliamentary Institutions. I am indebted to my colleagues, Professors G. P. Cuttino, W. D. Love, and J. J. Mathews for reading and criticizing this paper.

(2) W. NOTESTEIN, *The Winning of the Initiative by the House of Commons*, in *Proceedings of the British Academy*, XI, 1924-25, pp. 125-175.

for the representative institution in the government of the nation. The procedure used in the Estates General during this period prevented either the crown or the parliamentarians from exercising the necessary initiative to make it an effective institution. In France there was no alternative to royal absolutism save anarchy. Why had the Estates General become so ineffectual ? It is necessary to turn back to the reign of Charles VII in search for the answer.

From the standpoint of royal initiative, the assemblies during the reign of Charles VII were of two general types: those that were held in the presence of king in council and those that were not. The former included both the assemblies of the three estates of the kingdom, or that part of it controlled by Charles, and of the three estates of Languedoïl. The latter consisted of the provincial, bailiwick, and other local estates (3).

Weak and indolent though he was, Charles VII held the initiative in the twenty-odd meetings of the Estates General and the estates of Languedoïl he held between 1421 and 1439. This statement is based on three facts. First, there were in the estates no revolts such as had occurred in 1356 when Étienne Marcel had challenged royal authority. The condition of France during this part of the reign of Charles VII was at least as bad as in 1356. Over half the country acknowledged a Lancastrian as its sovereign while Charles had neither money, troops, nor too certain a claim to the throne. Yet, the deputies did not revolt !

Second, Charles VII was able to push an unpopular kind of tax through seven different meetings of the Estates General, or the estates of Languedoïl, but except for the last meeting the provincial estates later forced him to accept instead an equivalent collected in the form of the more popular *taille*. It is therefore evident that the king controlled the Estates General well enough to get a disliked form of taxation approved, but did not control the subordinate provincial estates to the degree necessary to get their consent (4).

Third, Charles VII sometimes summoned the western provinces of Languedoïl to get consent to a particular tax of a fixed amount

(3) There were a few instances in which Charles VII presided over the provincial estates, but it was impossible for him to be present at more than a small percentage of the meetings.

(4) J. RUSSELL MAJOR, *Representative Institutions in Renaissance France, 1421-1559*, in *Studies presented to the International Commission for the History of Representative and Parliamentary Institutions*, XXII, Madison, 1960, pp. 25-45.

to fall on the bulk of the kingdom and then turned to the eastern provinces and there obtained consent for the identical tax, for the identical amount, to fall on the identical area. Thus in October 1424 the representatives from the western provinces met and voted a *taille* of 1,000,000 *livres* that was almost certainly intended to be collected from east and west alike, and then in November, the eastern provinces met and consented to the same tax in the same amount. Again in November 1426 the western provinces voted a *taille* of 120,000 francs and a hearth tax to be collected from the entire area. Then in December the eastern provinces voted the same two taxes in the same amount (5). It is evident that the king and his councilors could not go before one group of representatives and have them set a figure for the financial needs of the crown and agree on what form the intended tax should take, and then go before the representatives of the other provinces and get them to agree that the crown needed exactly the same sum to be collected by exactly the same tax, unless they held the initiative in at least the second assembly.

Charles VII kept the initiative in the Estates General in very much the same manner as the Tudors did a century later in England, but rather than piece together scraps of evidence from his various assemblies, let us describe the techniques used by his son, Louis XI, in the estates of Tours in 1468, for here there are several journals to aid us. Louis had summoned the three estates on this occasion to explain to them why it was imperative for the crown to keep the wealthy duchy of Normandy rather than give it to his brother, Charles. He saw to it that from their arrival at Tours until their departure, the representatives were carefully herded from place to place and from debate to debate by the spokesmen of the crown. Notices were placed on the gates and churches of the city directing the deputies to report upon their arrival to the royal clerk to verify their powers (6). The estates opened with brief talks by the king and several magnates and a two hour address by the chancellor, who explained the problems that would be created if Normandy were lost. During the three days that followed, with the royal clerk serving as secretary of the assembly, the councilors and other loyal friends of the king were called upon one after another to give

(5) *Ibid.*, pp. 28-29.

(6) ARCHIVES COMMUNALES, Rodez, BB 3, f° 52.

their opinion, and each in his own words explained why the king's brother should not be allowed to keep Normandy. By the time the representatives got the floor they had been sufficiently «brain-washed», or perhaps convinced, to accept in the presence of the councilors the royal policy, and the recommendations the three estates submitted at the end of the session were all that the crown could have wished. By the effective use of his councilors and his clerks Louis XI had turned a meeting of the Estates General into a propaganda weapon against his adversaries ([7]).

The very limited material available on the deliberations of the estates of Charles VII indicates that the same close relationship existed between the councilors and the deputies. They were in close contact before the estates opened and one of the lasts acts of the deputies before leaving was to obtain an order from the chancellery for their payment by their fellow townsmen. Even the king was expected to be present during a good part of the deliberations and the Bishop of Beauvais sharply criticized Charles VII for failing in this duty at the assembly at Orléans in 1439 ([8]).

Charles VII decided to abandon the Estates General and the estates of Languedoïl around 1440. In doing so he was not motivated by fear. He had effectively controlled the meetings for two decades during a time when he was very weak. He had every reason to anticipate doing so now that he was strong. Rather he abandoned the Estates General and the estates of Languedoïl because he no longer had need of them. In financial matters these two institutions served only to explain the need for money and to fix the amount and the nature of the tax in the hope of influencing the provincial estates to take favorable action, for the consent of these last assemblies had to be obtained as well before the money could be collected. Where there were no provincial estates, the consent of the privileged towns was required. Where there were great nobles, they had to be given a share in return for permitting the levy to be collected in their domain. Neither the provincial estates nor the towns hesitated to give less than what was asked or to insist on changing the nature of

([7]) MAJOR, pp. 54-58.

([8]) C. DE GRANDMAISON, *Nouveaux documents sur les États généraux du XV^e siècle*, in *Bulletin de la Société archéologique de Touraine*, IV, 1877-79, pp. 139-155; G. DU FRESNE DE BEAUCOURT, *Histoire de Charles VII*, Paris, 1881-1885, I, pp. 356-365; II, pp. 577-601; III, pp. 434-452, 501-509; Pierre L. PÉCHENARD, *Jean Juvenal des Ursins*, Paris, 1876, pp. 198-207.

the tax. Thus in financial matters the Estates General and the estates of Languedoïl were useful only when it was necessary to apply additional pressure on the people to accept some form of taxation. By 1439 Charles VII felt strong enough to go directly to the provincial estates and the towns for consent without any preliminary propaganda. The victory at Orléans, the triumphant coronation at Reims, and finally the Burgundian alliance of 1435 had so changed his fortunes that final success seemed assured ([9]). Between 1439 and 1560 we know of only one occasion in which a full meeting of the Estates General was asked to vote a tax. In this instance, it might be added, the money that was voted had to be consented to by the provincial assemblies just as before ([10]).

There was certainly no reason for Charles VII to have preferred dealing with the provincial estates or the towns, for their deliberations were far more difficult to control than those of the national assembly. «When the representatives of the kingdom met, they were in his power. Persuaded by the royal councilors, impressed by the royal majesty, surrounded by the palace guard, and far from their homes, they rarely mustered sufficient courage to resist the king's desires. In the provincial estates and municipal assemblies, on the other hand, the reverse was true. The king was not present. In his place stood one or more royal commissioners who inspired little awe among the local leaders. There was no council to guide the deliberations and the initiative was seized by the members of the assembly who treated and bargained with their monarch rather than follow his lead. Secure in a fortified town or castle, surrounded by their friends, and far from the royal army, they did not hesitate to change the form of a tax, reduce the amount of the levy, or even refuse to vote anything at all. If they granted money, they were likely to request concessions in the same breath» ([11]). Thus it was the provincial estates and the privileged towns that were the true checks on royal taxation, and it is not surprising that Charles VII eventually abandoned a few of the former when he felt strong enough to collect the taxes without winning their consent.

The important thing, however, is that Charles VII *did* cease to convoke the Estates General and the estates of Languedoïl. If he and

([9]) MAJOR, pp. 34-39.
([10]) *Ibid.*, pp. 115-116. The meeting was the Estates General of Tours in 1484.
([11]) *Ibid.*, p. 38.

his successors had continued to summon them after 1440 as much as they had before, would not these institutions have become regarded in the minds of the people as playing an essential role in the government of the kingdom ? Might not procedures have developed that would have enabled the estates to function effectively, so that the deputies would have been in a strong position to challenge the crown during the time of division that occurred during the late sixteenth and early seventeenth centuries ? This is what was to happen in England a little later. Why could it not have happened in France ?

It is true that the period 1440-1530 was not as devoid of large assemblies as we have often been led to believe. There were only a handful of meetings of the Estates General, but the kings frequently summoned members of one or two estates to give advice on particular subjects. When ecclesiastical matters were under consideration, the clergy was convoked; when military, «the captains and chiefs of war»; when judicial or financial, the sovereign courts; when commercial, the deputies of the towns. The council and other royal officials were present and often various mixtures of the above groups attended. It is impossible to list all the meetings, but some idea of their frequency may be gathered from the fact that Louis XI held about ten assemblies of the deputies of the towns during a reign of twenty-two years ([12]).

These meetings were frequent until the middle of the reign of Francis I. They undoubtedly served to give the councilors experience in controlling deliberative bodies and to acquaint select elements of the population with the problems of government. On the other hand, their limited objectives and their very variety prevented the discovery of the more complex procedures that were necessary if a representative institution were to cope with the manifold problems of the sixteenth century. For example, our modern system of committees, so necessary for every type of deliberative assembly, could develop only if the same deputies were summoned over and over again to assemblies where it was necessary to deal with many different problems. In time they would then learn to break up into different groups to speed the deliberations; some might study taxation, others religious affairs, and still others legal administration. In this manner the deputies would become experts in this or that field and the work of the assembly would be greatly speeded. The limited

([12]) *Ibid.*, pp. 47-59, 117-140.

purpose of the meetings between 1440 and 1530, on the other hand, meant that there was no need to divide the work among those who attended. When a meeting was held to discuss the foreign currency problem, foreign currency alone needed to be considered. Furthermore, the wide variety of meetings meant that the same people were not called upon to work together year after year and that no one type of assembly ever became so firmly implanted in the minds of the people that they were likely to look upon it as sharing in royal authority. The assemblies of the clergy, the towns, the sovereign courts, and the great nobles so common during this period served more to keep alive the idea that the wise king acted only upon the advice of his leading subjects than they did to develop new deliberative techniques.

Even these assemblies were held less frequently after 1530, so that when a return was made to the use of the Estates General a generation later, the primitive procedure of the earlier period had been forgotten. It was necessary to start from scratch and build anew.

The first thing that strikes the historian as he studies the meetings of the estates beginning in 1558 and ending in 1615 is that the government had lost the initiative in the deliberations. No longer were the royal councilors able to direct the efforts of the deputies towards the preconceived solutions desired by the crown as had been done in the reigns of Charles VII and Louis XI. During the fifteenth century the government had been able to get national assemblies to vote for taxes, but in 1558 when the estates were merely asked to furnish a list of 3000 persons who could lend the king 1000 *écus* each at 8 1/3 % interest, they balked, and only the enthusiasm brought about by the news of the capture of Calais led to a more cooperative frame of mind. In 1560 and 1561 the secular estates refused to vote taxes, and in 1576 and in 1588 they were equally recalcitrant ([18]). Thereafter, the crown did not bother to ask the deputies for financial aid. Meanwhile, the estates were making suggestions concerning every aspect of royal policy. They showed no respect for the prerogative and their *cahiers* which had been brief documents of specific complaints in the earlier age, now became

([18]) *Ibid.*, pp. 144-147. J. Russell Major, *The Estates General of 1560*, Princeton, 1951, pp. 97-114; J. Russell Major, *The Third Estate in the Estates General of Pontoise, 1561*, in *Speculum*, XXIX, 1954, pp. 460-476. Georges Picot, *Histoire des États généraux*, Paris, ed. of 1888, III, pp. 32-85, 398-427.

lengthy proposals for a general reorganization of the state filling an entire printed volume for a single meeting ([14]). To restore a semblance of order in the estates of 1588, Henry III found it necessary to assassinate the Duke of Guise and to send a band of men into the chamber of the third estate in the hope of arresting the opposition leaders. The initiative had passed from the government just as it was to do later in England. Violence remained the only recourse of the crown.

Certainly one of the causes of the loss of royal leadership lay in the temper of the times. The deep distrust of ultra-Catholic and Protestant alike of the religious policies of the crown, coupled with political, social, and economic grievances, was sure to cause trouble in the Estates General even though the councilors of the last of the Valois had been as effective leaders as their predecessors.

A new method of choosing the representatives, however, was of equal importance, for it led to the assemblies being composed of men less favorably disposed to the crown and to procedural changes in the Estates General itself that blocked the effective exercise of royal initiative.

Until 1483 only the towns and chapters habitually elected deputies to the Estates General. The remainder of the clergy and the nobility who attended, did so by virtue of writs of summons sent them by the royal officials at the capital or their subordinates in the bailiwicks ([15]). The most important members of the two groups might well expect to be called by right, yet certainly the government had a degree of latitude among the others it chose. Beginning in 1483, however, the practice of holding elections in the bailiwick for all three estates was inaugurated, thereby giving the disaffected elements in the provinces the power to choose their own spokesmen. By 1561 there is evidence that the Protestants were engaged in block voting and other forms of electoral manipulation ([16]). In 1576, and especially in 1588, the Guise and the Catholic League showed a decided mastery of this highly important modern art. The situation could have been

([14]) LALOURCÉ et DUVAL, *Recueil des cahiers généraux des trois ordres aux États généraux*, Paris, 1789, 4 vols.

([15]) There were some exceptions to this rule for here and there instances have been found of provincial estates electing deputies prior to 1483. MAJOR, *Representative Institutions . . .*, pp. 66-67.

([16]) N. VALOIS, *Les États de Pontoise*, in *Revue d'histoire de l'Église de France*, XXIX, 1943, pp. 237-256.

mitigated only by the crown's taking an active part in the electoral campaigns, but it did not. Admittedly, there is instance after instance of local royal officials altering the electoral procedure to obtain the choice of a deputy favorable to the royal cause, but each time they were overruled by the king's council, so great was the crown's respect for the privileges of its subjects. Not one incident prior to the Fronde has been found in which an illegal election was allowed to stand even though the deputy so chosen was an outspoken advocate of the royal cause ([17]). In 1614 Marie de Medici did take her son on a well-publicized tour of the western provinces. This action, plus the ineptness of the opposition led by the Prince of Condé, made possible the election in that year of the only Estates General favorable to the government since the reign of Louis XI ([18]).

In addition to permitting the choice of deputies badly disposed towards the crown, the new electoral procedure led to confusion in the Estates General itself ([19]). Since it was the bailiwick that elected the deputies, the idea developed that each bailiwick should have the same vote. This in itself seemed just since the bailiwicks named various numbers of deputies depending on the whim of the electorate. Voting by head would have given a jurisdiction that had chosen three deputies for one estate three times the weight of its neighbor that had chosen only one. On the other hand, voting by bailiwick was more cumbersome than voting by head. The obvious solution to the difficulty was for the bailiwicks to elect the same number of deputies, and the crown soon recognized this fact. Beginning in 1576 the letters of convocation always specified that each bailiwick choose one deputy from each estate ([20]). Unfortunately, this regulation was rarely observed. Local pride often dictated the choice of more than the required number. The easiest way to keep two

([17]) J. Russell Major, *The Deputies to the Estates General of Renaissance France*, in *Studies presented to the International Commission for the History of Representative and Parliamentary Institutions*, XXI, Madison, 1960.

([18]) G. A. Rothrock, Jr., *The French Crown and the Estates General of 1614*, in *French Historical Studies*, I, pp. 295-318.

([19]) The only studies of the deliberative procedure of the French Estates General during the Renaissance are Lalourcé and Duval's introduction to *Recueil de pièces originales et authentiques, concernant la tenue des États généraux*. Paris, 1789, 9 vols.; Edmond Charleville, *Les États généraux de 1576*, Paris, 1901, pp. 104-144. My general statements on deliberative procedure in the pages that follow can be substantiated here.

([20]) Major, *The Deputies . . .*, p. 5.

rival candidates happy was to ignore the royal limitation and elect them both. Whatever the reason, of the ninety-nine bailiwicks that named delegations to the Estates General of 1614, only twenty-six complied with the royal order to send one and only one deputy from each estate. Clearly voting by bailiwick had to be continued if those jurisdictions that elected a large number of deputies were not to have an unfair advantage over those that observed the legal limit.

The decision to vote by bailiwick, however, led to other complications. France at this time was divided into twelve governments, but in three of them — Brittany, Dauphiné, and Provence — local loyalties were so strong that the inhabitants insisted that their deputies be chosen by their provincial estates in order better to preserve their integrity. It would be clearly unjust to allow the deputies from these governments no more voice than those of the bailiwicks in other parts of France. A solution was found by giving one vote to each government. To determine how the governments voted, the deputies from each met together. In the meetings for Brittany, Dauphiné, and Provence, voting was presumably done by head, but in the nine other governments, the deputies from each bailiwick had to be polled to determine the vote of the bailiwick and then the bailiwicks had to be polled to determine the vote of the government.

When it came time to prepare the *cahier* of the order, the deputies of the bailiwicks of each government met together to pool the *cahiers* they had received from their constituents. A *cahier* for the government emerged from these deliberations. Then, in turn, the *cahiers* of the various governments were combined to form the *cahier* of the order. Since the preparation of the *cahier* and voting were among the most time-consuming duties of an assembly, the deputies of this or that government spent more and more time working together. They found it advisable to choose their own president and clerk. They kept journals of their deliberations. Thus each estate became composed of twelve deliberative groups and the unity of action of the whole was difficult to maintain.

The Estates General of 1560, which saw the introduction of voting by bailiwick and government, also witnessed the separation of the orders. During the reigns of Charles VII and Louis XI the three estates had normally deliberated together, and even the brief separation of an order to discuss this or that matter appears to have

been exceptional ([21]). In 1560, however, Charles IX ordered the three estates to meet temporarily in different chambers to prepare separate *cahiers*. When they had completed this task, they were to meet together again and choose a single speaker ([22]). The Cardinal of Lorraine, who was the leading figure in the royal administration, sought this office, but religious passions and political rivalries were too aroused for the secular estates to accept his candidature. Likewise, efforts to get the estates to combine their separate *cahiers* into a single *cahier* to be enacted into an ordinance ended in failure ([23]). Each order chose its own president, orator, and clerk and prepared its own *cahier* and petitions to submit to the crown. Efforts were made to get the three estates to act together in later meetings of the Estates General, but without success. From 1560 the Estates General consisted of three chambers and each of these chambers was divided into about twelve governments.

The division of the Estates General into three chambers and the division of each chamber into twelve governments meant that there were in all thirty-six deliberative units ([24]). It would have been virtually impossible for the wisest and most experienced of royal councilors to have maintained the initiative in such a parliament even if there had been enough of them to attend the meetings of each of the thirty-six units, and the advisors of the late Valois-early Bourbon monarchs had only an average amount of wisdom and very little experience in dealing with representative institutions. Indeed, except for the opening and closing ceremonies, the councilors appeared in the chambers of the estates in 1560 and thereafter only to bring messages from the king. The deputies were left to do virtually as they pleased. The thirty year interregnum beginning around 1530 meant that there was no one who knew much about the control of assemblies when they were later revived. This inexperience was highlighted by the council at Fountainebleau in 1560 where it was decided to turn once more to the Estates General. The councilors saw clearly what use other monarchs in Europe were making of representative institutions, but they failed to grasp the

([21]) MAJOR, *The Estates General of 1560*, pp. 79-80.

([22]) BIBLIOTHÈQUE NATIONALE, ms. français 3159, f° 5.

([23]) MAJOR, *The Estates General of 1560*, pp. 83-86.

([24]) The clergy was sub-divided by archdiocese rather than by government in several meetings of the Estates General, but the result was the same.

role they themselves had to play to secure the desired results ([25]).

So it came to pass that the crown lost the initiative in France as it was to do later in England, but here the parallel ends. The very factors that had brought about a collapse of royal initiative in France prevented the assumption in its place of the initiative by the deputies. The system of voting by bailiwick and deliberating by government prevented the development of effective leadership on the floor. The English Parliament, it is true, broke up into committees and the use of these committees was one of the factors that led to the collapse of royal leadership, but there was this difference. The English committees were designed to study and make recommendations on particular subjects. They prepared and submitted individual petitions. Their formation speeded the work of the assembly and led to the development in Parliament of specialists in different areas. They trained the representatives for the assumption of a more important role in national affairs. The French governmental assembly, on the other hand, was composed of the deputies from a particular province, whose interests, loyalties, and prejudices reflected those of their region rather than of France as a whole. They felt it necessary to make recommendations on every sort of matter, and no specialization developed. Instead, each government duplicated the work of the other. The assemblies became longer, to the dismay of the crown, deputy, and taxpayer alike. At the same time the lack of specialization led to unwise recommendations and, more important, to the failure to develop experts on finance, administration, foreign policy, and the like among the deputies. They were not prepared to take the initiative when the crown could no longer hold it.

The result of the lack of leadership by either the crown or the deputies was confusion, delay, and lack of accomplishment. Sometimes hope ran high when the Estates General opened, but invariably by the time the final assembly was held the deputies and their constituents were disillusioned. More serious still was the disappointment of the officials who had advised the convocation of the estates. In place of sound advice, they had received selfish complaints; in place of devotion to the crown, they had seen only provincial loyalties and jealousies. From being advocates of these meetings, they became opponents. We have only to read the comments attributed to Cardinal

([25]) MAJOR, *The Estates General of 1560*, pp. 30-41.

Richelieu as he looked back on his experiences as a young deputy in the Estates General of 1614. The assembly his *Mémoires* declare, «had no other effect than to burden the provinces with the tax... to pay their deputies and to make it apparent to everyone else that it is not enough to recognize faults if one does not have the will to remedy them...» ([26]). Hence the great cardinal failed to turn to the Estates General when he came to power because he could forsee no useful results from its deliberations.

The history of representative institutions in France between 1421 and 1615 may, therefore, be divided into four periods. The first saw the crown exercising the initiative in the Estates General and the estates of Languedoïl but still having the regretful necessity of appealing to the provincial estates before taxes could be collected. The second period witnessed the virtual abandoning of the Estates General and the estates of Languedoïl, but the continued use of smaller deliberative groups of various types to give advice on specific matters. The crown maintained the initiative, but there was little development of procedure because of the different types and limited purposes of the meetings. A third period comprising the last half of the reign of Francis I and nearly all of that of Henry II saw a reduction in the number of these meetings, and the techniques of controlling assemblies were forgotten. The final period, therefore, was characterized by the loss of royal initiative, but this development found the deputies unprepared to assume a larger role. Confusion and lack of accomplishment became the rule. Neither the crown nor the people saw much occasion for the Estates General, and it was rarely convoked. As a result, the loss of royal initiative actually furthered the decay of the Estates General in France.

J. Russell Major.

([26]) *Mémoires du Cardinal de Richelieu*, ed. H. de Beaucaire, Paris, 1907, I, pp. 367-368.

XIV

Cardinal Richelieu and the Social Estates of the Realm,

BY

WILLIAM F. CHURCH,
Brown University.

Much has been written concerning the relationship between Cardinal Richelieu and the social estates in France, but it does not seem adequately realized that his policies regarding these bodies represented in large measure the practical fruition on the concept of divine right sovereignty. Although the Cardinal was a man of action rather than abstract thought, his policies and writings embodied well articulated ideas concerning the major problems of politics, especially the relations between the sovereign power and the various groups and classes in the realm. During Richelieu's tenure of power, his contemporaries found the novelty of his «rule» not in his concept of governmental power but in the policies through which he attempted to render it effective. Ideas of strong, even absolute monarchy had been widely accepted before his time, but in many ways the Cardinal was the first to apply them in practice. This is not to maintain that political ideas were the Cardinal's sole guide and motivation, since it is certain that his policies were largely dictated by a host of practical circumstances which vitally influenced the attainment of his objectives. Nevertheless, his policies exhibit a certain consistency and a striking consonance with the absolutistic conceptions which had been developed in France immediately prior to his time. One key to Richelieu's place in the history of the French monarchy may therefore be found by analyzing his practical implementation of these concepts, for we should never lose sight of the fact that the French monarchy was absolute in theory before it was in practice. From this standpoint, Cardinal Richelieu's achievement was the practical realization of the implications of the concept of absolutism which has been developed over centuries of time, and which had received crucial re-examination and articulation during the two generations immediately prior to his tenure of power. In this brief essay, I propose to examine only one segment of this evolution and the Cardinal's place in it: that concerning the relations between the sovereign power and the social estates of the realm.

During the later Middle Ages and the early sixteenth century, the jurists and other political writers successfully developed two concepts which seriously undermined the position of the privileged

classes and were of primary importance to later absolutism. First, these writers won general acceptance of the idea that all governmental authority lay in the crown and was held of right only by the king. The actual exercise of certain powers, or «marks of sovereignty», might be delegated to royal agents or great feudal lords, but they held such powers only precariously and enjoyed no right in them, since they belonged solely to the king who might reassume them at will. Second, it was generally asserted that social status and tenure of lands were entirely separate entities in relation to the crown. A given nobleman of exalted rank might enjoy great wealth and many dignities, but he, his vassals, sub-vassals, and indeed all men in the realm were alike in their direct, personal subordination to the king regardless of their places in the social hierarchy. In consequence, all were reduced to the status of subjects, and their loyalty to the crown became the most important personal relationship in the kingdom. Clearly, such doctrines drastically diminished the powers and immunities which the noble estate had enjoyed during the feudal period (1).

It was, however, the great crisis of the Wars of Religion which forced French political thinkers to re-examine their views of governmental authority and produced the crucially important theory of royal sovereignty, the work of Jean Bodin. The great Angevin's contribution was to redefine the sovereign authority as a natural and necessary body of power which was found in all true states and whose principal component was the authority to make new laws. Sovereignty, he insisted, was held entirely by the king in all true monarchies, with the result that all other men in the realm were the king's subjects regardless of office, function, or position in the social hierarchy. Although Bodin believed that the ruler's prerogative to legislate gave him authority over the vast body of customary law, he carefully preserved the rights of the subjects, particularly property rights, by giving them a foundation in natural law. Through this device, he maintained the traditional dual spheres of legal right: that of the ruler, now defined as legislative sovereignty, and that of the subjects, who, although alike in their personal subordination to the monarch, enjoyed varying rights according

(1) M. P. GILMORE, *Argument from Roman Law in Political Thought, 1200-1600*, Harvard University Press, 1941, chapter I. W. F. CHURCH, *Constitutional Thought in Sixteenth-Century France*, Harvard University Press, 1941, chapter 2; chapter 4, part A.

to their positions in society and property holdings. It was in this context that Bodin made his crucially important insistance upon consent to taxation. In discussing «estates, colleges, and corporations», he maintained that these were natural and necessary social groupings, and that they enjoyed rights which might be defended, especially as these pertained to property. He cited the functioning of the Estates General where each estate consented to taxes touching themselves. In consequence, Bodin insisted, the king should govern so as to preserve the harmonious proportion which existed between the crown and the social estates, frankly recognizing and protecting the latter's rights and privileges (2).

In this fashion, Bodin materially expanded the competence of the royal prerogative, but retained the traditional dualism of public and private legal rights in the realm, thereby preserving an important place for the social estates. The next generation of political writers, however, sharply altered his views in the direction of absolutism. In their great desire to strengthen monarchy as the only power capable of restoring order to the war-torn realm, such men as Grimaudet, Grégoire, Du Rivault, L'Hommeau, Loyseau and a host of others seized upon Bodin's theory of sovereignty and adapted it to their purposes by further expansion of the royal prerogative and sharp reduction of his limitations on legitimate royal policy. This they accomplished chiefly by placing Bodin's concept of sovereignty in the context of divine rights of kings, and drawing logical conclusions. Repeatedly, they insisted upon the divine authorization of monarchy and the divine choice of the king who was consequently a semi-divine being and whose rule was divinely inspired. In a very literal sense the king could do no wrong, since he was a living law and his acts were *ipso facto* just. In such a context, not only was resistance impossible, but the traditional limits upon royal discretion were sharply diminished. Divine, natural, and fundamental law remained intact, but the mass of substantive, customary law was subordinate to his will. The precariousness of Bodin's grounding of property rights in natural law was dramatically demonstrated by the disappearance of all insistence upon consent to taxation early in the seventeenth century. The resulting position may be described in the following terms: the divinely appointed and inspired ruler was placed at great heights above his

(2) Bodin, *République*, especially Book III, chapter 7.

subjects, exercising legislative sovereignty which was superior to all substantive law (save the two fundamental laws), and governing through a policy which was assumed to be just and in the general interest. All social estates and other groups might continue to hold their traditional rights, but on a much more precarious basis, and were ultimately subject to the ruler's control ([3]).

Such was the predominant view of monarchy and just government which prevailed in France when Cardinal Richelieu assumed the reins of power, and it was within this ideological frame of reference that he developed his views of the state and his policies for rebuilding its strength. Few new political conceptions are found in France during Richelieu's tenure of power, except reason of state which he and his supporters developed and popularized, although they did not originate it. The great debate concerning reason of state in this period lay in the realm of foreign affairs, where norms of acceptable conduct were lacking and where the special nature of Richelieu's foreign policy required elaborate justification. In domestic matters, however, the prevailing concept of divine right sovereignty, strongly reinforced by widespread desire for the restoration of order and discipline in French society, provided a readymade ideological framework for the Cardinal's policies. These, therefore, represented in large measure the practical implementation of ideas which had been previously developed, and to which the Cardinal added certain special features by way of self-justification. The fact that his policies reflected widely accepted ideas seems indicated by the remarkable lack of well articulated criticisms of his domestic policies by his contemporaries. Although he was hated as arbitrary and tyrannical, he was rarely criticized in principle. And there never appeared during his «rule» a well developed alternative view of just government in internal affairs. The explanation seems to be that the theoretical foundations of absolutism were already generally accepted, and that the Cardinal's policies in domestic matters merely represented progressive, practical application of these concepts.

Cardinal Richelieu's key ideas concerning the social estates of the realm may be shown to represent an extension and crystallization of views that had been developed immediately prior to his time. Richelieu viewed the state, the object of his constant solicitude,

([3]) CHURCH, *op. cit.*, chapter 4, part C; chapter 6.

not in terms of human collectivity but of governmental authority, the sum of all the prerogatives of royal sovereignty. It was essentially a dignity incarnate and personalized in the prince who alone held all public authority and rendered the vast apparatus of government effective through his will. Clearly this view of the state was but an extension of the prevailing concept of divine right sovereignty. Likewise, Richelieu thoroughly accepted contemporary ideas concerning the quasi-religious qualities of monarchy and the superior inspiration of the ruler. Because the sovereign was endowed with virtues and attributes which were denied to ordinary mortals, he necessarily enjoyed greater understanding of the mysteries of state, the essence of policy ([4]). These *arcana imperii*, Richelieu insisted, occupied a sphere higher than the ordinary affairs of men and were understood only by the sovereign and his ministers. Subjects should concern themselves only with their accustomed pursuits, and should never question the acts of those who alone understood the mysteries of high policy ([5]). This view that government was superior to ordinary human affairs was grounded in a concept of two levels of morality, one for the people and a higher one for the state. It was a major foundation of his view of reason of state. Because of its special attributes and unique place in human affairs, Richelieu held that the state was endowed with a higher morality which justified policies that were undertaken in its interest, even though they might run counter to the canons of ordinary justice ([6]). Such policies might by-pass or violate established laws and legal procedures; they might even sacrifice the lives of individuals and the rights of entire social groups for the good of the state ([7]). This means-end rationality concerning the interests of the state was but an extension of contemporary ideas which exalted the ruler far above his subjects and justified all policies that he might undertake, in his wisdom, for the

([4]) *Mercure français*, vol. XX, pp. 14-16.

([5]) *Testament politique*, L. ANDRÉ, ed., Paris, 1947, pp. 287-305, 357-71. Richelieu used this argument to prevent consideration of matters of policy by the Parlement of Paris. M. MOLÉ, *Mémoires*, Paris, 1855, vol. II, pp. 50-53.

([6]) AVENEL, ed., *Lettres, Instructions diplomatiques et papiers d'Etat du Cardinal de Richelieu*, 8 vols., Paris, 1853-1877, vol. III, pp. 192-96. *Testament politique*, pp. 330-33.

([7]) G. HANOTAUX, ed., *Maximes d'Etat et fragments politiques*, in *Collection des documents inédits, Mélanges*, vol. III, Paris, 1880, Maxims LXXX, CXXIV, CXXV. *Testament politique*, pp. 338-346.

general good. From all this, there followed a changed view of government according to the harmonious proportion within the realm. Discarding Bodin's position in which the sovereign respected and protected the rights of the various groups within the social structure, Richelieu insisted upon the necessity of coercive rule which would maintain the established order through rigid controls, reduce the subjects to a position of complete, unquestioning obedience, and even sacrifice individuals and group interests as dictated by necessity of state ([8]).

That these ideas of Cardinal Richelieu were guiding principles rather than mere specious apology for his acts may be demonstrated by two important considerations. First, they are found throughout his writings, not only in such works as the *Memoirs* and the *Testament politique* which were largely *ex post facto,* but in documents which date from his earliest years of power. Second, they are continually reflected by his actual relations with the social estates of the realm. Regarding his attitude toward the clergy and the nobility, it should be stressed that Richelieu was thoroughly imbued with aristocratic sentiment and was quite convinced that the privileged classes made vital contributions to the life of the nation. He even sought to strengthen both orders by his attempts to reform the clergy and his projects to aid the nobility by reserving for them major appointments in the army and the church, and giving educational aid to young noblemen. However, he always insisted that both orders remain in their stations in society, entirely subordinate to the crown. The interests of the state were superior to those of any social group, however important, and if a clash occurred between those of the state and those of an order, the latter must be sacrificed, even if violent means were necessary to achieve this end. The result was severe conflict of varying intensity throughout most of his years of power.

This is well illustrated by his relations with the clerical estate. Although the Cardinal was a loyal prince of the church in many essentials, his determination to place the interests of the state above all else caused him to adopt extremely high-handed procedures in dealing with the representatives of the clergy. The most important area of friction concerned the financial support which the clergy

([8]) *Lettres,* vol. I, p. 226; vol. II, pp. 321-22. Maxims LV, LXI, LXIX. *Testament politique,* pp. 256-57.

accorded the government, since Richelieu needed ever-increasing resources with which to support his war effort. When he repeatedly placed enormous pressure on the Assembly of the Clergy for increased financial aid, he usually had the letter of the law on his side, as in the affair of the *amortissements,* but his methods included outright coercion of the Assembly, and even the expulsion of uncooperative members, as at Mantes in 1641 ([9]). The implications of Richelieu's position were well expressed by Cardin Lebret, his most important supporter among contemporary jurists, who wrote that the clergy were similar to all others in matters of sovereignty, and that ecclesiastical lands might be taxed like all others, for necessities of state ([10]).

Cardinal Richelieu's ideas concerning the supremacy of state interests over those of the social estates are nowhere more clearly revealed than in his relations with the nobility. Not only did he seek to lessen the nobles' power and prestige by denying them high office, destroying their castles, and widespread selling of titles of nobility; he also aimed to reduce them to the level of subjects whose rights, individual and corporate, were demonstrably subordinate to those of the state. Especially significant was his handling of any clash of public and private interests, as in the so-called crimes against the state which he interpreted to include not only acts against the rights and powers of the crown but also those contrary to his own policies. Opposition to his «rule» most frequently took the form of intrigue or rebellion by groups of nobles, and the Cardinal's repression of these defenders of privilege was by far the most striking example of his application of the principles of reason of state in domestic affairs, implicitly demonstrating his view that the state enjoyed a morality superior to that of its subjects. Arguing that the safety of the state was an end higher than the good of any individual or group, he habitually urged that any hostile act should be punished by swift, inexorable justice in which clemency and mercy had no place ([11]). Established judicial procedures and proofs of guilt might be needed in cases between subjects, he said, but the superior good of the state suspended these requirements when the

([9]) J. Tournyol du Clos, *Richelieu et le clergé de France: la recherche des amortissements d'après les mémoires de Montchal,* Paris, 1912.

([10]) Cardin Lebret, *Œuvres,* Paris, 1689, pp. 24, 29.

([11]) Cf. citations in notes 6, 7.

state was in danger ([12]), and it is well known that he frequently resorted to preventive imprisonment for indeterminate periods. In great cases, such as the trials of Chalais, Marillac, Cinq-Mars and others, he habitually arranged for hand-picked tribunals, thereby practically determining the verdicts against the accused. Richelieu even referred to Gaston d'Orléans in key documents as a subject of the crown, and exacted from him the same submission that was required of all others ([13]). In these ways, the Cardinal subordinated the nobles, regardless of their place in the social hierarchy, to the interests and powers of the state.

In view of Richelieu's attitude toward the privileged classes, it is not surprising that he regarded the great unprivileged majority with contempt and even open hostility. Their relations with the sovereign were merely those between ruler and ruled, he held, since it was a major function of government to preserve the established order of society through sharp controls from above. The people, he said, should be compelled to remain in their stations and to contribute to the financial needs of the sovereign power, since too much freedom and prosperity easily led to social unrest. And it is clear that Richelieu regarded taxation as both a mechanism for supporting the royal establishment and a means of discipline ([14]). In essence, these views merely complemented his ideas concerning the social estates generally. For Richelieu, therefore, the key political relationship in the nation at large was the supremacy of the state and the subordination, even the exploitation if necessary, of the social estates of the realm. His view of state-building, which he implemented so extensively, was not one of community but of authority, as determined by divine right sovereignty. For him, the political state was superior, both in power and ultimate objectives, to the social estates. In thus subordinating all elements in organized society to an omnicompetent, morally superior governing power, Richelieu clearly foreshadowed the administrative state of modern times.

W. F. CHURCH.

([12]) *Lettres*, vol. V, pp. 321-22, 330-36; vol. VII, pp. 163-67.

([13]) *Lettres*, vol. IV, pp. 125-30; vol. V, pp. 711-12. *Mercure français*, vol. XX, pp. 877-79.

([14]) *Lettres*, vol. II, p. 300; vol. VI, pp. 515-16. *Testament politique*, pp. 253-55.

XV

Des Engagements qui affectent l'état des personnes et des biens, d'après Jean Domat,

PAR

EMILE LOUSSE,
Professseur à l'Université de Louvain et à l'Ecole de Guerre de Belgique.

Les traités de droit français de Jean Domat (1625-1696), le grand jurisconsulte du Siècle d'Or français, renferment des considérations sur l'ordre social et juridique en général, sur le statut des personnes et des biens, sur la portée des engagements. Du *Traité des Loix*, sorte d'encyclopédie du droit dans le sens où nous entendons communément ce terme [1], nous avons extrait naguère des considérations sur les premiers fondements de la Société, et sur les corollaires que l'on peut dégager de ces premiers principes, pour tout ce qui regarde les engagements, — volontaires ou non, généraux ou particuliers, familiaux ou non familiaux, — de chaque homme au service de Dieu, au service de ses semblables et du bien commun de tous, par l'observance de la double loi chrétienne de l'amour, et par l'observance non moins stricte de l'universelle loi du travail, dans le respect de la parole donnée et dans la considération bienveillante de la faiblesse des déshérités [2]. Nous voudrions aujourd'hui aborder l'examen des textes, que Domat a consacrés d'une manière plus spéciale à la technique et aux effets statutaires des engagements.

Nous reprendrons d'abord la définition domatienne des «engagements». Nous verrons ensuite les trois espèces de «liaisons» que Dieu forme entre les hommes, et dont l'usage des conventions n'est qu'une suite naturelle: la religion, le droit naturel, le droit positif (public et privé). Ordonnés au maintien de l'ordre social et des droits de chaque individu, stipulant des devoirs à remplir par chacun pour le bien commun, tous ces engagements ont un rapport particulier aux qualités statutaires des personnes et, subsidiairement, des biens. Ils sont «générateurs d'état» dans les limites qui leur sont assignées par les capacités des partenaires, le cadre de la nature et les normes du droit. L'état des personnes se fixe par les réactions volontaires et légitimes de ces personnes, dans les conditions et les

(1) J. Domat, *Les Loix civiles dans leur ordre naturel; le Droit public, et Legum delectus*. Nouvelle édition revue, corrigée et augmentée par de Hericourt, de Bouchevret, Berroyer et Chevalier. Paris, 1757, 2 volumes. — *Le Traité des Loix* occupe les pages I-XXIX du tome premier.

(2) Voir E. Lousse, *Des premiers Fondements de l'Ordre social d'après Jean Domat*, dans *Miscellanea J. Gessler* [t. II], p. 752-758. S. l. [Anvers], 1948.

limites qui leur sont assignées par la volonté du législateur, divin et humain ([3]).

«Engagements» revêt une signification très générale dans la terminologie technique de Domat. Il ne désigne pas seulement les engagements volontaires générateurs d'état, mais encore les engagements où Dieu place les hommes sans aucune disposition de leur part et, finalement, les simples conventions dépourvues d'effets statutaires. Venir au monde, c'est être engagé pour la première fois, malgré soi. Et c'est s'engager que de conclure un contrat de vente ou de bail. «Les conventions sont les engagemens qui se forment par le consentement mutuel de deux ou plusieurs personnes qui se font entr'eux une loi d'exécuter ce qu'ils promettent. L'usage des conventions est une suite naturelle de l'ordre de la société civile, et des liaisons que Dieu forme entre les hommes. Car comme il a rendu nécessaire pour tous leurs besoins, l'usage réciproque de leur industrie et de leur travail, et les différens commerces des choses; c'est principalement par les conventions qu'ils s'en accommodent. Ainsi pour l'usage de l'industrie et du travail, les hommes s'associent, se louent et agissent différemment les uns pour les autres. Ainsi pour l'usage des choses, lorsqu'ils ont besoin de les acquérir ou de s'en défaire, ils en font commerce par des ventes et par des échanges; et lorsqu'ils n'ont besoin de les avoir que pour un tems, ils les louent ou les empruntent; et selon les autres divers besoins, ils y assortissent les différentes sortes de conventions» ([4]). Nous limitons nos réflexions aux engagements volontaires qui affectent l'état des personnes et des biens, et nous en décrivons principalement les effets statutaires personnels.

«L'ordre de la société se conserve dans tous les lieux par les engagemens dont Dieu lie les hommes, et... il se perpétue dans tous les tems par les successions, qui appellent de certaines personnes à la place de ceux qui meurent, pour tout ce qui peut passer à des

([3]) Comp. nos travaux antérieurs sur les mêmes questions: 1° *Le Moyen Age.* Paris, 1944; 2° *Engagements sacramentels dans l'ancien Droit,* dans *Les Questions liturgiques et paroissiales,* t. XXVIII, 1947, p. 16-35; 3° *L'Homme et ses Engagements,* dans *Institut supérieur de Commerce pour Jeunes Filles, 88, rue Général Leman, Bruxelles, Année académique 1950-1951,* p. 32-46; 4° *Beloften voor het Leven,* dans *Dietsche Warande en Belfort,* février 1952, p. 78-95; 5° *N'y avait-il vraiment que «des» Libertés ?,* dans *Anciens Pays et Assemblées d'états — Standen en Landen,* t. IX, p. 67-78. Louvain, 1955.

([4]) J. Domat, *Les Loix civiles,* t. I, Liv. I[er], Introduction, p. 19.

successeurs» ([5]). Domat distingue les effets «spatiaux» des engagements et les effets «temporels» des successions. Il traite séparément de ces deux sortes d'institutions qui se complètent; il ne les oppose pas les unes aux autres. Les successions permettent le relief par les successibles qui manifestent la volonté de le faire, des engagements que le trépas du *de cujus* a fait venir à leur terme.

«La société des hommes dans tout l'Univers, ... Dieu la fait subsister par trois diverses espèces de liaisons qui la distinguent comme en trois parties, ou en trois ordres, selon autant de différentes manières de sa conduite sur le genre humain. La première de ces espèces de liaisons, est celle que fait la Religion, dont l'esprit embrasse les Peuples, et tend à ramener à l'unité de l'Eglise toutes les Nations indistinctement. La seconde est celle que fait l'humanité, dont le lien doit unir tout le genre humain indépendamment des différences de Religion. La troisième est celle que forme dans chaque Etat l'ordre qui unit toutes les familles qui le composent sous un même gouvernement; soit qu'on y connoisse la véritable Religion, soit qu'on l'ignore». Nous traduirions en termes plus actuels, qu'il y a l'ordre interne de l'univers chrétien, une sorte d'ordre international qui s'établit entre l'universalité des chrétiens et les infidèles; il y a l'ordre public interne de chaque Etat, qu'il soit composé de «familles» infidèles ou chrétiennes. «Ces trois différens ordres, ou parties de la société universelle» ont chacun «leurs différens rapports aux biens communs et aux différens engagemens et devoirs des hommes». C'est ce qui fait «les matières de leurs Loix, et leurs Loix aussi, ont même leurs différences proportionnées à leurs usages» ([6]).

Il existe un ordre humain. C'est celui, dit Domat, que «font les règles naturelles de l'humanité et de l'équité». Il «devroit naturellement avoir son étendue dans tout l'Univers», et de fait il a «par tout son usage en quelque degré»; mais «en plusieurs lieux» il est violé «en plusieurs manières, et différemment, selon qu'on y est plus ou moins dominé par les intérêts et par les passions» ([7]). Cet ordre entre les chrétiens et les infidèles, Domat ne le conçoit pas de la même manière, par exemple, que les rapports entre les anciens Romains et les non-citoyens. *Jus gentium* si l'on veut, mais régi par la loi divine et le précepte de charité fraternelle. «Il y a réellement

([5]) J. DOMAT, t. I, *Traité des Loix*, chap. XIV, § II, p. XXVII.
([6]) J. DOMAT, t. II, *Le Droit public*, Préface, f° a ij, r°.
([7]) *Ibid.*

entre tous hommes une liaison que Dieu a formée, et qui engage chaque particulier envers tout autre aux devoirs dont les conjonctures peuvent faire naître les occasions. Et si quelques Barbares ignorent cette vérité, la Religion nous apprend que tout homme doit considérer tout autre comme son prochain; et que quelques distinctions que fassent entr'eux les différences de Nations, de Langues, de Mœurs, de Religion, ils se doivent tous réciproquement les offices et les devoirs, que les occasions qui les approchent, et leurs besoins, peuvent demander. C'est le précepte de ce devoir, que la seconde Loi commande à tous les hommes indistinctement, qui est le fondement de la société universelle que Dieu a liée entr'eux, et qui n'en exclut aucun; non-seulement parce que ceux qui connoissent cette Loi doivent se regarder comme prochains de tous les autres, et tous les autres comme leurs prochains; mais parce qu'ils doivent considérer ceux même qui sont le plus éloignés de l'observer, comme pouvant parvenir à l'aimer et à la pratiquer, ce qui donne à tous un droit dans cette société» (8).

La liaison «que fait l'humanité» n'est que la seconde. La première est «celle que fait la Religion». Elle est première, «soit qu'on la considère dans l'étendue que lui donne son esprit, qui n'en exclut personne, ou dans son étendue effective sur les Nations qui la reçoivent, et qui sont dans l'Eglise», ou dans son but «qui regarde le bon ordre de la société par rapport au culte divin» (9), ou encore dans la perfection que ses lois introduisent dans les rapports entre les peuples. L'humanité se divise en deux portions qui n'ont pas les mêmes lois, ni les mêmes devoirs. Les peuples qui ignorent la religion «ont pour Loix communes entre eux tous, sans distinction, les règles de l'humanité et de l'équité naturelle, qui composent le Droit naturel, c'est-à-dire, que la nature enseigne à tous les hommes, et quelques-uns ont outre ces règles celles des Traités qu'ils peuvent avoir faits entre eux d'un Peuple à un autre; et on a aussi pour règles entre les Nations, de certains usages reçus communément par tout, et qu'on observe de bonne foi. Mais ceux qui connoissent la Religion, ont entre eux, outre ces règles de l'équité naturelle et celles des Traités et de ces usages, les Loix de la Religion qui renferme dans son étendue tout ce qu'il peut y avoir de devoirs de toute nature; et qui non seulement comprend des règles plus parfaites que

(8) J. Domat, t. II, *Le Droit public*, Préface, f° a, v°.
(9) J. Domat, *op. cit.*, Préface, f° a ij, r°.

celles qui sont simplement du Droit naturel, mais encore fait observer celles-ci plus parfaitement» ([10]). Tous les peuples qui font profession de cette religion, «sont unis dans une Eglise, sous un seul Chef Vicaire de Jésus-Christ, Successeur de Saint Pierre; en qui réside la puissance universelle du gouvernement spirituel de cette Eglise, et le centre de son unité, et qui est en même temps le père commun de tous les Fidèles, qui en sont les membres répandus dans tout l'Univers» ([11]).

«La troisième partie de l'ordre de la société... est bornée aux personnes unies dans un Etat sous un même gouvernement». «Les matières qui naissent de cet ordre, sont de deux sortes, qu'il est nécessaire de distinguer. La première est de celles qui se rapportent à l'ordre général de l'Etat, comme celles qui regardent le gouvernement, l'autorité des Puissances, l'obéissance qui leur est due, les forces nécessaires pour maintenir la tranquillité publique, l'usage des finances, l'ordre de l'administration de la justice, la punition des crimes, les fonctions des différentes sortes de charges, d'emplois, de professions, que demande l'ordre public, la Police générale pour l'usage des mers, des fleuves, des grands chemins, des mines, des eaux et forêts, de la chasse, de la pêche, celles des villes et autres lieux, les distinctions des différens ordres des personnes, et les autres matières semblables. La seconde sorte... est de celles qui regardent ce qui se passe entre les particuliers; leurs divers engagemens, soit par des conventions, comme par des ventes, échanges, louages, prêts, dépôts, sociétés, donations, transactions, et autres; ou sans convention, comme les tutelles, les prescriptions, les successions, les testamens, les substitutions, et autres. C'est cette première sorte de matières, qui se rapportant à l'ordre général d'un Etat, font les matières du Droit Public; et celles de la seconde ne regardant que ce qui se passe entre particuliers, font les matières de cette autre partie du Droit, qui est appellé par cette raison le Droit privé» ([12]).

Les engagements sont ordonnés aux besoins de chaque personne ainsi qu'au bien général de chaque Etat, de la chrétienté, de l'humanité tout entière. Les engagements volontaires sont libres,

([10]) J. DOMAT, t. II, *Le droit public*, Préface, f° a ij, r° et v°.

([11]) *Ibid.*, f° a, r°.

([12]) J. DOMAT, t. II, *Le Droit public*, Préface, f° a ij, v°. — Comp. le titre du traité sur *Le Droit public*: «Le Droit public, contenant les matières qui se rapportent à l'ordre général d'un État, et les règles des fonctions et des devoirs de toutes sortes de Professions par rapport à cet ordre» (*Ibid.*, f° a, r°).

pour la raison, dit Domat, qu'il appartient à chaque homme d'apprécier ses besoins. «Que les engagemens volontaires entre les particuliers devant être proportionnés aux différens besoins qui leur en rendent l'usage nécessaire; il est libre à toutes personnes capables des engagemens, de se lier par toute sorte de conventions, comme bon leur semble, et de les diversifier selon les différences des affaires de toute nature, et selon la diversité infinie des combinaisons que font dans les affaires les conjonctures, et les circonstances» ([13]). Volontaires ou non, dès qu'ils sont conclus les engagements deviennent le fondement des devoirs de chacun. «Car comme c'est par ces liens que Dieu applique les hommes à tous leurs différens devoirs, et qu'il a mis dans chaque engagement les fondemens des devoirs qui en dépendent; c'est dans ces sources qu'on doit reconnoître les principes et l'esprit des loix selon les engagemens où elles se rapportent» ([14]). Et voici déjà leur rapport organique au bien commun: «Que tout homme étant un membre du corps de la société, chacun doit y remplir ses devoirs et ses fonctions, selon qu'il y est déterminé par le rang qu'il occupe, et par ses autres engagemens. D'où il s'ensuit, que les engagemens de chacun lui sont comme ses loix propres» ([15]).

L'ordonnance des engagements au bien de tous ne peut pas se concevoir sans le respect des tiers, mais spécialement des contractants. L'exercice des devoirs de charité fraternelle s'étend jusqu'au domaine des lois civiles. «Que dans tous les engagemens de personne à personne, soit volontaires ou involontaires, qui peuvent être des matières des Loix Civiles, on se doit réciproquement ce que demandent les deux préceptes que renferme la seconde loi; l'un de faire aux autres ce que nous voudrions qu'ils fissent pour nous, et l'autre de ne faire à personne ce que nous ne voudrions pas que d'autres nous fissent. Ce qui comprend la règle de ne faire tort à personne, et celle de rendre à chacun ce qui lui appartient» ([16]). Suivant l'usage de ce temps-là, Domat dispute aux canonistes le privilège de citer les Saints Livres: «*Omnia ergo quaecumque vultis ut faciant vobis homines, et vos facite illis*» ([17]); «*Et prout vultis ut faciant vobis*

([13]) J. Domat, t. I, *Traité des Loix*, chap. V, § IX, p. VIII.
([14]) *Ibid.*, chap. IV, § VII, p. VI-VII.
([15]) *Ibid.*, chap. V, § II, p. VII.
([16]) *Ibid.*, chap. V, § IV, p. VII.
([17]) *Matth.*, 7, 12; *ibid.*, p. VII, note c.

homines, et vos facite illis similiter» ([18]) ; «*Quod ab alio oderis fieri tibi, vide ne tu aliquando alteri facias*» ([19]).

Le respect des autres et de soi-même comporte l'obligation d'être sincère et fidèle, tant dans la conclusion que dans l'exécution des engagements. «Que dans les engagements volontaires et mutuels, ceux qui traitent ensemble se doivent la sincérité, pour se faire entendre réciproquement à quoi ils s'engagent, la fidélité pour l'exécuter, et tout ce que peuvent demander les suites des engagements où ils sont entrés . . .» ([20]). L'obligation de fidélité s'étend «à ce que demandent les engagemens involontaires» ([21]). «Qu'en toute sorte d'engagemens, soit volontaires ou involontaires, il est défendu d'user d'infidélité, de duplicité, de dol, de mauvaise foi, et de toute autre manière de nuire et de faire tort» ([22]). Saint Paul, le *Livre des Proverbes* et l'*Ecclésiastique* sont invoqués tour à tour, concurremment avec des textes de droit romain: «*Ut sitis sinceri*» ([23]) ; «*Abominatio est Domino labia mendacia; qui autem fideliter agunt, placent ei*» ([24]) ; «*Confirma verbum, et fideliter age cum illo proximo tuo*» ([25]) ; «*Ne quis supergrediatur neque circumveniat in negotio fratrem suum*» ([26]).

Le bien commun de tous apporte encore d'autres limitations à la liberté des engagements: la «soumission aux Puissances» et l'obligation de «ne faire rien en son particulier qui blesse l'ordre public». «Que chaque particulier étant lié à ce corps de la société dont il est un membre, il ne doit rien entreprendre qui en blesse l'ordre; ce qui renferme l'engagement de la soumission et de l'obéissance aux puissances que Dieu a établies pour maintenir cet ordre» ([27]). «Que l'engagement de chaque particulier à ce qui regarde l'ordre de la société dont il fait partie, ne l'oblige pas seulement à ne rien faire à l'égard des autres qui blesse cet ordre, mais l'oblige aussi de se contenir dans son rang, de telle manière qu'il ne fasse aucun mauvais usage ni de soi-même, ni de ce qui est à lui. Car il est dans la société

([18]) *Lc.*, 6, 31; J. DOMAT, t. I, *Traité des Loix*, chap. V, p. VII, note c.
([19]) *Tob.*, 4, 16; *ibid.*, note d.
([20]) *Ibid.*, chap. V, § V, p. VII.
([21]) *Ibid.*, chap. V, § VI, p. VII.
([22]) *Ibid.*, chap. V, § VII, p. VII.
([23]) *Philip.*, 1, 10; *ibid.*, p. VII, note f.
([24]) *Prov.*, 12, 22; *ibid.*, note f.
([25]) *Eccli.*, 29, 3; *ibid.*, note f.
([26]) *I Thessal.*, 4, 6; *ibid.*, note i.
([27]) J. Domat, t. I, *Traité des Loix*, chap. V, § III, p. VII.

ce qu'est un membre dans le corps» ([28]). Il appartient aux «puissances» d'intervenir de plusieurs manières pour contenir l'exercice de la liberté particulière dans les limites du bien commun. Elles punissent les coupables et contraignent les négligents. «Ainsi ceux qui sans faire tort à d'autres, tombent dans quelque dérèglement qui offense le public, soit en leurs personnes, ou sur leurs biens, comme font ceux qui se désespèrent, ceux qui blasphèment, ou qui jurent, ceux qui prodiguent leurs biens, et tous ceux enfin qui violent les bonnes mœurs, la pudeur ou l'honnêteté d'une manière qui blesse l'ordre extérieur, sont justement punis par les loix civiles, selon la qualité du dérèglement» ([29]). «Que tout engagement n'est licite qu'à proportion qu'il est conforme à l'ordre de la société: et que ceux qui le blessent sont illicites et punissables, selon qu'ils y sont opposés. Ainsi, les emplois contraires à cet ordre, sont des engagemens criminels. Ainsi les promesses et les conventions qui violent les lois ou les bonnes mœurs, n'obligent à rien, qu'aux peines que peuvent mériter ceux qui les ont faites» ([30]). «Que tous les particuliers composant ensemble la société, tout ce qui en regarde l'ordre, fait à chacun un engagement de ce que cet ordre demande de lui: et il peut y être obligé par l'autorité de la justice, s'il n'y satisfait volontairement» ([31]).

Ordonnés au maintien de l'ordre social et des droits de chaque individu, stipulant des devoirs à remplir par chacun pour le bien commun de tous, «toutes ces sortes d'engagemens sont proportionnés et à la nature de l'homme, et à son état pendant cette vie» ([32]). Ils ont un rapport particulier aux qualités statutaires des personnes et, subsidiairement, des biens. «Les Loix Civiles considèrent et distinguent les personnes par de certaines qualités qui se rapportent aux engagemens ou aux successions; comme par exemple, les qualités de père de famille, ou fils de famille, de majeur ou mineur, celles de légitime ou bâtard, et autres semblables, qui font ce qu'on appelle l'état des personnes... Les Loix Civiles distinguent les choses qui sont à l'usage des hommes, par rapport aux engagemens et aux successions. Ainsi, par rapport aux engagemens les Loix distinguent les choses qui entrent dans le commerce, de celles qui n'y entrent point, comme sont les choses publiques, et les choses sacrées, et par

([28]) J. DOMAT, t. I, *Traité des Loix*, chap. V, § III, p. VII.
([29]) *Ibid.*
([30]) *Ibid.*, chap. V, § X, p. VIII.
([31]) *Ibid.*, chap. V, § VIII, p. VII.
([32]) *Ibid.*, chap. IV, § II, p. VI.

rapport aux successions, on distingue les biens paternels et maternels, les acquêts et les propres» ([33]).

Pour ce qui regarde les personnes: «Quoique les Loix Civiles reconnoissent une espèce d'égalité qui met le droit naturel entre tous les hommes, elles distinguent les personnes par de certaines qualitez, qui ont un rapport particulier aux matières du droit civil, et qui sont ce qu'on appelle *l'état des personnes*». Le droit romain s'en était occupé, naturellement, mais il n'avait pas tout dit. D'abord, il n'avait point défini l'état des personnes; ensuite, il n'avait considéré qu'un petit nombre de qualités; il n'avait point ramené ces qualités à un critère unique, indispensable à la définition générale. «Ce sont ces qualitez dont il est parlé dans le Droit Romain, sous le titre, *de Statu hom.* Mais on ne trouve ni dans ce titre, ni dans aucun autre, ce que c'est proprement que l'état des personnes. On voit seulement qu'il y a de différentes qualitez, comme celles de libre et d'esclave, de père de famille et de fils de famille, et autres dont il est dit qu'elles font l'état des personnes. Mais on ne voit rien qui marque ce qu'il y a de commun dans ces qualitez, par où l'on puisse concevoir une idée juste et précise du caractère nécessaire dans une qualité, pour pouvoir dire qu'elle regarde ou ne regarde pas l'état d'une personne» ([34]).

Pour toutes ces qualités des personnes qui ont un rapport aux matières du droit civil, Domat veut considérer «ce qu'elles ont de commun entr'elles, et ce qui les distingue des autres qualitez qui ne font pas le même effet. Et il paroît que la distinction de ces qualitez qui font l'état des personnes, et de celles qui n'y ont point de rapport, est une suite toute naturelle de l'ordre de la société, et de celui des matières des Loix Civiles. Car comme on a vû... que les loix civiles ont pour leur objet les engagemens et les successions; on verra que les qualitez que ces loix considèrent pour distinguer l'état des personnes, ont aussi un rapport particulier aux engagemens et aux successions, et qu'elles ont toutes cela de commun, qu'elles rendent les personnes capables, ou incapables, ou de tous engagemens, ou de quelques-uns, ou des successions». Ainsi, les qualités d'état sont-elles des capacités naturelles de s'engager (ou de succéder), dont le droit reconnaît l'existence et à l'exercice légitime et libre desquelles il attache des effets à lui propres. Le statut d'une personne

([33]) J. Domat, t. I, *Traité des Loix*, chap. XIV, § II, p. XXVII.
([34]) J. Domat, t. I, *Les Loix civiles*, Liv. prélim., tit. II, Introduction, p. 10.

est le faisceau de ses capacités juridiques, auxquelles correspondent toujours des incapacités, juridiques, sinon naturelles, de s'engager. «L'état des personnes consiste dans cette capacité ou incapacité qu'il est facile de reconnoître par ces qualitez; car elles sont de telle nature, que chacune est comme en parallèle à une autre qui lui est opposée, et que l'une des deux opposées se rencontre toujours en chaque personne» ([35]).

Domat compte plus de qualités d'état que les Romains: «on a mis dans ce titre quelques distinctions des personnes, qui ne sont pas mises dans le Droit Romain, parmi celles qui font l'état des personnes» ([36]). Il reconnaît deux sortes de distinctions, «que font entre les personnes les qualitez qui règlent leur état... La première est de celles qui sont naturelles et réglées par des qualitez que la nature même marque et distingue en chaque personne» ([37]). Ces distinctions «sont fondées sur le sexe, sur la naissance, et sur l'âge de chaque personne, en comprenant sous les distinctions que fait la naissance, celles qui dépendent de certains défauts ou vices de conformation qu'on a de naissance» ... et encore en considérant que «quelques-uns de ces défauts puissent aussi survenir par des accidens après la naissance» ([38]). La seconde sorte de distinctions est «des distributions qui sont établies par des loix humaines» ([39]), par des «loix arbitraires, soit que ces distinctions n'ayent aucun fondement dans la nature, comme celles des personnes libres et des esclaves, ou que quelque qualité naturelle y aye donné lieu, comme sont la majorité et la minorité» ([40]).

L'infériorité des Romains par rapport aux conceptions françaises du XVII[e] siècle apparaît dans l'une et l'autre catégories. Parmi les distinctions statutaires qui sont «de l'ordre de celles que fait la nature», par exemple, «il est dit dans le Droit Romain que la démence ne change pas l'état», qu'elle n'est pas «une cause d'état» ([41]). Il y a des lacunes encore plus graves parmi les qualités provenant des lois. «On considéroit dans le Droit Romain principalement trois choses en chaque personne. *La liberté, la cité, la famille*; et par ces

([35]) J. DOMAT, t. I, *Les Loix civiles*, Liv. prélim., tit. II, Introduction, p. 10.
([36]) *Ibid.*, p. 11.
([37]) *Ibid.*, p. 10.
([38]) *Ibid.*, Liv. prélim., tit. II, sect. I, Introduction, p. 11.
([39]) *Ibid.*, Liv. prélim., tit. II, Introduction, p. 11.
([40]) *Ibid.*, Liv. prélim., tit. II, sect. II, Introduction, p. 13.
([41]) *Ibid.*, Liv. prélim., tit. II, Introduction, p. 11.

trois vûes, on faisoit trois distinctions des personnes. La première des libres et des esclaves; la seconde des citoyens Romains et des étrangers, ou de ceux qui avoient perdu le droit de cité par une mort civile; et la troisième des pères de famille, et des fils de famille» ([42]). Les Français, dit Domat, conservent ces trois distinctions, bien que ce ne soit pas toujours sur le même fondement théorique. Ils ont, en outre, «une distinction des personnes qui n'est pas du Droit romain, ou qui est bien différente de ce qu'on y en trouve... C'est celle qui fait la noblesse entre les Gentilshommes, et ceux qui ne le sont pas, qu'on appelle roturiers», et encore la distinction entre «les habitans des Villes» et «les gens de la campagne et des petits lieux», et encore entre les «personnes de condition serve, ou servile, qui les distingue de ceux qui sont de condition franche», etc. ([43]). Si Domat peut se permettre de proposer des améliorations au système des Romains, c'est qu'il a mis en évidence un critère unique et plus profond: les capacités d'engagement pour le service du bien commun, par lesquelles les hommes diversifient leurs états.

Domat descend jusque dans le détail et relève les capacités et les incapacités distinctives de chaque état. Dans la Section *De l'état des personnes par la nature,* il note premièrement la «distinction des personnes par le sexe», et «que les hommes sont capables de toute sorte d'engagemens et de fonctions, si ce n'est que quelqu'un en soit exclu par des obstacles particuliers, et que les femmes sont incapables par la seule raison du sexe de plusieurs sortes d'engagemens et de fonctions» ([44]). «La naissance met les enfans sous la puissance de ceux de qui ils naissent» ([45]). «Les enfans légitimes sont capables de succéder, et les bâtards en sont incapables» ([46]). «Le mariage étant la seule voye légitime de la propagation du genre humain, il est juste de distinguer la condition des bâtards, de celle des enfans légitimes. Et c'est à cause de cette distinction que les loix rendent les bâtards incapables des successions *ab intestat*, et que comme ils ne succèdent à personne, n'étant d'aucune famille, personne aussi ne leur succède que leurs enfans légitimes» ([47]). «Les insensez sont ceux qui sont privez de l'usage de la raison, après l'âge où ils devroient

([42]) J. DOMAT, t. I, *Les Loix civiles,* Liv. prélim., tit. II, sect. II, Introduction, p. 13.

([43]) *Ibid.*, p. 13.

([44]) *Ibid.*, Liv. prélim., tit. II, sect. I, § I, p. 11.

([45]) *Ibid.*, § II, p. 12.

([46]) *Ibid.*, Liv. prélim., tit. II, Introduction, p. 10.

([47]) *Ibid.*, Liv. prélim., tit. II, sect. I, § III, p. 12.

l'avoir; soit par un défaut de naissance ou par accident. Et comme cet état les rend incapables de tout engagement et de l'administration de leurs biens, on les met sous la conduite d'un curateur» ([48]). «Ceux qui sont tout ensemble sourds et muets, ou que d'autres infirmitez rendent incapables de leurs affaires, sont dans un état qui, comme la démence, oblige à leur nommer des curateurs qui prennent soin de leurs affaires et de leurs personnes, selon le besoin» ([49]). «Ceux qui sont en démence et dans ces autres imbécillitez, ne perdent pas l'état que leur donnent leurs autres qualitez: et ils conservent leurs dignitez, leurs privilèges, la capacité de succéder, leurs droits sur leurs biens, et les effets même de la puissance paternelle qui peuvent subsister avec cet état» ([50]). «L'âge distingue entre les personnes, ceux qui n'ayant pas la raison assez ferme, ni assez d'expérience, sont incapables de se conduire eux-mêmes, et ceux à qui l'âge a donné assez de maturité pour en être capables. Mais parce que la nature ne marque pas en chacun le tems de cette maturité, les loix civiles ont réglé le temps où les personnes sont jugées capables et du mariage, et des autres engagemens» ([51]).

Dans la Section *De l'état des personnes par les Loix civiles,* Domat dit que «l'esclave est celui qui est sous la puissance d'un maître, et qui lui appartient, de sorte que le maître peut le vendre et disposer de sa personne, de son industrie, de son travail, sans qu'il puisse rien faire, rien avoir ni rien acquérir qui ne soit à son maître» ([52]). Les gens de condition serve, ou servile, se distinguent de ceux qui sont de condition franche, «en ce qu'ils sont engagez... à quelques servitudes personnelles qui regardent les mariages, les testamens, les successions» ([53]). «Les personnes libres sont tous ceux qui ne sont point esclaves, et qui ont conservé la liberté naturelle, qui consiste au droit de faire tout ce qu'on veut, à la réserve de ce qui est défendu

([48]) J. Domat, t. I, *Les Loix civiles,* Liv. prélim., tit. II, sect. I, § XI, p. 13.
([49]) *Ibid.,* § XII.
([50]) *Ibid.,* § XIII.
([51]) *Ibid.,* § XVI.
([52]) *Ibid.,* Liv. prélim., tit. II, sect. II, § I, p. 14.
([53]) *Ibid.,* Liv. prélim., tit. II, sect. II, Introduction, p. 13. — «A quoi il faut ajoûter que cette distinction de ces personnes serves, n'a pas son fondement sur quelques qualitez personnelles, mais seulement sur le domicile de ces personnes et la qualité de leurs biens sujets à ces conditions serviles. De même que les qualitez de Vassal, justiciable, emphytéote, ne sont pas proprement des qualitez personnelles, mais des suites ou du domicile ou de la nature des biens qu'on possède» (*Ibid.,* p. 14).

par les loix, ou de ce qu'une violence empêche de faire» ([54]). «Les affranchis sont ceux qui ayant été esclaves, sont parvenus à la liberté» ([55]). «Les fils et filles de famille... sont sous la puissance paternelle», et «la puissance paternelle est le fondement de diverses incapacitez dans les fils de famille». «Et les pères ou mères de famille, que nous appelons aussi chefs de famille, sont les personnes qui ne sont pas sous cette puissance; soit qu'ils ayent des enfans ou non; et soit qu'ils ayent été dégagez de la puissance paternelle par une émancipation, ou par la mort naturelle, ou par la mort civile du père. Et en quelque bas âge que soient ces personnes, on les considère comme chefs de famille, de sorte que plusieurs enfans d'un seul père sont autant de chefs de famille après la mort du père» ([56]). Le mariage émancipe ([57]) et l'émancipation met le fils ou la fille hors de la puissance paternelle ([58]). «Selon ces deux distinctions des libres et des esclaves, des pères de famille et des fils de famille, il n'y a personne qui ne soit ou sous la puissance d'un autre, ou en la sienne propre, c'est-à-dire maître de ses droits» ([59]).

«Les mineurs sont ceux des deux sexes qui n'ont pas encore vingt-cinq ans accomplis, quoiqu'ils soient adultes, et ils sont en tutelle jusqu'à cet âge... excepté dans quelques Coutumes qui font cesser plutôt la minorité» ([60]). «On doit mettre au rang des mineurs ceux qui sont interdits comme prodigues, quoiqu'ils soient majeurs, parce que leur mauvaise conduite les rend incapables de l'administration de leurs biens, et des engagemens qui en sont les suites; et cette administration est commise à la conduite d'un curateur» ([61]). «Nous appellons Régnicoles les sujets du Roi; et les étrangers sont ceux qui sont sujets d'un autre Prince, ou d'un autre Etat. Et ceux de cette qualité, qui n'ont pas été naturalisez par Lettres du Roi, sont dans les incapacitez qui sont réglées par les Ordonnances et par notre usage... En France les étrangers qu'on appelle Aubains, *alibi nati,* sont incapables de succéder, et de disposer par testament: ils ne peuvent posséder de Charges, ni de Bénéfices; et ils sont dans les

([54]) J. DOMAT, t. I, *Les Loix civiles,* Liv. prélim., tit. II, sect. II, § II, p. 14.
([55]) *Ibid.*, § IV.
([56]) *Ibid.*, § V.
([57]) *Ibid.*
([58]) *Ibid.*, § VI.
([59]) *Ibid.*, § VII.
([60]) *Ibid.*, § IX, p. 15.
([61]) *Ibid.*, § X.

autres incapacitez réglées par les Ordonnances et par notre usage... Il faut excepter de ces incapacitez quelques étrangers à qui les Rois ont accordé les droits des Régnicoles et naturels François» ([62]). «On appelle Mort civile l'état de ceux qui sont condamnez à la mort, ou à d'autres peines qui emportent la confiscation des biens. Ce qui fait que cet état est comparé à la mort naturelle, parce qu'il retranche de la société et de la vie civile ceux qui y tombent, et les rend comme esclaves de la peine qui leur est imposée» ([63]).

Finalement Domat traite du statut des ruraux, des bourgeois, des nobles, des clercs et des religieux, les définissant par leurs capacités et incapacités respectives d'engagement. «On distingue encore en France les habitans des Villes qui ont quelques droits, quelques exemptions, quelques privilèges attachez au droit de bourgeoisie de ces Villes, avec la capacité d'en porter les charges; et les gens de la campagne et des petits lieux qui n'ont pas les mêmes privilèges et les mêmes droits» ([64]). «La noblesse donne à ceux qui sont de cet ordre divers privilèges et exemptions, et la capacité de certaines charges et bénéfices affectez aux Gentilshommes, et dont ceux qui ne sont pas nobles sont incapables. Et la noblesse fait aussi dans quelques coûtumes des différences pour les successions» ([65]). «Les Ecclésiastiques sont ceux qui sont destinez au ministère du culte divin, comme les Evêques, les Prêtres, les Diacres, les Sous-diacres, et ceux qui sont appellez aux autres Ordres. Et cet état qui les distingue des laïques, fait l'incapacité du mariage en ceux qui ont les Ordres sacrez; et fait aussi d'autres incapacitez des commerces défendus aux Ecclésiastiques, et leur donne les privilèges et les exemptions que les Canons, les Ordonnances et notre usage leur ont accordés» ([66]). «Les Religieux profès sont dans une... espèce de mort civile volontaire, où ils entrent par leurs vœux qui les rendent incapables du mariage, de toute propriété des biens temporels et des engagemens qui en sont les suites» ([67]).

E. LOUSSE.

([62]) J. DOMAT, t. I, *Les Loix civiles*, Liv. prélim., tit. II, sect. II, § XI.
([63]) *Ibid.*, § XII.
([64]) *Ibid.*, Liv. prélim., tit. II, sect. II, Introduction, p. 13.
([65]) *Ibid.*
([66]) *Ibid.*, Liv. prélim., tit. II, sect. II, § XIV, p. 15.
([67]) *Ibid.*, § XIII.

XVI

The Causes of the Decline of the German Estates,

BY

F. L. CARSTEN,
University of London.

For most of the German principalities — with the significant exception of Württemberg (1) — we do not possess any satisfactory history of the Estates: the study of their history has been neglected, yet its outlines are fairly clear. After a period of growth beginning in the later Middle Ages they reached the highest point of their power in the 16th, or even in the earlier 17th century — considerably later than the French States General and Provincial Estates or the Spanish Cortes; but upon that period there followed a period of rapid decline, particularly so in the later 17th century, and in certain principalities the Estates disappeared as an institution (2). In many other principalities, however, they survived, although with restricted powers, to the end of the *ancien régime,* and in the 18th century there occurred a distinct revival of their influence, above all in Württemberg and Mecklenburg. In the majority of German principalities the fate of the Estates was very different from that which befell them in the absolute monarchies of western Europe, but equally different from their rôle in Britain and the United Provinces where they gained decisive influence and became part of the machinery of government. Within Germany, there was a world of difference between the absolute military monarchy of the Hohenzollerns, in which the Estates had virtually disappeared, and the principalities which were governed constitutionally, such as Saxony, Hanover or Württemberg. Yet even within the Hohenzollern monarchy the Estates of Cleves and Mark continued to function and to provide a practical alternative to absolute government, as the Freiherr vom Stein had occasion to observe as late as the end of the

(1) Walter GRUBE, *Der Stuttgarter Landtag, 1457-1957,* Stuttgart, 1957.

(2) In the Rhine Palatinate, where the Estates had never properly developed as an institution, they disappeared completely with the events of the Thirty Years War and the restoration of the Elector Charles Louis at the end of the war. In the Upper Palatinate, Maximilian of Bavaria abolished the Estates during the war after the conquest of the territory because they had allegedly forfeited their privileges by participating in the Bohemian venture of their prince, Frederick V of the Palatinate. The Estates of the margraviate of Baden-Durlach and of the duchy of Holstein were abolished during the third quarter of the 17th century. In most of the Hohenzollern territories they practically disappeared soon afterwards.

18th century; and in Bavaria — another absolute monarchy — the Estates' committees continued to meet regularly and to exercise the functions of the Diet, which was no longer summoned, especially in the field of taxation and financial administration.

Most of the German Estates in the 16th century possessed far-reaching privileges and wielded the power of the purse; they had their own officials and standing committees which could meet without a summons from the ruler; they took an active part in legislation, which was often due to their own initiative, to the *gravamina* which they raised during the sessions of the Diet; they frequently acted as arbiters in cases of conflict between members of the ruling house; they participated through their own deputies in treaties and alliances concluded by their princes; they exercised the regency on behalf of rulers who were minors or incapable, and their consent was often required before the beginning of a war or other foreign venture. Above all, when the Estates took over their princes' debts in the course of the 16th century, they acquired a decisive voice in the financial administration of the principality, collecting the taxes through their own deputies and officials, paying from the revenue the interest on the debts, and in general allocating supply in the interests of the principality. They thus entered the field of general administration and, after the Reformation, they even acquired a voice in religious affairs: many a prince had to promise that he would not alter the established religion of the principality without the Estates' consent; and the revenues from the secularized monasteries were partly used for pious and educational purposes at the insistence of the Estates, for otherwise they might have been entirely squandered. In Catholic Bavaria the Estates did achieve that the chalice was, for a time, granted to the laity; and in Lutheran Prussia the Estates completely dominated the Church and all appointments in the religious as well as the secular sphere. Although it has often been asserted that the power of the princes grew as a result of the introduction of the Lutheran Reformation ([8]), there

([8]) Otto HINTZE, *Typologie der ständischen Verfassungen des Abendlandes*, in *Staat und Verfassung*, ed. Fritz HARTUNG, Leipzig, 1941, p. 128, in general sees in the transfer of spiritual powers to the temporal rulers since the Council of Basle and the Reformation one of the principal causes of the development of absolutism, under the Tudors, in Denmark and Sweden, and especially in France, Germany, Southern Italy and Spain. The example of the Tudors alone shows how doubtful this generalization is.

is no evidence that this applied to the relationship between prince and Estates. Like Henry VIII of England, most German princes were forced by lack of money to sell or pawn many of the monastic lands, mainly to members of the nobility — a factor which strengthened the local Estates. Even where a large proportion of the monastic lands remained state domains they were administered — as in the duchy of Prussia — by members of the local nobility for their own benefit; or their revenues were used to pay the interest on the prince's debt and to support schools and universities, functions which were supervized by members of the Estates.

In Bavaria, on the other hand, and later in the Habsburg territories, it was the introduction of the Counter-Reformation which strengthened the power of the prince and weakened the Estates — for the simple reason that in all these lands (with the exception of the county of Tyrol) the leaders of the opposition among the Estates were Protestants. The triumph of the Counter-Reformation before and during the Thirty Years War meant that the political and the religious aspirations of these leaders were defeated simultaneously. The religious privileges which had been granted previously were withdrawn; the Protestant leaders were tried, imprisoned and forced into exile; the nobility, a declining class, was disunited and offered but feeble resistance; the ruin caused by the Thirty Years War completed the work begun by Albert V of Bavaria and Ferdinand of Styria. Although the Estates survived as an institution and retained a certain influence, their power of resistance was broken and their political ambitions were extinguished when the disastrous war reached its end. They had become subservient to the prince, and he saw no reason why he should abolish them altogether, as they performed useful services as collectors of taxes, in billeting and recruiting, and in the sphere of local government.

In the Lutheran principalities also the Thirty Years War decisively influenced the relationship between the prince and the Estates, not only in the sense that their power of resistance was broken through devastation and depopulation. Many principalities were occupied by hostile armies, Swedish, French or Imperialist, which levied contributions without any regard for the Estates' privileges; and this example was followed by Maximilian of Bavaria no less than by Count Schwartzenberg, the ambitious minister of the Elector of Brandenburg. In Brandenburg the Estates never recovered from this period of military rule, soon to be followed by a much harsher

and more permanent military régime. Yet in other principalities — Saxony, Württemberg, Hesse — the princes after the end of the war needed the support of their Estates to promote the recovery of their devastated lands. And in the duchies on the lower Rhine — Jülich, Cleves, Berg and Mark — the Estates' position was strengthened through the long-drawn-out conflicts over the succession to this rich inheritance and the competition of the European powers for influence in this vital area, which strengthened the ties between the United Provinces and the Estates of Cleves. If there had been a long period of peace and recuperation after the peace of Westphalia, the Estates might have been able to retain and to consolidate their influence.

This, however, was not to be. Only six years after the end of the great struggle, the War of the North between Poland and Sweden offered to the Great Elector of Brandenburg his chance to gain the sovereignty over the duchy of Prussia and to establish a régime based on military force in those of his territories which were not directly touched by the war. His growing forces allowed him to disregard the Estates' privileges in Brandenburg as well as in Cleves and Mark — a policy he continued to apply after the end of the war in the duchy of Prussia. The foundation of the Brandenburg standing army ensured that in future taxes could be levied by the military if the Estates hesitated to make grants. The establishment of a military bureaucracy enabled the Great Elector to dispense with the services of the local officials, drawn from and supervised by the Estates, in the collection and administration of the taxes. The introduction of a permanent tax — the urban excise — made the summoning of the Diets unnecessary and deprived the Estates of their *raison d'être*. The adoption of different systems of taxation in the countryside and the towns divided the corporation of the Estates and made out of their once united edifice a heap of rubble, as the Estates of Prussia pointed out to the Elector (4). By skilfully playing off one Estate against the other and using their antagonistic

(4) «alss nach dem übel gesinnete den einen leib der dreyen Stände dieses landes zergliedert, einen Krepel daraus gemacht, die Städte undt freyheiten von dem lande undt die woll-priviligirte Cöllmer undt freyen von dem Adel, wieder Königl. Churfürstl. undt fürstliche Assecurationes mit himmelschreyender Unbilligkeit getrennet . . .»: Declaration of the Prussian nobility of 5 Juli 1683: *Ostpreussische Folianten*, vol. 718, f° 1210 (also in vols. 717, 719, 722), in the KÖNIGSBERG STATE ARCHIVES, now at Göttingen.

interests he successfully destroyed their political power. The creation of the officer corps soon reconciled most of the nobility to the establishment of absolute government. The example of the powerful Prussian state and the imposing Prussian army strongly influenced other German princes, the Electors of Saxony no less than the landgraves of Hesse and the dukes of Württemberg, especially in the 18th century.

Yet in the later 17th century — which saw a far more rapid decline of the Estates' power than the 18th century — it was not so much Brandenburg but France which exercised a decisive influence on German affairs. The wars of Louis XIV forced the German states along the Rhine to take defensive measures. Many German princes used the opportunity to create their own standing armies (which proved of little avail against the might of France) and in doing so encountered the determined opposition of the Estates: they correctly emphasized the plight of the country after the terrible devastations of the Thirty Years War, their inability to pay heavy taxes, and the uselessness of these armaments. In the long-drawn-out struggles which ensued many German princes were successful in establishing small standing armies and in fatally weakening their own Estates. Eventually most Estates had to accept the principle of a standing army and of more or less fixed contributions for its maintenance: their power of the purse in practice ceased to exist.

Louis XIV not only influenced constitutional developments inside Germany through his wars of aggression, but equally through his example, which set a pattern for so many European countries. He was the most powerful king of Europe, unfettered by any representative institutions or privileged corporations: nobody dared to oppose his will. It became the ambition of many a German prince to make himself more «considerable», inside and outside his principality. If there were any privileges of the Estates which stood in his way, these were out of tune with the times and must be revoked; it was the duty of subjects to obey, and not to argue. Time and again German princes pointed this out to their intimidated Estates. As early as 1657 an official of the Great Elector informed the Estates of Cleves that subjects must not grumble, but rather pray when their prince was fighting ([5]). Such admonitions did not stop them from grum-

([5]) «Unterthanen müssten dagegen nicht murren, sondern viel eher beten, wenn der Fürst fechtete . . .»: *Urkunden und Actenstücke zur Geschichte des*

bling, but there was virtually no resistance to the imposition of arbitrary taxes and their collection by military force: the spirit of the Sea-Beggars and of the Roundheads was not abroad in Germany. This was partly due, I think, to the general economic decline caused by the Thirty Years War and the subsequent wars, and partly to the Estates' ingrained attitude of obedience to the prince according to the doctrine of the Divine Right of Kings and the teachings of Luther; this had prevented the Lutheran noblemen of Bavaria from rendering resistance to Duke Albert V in the 16th century, and it deeply influenced their successors in the 17th century.

Against the violation of their privileges the Estates of many principalities complained to the Emperor and the Imperial courts, especially to the Aulic Council, or — in Prussia at the time of the Great Elector — to the crown of Poland, but with little effect. The enfeeblement of the Empire and the Emperor's need of princely support against France and against the Turks meant that these complaints were hardly ever entertained; if a suit developed the decision usually went against the Estates. The Great Elector with impunity could arrest the deputies of the Estates of Cleves on their return from Ratisbon where they had submitted their complaints to the Emperor. The decisions of the Imperial Diet of 1654 and the capitulation granted before his election in 1658 by the Emperor Leopold I expressly forbade all complaints by the Estates to the Imperial institutions against the maintenance of their rulers' garrisons and fortresses and prohibited any assemblies of the Estates without a summons. When the danger from France had subsided, however, such complaints were not only heard again by the Aulic Council; but, what is even more important, its decisions went in favour of the Estates, at least in the two memorable cases of Mecklenburg and Württemberg. In the 18th century the institutions of the Empire once more upheld the case of the Estates, with highly significant results. Even in the 18th century the Empire was by no means dead.

The main issue between the princes and the Estates undoubtedly was finance. The power of the Estates lasted as long as they possessed

Kurfürsten Friedrich Wilhelm von Brandenburg, vol. V, Berlin, 1869, p. 891: letter of 14 March 1657. References to out-of-date privileges were much more frequent in the 18th century, claims which were hardly ever disputed by the Estates.

the power of the purse and controlled taxation and financial administration. Wherever the prince did not need the financial aid of the Estates, for example in the Rhine Palatinate, they remained weak or even insignificant. Wherever the prince succeeded in obtaining a substantial revenue of his own, be that from former monastic lands or, as in Bavaria, from decimations of the clergy, his hand was strengthened against the Estates. Wherever a permanent tax was introduced, which was no longer dependent on a vote of credit by the Estates, their privileges disappeared. The best-known example of this kind was the introduction of the urban excise by the Great Elector, an example which was imitated by the Electors of Saxony and other princes. It is noteworthy, however, that in Bavaria, Württemberg and elsewhere an excise on consumption was also introduced; but it was only granted for limited periods at a time and it continued to be administered by the Estates: hence their privileges survived, at least to a certain extent.

There are thus strong parallels between the history of the German Estates and that of the English Parliament. While in the 16th century many German Estates were stronger and exercised a greater political influence on the principality in question than did the English Parliament, in the course of the 17th century this relationship was reversed. In England, Puritanism became a militant creed, the heart and soul of the Parliamentarian opposition. No parallel for this can be found anywhere in Germany, although there Lutheranism at times — for example in Hesse, Saxony and Württemberg — strengthened the hand of the Estates against a Calvinist or a Catholic prince ([6]). Antagonized by a new, inexperienced and inapt dynasty the English Parliament developed from strength to strength, while the German Estates declined rapidly. As I have tried to show, this was partly due to the Thirty Years War and to other calamities over which they had no control, partly to the influences emanating from France. Further causes of their decline were their own divisions and lack of tactical skill, the absence of able leaders, the Estates' unwillingness or inability to resist princely encroachments, and

([6]) The best-known example is the resistance of the Estates of Hesse-Cassel during the Thirty Years War to the forward Protestant policy of the Landgrave Maurice which led to his abdication. The opposition of the Estates of Saxony and of Württemberg to the absolutist policy of their rulers was strengthened by the fact that their Catholicism (from 1697 and 1733 onwards respectively) aroused much animosity in these strongly Lutheran principalities.

their readiness to make large grants, even for purposes of which they strongly disapproved, such as the creation of the *miles perpetuus*. Yet it remains true that the German Estates fulfilled very important functions, that they had the interests of their principalities at heart, and that they represented the whole country. Wherever their liberties were destroyed, liberty suffered the same fate. Although liberties and liberty did not mean the same thing, they were nevertheless closely connected. The Estates indeed belong to the main stream of German history, as they do in the majority of European countries. They deserve a much more honoured place than has been accorded to them by the historians ([7]).

F. L. CARSTEN.

([7]) The detailled evidence for the arguments advanced in this paper will be found in the author's *Princes and Parliaments in Germany*, Oxford, 1959.

XVII

Aus der Geschichte der Landstände Tirols,

VON

Dr. NIKOLAUS GRASS,
Professor der Rechte an der Universität Innsbruck.

«Die Eigenart der Verfassungsgeschichte des Landes Tirol besteht in der frühen Entwicklung des politischen Selbstbestimmungsrechtes seiner Bevölkerung» (1). Wenn auch bei der Bildung des Landes Tirol das Erbfürstentum die führende Kraft war, so trat diesem doch alsbald die Mitwirkung der politisch berechtigten Schichten des Landvolkes an die Seite. Dies zeigt ein Blick auf die Geschichte dieses Landes (2):

Das Gebiet des späteren Deutschtirol gehörte nach dem Abschluß der germanischen Völkerwanderung, also seit dem 6. Jahrhundert zum bayerischen Stammesherzogtum, das im 8. Jahrhundert als ziemlich selbständiges Glied in den Verband des Fränkischen und dann des Deutschen Reiches eingetreten war. In Tirol bestanden damals verschiedene Gaue und Grafschaften, z.B. Inntalgau, Noritalgau, Pustertalgau, Vintschgau und Boznerland. An der Spitze der Grafschaften standen Grafen, deren Amt mit der Zeit erbliches Lehen wurde und reich mit Grundbesitz ausgestattet war und nur gewissen, edelfreien Geschlechtern verliehen wurde.

(1) So urteilt der führende Erforscher der Geschichte Tirols, Otto STOLZ (†1957), *Die Magna Charta des Landes Tirol,* in der Zeitschrift: *Tirol, Natur, Kunst, Volk, Leben,* II. F., 2. Heft, Innsbruck o.J. [1929], S. 8-17, bes. S. 8. Vgl. auch STOLZ, *Die alte Tiroler Verfassung — ein Erbstück bodenständiger Demokratie,* in der Zeitschrift *Tiroler Heimat,* N.F., 2. Bd., Innsbruck, 1922, S. 39-53; STOLZ, *Die alte Verfassung des Landes Tirol,* in *Schweizerische Monatshefte für Politik und Kultur,* 10. Jg., Zürich, 1930/31, S. 403-413; STOLZ, *Das Land Tirol als politischer Körper,* im Sammelwerk: *Tirol, Land und Natur, Volk und Geschichte,* herausgegeb. vom Alpenverein, 1. Bd., München, 1933, S. 337-389; STOLZ, *Die älteste Verfassungsurkunde der Tiroler Landschaft,* in *Tiroler Heimatblätter,* 15. Jg., Innsbruck, 1937, S. 98-102: Ich folge hier weitgehend den Ausführungen von Stolz. Vgl. auch STOLZ, *Geschichte des Landes Tirol,* 1. Bd., Innsbruck, 1955; der 2. Bd. dieses Werkes behandelt die Verfassungs-, Verwaltungs- und Wirtschaftsgeschichte und ist noch nicht veröffentlicht; seine Drucklegung bereitet Fridolin Dörrer vor. Vgl. Nik. GRASS, *Otto Stolz †,* in *Zeitschr. für Rechtsgeschichte,* Germ. Abt., 75. Bd., 1958, S. 589-594.

(2) Vgl. Jakob Andrä Frh. von BRANDIS, *Die Geschichte der Landeshauptleute von Tirol,* Innsbruck, 1850; Albert JÄGER, *Geschichte der landständischen Verfassung Tirols,* 2 Bde., Innsbruck, 1881-1885 (Hauptwerk!); STOLZ, *Geschichte des Landes Tirol,* 1. Bd., dazu die Rezension von Nik. GRASS in *Histor. Zeitschr.,* 190. Bd., 1960, S. 614 f.

Bei wichtigeren Amtshandlungen, insbes. bei bedeutsamen Entscheidungen der Rechtspflege und Verwaltung, war der Graf an die Zustimmung der Versammlung der edlen und freien Grundbesitzer seines Gaues gebunden. Wenn auch im allgemeinen die urkundlichen Quellen, die für die Zeit vom 10. bis zum 13. Jahrhundert aus Tirol erhalten sind, recht spärlich fließen, so erwähnen doch einige von ihnen solche Versammlungen in jenen Grafschaften, sog. Taidinge, lat. placita, die an bestimmten Ding- oder Malstätten unter freiem Himmel stattfanden, und erwähnen auch das Zustimmungsrecht der dort versammelten comprovinciales oder incolae, also der Landsgenossen und Insassen (3). 1078 erscheinen die «comprovinciales», die Landsgenossen der Grafschaft Bozen bei dem «placitum», dem Taiding derselben (4). Und als 1230 der Graf des Noritales und Vogt des Hochstiftes Brixen, Graf Albert von Tirol, dem Kloster Neustift bei Brixen das Eigentumsrecht an den vom Kloster angelegten Neurodungen abtrat, da tat er dies «consenciente tota communitate ... divitum pauperum, nobilium et ignobilium, militum, rusticorum omnimodum» (5), also mit Zustimmung der Reichen wie der Armen, der Edlen und der Gemeinen, der Ritter wie der Bauern jeden Standes. Das zeigt, daß ein gewisses politisches Zustimmungsrecht nicht nur dem Adel und den Grundherren allein, sondern auch den wirtschaftlich selbständigen Bauern zugestanden hat.

Die deutschen Könige haben im 11. Jahrhundert die Grafschaften im Inn-, Etsch- und Eisacktal den Hochstiftern Brixen und Trient verliehen. Diese aber haben selbst wieder weltliche Grafen als ihre Vasallen an die Spitze der Grafschaften gestellt. Schließlich haben die Grafen des Vintschgaues, die sich seit dem 12. Jahrhundert nach ihrer bei Meran gelegenen Burg als Grafen von Tirol bezeichneten, die meisten Grafschaften im Lande Tirol in ihren Händen vereinigt und die Vogtei über die Hochstifter Brixen und Trient erworben (6).

(3) Otto Stolz, *Rechtsgeschichte des Bauernstandes und der Landwirtschaft in Tirol und Vorarlberg*, Bozen, 1949, S. 334-340.

(4) *Monumenta Boica*, 9. Bd., S. 372. Vgl. dazu Stolz, *Gesch. d. Gerichte Deutschtirols*, im *Archiv f. österr. Gesch.*, 102. Bd., S. 109; Stolz, *Die Landstandschaft der Bauern in Tirol*, in *Histor. Vierteljahrschrift*, 28. Bd., 1933, S. 699-736 u. 29. Bd., 1934, S. 109-144, bes. S. 706 f.

(5) *Urkundenbuch des Augustiner Chorherrenstiftes Neustift in Tirol* (Font. rer. Austr., 2. Abt., 34. Bd., Wien, 1871), S. 90.

(6) Vgl. Stolz, *Geschichte des Landes Tirol*, 1. Bd., S. 430 ff.

Graf Meinhard II. von Görz-Tirol hat dann während seiner langen Regierung (1258-1295) durch eine für die damalige Zeit ungewöhnlich straffe innere Organisation die alten Grafschaften im Land im Gebirge zu einer staatlichen Einheit verschmolzen, die unter ihm zuerst als Grafschaft oder Land Tirol und alsbald als selbständiges Fürstentum des Römisch-deutschen Reiches anerkannt wurde (7).

So sehr nun die Bildung der Grafschaft Tirol persönliches Werk des Grafen Albert von Tirol wie insbesondere des (vorhin erwähnten) Herzogs Meinhard II. gewesen ist, so wollte oder konnte letzterer doch den schon von früher her eingewurzelten Zug zur Selbstbestimmung der Bevölkerung in dem neugebildeten Territorium nicht unterdrücken. Meinhard II. hat sich vielmehr an die überlieferte Form gehalten, die Bewohner der Grafschaft an altgewohnter Dingstätte zu versammeln und ihre Meinung durch ihre Wortführer zu vernehmen. Meinhard II. hat ja die feudalen Gewalten weitgehend zurückgedrängt und das einfache Volk begünstigt. Im Bürger- und Bauernstand sah er die tragende Schicht des Landes. So scheint er von Anfang an deren Vertreter, die seniores, syndici oder anciani neben den bevorrechteten Ständen zur Vertretung der allgemeinen Interessen herangezogen zu haben. Sein nur in dürftigen Bruchstücken erhaltenes Tiroler Landrecht hat Meinhard II. kurz vor 1282 erlassen, «mit ehrsamer und weiser leute und weiser dienstmannen rat über all unser lant» (8). Und als 1293 für die Grafschaft Bozen eine neue Gerichtsordnung vereinbart wurde, waren bei der Versammlung der Insassen anwesend: einerseits die nobiles, magnates et ministeriales (Edlen, Grundherren und ritterlichen Dienstmannen) andererseits auch die burgenses et cultores et alii homines et personae, also Bürger, Bauern und andere Leute (9).

Andere wichtige, für das Land gültige Gesetze wurden damals stets mit ausdrücklicher Zustimmung des landesfürstlichen Rates erlassen. Dieser bestand allerdings vorwiegend aus den obersten Hof-

(7) Vgl. Hermann WIESFLECKER, *Meinhard der Zweite. Tirol, Kärnten und ihre Nachbarländer am Ende des 13. Jhs.* (*Schlern-Schriften*, 124. Bd.), Innsbruck, 1955; dazu Rezension von O. STOLZ in *Mitteil. d. Inst. f. österr. Geschichtsforschung*, 64. Bd., 1956, S. 142-145 u. Nik. GRASS in *Histor. Zeitschr.*, 190. Bd., 1960, S. 203 f.

(8) WIESFLECKER, *Meinhard der Zweite*, S. 178.

(9) *Ausgew. Urkunden zur Verfassungsgesch. d. österr. Erblande im Mittelalter*, hg. von E. v. SCHWIND u. A. DOPSCH, Innsbruck, 1895, S. 146, Zl. 33 f. u. 40 dazu JÄGER, *Landständ. Verfass.*, II/1, S. 7 ff. u. STOLZ, *Landstandschaft*, I, 718.

und Landesbeamten. Mitunter wurde auch die Zustimmung der Ältesten oder Vornehmsten ([10]), auch ehrsamer, weiser oder biederer Leute eingeholt ([11]). Unter diesen sind eben im Gegensatz zu den Beamten Vertreter der Bevölkerung des Landes oder wenigstens gewisser maßgebender Kreise derselben gemeint, die zur Beratung der wichtigsten Landesangelegenheiten schon damals beigezogen worden sind, wenn auch nichts Näheres über die Form der Landtage aus jener oder der nächstfolgenden Zeit überliefert ist ([12]). Verfassungsformen treten eben oft nicht mit einem Schlage fertig in Erscheinung, sondern bedürfen vielfach einer längeren Zeit zu ihrer vollen Ausbildung.

Solange die landesfürstliche Gewalt fest in den Händen einer im Lande wurzelnden Dynastie ruhte, war weniger Anlaß gegeben, durch Anrufungen des Volkes sich dessen Anhängerschaft zu versichern. Dies änderte sich, als das bisherige Fürstenhaus der Görzer 1335 im Mannesstamme ausstarb. Da bemühten sich die drei mächtigsten Dynastien des damaligen Deutschland, die Habsburger, die Wittelsbacher und die Luxemburger, Tirol in ihren Besitz zu bringen ([13]).

Die Hand der Erbtochter, der Margarethe Maultasch, gewann der Luxemburger Johann Heinrich; die Wittelsbacher und die Habsburger jedoch hatten vereinbart, Tirol gemeinsam in Besitz zu nehmen und es dann unter sich zu teilen, wobei Bayern das Inntal, Österreich Südtirol erhalten sollte.

Als dieser Plan der Zerreißung Tirols im Lande bekannt wurde, gewann der Luxemburger, der die Einheit des Landes verkörperte, erst die richtige Anhängerschaft. Das eigentliche Schicksal des Landes nahm aber die Bevölkerung selbst in die Hand. Wie uns die darüber ausgestellte Urkunde berichtet ([14]), ward 1336 ein förmlicher Vertrag zwischen dem neuen Landesfürsten und den Vertretern des Landes geschlossen. Die letzteren werden als «nobiles, et

([10]) So erklärt 1305 der Landesfürst, daß er den Bügern Merans seniorum testimonio et pociorum terre nostre approbatis indiciis Privilegien verleihe. Cöl. STAMPFER, *Geschichte von Meran*, Innsbruck, 1889, S. 345.

([11]) JÄGER, *Landständ. Verfassung*, II/1, S. 15 u. 30.

([12]) STOLZ, *Landstandschaft*, I, S. 717 f.

([13]) Vgl. hiezu JÄGER, *Landständ. Verfassung*, II/1, S. 36 ff.; STOLZ, *Landstandschaft*, I, S. 722 f.

([14]) Vollinhaltlich erstmals veröffentlicht von Ludwig SCHÖNACH, *Die Bewerbung der Luxemburger um Tirol 1335 mit Urkunden*, in *Mitteilungen des Vereins für Geschichte der Deutschen in Böhmen*, 43. Bd., 1905, S. 507 f.

ignobiles communiter cuiuscunque dignitatis», also als «Edle und Unedle gemeiniglich jeden Standes» bezeichnet. Darunter sind die Vertreter des Adels, der Bürgerschaft der Städte und der Bauern, der sogenannten Täler und Gerichte gemeint.

Die Luxemburger mußten sich in dieser Urkunde vor allem verpflichten, das Land Tirol in seinem Umfange und seinen bisherigen Rechten zu erhalten, wogegen die Landstände versprachen, den Fürsten bei der Aufrechterhaltung dieses Vertrages und der Verteidigung des Landes zu helfen. Sie schwören ihnen Treue, «einmütig und aus freien Willen», wie die Urkunde sagt.

Wir stellen also fest,

1.) daß das Land durch Verordnete seiner Bevölkerung, eben die später sog. Landschaft, gegenüber dem Fürstenhause vertreten wird, und
2.) daß schon damals, 1335/36, an dieser Landesvertretung nicht bloß die Edeln-Adeligen, sondern auch die Unedeln, also die Bürger und Bauern beteiligt sind.

In Tirol stellen sich also die Bürger und die Bauern von Anfang an bei der Landesvertretung gleichberechtigt neben den Adel. Die Teilnahme der Städte an den Landtagen hat sich ja in den meisten germanischen und romanischen Staaten des Mittelalters durchgesetzt, die Bauern blieben jedoch meistenteils davon ausgeschlossen. Eine Ausnahme bilden nur Vorarlberg ([15]), die Schweizer Urkantone, die Gaue der Friesen und Dietmarschen an der Nordsee, die skandinavischen Länder und eben Tirol.

Warum nun ist in Tirol dem Bauernstand die politische Gleichberechtigung eingeräumt worden, die ihm in den meisten stammverwandten Ländern versagt blieb ?

In Tirol ist es nur ganz selten zur Ausbildung räumlich geschlossener, ganze Gemeinden umfassender Grundherrschaften gekommen. Die den Grundherren unterworfenen Güter, die mit Ausnahme des oberen Inntales und Lechtales auch in Tirol überwogen, befanden sich hier meist in Streulage. Die Grundherren verliehen die Güter

([15]) Vgl. Anton BRUNNER, *Die Vorarlberger Landstände*, Innsbruck, 1929, und Otto STOLZ, *Verfassungsgeschichte des Landes Vorarlberg*, Separatum aus der Zeitschrift *Montfort*, Bregenz, 1950, S. 1-100, bes. S. 43 f.

den Bauleuten vornehmlich in der günstigen Leiheform der Erbleihe, wodurch die bäuerliche Freiheit nicht gemindert wurde (16). Die Bauern behielten daher die Selbstverwaltung in ihren Gemeinden und damit sowohl die Notwendigkeit wie auch Eifer und Verständnis für eine gewisse politische Betätigung. Sie blieben ein Faktor, mit dem jede Landesregierung rechnen mußte und wurden daher zu den wichtigen Entscheidungen über das Schicksal des Landes herangezogen (17).

Auch die Art der Entstehung des Landes und der landesfürstlichen Gewalt trug dazu bei, das politische Gewicht der unteren Stände zu erhöhen. Die Grafen von Tirol mußten sich im Gegensatz zu ihren Lehensherren, den Hochstiftern Brixen und Trient und deren mächtigem Lehensadel emporringen und suchten daher Anlehnung an die breiten Volksschichten, die sie durch Verleihung von Freiheiten und Rechten für sich gewannen. Indem der Herzog Meinhard II. die Bauern und Bürger zu den Beratungen des Landes heranzog, vermochte er die große Masse des Landesvolkes an sich zu ziehen und damit die von ihm betriebene Zurückdrängung der feudalen Gewalten zu sichern (18).

Noch im 15. Jahrhundert konnte sich Herzog Friedrich IV. (1407-1439) eines Versuches des Tiroler Adels, sich reichsunmittelbar zu machen und das Land in kleine Adelsherrschaften aufzuteilen, nur mit der bewaffneten Hilfe der Städte und Bauernschaften erwehren. Dies wirkte natürlich wieder auf deren politische Stellung zurück (19). Auch empfahl es sich für die Habsburger, gerade den Interessen des Tiroler Bauernstandes Entgegenkommen zu zeigen, da sonst Gefahr

(16) Vgl. Hermann Wopfner, *Beiträge zur Geschichte der freien bäuerlichen Erbleihe Deutschtirols im Mittelalter (Untersuchungen zur deutschen Staats- und Rechtsgeschichte,* hg. v. O. Gierke, 67. Heft), Breslau, 1903; Stolz, *Rechtsgeschichte des Bauernstandes,* S. 114, 205, 227 ff.; Wopfner, *Bergbauernbuch,* 1. Bd., Innsbruck, 1951 ff., S. 456 ff.

(17) Vgl. Ferdinand Kogler, *Die Stellung Tirols in der deutschen Rechtsgeschichte bis ins 16. Jh.,* in der Zeitschr. *Tiroler Heimat,* N.F., IV. Bd., Innsbruck, 1931, S. 3-20; Otto Brunner, *Land und Landstände in Österreich,* in *Mitteilungen des Oberösterr. Landesarchivs,* 5. Bd.: *Staat und Land,* Graz-Köln, 1957, S. 61-73, bes. S. 65; Ernst Klebel, *Die historischen Individualitäten der österr. Länder,* ebd. S. 74-85, bes. S. 81.

(18) Vgl. Wiesflecker, *Meinhard der Zweite,* S. 147 ff. u. 181.

(19) Vgl. Jäger, *Landständ. Verfassung,* II/1, S. 307 ff.

bestanden hätte, daß die Bauern Anschluß an die nahe Schweizer Eidgenossenschaft gesucht hätten (20).

Doch damit sind wir dem Gang der Geschichte etwas vorausgeeilt. Wir müssen noch kurz zurückkehren zur schon erwähnten Margaretha Maultasch, der letzten Sprossin des Hauses Görz-Tirol. Deren zweiter Gemahl Ludwig der Brandenburger, der Sohn Kaiser Ludwigs des Bayern aus dem Geschlechte der Wittelsbacher war in seiner Stellung als Landesfürst ganz auf die Gunst der Stände angewiesen und befestigte sie durch eine feierliche Verbriefung ihrer alten Rechte.

Um die öffentliche Meinung im Lande für sich zu gewinnen und zu befestigen, wahrscheinlich über Drängen der Tiroler Landschaft selbst, hat Ludwig der Brandenburger als Tiroler Landesfürst 1342 die Rechte der Landstände gegenüber dem Landesfürsten bestätigt, und zwar unter Anführung der wichtigsten einzelnen Bestimmungen. Diese am 28. Jänner 1342 ausgestellte Urkunde stellt die älteste erhaltene Tiroler Landesverfassung dar (21).

Merkwürdigerweise ist diese Urkunde — im übrigen völlig gleichlautend — an zwei verschiedene Empfänger in voller Originalausfertigung gegeben worden:

Die eine Ausfertigung richtet sich an die beiden oberen Stände: an die Gotteshäuser, das sind hier die mit Grundbesitz reicher ausgestatteten Stifte oder Klöster, und an die Edelleute, also an die weltlichen Grundherren, die in der Grafschaft Tirol gesessen sind. Diese Ausfertigung befindet sich noch heute im Original im Landesarchiv (Landhaus) zu Innsbruck.

Die zweite Ausfertigung richtet sich an einen weiteren Kreis, nämlich nicht nur an die Gotteshäuser und Edelleute, sondern auch an die Stadt-, Markt- und Dorfgemeinden sowie überhaupt an alle Leute in der Grafschaft Tirol, edel und unedel, reich und arm, wie immer sie heißen, oder wo immer sie gesessen sind in der Grafschaft Tirol.

Diese zweite Ausfertigung ist gerade deshalb von besonderer Wichtigkeit, weil sie zeigt, daß an der Tiroler Landschaft schon damals auch die Landgemeinden beteiligt gewesen sind, und zwar

(20) Hermann WOPFNER, *Die Lage Tirols zu Ausgang des Mittelalters (Abhandlungen zur Mittleren und Neueren Geschichte,* herausgegeb. v. G. v. BELOW, H. FINKE und Fr. MEINECKE, 4. Heft), Berlin, 1908, S. 117.

(21) STOLZ, *Magna Charta,* S. 12; DERS., *Landstandschaft,* I, S. 727. Vgl. Anhang Nr. 1, unter S. 320-322.

anscheinend nicht als Neuerung, sondern auf Grund der bisherigen Überlieferung ([22]).

Diese zweite Ausfertigung ist zur Grundlage der schriftlich festgelegten Verfassung des Landes Tirol geworden, denn nur in dieser Ausfertigung werden alle Stände der Tiroler Landschaft erwähnt und erhält diese auf Grund ihrer bisherigen Rechte und Freiheiten zum erstenmal eine feierliche und ausführliche Verbriefung derselben. Man darf deshalb diese Urkunde von 1342 — gleich den ältesten Urkunden der englischen und der ungarischen Verfassung von 1215 bzw. 1222 — wohl als die Magna Charta, den großen Freiheitsbrief des Landes Tirol bezeichnen ([23]).

Diese Magna Charta des Landes Tirol von 1342 beweist, daß in Tirol an den Landständen nicht nur die Stifte, der Adel und die Städte beteiligt waren, wie dies auch in anderen deutschen Ländern der Fall war, sondern auch die Bauern der Landgemeinden, geordnet nach den Landgerichten.

Weiters wird in diesem Freiheitsbriefe die Tiroler Landesverfassung als eine alte Gewohnheit bezeichnet, war also damals — 1342 — schon fest eingelebt, und als erster Landesfürst, unter dem sie gegolten habe, wird Herzog Meinhard II. bezeichnet. Dieser Fürst, der in Tirol die Landeshoheit geschaffen hat, wird hier geradezu als ein Urheber der landständischen Verfassung betrachtet und damals, 50 Jahre nach seinem Tode, mußte man das wohl noch beiläufig wissen. Doch ist eine schriftliche Beurkundung dieser Verfassung durch Meinhard II. nicht auf uns gekommen ([24]). Jene Erwähnung des Herzogs Meinhard II. ist übrigens ein starker Hinweis darauf, daß die Tiroler Landesverfassung in ihren Ursprüngen mit der Entstehung des Landes enge zusammenhängt und daß bei dieser territorialen Entwicklung nicht nur der Machtsinn einer Dynastie, sondern auch der politische Wille der betroffenen Bevölkerung mitgearbeitet hat.

Weitere wichtige Bestimmungen des Freiheitsbriefes von 1342: *«Wir sollen keine ungewöhnliche Steuer auflegen ohne der Landleute Rat»*.

([22]) STOLZ, *Magna Charta*, S. 12; DERS., *Landstandschaft*, I, S. 727.

([23]) Textedition bei SCHWIND-DOPSCH, *Ausgew. Urkunden*, S. 179 f.; Abbildung der Urkunde mit Erörterung bei STOLZ, *Die Magna Charta des Landes Tirol*, a.a.O.

([24]) WIESFLECKER, *Meinhard der Zweite*, S. 177 ff. u. 303.

Rat bedeutet in diesem Zusammenhang soviel wie Zustimmung; Die Landschaft hatte also das Recht der Steuerbewilligung. «Auch sollen wir die Grafschaft zu Tirol handeln und haben nach der Besten Rat, die darin gesessen sind, und allzeit des Landes zu Tirol Recht bessern und nicht bösern nach ihrem Rat».

Damit wurde also den Vertretern der Landschaft eine Mitwirkung bei der Regierung und Gesetzgebung eingeräumt.

Diese Befugnisse: Steuerbewilligung, Gesetzgebung und Mitwirkung bei der Regierungstätigkeit sind für alle Zeiten die Hauptsache jeder Volksvertretung, wir sehen also ihre Bedeutung in der Urkunde von 1342 bereits voll erfaßt. Es sind dies dieselben oder ähnliche Rechte, wie sie auch in der englischen Magna Charta von 1215 niedergelegt sind ([25]). Und wenn man heute letztere allgemein als den Geburtsbrief aller europäischen Verfassungen bezeichnet, so dürfen wir nicht vergessen, daß auch in der Geschichte Tirols ganz die gleichen staatsrechtlichen Anschauungen und Bildungen völlig selbständig und unbeeinflußt von außen bereits im späteren Mittelalter zutage treten. Nicht von Nachahmung auswärtiger Vorbilder kann und soll da gesprochen werden, sondern von der Gemeinsamkeit der ursprünglichen Grundlage: der germanischen Neigung nach Wahrung der Einzelpersönlichkeit auch in dem an sich unentbehrlichen Zwang des Staatslebens.

Dann:

Die bisherigen Beamten sollen bei ihren Stellen und Befugnissen belassen und insbesondere solle keine Burg des Landes einem Ausländer verliehen werden, solche sollen nur Landesangehörigen übertragen werden.

Dies die wichtigsten Bestimmungen des Freiheitsbriefes von 1342.

Um diesem Freiheitsbrief Ludwigs des Brandenburgers für Tirol von 1342 noch besonderes Gewicht zu verleihen, hat auch der Vater des Ausstellers, Kaiser Ludwig der Bayer, der Tiroler Landschaft in einer feierlichen Urkunde vom 28. Jänner 1348 den von seinem Sohne erlassenen Freiheitsbrief von 1342 bestätigt und versprochen, seinen Inhalt immer zu wahren. Auch diese kaiserliche Bestätigung ist uns in zwei Ausfertigungen erhalten, die eine nur für die Edelleute, die andere für alle Stände und Insassen der Grafschaft Tirol.

Die Magna Charta von 1342 bildete die Grundlage der Tiroler Landesverfassung für die folgende Jahrhunderte!

([25]) Nach Stolz, *Magna Charta des Landes Tirol*, S. 14.

Eine inhaltlich so bestimmte Verbriefung ihrer Rechte haben die Landstände anderer österreichischer oder auch deutscher Länder weder zu dieser Zeit noch später erhalten:

Die erste Landhandfeste der Steiermark, die Georgenberger Handfeste von 1186 ([26]) enthält im Wesen nur Standesrechte der landesfürstlichen Ministerialen.

Auch die späteren Landhandfesten der Herzogtümer Steiermark und Österreich enthalten nur die Bestätigung der Rechte und Freiheiten der Landstände mit allgemeinen Ausdrücken, jedoch keine näheren Angaben über ihre Befugnisse, diese waren eben nur durch die Gewohnheit und das Herkommen geregelt.

Als sich Gräfin Margaretha Maultasch als die erbliche Inhaberin der Grafschaft Tirol 1363 entschloß, diese ihren Verwandten, dem Habsburger Herzog Rudolf IV., dem Stifter, und den anderen Herzogen von Österreich zu übergeben, geschah dies mit Zustimmung und unter Mitwirkung der gesamten Landschaft.

In der Übergabs-Urkunde vom 26. Jänner 1363 beruft sich Margaretha Maultasch auf die Verhandlungen, die sie mit den «edeln ... lantherren und ratgeben, die an stat und in namen der andern aller geystleicher und weltleicher, edeler und unedeler, armer und reicher, in steten und auf dem lande, die zu allen den vorgenanten fürstentum, grafscheften und herscheften [ze Tyrol] gehörent» (edeln Landherren und Ratgebern von wegen aller anderen, Geistlichen und Weltlichen, Edlen und Unedlen, Armen und Reichen, in den Städten und auf dem Lande, die zum Fürstentum Tirol gehören) geführt habe ([27]). Die Stände Tirols leisteten dem neuen Landesfürsten erst dann den Treueid, nachdem dieser die Freiheiten und Rechte des Landes bestätigt und sie zu halten versprochen hatte. Dadurch war eine einseitige Änderung des Landesrechtes durch den Landesfürsten rechtlich unmöglich gemacht ([28]). Und kurz darauf berichtet Her-

([26]) Gedruckt bei SCHWIND-DOPSCH, *Ausgew. Urkunden*, S. 20-22, dazu Anton MELL, *Grundriß der Verfassungs- und Verwaltungsgeschichte des Landes Steiermark*, Graz, 1929, S. 30 ff. u. ö.

([27]) Abdruck dieser Urk. bei Alfons HUBER, *Geschichte der Vereinigung Tirols mit Österreich*, Innsbruck, 1864, S. 225 oben.

([28]) HUBER, *Vereinigung*, S. 87 u. 226, Reg. 294; WOPFNER, *Von der Ehre und Freiheit des Tiroler Bauernstandes*, 1. Bd. (nicht mehr erschienen), Innsbruck, 1934, S. 6.

zog Rudolf IV. dem Dogen von Venedig, daß bald nach seinem Eintreffen in Tirol die «communitas incolarum tam nobilium quam ignobilium nos dominum suum recognoscentes nobis iuramenta fidelitatis, obedientiae et homagii praestiterunt» ([29]). Mit Urkunde vom 11.9.1363 bestätigt die Landschaft, daß Margaretha die Grafschaft Tirol den Herzogen von Österreich ganz übereignet habe und bezeichnet sich hierbei als «die Landschaft gemeinlich, edel und unedel, die zur Herrschaft von Tirol gehört» ([30]). Das ist übrigens die erste schriftliche Verwendung des Ausdruckes «Landschaft», die für Tirol überliefert ist. In Übereinstimmung mit dieser Urkunde sagt der zeitgenössische tirolische Geschichtsschreiber Goswin von Marienberg, die Abtretung des Landes sei erfolgt «cum consilio nobilium et ignobilium hujus terre» ([31]).

Als im Jahre 1404 ein Landesgesetz von höchster Wichtigkeit ([32]) das Rechtsverhältnis zwischen Grundherren und Bauleuten in einer die soziale Entwicklung der Tiroler Bauernschaft gegenüber der der Nachbarländer besonders günstig beeinflussenden Weise regelte, geschah dies «nach Rat und Erkanntnues uenser Raet und den merern Tail der Landesleut daselbs... unsern Praelaten, Aepten, Dienstleuten, Herren, Rittern, Knechten, Stetten und gemainleich allen Landsleuten... der Herrschafft ze Tyrol...» ([33]) «nach Rat und Erkenntnis der landesfürstlichen Räte und des mehrern Teils der Landesleute, als Prälaten, Herren, Ritter, Knechte, Städte und gemeinlich aller Landleute».

Wir sehen hier zum erstenmal in der Tiroler Verfassungsgeschichte das Mehrheitsprinzip, das Um und Auf jeder parlamentarischen Regierungsform, ausdrücklich angewendet und ausgesprochen ([34]).

Im Jahre 1406 erließen die damaligen Landesfürsten aus dem Hause Habsburg (die Herzoge Leopold und Friedrich), um sich der Opferwilligkeit und Anhänglichkeit des Landes im Kampf gegen Italiener und Schweizer zu sichern, eine neue Verfassungsurkun-

([29]) HUBER, *Vereinigung*, S. 226, Reg. 296.

([30]) HUBER, *Vereinigung*, S. 94 u. 233, Reg. 330; JÄGER, *Landständ. Verfass.*, II/2, S. 147 f.

([31]) *Tirolische Geschichtsquellen*, 2. Bd., Innsbruck, 1880, S. 217; STOLZ, *Landstandschaft*, I, S. 729.

([32]) Veröffentlicht bei WOPFNER, *Erbleihe*, S. 203-209.

([33]) WOPFNER, *Erbleihe*, S. 204.

([34]) STOLZ, *Landstandschaft*, I, S. 730.

de (35), welche jene von 1342 bestätigt und um einige sehr wichtige Bestimmungen erweitert. Diese betreffen den Rechtsschutz der Landesangehörigen: Diese sollen ihrem ordentlichen Gerichtsstande nicht entzogen und ohne Spruch desselben nicht verurteilt und bestraft werden, auch verspricht der Landesfürst in den Gang dieser Rechtspflege nicht einzugreifen (36).

Bestimmungen solcher Art finden sich auch in der englischen Magna Charta von 1215 und besonders in der Habeas-Corpus-Akte von 1679 (37) und sind seither in den eisernen Bestand aller konstitutionellen Verfassungen übergegangen (38).

Selbst die Freiheit der politischen Meinungsäußerung ist in Tirol schon durch einen Landtagsbeschluß von 1487 ausgesprochen worden. Damit hat die Tiroler Landschaft auch in dieser Hinsicht einen unentbehrlichen Gedanken der modernen Verfassungen vorweg genommen.

Auf Grund der besprochenen Verfassungsurkunden von 1342 und 1406 entwickelte sich die Tiroler Landschaft zu immer größerer Bedeutung und Macht. Alle entscheidenden Schicksale des Landes gingen von den Landtagen aus, Versuche einzelner Fürsten oder deren Räte, über jene hinweg zu handeln, scheiterten an dem Widerstande des Volkes. Es gab keine Angelegenheit des öffentlichen Lebens, in der die Landschaft ihren Willen nicht zur Geltung brachte. Ja dieser erwirkte, als im sog. Landlibell von 1511 die Wehrverfassung des Landes neu geordnet wurde (39), seitens des Landesfürsten (Maximilian I.) die auch für dessen Nachfolger bindende Zusage, daß Kriege, in denen Tirol als Schauplatz oder unmittelbares Hinterland in Mitleidenschaft gezogen würde, nur mit Zustimmung des Landtages unternommen werden dürften (40).

(35) Druck bei SCHWIND-DOPSCH, S. 297 mit irrigem Regest *Landesordnung*.

(36) STOLZ, *Landstandschaft*, I, S. 730.

(37) Vgl. J. HATSCHEK, *Englische Verfassungsgeschichte*, München, 1913, S. 505.

(38) STOLZ, *Magna Charta*, S. 14.

(39) Wortlaut des Landlibells von 1511 bei BRANDIS, *Geschichte der Landeshauptleute*, S. 412-422; dazu Hermann CONRAD, *Geschichte der deutschen Wehrverfassung*, 1. Bd.: *Von der germanischen Zeit bis zum Ausgang des Mittelalters*, München, 1939, S. 159 sowie Otto STOLZ, *Wehrverfassung und Schützenwesen in Tirol von den Anfängen bis 1918*, herausgegeb. v. Franz HUTER, Innsbruck, 1960, S. 66 ff. Vgl. hiezu die inhaltsreiche Rezension von H. CONRAD, in *Zeitschr. für Rechtsgesch.*, Germ. Abt., 77. Bd., 1960, S. 457 f.

(40) In Bayern hatten die Landstände schon 1393 das Privileg erhalten, daß kein «namhafter Krieg» ohne ihren Rat begonnen werde. LERCHENFELD, *Die*

In keiner der konstitutionell-monarchischen Verfassungen des 19. Jahrhunderts war ein so formeller Einfluß des Parlamentes auf die folgenschwerste aller Regierungshandlungen, die Erklärung eines Krieges, vorgesehen. Dieses Recht hat die Tiroler Landschaft in seiner Bedeutung wohl erfaßt und auch in späterer Zeit, so in den Jahren 1534 und 1640, gegenüber den damaligen landesfürstlichen Regierungen mit allem Nachdruck in Erinnerung gebracht.

Seit der Mitte des 15. Jahrhunderts hat man eine Sammlung grundlegender Landesgesetze angelegt, die als «Landesfreiheiten der fürstlichen Grafschaft Tirol» bezeichnet wurden. Hierin finden wir auch die vorhin besprochenen Verfassungsurkunden von 1342 und 1406.

Von dieser Sammlung haben sich zahlreiche Abschriften erhalten, weil solche fast alle Landstände, die Stifte, Adelsfamilien, die Städte und auch die größeren Gerichtsverbände begreiflicherweise haben wollten ([41]). Diese «Landesfreiheiten» stellen eine wirkliche Sammlung der Tiroler Verfassungsgesetze dar, die durch streng bodenständige Rechtsentwicklung erwachsen waren und von der Kraft des alttirolischen Landesgeistes beredtes Zeugnis ablegen. Eine Drucklegung dieser Landesfreiheiten ist niemals erfolgt, während dies in der Steiermark für die dortigen Landhandfesten geschehen ist ([42]).

Jeder neu zur Regierung gelangte Landesfürst hatte diese Landesfreiheiten zu bekräftigen, die Landschaft ihrerseits dem Landesfürsten die Erbhuldigung darzubringen. Bei der Erbhuldigung leistete die Landschaft im eigenen Namen wie in jenem der gesamten Einwohner des Landes ein eidliches Gelöbnis der Treue und des Gehorsams. Anläßlich dieser Erbhuldigung haben seit dem Anfang des 15. Jahrhunderts alle weiteren Tiroler Landesfürsten der Landschaft ihre hergebrachten «Rechte und Freiheiten, Gnaden und Privilegien bestätigt und erneuert» ([43]).

altbaier. Landständ. Freibriefe, 1853, S. 37; Otto BRUNNER, *Land und Herrschaft*, 4. Aufl., Wien, 1959, S. 428.

([41]) Vgl. Alfred R. v. WRETSCHKO, *Zur Geschichte der Tiroler Landesfreiheiten*, in *Schlern-Schriften*, 9. Bd., Innsbruck, 1925, S. 309-334. Anläßlich der in Innsbruck abgehaltenen Tagung der Internat. Kommission für Geschichte der Ständeversammlungen wurde am 6. Sept. 1959 eine in der Sammlung Hochenegg in Hall verwahrte *Handschrift der Tiroler Landesfreiheiten* besichtigt.

([42]) Vgl. Emil WERUNSKY, *Österreichische Reichs- und Rechtsgeschichte*, Wien, 1894 ff., S. 253 f.

([43]) Otto STOLZ, *Die Bestätigung der alten Tiroler Landesfreiheiten durch die Landesfürsten*, in *Schlern-Schriften*, 52. Bd., Innsbruck, 1948, S. 317-327.

Nur Maria Theresia und Joseph II. haben — im Gegensatz zu all' ihren Vorgängern und Nachfolgern — bei ihrem Regierungsantritte (1740 bzw. 1780) die Landesfreiheiten, die neben dem Gewohnheitsrecht die schriftliche Grundlage der Landesverfassung bildeten, nicht bestätigt. Dies bedeutete zwar nicht deren förmliche Aufhebung, hatte aber doch eine zeitweilige Nichtbeachtung zur Folge. Eine gegenwärtig noch verbreitete Lehrmeinung will wissen, daß die Landstände nur Vertreter der einzelnen Stände, nicht des ganzen Landes und seiner Bevölkerung gewesen seien und letzterer Begriff erst durch die konstitutionellen Verfassungen des 19. Jahrhunderts geschaffen und verwirklicht worden sei. Was Tirol betrifft, ist dies gewiß unrichtig. Vielmehr erklärt die Landschaft von Tirol in Schriftstücken seit dem 14. Jahrhundert öfters, daß sie im Namen des ganzen Landes spreche und handle und fortgesetzt faßt sie Beschlüsse in den verschiedensten Angelegenheiten, die die Wohlfahrt und die Bedürfnisse des ganzen Landes und seiner Bewohner in ihrer Gesamtheit betreffen. Das Recht dazu ist der Landschaft wohl nicht ausdrücklich verbrieft worden, weil es einfach als selbstverständlich galt. Doch nahm die Landschaft dasselbe mitunter auch grundsätzlich in Anspruch. Eine Vollmacht des Landgerichtes Meran für seine Landtagsabgeordneten von 1640 drückt sich so aus: «sie sollen dasjenige, was dem lieben Vaterland und diesem Landgericht anständig, erschwinglich und erträglich sein mag, bewilligen und beschließen helfen». Dies ist nicht die Sprache eines engen Klassengeistes, sondern einer Gesinnung, die das Wohl und Wehe des ganzen Vaterlandes gleichmäßig umfaßt. Die tirolische Landesvertretung hat auch bis ins 17. Jahrhundert in ihren Schriften sich niemals als Landstände, sondern nur als Landschaft oder noch deutlicher als gemeine Landschaft bezeichnet, also nicht die Gliederung in Stände, sondern deren Zusammenfassung im Landesbegriffe als ihr eigentliches Wesen betrachtet.

Dieser echt demokratische Grundzug der Voranstellung der Gesamtheit vor die Teile zeigt sich auch in der Geschäftsordnung des Tiroler Landtags. Es wurde nämlich altem Brauche gemäß nicht nach Ständen, sondern nach Köpfen abgestimmt, und zwar rief der Landeshauptmann immer nach je einem Mitgliede der oberen Stände ein solches der unteren zur Abgabe seiner Stimme auf.

Als 1640 die Regierung den Vorschlag machte, die Abstimmung nach den drei Kollegien der Geistlichkeit, des Adels und der Städte und Gerichte (Landgemeinden) einzuführen, waren hauptsächlich

letztere dagegen, offenbar weil sie den bisherigen Charakter der Landschaft als einer einheitlichen Vertretung des Landesvolkes nicht preisgeben wollten ([44]).

Die ältesten Verhandlungsberichte und Abschiede von Landtagen wie Verzeichnisse der Landschaft, die sog. Landtafeln oder Landesmatrikel sind etwa seit 1420, und vollständiger seit 1460 erhalten ([45]). Diesen ist zu entnehmen, daß auf den Landtagen die Stifte meist durch ihre Prälaten (Äbte oder Pröpste), die Adeligen durch die älteren Mitglieder aller einzelnen Geschlechter, die Städte durch ihre Bürgermeister oder andere Ratsherren und die Gerichte durch ein bis drei gewählte Abgeordnete vertreten waren. Diese Abgeordneten des Bauernstandes wurden, wie ihre erstmals aus dem Jahre 1453 erhaltenen Vollmachtsbriefe besagen ([46]), auf den Taidingen oder Versammlungen der Gerichtsinsassen «erwählt und bestellt». Die Gewählten, meist «Boten» genannt, sollten den Willen des ganzen Gebietsverbandes vertreten, es ist dies das sog. politische Repräsentationsprinzip, hier aber erscheint es unmittelbar dem uralten Rechtsempfinden einer deutschen Bauerngemeinschaft entsprungen. Bei den Taidingen waren alle, die im Gerichtssprengel mit eigenem Haus und Herd ansässig waren, stimmberechtigt; später nahm die Wahl der Landtagsboten meist der Gerichtsausschuß vor, dessen Mitglieder von den Gerichtsgemeinden durch Wahl bestimmt waren. Ähnlich wurden auch die Vertreter des Bürgerstandes vom Rate der einzelnen Städte gewählt. Das Wahlrecht der beiden unteren Stände war also indirekt und an einen gewissen Besitz und an lange Seßhaftigkeit gebunden, der bodenständige Mittelstand bestimmte also die politische Richtung dieser Vertretung.

([44]) Vgl. STOLZ, *Die alte Tiroler Landesverfassung*, S. 47.

([45]) STOLZ, *Das Land Tirol als polit. Körper*, S. 365; STOLZ, *Landstandschaft*, II, S. 127.

([46]) In Auswahl erstmals veröffentlich bei STOLZ, *Landstandschaft*, II, S. 139 ff, bei STOLZ, *Beschichtskunde des Zillertales* (*Schlern-Schriften*, 63 Bd., Innsbruck, 1949), S. 246 f. und bei STOLZ, *Meran und das Burggrafenamt* (*Schlern-Schriften*, 142.Bd.) Innsbruck, 1956, S. 57 ff. Vollmachtsbrief für die Abgeordneten des Landgerichtes Gries 1453 unten in Anhang Nr. 2. Diese Vollmachtsbriefe sind, worauf Prof. Burkhart Seuffert (Graz) in seinem Innsbrucker Vortrage vom 7. Sept. 1959 hinwies, ein archivalisches Unikum. Etwas ähnliches ist Seuffert sonst noch nirgends untergekommen. SEUFFERT gibt gemeinsam mit Elfriede KOGLER *Die ältesten steirischen Landtagsakten 1396-1519* heraus; bisher sind von dieser Edition 2 Bde., Graz, 1953 und 1958, erschienen. Vgl. dazu die Rezension von Nik. GRASS, in *Zeitschr. für Rechtsgesch.*, 77. Bd., 1960, S. 432-434.

Die im Bauernaufstand des Jahres 1525/26 entstandenen Meraner Artikel brachten keine Kritik an der Verfassung Tirols, sondern nur zwei darauf bezugnehmende positive Forderungen:

Es sollen die Landesfreiheiten in Abschriften im ganzen Lande verbreitet werden und die Landtage abwechselnd in Nord- und Südtirol abgehalten werden ([47]).

Mit dem schon erwähnten Landlibell von 1511 war die Entwicklung der Tiroler Landesverfassung eigentlich abgeschlossen und trat nun in einen Zustand der Erstarrung. Zwar behaupteten im 16. Jahrhundert die Landtage von Tirol ihr altes Ansehen. Ein venetianischer Gesandter am Hofe Kaiser Ferdinands I. schlägt 1548 die Macht der Tiroler Landschaft so hoch an, daß der Kaiser nicht als eigentlicher Herr und Herrscher des Landes bezeichnet werden könne ([48]). Das mag etwas übertrieben ausgedrückt sein, aber im Grunde war es richtig, daß die Landstände auf die Regierungshandlungen damals sehr starken Einfluß genommen haben. Und in einem Schreiben Kaiser Rudolfs II. von 1597 wird gesagt, daß «auf die Tiroler Stände die andern Fürstentümer und Lande zu sehen pflegen und ihnen gewöhnlich nachfolgen».

Die Tagungen der Stände fanden in irgend einer Stadt des Landes statt, wohin der Landesfürst die Stände berief. Ursprünglich wurden die Versammlungen der Landstände unter freiem Himmel abgehalten. Im späteren Mittelalter verlegte man die Beratungen der Landstände in die Rathäuser der Städte. 1613 erwarb die Tiroler Landschaft in Innsbruck ein großes Bürgerhaus, das als «Landhaus» eingerichtet wurde. Es barg im ersten Stockwerk die «Ratsstube», deren Wände mit den Wappen und Namen der tirolischen Landeshauptleute geschmückt waren. 1666 erwarben dann die Stände Tirols in der Neustadt, in der heutigen Maria-Theresienstraße ein geräumigeres Landhaus, an dessen Stelle 1724/28 das noch heute benutzte prächtige Landhaus erbaut wurde ([49]).

Auch die Mariahilfkirche zu Innsbruck wurde (1647-49) von den Tiroler Landständen errichtet.

Im 15. und 16. Jahrhundert wurden zur Beratung von Angelegen-

([47]) *Acta Tirolensia*, III/1, Innsbruck, 1908, S. 45, Zl. 11 f., S. 90, Zl. 30 f. Vgl. auch Walter HONOLD, *Die Meraner Artikel* (Tübinger phil. Diss.), Tübingen, 1936, S. 56 ff. u. ö.

([48]) STOLZ, *Das Land Tirol als polit. Körper*, S. 366.

([49]) Vgl. Heinrich HAMMER, *Wo versammelten sich die Tiroler Landstände in alter Zeit*, in der Zeitschrift *Tiroler Heimat*, 11. Bd., Innsbruck, 1947, S. 39-46.

heiten, die mehrere österreichische Länder betrafen, Vertreter dieser Länder vom Landesfürsten zu sog. Generallandtagen oder Ausschußlandtagen zusammenberufen. So traten auf den Ruf Kaiser Maximilians I. im Jänner 1518 69 Delegierte der Stände aller österreichischen Länder zu einem Ausschußlandtag in Innsbruck zusammen (50).

Diese Anfänge einer Gesamtvertretung der Bevölkerung der österreichischen Monarchie wurden aber damals nicht weiter ausgebaut, sondern alsbald ganz eingestellt. Denn das Streben auch der österreichischen Herrscher ging seit dem 17. Jahrhundert darauf aus, die politische Bedeutung der Landstände möglichst zurückzudrängen (51). Deshalb kam es in der österreichischen Monarchie auch nicht zur Bildung einer ständischen Union, zu dauernden Gesamtlandtagen oder Reichsständen, wie solche in Großbritannien oder in Polen-Litauen entstanden. Infolgedessen war auch eine Einflußnahme der einzelnen Landstände auf die große Politik des Hauses Österreich nicht möglich (52).

Diese Entwicklung macht sich insbesonders seit dem spätern 17. Jahrhundert auch in Tirol stärker bemerkbar.

Bis 1665 fanden die Landtage ziemlich regelmäßig statt. In diesem Jahre ist die jüngere Tiroler Linie des Hauses Habsburg erloschen, daraufhin wurde Tirol der Wiener Regierung unterstellt. Nun machte sich der Zug zum Absolutismus auch in Tirol stärker bemerkbar und der Einfluß der Landschaft trat zurück. Es wurden zwar ihre alten Privilegien keineswegs förmlich aufgehoben, aber die Regierung suchte den Einfluß der Landschaft zurückzudrängen.

Als bald nach dem Tode des letzten selbständigen Tiroler Landesfürsten Erzherzog Sigmund Franz († 25.VI.1665) im Sommer 1665 die Abgeordneten von 14 Dorfschaften sich in Patsch versammelt hatten, stellte das Regiment (Regierung) zu Innsbruck fest, «das

(50) Alfons Huber und Alfons Dopsch, *Österr. Reichsgeschichte*, 2. Aufl., Wien, 1901, S. 80 f; H. J. Zeibig, *Der Ausschußlandtag der gesamten österr. Erblande zu Innsbruck 1518*, in *Archiv für Kunde österr. Geschichtsquellen*, 13. Bd., Wien, 1854; Ferd. Hirn, *Geschichte der Tiroler Landtage von 1518-1525* (Erläuterungen und Ergänz. zu Janssens *Geschichte des deutschen Volkes*, hg. v. L. v. Pastor, IV/5), Freiburg i.Br., 1905; Maria Bechina, *Die Tiroler Landtage von 1526-1563*, (Wiener phil. Diss.) Maschinschrift im Landesreg. Archiv Innsbruck, Cod. 5520.

(51) Otto Stolz, *Österr. Verfassungs- und Verwaltungsgeschichte*, Innsbruck, 1951, S. 116 f.; Stolz, *Geschichte des Landes Tirol*, 1 Bd., S. 526.

(52) Otto Brunner, *Adeliges Landleben und europäischer Geist*, Salzburg, 1949, S. 325; Ders., *Land u. Landstände in Österr.*, S. 67 f.

zwar sonst die Unterthanen in ieden Dorfschafften particulariter ain Zusamenkhonfft anzustellen die Facultet herbracht», fand jedoch, daß «dergleichen Conventicula aber ohne des bei gegenwiertigen Coniuncturn nit weniger Bedenckhen mit sich zichen» und beauftragte sogleich den Landrichter zu Sonnenburg, zu erheben, «zu was Ende solche Conferent angesehen seye» und «daselbst aus den umbligenden Dörffern die vornembste Ausschüß vor sich zu erfordern, solche angestelte unterschidliche Dorfschaften-Generalzusammenkhonfften, das inen selbige ohne Vorwissen der Oberkhait nit gebürt, ernstlich zu verweisen und khunfftigen dergleichen Anmassungen zu denortiern ...» ([53]). Im 18. Jahrhundert wurden in Tirol nur mehr drei offene, d.h. volle Landtage abgehalten, im übrigen nur Sitzungen der landschaftlichen Ausschüsse, die sich hauptsächlich mit der Aufbringung der Steuern befaßten ([54]).

Daß die tirolische Landesverfassung aber auch im 18. Jahrhundert noch immer die politische Eigenart des Landes kennzeichnete, beweist das Urteil, das in dem wohl ältesten englischen Werk über Tirol, den im Jahre 1786 erschienenen «Travels through the Rhaetian Alps» von Albanis Beaumont abgegeben wird ([55]). Wir dürfen dem Zeugnis eines Engländers hier umsomehr Wert beimessen, als sein Blick für konstitutionelle Staatsformen von seiner Heimat her geübt sein mußte. Beaumont sagt: «Obwohl die Grafschaft Tirol in der allgemeinen Einteilung von Deutschland als in den österreichischen Kreis eingeschlossen gilt, so ist doch zu beachten, daß sie ihre eigenen Gesetze und Gewohnheiten hat, gänzlich verschieden von den übrigen zu diesem Kreis gehörigen Ländern. Alle Staatsangelegenheiten sind dem Landtag übertragen, der zu Innsbruck gehalten wird, so oft es nötig ist. Er setzt sich zusammen aus den Abgeordneten der vier Stände, welche die Nation vertreten». Der Ausdruck «Nation» für das Volk von Tirol wird seit dem 18. Jahrhundert gerne gebraucht, er sollte einerseits die gegenüber anderen Ländern deutscher Zunge stark hervortretende Eigenart Tirols, aber auch seinen Besitz an besonderen politischen Rechten andeuten.

([53]) *Schreiben des Regimentes an die Geheimen Räte, Innsbruck 26. Aug. 1665*, Landesreg. Archiv Innsbruck, Kopialbuch: *An die Fürstl. Durchlaucht*, 1665, Fol. 421 v.

([54]) Vgl. Tullius R. v. Sartori-Montecroce, *Geschichte des landschaftlichen Steuerwesens in Tirol*, Innsbruck, 1902.

([55]) Albanis Beaumont, *Travels through the Rhaetian Alps*, London, 1792, p. 68. Vgl. unten Anhang Nr. 3, S. 322 f.

1792 hat der Geheime Hausarchivar Cassian Anton Roschmann von Hörburg den 1. Bd. seiner «Geschichte von Tirol» «Den vier Ständen einer Löblichen Tirolischen Landschaft, aus patriotischer Verehrung und Ergebenheit gewidmet». Und der 1803 erschienene 2. Teil enthält «zum zweytenmal» dieselbe Widmung ([56]).

Eine sehr zutreffende Schilderung der Tiroler Landesverfassung finden wir in dem Werke des namhaften bayerischen Schriftstellers *Peter Philipp Wolf* über Tirol, das 1807 erschienen ist. Wolf leitet seine Ausführungen ein: «Der Tiroler ist stolz auf seine Grundverfassung und besonders auf seine Landesfreyheiten. Während in den politischen Stürmen des siebenzehnten und achtzehnten Jahrhunderts manches kostbare Gut für die Menschheit verloren gieng, und mancher Staat und manche Provinz in dem Europäischen Staatskörper ihre alte freyere Grundverfassung den Interessen und Konvenienzen einer neuern Zeitpolitik zum Opfer bringen mußten, rettete Tirol die seinige, freylich nicht in ihrem ganzen Umfange, aber doch immer weit mehr davon, als viele Flachländer von der ihrigen gerettet haben» ([57]). Also auch hier wieder eine deutliche Hervorhebung der Tiroler Landesverfassung als eines Erbstückes altfreiheitlicher Staatsbildung!

Für eine gesunde Fortentwicklung der Tiroler Landesverfassung wäre eine Reform der Zusammensetzung und des Wahlrechtes des Landtages dringend notwendig gewesen. Denn der Adel besaß ein ungebührliches Übergewicht, beim Landtag des Jahres 1792 standen sich die Stimmenzahlen der oberen und unteren Stände mit je ungefähr 200 Stimmen gleich gegenüber. Es ist nun sehr bezeichnend, daß auch im Lande selbst dieses Mißverhältnis bereits zu einer Zeit empfunden und bekämpft wurde, für die dies einer Beeinflussung der Geister durch die moderne konstitutionelle Lehrmeinung allein wohl nicht zugeschrieben werden kann. Auf einer Konferenz der Abgeordneten des Oberinntales zu Nassereith 1801 wurde über An-

([56]) ROSCHMANN, *Geschichte von Tirol*, 2. Teile, Wien, 1792 und 1803, bei Anton Gassler. Über die Historikerschule, aus der Cassian Ant. Roschmann, der Sohn des Innsbrucker landschaftlichen Historikers Anton Roschmann, hervorgegangen war, berichtet Nik. GRASS, *Benediktinische Geschichtswissenschaft und die Anfänge des Instituts für österr. Geschichtsforschung*, in *Mitteil. d. Instituts für österr. Geschichtsforschung*, 68. Bd., 1960, S. 470-484. Vgl. auch: *Forschungen zur Innsbrucker Universitätsgeschichte*, 1. Bd., Innsbruck, 1961.

([57]) Peter Philipp WOLF, *Kurzgefaßte Geschichte, Statistik und Topographie von Tirol*, München, 1807, S. 159 f.

regung des Landrichters *Michael Senn* von Pfunds ein umfangreiches Gutachten zur Reform der Landesverfassung beschlossen. Es gipfelte in dem Antrag, die Verteilung der Landtagsmandate der Steuerleistung anzupassen, was zu einem Stimmenverhältnis von 18:32 geführt hätte. Diese Anregung konnte in den folgenden bewegten Jahren nicht verwirklicht werden. Sie zeigt jedoch, daß man im Land aus sich selbst heraus die Notwendigkeit einer Reform der Landesverfassung erkannt hatte, aber auch die richtigen Mittel, um diese zu bewerkstelligen, ohne den Grundbau selbst anzugreifen, mithin diesen selbst für das moderne Verfassungsleben zu erhalten.

1805 kam Tirol vorübergehend unter bayerische Herrschaft. Die bayerische Verfassung vom 1. Mai 1808 bereitete allen ständischen Einrichtungen im ganzen Umfang des Königreiches Bayern ein Ende. Damit hatte ungeachtet einer früheren gemachten Zusage der König von Bayern auch die alte Tiroler Landesverfassung nach vielhundertjährigem Bestande aufgehoben, ungeachtet der Tatsache, daß ein Angehöriger desselben Hauses Wittelsbach, Ludwig der Brandenburger, schon 1342 die Freiheiten der Tiroler Landschaft verbrieft hatte! Schon anläßlich der 1807 von Bayern angeordneten Beseitigung der landschaftlichen Kassen war der Südtiroler Patriot Joseph v. Giovanelli d.Ä. in die Klage ausgebrochen: «Also ist der ständische Körper aufgelöst, die Konstitution untergraben; das Kleinod ist geraubt, das der biedere Tiroler durch Jahrhunderte mit Ehren zu behaupten gewußt hat» ([58]). Und der Bozner Patrizier Serafin Hepperger vermerkt in seinem Tagebuch, als er auf Bayerns Eingriffe in das tirolische Verfassungsleben zu sprechen kommt: «Die Landschaft, dieser ehrwürdige Körper, auf den sich unsere Urverfassung gründete, der das Sprachorgan zwischen Land und Fürst war, wurde aufgelöst, obgleich der König die Aufrechterhaltung unserer Verfassung feierlich zugesichert hatte» ([59]).

Diese einseitige Aufhebung der jahrhundertealten Landesverfassung hat in Tirol sehr verstimmt. Es war auch dies mit ein Grund zur Erhebung Tirols im Jahre 1809 ([60]).

([58]) Josef Hirn, *Tirols Erhebung im Jahre 1809*, 2. Aufl., Innsbruck, 1909, S. 69.

([59]) Hirn, a.a.O., S. 69.

([60]) Vgl. darüber Hirn, *Tirols Erhebung im Jahre 1809*. Die 150-Jahrfeier der Erhebung Tirols 1809 bot 1959 für die Int. Kommission für Geschichte der Ständeversammlungen die Veranlassung, ihre Tagung im September 1959 in Innsbruck abzuhalten.

Als im August-September diesese denkwürdigen Jahres 1809 der alte, echte Tiroler Geist die Regierungsgewalt im Lande ergreifen konnte, da zeigte er in dem von Andreas Hofer erlassenen «Organisationspatent» vom 29. Sept. 1809 sehr deutlich, wie er die Regierungsgewalt dem Volke zu sichern gedachte: Die Landesregierung sollte aus je sechs Beamten als Referenten und ebensoviel Vertretern der «Volks- und Nationalrepräsentation» als Votanten bestehen. Wenn man diese Gedankengänge überblickt, so versteht man, warum für die österreichische Regierung nach 1815 (nach der Rückkehr Tirols zu Österreich) die Erinnerung an das Jahr 1809 trotz der in ihr ausgesprochenen Anhänglichkeit an das Haus Österreich einen unangenehmen Beigeschmack hatte.

Nach der Niederringung von Napoleons Herrschaft über Europa und der Wiederherstellung Tirols wäre die zeitgemäße Erneuerung seiner alten Verfassung um so mehr eine Selbstverständlichkeit gewesen, als jetzt das konstitutionelle System in Europa im Vordergrund des allgemeinen Interesses stand. Im Lande selbst erhoben sich auch sofort und nachdrücklich entsprechende Stimmen; man erwartete allgemein, daß Kaiser Franz die alte Landesverfassung wieder ins Leben rufen werde. So hob Jos. v. Giovanelli d.J. in einer Denkschrift von 1814 diesbezüglich hervor: «Verfassungen, auf welche der ganze Nationalcharakter, die ganze Nationalexistenz sich gründet, wie dies in Tirol der Fall ist, werden von den Völkern mit Recht als ein Heiligthum betrachtet». «Der Tiroler liebt, wie sein Vaterland, wie die Scholle, die er als freier Mann sein Eigenthum nennt, so auch seine Verfassung über alles; es ist ja seine Existenz daran geknüpft» ([61]). Doch allen diesen Vorstellungen blieb ein entsprechender Erfolg versagt. In heute kaum verständlicher Engherzigkeit hat nämlich die damalige Wiener Hofkanzlei, die unter Metternichs Führung die Mitwirkung weiterer Volkskreise an der Regierung möglichst zurückdrängen wollte, dem Kaiser Franz zum Erlasse einer neuen Verfassung für das Land Tirol geraten, die wohl die äußeren Formen der alten wiederbrachte, aber ihren wichtigsten Gehalt, die aktiven politischen Rechte, dem Landtag verwehrte. Denn von der alten Verfassung von 1342 und ihren Grundsätzen war nicht mehr viel übrig gelassen; nur das, was von ihr seit Maria Theresia tatsächlich in Übung und Geltung war: nämlich nur das

([61]) Albert JÄGER, *Tirol's Rückkehr unter Österreich und seine Bemühungen zur Wiedererlangung der alten Landesrechte von 1813 bis 1816*, Wien, 1871, S. 126 u. 136.

Recht, die vom Landesfürsten geforderten Steuern auf die Bevölkerung aufzuteilen und Bitten und Vorstellungen in den Angelegenheiten des Landes an den Landesfürsten und seine Regierung zu richten ([62]). Das Steuerbewilligungsrecht weist diese Verfassung für die Landstände ausdrücklich zurück und von ihrer Mitwirkung an der Gesetzgebung spricht sie überhaupt nichts. Dafür blieb sie bei der herkömmlichen gleichen Stimmenzahl, nämlich von je 13 für alle vier Stände bei den Ausschußkongressen, die nun allein wirklich abgehalten wurden. Gegenüber den Landständen der anderen österreichischen Länder war für Tirol nur der eine Vorzug, daß auch der Bauernstand an dieser landständischen Verfassung wie bisher direkt beteiligt und daß diese Beteiligung in einer Urkunde nun neu niedergelegt war, während sie für die meisten anderen österreichischen Länder ausschließlich dem Herkommen überlassen war ([63]).

Den Übergang ins moderne Verfassungsleben hat Tirol allerdings nicht direkt von seiner alten, eigenständigen Verfassung aus und auch nicht infolge einer dem Lande allein angehörigen Bewegung vollzogen, sondern im Rahmen jener politischen Entwicklung, die den österreichischen Gesamtstaat in seiner Gänze seit dem Jahre 1848 ergriffen und gleichartig bis auf den heutigen Tag umgestaltet hat und deshalb hier außer Betracht bleiben kann ([64]).

N. GRASS.

([62]) Albert JÄGER, *Tirol's Rückkehr unter Österreich und seine Bemühungen zur Wiedererlangung der alten Landesrechte von 1813 bis 1816*, Wien, 1871, S. 126 u. 136.

([63]) Vgl. Hermann GSTEU, *Geschichte des Tiroler Landtages von 1816-1848*, in der Zeitschr. *Tiroler Heimat*, 7. Jg., Innsbruck, 1927, S. 77-170 u. WOPFNER, *Von der Ehre und Freiheit*, 1. Bd., S. 111 ff.

([64]) Vgl. Franz v. ZIMMETER-TREUHERZ, *Die Fonde, Anstalten und Geschäfte der Tiroler Landschaft*, Innsbruck, 1894; Alfred v. WRETSCHKO, *Die Frage der Landstandschaft der Universität Innsbruck*, in *Zeitschr. für Rechtsgeschichte*, Germ. Abt., 41. Bd., 1920, S. 40-74; Rudolf GRANICHSTAEDTEN-CZERVA, *Die staatsrechtliche Stellung Tirols*, Innsbruck, 1919; DERS., *Die Entstehung der Tiroler Landesverfassung (1790-1861)*, Innsbruck, 1922; STOLZ, *Das Land Tirol als polit. Körper*, S. 374 f.; WOPFNER, *Von der Ehre und Freiheit*, 1. Bd.; Oswald v. GSCHLIESZER, *Die ersten direkten Reichsratswahlen in Tirol (1873)*, in *Schlern-Schriften*, 52. Bd., Innsbruck, 1947, S. 53-67; Ludwig v. ADAMOVICH, *Österr. Verfassungsrecht*, 5. Aufl. hg. von Hans SPANNER, Wien, 1957; HELLBLING, *Österr. Verfass. u. Verwaltungsgesch.*, S. 350, 358; Franz GRASS, *Landesbewußtsein und Kulturpolitik Tirols*, Innsbruck, 1957.

ANHANG Nr. 1

1348 - Jänner - 28

Ludwig der Brandenburger bestätigt die Rechte der Tiroler Landschaft gegenüber dem Landesfürsten.

Original-Pergament-Urkunde im Hauptstaatsarchiv München; Druck mit Faksimile bei STOLZ, *Magna Charta*, S. 12 f.

«Wir Ludowig von Gotz genaden Margraf ze Brandenburg, Pfallentzgraf ze Rin, Herzog ze Beyern vnd des heiligen Roemischen Richs Oberister Kamrerer, veriehen vnd tun chunt allen den, die disen brief sehent, hoerent oder lesent, daz wir verheizzen, daz wir alli Gotshueser, gaistlichi und weltlichi, all Stet, Doerffer und Maerkt vnd ouch alle Luete, Edel vnd Vnedel, Rich vnd Arme, swie di geheizzen oder swa die gelegen oder gesezzen sint in der Grafschaft ze Tyrol, bei allen irn Rehten behalten suellen, des si Luete oder brief habent, vnd als es von alter gewohnheit her ist komen von aller Herschaft, vnd als es sich von enther gehandelt hat von den Hohgeborn Herren Herzog Meinharten vnd von sinen Suenen vnd von Kuenig Johann von Beheim, alldiweil vnd er sins Suns Graf Johanns vnd der Herschaft von Tyrol Gerhab gewesen ist, vnd ouch von demselben Graf Johann, des vorgenanten Kuenigs von Beheim Sun, vnd ouch von der Edeln ffuerstinn ffrawen Margareten, Herzoginn ze Kerenden vnd Graefinn ze Tyrol vnd ze Görtz unser liebi Wirtinn, Vnd ouch all die brief, die vnser Lieber Herr vnd Vater Kaiser Ludowig von Rome vnd ouch Wir veber die vorgeschriben sach geben haben oder noch gebend werden. Wir suellen ouch die Amptluett, die darzu gehörnt vnd belehent sint, bei irn Rehten behalten und in der guennen. Auch suellen wir dhein ungewonlich Stiur nicht vflegen on der Lantluett Rat. Wir verheizzen ouch, daz wir dhein Vest, die zu der Herschaft ze Tyrol gehoert, mit dheinem Gaste noch Vsman nicht besetzen suellen. Auch suellen wir die Grafschaft ze Tyrol handeln vnd haben nach der besten Rat, die darinne gesezzen sint, und alle zeit des Landes ze Tyrol Reht bezzern und nicht boesern nach ir Rat. Wir verheizzen ouch, daz wir die vorgenanten ffrawen Margareten, unser lieb Husfrawen, uz dem Land nicht fueren suellen wider irn Willen. Swer ouch iemans von der Herschaft ze Tyrol oder der darzu gehoert Veint wolt sein vmb die handelung, die gen uns beschehen ist, oder vmb dhein der vorgeschriben sach, daz wir den wider dieselben zu legen sullen vnd wider si beholfen

sein, als wir beste muegen on geverd. Dis vorgeschriben sach vnd stuk alle vnd ieglich besunder geheizzen wir mit guten triwen stet gantz vnd vnzebrochen behalten vnd dawider nimmer ze tun noch ze komen vnd haben ouch des ze den Heiligen gesworn. Der brief ist geben ze Muenchen an Montag vor Vnserer ffrawen tag ze Liehtmesse vnder vnserm Insigelt besigelt, daz daran hanget, nach Kristus gebuert driuczehenhundert Jare darnach in dem zwei und vierczigstem Jare».

ANHANG Nr. 2

1453 - Dezember - 23

Vollmacht für die Landtagsboten (Abgeordneten) des Landgerichtes Gries bei Bozen (Südtirol).

Or. Papier im LANDESREGIERUNGSARCHIV INNSBRUCK, Urk. 8389. Druck bei STOLZ, *Landstandschaft*, II, S. 139.

«Durchleuchtiger hochgeborner furst, gnadiger herr ([65]). Als ewer fürstleich Gnad gemainer lannttschafft als auf sand Michelstag yecz kunfftigen ainen lanttag geschriben hatt von yedem gericht darzu zwen mit gewaltsam zu senden, darauff senden wir die gancz gemaind des lanntgerichts zu Gries ewrer Gnaden arm willig undtertan aus uns die erbern Christoffen Hasler und Micheln Pockh, den wir an unser stat volmechtig gewaltsam geben haben alles zu tun, zu hanndeln und zu begeben, das durch ewrer fürstleich Gnad, ewrer Gnad räthe und der lantschafft auff den obgenanten lanndtag fürgenommen, abgeredt und beschlossen wirtt». Siegler «Erhart Zolner lanntrichter zu Gries. Suntag vor Michaelis a.d. LIII».

([65]) Herzog Sigmund der Münzreiche von Tirol.

ANHANG Nr. 3

Albanis Beaumont über die Verfassung Tirols.

Albanis BEAUMONT, *Travels through the Rhaetian Alps*, London, 1792, p. 68.

Section VIII. Continuation of the form of the Tyrolese government — Description of Inspruck and the extensive valley of Inn.

Although the county of Tyrol be considered in the general division of Germany as included in the Austrian circle: it is proper to observe, that it has laws and customs peculiar to itself, totally different from the rest of the provinces belonging to that circle.

All affairs relating to the State are transacted at the Diet held at Inspruck, which is assembled whenever it is deemed necessary. The Diet is composed of deputies or members belonging to the four orders or classes which represent the nation; consisting of the church, the noblesse, the tiers etats, or citizens, and the peasants. They are chosen from among the six districts into which the country is divided, viz. the lower valley of Inn, the upper valley of the same name, the district of Vinstgau, that of the Adige, of the Eisach, the valley of Puster on the confines of Italy.

The Diet, when assembled, has a right to deliberate on whatever relates to the general good of the county; and has also the power of levying taxes, etc. When the Prince, or Sovereign, in time of war, finds it necessary to lay any extra imposts on the people, he applies directly to the Diet; and, each time that supplies are granted to him, he makes a kind of acknownledgment, or declaration, that it is without prejudice to the privileges of the county.

The Diet also has the power of raising troops when the States of Tyrol are in danger of being attacked. That province enjoys several privileges and exemtions which their sovereigns have never attempted to infringe, the people having amply deserved them, by their courage and steady attachment to the house of Austria.

In time of war they all bear arms, and themselves guard their defiles. The French, although superior in numbers, and commanded by most excellent officers, experienced a severe repulse from the Tyrolese, at the beginning of the present century: for they defended the different passes of the Tridentine Alps with the greatest bravery, and prevented the enemy from entering Italy that way, as they

proposed doing. The French lost also vast numbers of their troops near the city of Trent.

The states furnish one regiment, which bears the name of the county; half of which is garrisoned at Inspruck; the other half does duty with the Austrian troops.

The chief, or head of the Diet, takes the title of *Prefect*, who ought, according to the laws of the county, to be elected by representatives of the four estates, from among the clergy or noblesse; but the Bishops of Trent, or Brixen, occupy that dignity alternately.

XVIII

Der Kampf der Stände Tirols um die Glaubenseinheit des Landes,

VON

Dr. iur. FERDINAND KOGLER (†) und Dr. iur. FRANZ GRASS,
Professoren an der Universität Innsbruck.

Das 16. Jahrhundert ist in Deutschland die Zeit der religiösen Bewegung und der Spaltung der christlichen Einheitsreligion und Einheitskirche (1).

Die von Martin Luther begründete neue Lehre, die man nach der gegen die Beschlüsse des Reichstages von Speyer (1529) erhobenen Protestation als Protestantismus bezeichnet, drohte die bis dahin allein bestehende und rechtlich anerkannte katholische Kirche zu erdrücken.

Die der neuen Lehre zugetanen Fürsten nahmen sofort das Recht in Anspruch, auch ihre Untertanen zur neuen Religion zu zwingen und der Augsburger Religionsfriede (1555) hat dieses sogenannte «ius reformandi» für alle Landesfürsten reichsgesetzlich statuiert (2). Diesem landesfürstlichen Religionsbann gegenüber hatten die Untertanen kein anderes Rechtsmittel als das «flebile beneficium emigrationis», d.i. das Recht der Auswanderung (3).

Dieses «ius reformandi» der Landesfürsten stellt das Staatskirchentum in Reinkultur dar und trieb die sonderbarsten Blüten. So oft es einem Landesfürsten einfiel, den Glauben zu wechseln, mußten die Untertanen wohl oder übel mitmachen. So mußten zum Beispiel die Bewohner der Pfalz seit Friedrich III. (1559 bis 1576) in 60

(1) Vgl. z.B. Peter Rassow, *Das Zeitalter Luthers und Karls V.* (1517-1558), im Sammelwerk: *Deutsche Geschichte im Überblick*, hsg. v. P. Rassow, Stuttgart, 1953, S. 252 ff.

(2) Vgl. H. E. Feine, *Kirchliche Rechtsgeschichte*, Bd. 1, 3. Aufl. Weimar, 1955, S. 459, mit Hinweis auf Literatur über die Entstehung jenes Satzes. Vgl. auch Fritz Hartung, *Deutsche Verfassungsgeschichte vom 15. Jahrhundert bis zur Gegenwart*, 6. Aufl., Stuttgart, 1950, S. 79; Alfons Huber, *Geschichte Österreichs*, Bd. 4, Gotha, 1892, S. 141; Albert Michael Koeniger, *Katholisches Kirchenrecht*, Freiburg i. Br., 1926, S. 63; Josef Lortz, *Die Reformation in Deutschland*, 3. Aufl., 2. Bde., Freiburg i. Br., 1949; W. M. Plöchl, *Geschichte des Kirchenrechts*, Bd. 3, Wien, 1959, S. 32 u. 53; Peter Rassow, wie oben, S. 283; Schroeder-Künssberg, *Lehrbuch der deutschen Rechtsgeschichte*, 7. Aufl., Berlin, 1932, S. 893, 935 f., 943, 958, 962, 997, sowie Adolf Zycha, *Deutsche Rechtsgeschichte der Neuzeit*, 2. Aufl., Marburg/Lahn, 1949, S. 54.

(3) Vgl. z.B. Gebhard-Grundmann, *Handbuch der deutschen Geschichte*, 8. Aufl., Bd. 2, Stuttgart, 1955, S. 103; Georg Mentz, *Deutsche Geschichte im Zeitalter der Reformation, Gegenreformation und des dreissigjährigen Krieges*, Tübingen, 1913.

Jahren viermal die Religion wechseln. Die an die Pfalz verpfändete Reichsstadt Oppenheim mußte bis zum westfälischen Frieden (1648) sogar zehnmal die Religion wechseln. Nicht umsonst klagt ein protestantischer Zeitgenosse Sebastian Frank: «Stirbt ein Fürst, so wechselt auch das Gotteswort» (4).

Die neue Lehre fand seit dem 3. Jahrzehnt des 16. Jahrhunderts auch in den österreichischen Ländern eine aufnahmsbereite Bevölkerung, wozu der Tiefstand des christlichen Lebens und das Darniederliegen jeglicher Kirchenzucht einen fruchtbaren Boden vorbereitet hatte.

Die Habsburger haben die neue Lehre vom Anfang an bekämpft. Die Wurzeln ihrer negativen Einstellung zum Protestantismus sind mannigfache. Einmal waren alle Habsburger mit Ausnahme Maximilians II. überzeugungstreue Katholiken, die erfüllt waren von der Gerechtigkeit ihrer Sache und ihrer katholischen Sendung. Dann waren sie durch die Idee des Gesamthauses, von dem die spanische Linie im romanischen Gebiet ihren Herrschaftsbereich hatte und durch die katholischen Grundlagen des römischen Kaisertums und des heiligen römischen Reiches so sehr mit dem katholischen Romanentum und mit Rom verknüpft, daß sie die Glaubensspaltung nicht ruhig hinnehmen, noch weniger mitmachen konnten. Diese Bindungen waren so stark, daß selbst Maximilian II. von dem man lange Zeit den Übertritt erwartete, sich nicht darüber hinwegsetzen konnte (5). Und schließlich bekämpften die österreichischen Landesfürsten im Protestantismus eine schwächende und zersetzende Kraft, die sich in den österreichischen Territorien sofort von ihrem ersten Auftauchen an mit allen oppositionellen Elementen verbunden hatte. Der Kampf der Habsburger gegen den Protestantismus war also

(4) Friedrich Hurter, *Geschichte Kaiser Ferdinands II. und seiner Eltern*, 11 Bde., Schaffhausen, 1850-1864; Franz Zach, *Christlich-germanisches Kulturideal*, 4. Aufl., Wien, 1936, S. 229. Über mehrere Konfessionswechsel in der Pfalz und der Badischen Markgrafschaft siehe E. W. Zeeden, *Kleine Reformationsgeschichte von Baden-Durlach und Kurpfalz*, Karlsruhe, 1956.

(5) Eine vortreffliche quellenmässige Darstellung der religiösen Einstellung Maximilians II. gibt Ignaz Philipp Dengel in Abt. 2, dem von ihm herausgegebenen Bd. 6 der 2. Abt. der *Nuntiaturberichte aus Deutschland*, Wien, 1939, Einleitung S. XIX ff. u. bes. S. LXXXVIII ff.: «Nuntius Biglia als Legat bei Kaiser Maximilian II.». Über Dengel siehe: *Innsbrucker Beiträge zur Kulturwissenschaft*, Bd. 4, Innsbruck, 1956, S. 133 ff. Vgl. auch Viktor Bibl, *Maximilian II., der rätselhafte Kaiser*, Hellerau bei Dresden, 1929, S. 69 ff.

zugleich ein Kampf um die Aufrechterhaltung der landesfürstlichen Macht.

Wenn die österreichischen Herrscher den Protestantismus bekämpften und um die Wiederherstellung der katholischen Religion sich bemühten, so haben sie nichts anderes getan, als was alle übrigen Reichsfürsten, protestantische und katholische, auch getan haben, sie haben von einem reichsgesetzlich festgesetzten Recht, dem «ius reformandi», Gebrauch gemacht (6). In den nieder- und innerösterreichischen Ländern ist die Durchführung der Gegenreformation, d.i. die Zurückdrängung des Protestantismus und die Rekatholisierung des Landes, nicht ohne Zwangsmaßnahmen und ohne Härten vor sich gegangen (7).

In Tirol hingegen ist die Rekatholisierung des Landes ohne besondere äußere Aufmachung und viel nachhaltiger erfolgt, als in den anderen österreichischen Ländern (8).

Die religiösen Neuerungen in den verschiedenen Schattierungen haben in Tirol trotz der natürlichen Abgeschlossenheit des Landes seit dem 3. Jahrzehnt des 16. Jahrhunderts Anhänger gefunden (9).

Ferdinand I. (1519 bis 1564) konnte die Ausbreitung der neuen Lehre zwar hemmen, aber nicht aufhalten. Seine reformierende Tätigkeit hatte keinen durchgreifenden Erfolg. Sein Sohn Erzherzog Ferdinand II. (1564 bis 1595), der Gemahl der schönen Philippine Welser, ist der neuen Lehre völlig Herr geworden durch die Berufung der geistlichen Orden (Jesuiten, Franziskaner, Kapuziner), deren Wirken im Volk umso erfolgreicher war, als durch die Beschlüsse des Trienter Konzils (1545 bis 1563) das katholische Leben wieder aufgerichtet und die Kirchenzucht wieder hergestellt war (10).

(6) Der Gedanke der Toleranz war eben diesem Zeitalter weithin noch fremd! Vgl. Nikolaus PAULUS, *Protestantismus und Toleranz im 16. Jahrhundert*, Freiburg i. Br., 1911. Siehe auch Joseph LECLER, S.J., *Histoire de la Tolérance au siècle de la Réforme*, 2 Bde, Aubier, 1955.

(7) Vgl. Hugo HANTSCH, *Geschichte Österreichs*, 2 Bde., Bd. 1 in 4. Aufl., Graz, 1959, Bd. 2 in 2. Aufl., Graz, 1953.

(8) Josef HIRN, *Erzherzog Ferdinand II. von Tirol, Geschichte seiner Regierung und seiner Länder*, 2 Bde., Innsbruck, 1885-1888. Zur allgemeinen Orientierung genügt die kurzgefaßte: *Kirchengeschichte Tirols*, im Grundriß dargestellt von Anselm SPARBER, Bozen, 1957.

(9) Hier wäre neben Sparbers Übersicht heranzuziehen: Eduard WIDMOSER, *Die Wiedertäufer in Tirol*, in *Tiroler Heimat* (Innsbruck), Neue Folge 15 für 1951, S. 45-90, 16 für 1952, S. 103-128.

(10) Vgl. Josef HIRN, *Erzherzog Ferdinand II. von Tirol* (wie oben); Anton DÖRRER, *Volkskulturelle Auswirkungen des Trienter Konzils auf die Alpenländer*,

Seit den Tagen Ferdinands II. war Tirol, abgesehen von einem bald da bald dort auflodernden Sektenwesen, ein rein katholisches Land (11). Nichtkatholiken, wo vereinzelt solche sich zeigten, wurden nicht geduldet, und als äußerste Zwangsmaßnahme kam freiwillige oder erzwungene Auswanderung in Anwendung. Landstände und Landesfürst wetteiferten miteinander um die Aufrechterhaltung der Einheit und Reinheit der katholischen Religion (12).

Träger des Religionsbanners, des «ius reformandi», war der Landesherr. Die Stände waren auf das Antragstellen und Bitten beschränkt. Nach Einführung des Konstitutionalismus waren Träger des Religionsbannes dann Landesfürst und Landtag. Die Beweggründe, die Landesfürst und Stände veranlaßten, für die Aufrechterhaltung der Glaubenseinheit einzutreten, waren in erster Linie religiöse. Beide Faktoren waren überzeugt von der Wahrheit der Lehre der katholischen Kirche und kamen daher, da es Wahrheit nur eine geben kann , von selbst zur Bekämpfung aller Nichtkatholiken. In zweiter Linie kamen aber auch politische Motive in Betracht: Die Aufrechterhaltung der Ruhe und Ordnung im Lande, die Verhinderung einer Spaltung des Volkes und die Schwächung der Macht und Schlagkraft des Landes.

Auch als durch das Toleranzpatent Josefs II. und nachfolgende Reichsgesetze die Gleichberechtigung der religiösen Gemeinschaften und das Recht der öffentlichen Religionsausübung für alle gesetzlich anerkannten Religionsgemeinschaften proklamiert war (13), führt

in *Das Weltkonzil von Trient. Sein Werden und Wirken.* Hsg. von Georg SCHREIBER, Bd. 1, Freiburg, 1951, S. 427-462. Dazu die Besprechung von Nicolaus GRASS, in *Mitteilungen des Instituts für österr. Geschichtsforschung*, Bd. 61, 1953, S. 464-468.

(11) Sogar die Aufklärung verlief in ihrem Frühstadium in Tirol weniger radikal als in den anderen österreichischen Ländern. Vgl. Nikolaus GRASS, *Die Innsbrucker Gelehrtenakademie des 18. Jahrhunderts und das Stift Wilten*, in *Tiroler Heimatblätter*, Jg. 23 (1948), S. 13-19; DERS. *Benediktinische Geschichtswissenschaft und die Anfänge des Instituts für österreichische Geschichtsforschung*, in *Mitteilungen des Instituts für österreichische Geschichtsforschung*, Bd. 67 (1960), S. 470-484, sowie in *Forschungen zur Innsbrucker Universitätsgeschichte*, Bd. 1, Innsbruck (derzeit in Druck).

(12) Vgl. Josef HIRN, *Erzherzog Maximilian der Deutschmeister*, Bd. I, Innsbruck, 1915, Bd. 2, 1. Hälfte, hsg. v. Gerold FUSSENEGGER, Innsbruck, 1936 (mehr nicht erschienen).

(13) Vgl. hiezu: Johann WÖRZ, *Rechtshistorische Bemerkungen über die österreichischen Toleranzgesetze und deren Wirksamkeit in Tirol*, Innsbruck, 1862; Johannes HOFER, *Zur Geschichte des Toleranzpatentes Josefs II. in Tirol*, in *Histor.*

das Land Tirol durch ein Jahrhundert hindurch einen geradezu heroischen Kampf um die Aufrechterhaltung der Glaubenseinheit und das Landesrecht ist lange Zeit dem Reichsrecht vorgegangen. Tirol hatte in Glaubenssachen eine Sonderstellung innerhalb der österreichischen Länder. Das für alle österreichischen Länder erlassene Toleranzedikt Josefs II. vom 13. Oktober 1781, das auch in Tirol kundgemacht wurde, gewährte den Protestanten augsburgischen und helvetischen Bekenntnissen und den nichtunierten Griechen das Recht der häuslichen Religionsausübung und an Orten, wo 100 Familien in nicht zu weiter Entfernung ansässig sind, das Recht der Errichtung einer eigenen Gemeinde mit Bethaus und Schule und der Anstellung eines Seelsorgers und Lehrers ([14]). Auch zu Häuser- und Güterkäufen, zu Bürger- und Meisterrechten, zu akademischen Würden und öffentlichen Diensten sollten die genannten Nichtkatholiken dispensando, d.h. unter Dispenserteilung, zugelassen werden.

Dieses Toleranzedikt Josefs II. hatte theoretisch in Tirol ebenso Geltung wie in den anderen österreichischen Ländern. Aber praktisch hatte es zunächst gar keine Bedeutung, weil es in Tirol keine Protestanten und noch viel weniger nichtunierte Griechen gab. Die Stände Tirols haben gleichwohl gegen das Toleranzedikt sofort Protest eingelegt und diesen Protest bei jeder sich bietenden Gelegenheit erneuert und um Aufhebung desselben gebeten, mit der Begründung, daß es nur für solche Länder passe, wo schon mehrere Religionsgemeinschaften bestehen, nicht aber für Tirol, wo die römisch-katholische Religion die herrschende und alleinige ist.

Im Jahre 1795 wiesen die tirolischen Stände darauf hin, daß seit der Erlassung des Toleranzediktes keine einzige Person sich für eine andere Religion als die katholische erklärt habe und erneuerten bei Seiner Majestät die Bitte um Aufhebung des Toleranzediktes und Hinderung der Ansiedlung fremder Religionsgenossen im Lan-

Jahrbuch der Görres-Gesellschaft, 47 (1927). Dazu die Besprechung von Hermann Wopfner, in *Tiroler Heimat*, Neue Folge 1 (1928), S. 87-88 mit dem Hinweis, der Ausschußkongreß des Tiroler Landtages habe das Toleranzpatent abgelehnt, weil es ohne Einwilligung der Landstände erlassen worden sei. Die Regierung betrachtete das Patent auch für Tirol als gültig. Schließlich erreichte das Land, daß der Kaiser die Dispensen zur Ansiedlung fremder Akatholiken dem Wirkungskreise der unteren Behörden entzog und diese sich selbst vorbehielt.

([14]) Willibald M. Plöchl, *Geschichte des Kirchenrechts*, Bd. 3, Wien, 1959, S. 55; Ernst Tomek, *Kirchengeschichte Österreichs*, Teil 3, Innsbruck, 1959, S. 374 ff; Adolf Zycha, *Deutsche Rechtsgeschichte der Neuzeit*, wie oben, S. 127.

de, «weil Tirol das Land ist, wo eine fremde Religion nicht besteht, auch nicht wünscht, daß eine solche jemals eingeführt werde».

Die darauf erfolgte Hofentscheidung vom 18. September 1795 lehnte zwar einen Widerruf des Toleranzpatentes ab ([15]); da jedoch die Ansiedlung fremder Religionsgenossen in einem Lande, in welchem die katholische Religion die einzige ist, nach den bekannten Begriffen des Volkes zu Unruhen Anlaß geben könnte, soll jeder einzelne Fall der Entscheidung der Hofstelle unterzogen werden.

Tatsächlich soll sich bis zum Jahre 1819 nur ein einziger Protestant im Lande angesiedelt haben.

Eine Gefahr, daß die Glaubenseinheit des Landes angetastet werden könnte, bestand also in Wirklichkeit auch nach dem Toleranzpatent Josefs II. nicht, und die zu Ende des 18. und zu Beginn des 19. Jahrhunderts tobenden Kriege ließen die Frage der Glaubenseinheit ganz in den Hintergrund treten. Die in der Zeit der bayerischen Zwischenregierung auch in Tirol kundgemachte bayerische Reichskonstitution vom 1. Mai 1808 proklamierte die vollkommene Gewissensfreiheit aller Staatsbürger und auch die Freiheit, sich die protestantische Religion zu wählen ([16]).

Dieses Attentat auf die Glaubenseinheit des Landes war mit ein Grund für die Erhebung Tirols im Jahre 1809 ([17]).

([15]) Dieser Entscheidung lag ein Gutachten der Landesstelle zugrunde: «Die Gesetze der Duldsamkeit sind nicht nur dem Geiste des Christentums überhaupt, sondern auch politischen guten Grundsätzen insonderheit für jene Länder der Monarchie ganz angemessen, in welchen schon mehrere christliche Religionen wirklich bestehen. In Tirol ist die katholische Religion die einzige ... und da ist nun gar keine politische Ursache vorhanden ... in Tirol auch andere christliche Religionen aufkeimen zu lassen, da die Mehrheit der Religionen in dem nemlichen Lande in der Staatsverwaltung nach Zeugnis der Erfahrung so manche Schwierigkeiten gebährt. Unterdessen ... muß nicht Zwang ... sondern es müssen Ermahnungen, Wahrnungen, dann der beständige und gute Unterricht ... gegen Irrthümer verwahren ..». Vgl. Ferdinand MAASS, *Der Josefinismus*, Bd. 4, Innsbruck, 1957, (*Fontes rerum Austriacarum*, Abt. 2, Band 74, Teilband 4), S. 263 f.

([16]) Josef EGGER, *Geschichte Tirols*, Bd. 3, Innsbruck, 1880, S. 491-526: Die Constitution und die damit verbundenen Reformen (Ferdinand und Josef Hirn erwähnen diese Konstitution nicht!).

([17]) Josef HIRN, *Tirols Erhebung im Jahre 1809*, 2. Aufl., Innsbruck, 1909, S. 166: «Wer wollte nur blinden Zufall darin erblicken, daß die Erhebung am lebhaftesten in jenen Gauen aufflammte und am zähesten andauerte, welche den Kirchenkonflikt mit seinen Begleiterscheinungen am gründlichsten durchgekostet hatten»? Ferdinand HIRN, *Geschichte Tirols von 1809-1814*, Innsbruck, 1913, S. 192: «Schon am Beginne des Kampfes hatte der französische Legationssekretär Bogne

Nach der Rückkehr Tirols unter österreichische Herrschaft war zunächst kein Anlaß, sich mit der Glaubensfrage zu befassen. Erst als gegen Ende der Zwanziger- und in den Dreißigerjahren des 19. Jahrhunderts im Zillertal die sogenannten protestantischen Inklinanten immer zahlreicher wurden ([18]), tauchte die Frage auf, nach welchen gesetzlichen Normen die konfessionelle Angelegenheit zu behandeln sei und insbesondere, ob die Toleranzgesetze Josefs II. in Tirol Geltung haben oder ob etwa die bayerische Reichskonstitution im vorliegenden Fall anzuwenden sei.

Die Geltung des josefinischen Toleranzgesetzes ist in jedem Fall durch die bayerische Zwischenregierung und die bayerische Gesetzgebung unterbrochen worden und da nach der Rückkehr Tirols unter österreichische Herrschaft eine Republikation nicht stattfand und es ein «ius postliminii» für Gesetze nicht gibt, konnte die Frage auftauchen, ob nicht die bayerischen Gesetze zur Anwendung zu kommen haben, welche sicher richtige Meinung das k.k. Fiskalamt vertrat.

Diesen Meinungsverschiedenheiten machte ein Hofkanzleidekret vom 10. Jänner 1832 ein Ende, welches nicht die bayerische Gesetzgebung, sondern die österreichischen Toleranzgesetze für Tirol als bindende Norm erklärte, was ein neuerliches Hofkanzleidekret vom 4. März 1832 bestätigte ([19]).

Auf das nun für gültig erklärte josefinische Toleranzgesetz setzten die Zillertaler Religionsneuerer ihre ganze Hoffnung. Sie strebten zunächst danach, die vorgeschriebene Zahl von Glaubensgenossen (100 Familien oder 500 Personen) zu erreichen, damit ihnen die Errichtung einer eigenen Gemeinde mit Seelsorger und Lehrer nicht mehr verweigert werden könne ([20]). Außerdem strebten sie danach, durch

beteuert, daß die Triebfeder der Massen nicht so sehr in der Anhänglichkeit an das alte Herrscherhaus als vielmehr in der Liebe zur alten Religion hänge». Vgl. auch Albert JÄGER, *Die Priesterverfolgung in Tirol von 1806-09*, 2. Aufl., Wien, 1868 und Ernst TOMEK, *Kirchengeschichte Österreichs*, Teil 3, Innsbruck, 1959, S. 583.

([18]) Vgl. darüber Gustav v. GASTEIGER, *Die Zillertaler Protestanten und ihre Ausweisung aus Tirol*, Meran, 1892; Viktor BIBL, *Die Zillertaler Emigration*, in *Forschungen zur brandenburgischen und preußischen Geschichte*, 45 (1932); Ekkart SAUSER, *Die Zillertaler Inklinanten und ihre Ausweisung im Jahre 1837*, Innsbruck, 1959 (*Schlern-Schriften*, 198. Bd.). Es enthält zahlreiche Literaturangaben und verarbeitet bisher unveröffentlichte Archivalien. Leider ist ihm die Abhandlung KOGLERS in *Tiroler Heimatblätter*, 1938, S. 41 ff. u. 77 ff. entgangen.

([19]) Vgl. SAUSER, wie oben, S. 35.

([20]) Ganz ähnliche Vorgänge waren in andern österreichischen Ländern schon

Ankauf von Realitäten ihre Existenz äußerlich zu festigen. Aber dieser Realitätenerwerb ging auch nicht ohne Schwierigkeiten vor sich.

Im Jahre 1833 wurde Inklinanten unter Berufung auf das Toleranzpatent, welches die Nichtkatholiken zum Realitätenerwerb nur dispensando zulasse, vom Landgericht Zell die Verfachung (bücherliche Eintragung) von Realitätenkäufen verweigert ([21]). Der Kreishauptmann von Schwaz, an den die Sache im Beschwerdewege kam, ist gegen jede Beschränkung des Güterkaufes. Beim Gubernium machten sich wieder zwei verschiedene Meinungen geltend. Die Mehrheit der Ratsmitglieder war für die Anwendung des von der Hofstelle als rechtsgültig erklärten Toleranzgesetzes, also Zulassung zum Güterkauf nur nach erteilter Dispens, die Minderheit wollte das Toleranzedikt im vorliegenden Fall nicht anwenden.

Ein Hofdekret vom 28. Februar 1833 entschied im Sinne der Minderheit des Guberniums, wonach Güterkauf den Zillertaler Glaubensneuerern aus dem Toleranzgesetze nicht verweigert werden kann.

Eine Begründung ist in dieser Hofentscheidung nicht gegeben. Sie ist aber wohl in der Bestimmung des Hofdekretes vom 30. April 1783 zu suchen, wonach für den Übertritt eines Katholiken zu einer anderen in Österreich geduldten Religion ein vorausgehender sechswöchentlicher Religionsunterricht vorgeschrieben ist ([22]).

nach Erlaß des Toleranzpatentes, 1781, zu beobachten. Der gewiß objektive juristische Kanonist Ignaz BEIDTEL berichtet in seiner vom liberalen Historiker Alfons HUBER herausgegebenen *Geschichte der österreichischen Staatsverwaltung 1740-1848*, (Bd. 1, Innsbruck, 1896, S. 265) diesbezüglich, wie die Protestanten in manchen Gegenden von Haus zu Haus liefen, um Glaubensgenossen zu werben und dadurch mehrere Contribuenten zum Unterhalt des Pastors zu gewinnen. «... Zank, Verdruß, tödtlichen Haß gab es in unzählichen Familien ...». — Auch Sauser berichtet von ähnlichen Erscheinungen im Zillertale. Erschütternd ist in den Lebenserinnerungen des Brixner Fürstbischofs Egger zu lesen, wie seine Jugendzeit durch ständige Familien- und Seelenkonflikte getrübt war, weil der Vater ein fanatischer Inklinant, die Mutter aber eine treue Katholikin war. Vgl. Franz EGGER, *Ein Bischof erzählt von seiner Mutter*, Innsbruck, 1935.

([21]) Vgl. SAUSER, S. 41.

([22]) Ein Verbot des Religionsunterrichtes war angeregt worden, um eine Vorbedingung des Kirchenaustritts auszuschalten. Was die Behörden verweigern konnten und tatsächlich nicht gestatteten, war die Berufung eines protestantischen Pastors in das Zillertal, denn die Bildung einer akatholischen Gemeinde in Tirol war schon aus politischen Gründen unerwünscht. Vgl. SAUSER, S. 56 u. 80. Die religiöse Unterweisung der Inklinanten, nämlich der zum Protestantismus Neigenden, war als Angelegenheit der Seelsorge behördlicherseits weder zu bewilligen

Dieser vorgeschriebene sechswöchentliche Religionsunterricht ist von den Zillertalern zwar gefordert, ihnen aber zunächst nicht bewilligt worden, sodaß sie rechtlich den Übertritt gar nicht vollziehen konnten und daher rechtlich immer noch als Katholiken angesehen

noch zu verbieten. Sie war dem Klerus eine selbstverständliche Pflicht; er hatte sich dabei nur nach seinen geistlichen Vorgesetzten zu richten. Weil die Behörden jedoch am Ergebnis der im Toleranzedikt vorgesehenen sechswöchigen Religionsunterrichts interessiert waren, sparten sie mit guten Ratschlägen nicht. So ersuchte das Landesgubernium am 28. 6. 1827 die Ordinariate in Salzburg und Brixen, die Geistlichkeit möge doch durch eifrige Belehrung auf die Bevölkerung einwirken, worauf der Bischof von Brixen am 12. 7. des gleichen Jahres an die «bereits ergangene, zweckmäßige Pastoralbelehrung in dieser so delikaten wie schwierigen Angelegenheit» erinnerte (SAUSER, S. 34). — Eine Präsidialerinnerung vom 22. 4. 1830 empfahl dem Kreisamte in Schwaz wie den Landgerichten Zell und Fügen im Sinne des josefinischen Toleranzediktes, jedoch ohne Berufung darauf, zu handeln, jede Ermächtigung, den sechswöchentlichen Unterricht beim Seelsorger nehmen zu dürfen, vorläufig abzulehnen und die sich Meldenden dem Geistlichen bekannt zu geben (SAUSER, S. 78). Aber das waren Vorschläge; sie brachten keine Klärung der Sachlage, sodaß der Kreishauptmann von Schwaz am 12. 6. 1830 in einem Schreiben an das Gubernium bemerkte, daß es nun an der Zeit sei, für die Behandlung der Sektierer klare Vorschriften vor sich zu haben (SAUSER, ebendort auf S. 78). Die Geistlichkeit hatte den vorgeschriebenen sechswöchentlichen Religionsunterricht schon vorher durchgeführt und führte ihn auch weiter, begleitet von den Ratschlägen der weltlichen Behörden. So beantragt das Gubernium im Jahre 1834: «Zur Ertheilung des 6-wöchentlichen Unterrichts wären von den Ordinariaten ganz besonders geeignete Priester abzusenden, die den letzten Versuch mit voller Unparteilichkeit wagen würden (SAUSER, S. 94). Am 9. 8. 1836 gab Staatsrat Prälat Josef Jüstel sein Votum ab: «Die Auswahl der für den sechswöchentlichen Unterricht auszuwählenden Priester müßte den Ordinariaten überlassen bleiben ... Der Bestimmung der Ordinariate wäre es auch anheimzustellen, mit wievielen — nicht zu vielen Individuen auf einmal —, weil dann der Unterricht nicht leicht auf alle, an Fassungskraft und Neigung sehr verschiedenen Individuen paßt ..., er zu erteilen wäre ... (SAUSER, S. 99). — Der Klerus tat tatsächlich sein Möglichstes, um die Inklinanten durch Belehrung und religiösen Zuspruch zurückzugewinnen, hatte aber wenig Erfolg. Ekkart Sauser berichtet in seiner aktenmäßigen Darstellung, daß der Pfarrer von Hippach auf Weisung des für ihn zuständigen Bischofs von Brixen im Jahre 1826 fünf Männern den sechswöchigen Religionsunterricht erteilt habe. Aus diesen fünf ließen sich zwei bekehren, jedoch nach einiger Zeit fielen sie wieder ab. Ebenso war alle Mühe umsonst, als im Jahre 1829 sechs Männer in Mayrhofen denselben Unterricht erhalten hatten (SAUSER, S. 33). Kurat Weinold von Brandberg berichtete am 22. 6. 1837 dem Salzburger Erzbischof: «... Der Inklinant Johann Innerbichler, dem ich den sechswöchentlichen Religionsunterricht zu erteilen habe, kommt von seinen Mitkonsorten aufgeredet ... mit hartnäckigen Herzen. Bevor ich den Unterricht beginne, sagt er schon: «Du dabarmst mir, daß du umsonst a sölche Mühe haben musst. Ich bleib wie ich bin, magst sagen, was d'willst ...»! (SAUSER, S. 62).

werden mußten. Im Sommer 1832 besuchte Kaiser Franz Tirol, und Abgeordnete der Zillertaler Inklinanten trugen unter Überreichung einer Bittschrift dem Kaiser in Innsbruck persönlich ihre Wünsche vor und baten um politische und konfessionelle Duldung ([23]). Gleichzeitig trugen aber die Vertreter der Gerichtsgemeinden des oberen Zillertales, wo die Glaubensneuerer hauptsächlich ihren Sitz hatten und die Ständevertreter des unteren Inntales dem Kaiser die Bitte um Erhaltung der Glaubenseinheit in Tirol vor und auch der tirolische Landtag erneuerte im April 1833 die schon oft gestellte Bitte des Volkes von Tirol um Erhaltung der Einheit des katholischen Bekenntnisses ([24]).

Über alle drei Majestätsgesuche berichtet das Gubernium unterm 31. Mai 1833 an die Hofstelle und beantragt die Aufhebung des Toleranzgesetzes vom 13. Oktober 1781 für Tirol und die Verweigerung der Gründung nichtkatholischer Gemeinden im Lande. Das Gubernium hat sich dabei große Mühe gegeben, die Nichtanwendbarkeit der Bestimmungen des westfälischen Friedens (1648) über die Religionsausübung für Österreich darzutun. Mit demselben Recht hätte es auch den Artikel XVI der deutschen Bundesakte vom Jahre 1815, wonach «die Verschiedenheit der christlichen Religionsparteien in den Ländern und Gebieten des deutschen Bundes keinen Unterschied in dem Genusse der bürgerlichen und politischen Rechte begründen könne» ablehnen können ([25]), aber davon schweigt

([23]) SAUSER, S. 36 u. 38.

([24]) Vgl. Hermann GSTEU, *Geschichte des Tiroler Landtages von 1816-1848*, in *Tiroler Heimat*, Heft 8, Innsbruck, 1927, S. 147-151.

([25]) Über die im Artikel XVI der Deutschen Bundesakte ausgesprochene Gleichberechtigung der christlichen Konfession und das Recht der Bundesangehörigen auf Grunderwerb in jedem beliebigen Bundesstaate vgl. Hans Erich FEINE, *Das Werden des Deutschen Staates von 1800-1933*, Stuttgart, 1936, S. 82. — Auf den genannten Artikel XVI verweist auch Ernst Rudolf HUBER, *Deutsche Verfassungsgeschichte seit 1789*, Bd. 1, Stuttgart, 1957, S. 398. Er bemerkt hiezu, daß der Artikel im Bundestage wiederholt Gegenstand lebhafter Debatten war, und daß einige kleinere Länder wie Sachsen-Meiningen, Sachsen-Altenburg, beide Mecklenburg an der Bevorrechtung ihrer protestantischen Landeskirche festhielten. — Das Beharren Tirols an der Glaubenseinheit entbehrt demnach nicht der Gegenstücke aus dem anderen Lager! Die grundsätzlich ausgesprochene Gleichberechtigung der christlichen Bekenntnisse ließ sich also nicht im ganzen Bundesgebiete durchsetzen; durfte sie in Teilen Norddeutschlands ignoriert werden, konnte das auch in Österreich geschehen. — Eine auch SAUSER entgangene Schrift: *Für die Glaubenseinheit Tirols. Ein offenes deutsches Wort an das Tiroler Volk von einem rheinischen Rechtsgelehrten*, Innsbruck, 1861, begründet diese Tatsache: Verfasser

das Gubernium. Unterm 2. April 1834 erging darauf die kaiserliche Entschließung ([26]). Eine formelle Aufhebung des josefinischen Toleranzpatentes erfolgte zwar nicht, aber dasselbe wurde in seinem wichtigsten Teil durchlöchert, indem die Bildung einer akatholischen Gemeinde in Tirol nicht gestattet wurde. Wenn die Zillertaler Inklinanten nicht katholisch werden wollten, soll es ihnen freigestellt sein, in andere österreichische Provinzen zu übersiedeln, wo es akatholische Gemeinden gibt. Aber die Zillertaler Inklinanten wollten nicht katholisch werden beziehungsweise bleiben, sondern betrieben im Mai 1836 selbst beim Landtag die Vollziehung der Allerhöchsten Entschließung vom 2. April 1834 und auf neuerliche Bitte der Stände erging dann unterm 12. Jänner 1837 eine neue Allerhöchste Entschliessung, welche die Allerhöchste Entschließung vom 2. April 1834 bestätigte und deren Vollzug anordnete ([27]). Der Großteil

war Franz Josef Buss (1803-1878), Professor des kanonischen Rechts, des Staatsrechts und der Staatswissenschaften an der Universität Freiburg im Breisgau. Buss verweist auf Seite VIII/IX auf die provisorische Kompetenzbestimmung der Bundesversammlung vom 12. Juni 1817; Paragraph 5, Artikel 3 betone ausdrücklich, daß den Bundesakten «der Begriff der vollen Souveränität der einzelnen Bundesstaaten zu Grunde liege und jede Einmischung in die inneren administrativen Verhältnisse außerhalb der Kompetenz der Bundesversammlung liege». Auch die Wiener Schlußakte vom 15. Mai 1820 erklären in ihrem Artikel LXV: «Die in den besonderen Bestimmungen der Bundesakte, Artikel 16, 18, 19 zur Beratung der Bundesversammlung gestellten Gegenstände bleiben derselben, um durch gemeinschaftliche Übereinkunft zu möglichst gleichförmigen Verfügungen darüber zu gelangen, zur ferneren Bearbeitung vorbehalten». Diese Vereinbarung sei niemals zustandegekommen; jedem Bundesstaate blieb daher ohne Bundeszwang volle Handlungsfreiheit. Daher habe sich die Bundesversammlung in der Kettenburgischen Angelegenheit nicht für ermächtigt erklärt, die großherzoglich mecklenburgische Regierung anzuhalten auf die wohlbegründete Beschwerde eines katholischen Untertanen wegen Untersagung des katholischen Privatgottesdienstes einzugehen. Über Buss vgl. u.a. Joh. Friedr. v. Schulte, *Die Geschichte der Quellen und Literatur des Canonischen Rechts*, 3. Bd., 1. Hälfte, Stuttgart, 1880, S. 391-393. Dieses für die juristische Wissenschaftsgeschichte unentbehrliche Werk Schultes verdiente längst eine Neubearbeitung. Viel ergänzendes Material aus Österreich bringt Nik. Grass, *Innsbrucker Kirchenrechtslehrer*, in *Veröff. des Ferdinandeums*, 31. Bd., Innsbruck, 1951, auch als Sonderdruck im Buchhandel; Ders., *Österr. Kanonistenschulen*, in *Zeitschr. der Savigny-Stiftung für Rechtsgesch.*, Kan. Abt. 1955, S. 290-411; Ders., *Die Kirchenrechtslehrer der Universität Graz*, in *Studia Gratiana* (Bologna), dzt. in Druck.

([26]) Vgl. Sauser, S. 47 f.

([27]) Vgl. Sauser, S. 42 ff. — Vergleichsweise sei eingeschaltet, daß zur Zeit des Hervortretens einer anderen Sekte, nämlich der Manharter, die zwischen 1815 und 1825 im nordöstlichen Tirol viele Anhänger hatte, niemals von einer Auswei-

der Zillertaler Inklinanten hat die Rückkehr zur katholischen Religion abgelehnt und ist noch im Jahre 1837 nach Preußisch-Schlesien (416 Köpfe) oder in andere österreichische Provinzen (11 Köpfe) übersiedelt ([28]).

Tirol war also im Verband der österreichischen Länder im Besitz eines Ausnahmszustandes: Die Bildung einer nichtkatholischen Gemeinde war in Tirol gesetzlich unmöglich. Landesrecht geht vor Reichsrecht.

Vom Toleranzpatent Josefs II. ist in Tirol nichts übrig geblieben als die Bestimmung, dass Akatholiken zum Häuser- und Güterkauf nur dispensweise zugelassen werden. Von dieser Norm wurde wiederholt Gebrauch gemacht ([29]).

sung die Rede war, da sie die öffentliche Ruhe in keiner Weise störten. Vgl. Alois FLIR, *Die Manharter*, Innsbruck, 1852; dann SAUSER, S. 64, Anm. 2. — Im Falle der Zillertaler Inklinanten handelte es sich aber um eine Art Staatsnotwehr gegen unbotmäßige Elemente, da die Regierung nach fehlgeschlagenen Versuchen kein anderes Mittel mehr wusste, um im Zillertale die öffentliche Sicherheit und bürgerliche Ruhe wiederherzustellen. Die Regierung ging jedoch mit aller Milde vor. In der kaiserlichen Entschließung vom 12. Jänner 1837 war im Interesse der Auswandernden ausdrücklich verfügt: «... Denen, welche sich für die Übersiedlung bestimmen, ist der hiezu allenfalls erforderliche Vorschub, selbst wenn es notwendig ist, mit einigen pekuniären Opfern zu leisten ... In der gesetzlichen freien Verwaltung und Verfügung mit ihrem in Tirol befindlichen Vermögen sind die aus diesem Lande abziehenden Individuen nicht zu beirren ...» (SAUSER, S. 102). Über Flir vgl. Nik. GRASS, *Österr. Historiker-Biographien*, 1. Folge, Innsbruck, 1957, S. 86-108.

([28]) Vgl. SAUSER, S. 46 ff.

([29]) Ein packendes Beispiel: Im Sommer 1845 kauften zwei evangelische Damen, Eveline und Agnes von Angern aus Preußen, von der Bäuerin Anna Laimböck um 3500 Gulden die Ruine Kropfsberg. Das Landgericht in Rattenberg verfachte ohne weiteres den Kaufvertrag und die Käuferinnen begannen mit Restaurierungsarbeiten. Über Einspruch der Gemeinden des Pfarrbezirkes Reith, in dessen Sprengel die Ruine gelegen, und des Erzbischofs von Salzburg, wurden die Bauarbeiten eingestellt und die Käuferinnen angewiesen, um die vorgeschriebene Dispens «höheren Ortes» einzureichen. Und nun beginnt ein über eine Jahr dauernder Notenwechsel zwischen den verschiedensten Behörden und Personen. Das Landgericht Rattenberg, das Kreisamt Schwaz, das Tiroler Landesgubernium, der Erzbischof von Salzburg, der Bischof von Brixen, die Hofkanzlei, der Hofkammerpräsident, die Staatskanzlei, die österreichische Gesandtschaft in Berlin, die preußische Gesandtschaft in Wien, ja sogar der König von Preußen wurden in Bewegung gesetzt und der Schlußstein dieser Affäre war die Allerhöchste Entschließung vom 9. Dezember 1846, wonach den Freiinnen von Angern der Ankauf verweigert wurde: «Was im Zillertal durch meine Entschließung vom 12. Jänner 1837 meinen protestantischen Untertanen verboten worden ist, soll ebendort protestantischen Aus-

In ein neues akuteres Stadium trat der Kampf um die Glaubenseinheit mit dem Vordringen des Konstitutionalismus, Zentralismus und Liberalismus ([30]) seit dem Jahre 1848. Der Kampf um die Glaubenseinheit geht weiter und stellt nur einen Ausschnitt dar aus dem Kampf um die Vorrechte des Landes ([31]). Nachdem schon die Pillersdorfsche Verfassung vom 25. April 1848, die ausdrücklich auch für die gefürstete Grafschaft Tirol Geltung haben sollte, allen Staatsbürgern volle Glaubens- und Gewissensfreiheit, das Recht der Freizügigkeit und freies Niederlassungsrecht gewährt hatte, hat das mit der Märzverfassung vom 4. März 1849 gleichzeitig erflossene Patent über die Grundrechte der Staatsbürger bestimmt, daß jede gesetzlich anerkannte Kirche und Religionsgemeinschaft das Recht der gemeinsamen öffentlichen Religionsausübung haben soll ([32]). Die Märzverfassung und das Patent über die Grundrechte der Staats-

ländern nicht gestattet werden». Jedoch soll den Käuferinnen der ausgelegte Kaufschillung vom Aerar vergütet werden. Vgl. Viktor BIBL, *Die Schloßruine von Kropfsberg. Ein Nachspiel zur Zillertaler Protestantenaustreibung*, in *Mitt. des Inst. f. österr. Geschichtsforschung*, Erg.-Band XI (1929), S. 735 ff.

([30]) Vgl. Karl EDER, *Der Liberalismus in Altösterreich. Geisteshaltung, Politik und Kultur*, Wien, o.J. [1955] u. G. FRANZ, *Liberalismus*, München, o.J. [1955]; dazu die Rezension von K. REPGEN im *Histor. Jahrbuch*, 78 (1959), S. 318 ff.

([31]) Über das Eintreten des Fürstbischofs von Trient Johann Nepomuk von Tschiderer für die Glaubenseinheit am Tiroler Landtage 1848 vgl. Marie von BUOL, *J. N. von Tschiderer und seine Zeit*, Innsbruck, 1934, S. 252 sowie Jos. GRISAR, *De historia Ecclesiae Catholicae Austriacae saeculi XIX. et de vita Principis — Episcopi Tridentini, Venerabilis Servi Dei Joannis Nepomuceni de Tschiderer, quaestiones selectae*, Romae, 1936, p. 248, 301, 303, 306 u.ö. — Vgl. auch Jos. GRISAR, *Num Ven. Joannes Nepomucenus de Tschiderer, Princeps-Episcopus Tridentinus, Josephinismo Austriaco nimis indulserit ? Disquisitio historica*, Romae, 1940. Beide Werke befinden sich in der Bibliothek des Landesregierungsarchivs in Innsbruck. Als allgemein gehaltene Darstellungen sind u.a. zu nennen: Rudolf v. GRANICHSTAEDTEN-CZERVA, *Die Entstehung der Tiroler Landesverfassung*, Innsbruck, 1922; Ferdinand KOGLER, *Vorlesungen über die ideellen und historischen Grundlagen des österreichischen Staates*, Innsbruck, 1936, S. 75; Hermann WOPFNER, *Von der Ehre und Freiheit des Tiroler Bauernstandes*, Bd. 1, Innsbruck, 1934, S. 136 ff.

([32]) Oswald GSCHLIEßER, *Zur Geschichte der Grundrechte in der österreichischen Verfassung*, in *Festschrift zur Feier des zweihundertfünfzigjährigen Bestandes des Haus-, Hof- und Staatsarchivs*, Bd. 2, Wien, 1954, S. 44–60 (auf S. 57 über die Paragraphen 14 und 15, Glaubens- und Gewissensfreiheit, Rechte der Kirchen- und Religionsgemeinschaften, im Staatsgrundgesetz vom 21. 12. 1867, RGBl. Nr. 142). — Ernst Carl HELLBLING, *Grundriß der österreichischen Verfassungs- und Verwaltungsgeschichte*, Wien, 1956; bespr. v. Nikolaus GRASS in *Deutsche Juristenzeitung*, Tübingen, 1958, Heft 18, S. 583.

bürger wurden allerdings durch das Silvesterpatent vom 31. Dezember 1851 wieder aufgehoben, aber die Bestimmung der Grundrechte über das jeder gesetzlich anerkannten Religionsgemeinschaft gewährleistete Recht der gemeinsamen öffentlichen Religionsübung wurde ausdrücklich aufrecht erhalten.

Die Frage war nun die: Hat es in Tirol eine gesetzlich anerkannte nichtkatholische Religionsgemeinschaft gegeben ? Die Frage ist zu verneinen. Nach dem in Tirol geltenden Rechtszustand war die Gründung einer nichtkatholischen Gemeinde unmöglich. Die bezügliche Bestimmung der Grundrechte konnte daher in Tirol keine Geltung erlangen. Landesrecht geht vor Reichsrecht. Man hätte, damit diese Norm in Kraft hätte treten können, die nichtkatholischen Religionsgemeinschaften erst schaffen müssen, was gesetzlich unmöglich war.

Aber die Gefahr, daß Tirols Vorrecht der Glaubenseinheit den Zentralisations- und Gleichmachungsbestrebungen zum Opfer fallen könnte, lag in der Luft, deshalb erneuerten die Tiroler auch immer ihre alte Forderung nach Aufrechterhaltung der Glaubenseinheit.

Die zu Wien tagende Versammlung der Bischöfe Österreichs im Jahre 1859 machte die Forderung der Tiroler zu der ihrigen und stellte an Seine Majestät die Bitte um Aufrechterhaltung der Glaubenseinheit in Tirol ([88]).

([88]) Die Bischöfe verfolgten die Entwicklung in Tirol eingedenk der in den Dreissiger Jahren vorgekommenen Zwistigkeiten und Religionsstörungen mit ernster Sorge. Eine Illustration bietet folgender Auszug aus einem Handschreiben des Salzburger Fürsterzbischofs (und späteren Kardinals) Maximilian Josef von Tarnoczy (1851-1876) an den Geistlichen Rat Ignaz Huber, Dekan zu Zell am Ziller vom 18. 6. 1857 (Das Originalschreiben ist verwahrt in der Sammlung Hochenegg, Hall in Tirol): «... Die oberhirtliche Pflicht gebiethet mir jene Kräfte in Anspruch zu nehmen, von denen ich eine wirksame Abhilfe in Gefahren gewärtigen kann, die das Heil der mir anvertrauten Gläubigen bedrohen. Wenn ich somit in einer Angelegenheit, welche vorzugsweise die Seelsorgskinder des Ihnen anvertrauten Dekanats betrifft, auf Ihre ebenso thätige wie umsichtige Mitwirkung zähle, so werden Sie hierin nur einen erneuten Beweis jenes Vertrauens finden ..., daß Sie auch gegenwärtig, wo es sich um die Abwendung einer die Glaubenseinheit im Zillerthale drohenden Gefahr handelt, Ihrem Oberhirten thätig zur Seite stehen ... werden ... Ich brauche diese Gefahr, welche aus der Möglichkeit des Ankaufes des k.k. Bergwerks im Zillerthale durch Protestanten droht, nicht weitläufiger zu bezeichnen, sondern erinnere vielmehr an die trüben Zeiten, welche Sie mit Ihren Amtsbrüdern während der Glaubenswirren im Zillerthale zu bestehen hatten, um Sie nochmals dringend aufzufordern, auf Grundlage Ihrer Kenntnis der Verhältnisse und mit dem Ihnen so eigenen Opfermuthe nichts unversucht zu

Auf Bitten der Kirchenfürsten und auf Bitten des verstärkten Landesausschusses hat ein kaiserliches Handbillet vom 7. September 1859 die religiöse Frage ausdrücklich als Landesangelegenheit erklärt, über welche Anträge zu stellen und der Sanktion der Krone zu unterbreiten der künftige Landtag berufen sein wird, womit die Krone sich des Rechtes der einseitigen Regelung dieser Frage, wie das bisher der Fall war, entschlägt ([84]).

Denselben Standpunkt, daß die religiöse Frage in Tirol Landesangelegenheit sei, vertritt eine Allerhöchste Entschließung vom 17. November 1865, welche den Tiroler Landtag zur Behandlung eines Landesgesetzes wegen Gründung evangelischer Gemeinden auffordert.

Als das Protestantenpatent vom 8. April 1861, welches ausdrücklich auch in Tirol gelten sollte, den Evangelischen volle Freiheit ihres Glaubensbekenntnisses in allen österreichischen Kronländern zusicherte, alle bisher etwa bestandenen Beschränkungen und Dispenserteilungen aufhob, folglich auch in Tirol freies Niederlassungsrecht gewährte, gab es in Tirol große Aufregung ([85]). Die wiederholt verbriefte Glaubenseinheit war aufs höchste bedroht. Die Erregung aller am öffentlichen Leben nicht gleichgültigen Volksschichten

lassen, was die Wiederkehr solcher Calamität abzuwenden vermag ... Salzburg den 18. Juni 1857. Maximilian Joseph, Fürsterzbischof». Über die vom Erzfürstbischof erwähnten «Calamitäten» und «trüben Zeiten» vgl. die von SAUSER auf S. 33 und 53 ff. erwähnten zahlreichen Fälle von Religionsstörung, Familienkonflikt und gegenseitiger Verhetzung. Auch die Besorgnis vor einem ungünstigen Einfluß andersgläubiger Unternehmer auf ihre Angestellten war nicht unbegründet. Über die Intoleranz des evangelischen Fabrikanten Lüthi in Innsbruck und über mehrere in seinem Betrieb vorgekommenen Fälle von Gewissenzwang berichtet der Rechnungsbeamte Johann LANG 1842 in seinem *Tagebuche* (Bibliothek des Landesmuseum Ferdinandeum in Innsbruck, 1931 (*Schlern-Schriften*, 19.), S. 116.

([84]) Vgl. darüber die Tageszeitungen, Landtagsprotokolle und Johann Nepomuk Freiherr DI PAULI, *Anton Freiherr Di Pauli, ein Lebensbild als Beitrag zur Geschichte Österreichs und Tirols in der zweiten Hälfte des 19. Jahrhunderts*, Innsbruck, 1931 (*Schlern-Schriften* 19.), S. 116.

([85]) DI PAULI, wie oben, S. 146 ff: Der Verfasser schildert den aus dem genannten Anlaß zusammengetretenen «Stern-Landtag», eine trotz aller behördlichen Schikanen am 29. und 30. Juni 1861 im Innsbrucker Gasthaus zum «Goldenen Stern» stattgefundene Versammlung von Vertrauensleuten aus ganz Deutschtirol. Eine von den Versammelten an Kaiser und Papst gerichtete Adresse betont, die Glaubenseinheit sei das kostbarste Erbgut, sozusagen die Seele des Landes; sie gebe ihm die Kraft ein Bollwerk für die Kirche und für das von Gott gesetzte angestammte Herrscherhaus zu sein.

machte sich Luft in Vertrauensmännerversammlungen, Petitionen fast aller Gemeinden an den Landtag, in großen Landtagsdebatten (17. April 1861, 25. Feber 1863 u. 3. Feber 1865), Landtagsbeschlüssen, Adressen an Papst und Kaiser, öffentlichen Andachten und großen Bittprozessionen.

Alles rief nach Aufrechterhaltung des Nationalgutes der Glaubenseinheit. Am eindringlichsten mahnten und riefen die drei Landesbischöfe (Salzburg, Brixen, Trient). Mit dem Rufe nach Aufrechterhaltung der Glaubenseinheit war immer auch die Forderung verbunden, die Niederlassung Andersgläubiger im Lande zu verwehren, oder wenigstens von der Erlassung eines Landesgesetzes abhängig zu machen, «denn den Gütererwerb der Protestanten frei geben und die Bildung protestantischer Gemeinden dennoch verhindern, hieße», wie Fürstbischof Vinzenz von Brixen in seiner großen Rede im Landtag am 3. Februar 1866 ausführte, «die Prämissen stehen lassen und die Konsequenz dennoch bestreiten» ([86]).

Die Regierung setzte insbesondere der Forderung nach Beschränkung des Niederlassungsrechtes der Protestanten unter Berufung auf das Protestantenpatent hartnäckigen und unüberwindlichen Widerstand entgegen. Nach hartem Kampf und langen Verhandlungen kam dann das von der Krone *sanktionierte Landesgesetz vom 7. April 1866 zustande,* wonach die Bildung einer selbständigen Gemeinde oder Filiale der Evangelischen des augsburgischen oder helvetischen Bekenntnisses, von welcher Bildung das Recht der Ausübung des öffentlichen Gottesdienstes abhängt, innerhalb der Landesgrenze der gefürsteten Grafschaft Tirol von den kompetenten Behörden *nur über Einverständnis des Landtages* bewilligt werden könne.

Also noch einmal ging Landesrecht vor Reichsrecht, aber eine Beschränkung der Niederlassung von Nichtkatholiken in Tirol war nicht mehr zu erreichen gewesen.

Als das Staatsgrundgesetz vom Jahre 1867 neuerdings im ganzen

([86]) Vgl. Johann ZOBL, *Vinzenz Gasser, Fürstbischof von Brixen, sein Leben und Wirken,* Brixen, 1883: Den Landtag von 1866 behandeln die Seiten 368-379. — Ein etwas gedämpftes Stimmungsbild über diese Tage und die dabei hervorgetretenen verschiedenen Richtungen im konservativen Lager gibt DI PAULI auf S. 214-219. Eine Parallele zum Eintreten der tirolischen Bischöfe für die Glaubenseinheit bilden die Hirtenbriefe und Landtagsreden des aus Parthenen in Vorarlberg gebürtigen Bischofs Rudigier von Linz zur Verteidigung des Konkordats und der religiösen Erziehung. Vgl. Konrad MEINDL, *Leben und Wirken des Bischofs Franz Josef Rudigier von Linz,* 2 Bände, Linz, 1891-1892.

Staatsgebiet ohne alle Einschränkung allen gesetzlich anerkannten Kirchen, mithin auch den Evangelischen, freie Religionsausübung und das freie Niederlassungsrecht zusicherte, drängte endlich die Frage zur Entscheidung, wie sich der *Konflikt zwischen Landesrecht und Reichsrecht* lösen würde. Nach dem alten Satz «Landesrecht bricht Reichsrecht» ([87]) hatte bisher das Landesrecht über das Reichsrecht den Sieg davongetragen.

Aber Theorie und Praxis der neueren Zeit wollte diesen Satz in das Gegenteil verkehren ([88]). Die Verfassungsurkunde des Norddeutschen Bundes vom 25. Juni 1867 spricht im Artikel 2 ausdrücklich aus, daß Bundesgesetze den Landesgesetzen vorgehen. In Österreich fehlte allerdings eine solche Verfassungsbestimmung. Aber tat-

([87]) Vgl. dazu SCHRÖDER-KÜNSSBERG, *Lehrbuch der Deutschen Rechtsgeschichte*, 7. Aufl., Berlin, 1932, S. 972.

([88]) Den Angriffen auf die Landesrechte antwortete die konservative Majorität des Landtages im Herbst 1869 mit den sogenannten Dietl'schen Anträgen. Als Autoren dieser scharf umrissenen Sätze werden Ignaz Giovanelli, Franz Buol oder Anton Di Pauli vermutet; vertreten wurden sie durch Josef Dietl:
«I. Die Verfassungsgesetze vom 21. Dezember 1867 sind unvereinbar mit dem öffentlichen Rechte und der staatrechtlichen Stellung Tirols und führen in ihrer weiteren Entwicklung zur Vernichtung der politischen Existenz des Landes.
II. Der Landtag spricht seine Überzeugung aus, daß der Reichsrat nicht berechtigt war, über die Landesrechte Tirols, über seine Stellung zur Gesamtmonarchie, über seine Selbständigkeit und staatrechtliche Bedeutung ohne Zustimmung des Landes endgültig zu entscheiden.
III. Der Landtag hat in der an Se. k.k. apostolische Majestät am 1. März 1867 gerichteten Adresse die Verwahrung der Landesrechte ausgesprochen; er wiederholt heute diese Verwahrung gegenüber den seither erschienenen Gesetzen, und will die öffentliche Gerechtsame Tirols als eines selbständigen Teiles der Gesamtmonarchie aufrecht erhalten wissen.
IV. Der Landtag in Unterordnung unter Se. Majestät den Landesfürsten und Kaiser nimmt das Recht der Gesetzgebung in allen Angelegenheiten in Anspruch, deren gemeinsame Behandlung zur Erhaltung und Förderung der Einheit und Macht der Gesamtmonarchie nicht notwendig ist.
V. Das Land Tirol fordert insbesondere als sein Recht, daß die Gesetze in Schul- und Ehesachen mit den Gesetzen der katholischen Kirche nicht in Widerspruch seien.
VI. Tirol ist bereit zur Regelung der staatsrechtlichen verhältnisse der Monarchie auf Grundlage des mit kaiserlichen Diplome vom 30. Oktober 1869 erlassenen Staatsgrundgesetzes mittels gemeinsamer Beratung mitzuwirken».
Da Statthalter von Lasser erklärte, daß nur der Staatsanwalt auf diese Anträge zu antworten hätte, schloß der Landeshauptmann am 29. Oktober 1869 den Landtag, um eine Abstimmung über diese Forderungen zu verhindern. Vgl. DI PAULI, S. 273-274.

sächlich hat auch die österreichische Regierung nach dem Grundsatz gehandelt: «Reichsrecht bricht Landesrecht». Sie hat das Vorrecht Tirols auf Glaubenseinheit nicht mehr respektiert. Mit einer einfachen Verordnung vom 29. Dezember 1875 hat der liberale Kultus- und Unterrichtsminister Stremayr das vom Kaiser sanktionierte Landesgesetz vom 7. April 1866 kurzerhand außer Kraft gesetzt und die Gründung evangelischer Gemeinden in Innsbruck und Meran gestattet ([39]). Nach Ansicht des Ministers «bestehe aus dem tirolischen Landesgesetze vom 7. April 1866 kein Grund gegen Konstituierung einer evangelischen Gemeinde in Meran und Innsbruck».

Durch einfache ministerielle Verfügung ist so das Gesetzgebungsrecht des Landtages in Glaubenssachen illusorisch gemacht worden. Die Majorität des Landtages hat im Landtag am 7. März 1876 gegen diese Willkür des Ministers energisch Protest eingelegt und zum Zeichen des Protestes den Landtag verlassen, wodurch derselbe gesprengt wurde.

Die Abgeordneten der Majorität führten in ihrer Erklärung aus: «Das Gefühl der vollendetsten Rechtsunsicherheit hat sich im ganzen Lande verbreitet und jedes katholische und tirolische Herz ist tief betrübt ... die Regierung hat die im Tiroler tief wurzelnde Anhänglichkeit an die heilige katholische Kirche, die angestammte Treue an das erlauchte Kaiserhaus, das Bewußtsein des vaterländischen Rechtes, mit einem Worte alles, was dem Tiroler wert und heilig ist, auf das schwerste gekränkt» ([40]). Im Landtag vom Jahre 1878 protestierte die Majorität des Landtages neuerdings in Form einer Interpellation gegen die begangene Verletzung des Landesrechtes, worauf der Regierungsvertreter einfach erwiderte, daß durch die Dezem-

([39]) Di Pauli, S. 486 ff., spricht von einem krassen Rechtsbruch. «Das Gesetzgebungsrecht des tirolischen Landtages ist illusorisch gemacht und ministerielle Willkür an dessen Stelle gesetzt ... Im Landtag kann daher unser Platz nicht mehr sein ...» (Aus einem Schreiben an Paul Giovanelli).

([40]) Die vermutlich durch Ignaz Giovanelli ausgearbeitete Erklärung sagt u.a. noch: «Das Land Tirol hat in den letzten Jahren bei mannigfaltigen Anlässen die empfindlichsten Kränkungen seines öffentlichen Rechtes erlitten ... Das treue Land Tirol sieht sich seiner staatsrechtlichen Stellung verlustig erklärt ... Der Herr Minister für Kultus und Unterricht findet sich seines Erachtens ermächtigt, Verfügungen zu treffen, welche ein von Sr. Majestät sanktioniertes Gesetz willkürlich beseitigen. Wir die Vertreter des Landes, sehen mit Kummer in die Zukunft ... Zur Wahrung des Ansehens des Landtages erachten wir es für unsere Pflicht diese Versammlung zu verlassen, deren verfassungsmässige Tätigkeit die Regierung nicht achtet ...» Vgl. Di Pauli, S. 490-493.

bergesetze von 1867 die konfessionellen Fragen in den Bereich der Reichsgesetzgebung gezogen worden seien. Also das Reichsrecht hat über das Landesrecht den Sieg davongetragen.

Die Kampfkraft der Führer des Tiroler Volkes ist seither erlahmt. Sie sahen den Kampf als aussichtslos an und begnügten sich nur mit der Wahrung des prinzipiellen Standpunktes.

Auf der Landtagsbühne wurde die Frage der Glaubenseinheit nicht mehr berührt. Die Mehrheit der Abgeordneten schlug zur Wahrung ihres prinzipiellen Standpunktes einen neuen Weg ein.

Im Jahre 1881 brachten sie die Frage in einem Promemoria an den Ministerpräsidenten Taaffe zur Sprache (41), und im nächsten Jahr trug eine Deputation dieselbe Frage Graf Taaffe vor (42).

Einen Erfolg haben diese Schritte nicht gehabt. Seit dem Jahre 1875 war die Glaubenseinheit des Landes, um welche Tirol ein Jahrhundert lang gekämpft, endgültig verloren. Die Glaubenseinheit des Landes gehört heute der Geschichte an, sie gehört zu den «antiquitates juris», zu den Rechtsaltertümern (43).

F. KOGLER u. F. GRASS.

(41) DI PAULI, S. 573. «... Sie wissen, daß außerhalb Tirols das Verständnis für dessen Forderung in der Einheit des katholischen Glaubens erhalten zu bleiben, selbst in konservativen Kreisen erst aufzudämmern beginnt, und daß die Zeitströmung im allgemeinen noch immer eine der tirolischen Auffassung feindselige ist. Auf je weniger Verständnis aber Tirol zu rechnen hat, desto mehr ist es angewiesen mit aufmerksamen Auge die Entwicklung der gegenwärtigen politischen und sozialen Verhältnisse zu verfolgen ...»

(42) Baron Di Pauli vertrat dabei den deutschen Teil Tirols und Baron Hippoliti den italienischen Teil. Ersterer bezeichnet es als Zweck seiner Reise «in der Glaubenseinheitfrage eine Fristerstreckung zu erwirken» und einige Einzelheiten unter Ausschluß der Öffentlichkeit zu besprechen. Der Minister habe eine befriedigende Antwort gegeben. Vgl. DI PAULI, S. 592-593.

(43) Man mag über den der Vergangenheit angehörenden Kampf Tirols um seine Glaubenseinheit denken wie man will, es lag gewiß einige Wahrheit in einem Ausspruch Anton Di Paulis, den auch Otto STOLZ in seinem Werke *Die Ausbreitung des Deutschtums in Südtirol im Lichte der Urkunden*, Bd. 3, Teil 2, München, 1932, auf S. 316 zitiert: «Welcher Deutsche, was für einer Konfession er immer angehöre, wird es billigen, daß in einem deutschen Grenzland, das von kriegerischen und friedlichen Invasionen der welschen (südlichen Nachbarn) bedroht ist, eine Spaltung versucht werde»?

XIX

La Formation des deux Chambres de l'Assemblée nationale hongroise,

PAR

JOSEPH HOLUB,
*Professeur émérite de l'Université de Pécs**.

* Puisque le but de la présente étude est de fournir des matériaux à la comparaison, il m'a paru inutile de citer les sources utilisées. J'attire cependant l'attention sur l'ouvrage de Félix SCHILLER, paru en 1900, car ses parties essentielles ont été reprises en allemand, sous le titre de *Der Ursprung des erblichen Magnatenstandes in Ungarn,* dans la *Zeitschrift für vergleichende Rechtswissenschaft* (vol. XVI, 1903), puis en français: *Les origines de l'état des magnats en Hongrie,* dans *The Conference of the International Law Association* (vol. VII, 1908). — Je renvoie encore à mon compte rendu du livre paru en 1947 de György BONIS, *La féodalité et le corporatisme dans le droit hongrois du moyen âge* (dans la *Revue historique de droit français et étranger,* XXVIII, 1951, pp. 434-443) et à mon étude intitulée *La représentation politique en Hongrie au moyen âge,* publiée dans les *Etudes présentées à la Commission internationale pour l'histoire des Assemblées d'états* (vol. XVIII, 1958, pp. 77-121).

En cherchant un terme pour caractériser la première période du royaume de Hongrie, qui s'échelonne de 1000 à 1200 environ, les savants ont utilisé les qualificatifs de *chrétien, patrimonial, charismatique, sacral, personnel.* Cet usage montre clairement qu'ils voulaient souligner le caractère quasi illimité du pouvoir royal.

Cependant, malgré l'étendue de cette puissance, les dignitaires ont également un rôle à jouer. Bien sûr, nous rencontrons dans les lois de notre premier roi, saint Etienne (1000-1038), des expressions comme *volumus, decrevimus regali nostra potentia,* mais d'autre part, les allusions aux conseils des dignitaires n'y sont nullement absentes: *consensimus petitioni totius senatus; regale concilium; primatum conventus.* C'est naturel, car avant de promulguer ses décrets, le roi devait s'assurer de leur concordance avec l'ordre divin et avec l'ordre juridique positif.

La position du haut clergé fut renforcée plus tard par la victoire des idées grégoriennes. Les dignitaires laïcs s'éveillèrent à la conscience de leur puissance au début du XII[e] siècle, quand débuta la politique d'expansion: celle-ci et les liens de parenté de la famille royale avec les dynasties voisines entraînèrent des guerres permanentes et le roi avait besoin de l'appui des grands. Othon de Freising, qui cependant parle de la puissance grande et accrue du roi de Hongrie, ne manque pas de souligner que les dignitaires se réunissaient à la cour royale, prenant avec eux leurs sièges et discutant des affaires du pays.

Béla IV (1235-1270) essaya de limiter la puissance des seigneurs: il fit brûler leurs sièges et ne permit qu'aux membres du haut clergé et aux dignitaires de la cour de s'asseoir en sa présence. Bien que souverain fort, il ne parvint cependant pas à briser le pouvoir des seigneurs.

A côté des expressions *principes* et *nobiles,* d'autres encore furent employées pour désigner cette couche supérieure de la société. Ceci prouve clairement que nous ne pouvons pas encore chercher dans ces appellations le reflet d'une stratification sociale. Ces dénominations traduisent tout simplement le jugement, peu précis, de l'opinion au sujet de certains groupes. Au début du XIII[e] siècle apparaît un terme nouveau, *baro,* importé d'Occident. Il sert à désigner chez

nous, aussi bien les princes d'Eglise que les dignitaires laïcs, et non seulement ceux qui étaient investis de hautes charges, mais encore les membres de l'aristocratie, grands propriétaires. C'étaient eux qui siégeaient dans le conseil du roi et représentaient le pays (*regnum*).

A la même époque la noblesse moyenne commence à prendre forme. Au milieu du XIII[e] siècle, elle était déjà considérée comme une couche à part dans la société. Aucun terme spécifique n'existait au début du siècle pour la désigner; seule une circonlocution pouvait exprimer que le roi avait conféré à quelqu'un le titre de *serviens*; dès le milieu du siècle une formule suffisait: l'homme fut admis *in cetum, numerum et consortium servientium suorum*. Puisque, comme nous venons de le voir, les dignitaires ont commencé à cette même époque à utiliser le titre de *baro*, le terme de *nobilis*, qui les désignait souvent auparavant, servit désormais tout naturellement à dénommer la noblesse moyenne.

Le règne effacé d'André II (1205-1235) et les conditions de la société hongroise au début du XIII[e] siècle expliquent la position de force, en pleine expansion, de l'aristocratie terrienne enrichie. Le pouvoir royal était incapable de freiner l'empiètement de cette aristocratie sur les prérogatives du souverain et des sujets. La noblesse moyenne s'éveillait aussi à la conscience de son importance. Son unité était encore davantage scellée par la formation du «comitat» nobiliaire et autonome. Ainsi le dernier tiers du XIII[e] siècle voit la féodalité en plein développement et les débuts d'une constitution féodale.

Nous devons brosser les grands traits de l'évolution de la société, car la question à examiner ne saurait être comprise sans son *background* social.

Le résultat du grand dynamisme de la société hongroise tout au long du XIII[e] siècle, fut donc d'ouvrir une nouvelle étape dans l'évolution constitutionnelle. Les événements politiques vinrent la précipiter. En 1270, un jeune enfant, Ladislas, accéda au trône (1270-1290). Sa mère, une personne ambitieuse et légère, gouvernait à sa place. Aucun obstacle n'empêchait désormais la réussite des efforts de domination des seigneurs. Quand Ladislas prit en mains les rênes du pouvoir, la situation n'en devint pas meilleure.

La volonté des ordres de régler eux-mêmes leur destinée et d'influencer les affaires du pays voit donc le jour assez rapidement. Vers 1270, des réunions nationales commencent à avoir lieu, où les ordres ne se contentent plus de conférer avec le roi, des affaires

publiques, mais légifèrent. En 1289 et en 1299, elles sont déjà appelées *parlamentum*.

Parmi ces assemblées, la mieux connue est celle de 1298, car les lois qu'elle a faites ont été conservées. Nous lisons dans l'introduction que les nobles avaient conféré avec les membres du haut clergé, les barons ayant été exclus comme d'habitude («... *exclusis quibuscunque baronibus, prout moris est* ...»). Il n'est pas permis cependant de tirer la conclusion que c'était là une coutume, car nous pouvons aussi lire la déclaration du haut clergé selon laquelle les dignitaires ecclésiastiques et les nobles ont le pouvoir de promouvoir le bien du pays et des ordres, avec l'accord du roi et des barons. Au terme de l'énumération des lois, il est souligné une fois de plus que leurs décisions ont été prises avec le consentement légal du roi et des barons («... *de legali consensu domini regis et baronum* ...»). Nos sources les plus anciennes prouvent incontestablement que le roi et les barons étaient «assis» à part lors des assemblées, c'est-à-dire qu'ils tenaient leurs assises entre eux. La situation spéciale de 1298 s'explique par le mécontement du haut clergé en face de la puissance exorbitante des barons: les dignitaires ecclésiastiques s'étaient donc joints à la noblesse moyenne pour avoir plus de poids dans la discussion avec le roi et les barons.

Les contours de deux chambres séparées se dessinent dès l'apparition des assemblées. Nous y voyons l'influence que le conseil royal avait exercée sur leur formation. Ceci est naturel, car, comme nous l'avons dit, le roi prenait conseil de ses dignitaires dans chaque affaire importante et il allait même jusqu'à insister sur leur consentement (*consensus, assensus*) ce qui est plus que le simple conseil (*consilium*). Nous comprendrons donc la déclaration d'André II, rencontrée dans l'une de ses chartes, selon laquelle «la force et le conseil des dignitaires sont les piliers de la couronne et du pays». C'est à son époque que nous rencontrons pour désigner le conseil royal l'expression *regale consistorium*, empruntée sans doute par notre chancellerie aux coutumes de la curie pontificale. Voici autant de preuves pour affirmer que l'institution, à l'origine inorganisée, était capable de se développer. Béla IV ne parle même plus de «membres du haut clergé et barons», mais tout simplement de ses «conseillers».

Vers la seconde moitié du XIII^{e} siècle, la noblesse moyenne commença à jouer un rôle important à côté du conseil royal. Mais son influence déclina rapidement: sous les rois de la maison d'Anjou

(Charles Robert, 1301-1342, et Louis le Grand, 1342-1382), le pouvoir royal se fortifia et les assemblées furent à peine convoquées. Toutefois, en prenant toutes ses mesures, le roi souligna la collaboration du conseil et indiqua maintes fois que l'affaire avait été délibérée avec les dignitaires. Le dualisme féodal subsistait donc, seuls les rapports de force changèrent entre les deux facteurs: le pouvoir du souverain devint prédominant.

Après la mort de Louis le Grand, l'évolution prit une tournure nouvelle. A la place de la jeune Marie, fille de Louis, sa mère gouvernait fort maladroitement. Aussitôt des troubles graves éclatèrent et le mécontement devint tel que la reine se vit forcée de convoquer l'assemblée nationale (1384, 1385). A cette époque mouvementée, la noblesse moyenne reprit également ses forces et nous la rencontrons désormais à côté des grands seigneurs chaque fois qu'une affaire publique importante est à régler. Conformément à ses prétentions et à son rôle, elle adopta peu à peu la forme d'action qui semblait la meilleure: le système représentatif.

Sigismond (1395-1437) tint peu d'assemblées et gouverna par décrets élaborés en conseil. Il attribuait cependant beaucoup d'importance à ce que les grandes décisions fussent prises avec la participation de la noblesse moyenne. Mathias Corvin (1458-1490) était un souverain de la Renaissance, imbu de l'idéal impérial; il ne toucha cependant pas à la féodalité, mais il rechercha l'appui de la noblesse moyenne contre les grands. Il convoqua donc de nombreuses assemblées, mais la noblesse des comitats ne pouvait y envoyer que ses représentants. Les décades qui suivirent la mort du roi, de 1490 à 1526, jusqu'à la catastrophe de Mohács, furent caractérisées par le renforcement de la féodalité et l'évolution de la constitution féodale. Sous Vladislas II et Louis II, monarques trop faibles, la tendance esquissé sous Mathias Corvin vers l'absolutisme royal prit fin et les exigences féodales ne rencontrèrent plus d'obstacle. Les assemblées se suivirent, parfois à la cadence de deux ou trois par an. La noblesse moyenne en profita pour augmenter sa puissance et elle obtint même de pouvoir arriver en nombre complet.

Si nous examinons de plus près ces assemblées en nous basant sur ce qui vient d'être dit, nous pouvons constater que poursuivant dans la ligne du conseil royal depuis toujours, les dignitaires n'ont pas cessé de se réunir à part. D'ailleurs le rôle du conseil s'étendait au moment des assemblées, car alors le roi en avait davantage besoin. Bonfini, l'historiographe humaniste de Mathias Corvin, en décrivant

le splendide palais royal de Buda, mentionne la salle du conseil: «*Buleuterion hic et dieta*» — écrit-il, ce qui laisse supposer que non seulement les réunions du conseil y eurent lieu, mais que les grands seigneurs y tinrent leurs sessions au moment de la diète, souvent sous la présidence du roi. La noblesse moyenne, déjà fort nombreuse, envoya ses députés qui se rencontrèrent au pied des murs de la ville de Pest (en face de Buda), sur le champ de Rakos qui s'étend le long du Danube. Aussi, sous la plume des étrangers, le mot *Rakos* devint synonyme de la notion de diète et les Polonais ont directement repris le terme dans ce sens (*rokosz*). Il se comprend que les députés de Pozsony parlent, dans leur rapport de l'assemblée de 1446, des dignitaires réunis à part, comme *Landherren im Rath*, et désignent la noblesse moyenne comme *Orzag* (regnum). La terme hongrois *ország* (pays) désignait seulement les grands seigneurs, au début du XV[e] siècle. Vers le milieu de ce siècle, il servait déjà à dénommer la noblesse qui devint un facteur important de la vie politique. A l'occasion de l'élection d'un nouveau roi, en 1490, les grands seigneurs passèrent de Buda à Rakos pour entendre les délégués des prétendants au trône. Mais la noblesse moyenne n'attendit pas la fin des tractations: elle transmit ses droits à des représentants plénipotentiaires, élus à raison de deux par comitat, et se dispersa. Ces représentants se réunirent alors avec les grands seigneurs dans une des églises de la ville de Pest pour délibérer en commun au sujet des conditions de l'élection. A propos des troubles survenus à la diète de 1519 convoquée pour élire un *nador* (remplissant des fonctions analogues à celles d'un vice-roi), l'ambassadeur de Venise rapporte des détails intéressants: les partisans de Zapolya «prese le armi, arrivarsi *contro il castello, ove trovarsi il re con tutti i signori.* Quei del castello prese le armi, il posero in fuga e fecerli ripassare *oltre il Danubio, dove era il luogo solito per le diete*» — c'est-à-dire que la noblesse assiégea le château de Buda, mais les grands seigneurs la reléguèrent, les armes à la main, au champ de Rakos.

Examinons maintenant la personnalité des membres du conseil royal qui formèrent l'une des chambres de l'assemblée nationale et qui furent convoqués aux diètes par des lettres royales personnelles.

Il est indubitable que les membres se recrutaient non seulement dans les rangs du haut clergé et des dignitaires les plus élevés, mais également dans ceux de l'aristocratie, grands propriétaires. Othon de Freising, déjà cité, mentionne comme un fait curieux que les seigneurs hongrois «ad curiam regis singulis ex *primoribus* sellam

secum portantibus conveniunt ac de suae rei publicae statu pertractare et discutere non negligunt». Ces seigneurs devinrent membres du conseil royal sans aucune formalité, uniquement en vertu de leur grande fortune. Plus tard, ils étaient désignés sous le nom de *proceres,* mais la loi n° 64 de 1486 utilise, à côté des termes *prelati et barones,* l'expression *ceteri possessionati* qui s'applique bien entendu aux grands propriétaires et non pas en général à toute la noblesse possédante. Ces seigneurs étaient invités aux assemblées par des lettres royales personnelles.

Après 1526, la situation se modifia. Les membres de la nouvelle dynastie, les Habsbourgs, gouvernaient de Vienne et les affaires de leurs différentes possessions étaient réglées par les administrations de la cour. Les seigneurs hongrois de toutes conditions se rendirent rapidement compte du danger que la situation présentait surtout pour l'indépendance du pays et pour leurs libertés. Ils recoururent à tous les moyens possibles pour forcer le roi à respecter les lois du pays et leurs libertés. Puisque le moyen le plus sûr semblait être la diète, elle se réunit fréquemment. Mais son organisation subit de profondes modifications.

Un trait essentiel de la chambre basse fut la disparition des sessions plénières depuis 1532: la noblesse moyenne ne fut plus jamais convoquée à titre individuel et en nombre complet, elle fut représentée désormais par ses députés élus. Pous ce qui concerne la chambre haute, la coutume des convocations personnelles fut juridiquement consacrée en 1608. La loi n° 1 de cette année définit les conditions à remplir pour pouvoir siéger et voter aux assemblées. Plus tard, après la formation définitive de l'aristocratie héréditaire, il fut minutieusement déterminé quelles étaient les personnes qui pouvaient prétendre à une invitation.

Nous avons vu que la chambre haute groupait aussi bien le haut clergé, les dignitaires et les barons que l'aristocratie, grands propriétaires. Cette situation *de facto* fut juridiquement reconnue par la loi n° 1 de 1608 qui détermine «*Quinam status et ordines dicantur* ? Et qui locum et vota in publicis diaetis habere debeant». La cause de cette sanction juridique de la coutume fut une mesure, par laquelle le roi octroya le privilège de ville royale libre à plusieurs villes de province. La noblesse craignait que le roi ne voulût augmenter le nombre des représentants aux diètes par l'adjonction de bourgeois et dénia au roi le droit de créer des villes royales libres par un simple privilège. Par conséquent, après la victoire de la révolte de Bocskay,

il fut non seulement stipulé «ne de caetero sua regia maiestas qualiacunque in regno oppida sine consilio Hungarico eximat aut libertet» (loi n° 6 d'avant le couronnement, 1608), mais il fut aussi souligné dans la loi n° 1, après le couronnement, que les représentants des huit villes libres énumérées dans la loi n° 3 de 1514 «inter regnicolas locum et vota habeant», mais que «reliquarum civitatum liberarum, qui ibi comprehensae non essent, status rejicitur ad emendationem decretorum».

Mais il était aussi nécessaire de déterminer avec exactitude les membres qui composaient la chambre haute. Des prélats y voulurent prendre place auxquels les seigneurs déniaient le droit de siéger. Il est vrai que la loi se limitait à dire en général que «quantum ad ordinem magnatum statutum est, ut universi barones et magnates in generalibus diaetis praesentes in coetu et conventu praelatorum, baronum et magnatum suum locum et vota habeant», mais elle détaillait minutieusement lesquels parmi les prélats pouvaient y venir et elle statuait que seuls les évêques résidentiels jouissaient de ce droit. De ce fait, les autres prélats devaient passer à la chambre basse.

A partir de la seconde moitié du XVI[e] siècle, parmi les représentants de la Croatie, un membre siégeait à la chambre haute et trois se trouvaient parmi la noblesse moyenne. Cette coutume fut sanctionnée par la diète de 1625 (loi n° 61) qui ajouta encore que le prévôt de Zagreb «peculiaribus litteris regalibus evocetur ad comitia et inter dominos praelatos, barones et magnates locum et vocem habeat». Ceci fut décidé ainsi, car en 1632 les possessions abbatiales de Vrana furent réunies à la grand-prévoté de Zagreb.

Bien plus important est le fait qu'au cours des XVI[e]-XVII[e] siècles se forma l'aristocratie héréditaire; en conséquence, les détenteurs d'un titre aristocratique héréditaire siégeraient désormais à la chambre haute.

Nous lisons sur une liste, dressée à la seconde moitié du XVI[e] siècle par la chancellerie pour énumérer les dignitaires qui devaient recevoir une invitation personnelle, qu'après les porte-drapeaux et les superispans (chefs d'un comitat) venaient directement les *nobiles regni potiores castra habentes*. C'était la seule façon de désigner à cette époque les magnats qui pouvaient prétendre à une place à la chambre haute en vertu de leur fortune. L'aristocratie était donc de nature purement personnelle: elle était l'attribut d'une fonction, d'une dignité ou d'une grande richesse, comme y fait allusion l'expression

castra habentes; le caractère héréditaire en est encore absent. La séparation de la noblesse, au point de vue juridique, fut consacrée quand les seigneurs siégeant à la chambre haute commencèrent à transmettre leurs titres d'une génération à l'autre, c'est-à-dire au moment où l'aristocratie de naissance apparut. Le fait d'être invité aux assemblées nationales par lettre personnelle du roi, ne suffisait pas pour exprimer le caractère héréditaire de l'état de dignitaire; celui-ci était acquis uniquement par l'octroi d'un titre aristocratique héréditaire. Par la généralisation de cette pratique, la participation personnelle à la législation devint un droit hérité et transmissible pour une petite partie de la noblesse.

Déjà avant 1526, nous rencontrons en Hongrie des titres familiaux héréditaires. Mais la distribution généreuse des titres de baron et de comte débuta seulement après 1526, sous les Habsbourgs. Bientôt, toutes les familles en vue — soit par leur descendance, soit par leur fortune, soit par leurs fonctions — purent s'enorgueillir d'un titre aristocratique quelconque. Le terme générique pour des désigner devint *magnates*. C'est exclusivement aux porteurs de tels titres aristocratiques, que les invitations personnelles furent adressées désormais. La remarque que nous pouvons lire dans la liste précitée à côté du nom d'un seigneur *potior*, est caractéristique: «sub hac dieta per maiestatem regiam ascitus in numerum Magnatum»; un membre de l'aristocratie, grand propriétaire, (*castrum habens*) a reçu une invitation personnelle à l'assemblée, mais le titre de baron lui est accordé uniquement à l'occasion de la diète.

Avec l'apparition de l'aristocratie héréditaire, l'union de la noblesse si fortement soulignée par le *Tripartitum* (œuvre théorique capitale du juriste Werböczy, au XVI[e] siècle) se disloqua au point de vue du droit public. L'égalité au point de vue du droit privé se maintint évidemment.

Le nombre des familles aristocratiques n'était pas encore très élevé vers la fin du XVII[e] siècle: une cinquantaine sur le territoire de la Hongrie royale (non occupé par les Turcs). A la fin du règne de Marie-Thérèse (1780), les sources nous renseignent déjà l'existence de 84 familles de comtes et de 69 familles de barons. Entre 1670 et 1780, nous avons connaissance de plus de 160 octrois de titres aristocratiques.

A une époque où les règles de préséance jouaient un grand rôle, l'ordre des sièges était important. Les prélats avaient leurs places clairement indiquées, grâce à la hiérarchie ecclésiastique et à la date

des nominations. Parmi les dignitaires laïcs, des discussions s'élevaient si fréquemment, que l'assemblée de 1687 voulut y mettre fin, en réglant définitivement la question (art. 10). Autour d'une longue table durent prendre place désormais: à la droite du président, les prélats et, à gauche, les barons du pays, d'après leur rang et âge, puis le comte de Pozsony, les gardiens de la couronne, les super-ispans, ainsi que le délégué de la Croatie, et enfin les magnats de naissance qui, occupant une place surélevée, formaient une double rangée, tout autour de la table.

Le droit de l'aristocratie de recevoir une lettre d'invitation personnelle entraîna le devoir de se rendre aux assemblées. Déjà une loi de 1498 fulminait une peine assez lourde contre les absents. Si un empêchement légal les retenait — la loi n° 53 de 1662 parle de *legitime impediti* — il leur était loisible d'envoyer des remplaçants (*absentium legati*), qui les représentaient validement. La loi n° 1 de 1608 le déclare expressément: «Absentium vero nunciis inter regnicolas locus et dignitas ac vota ipsorum (more antiquitus consueto) post comitatuum nuncios et capitula eisdem tribuantur», c'est-à-dire que les délégués des absents reçurent leur place dans la chambre basse et purent y voter. Plus tard, leur droit de vote disparut — nous ne savons pas quand ni dans quelles circonstances — et seuls leurs droits de siège et de participation aux députations subsistèrent.

Nos souvenirs des assemblées d'avant 1526 sont peu nombreux et peu explicites. Toutefois la présence de remplaçants est déjà signalée. L'ambassadeur de Venise rapporta de Buda, en 1517, que Jean Zapolya avait envoyé des députés pour être remplacé. Les sources qui nous renseignent sur l'assemblée de 1532 mentionnent qu'aux côtés des seigneurs et des députés des comitats apparaissent également les «*dominorum servitores et nuncii*». Nous savons aussi que deux seigneurs se firent représenter par des députés à la diète de 1578. La loi citée parle en général des «absents», mais il est certain que non seulement les magnats avaient la faculté de se faire remplacer, mais que leurs veuves et leurs orphelins pouvaient aussi envoyer des députés. Ainsi, en 1560, six veuves d'aristocrates reçurent une invitation personnelle et, en 1582, huit.

La loi n° 62 de 1625 insistait pour que les députés des magnats fussent des nobles possédants, tout comme les députés des comitats. Nous en tirons la conclusion que les aristocrates absents devaient envoyer souvent des nobles sans fortune qui ne possédaient que leurs armoiries ou tout au plus une seule parcelle de terre. Il semble que

des considérations matérielles devaient déterminer cette politique, car des envoyés plus modestes coûtaient moins cher. On dirait que la pratique ne disparut point, car la diète de 1723 réitère les dispositions précédentes. Nous pensons que le motif du procédé des magnats était d'ordre matériel, puisque nous savons fort bien qu'au XVII[e] siècle, il était de coutume de s'unir — il s'agit parfois de cinq, six ou même sept seigneurs — pour envoyer en commun un seul député. C'est compréhensible: l'octroi des titres aristocratiques était rarement accompagné de donations, et de grandes familles s'appauvrirent. En vue de remédier à cet état de choses, la loi n° 51 de 1681 stipula qu'un député ne pourrait plus désormais représenter plus de deux magnats plus modestes ou de veuves d'aristocrates.

Terminons notre examen par un bref coup d'œil sur les prérogatives de la chambre haute.

Les deux chambres de l'assemblée furent considérées comme une seule institution. Dès le milieu du XVIII[e] siècle, il fut souligné qu'elles formaient ensemble le corps unique de la diète. Mais le droit d'initiative appartint pratiquement tout entier à la chambre basse. La chambre haute discutait les propositions des députés, les adoptait ou les rejetait. Parfois les deux chambres se réunissaient en assemblée commune (*sessio mixta*). Les articles de loi composés par la chambre basse étaient examinés par le roi avec les magnats et ensuite corroborés. Nous lisons dans un texte de 1518: «iuxta contenta articulorum ... per universitatem electorum nobilium ... formatorum ac tandem per regiam maiestatem de consensu *prelatorum et baronum* confirmatorum acceptorumque ...»

Si la diète devait élire un roi, la préparation des propositions incombait évidemment aux grands seigneurs, car l'assemblée de la noblesse moyenne nombreuse n'aurait pas pu venir à bout de cette tâche. Les magnats discutaient d'abord entre eux et portaient ensuite leur proposition à la connaissance du *regnum*.

J. HOLUB.

XX

Le Rôle du Storting norvégien dans l'Indépendance de la Norvège en 1905,

PAR

GABRIEL LEPOINTE,
Faculté de Droit de Paris.

Le choix de ce sujet pourrait surprendre en raison de l'époque considérée qui est celle de l'histoire contemporaine. Il est utile au contraire de montrer que même en des temps presque actuels les assemblées représentatives d'un pays gardent un rôle capital et parfois décisif dans ses destinées.

Le lieu de la session de 1960, dans la capitale de la Suède, ne doit pas étonner davantage, au contraire encore, pour la présentation de ce sujet: l'examen, après plus d'un demi-siècle et après deux générations qui ont connu des bouleversements politiques et sociaux à peu d'autres pareils, d'une révolution nationale qui s'est faite le plus pacifiquement du monde, mérite au contraire d'être souligné; le comportement du *Storting* et celui de gouvernement et du *Ricksdag* suédois constituent des modèles et des tests d'une civilisation exemplaire dont les protagonistes peuvent être justement fiers en 1960; ils manifestent en effet un état de haute noblesse civique et internationale à la gloire des principes fondamentaux de notre culture.

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Après avoir rappelé brièvement l'historique constitutionnel et la situation de la Norvège en 1905, nous verrons les points essentiels de l'action du *Storting* qui furent décisifs pour la transformation du Statut national du pays.

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I. — Après avoir fait partie du royaume de Danemark de 1376 à 1814, la Norvège était alors un Etat libre, indépendant, indivisible et inaliénable mais uni à la Suède sous un seul roi en 1814; cette situation devait durer près d'un siècle jusqu'en 1905. Depuis lors, royaume absolument maître de ses destinées, le régime constitutionnel demeure une monarchie héréditaire et limitée dont l'essentiel reste fondé sur la constitution du 4 novembre 1814.

Cette constitution était alors très en avance sur les autres cons-

titutions européennes. Elle possédait un caractère très démocratique provenant des circonstances de sa naissance, issue en effet d'un mouvement national que la royauté danoise avait encouragé et provoqué pour disputer le pays à la Suède sa rivale. En effet, lors de l'élaboration des traités de liquidation du régime napoléonien, le Danemark, allié de Napoléon, avait été privé de la Norvège qu'avait obtenue la Suède, les Alliés compensant ainsi la perte de la Finlande pour Gustave IV. Le 14 janvier 1814 Frédéric IV de Danemark signait le traité de Kiel dont l'article 4 stipulait sa renonciation à la Norvège qui devait former avec la Suède un Royaume-Uni. Mais le prince Christian Frédéric qui gouvernait au nom du roi de Danemark refusa d'accepter le texte; il se proclama régent, fit appel à l'insurrection et invoqua la souveraineté populaire afin de décider les Norvégiens à repousser la domination suédoise. Il convoqua à Eidsvold une véritable assemblée nationale composée de 113 députés recrutés dans toutes les classes du peuple norvégien. Le 16 avril 1814 cette diète adoptait un régime politique qui s'inspirait des traditions parlementaires anglaises et de nos principes de 1791; la souveraineté du peuple représenté par le *Storting* en assemblée nationale constituait un gouvernement assez républicain sous une étiquette monarchique; Christian Frédéric proclamé roi de Norvège jurait fidélité à cette loi fondamentale.

Mais il ne put défendre sa couronne contre Bernadotte; cependant ce dernier dut s'engager par la Convention de Moss du 14 août 1814 à accepter les principes de la Constitution d'Eidsvold. Le 30 octobre 1814 le *Storting* norvégien déclarait provisoirement que «la Norvège serait à l'avenir comme un État indépendant, réunie à la Suède sous un seul et même roi, mais en conservant sa constitution à laquelle cependant on apporterait les changements rendus nécessaires dans l'intérêt du royaume et à l'occasion de son union avec la Suède». La loi fondamentale, légèrement remaniée, fut définitivement votée le 4 novembre suivant (1814) et le même jour le *Storting* procédait à l'élection de Charles XIII de Suède comme roi de Norvège et de Charles Jean Bernadotte pour prince royal.

D'après l'acte d'Union — *Ricksakt* — établi d'un commun accord le 6 avril 1815 entre délégués du *Ricksdag* de Suède et du *Storting* norvégien, les deux royaumes devaient former sous l'administration d'un souverain unique des États totalement séparés; chaque pays avait son gouvernement indépendant et presque complet; la Norvège n'avait pas de ministre des affaires étrangères et les légations comme

les Consulats devaient être communs relevant du ministre suédois, le drapeau national devait comporter aussi le signe de l'Union (1).

En fait, l'interprétation du régime de ce Royaume-Uni fut différente par chacun des deux pays et la rupture de 1905 survint après des périodes de tension suivies de détente. Avant de voir comment la scission se produisit et le rôle capital qu'y joua le *Storting*, il faut encore rappeler quelques modalités de cette constitution et notamment du fonctionnement de l'assemblée. Le *Storting* était élu pour trois ans assez démocratiquement, pour un tiers par les citadins pourvus du droit de bourgeoisie, les deux autres tiers provenaient d'une importante fraction de la paysannerie des campagnes. Le ministère devait jouir de la confiance et être investi par la majorité; trois ministres résidaient à Stockholm et devaient pouvoir faire entendre au roi la voix du pays. Les députés se réunissaient pour élire le quart de leurs membres qui formaient une chambre, *le Lagting*, les trois autres formaient l'*Odelsting*, les deux fractions se réunissaient en cas de conflit entre elles. Lorsqu'un texte avait été régulièrement voté, la sanction royale devait intervenir pour l'application. Cette sanction était forcée et obligatoire si le même texte avait été voté régulièrement par trois Stortings successifs et elle s'imposait également en cas de vote à la majorité des deux tiers des membres d'un *Storting* (2).

D'après ce qui précède il apparait bien que le *Storting* est l'organe capital de la Constitution politique, il allait jouer en effet le rôle prépondérant dans la transformation du Statut en 1905.

Le conflit entre les deux membres du Royaume-Uni était latent depuis longtemps, on vient de le noter: en 1895 une commission mixte comprenant des représentants des deux pays était formée pour délibérer sur les questions touchant à l'Union (3). Dans ce même

(1) Le présent article provient d'une communication présentée à la Session de Stockholm, le 19 août 1960 pour l'histoire des Assemblées d'États, session tenue à l'occasion du XI[e] Congrès International de Sciences historiques.

(2) Cf. ci-dessous, p. 352, n. 6 les termes mêmes d'un rapport de notre légation de Suède d'octobre 1896 qui soulignent cette place éminente du *Storting*.

(3) Note de février 1896 de notre Consul général au ministre français des affaires étrangères, alors M. Berthelot (ARCH. DES AFF. ETRANGÈRES, Suède, *Question de Norvège*, I). Plusieurs réunions avaient eu lieu à Stockholm, d'autres devaient avoir lieu en Nervège après la clôture de la session du Storting; ce dernier en majorité de gauche était décidé à ne pas soulever de questions irritantes tant que cette Commission siègerait; un vote relatif à la suppression du signe sur

temps ce *Storting* à majorité de gauche avait voté dans sa chambre de l'*Odelsting* un projet acheminant le suffrage vers le caractère universel (44 contre 41) ([4]). Le *Storting* allait être renouvelé l'année suivante (1897) ; on s'attendait à un renforcement de la gauche. Mais dans ce même temps un rapport de nos agents diplomatiques du 1[er] octobre notait les progrès frappants de l'idée d'indépendance en Norvège qui gagnaient la droite laquelle s'appropriait une partie du programme de ses rivaux afin de regagner de l'influence; or cette situation tendait à une unanimité du sentiment national. On faisait valoir ([5]) que si une majorité des deux tiers était dégagée au *Storting*, la constitution norvégienne pourrait être révisée sans l'assentiment royal ([6]). Nos agents insistaient ([7]) sur ce que «psychologiquement il importe que le roi demeure impartial entre les deux pays», or l'opinion publique norvégienne reprochait au roi Oscar II d'être trop exclusivement suédois; les Norvégiens réclamaient des Consulats à eux et après une période de tension le *Storting* avait accepté la négociation, en Comité mixte, de nouveaux accords sur l'Union.

Finalement au renouvellement de 1897 la gauche avec 79 sièges

le drapeau était sans conséquence, le roi ne le sanctionnerait pas et constitutionnellement il fallait attendre un vote identique du Storting suivant; le Storting avait repoussé d'autre part le relèvement de la liste civile à deux voix de majorité.

([4]) La gauche aurait voulu davantage et notamment l'extension du droit aux femmes pour le vote communal et la droite espérait au contraire un refus de sanction royale; or ce vote du 6 juin 1896 était sanctionné par le Roi le 31 juillet en même temps que la session était close (mêmes références d'archives).

([5]) *Op. cit.*, 1[er] octobre, n° 49, légation de Suède,

([6]) Cf. les observations ci-dessus, relatives à quelques principes de cette constitution norvégienne: la sanction royale, avons nous noté, s'imposait en cas de telle majorité. Le rapport précité ajoutait qu'en fait la Norvège n'avait jamais accepté d'avoir été une compensation à la perte de la Finlande pour la Suède et qu'elle avait toujours revendiqué son autonomie bien qu'elle en ait joui en effet «car elle a l'entière disposition de son administration, de ses finances, armée, marine et a tous les rouages sauf les affaires étrangères. Ses libertés politiques sont garanties par une constitution libérale ainsi que par une longue politique du régime parlementaire: le roi n'a qu'un veto suspensif sur les résolutions du *Storting* qui sont obligatoires par le vote conforme de trois législatures successives» (cf. ci-dessus) ; il n'a pas le droit de dissolution, et l'appel au pays n'est exercé que tous les trois ans pour le renouvellement normal du *Storting*. Même pour les Affaires Etrangères qui sont gérées par le roi en commun pour les deux pays, les traités négociés et passés par lui sont soumis à la sanction parlementaire quand ils peuvent engager les finances norvégiennes, les autres pouvant demeurer secrets.

([7]) *Hoc loco.*

en emportait plus des deux tiers ([8]). Comme prévu par nos informateurs, une grosse majorité établissait le suffrage universel pour les élections législatives de l'avenir, par 78 voix contre 36 ([9]). Quant à la question du drapeau, c'est-à-dire la demande de suppression du signe de l'Union sur les couleurs norvégiennes, elle était résolue par un vote *quasi unanime* (moins une voix à l'*Odelsting*, unanime au *Lagsting*) sans intervention du ministère et même sans discussion à la seconde chambre ([10]). Or c'était la troisième fois que ces deux chambres s'étaient prononcées, ce signe devait donc disparaître, après quelques formalités et délai de procédure dont on discutait ([11]).

Le *Storting* poursuivait ses sessions dans le calme, on attendait les élections suivantes qui, pour la première fois, devaient avoir lieu à la même date pour toutes les circonscriptions et au suffrage universel. Aux élections la gauche emportait 77 sièges contre 37 à la droite ou aux modérés au lieu de 79 et 35 à la précédente assemblée, mais, fait plus notable que ce léger amoindrissement de la majorité,

([8]) Cf. rapport du 13 novembre, n° 6, du Consulat de Christiania et rapport du 22 novembre: la droite n'avait que 35 membres sur un total de 114. Au précédent Storting les chiffres étaient respectivement de 59 et 55 pour un même total.

([9]) Note du 23 avril 1898, après rejet d'amendements dont l'un qui proposait le suffrage féminin; le 15 juin suivant le Storting votait des crédits de 16 millions de couronnes pour la guerre et la marine.

Quant aux conditions de ce suffrage universel, elles étaient les suivantes: avait droit de vote tout sujet majeur de 25 ans et après résidence de 5 années; le droit était suspendu en cas de poursuite pour crime, délit ou en cas de Conseil judiciaire ainsi que d'entretien par l'assistance publique.

([10]) Notes de nos agents des 12 en 20 novembre 1898 (*loc. cit.*).

([11]) La décision devait être transmise au roi avec prière de donner la sanction officielle, mais il pouvait le faire jusqu'à la clôture de la session et il fallait encore un an pour que la résolution puisse être exécutée officiellement; on se demandait si par piété filiale le roi ne refuserait pas cette sanction, laissant la loi s'appliquer automatiquement sans son intervention, selon l'art. 79 de la loi fondamentale norvégienne qui en disposait ainsi. De toute façon, écrivait notre représentant, dans les dix-huit mois ce signe doit disparaître des bâtiments de commerce, postes et douanes sinon sur les bâtiments de guerre et pour l'armée; finalement là encore la lassitude devant le fait accompli pour les Suédois n'aboutit qu'à un changement de ministère (de Lagerheim à la place de Douglas); le ministère commence à se préoccuper de la question des consulats séparés, mais dès la rentrée du Storting le 18 octobre 1899 suivant est signalée la création d'une Section au ministère de l'intérieur norvégien pour les affaires extérieures, la navigation et le commerce, sorte d'intermédiaire norvégien près du ministère commun des affaires extérieures (*loc. cit.*).

la capitale faisait échec à la gauche et la droite qui avait eu aussi un programme national, on l'a déjà dit, se montrait optimiste à juste titre. Un Comité quadripartite sur les affaires de l'Union reprenait activité en 1902 et semblait devoir aboutir aux dires des diplomates étrangers; le projet élaboré recevait un bon accueil en Norvège qui paraissait recevoir une large satisfaction dans l'affaire des consulats ([12]). Cependant la gauche invitait la droite à s'associer à une déclaration commune sur la nécessité de consulats séparés, mais, inquiète de la violence de certains qui semblaient vouloir brusquer les choses, la droite demandait des garanties. Pourtant un ordre du jour déposé par un des chefs de la gauche, Berner, obtenait 81 voix contre 32; il proclamait cette nécessité de consulats séparés mais le comité mixte suspendait ses travaux (janvier 1903) ([13]), car les Suédois demandaient des explications sur le sens précis de cette manifestation. Une éclaircie apparaissait tout de même, car les travaux du comité avaient paru donner satisfaction aux Norvégiens; l'un des membres du Comité, Ibsen, fils de l'écrivain, avait joué un rôle important dans l'affaire; mais malheureusement la Suède repoussait ce projet: le 15 mai la Seconde Chambre rejetait l'accord sans même discuter le texte ([14]), Ibsen quittait le ministère dont il faisait partie.

C'est alors qu'en septembre 1903, les élections au nouveau *Storting* renversaient les tendances de la majorité, à la suite d'une lutte assez vive: 64 à droite, 5 socialistes et 48 radicaux-libéraux à gauche sur 117 membres désormais. Ce revirement à droite dépassait les pronostics; il apparaissait à notre légation à Stockholm comme une protestation contre la politique financière de la gauche, hasardeuse, mais plus encore contre la politique aventureuse menée ainsi que comme une réaction contre l'intransigeance de cette gauche à l'égard de l'Union scandinave; le ministère précédent avait pressenti ce mouvement mais il s'était séparé trop tard de ses éléments intransigeants. Le chef de la droite Hagerupt avait mené la lutte avec talent, aidé du littérateur Bjoenestjorn Björnson dont la rentrée en scène, comme vieux champion du libéralisme, était caractéristique: tous deux apparaissaient comme des défenseurs de l'Union et partisans de solutions pacifiques; d'autre part l'évolution importante de l'opinion

([12]) Une crise ministérielle en Norvège semblait n'avoir que des causes personnelles, changer une direction trop âgée, avril 1902 (*loc. cit.*).

([13]) ARCH. AFF. ETRANG. SUÈDE, *Question de Norvège, loc. cit.*, I, p. 238.

([14]) *Hoc. loco*, p. 263 et suiv. Postscriptum à une Note de Stockholm du 12 mai, en date de ce 15 mai.

publique aboutissait à la possibilité d'une grande concentration politique ([15]). La sagesse politique laissait de grands espoirs également dans la formation même du ministère où la gauche alliée avait une large place — la moitié — Hagerupt et Ibsen — ce dernier ministre à Stockholm — étaient à la tête de la formation ([16]). La Suède réservait un accueil favorable à la nouvelle situation politique et le nouveau *Storting* ouvrait sa session le 12 octobre.

La fin de l'année 1904 devait au contraire marquer un changement de climat et, au contraire des prévisions, une nouvelle tension se produisait à propos de l'affaire des Consulats. Le ministère suèdois de Lagerheim, attaqué pour son attitude conciliante, devait démissionner; après le rejet de contrepropositions suédoises l'opinion suédoise, en revirement aussi, devenait agressive ([17]) : ce qui est grave, écrivait notre représentation en Scandinavie, c'est l'accord entre les différents partis, libéraux, modérés, conservateurs en Norvège: la revendication de l'indépendance complète se fait sans retour en arrière et en accord à peu près unanime. L'impression de nos agents au début de 1905 est donc réservée, voire inquiète: le *Storting* uni comme d'ailleurs le *Ricksdag* suédois, les choses peuvent prendre une tournure sérieuse. L'unanimité nationale norvégienne frappe, l'honneur et l'intérêt de la Nation paraissent engagés, le ton de tous les journaux est ferme et il y a une irritation sous la modération voulue de la forme. Nos agents diplomatiques observent que le ministère paraît devoir subir un échec à la suite de cette crise, mais pour la résoudre un seul nom est prononcé, celui de Michelsen, actuel ministre des finances, auteur d'un emprunt récent dont les fonds relevés *in extremis* de dix millions de couronnes ont été constitués comme un fonds de réserve pour le trésor sans désignation d'emploi ([18]). Le 9 février une déclaration était faite par le ministre

([15]) ARCH. AFFAIRES ETRANGÈRES, *loc. cit.*, I, p. 270 et suiv.

([16]) Les rapports de nos agents qualifient Hagerupt d'homme d'Etat aux idées larges; Hagerupt avait 50 ans, Ibsen 44; le programme était de droite mais libéral et d'allure nationale. Il prônait le règlement de l'affaire des Consulats par voie de négociations, une stricte économie des finances, des associations ouvrières et la protection du travail mais la lutte contre le socialisme dans la gestion des fonds de l'Etat et des Communes.

([17]) Note du 26 décembre, *boc. loco*, I, p. 296.

([18]) Un extrait en anglais du *Journal de Christiania* du 28 janvier, de 10 pages sur 2 colonnes est joint au rapport diplomatique, rappelant l'historique de la situation politique.

Hagerupt, écoutée par le *Storting* dans le plus profond silence qui levait sa séance aussitôt ([19]).

Ainsi se trouvait réalisé un sentiment d'unité nationale certain; le *Storting* se trouvait donc admirablement placé pour agir vigoureusement, sans inquiétude d'une opposition ([20]). Certes cette unanimité facilitait l'action, mais des questions épineuses allaient surgir et le *Storting* eut une attitude ferme et intelligente, décisive, c'est ce qu'il faut voir à présent.

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II. — La crise se poursuivit comme il était prévu: la démission d'Hagerupt suivit celle d'Ibsen, qui était un des membres de la Commission mixte. Pour résoudre la cause de la crise, la voie légale, longue, était celle du vote d'une nouvelle législation sur les consulats, par trois législatures successives, c'était la solution du ministère démissionnaire. Une seconde était un vote unique à la majorité voulue par le *Storting*, ce qui entraînait l'application immédiate. Une troisième solution était écartée par avance, celle de la violence.

Le nouveau ministère fut formé par Michelsen, qui prit la justice ([21]). La tension subsistait toujours en avril ([22]) et le 24 mai notre chargé d'affaires observait que l'affaire à l'origine du conflit, celle des Consulats, était revenue au premier plan: le projet de loi sur ce corps séparé norvégien avait été approuvé à l'unanimité par la 2° Chambre du *Storting* malgré un discours sage du président Premier-Ministre et, la veille même, la première chambre, ratifiait le

([19]) Archives des Affaires Etrangères, Suède, *Question de Norvège*, II, f° 11; Communication de notre Consul du 10 février dont les impressions étaient prudentes; rarement des paroles aussi mesurées mais fermes et d'une telle portée avaient été prononcées, rarement un gouvernement n'avait paru aussi d'accord avec la représentation nationale et le pays entier; la presse et l'opinion approuvaient sans réserve.

([20]) Une enquête menée par un journal de droite donnait en effet des résultats nets: si l'affaire des Consulats n'aboutissait pas, c'était la rupture certaine de l'Union, le roi ne trouverait pas un seul ministre pour une autre politique. (*Hoc. loco*, II, f° 20 et suiv.).

([21]) Dépêche de Christiania du 14 mars 1905 (Aff. Etr. Suède, *Question de Norvège*, vol. II, f° 38).

([22]) *Hoc. loco*, f° 47.

vote à l'unanimité également (23). Quelle allait-être la décision royale ? Le 27 mai un télégramme de notre Consulat à Christiania annonçait que le roi avait refusé sa sanction et que le ministère était démissionnaire (24). Ce refus s'appuyait sur ce fait qu'il s'agissait d'une question dont la modification ne pourrait être unilatérale mais devait provenir d'un accord entre les deux membres.

Le roi refusait d'autre part la démission du ministère, ce qui créait une complication constitutionnelle, mais politiquement la situation était simple, elle était aux mains du *Storting*.

Fort de l'appui unanime de l'opinion, le *Storting* prenait le 7 juin les décisions capitales. Il déclarait l'Union rompue et prenait le gouvernement en mains: Il chargeait les ministres actuels d'exercer provisoirement le pouvoir qui appartenait au roi constitutionnellement; il votait en second lieu une Adresse au roi Oscar, enfin il publiait une proclamation au peuple, lui expliquant la situation et lui demandant de se conformer aux ordonnances et prescriptions du gouvernement national, gardant son calme et sa tranquillité et prêt aux sacrifices exigés par les circonstances (25).

a) La première décision était ainsi conçue:

«Vu que tous les membres du ministère se sont démis de leurs fonctions,

Vu que Sa Majesté s'est déclarée hors d'état de procurer un nouveau gouvernement au pays (26),

Vu que le pouvoir royal constitutionnel a par là cessé d'exercer ses fonctions,

Le Storting charge les membres du ministère maintenant démissionnaire, d'exercer provisoirement à titre de gouvernement norvégien le pouvoir appartenant au Roi, en se conformant à la Constitu-

(23) *Hoc. loco*, f° 65.

(24) *Hoc. loco*, f° 70.

(25) Cf. ces textes au volume cité des AFF. ETRANG., II, f° 98 et suiv.

(26) La démission du ministère aux mains du roi Oscar s'appuyait sur ce fait qu'aucun ministre ne pouvait contresigner la décision de S.M. refusant la sanction au vote du *Storting*; le Roi ripostait que c'est à cause de cette évidence même qu'il ne pouvait constituer aucun gouvernement norvégien et qu'il refusait la démission du gouvernement en fonctions: c'est le 29 mai que le roi avait écrit sa lettre, en priant le ministère de publier son texte refusant la sanction royale, c'était l'impasse au point de vue constitutionnel. Le texte cité était transmis par notre représentation.

tion du royaume de Norvège et aux lois en vigueur, avec les modifications nécessitées par la dissolution de l'Union avec la Suède sous un même Roi par suite du fait que le Roi a cessé d'exercer ses fonctions de Roi Norvégien».

b) L'Adresse votée par le *Storting* unanime au roi mérite aussi d'être publiée ici au moins partiellement:

«Sire

«Tous les membres du ministère s'étant aujourd'hui, au Storting, démis de leurs fonctions, et Votre Majesté ayant déclaré officiellement au procès verbal du 27 mai que Votre Majesté ne se voit pas en état de procurer un autre gouvernement au pays, le pouvoir royal constitutionnel a par là cessé d'exercer ses fonctions en Norvège.

Aussi le devoir du Storting, comme représentant du peuple norvégien, a-t-il été de charger, sans retard, les membres du ministère démissionnaire d'exercer provisoirement à titre du gouvernement norvégien le pouvoir conféré au Roi en se conformant à la constitution légitime de Norvège et aux lois en vigueur avec les modifications nécessitées par ce fait que l'Union avec la Suède — supposant un Roi commun aux deux pays — est dissoute comme conséquence que le Roi a cessé d'exercer ses fonctions de Roi norvégien.

... Comme un témoignage que l'œuvre et la lutte du peuple norvégien pour «l'indépendance absolue» de la patrie n'ont pas été fondées sur l'aversion contre la maison royale ou contre le peuple suédois et n'ont pas laissé la moindre amertume contre eux, le Storting sollicite respectivement le concours de Votre Majesté pour qu'un prince de la maison de Votre Majesté soit autorisé à accepter l'élection comme Roi de Norvège, avec renonciation de ses droits de succession au trône de Suède».

c) La Proclamation au peuple norvégien disait «Avec l'adhésion du peuple tout entier, le Storting a voté à l'unanimité la loi relative à la création d'un service consulaire séparé».

Le gouvernement norvégien a unanimement et expressément engagé le roi à sanctionner cette loi. Après avoir rappelé le refus par le roi alors que la délégation norvégienne à Stockholm avait prié le roi de remettre la décision après un Conseil tenu à Christiania en une assemblée complété du gouvernement norvégien, sur le refus du souverain cette délégation avait présenté la démission collective du gouvernement que le roi avait refusée également. «Notre pays

était par là placé dans une situation constitutionnelle insoutenable; les membres du gouvernement ne pouvaient être forcés, contre leur conviction, à rester conseillers responsables d'un roi qui ne voulait pas suivre leur conseil». Le roi ayant déclaré ne pouvoir procurer au pays un nouveau gouvernement, les ministres se sont retirés de leur fonction en faisant communication au *Storting*. «Par ce fait le roi constitutionnel s'est mis hors de fonctions, le roi devait d'après la loi fondamentale, avoir un conseil responsable et par ce fait l'Union avec la Suède qui prévoit un roi commun se trouve dissoute...» Le *Storting* explique les mesures prises par lui en conséquence et conclut en réclamant avec le calme, l'union de tous avec lui et l'obéissance de tous et en particulier des fonctionnaires et employés publics.

Ainsi le *Storting* avait pris les mesures décisives de rupture de l'Union et d'organisation d'un gouvernement provisoire dans le cadre de la Constitution de 1814. Les mesures d'organisation du nouveau régime définitif devaient également émaner de ce Storting, représentation de l'unanimité nationale. Certes le roi Oscar ne reconnut pas spontanément ces dispositions et ne se prêta pas tout de suite ni aisément à la combinaison envisagée ([27]). Le roi Oscar répondit par une longue lettre ouverte, plaidoyer en faveur des droits que la Norvège venait de contester au souverain ([28]). Cette lettre adressée au président du Storting soulignait elle aussi la place éminente du Storting dans la direction des affaires de politique norvégienne.

La suite des événements souligna encore cette place prépondérante. Pour nous en tenir à l'essentiel de notre propos nous laisserons complètement de côté tout ce qui a trait aux mouvements, bruits et rumeurs, actions et réactions des diverses capitales de l'Europe, intéressées à ce qui se passait ([29]).

([27]) La Légation de Suède à Paris fit connaître que le roi ne reconnaissait pas le gouvernement provisoire institué illégalement en Norvège par le Storting; de leur côté les instructions à nos agents consulaires prescrivaient aussi d'ignorer ce qui avait été fait; leur action devait se borner à la protection des ressortissants français et à renseigner le gouvernement français sur l'attitude de leurs collègues (*Hoc. loco*, II, f° 119).

([28]) II, f° 139, de Stockholm le 12 juin.

([29]) Simplement pour ce qui a trait au Danemark, si directement intéressé comme l'avenir allait le démontrer, il y aurait fort à dire; les sphères officielles de Copenhague se tenaient d'ailleurs dans une réserve prudente; on trouverait de nombreux renseignements dans les volumes déjà cités des ARCHIVES DES AFF. ETRANGÈRES.

Le *Ricksdag* suédois avait posé, quant à lui, quelques conditions à la reconnaissance *de jure* de la scission; il réclamait de nouvelles élections en Norvège et, d'autre part, à titre de précaution militaire, la destruction des fortifications norvégiennes en bordure de la frontière suédoise, question brûlante pour l'amour-propre et aussi la sécurité des Norvégiens. Il y avait aussi la grosse question de la Couronne royale, ou plus généralement de la détermination du régime politique et cela causait quelques préoccupations non seulement dans les deux pays directement intéressés mais aussi dans les autres pays européens.

Très vite il apparut que la candidature d'un Bernadotte devrait être écartée, le roi Oscar ne pouvait s'y prêter, mais les Norvégiens tiendraient-ils leur nouveau souverain de leur volonté propre et de celle de l'ancien souverain ou bien d'un vote où le *Ricksdag* aurait concouru ? La Norvège admettait difficilement cette seconde éventualité, mais les Suédois objectaient que le roi Oscar n'avait pas été autorisé par l'assemblée suédoise à abdiquer du trône de Norvège et qu'ainsi un nouveau souverain ne pourrait être désigné pour un trône encore occupé légalement. Selon eux, c'est après un referendum que devait se poser la succession au trône, la discussion pourrait être longue car si les Norvégiens étaient pressés, les Suédois ne l'étaient pas ([80]).

Finalement le 28 juillet les électeurs norvégiens étaient appelés à un vote plébiscitaire sur la dissolution de l'Union, le Storting demandait ainsi la confirmation populaire sur ce qu'il avait fait ([81]). Les électeurs devraient approuver massivement la scission, par 362. 307 voix pour, contre 182 ([82]).

Le Storting se réunissait peu après ([83]) pour résoudre la question

([80]) Cf. Information de notre chargé d'affaires à Stockholm, de Blignières, du 26 juillet rapportant une interview du maréchal du Palais qui avait produit mauvais effet. Notre agent faisait état de la candidature du prince de Danemark que l'ambassadeur d'Angleterre paraissait envisager avec faveur, ce prince était en effet l'époux d'une princesse anglaise; il ajoutait que le ministre de Danemark à Stockholm se montrait très réservé et les dépêches de Copenhague marquaient toujours la même prudente réserve également (vol. III, f° 56 des ARCH. DES AFF. ETRANG., déjà citée).

([81]) Dépêche de notre agent consulaire à Christiania.

([82]) Dépêche de notre agent consulaire (III, f° 95 du 15 août). Une dépêche du 18 août de Copenhague déclarait qu'on avait dans cette ville une grande satisfaction du résultat.

([83]) Dépêche du 19 août, III, f° 112.

de la Couronne royale et corrélativement la liquidation du problème de l'Union. Effectivement, par 100 voix contre 11, le Storting adoptait une résolution par laquelle il priait le gouvernement Suédois de lui donner son concours pour parvenir à la dissolution de l'Union et à l'abolition du *Ricksackt*; le gouvernement norvégien était autorisé à se mettre en rapport avec le gouvernement suédois pour négocier la séparation et le président du conseil norvégien télégraphiait cette décision à son collègue suédois (84).

Le 31 août des délégués des deux pays, au nombre de quatre pour chacun, se réunissaient à Karlstadt pour la négociation du compromis; il s'agissait du côté norvégien des deux ministres Michelsen et Lawland, de Berner, président du Storting et d'un jurisconsulte Wigt; du côté suédois figuraient le président du conseil Landberg et le ministre des affaires étrangères comte Wachtmeister, du ministre des cultes Hammarskjöld (85) et de Stouff, ministre sans portefeuille. Les délibérations avaient lieu en secret comme il se doit.

Le 23 septembre on annonçait la fin des négociations, après accord complet sur tous les points et les délégués rentraient dans leur capitale respective. Le 10 octobre le Storting ratifiait la convention élaborée par 101 voix contre 16. L'assemblée avait repoussé le referendum ou l'arbitrage sur la question, se considérant comme l'interprète de l'opinion publique fidèle au programme du gouvernement, bien que l'idée eût été mise en discussion par des socialistes et aussi des nationalistes (86).

La question du souverain se posait alors et elle devait être résolue en faveur du prince Charles de Danemark comme il apparaissait depuis longtemps aux gens bien informés (87). Le gouvernement norvégien déférait en effet au Storting réuni en séance secrète un projet d'offre de la couronne à ce prince avec la condition réclamée par lui que cette élection serait soumise au plébiscite. Le roi Oscar renonçait à la couronne de Norvège pour lui et sa maison (88) et

(84) Dépêche de Stockholm du 22 août (f° 117); le ministre des affaires étrangères en communiquant cette décision à notre agent ne lui cachait pas sa satisfaction de la façon conciliante dont la Norvège «accepte les conditions posées par la Suède». Les gouvernements marquaient la même satisfaction (cf. f° 120) mais des faux bruits se glissaient fatalement, nos agents en font état.

(85) Il s'agit du père du secrétaire général actuel de l'O.N.U. qui devait être président du Conseil durant la première guerre mondiale.

(86) Cf. f° 29 et suiv., vol. IV, AFF. ETR., *op. cit.*

(87) Les diverses informations adressées à notre gouvernement en faisaient état.

(88) Télégramme du 26 octobre.

S.M. chargeait le Ministre des affaires étrangères de notifier aux puissances qu'elle reconnaissait la Norvège comme État entièrement séparé de la Suède; le 27 octobre un message du roi de Suède au président du Storting annonçait cette renonciation et formait des souhaits pour le pays ([39]). La voie légale était ouverte; le 9 novembre, par 87 voix contre 29 le Storting adoptait la proposition gouvernementale d'offrir la couronne à Charles de Danemark après un plébiscite; c'était, disait-on, l'activité du parti républicain qui avait obligé le ministre Michelsen à se rallier au plébiscite; le peuple en tout cas devait approuver encore à une très grosse majorité: 259.563 oui contre 69.264 non ([40]).

En conséquence, le 18 novembre ([41]) le *Storting* élisait à l'unanimité roi de Norvège le prince Charles qui prenait le nom de Haakon de Norvège; une délégation de 9 membres devait se rendre à Copenhague pour en aviser officiellement le souverain, dont l'entrée à Christiania était prévue pour le 25.

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Arrêtons-nous à présent. De ce qui vient d'être retracé le plus brièvement possible découle clairement que le Storting, assemblée représentative de la Norvège, avait en réalité tout fait; certes l'appui du peuple dans sa quasi totalité était acquis, les élections libres qui donnèrent les chiffres que l'on vient de rappeler le montrent à l'évidence. Mais il est bon de marquer ce jeu régulier se déroulant dans le calme et la dignité, sans violence, pour opérer une Révolution nationale donnant les derniers éléments de l'indépendance et de la souveraineté nationale.

C'est une belle leçon de sagesse politique que nous donnent ces peuples scandinaves.

Certes il y eut dans les chancelleries et les ministères de l'Europe quelques moments d'inquiétude, quelques craintes de l'inconnu; il y eut également dans les pays intéressés des mesures de précaution

([39]) F° 55, vol. IV. Plusieurs pays avaient déjà reconnu la Norvège comme Etat séparé.

([40]) Chiffres définitifs transmis par notre légation de Norvège le 24 novembre, mais les résultats approximatifs non douteux avaient déjà été donnés dès le soir du 14 novembre.

([41]) IV, f° 150.

militaire dont nos agents font état à diverses reprises dans leurs rapports. Mais nous venons de voir que le sens de la Patrie dans une prise de conscience d'unanimité nationale peut s'unir à celui de la solidarité internationale et humaine; les Norvégiens mettaient au premier rang l'amour de leur pays, mais ils n'oublièrent pas le Storting, leur représentation politique légale, n'oubliant pas non plus l'amitié et le lien des peuples frères de la Scandinavie; leur souci majeur fut la primauté de la paix: on a dit qu'entre plusieurs solutions, une seule était exclue: celle de la violence !

C'est une attitude qu'il me paraît inutile de méditer en 1960 et l'on peut conclure que lorsque deux pays comme la Suède et la Norvège ont pu mener à bien dans le calme et la dignité le dénouement d'une grave crise comme celle de la dissolution de leur Union, ils sont un honneur pour la civilisation qui les a produits; d'autre part, une telle civilisation qui les a formés a bien mérité de la gratitude humaine.

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Sources et documentation

Le présent article a été écrit sur les renseignements trouvés aux archives du Quai d'Orsay (*Norvège et Suède, Questions politiques*).

Il a aussi été puisé aux archives particulières de la famille d'Estournelles de Constant déposées aux Archives départementales de la Sarthe et je remercie à cette occasion la fille de d'Estournelles, Madame Le Guillard, de m'avoir permis de travailler sur ce fonds capital pour la connaissance de notre histoire politique, française et internationale de la fin du XIX^{e} siècle et du début du XX^{e} siècle.

On a consulté aussi la thèse de droit de Montpellier de G. Coste-Floret: *La situation internationale de la Norvège* (1929), ainsi que *La petite histoire des pays scandinaves* de F. Jeannin (*Que Sais-je,* n° 704, Presses Universitaires de France) et les volumes d'histoire du XIX^{e} siècle de la Collection *Clio* (IX, 1 et 2) qui, comme toujours, renferment une orientation bibliographique et un état des questions très précieux.

G. LEPOINTE.

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