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Reviews

LIBERTADES Y DERECHOS DE LOS PEREGRINOS DURANTE LA EDAD MEDIA

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Universidad Rey Juan Carlos

Abstract: During the Middle Ages, a period in which pilgrimages acquired a very great importance in European society, and of course in Hispanic society, the public powers, and more specifically the king, were concerned with guaranteeing a series of rights and freedoms to the pilgrims, tending to favor their pilgrimage, as well as to avoid the abuses that on many occasions they suffered, both in their person and in their patrimony, due to their condition as foreigners, which is why they were under the protection of the king. All this, protected by canonical legislation.

Key words: Pilgrims, freedom of movement, protection of pilgrims, medieval law.

1.- Introducción

Se suele pensar que los derechos y libertades de los individuos son obra del estado Liberal decimonónico, lo que es cierto en algunos sentidos, especialmente en lo político, pues es, en este contexto, temporal y político, donde se irán reconociendo libertades y derechos que resultaban incompatibles con las monarquías absolutas del antiguo régimen.

Pero no es menos cierto que, a lo largo de la historia, los individuos, tanto en el ámbito individual como en algunos supuestos grupales, han gozado de derechos y por ende de libertades, y así lo veremos a lo largo de este congreso.

Esa es precisamente la base del derecho, la ordenación de la vida social, de tal manera que se preserven los derechos de los individuos, y que puedan gozar de libertad para poderlos ejercer en su actividad cotidiana.

Esta exposición se centra en el estudio de un grupo de la sociedad medieval, los peregrinos, que gozaron de una serie de derechos y libertades, que las instituciones y los poderes de la época se ocuparon de salvaguardar, a través de la creación de normas jurídicas, tendentes a garantizar su seguridad, así como otros aspectos propios de su condición[1].

[1] La actividad legislativa, tanto canónica como secular, referente a los peregrinos durante la España medieval y los diferentes aspectos que esta legislación regulaba, se pueden ver en GALLEGOS VÁZQUEZ, F., *Estatuto jurídico de los peregrinos en la España Medieval*, Santiago de Compostela, 2005

2.- ¿Quién es peregrino?

Debemos comenzar, aunque sea someramente, determinando cuál es el sujeto de nuestro estudio: el peregrino.

Hoy en día se tiene una visión de los peregrinos muy confusa, ya que cuando hablamos de romerías y peregrinaciones pensamos en actividades lúdicas y folclóricas, o a grupos de individuos que realizan un recorrido, en muchas ocasiones semi deportivas.

Como bien sabemos, en derecho romano el peregrino es el extranjero que se encuentra en tierras de Roma, por lo tanto, el peregrino es un individuo al que no se le aplica el derecho romano y tampoco el latino. Pero no por eso estaba exento de protección jurídica, pues el "pretor de los peregrinos" protegía sus intereses y derechos a través de sus edictos.

Con la concesión de la ciudadanía romana a todos los habitantes del imperio por el emperador Caracalla en 212, desaparecerán los peregrinos como habitantes del imperio, si bien, como señala el profesor Álvaro D´Ors, se mantendrá el significado peregrino para denominar a aquel ciudadano que se encuentre en un lugar distinto del de su residencia, lo que vendrá a equivaler a peregrino en un sentido relativo[2].

Tras la disolución del Imperio Romano de Occidente, su fragmentación política y la creación de los nuevos reinos bárbaros, los súbditos de cada uno de estos reinos se convertirán en extranjeros en todos los demás territorios distintos del suyo.

[2] D´ORS, A., "Estudios sobre la Constitutio Antoniniana III. Los peregrinos después del Edicto de Caracalla", *Anuario de Historia del Derecho Español,* XVIII, 1945, pp. 586-604.

En este sentido se expresa san Isidoro de Sevilla en sus "Etimologías", al decir que:

"Perebrinus, longe a patria positus, sicut alienígena"[3].

No obstante, esta nueva situación llevará a que no todo extranjero tenga la misma consideración, pues se distinguirá dentro de este grupo de personas en función de la causa que motive el que un individuo se encuentre fuera de su patria, por lo tanto, en un lugar extraño.

Ibn Rusteh, en su obra Al-a´-laq al-nasifa, escrita en 290 de la Égira (902 d.C.), señalaba que

Entre los extranjeros encontramos diversos tipos:

- El que está realizando una misión de naturaleza diplomática, legado, nuncio, embajador o procurador.

- El que recorre los caminos para realizar un comercio

- El que se encuentra de camino por razones religiosas, ya sea como misionero o para visitar un lugar santo[4]

Solamente estos últimos, los que se encuentran en camino para visitar un lugar santo, serán los que pasen a ser considerados peregrinos, recogiéndose así por la doctrina y la normativa eclesiástica, la literatura, de cualquier tipo, y la normativa seglar.

[3] Etimologías. X. 215, San Isidoro de Sevilla, Etimologías, Edición bilingüe por José Oroz Reta y Manuel A. Marcos Casquero, Madrid, 1994.
[4] Citado por CHALMETA, P., "El viajero musulmán", *Viajes y viajeros en la España Medieval. Actas del V Congreso de cultura medieval. Aguilar de Campóo, 20-23 de septiembre de 1993*, pp. 97-107, Madrid 1997, p. 97

Por lo tanto, podemos decir que, peregrino es, en la época medieval, quien se encuentra fuera de su casa, realizando un viaje para acudir a un lugar sagrado[5].

Esta consideración del término peregrino, aplicable sólo para el viajero religioso, es la que marcará a estas personas, así como la actuación de los poderes públicos, con una intención clara de guardar y garantizar sus derechos y libertades.

Tras la consolidación de los diferentes reinos de Europa Occidental, el rey, cabeza de la comunidad política, se convertirá en el último garante de los derechos de los miembros de ella, de su seguridad y su libertad.

Desde finales del siglo VI, con san Gregorio Magno y san Isidoro, se considera que el reino terrestre debe estar al servicio del Reino de los Cielos, y, por lo tanto, el poder civil debe ser el protector y auxiliador del poder religioso; por ello, los reyes deben asegurar no sólo los bienes terrestres de sus súbditos, sino también su salvación; poniendo todos los medios de que disponen, fundamentalmente las leyes para conseguir esto. Este pensamiento, denominado "agustinianismo político", tuvo una gran importancia en el reino franco, especialmente durante el periodo carolingio, cuando los reyes-emperadores se convirtieron en defensores de la Iglesia y de la comunidad cristiana[6].

[5] La concepción del término peregrino, sus diferentes significados, y en especial desde un punto de vista jurídico se puede ver en GALLEGOS VÁZQUEZ, F., "Los peregrinos, definición jurídica", *Compostellanum, revista de la archidiócesis de Santiago de Compostela, sección de Estudios jacobeos*, vol. IL, nums. 3-4, 2004, pp. 379-419

[6] BOUSARD, J., *La civilización Carolingia*, Traducción de Jaime Zarraluqui, Madrid, 1968, pp. 106-107

Cierto es, que las peregrinaciones, entendidas como circulación de personas que se dirigen a un lugar concreto, producen unos flujos económicos que benefician a las localidades por las que transcurren y a los lugares meta de las mismas, pero ésta no será la causa de las normas protectoras de los peregrinos, de sus derechos y sus libertades; las leyes que regulan las diferentes actividades económicas en las vías de comunicación, como ya hemos estudiado en otros trabajos[7], se plasma fundamentalmente en los fueros locales, que los reyes van concediendo a las diferentes localidades, y que articulan una serie de beneficios económicos y garantías de naturaleza económica para dichas ciudades, como son fundamentalmente, la concesión de ferias y mercados, y los privilegios económicos derivados de las peregrinaciones.

Las leyes que garantizan las libertades y derechos de los peregrinos derivan, como se percibe desde mediados del siglo VIII, de considerar al peregrino como aquel que viaja por amor a Dios, esto es, por causa religiosa.

Peregrini qui propter Dei vadunt[8].

[7] La actividad comercial de los peregrinos, los flujos económicos derivados de las peregrinaciones, la importancia del Camino de Santiago en la economía medieval de los reinos cristianos y las leyes que regulaban los derechos de naturaleza comercial de los peregrinos los hemos estudiado en GALLEGOS VÁZQUEZ, F., "Ferias y mercados en el Camino de Santiago", en *Compostellanum, revista de la archidiócesis de Santiago de Compostela, sección de Estudios jacobeos,* vol. XLVI, nums. 3-4, 2001, pp. 577-601; *Comercio, fueros y jurisdicciones locales en el Camino de Santiago Medieval,* Valladolid 2016

[8] *CONCILIUM VERNENSIS 755, jul, 11. M. G. H. Capitularia T. I,* p. 22; y *CAPITULA SYNODI VERNENSIS. EDITA A PIPPINO REGE, ET AB EPISCOPIS ANNO DCCLV. Corpus Iuris Germanici Antiqui. T.II, Capitularia Regum Francorum usque ad Ludivicum pium continens.* pp. 43 – 44

> *"Peregrini propter Deum ambulantibus per terram sive culibet itinerant propter amorem Dei et propter salute anime suae"*[9].

Y precisamente, esta naturaleza religiosa es la que influye en un tratamiento especial, que se plasma en una protección diferente y cualificada.

Diferente, por la propia consideración religiosa de los peregrinos, que conllevará a que se les trate de manera distinta que a otros viajeros que recorren los caminos y que también son protegidos, como los mercaderes.

> *"Onde los omes que con tan buena intención, e tan santa, andan por el mundo, derecho es, que mientras en esto andovieren, que ellos e sus cosas sean guardados, de manera, que ninguno non se atreva de yr contra ellos, faciendo les mal"*[10]. (Alfonso X, Partidas)

Cualificada, estableciendo una normativa que les confiere más derechos y libertades que a otros individuos foráneos, y que sanciona de forma más grave los ataques y lesiones de dichos derechos. Lo que, como ya hemos expuesto en anteriores trabajos, podemos considerar una legislación especial encuadrable en las denominadas paces especiales de esta época, "La paz de los peregrinos"[11], constituida por

[9] *CAPITULARE MISSORUM GENERALE 802, INITIO.* Norma 27. *De hospitalitate. M. G. H. Capitularia T.I,* p.96*;* y en *CAPITULARE PRIMUM ANNI DCCCII. SIVE CAPITULA DATA MISSIS DIMINICIS: ANNO SECUNDO IMPERII. C. I. G. A., T.II,* pp. 164 – 165

[10] Partidas, 1.24, "De los romeros e de los peregrinos", *Las Siete Partidas de Alfonso X. Glosadas por el licenciado Gregorio López*. Salamanca 1.555. Edición facsímil Madrid 1.985.

[11] El concepto de "Paz de los peregrinos" lo planteamos en nuestro trabajo,

legislación real y apoyada en la legislación canónica, en especial la emanada de los concilios generales, en los que se plasma la Paz de Dios, donde se encuentra a los peregrinos como sujetos protegidos por ella[12].

Una vez acotado nuestro sujeto de estudio, pasamos a ver qué derechos y libertades fueron protegidos, y qué instituciones se encargaron de legislar sobre los mismos.

3.- Derechos y libertades garantizados

En consecuencia, con el sujeto protegido, el peregrino, comprobamos que, lo que se le garantiza son aquellos derechos y libertades que tienen que ver con su actividad, su viaje a un lugar sagrado.

- **Libertad de circulación**

En primer lugar, si el peregrino es una persona que viaja por tierras extrañas, lo primero que se garantizaba era la libertad de circulación. Esta garantía se plasmó en una serie de normas que

GALLEGOS VÁZQUEZ, F., *Estatuto jurídico de los Peregrinos en la España Medieval*, Santiago de Compostela, 2005, y lo desarrollamos más ampliamente en GALLEGOS VÁZQUEZ, F., "La paz de los peregrinos", en *Compostellanum, revista de la archidiócesis de Santiago de Compostela, sección de Estudios jacobeos*, vol. LII, nums. 3-4, 2007, pp. 511-602. Sobre otros modelos de paz medieval, MARTÍNEZ PEÑAS, L., *El invierno*. Valladolid, 2019.

[12] Entre otras podemos señalar las posturas mantenidas por ORLANDIS, J., "La paz de la casa en el derecho español de la Alta Edad Media", *Anuario de Historia del Derecho Español*, XVI, 1.944. pp. 107 – 161, por GIBERT, R., "La paz del camino en el derecho medieval español", *Anuario de Historia del Derecho Español*, XXVII 1.957. pp. 831 – 852, y por GARCÍA DE VALDEAVELLANO, L., *Curso de Historia de las Instituciones Españolas*. pp. 556 – 557.

impedían el establecimiento de cualquier obstáculo a su peregrinaje, garantizando su persona, e impidiendo que alguien les pudiese causar un daño físico[13]:

> *"De peregrinos …, festinan corpora, ut salvi vadant et revertant sub nostra defensione"*[14].

> *"Quatemnus peregrini Dei et beati Iacobi per universum regnum nostrum al omnibus molestiis sint immunes nec sit hospes vel alius qui eos audeat in aliquo molestare"*[15].

Normas reforzadas con el establecimiento de unas penas importantes para quienes las conculquen, que en muchos casos son más elevadas que las establecidas para infracciones no cometidas contra individuos no especialmente protegidos, como las de la devolución del doble del daño causado, o el del "coto regio" de sesenta sueldos, en favor del fisco real, que desde época carolingia se aplicará a los delitos especialmente perseguidos[16].

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[13] Para comprender mejor esta libertad de circulación ver, GALLEGOS VÁZQUEZ, F., "La tolerancia con los peregrinos en la Europa medieval", en *Revista de la Inquisición, Intolerancia y Derechos Humanos*, num. 14, 2010, pp. 9-46.

[14] *KAROLI MAGNI ET PIPPINI FILII CAPITULARIA ITALICA. PIPPINI ITALIAE REGIS CAPITULARE 782 – 786. Monumenta Germania Histórica, Legum Sectio II. Capitularia T. I.,* Societas aperiendis fontibus rerum germanicarum medii aevi. Hannoverae et Lipsiae 1.883. editio nova 1.973. p. 193.

[15] GONZÁLEZ, J., *Alfonso IX. Tomo II*, *documentos*. Madrid 1.944, doc. nº 516. pp. 619 - 620.

[16] GARCÍA DE VALDEAVELLANO, L., Curso de Historia de las Instituciones Españolas, p. 440

"…, et qui ex ipsi peregrinis causus fuerit occidere LX solidos componat in palatio nostro"[17].

"…, si quis auctem pignoraverit aliquem LX solidos ad partem regis exolvat, …, et quod retulerit, duplatum restituat"[18].

- Exención de pago de tributos de paso

La fragmentación política del espacio de Occidente y el sistema tributario que se desarrolló a lo largo de la Edad media, llevaba a que en su discurrir por los diferentes reinos europeos, los peregrinos se encontraban, en muchas ocasiones, con que tenían que hacer frente al pago de tributos de paso (portazgos o *thelonei*) que dificultaban su peregrinación; por ello, desde tiempos muy tempranos, vemos cómo se da una exención de estos tributos de paso a los peregrinos

"De peregrini qui propter Dei vadant, ut de eis teloneas non tollant"[19].

[17] *KAROLI MAGNI ET PIPPINI FILII CAPITULARIA ITALICA. PIPPINI ITALIAE REGIS CAPITULARE 782 – 786. Monumenta Germania Histórica, Legum Sectio II. Capitularia T. I.,* Societas aperiendis fontibus rerum germanicarum medii aevi. Hannoverae et Lipsiae 1.883. editio nova 1.973. p. 193.

[18] Salvoconducto de Sancho el de Peñalén, dando la libertad a los habitantes de Lara que acudan en peregrinación a San Millán, 1073, URBIETO ARTETA, A., Cartulario de San Millán de la Cogolla (759- 1073), Valencia 1976, doc. 408, p. 384

[19] *CAPITULA SYNODI VERNENSIS. EDITA A PIPPINO REGE ET AB EPISCOPIS, ANNO DCCLV. Corpus Iuris Germanici Antiqui. T. II. Capitularia Regum Francorum usque ad Ludovicum pium continens,* pp. 43 – 44

"…, de romeuo non prendant ullam causa"[20].

Este beneficio tributario se concedía a los peregrinos, no porque favoreciesen la economía de un territorio, como algunos estudiosos sostienen[21], sino por su propia condición de peregrino, pues vemos como los mercaderes sí tenían que pagar dichos tributos, al ser, precisamente, el ánimo de lucro lo que movía a estos individuos, sin que en este caso se tuviese en cuenta los beneficios económicos, incontestables, que su actividad conllevaba.

> *"Ed si aliqui non religioni servientes, sed lucrum sectamtes, …, locos opportunis statuta solvalt telonea"*[22].

No obstante, en ocasiones, los peregrinos eran objeto de abusos por parte de los oficiales encargados de cobrar estos tributos, como reconoce el rey Alfonso IV, al suprimir los portazgos de Santa María de Auctares, en el puerto de Valcárcel, para los transeúntes, especialmente los peregrinos, que por él discurren en su camino hacia Compostela, como forma de agradecer al Apóstol Santiago el haber recuperado su trono en 1072[23].

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[20] VÁZQUEZ DE PARGA. L, LACARRA. J.M. y URÍA RIU. J. *Las peregrinaciones a Santiago de Compostela.* Madrid 1.942, tres volúmenes, edición facsímil con apéndice bibliográfico (1.949 – 1992) de Fermín Miranda García, Pamplona 1.992, p. 109

[21] PORRAS ARBOLEDAS, P. A., "Los portazgos en León y Castilla durante la Edad Media. Política real y circuitos comerciales", *En la España medieval,* n°. 15, 1.992, pp. 161 – 211, p. 162.

[22] Epístola Duae ad offam regem merciorum 1- De peregrinorum, Negotiatorumque patricinio; et de variis muneribus, quae pro Hadriani Papae anima mittit ad singulas Ecclesias regni eius, Ferd Walter, *Corpus Iuris Germanici Antiqui T. II Capitularia Regum Francorum usque ad Ludovicum pium continens*. Berolini, 1.824, pp. 124 – 125

[23] Para una aproximación más profunda de la intensa actividad de Alfonso VI

> *"Est quodam castellum quod dicitur Sancte Marie de Auctares ad portum montis Ualcarceris inter duas aquas Burbia et Ualbona ubi consuetudo fuit, usque ad hunc diem, depopulari et depredari omnes transeuntes occasione telonei, quod portaticum dicimus, ..., et ex hoc magnus clamor ad Deum ferebatur omnium transeuntium, et maxime peregrinorum et pauperum qui ad Sanctum Jacobum causa orationis proficiscebantur"*[24].

Junto a la normativa general, especialmente la castellanoleonesa, a finales de la Edad Media, los monarcas castellanos preocupados por que los peregrinos procedentes de Europa no acudiesen a la tumba del Apóstol Santiago en los años jubilares, expidieron una serie de salvoconductos en favor de todos ellos, siendo destinatario de esta garantía todo peregrino extranjero, independientemente de su país de origen.

En concreto se expidieron cuatro salvoconductos, dos del rey Juan II, para los años santos de 1434 y 1445, uno del rey Enrique IV, para el año santo de 1462, y uno de los Reyes Católicos, para el año santo de 1479[25].

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en favor de los peregrinos, tanto material como normativa, se puede consultar, GALLEGOS VÁZQUEZ, F., "Alfonso VI y los peregrinos", *Alfonso VI Imperator Totius Orbis Hispanie*, Fernando Suárez Bilbao y Andrés Gambra Gutiérrez(coords), Madrid 2010, pp. 333-353.

[24] RUIZ ASENSIO, J. M., *Colección documental del archivo de la catedral de León (775 - 1230) Tomo IV (1032 - 1109*). León 1.990, doc nº 1.182 pp. 425 - 427

[25] El texto de todos estos salvoconductos puede verse en GALLEGOS VÁZQUEZ, F., *Estatuto Jurídico de los peregrinos en la España Medieval*, Santiago de Compostela 2005, Apéndice normativo, pp. 253-334, normas 88, 90, 91 y 92, pp. 310-318.

En estos salvoconductos se garantizaba la seguridad de los peregrinos a lo largo de toda su peregrinación, tanto a la ida como a la vuelta, y durante los días que permaneciesen en Compostela u otra ciudad del reino. Haciendo referencia a su seguridad física, a la libertad de hospedaje y a la exención de portazgos, en todos los puestos del reino castellanoleonés, y en el caso concreto del salvoconducto de los Reyes Católicos, se incluyen en este campo los puertos de la Corona de Aragón, tanto los peninsulares, de Cataluña y Valencia, como los de las islas del reino de Mallorca y los del reino de Sicilia.

Para remarcar que ningún peregrino deje de acudir a realizar su peregrinación, se hace mención expresa de los conflictos que tanto el reino de Castilla, como cualesquiera de sus súbditos, tengan con otros reinos y sus súbditos, como los que enfrentaban a los marinos castellanos con los de la liga hanseática, en los salvoconductos de Juan II y Enrique IV, y a la guerra mantenida con Alfonso V de Portugal, en el de los Reyes Católicos.

- **Derecho al Hospedaje y a la compra de bienes**.

A lo largo de su viaje, el peregrino se encontraba con una serie de necesidades, Hoy pensamos que el peregrino medieval era una especie de individuo pobre y abandonada, que vivía de la caridad, pero no era siempre así. Cierto es, que había peregrinos necesitados de la caridad para poder cumplir con su peregrinación, y que había instituciones que se dedicaban a prestar socorro a éstos, pero en su gran mayoría, los peregrinos viajaban proveyéndose de los bienes que necesitaban y pagando su alojamiento.

Sirva como ejemplo, la historia del milagro de Santo Domingo de la Calzada, “donde cantó la gallina después de asada”, que tiene su origen en unos peregrinos que se alojan en una posada de la localidad y son acusados de cometer un robo en dicho establecimiento. Y si nos vamos al ámbito legislativo, las varias fazañas castellanas que recogen

casos de peregrinos alojados en posadas, como la de Juan Buhón, que aparece en dos de las fazañas recogidas en el Libro de los Fueros de Castilla[26].

A este respecto, las leyes garantizaban el derecho a hospedarse de los peregrinos; y aunque en ningún momento se recoge que este hospedaje sea gratuito, sí se establece la obligación de darles cobijo y proporcionarles techo.

> *"Praecipimusque ut qin omni regno nostro, neque peregrinis hospitia denegare audeant"*[27].

> *"Omnes peregrini livere hospitentur"*[28].

Junto al hospedaje, los peregrinos tenían la necesidad de adquirir su comida y bebida diaria, lo que queda garantizado jurídicamente mediante el reconocimiento del derecho a adquirir los bienes que necesitasen los peregrinos.

[26] Libro de los Fueros de Castilla, Título 2, "Título del albergador", Título 265, "Título de una fasanya de Gil Buhon e de su mujer dona Florencia e de los romeros", SÁNCHEZ, G., *Libro de los Fueros de Castilla*, Barcelona, 1924.

[27] Para Garrisson en lo relativo al acogimiento, la legislación carolingia trató de transformar en obligación legal la devoción de caridad existente con los viajeros piadosos. GARRISSON, F., "A propos des Pelerins et de leur condition jurídique", en *Études d'Histoire du Droit Canonique*, V. 2, 1.165 – 1.189, París 1.965, p. 1.185

[28] Constitutio omnes Peregrini, Coronatio Romana Federici II, *Monumenta Germaniae Historica. Legum Tomus II.* Hannoverae 1.863, editio nova Stuttgart, 1.993, p. 244. Incorporada al Codex, Comunia de sucesionibus *Cuerpo de Derecho Civil Romano, a doble texto*. Kriegel, Hermmann y Osenbrüggen, traducido al castellano del latín por Ildefonso L. García del Corral. Barcelona 1.895. Ed facsimil Edi. Lex Nova. Valladolid 1.988. p. 162

> *"Necesaria si habet aequo sibi precio vendant"*[29].

> *"Et otrosí mandamos que también en las alberguerías como fuera de ellas puedan comprar las cosas que ovieren menester"*[30].

Derecho reforzado mediante la prohibición expresa de que se vendiese a los peregrinos utilizando pesos y medidas distintas de las que se usaban para los naturales del país.

> *"Et per iusta pondera et mesura debitas licitum sit ipsis peregrinis a quibuscumque voluerit libere sibi necesaria comprare"*[31].

O lo que es lo mismo, que no se utilizase con los peregrinos pesos y medidas falsas, algo que ya aparece recogido como práctica de hosteleros y comerciantes de ciudades por las que pasaba el camino de Santiago, como Burgos o la propia Compostela, en textos normativos, como el Libro de los Fueros de Castilla, o literarios, como el Codex Calixtino, en su Sermón "Veneranda Dei"[32].

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[29] PAX DEI INCERTA (SAEC XI EX), *Monumenta Germaniae Historica. Legum Sectio IV Constitutiones et Acta publica Imperatores et Regum Tomus I*. Hannoverae 1.893. Editio nova 1.963, pp. 608-609

[30] Fuero Real, Libro IV, Título XXIV De los Romero, Ley I, MARTÍNEZ DÍAZ, G., *Fuero Real. Edición crítica,* Ávila, 1988

[31] Privilegio dado por Alfonso x a favor de los peregrinos, de 6 de noviembre de 1.254, RUIZ ASENSIO, J. M., *Colección documental del archivo de la Catedral de León, Tomo VIII (1230 - 1269)* doc. 2131 pp. 217 - 218

[32] *Liber Sancti Iacobi". Codex Calixtinus".* Traducción de MORALEJO, A., TORRES, C. y FEO, J., Santiago de Compostela, 1.951, edición de la Xunta de Galicia, Santiago de Compostela,1.992.

- **Defensa del peregrino en su tierra de origen**

Si mientras el peregrino se encontraba ausente de su tierra no se procurase una protección de los bienes y derechos que había dejado en ella, no podríamos hablar de una verdadera defensa de los mismos. Por ello, vemos como se procuró que los bienes y derechos de aquellos que se encontraban realizando una peregrinación tuviesen una protección tal, que los asegurase para que cundo el peregrino volviese a su tierra no se encontrase con que había sufrido un perjuicio o incluso perdió, algunos bienes o derechos.

Las medidas que se dictaban para garantizarlos solían estar determinadas a que el paso del tiempo no produjera la caducidad o la prescripción en el ejercicio de los derechos, incluidos los procesales, o que perdiesen sus bienes por no poder defenderlos frente a terceros.

Así vemos como, cuando se esté fuera,

> *"..., non debe ser ganada carta del rey, nin de alcalde para sacarlos de la posesión e tenencia de los bienes del romero ..."*[33]

y que

> *"..., qualquier omme que ffuese ydo en romeria .., non debe perder su heredat nin otra cosa por tiempo, ca la pena de perder por tiempo non es dada sino contra aquellos que pueden demandar su derecho e lo dexan de facer"*[34].

[33] Partidas, 1. 24. 3

[34] Espéculo, Libro V, Título V, Del tiempo o de los plazos de prescripción. Ley XV. MARTÍNEZ DÍAZ, G., *Espéculo*, Edición crítica, Ávila, 1985.

Estableciendo en algunas normas, plazos concretos, teniendo en cuenta la duración de las peregrinaciones más comunes.

> *"Nui ynfanzon que va en romería non deve ser peyndrado ata que torne. Si va á San Iame deve ser seguro un mes; á Rocamador XV días; a Roma III meses; á Oltramar un ayno; á Iherusalem un ayno et un día"*[35].

4.- Derecho y libertad sucesoria

Hemos dejado para último lugar un aspecto de gran relevancia en la protección de los derechos y libertades de los peregrinos. Nos referimos a la regulación del derecho a poder establecer el fin de los bienes que el peregrino lleva consigo, cuando fallecía mientras estaba realizando la peregrinación.

Las dificultades con las que se encontraban los peregrinos a lo largo de su viaje, llevaban a que mochos encontrasen la muerte durante el mismo, como se recoge en muchos textos medievales, literarios, como el "Codex Calistinus", como en documentos de creación de alberguerías, en las que se menciona expresamente que se levantan en un lugar concreto, debido al gran número de peregrinos que encontraban la muerte en parajes despoblados y peligrosos, como reconoce san Juan de Ortega en su testamento, al decir que levantó el hospital de san Nicolás en plenos Montes de Oca a mediados del siglo XII por este motivo[36]; y de igual manera se recoge en los documentos de creación de cementerios de peregrinos que encontramos en

[35] Libro III. Título XV. De peyndras, Capítulo XXVII. Ata que tiempo non deve ser peyndrado omne que va en romería. ILARREGUI, P., y LAPUERTA, S., *Fuero General de Navarra.* Edición de Pamplona, 1.869

[36] RODRÍGUEZ DE LAMA, I., *Colección diplomática medieval de la Rioja T. II. Documentos (923 - 1.168).* Logroño 1.976. doc. nº. 513, pp. 306 - 307

localidades por las que pasaba la vía de peregrinación, como Burgos, Azofra, León Astorga, Compostela u Oviedo[37].

Los peregrinos llevaban con ellos una serie de bienes, como sus ropas, y equipos, en ocasiones llevaban animales de silla o de carga, y como no, dinero para poder hacer frente a sus necesidades.

Aunque en el derecho romano no se recoge el derecho de los extranjeros a disponer de sus bienes[38], y el derecho germano entendía que, cuando un extranjero fallecía, los bienes que portase con él pasaban a poder del señor de la tierra, el rey o el señor, por el denominado "derecho de aubana", o derecho sobre el *aubains*[39], el extranjero, como ya hemos dicho más arriba, el peregrino no era un extranjero más, su naturaleza de viajero religioso le confería una protección diferente.

Es por ello, por lo que los reyes dictaron una serie de normas en las que se reconocía el derecho a disponer de sus bienes, por aquellas personas que se encontrasen realizando una peregrinación y llevasen a cabo una disposición testamentaria de los bienes que llevaban con ellos, para el caso de encontrar la muerte durante su viaje, como aparece recogido en una capitular de Carlomagno de comienzos del siglo IX, o en la constitución *Omnes peregrini* de Federico II de 1220, en la que se dice:

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[37] CAVERO DOMÍNGUEZ, G., "Fundaciones hospitalarias del clero secular en la diócesis de Astorga (siglos XII – XV)". en *El Camino de Santiago, la hospitalidad monástica y las peregrinaciones*. pp. 135 – 148. Salamanca 1.993, p. 139

RODRÍGUEZ DE LAMA, I., *Colección diplomática medieval de la Rioja T. II. Documentos (923 - 1.168).* doc. nº 228. pp. 310 - 311.

GAMBRA, A., *Alfonso VI. Cancillería, curia e imperio. V. II Colección diplomática.* León 1.998. doc. 116

[38] KASE, M., "Zum "Ius honorarium", *Estudios en homenaje al profesor Ursicino Álvarez Suárez*, Madrid, 1078, pp. 231-250, p. 232.

[39] BRUNNER, H., *Historia del Derecho Germánico,* Traducción de José Luis Álvarez López, Barcelona 1.936. p. 192

"Omnes peregrini …, si testari voluerint, de rebus suis liberant ordinari habeant facultatem"[40].

Y en el caso español, recoge el privilegio de Alfonso IX de León, dado en 1229, en el que se señala que los peregrinos tienen libertad de disponer de sus bienes según su voluntad.

"Licitum sit et liberum de ómnibus rebus suis secumdum propiam statuere voluntatem …"[41].

Pero, como en muchos casos, el peregrino se encontraría ante la necesidad de realizar testamento sin disponer de los medios necesarios para poder llevarlo a cabo de forma escrita, por no saber escribir y, en este caso, no poder acudir a personas que supieran hacerlo, nos encontraríamos ante la imposibilidad de hacer efectivo un derecho que se le reconoce. Por ello, se estableció que los peregrinos podían hacer testamento de forma oral, requiriéndose en tal supuesto sólo la confirmación de dos testigos.

"Que la prueba vale con dos testigos de la villa"[42].

Teniéndose que realizar con posterioridad su elevación a forma escrita, por la autoridad real.

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[40] *Monumenta Germaniae Historica. Legum Tomus II.* Hannoverae 1.863, editio nova Stuttgart, 1.993, p. 244

[41] Constitución promulgada por Alfonso IX en el concilio nacional de Salamanca en favor de los peregrinos. (5 de febrero de 1.228). Julio GONZÁLEZ, J., *Alfonso IX. Tomo II,* Madrid, 1.944, doc. 519. pp. 619 - 620

[42] Libro de los Fueros de Castilla, Título 65. Título del omne que va en romeria e pone o manda algo por su alma con la prueva. MARTÍNEZ DÍAZ, G., *Fuero Real*

Estos dos supuestos vistos, el derecho a disponer de sus bienes para después de su muerte, así como la libertad de forma, permitiéndose tanto el testamento oral como la presencia de sólo dos testigos, se asemejan mucho a los mismos casos del testamento militar de la época, que en algunos supuestos legislativos aparece recogido conjuntamente, como en el caso del Fuero Juzgo, que añade el supuesto del peregrino a la ley del *Liber Iudiciorum*, que reconocía el derecho a disponer de sus bienes por aquella persona que se encontraba en la hueste.

> *"Aquel que muere en romería o en hueste …, escriba su manda con su mano …, e si non sopier escribir faga su manda ante sus siervos"*[43].

Esta preocupación por proteger y garantizar el derecho y libertad de los peregrinos a disponer de sus bienes no se quedaba en un reconocimiento nominal. Se era consciente de que había que poner los medios para su cumplimiento, y esto no podía hacerse sino con el establecimiento de penas para quienes infringiesen tales normas.

La legislación real castellana, tanto el privilegio de Alfonso IX de 1229, como el de Alfonso X, de 1254, el Fuero real y las partidas, establecen una serie de penas para aquellos que se quedasen con algún bien del peregrino, de forma indebida, así como para aquellas personas que impidiesen que aquel pudiera realizar la disposición de sus bienes.

> *"Ita quod nichil inde percipiat et voci regi C. morabetinos pectet"*[44].

[43] Fuero Juzgo, 2. 5. 12. De las mandas de aquellos que van en romería, como deben ser firmadas; Fuero Juzgo en latín y castellano, edición Real Academia Española, Madrid 1815.

[44] Constitución de Alfonso IX en favor de los peregrinos de 1229, Julio González. *Alfonso IX. T. II* Madrid, 1.944, doc. 666. pp. 739 - 741

Las penas que se recogen son diferentes, según la norma que tratemos, siendo normalmente sanciones pecuniarias, que van desde cincuenta o los cien maravedíes, a que sea el juez, quien determine la cuantía de la sanción.

> *"...adicientes quod si contra huius nostre constitucionis tenorem ab aliquo quicquam fuerit atemptatum hoc per locorum sive provinciarum iudices quibus potestatem nostram dedimus in hac parte iuxta quantitatem delicti et deliquentis qualitatem celeriter emendetur"*[45].

Pero destaca la pena que imponen las Partidas para aquel que impida la realización de testamento, ya que establece una pena consistente en lo mismo en que delinquió, esto es, se le condena a no poder realizar testamento.

> *"..., que de allí adelante testamento nin manda que ficiese non vala en ninguna guisa"*[46].

Siguiendo lo que establecía Federico II en 1220, en la constitución *Omnes peregrini*

[45] RUIZ ASENSIO, J. M., *Colección documental del archivo de la Catedral de León, Tomo VIII (1230 - 1269)* doc. 2131 pp. 217 - 218

[46] Partidas, 5. 8. 30. Que pena merescen aquellos que embargan a los peregrinos e a los romeros que non puedan facer sus testamentos

5.- Conclusión

Vemos pues, como, durante la edad Media, periodo en el que las peregrinaciones adquirieron una importancia muy grande en la sociedad europea, y por supuesto en la hispana, los poderes públicos, y más concretamente el rey, se preocuparon por garantizar una serie de derechos y libertades a los peregrinos, tendentes a favorecer su peregrinación, así como para evitar los abusos que en muchas ocasiones sufrían, tanto en su persona como en su patrimonio, debidos a su condición de extranjero, razón por la que quedaban bajo la salvaguarda del rey.

Todo ello, amparado por la legislación canónica, principalmente la que emanaba de los concilios lateranenses, que recogían de forma general, para toda la Iglesia, las disposiciones de los concilios de paz y tregua de Dios, en los que los peregrinos aparecían como uno de los sujetos protegidos.

Esta regulación de los derechos y libertades de los peregrinos, de origen medieval, perdurará a lo largo de nuestra historia jurídica institucional, y así vemos como los derechos antes mencionados, se plasmarán en la Nueva Recopilación y en la Novísima Recopilación, y no desaparecerá hasta el sistema constitucional de 1812.

DEMOCRATISING TAIWAN IN 1990: A CONSTITUTIONAL JURIST'S PERSPECTIVE

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Abstract: Taiwan was peacefully democratised in 1990, but the significance of its Constitution and the contributions made by the constitutional court during the process are still undervalued by political scientists worldwide. This article examines Taiwan's democratisation through the lens of modern constitutional jurisprudence, analysing the institutional structure of the pre-democratic Taiwan and holding that it was a liberal democracy that subsisted in a state of emergency under the authority of its constitutional court in line with the Constitution. When the people argued that the emergency rule was anachronistic, the country's Justices voted for democracy citing clausula rebus sic stantibus and began the process of recreating Taiwan as a democratic state.

Key words: Taiwan's Democratisation; Taiwan's Democratic Transition; Constitution of Taiwan; Constitution of the Republic of China; Judicial Yuan Interpretation No.261.

1.- Introduction

In a move that echoed the Third Wave of Democratisation,[1] the Republic of China, Taiwan, which had hitherto subsisted as a nominal democracy under a state of emergency,[2] was peacefully democratised in 1990 to become the 'first Chinese democracy',[3] perhaps, showing 'a better path for all the Chinese people'.[4] Since that time the Republic of China, *Taiwan*, has subsisted in political contrast to the People's Republic of China, *China*. The two sovereign entities, although confusingly similar in name, embody the different forms of living that Chinese people enjoy in the world today.

As Shelley Rigger commented in 2003, Taiwan's 'democratic transition was a complex process, one that resists a theoretically tidy explanation. Ultimately Taiwan's transition must be viewed as multicausal, multi-dimensional, and path-dependant'.[5] However, most political scientists (Tom Ginsburg is a rare exception) studying Taiwan's democratisation have unfortunately not paid sufficient attention to the roles of the Constitution of the Republic of China[6] and the Justices of the Judicial Yuan in Taiwan's peaceful democratic

[1] *See generally* HUNTINGTON, S.P., *The Third Wave: Democratization in the Late Twentieth Century*, Norman, 1991, pp.3-316.
[2] *Compare* Constitution of R.O.C. (1947), *with* Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (1948).
[3] *See generally* CHAO, L. & MYERS, R.H., "The First Chinese Democracy: Political Development of the Republic of China on Taiwan, 1986-1994", in *Asian Survey*, vol 34(3), 1994, pp.213-230.
[4] "Remarks by Vice President Pence on the Administration's Policy Toward China", American Institute in Taiwan, issued October 4, 2018, https://www.ait.org.tw/remarks-by-vice-president-pence-on-the-administrations-policy-toward-china/.
[5] RIGGER, S., "Political Science and Taiwan's Domestic Politics: The State of the Field", in *Issues & Studies*, vol 39(1), 2003, p.71.
[6] Constitution of R.O.C. (1947).

transition. This has meant the Constitution's[7] embrace of liberal democracy has remained totally unexplored until this article, along with the sophisticated judicial mechanism under which Taiwan's democracy is practiced. The Constitution and the Judicial Yuan between them enabled the institutional provision for peaceful democratisation and have led the ongoing ratification of democratic principles since that time. This article therefore aims to fill that knowledge gap from the perspective of constitutional jurisprudence, explaining why the Republic of China or 'Taiwan' was democratised peacefully and institutionally. Tom Ginsburg argues that:

> [A] careful consideration of the [Judicial Yuan's] decisions shows that it has played a quiet but important role in contributing to the environment of political liberalization and advancing reform in the interstices of political institutions.[8]

In other words, this article explains Taiwan's democratisation from an institutional perspective, focusing on the opportunities for democratisation the Constitution[9] had pre-offered as well as the determination of the Justices of the Judicial Yuan to move the country towards democratisation.[10] This article is not intended to deny previous studies on Taiwan's democratisation, and should instead be considered as a supplementary study from the hitherto unexplored standpoint.

[7] Ibid.
[8] GINSBURG, T., *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge, 2003, p.120.
[9] Constitution of R.O.C. (1947).
[10] *Judicial Yuan Interpretation No.261* [1990].

2.- The Republic of China or Taiwan

Ebben! Ne andrò lontana,
Come va l'eco pia campana,
Là fra la neve bianca;
Là fra le nubi d'ôr;
Laddóve la speranza, la speranza
È rimpianto, è rimpianto, è dolor! – Alfredo Catalani
(1892)

The relationship between the Republic of China and Taiwan may be analogous to *Ebben! Ne andrò lontana*, Aria from *La Wally*,[11] insofar as Taiwan was a Japanese colony[12] when the Republic of China was established, but was recaptured[13] by the Republic of China at the end of the Second World War,[14] becoming the last territory of the State, i.e. the 'Free Area'[15] or 'Taiwan Area',[16] since the communist revolution and the establishment of the People's Republic of China.[17] In other words, the Republic of China was like Wally; it was forced to withdraw from the Chinese mainland (*ne andrò lontana*) with regret (*rimpianto*), sorrow (*dolor*) and hope (*speranza*) to its new but last remaining piece of land – Taiwan.[18] This explains why there was no constitution of Taiwan before now[19] other than the Constitution of the Republic of

[11] *See generally* BLEILER, E.H., ed., *Famous Italian Opera Arias: A Dual Language Book*, Mineola, 1996, p.5.
[12] *See generally* ROY, D., *Taiwan: A Political History*, Ithaca, 2003, pp.32-54.
[13] *Compare* Cairo Communiqué (1943), *with* Potsdam Declaration § 8 (1945).
[14] *See generally* ROY, D., *Taiwan: A Political History*, Ithaca, 2003, pp.55-75.
[15] Constitution of R.O.C. amend. §11 (1991/2005) (Official translation).
[16] Act Governing Relations between the People of the Taiwan Area and the Mainland Area § 2 (1992/2015) (Official translation).
[17] *See generally* TAYLOR, J., *The Generalissimo: Chiang Kai-Shek and the Struggle for Modern China*, Cambridge, 2009, pp.378-408.
[18] *See generally* CHEN, J.C., *Jiang Zhong Zheng Qian Tai Ji [The Generalissimo's Withdrawal to Taiwan]*, Taipei, 2005, pp.13-233.
[19] *See generally* CHIU, H.D., "Constitutional Development in the Republic of

China.[20] In fact, if the Constitution of the Republic of China[21] is considered to be Taiwan's constitution as well, it is interesting to note that the word 'Taiwan' cannot be found in the context at all. As Councillor Guo Guo-Ji pointed out:

> When the Japanese were defeated, Taiwan returned to the arms of [our] fatherland; [however,] when the Chinese mainland was taken over, [our] fatherland approached the arms of Taiwan.[22]

From the perspective of Taiwanese localism, it seems perhaps justifiable to label the Republic of China as a foreign political regime.[23] But if this justification is reasonable, then the argument that Taiwan was *de jure* democratised in accordance with a 'foreign constitutional framework' must be true too, because the main characteristic of Taiwan's peaceful democratisation in 1990 lies in the continuance of the constitutional peace of the Republic of China,[24] as stated in the Preambles of the Constitution of the Republic of China[25] and the Additional Articles thereof:[26]

> The National Assembly of the Republic of China, by virtue of the mandate received from the whole body of citizens, in accordance with the teachings bequeathed by Dr. Sun Yat-sen

China in Taiwan", in *In the Shadow of China: Political Developments in Taiwan since 1949*, Hong Kong, 1993, pp.17-47.

[20] Constitution of R.O.C. (1947).

[21] Constitution of R.O.C. (1947).

[22] CHEN, J.C., *Jiang Zhong Zheng Qian Tai Ji [The Generalissimo's Withdrawal to Taiwan]*, Taipei, 2005, p.190 (Author's translation).

[23] *See* CHANG, B.Y., *Place, Identity and National Imagination in Postwar Taiwan*, Abingdon, 2015, p.1.

[24] *See generally* HUANG, D.K.C., "Judicial Supremacy in Taiwan: Strategic Models and the Judicial Yuan, 1990-1999", PhD diss. in constitutional law, SOAS, University of London, 2016, pp.221-262.

[25] Constitution of R.O.C. pmbl. (1947).

[26] Constitution of R.O.C. amend. pmbl. (1991).

> in founding the Republic of China, […] does hereby establish this Constitution, to be promulgated throughout the country for faithful and perpetual observance by all.[27]

To meet the requisites of the nation prior to national unification, the following articles of the ROC Constitution are added or amended to the ROC Constitution […][28]

It is pertinent to point out that the aforesaid '*Pater Patriae*', Sun Yat-Sen, was never considered 'Taiwanese' during his lifetime, neither by *jus sanguinis* nor by *jus soli*, because he was more specifically Cantonese with special reference to Zhongshan City, Guangdong and Hong Kong.[29] The *Pater Constitutio* of the Republic of China, Carsun Chang, was not 'Taiwanese' either.[30] However, Taiwan was *de jure* democratised by the decision of the 'Constitutional Court' of the Republic of China, i.e. the Judicial Yuan, through *Judicial Yuan Interpretation No.261* [1990], which approved the constitutionality of democratisation on 21 June 1990, a week before the National Affairs Conference for political negotiation was due to be held.[31] In other words, the Justices of the Republic of China left two options to the then authoritarian Government, that it could either conduct democratic

[27] Constitution of R.O.C. pmbl. (1947) (Official translation).
[28] Constitution of R.O.C. amend. pmbl. (1991) (Official translation).
[29] *See generally* CHUANG, C., *Sun Wen Ge Ming Si Xiang Fa Zhan Shi Lun [The Development of Dr. Sun Yat-sen's Revolutionary Thinking System]*, Taipei, 2007, pp.109-126.
[30] *See generally* YANG, Y.C., *Zhong Hua Min Guo Xian Fa Zhi Fu: Zhang Jun Mai Zhuan [The Biography of the Founding Father of the Constitution of the Republic of China: Dr Carsun Chang]*, Taipei, 1993, pp.1-270.
[31] HUANG, D.K.C., "Judicial Supremacy in Taiwan: Strategic Models and the Judicial Yuan, 1990-1999", PhD diss. in constitutional law, SOAS, University of London, 2016, pp.251-253.

transition in accordance with *Judicial Yuan Interpretation No.261* [1990] or to tear up the Constitution[32] publicly. The Justices held that:

To address the present situation, those members of the First Congress who have not been re-elected shall cease exercising their powers no later than December 31, 1991. Those who have been proven to be incapable of exercising or to have often failed to exercise their powers as revealed by investigations shall be immediately discharged from their offices. The Central Government shall schedule, in due course, a nationwide election of the next members of Congress in compliance with the spirit of the Constitution, the essence of this Interpretation, and all relevant regulations, so that the constitutional system may function properly.[33]

3.- Another Weimar Republic

The emergency powers of the Weimar constitution did not in themselves lead to the demise of the republic. […] It was only in concert with what was occurring within Weimar society and how that was reflected in the political system that the constitutional provisions for emergency rule became the mechanism by which democracy was undone.[34]

In contrast to 'what was occurring within Weimar society'[35] when Adolf Hitler passed the Enabling Act of 1933, i.e. Das Ermächtigungsgesetz vom 24. März 1933,[36] there is no doubt that the situation within the Republic of China was even worse when the

[32] Constitution of R.O.C. §§ 1-2 (1947).
[33] *Judicial Yuan Interpretation No.261* [1990] (Official translation).
[34] BERNHARD, M.H., *Institutions and the Fate of Democracy: Germany and Poland in the Twentieth Century*, Pittsburgh, 2005, p.68.
[35] Ibid.
[36] Gesetz zur Behebung der Not von Volk und Reich (1933).

Chinese Enabling Act of 1948, i.e. the Temporary Provisions,[37] was attached to the Constitution.[38] If we agreed that a country is qualified to declare a state of emergency[39] 'in the event of an insurrection'[40] or a violent act 'which threaten[s] the constitutional order',[41] then surely no one would challenge the legitimacy of the Republic of China regarding its declaration of a state of emergency 'during the period of national mobilisation for suppression of the communist rebellion'[42] without being accused of blatant political bias against the Republic of China. History tells us that the Chinese Communist Party had overthrown the Republic of China by means of a violent insurrection in the Chinese Civil War,[43] transforming the Republic of China from a *liberal* democracy into a *nominal* democracy under a state of emergency.[44] However, in accordance with the Constitution it was still a democracy,[45] which meant that its temporary provisions for emergency rule[46] had to be approved by its constitutional court, i.e. the Judicial Yuan.

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[37] Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (1948) (Adopted on 18 April 1948 by the National Assembly; entered into force on 10 May 1948).

[38] Constitution of R.O.C. § 174 (1947) (amending a state of emergency provision to the Constitution).

[39] *See generally* DYZENHAUS, D., "State of Emergency", in *A Companion to Contemporary Political Philosophy*, Chichester, 2012, pp.804-820.

[40] ÖZBUDUN, E. & TURHAN, M., *Emergency Powers*, Strasbourg, 1995, p.8.

[41] Ibid.

[42] Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (1948) (Adopted on 18 April 1948 by the National Assembly; entered into force on 10 May 1948).

[43] *See generally* KUO, *T.Y., Jin Dai Zhong Guo Shi Gang [A Short History of Modern China]*, Hong Kong, 1986, pp.717-770.

[44] *Compare* Constitution of R.O.C. (1947), *with* Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (1948).

[45] Constitution of R.O.C. (1947).

[46] Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (1948) (Adopted on 18 April 1948 by the National Assembly; entered into force on 10 May 1948).

In a nutshell, the authoritarian regime that dominated the Republic of China[47] was rooted in the *impossibilitas rei* of holding re-elections of the central legislative body, because the communists had seized the Chinese mainland after the Chinese Civil War in 1949. The Republic of China was therefore facing a constitutional dilemma of how to represent all of China 'constitutionally' in the international world? The solution was provided by the Justices in *Judicial Yuan Interpretation No.31* [1954]:

> [O]ur state has been undergoing a severe calamity, which makes re-election of the second term of both Yuans de facto impossible. It would contradict the purpose of the Five-Yuan system as established by the Constitution, if both the Legislative and Control Yuans ceased to exercise their respective powers. Therefore, before the second-term Members are elected, convene and are convoked in accordance with the laws, all of the first-term Members of both the Legislative and Control Yuans shall continue to exercise their respective powers.[48]

It is reasonable to argue that the Justices constitutionalised the authoritarian regime via *Judicial Yuan Interpretation No.31* [1954], although they obviously did not have much choice unless the Republic of China intended to pursue an independent Taiwan at that point, which would have been politically impossible. However, the Justices established a *de facto* lifelong legislative body for the State – 'before the second-term Members [were] elected',[49] namely until the suppression of the communist revolution – by which the emergency rule[50] was analogously constitutionalised. This meant that when the

[47] *See generally* LEE L.Y., "Zhan Hou Tai Wan Zheng Zhi Ji Jing Ji De Bian Qian [The Transition of Politics and Economy in Post-War Taiwan]", in *Tai Wan Shi [History of Taiwan]*, Taipei, 2009, pp.269-273.
[48] *Judicial Yuan Interpretation No.31* [1954] (Official translation).
[49] Ibid.
[50] Temporary Provisions Effective During the Period of National Mobilization

Justices legitimised the first-term legislative Members, the Judicial Yuan as a guardian of the constitution[51] would accept emergency rule 'before the second-term Members [were] elected'.[52] If any excuse for the Justices' decision in *Judicial Yuan Interpretation No.31* [1954] can be found, it must be recognised that they seriously underestimated the communists and expected to retake power throughout China with little opposition.

From the perspective of the Constitution,[53] however, there is no doubt that the Republic of China has always been a liberal democracy similar to the Weimar Republic, although this democracy subsisted in a state of emergency between 1948 and 1990.[54] Accordingly, the democratisation of Taiwan would benefit greatly from the Constitution,[55] because the core argument would only lie in whether or not it was appropriate to maintain the state of emergency,[56] rather than become embroiled in the arguments as to whether or not democracy was suitable for China.[57] As far as I am concerned, the Constitution makes Taiwan's democratisation much easier.

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for Suppression of the Communist Rebellion (1948) (Adopted on 18 April 1948 by the National Assembly; entered into force on 10 May 1948).

[51] *Compare* Constitution of R.O.C. § 78 (1947), *with* Constitution of R.O.C. §§ 171-173 (1947).

[52] *Judicial Yuan Interpretation No.31* [1954].

[53] Constitution of R.O.C. (1947).

[54] *See generally* WANG, W., *Zhong Hua Min Guo Xian Fa Lun [An Introduction to the Constitution of the Republic of China]*, Taipei, 2000, pp.338-348.

[55] Constitution of R.O.C. (1947).

[56] *See generally* LEE, L.Y., "Zhan Hou Tai Wan Zheng Zhi Ji Jing Ji De Bian Qian [The Transition of Politics and Economy in Post-War Taiwan]", in *Tai Wan Shi [History of Taiwan]*, Taipei, 2009, p.283.

[57] *See generally* HUANG, D.K.C. & LI, N.N.T., "Why China Finds It Difficult to Appreciate Democracy", in *Global Constitutionalism*, vol 8(2), 2019, pp.332-356.

4.- Diplomatic Isolation

As mentioned previously, the emergency rule of the Republic of China in Taiwan rested on a prerequisite that it maintained the One China Policy,[58] representing all of China on the international stage. Because it was *de jure* recognised internationally as the sole China, the constitutional argument concerning the *impossibilitas rei* of holding re-elections for the central legislative body also make sense.[59] In other words, if the Republic of China is no longer *de jure* recognised as 'China', and becomes 'Taiwan' in the international world, it loses the legitimacy of emergency rule. As far as I am concerned, this was what was happening within Taiwan in the 1970s, and the United Nations was undoubtedly the pivot of this legal-political change:

> Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.[60]

There are many interpretations that help us understand United Nations General Assembly Resolution 2758.[61] One is that the people of Taiwan must self-determine their political identity as 'Taiwanese'[62] if they are no longer willing to be categorised as 'Chinese', because the latter definition now belongs to the Chinese communists in the

[58] *See* WANG, C., *Obama's Challenge to China: The Pivot to Asia*, Farnham, 2015, pp.199-200.
[59] *See Judicial Yuan Interpretation No.31* [1954].
[60] UN General Assembly Resolution 2758 (XXVI) (1971).
[61] Ibid.
[62] *See generally* HUGHES, C., *Taiwan and Chinese Nationalism: National Identity and Status in International Society*, Abingdon, 1997, pp.21-45.

international world.[63] In other words, if the United Nations recognises the People's Republic of China as 'China', then the Republic of China can only represent 'Taiwan', and the *impossibilitas rei* of holding re-elections for its central legislative body became void or even void *ab initio*.[64] What makes things even worse is that many countries began to switch their recognition to the People's Republic of China[65] in accordance with Resolution 2758,[66] which echoes the void (or void *ab initio*) argument and further sparked the Taiwanese desire for democratisation.

According to Sehnálková and Kucera, '[f]ollowing the loss of the UN representation, the diplomatic relations of the ROC started to shrink rapidly, so that from 1971 onwards, the diplomatic isolation of Taiwan was continually increasing'.[67] In other words, since 'the permanent seat for China in the UN was transferred from the Republic of China to the People's Republic of China … Taiwan has been fighting for international space'.[68] Under such circumstances, the claim for the legitimacy of the Republic of China, which was based on its sole international representation of 'China', would become untenable *in toto*, which would force the authoritarian Government to reconsider whether it was still politically wise to maintain the state of emergency

[63] BUSH, R.C., *At Cross Purposes: U.S.-Taiwan Relations Since 1942*, Armonk, 2004, p.129 (indicating that there is 'a significant portion of the population who after decades of Kuomintang [KMT] repression subjectively identified themselves politically as Taiwanese, not Chinese').
[64] UN General Assembly Resolution 2758 (XXVI) (1971).
[65] *See generally* HICKEY, D.V.V., *Foreign Policy Making in Taiwan: From Principle to Pragmatism*, Abingdon, 2007, pp.11-13.
[66] UN General Assembly Resolution 2758 (XXVI) (1971).
[67] SEHNÁLKOVÁ, J. & KUCERA, O., "Taiwan's Participation in International Organizations: Obstacles, Strategies, Patterns?", in *European Perspectives on Taiwan*, Heidelberg, 2012, p.149.
[68] LINDEMANN, B.A., *Cross-Strait Relations and International Organizations: Taiwan's Participations in IGOs in the Context of Its Relationship with China*, Heidelberg, 2014, p.18.

– or would it trigger off a crisis in which political demonstrators accused the Government of unconstitutionality?[69] As a matter of fact, this was what was occurring within Taiwan in the 1980s. Nigel N.T. Li recalled:

> Before [the Government] lifted the martial law [of Taiwan], the call for democracy constituted the main argument against [the legitimacy of] the Temporary Provisions. 'Implementing only the Constitution' was once the flag of the then political demonstrators against strongman politics [in Taiwan, with which they] demanded the *abolitio legis* of the Temporary Provisions because it was [deemed as] 'an unauthorised building works' that derogated from the main text of the Constitution.[70]

From the political perspective, citizens will demonstrate if they are treated unjustly,[71] but the effectiveness of the demonstration is dependent upon its scale.[72] In terms of protest against a government, is there any charge better than an accusation of unconstitutionality?[73] When a government is accused of unconstitutionality by the demonstrators (as happened in Taiwan's Wild-lily social movement in 1990[74] in which demonstrators demanded democracy in line with the

[69] *See generally* LEE, T.H., *Wei Zhu Zuo Jian Zheng: Li Deng Hui De Xin Yang Gao Bai [Be My Witness: Lee Teng-Hui's de Fide Confession]*, Taipei, 2013, pp.46-55.
[70] LI, N.N.T., *Ren Guo Zhi Li: Xian Fa Bian Qian De Kua Yue [The Classical Chinese 'Li (Charter)' of the Land and the People: The Transition of China's Constitutionalism]*, Taipei, 2012, p.329 (Author's translation).
[71] *See generally* OPP, K.D., *Theories of Political Protest and Social Movements: A Multidisciplinary Introduction, Critique, and Synthesis*, Abingdon, 2009, pp.33-44.
[72] *See generally* ibid., pp.127-160.
[73] *Cf.* ibid., pp.161-203.
[74] *See generally* YEH, J.R., "Marching towards Civic Constitutionalism with Sunflowers", in *Law and Politics of the Taiwan Sunflower and Hong Kong*

Constitution[75]), the government can easily become marginalised in a political sense because its legitimacy is doubted. In fact, during the process of peaceful democratisation in Taiwan, the Government could not even label the demonstrators as a mob,[76] because it would be an unconvincing move in the public eye – no rebels would align themselves with the constitution.

5.- The Third Wave Democratisation

Whereas most Taiwanese want to keep the statehood, China wants to pursue the path of the island's forcible integration into the mainland. Taiwan became a genuinely democratic country, surviving despite its diplomatic isolation. China regards Taiwan as an internal affair, but its attempts for coercive integration will provoke international legal, political, and moral opposition.[77]

From the perspective of Chiang Ching-Kuo, the late President of the Republic of China, perhaps,[78] democratisation was the only way to prevent Taiwan from 'forcible/coercive integration',[79] because the communist Chinese assault on Taiwan as a democracy 'will provoke

Umbrella Movements, Abingdon, 2017, pp.56-57.

[75] Constitution of R.O.C. §§ 1-2 (1947).

[76] *Cf.* LEE, T.H., *Wei Zhu Zuo Jian Zheng: Li Deng Hui De Xin Yang Gao Bai [Be My Witness: Lee Teng-Hui's de Fide Confession]*, Taipei, 2013, pp.52-55.

[77] LEONARD, T.M., ed., Encyclopedia of the Developing World, vol. 1 (New York: Routledge, 2006), 521.

[78] Cf. Lee Teng-Hui, Wei Zhu Zuo Jian Zheng: Li Deng Hui De Xin Yang Gao Bai [Be My Witness: Lee Teng-Hui's de Fide Confession] (Taipei: Yuan-Liou, 2013), 19-25 (President Lee Teng-Hui recollecting President Chiang Ching-Kuo and his determination for democratisation).

[79] Thomas M. Leonard, ed., *Encyclopedia of the Developing World*, vol 1, New York, 2006, p.521.

international legal, political, and moral opposition'.[80] If this argument[81] holds, it implies that political leaders in Taiwan in the 1980s and 1990s, perhaps, might democratise Taiwan strategically – rather than sincerely – unless there was more evidence showing that they were driven only by ideology rather than power or political interest.[82] If the Republic of China, *Taiwan*, expected international intervention from the free world, particularly the United States, in its battle against the People's Republic of China, *China*, it would have to behave in line with its potential allies as a genuine liberal democracy.[83]

In other words, political leaders in Taiwan in the 1980s and 1990s may not have had much choice but to democratise the Republic of China. When the Chinese communists chose to massacre demonstrators at Tiananmen Square on 4 June 1989, the choices of the Taiwanese political leaders in the 1990 Wild-lily social movement[84] were limited only to peaceful responses – would the Republic of China, which described itself as 'La Chine Libre' (*Zi-You-Zhong-Guo*), massacre the demonstrators at Chiang Kai-Shek Memorial Hall too? And would the free world support the Republic of China (or Taiwan) if it behaved like

[80] Ibid.

[81] *E.g.*, *Threats to U.S. National Security: Hearing Before the Comm. on National Security of the H.R.*, 105th Cong. 31 (1997) (Congressman Woolsey arguing that '[w]hen Taiwan was an autocratic State … it was a matter of pure politics and economic interests. But things changed a lot last year when Taiwan became a democracy….').

[82] From the perspective of constitutional jurisprudence which is based upon the balance of power under a framework of checks and balances, a presumption against involuntary power restraint is generally not accepted unless there is more evidence. CAMERON, M.A., *Strong Constitutions: Social-Cognitive Origins of the Separation of Powers*, New York, 2013, p.32 (arguing that 'rulers never voluntarily surrender power').

[83] *See Threats to U.S. National Security: Hearing Before the Comm. on National Security of the H.R.*, 105th Cong. 31 (1997).

[84] *See generally* YEH, J.R., "Marching towards Civic Constitutionalism with Sunflowers", in *Law and Politics of the Taiwan Sunflower and Hong Kong Umbrella Movements*, Abingdon, 2017, pp.56-57.

the Chinese communists? Of course, if political leaders in Taiwan were to show that the Republic of China, *Taiwan*, was different from the People's Republic of China, *China*, they must conduct the democratic transition peacefully.[85]

If we juxtapose Taiwan's peaceful democratisation against Huntington's Third Wave Democratisation,[86] it is not difficult to see that there was a worldwide trend towards democratisation in the 1980s and 1990s,[87] and the Republic of China was one of the states which echoed that trend. In June 1987, South Korean demonstrators successfully forced the military-authoritarian Government to democratise South Korea via the June Democratic Uprising,[88] as a result of which the Korean Sixth Republic was established.[89] Meanwhile in November 1989, the Berlin Wall (*Berliner Mauer*) fell[90] and Germany was reunified, i.e. die deutsche Wiedervereinigung,[91] in 1990. Poland and Mongolia were peacefully democratised in 1989[92] and 1990[93] respectively, too. From the perspective of behaviourism, would political leaders in Taiwan dare to turn themselves into enemies of democracy when their people were demanding democracy in line with

[85] COPPER, J.F., *The KMT Returns to Power: Elections in Taiwan 2008 to 2012*, Lanham, 2013, p.20.
[86] *See generally* HUNTINGTON, S.P., *The Third Wave: Democratization in the Late Twentieth Century*, Norman, 1991, pp.3-316.
[87] Ibid.
[88] *See generally* KATSIAFICAS, G., *Asia's Unknown Uprisings: South Korean Social Movements in the 20th Century*, Oakland, 2012, pp.277-308.
[89] *See generally* ibid.
[90] *See generally* MCADAMS, A.J., *Germany Divided: From the Wall to Reunification*, Princeton, 1993, pp.3-15.
[91] *See generally* ibid., pp.175-228.
[92] *See generally* SANFORD, G., "The Polish Road to Democratisation: From Political Impasse to the 'Controlled Abdication' of Communist Power", in *Democratization in Poland, 1988-1990: Polish Voices*, Basingstoke, 1992, pp.1-34.
[93] *See generally* GINSBURG, T., "Between Russia and China: Political Reform in Mongolia", in *Asian Survey*, 35(5), 1995, pp.462-466.

the Constitution, especially whilst the Republic of China was seen as a member of the Western bloc or the First World? In my opinion, it is unlikely that they would have made such an unsophisticated and unwise decision, be it sincere or otherwise, because Taiwan's national security lay in its qualification to speak out internationally and proclaim that 'Ich bin ein Berliner'.[94]

Two thousand years ago, the proudest boast was '*civis Romanus sum*'. Today, in the world of freedom, the proudest boast is 'Ich bin ein Berliner'. […] Freedom has many difficulties and democracy is not perfect, but we have never had to put a wall up to keep our people in, to prevent them from leaving us.[95] – John F. Kennedy (1963)

6.- Strategic or Sincere Decision

[James] Madison assumed that all individuals are egoists who wish to maximize their power. Clashes of interest between power-maximizing individuals are inevitable. […] Institutional checks and balances – the *vertical separation* of the powers […] and the *horizontal division* of sovereignty through federalism […] – would block any government attempting to act despotically.[96]

If James Madison's argument, which covers modern constitutionalism worldwide, holds, then a sincere decision will only be made when the decision maker has a better choice than what has been chosen, but he or she still chooses the inferior alternative. In other words, when there was no better choice than to democratise the Republic of China peacefully, we have to conclude in the absence of more evidence that democratisation in Taiwan was probably not a

[94] DAUM, A.W., *Kennedy in Berlin*, Cambridge, 2008, p.224.
[95] Ibid., pp.224-225.
[96] DUNLEAVY, P. & O'LEARY, B., *Theories of the State: The Politics of Liberal Democracy*, Basingstoke, 1987, p.14.

sincere decision from the perspectives of modern constitutional jurisprudence and behaviourism.[97] According to John F. Copper:

> The [ruling] KMT and the DPP … took different positions on promoting democracy. The KMT pushed democratization to convince the world Taiwan deserved its support. The DPP advanced the idea that Taiwan was a different place from China and the two were incompatible. President Lee Teng-hui was in a sense caught between those two perceptions.[98]

Copper's opinion of Taiwan's political leaders from the ruling Nationalist Party, KMT, is in line with this article, insofar as they *strategically* 'pushed democratization to convince the world Taiwan deserved its support'.[99] However, there is more evidence to prove that Taiwan's Justices might push democratisation *sincerely* in *Judicial Yuan Interpretation No.261* [1990] – the Justices could defer the case until the decision for democratisation was determined politically through the 1990 National Affairs Conference,[100] because the Judicial Yuan had neither docket control nor any system for deciding each case along a fixed roster of submission (FIFO). In other words, if the Justices did not behave in line with the attitudinal model constructed by Jeffrey A. Segal and Harold J. Spaeth, which 'holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological

[97] President Lee Teng-Hui asserted that he democratised Taiwan because of God's will. Perhaps that is true, although it cannot be proved without God's direct confirmation. LEE, T.H., *Wei Zhu Zuo Jian Zheng: Li Deng Hui De Xin Yang Gao Bai [Be My Witness: Lee Teng-Hui's de Fide Confession]*, Taipei, 2013, p.22.

[98] COPPER, J.F., *The KMT Returns to Power: Elections in Taiwan 2008 to 2012*, Lanham, 2013, p.20.

[99] Ibid.

[100] *See* HUANG, D.K.C., "Judicial Supremacy in Taiwan: Strategic Models and the Judicial Yuan, 1990-1999", PhD diss. in constitutional law, SOAS, University of London, 2016, pp.251-253.

attitudes and values of the justices',[101] then they should not grant a court order for democratisation[102] a week before political negotiation began,[103] suffering political retaliation by doing so.[104] Their best choice was to do nothing, but they did not choose that option. Justice Herbert H.P. Ma recalled Taiwan's peaceful democratisation on 19 July 2013 and said:

> I was one of the Justices who supported the decision of the *Judicial Yuan Interpretation No.261* [1990], and I can tell you why I supported it […] at that time the public opinion in our country was already changed, and the society could no longer accept a state of emergency, so I think the law should be modified. We the Justices had already noticed the changing political atmosphere in which [our] nationals wanted a constitutional reform, whereas our people's desire was just. Therefore, the fifth-term Justices had a common consensus that we should push the country's constitutional and political system towards a necessary reform.[105]

In a nutshell, more evidence is needed if we wish to prove that Taiwan's political leaders democratised the Republic of China *sincerely* rather than *strategically*. This does not mean that Taiwan's political leaders lacked a conscience, but it appears that no better choice was available to them. This also does not mean that only Taiwan's Justices were conscientious in 1990; it is a matter of fact that their sincere decision was proved to be in line with the attitudinal model of judicial

[101] SEGAL, J.A. & SPAETH, H.J., *The Supreme Court and the Attitudinal Model Revisited*, Cambridge, 2002, p.86.
[102] *Judicial Yuan Interpretation No.261* [1990].
[103] *See* HUANG, D.K.C., "Judicial Supremacy in Taiwan: Strategic Models and the Judicial Yuan, 1990-1999", PhD diss. in constitutional law, SOAS, University of London, 2016, pp.251-253.
[104] Ibid., p.253.
[105] Ibid., pp.230-231.

behaviourism.[106] However, one thing is held to be true, that peaceful democratisation in Taiwan represented a collective effort in which the Constitution,[107] the Judicial Yuan, the ruling KMT and the opposition DPP, and the people of Taiwan were all indispensable. The process of democratisation might be explained as follows:

I. The Constitution embraces liberal democracy, but the country was in a state of emergency because of the communist revolution.

II. The people demanded democracy in line with the Constitution due to the influence of UN General Assembly Resolution 2758 (XXVI) (1971).

III. The Justices granted a court order for democratisation *sincerely* in *Judicial Yuan Interpretation No.261* [1990].

IV. The ruling KMT considered democratisation as a political *strategy*, which would safeguard Taiwan from communist China's coercive annexation.

V. Both the ruling KMT and the opposition DPP agreed to democratise the Republic of China peacefully in accordance with *Judicial Yuan Interpretation No.261* [1990].

[106] *See generally* SEGAL, J.A. & SPAETH, H.J., *The Supreme Court and the Attitudinal Model Revisited*, Cambridge, 2002, pp.86-114.
[107] Constitution of R.O.C. (1947).

7.- Conclusion

In the final analysis, the Constitution of the Republic of China embraces liberal democracy,[108] and presents a sophisticated judicial mechanism for practising it,[109] which allowed for the possibility of Taiwan's peaceful democratisation when the people demand it[110] institutionally. In addition, the Republic of China, *Taiwan*, was only a nominal democracy before 1990 because it was in a state of emergency against the People's Republic of China, *China*.[111] Emergency rule[112] and democratisation[113] both took place under the ratification of the Guardian of Constitution of the Republic of China,[114] i.e. the Judicial Yuan. The Justices voted for a state of emergency in 1954,[115] but they switched their position to democracy by reason of *clausula rebus sic stantibus* in 1990,[116] believing that emergency rule had simply become anachronistic.[117]

[108] Constitution of R.O.C. §§ 1-2 (1947).
[109] *Compare* Constitution of R.O.C. § 78 (1947), *with* Constitution of R.O.C. §§ 171-173 (1947); *see also Judicial Yuan Interpretation No.185* [1984] (embodying the concept of judicial supremacy by which the Judicial Yuan as the Guardian of the ROC Constitution has the last word in politics).
[110] *See generally* LEE, L.Y., "Zhan Hou Tai Wan Zheng Zhi Ji Jing Ji De Bian Qian [The Transition of Politics and Economy in Post-War Taiwan]", in *Tai Wan Shi [History of Taiwan]*, Taipei, 2009, pp.282-283.
[111] *See generally* RIGGER, S., *Politics in Taiwan: Voting for Democracy*, London, 1999, pp.55-102.
[112] *Judicial Yuan Interpretation No.31* [1954].
[113] *Judicial Yuan Interpretation No.261* [1990].
[114] *See generally* SZE, V. & TSAI, R.H.C., "The Grand Justice' Role in Process of the R.O.C. Democratic Constitutionalism", in *The Republic of China Constitutional Court Reporter: Interpretations Nos.1-233 (1949-1988)*, Taipei, 2007, pp.699-720.
[115] *Judicial Yuan Interpretation No.31* [1954].
[116] *Judicial Yuan Interpretation No.261* [1990].
[117] Ibid.

We can conclude that Taiwan's peaceful democratisation represents an institutional model in which democracy was suspended by a constitutional authority due to the declaration of a state of emergency,[118] and the key for democratisation depended on whether or not it was still appropriate to maintain that emergency rule.[119] When the political environment, both domestic and international, tended towards democracy,[120] the Republic of China, under the authority of its constitutional court, the Judicial Yuan, democratised institutionally in 1990,[121] leaving the authoritarian Government with two options – either to conduct democratic transition in accordance with *Judicial Yuan Interpretation No.261* [1990], or to tear up the Constitution.[122] From the perspective of modern constitutional jurisprudence, Taiwan's democratisation therefore marks not only the triumph of democracy, but also the victory of constitutionalism.

[118] *Compare Judicial Yuan Interpretation No.31* [1954], *with* Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (1948).
[119] *Judicial Yuan Interpretation No.261* [1990].
[120] *See generally* HUNTINGTON, S.P., *The Third Wave: Democratization in the Late Twentieth Century*, Norman, 1991, pp.3-316.
[121] *Judicial Yuan Interpretation No.261* [1990].
[122] Constitution of R.O.C. §§ 1-2 (1947).

EL DERECHO A LA INMORTALIDAD EN EL CINE

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1. *And death shall have no dominion*

El cine es más grande y más poderoso que la vida, con o sin película de Nicholas Ray de por medio, aunque la presencia de James Mason, que la consideró siempre un "honorable desastre", contribuya decisivamente (Morley, 1989, 116). Lo que el cine en modo alguno resuelve es si esa grandeza consiste en prolongarla hasta el infinito e instalarla en el espacio que pertenece a los héroes, para después ofrecer diversas acepciones de la identidad heroica o, más bien, colocar un espejo delante de ella para que descubramos hasta qué punto desconocíamos quiénes somos. O, por reducirlo a un esquema más simple, el cine no nos obliga a tener que elegir entre John Ford e Ingmar Bergman y entre Gwylin Morgan y Antonius Block, Donald Crisp y

Max von Sydow, igual que, como le decía Albert Camus hace ahora 75 años, en abril de 1945, en la tercera de sus *Cartas a su amigo alemán*, no hay que optar entre Hamlet y Don Quijote (Camus, 1995, 49).

Como fordiano ejerciente, cuento ya con el pretexto para trasladarme a 1941, a *¡Qué verde era mi valle! (How green was my valley!)*, novela de Richard Llewellyn y realización de Sean Aloysius O'Fearna, síntesis céltica insuperable, Cwm Rhondda, la cuenca en donde se extraía carbón y se siguen extrayendo jugadores internacionales de la selección nacional de rugby por excelencia, la galesa. Para recorrer la carretera por la tantas veces me interné, y que, por Pontypridd, Dowlais, y a veces por Aberdare, el pueblo en el que nació el gran Roy Jenkins el 11 del penúltimo mes de 1920 (Jenkins, 1994, 10), conduce desde Cardiff a Hay-on-Wye. Y puedo también entrar en el hogar de la familia Morgan y asistir a su desmembramiento espacial, pero no espiritual, en el tránsito del siglo XIX al XX. Porque, como dice Beth Morgan, contemplando el mapa del mundo que se despliega en su casa para localizar en todo momento a sus hijos, se encuentren en Australia o en Canadá, ella sabe siempre dónde se encuentran todos: "están aquí".

Y Huw Morgan, que tiene el privilegio de acompañar a su padre en el mismo instante en el que deja de existir, escucha entonces por segunda vez en la película que "es un buen hombre", sin duda lo más importante que puede oír una persona en cualquier circunstancia de su vida. Aunque Ford siempre pensara en la frescura de la infancia como atributo supremo de la película (Bogdanovich, 1983, 83). Por eso, cuando el padre y el hijo salen juntos de la mina por última vez, Huw dice:

> "Hay hombres que no mueren nunca; los hombres como mi padre no pueden morir; permanecen en la memoria amados y recordados por siempre".

Así que hay seres humanos que no mueren nunca porque, sencillamente, no pueden morir. El planteamiento es simple, que no simplón: la muerte ha sido derrotada porque los seres humanos no consentimos que prevalezca. Corrobora la idea *El peso del agua* (*The Weight of Water*, 2000), de Kathryn Bigelow, pero esta vez no la novela de Anita Shreve en la que se basa (Shreve, 2002, 29), sino Sean Penn recitando *Y la muerte no prevalecerá* de Dylan Thomas -por cierto, mi muy personal traducción de *And death shall have no dominion*- ante la atenta mirada de Elizabeth Hurley y Catherine McCormack:

> "aunque se vuelvan locos, serán cuerdos
> aunque se hundan en el mar, emergerán
> aunque los amantes se pierdan, el amor no se perderá
> y la muerte no prevalecerá".

Perdón por mi traducción de lector. Dylan Thomas era de Swansea y compañero de alegrías de Richard Burton. Y su fallecimiento le originó también una profunda tristeza y la certeza de su propia mortalidad cuando se produjo en Nueva York el 9 de noviembre de 1953 (Munn, 2008, 87; Rubython, 2011, 306). De hecho, cuando Burton murió más de tres décadas después, y siguiendo sus instrucciones, los poemas completos de Dylan Thomas fueron inhumados con él. Dos inmortales frente a la muerte, y para siempre unidos en ella. Demasiados alicientes, tratándose del peso del agua, como para no sucumbir a la tentación del dulce naufragio en pleno bicentenario de *El infinito* de Giacomo Leopardi. En efecto: en el mar del infinito resulta siempre irresistible la tentación de naufragar.

Con Dylan Thomas y Richard Burton resulta inevitable regresar a Gales, que además este año 2019 ha ganado el *Grand Slam.* Resulta entonces, siguiendo a Llewellyn, Ford y Thomas, que el amor es más fuerte que la muerte. Tradición cristiana, dirá el lector. Richard Llewellyn y Dylan Thomas, sin embargo, acusaban una cierta tendencia a no creer ni en las aspirinas. Y John Ford decía: "soy católico, pero no

muy católico" Pero, entonces, ¿por qué Howard Fast, Dalton Trumbo y Stanley Kubrick, que no eran católicos en absoluto, se ocupan también de la inmortalidad, y en concreto la de Roma, en *Espartaco*, mientras Espartaco sostiene que una persona únicamente debe creer en sí misma y en sus interlocutores, es decir, en todas las personas (*Spartacus*, 1961)? (Fast, 1955, 114). Porque si en algo coinciden dos adversarios políticos que devienen enemigos, como Craso y Graco, y Laurence Olivier y Charles Laughton se toman pero que muy en serio el combate, el único que, en mi opinión, Charles Laughton ganó, pero a los puntos, en toda su insuperable carrera como actor, es en que ambos sirven a la grandeza e inmortalidad de Roma (Spoto, 1991, 246; Coleman, 2005, 318). Espartaco, que es un desclasado que únicamente ansía su libertad, sin saber que sólo aniquilando a Roma podrá obtenerla, sin embargo, es quien conquista la inmortalidad porque consigue que todos sus compañeros supervivientes asuman su identidad. "Yo soy Espartaco" le hace inmortal. Yo soy Roma, dirán también Constantinopla y Moscú, y Roma se hará inmortal igualmente. Mejor dicho: Roma se convertirá en el paradigma pétreo y secular de la inmortalidad.

No me olvidé de Ingmar Bergman, claro. Se me dirá, y con razón, que Bergman parece más obsesionado por la muerte que por la vida, y no digamos por la vida que perdura. Pero se me dirá por quienes son tan viejos como yo, y enfermaron del todo por el cine viendo en cine-clubs de finales de los 70 todas las películas de Woody Allen, el gran admirador y, en ocasiones, como en *La última noche de Boris Grushenko*, (*Love and Death*, 1975), parodiador de Ingmar Bergman. Yo, sin embargo, creo que Bergman celebra la vida en todo su cine. Y, muy especialmente, en una obra de arte que es una auténtica oda a la grandeza de la existencia humana, pero a la grandeza de la persona que realmente somos, y no la máscara de la que nos dotamos, en este caso, paradigmático, un profesor y científico que ha consagrado su existencia a la Universidad, la ciencia y la sabiduría (Luque, 2007, 46): *Fresas salvajes* (*Smultonstället*, 1957), y el indescriptible actor que fue y será siempre Víctor Sjöström, Bibbi Andersson, y la Ingrid Thulin que yo habría de descubrir en *La caída de los dioses* (*La caduta degli dei*, 1969)

de Luchino Visconti, ofreciendo testimonio de la inmensa dulzura que acompaña al final de una vida con sentido que se encamina hacia su coronación, que no su fin.

La vida del profesor y del científico no terminan nunca. La vocación la ocupa por completo. Y eso, como le decía Tomás Moro a Richard Rich en *Un hombre para la Eternidad* (*A Man fo All Seasons*, 1966) de Fred Zinnemann, "lo sabes tú, lo saben tus estudiantes, lo saben tu familia y tus amigos, y lo sabe Dios; no es mal auditorio ese". Por cierto: en España *A Man For All Seasons* abandonó las estaciones y ganó la Eternidad. Las estaciones eran poco para Paul Scofield. Merecía, en efecto, la inmortalidad.

2. El derecho a la mortalidad: Ulises y Damiel

En último término, la inmortalidad, tal y como la concibe nuestro espacio de civilización, es un concepto que obedece a la explícita renuncia del primer hombre digno de tal denominación, Ulises, quien prescinde de la existencia eterna de los dioses para seguir siendo un hombre. La película de Mario Camerini, (*Ulisse*, 1954), con Kirk Douglas en el papel principal y Silvana Mangano como Penélope y Circe, representa ya una muy interesante reflexión al respecto. Por no hablar de la revisión de la figura de Ulises por Alberto Moravia y después por Jean-Luc Godard en *El desprecio* (*Le Mépris*, 1963) Seguramente el tema que compuso Georges Delerue para la Camille que interpreta en la película Brigitte Bardot es la mejor expresión sonora de cómo la inmortalidad se instala en el cine. Bueno: a lo mejor habría que considerar, sin salir del mismo y exquisito compositor, su Largo de *Lo importante es amar (L'important c'est d'aimer*, 1975) de Andrzej Zulawski. Y pensar en las lágrimas que surcan el rostro de Romy Schneider. Seguro que no precisamente por trabajar con Fabio Testi. El rostro de quien asegura que, aunque pueda parecer lo contrario cuando, bajo la presión del director, dice y repite "te quiero", es realmente una buena actriz.

Una mujer que conoce su destino y quiere realizarlo. Ulises, en cambio, no conoce el suyo. Pero en el poema de Tennyson, cuando el largo día acaba, propone a sus compañeros ponerse una vez más a los remos para bogar hacia el hogar de todas las estrellas del Oeste. El Ulises de Tennyson, además, sirve para cerrar una candidatura a la nominación demócrata, como demostró Ted Kennedy en 1980 (Kennedy, 2010, 443) ¿He dicho Kennedy? Apellido y, sobre todo, inmortal estampa de la democracia, confiada, resuelta, responsable y vital, pero también delicada, frágil y vulnerable. Como la vida. Como la inmortalidad. Desafío al lector: cuando el 22 de noviembre de 2063 se conmemore el centenario del asesinato de John Fitzgerald Kennedy, habrá nueva película sobre el magnicidio. Está a punto de nacer su protagonista. 99 años y 4 días tendré yo cuando asista al estreno. Pero Kennedy, conste, es Hamlet y no Ulises.

El mismo planteamiento de la inmortalidad según Ulises es el que aplica Damiel, uno de los ángeles de *El cielo sobre Berlín* (*Der Himmel über Berlin,* 1987), de Win Wenders, historia y guion de Peter Handke, el gran escritor de Carintia, brillante, amada y recordada Carintia de los escritores, y la suprema interpretación (si cabe) del siempre extraordinario Bruno Ganz, quien como ángel puede cruzar el Muro de Berlín, resultando visible, como todos los ángeles, únicamente, para los niños y los hombres de corazón puro. Pero Gabriel se enamora de una trapecista llamada Marion, que interpreta Solveig Dommartin. Y decide convertirse en mortal por amor, sentir cómo la tinta de los diarios se deposita sobre la yema de sus dedos, sentir el peso de sus propios huesos… En la continuación de la película, llamada *Tan lejos, tan cerca* (*In weiter Ferne, so Nah!,* 1993), y cuando a lo mejor el espectador pudiera haber llegado a imaginar que el ángel se había encarnado en un cuerpo celeste, digamos un profesor universitario, Damiel ha tenido el mortal, aunque feliz criterio, de convertirse en un pizzero. Y canta *Funiculí, Funiculá.*

Wenders nos demuestra que el camino de la inmortalidad a lo largo de los milenios, y desde la Hélade de Ulises a la Alemania reunificada de Damiel, es el mismo camino de la mortalidad, porque el motor del proceso, se llame Penélope o Marion, es el amor. El amor ha hecho posible la creación y materialización de un derecho. Y la inmortalidad se convierte en la consecuencia natural del amor al que tienen derecho los seres humanos que habitan en nuestras pantallas desde hace más de un siglo, excepción hecha de las películas monográficamente centradas en el mito de la Vida Eterna. Pero incluso ese mito, se trate del *Drácula de Bram Stoker* (*Bram Stoker's Dracula*, 1992) de Francis Ford Coppola, o del *Frankenstein de Mary Shelley* (*Mary Shelley's Frankenstein*, 1994) de Kenneth Branagh, se fundamentaba en la voluntad del amor de prevalecer sobre la muerte. "El amor nunca muere", decían aquel año 1992 los carteles que anunciaban el estreno de la película, en pleno comienzo de la feliz y soberbia década final del siglo XX.

La publicidad de la película protagonizada por Gary Oldman y Wynona Ryder, más Anthony Hopkins y Keanu Reeves, Annie Lennox en la banda sonora, y la aparición de unas jovencísimas Sadie Frost y Mónica Bellucci, era muy nítida en su mensaje central: "el amor no muere nunca". Las sagas crepusculares posteriores, en su estilo las *matrix* que evocan universos paralelos, los héroes, super-héroes y mutantes, responden al mismo patrón: ¿son mortales el Capitán América, *Superman, Iron Man, Spiderman,* Lobezno, Charles Xavier, Magneto…? Me diréis y con razón que son inmortales porque el negocio lo exige. Y la inmortalidad, entonces, se convierte en un negocio.

John Tolkien retomó el planteamiento de Odiseo en *El Señor de los Anillos.* Los elfos deciden abandonar Rivendel, metáfora de la ausencia de compromiso y de responsabilidad, para asumir el destino de los hombres, y morir con ellos, como tan heroicamente demuestran en el Abismo de Helm en *Las dos torres* (*Lord of the Rings 2. The Two Towers,* 2002), y tanto en el libro de John Tolkien como en la película

de Peter Jackson. El elfo más representativo es Légolas, no Arwen o incluso Galadriel, por mucho que Orlando Bloom sea menos actor que actrices Liv Tyler y, sobre todo, Cate Blanchett. La reciente película de Dome Karukoski sobre *Tolkien* (*Tolkien*, 2019), un tanto fallida por culpa de su muy pasivo y poco creíble reparto, excepción hecha de Colm Meaney y Derek Jacobi, claro, revela con muchos argumentos la omnipresencia de la muerte en la vida de un escritor que era huérfano de padre con tres años, de madre con trece, y que vería perecer a casi todos sus mejores amigos en la Gran Guerra. Adicionalmente, John Tolkien era un convertido al catolicismo que mostró muy explícitamente en *El retorno del rey*, y la película lo manifiesta también, la tensión de inmortalidad cuando Frodo parte, sabiendo que "en lo que más tememos reside siempre nuestra mayor esperanza".

Después de todo, como dice la canción emblemática de *Los inmortales* (*Highlander*, 1985) de Russell Mulcahy, letra y música del doctor en Astrofísica Brian May, "¿Quién quiere vivir por siempre?". Lo llamativo es que el titulo originario de la película que protagoniza, para su desgracia, Christopher Lambert, es *Highlander*. ¿Por qué en España la referencia a las Tierras Altas de Escocia se suprime, y se pone el acento en la inmortalidad de sus protagonistas? De la Eternidad de Tomás Moro a la inmortalidad de Connor MacLeod. En España no somos especialmente solemnes, y nuestros académicos no son llamados "inmortales" como en Francia. Además, como reitera la película, "sólo puede quedar uno", es decir, la expectativa de la inmortalidad es tan agónica y dramática como limitada. Y, sin embargo, o por esa misma razón, son "los inmortales" quienes se apoderan de la película. Es el acento en el sentido de una inmortalidad secular o, todo lo contrario, el elemento que hace no ya soportable, sino casi vigente una película que, transcurrido más de un tercio de siglo desde su estreno, y a pesar de padecer todas las taras del cine de la década, atesora una rara y difícilmente definible atmósfera de permanente actualidad. Se diría que cuando una película reflexiona sobre la inmortalidad, tiene esa cualidad añadida y, claro, añadida para siempre.

3. La memoria y la muerte como posesiones: en el espejo, reflejos viajeros

Esta reflexión es mortal porque tiene término, O, como toda reflexión que termina, todo lo contrario. No hay que ser un lector devoto de T. S. Eliot para saber que, en la vida humana, cada paso que nos aproxima a su final comporta un retorno a su comienzo. La vida en sí misma es un interminable comienzo. Yo regreso al cine-club, en mi caso el Cine-Club por excelencia, el del Instituto Besaya de Torrelavega, que el curso 1981-1982 se convirtió, con un promedio de 540 entradas vendidas por sesión, en el cine-club con más asistentes de toda España. En mi primer curso, el 1978-1979, se pasó *El desencanto* (1976), de Jaime Chávarri. Recuerdo el impacto que la familia Panero Blanc me produjo con 14 años recién cumplidos. Obviamente, no olvidaré nunca la irrupción de Leopoldo María Panero en nuestras vidas, y en la vida, me atrevería a sostener, de toda una generación (Utrera, 2008, 61). Pero cuando leí a Juan Luis Panero decir que "sólo son tuyas -de verdad-la memoria y la muerte", el antipático Juan Luis que languidecía y al mismo tiempo se rebelaba ante el éxito y la brillantez de su segundo hermano, más cargante, más viejo, más decrépito y más feo, como una suerte de Antoine Blanche *avant la lettre* frente a Sebastián Flyte, en su inolvidable merienda en el Oxfordshire, me brindó la clave que me permite explicar el porqué del anhelo de hacer inmortales a las personas, las vivencias, las alegrías y las risas. Dueños de la muerte y de la memoria, apostamos por la vida y el amor. Se le llama ser persona y ciudadano.

La clave que permite entender que la despedida de Katie y Hubbell, de Barbra Streisand y Robert Redford enfrente del Plaza de Nueva York en *Tal como éramos* (*The Way We Were*, 1973), de Sidney Pollack, ese *"See yo, kid"*, es, en efecto, la certeza que siempre se están viendo quienes se aman, porque, en realidad, nunca dejaron de estar juntos. Con y sin canción de la Streisand, letra y música compuestas por Hamlisch, Bergman y Bergman. Porque, a pesar de la canción, no son

únicamente las risas cuanto evocamos. Además, no evocamos: celebramos. Celebramos la vida.

Porque esto no va de eternidad. Esto no va de inmortalidad. Esto va de vida. La sonrisa de las figuras recumbentes de los sarcófagos etruscos de Volterra en *Sandra* (1965), de Luchino Visconti, y la plenitud de Claudia Cardinale, César Franck de fondo, una sonrisa siempre considerada enigmática, casi siempre cínica o, al menos, irónica, puede así interpretarse de una manera mucho más simple: igual que el legado cívico y democrático del padre de Sandra ha sobrevivido a sus asesinos, la sonrisa de los etruscos ofrece testimonio de una existencia que sobrevive también a su propia extinción como pueblo (Schifano, 2009, 484) Han vivido y han amado, y, como decía nuestra María Casares cuando evocaba a Albert Camus, por eso estarán siempre juntos y nunca solos. Porque "la falta más grave" es "adormecerse, distraerse y apartarse de la vida" (Casares, 1981, 342). María Casares que, por cierto, había interpretado a la Muerte en el *Orfeo* (1945) de Jean Cocteau. Sí: Orfeo también prevalece sobre la muerte. Sobre todo, cuando es interpretado por Jean Marais en los años siguientes al final de la II Guerra Mundial (San Miguel, 2019, 111).

Porque el cine, sobre todas las cosas, como todas las infinitas formas de la felicidad, va también de vida y de celebración. Es un homenaje permanente e inagotable a la vida. Diría que el mejor testimonio reciente de hasta qué punto lo constituye *Roma* (*Roma*, 2018), de Alfonso Cuarón. Cada uno de sus universos microscópicos, la sublimación de la vida tal y como la entendía Marcel Proust, es decir, como una infinita masa de detalles en donde se funden la peripecia personal y la comunitaria, los sentimientos intransferibles y los que integran un sistema vital, el garaje y la playa, el hogar y el espacio que pertenece a la historia, el microscopio y el espejo. Cleo y Sofía. Yalitza Aparicio y Marina de Tavira.

Y, con ellas, habitando y creando en nuestro mismo y maravilloso idioma, Fede Moura, ahora hace treinta años prematura y cruelmente fallecido no sin haber demostrado ya, y ampliamente, que era el mejor compositor de canciones rock de la historia en castellano, desgranando la exquisita *Imágenes paganas* al frente de su banda de La Plata, *Virus,* para recordarnos que el espejo nos ofrece reflejos viajeros. Fragmentos de inmortalidad como los *Fragmentos de Estado* de Jellinek. Mientras, Moura sigue cantando que "un remolino mezcla los besos y la ausencia". En *El desencanto* Leopoldo María Panero decía que "en la infancia vivimos y después sobrevivimos". Seguramente, de la inmortalidad venimos, y por eso a ella pertenecemos. Desde Roma y hasta *Roma.* Sobreviviendo a las ausencias y a los besos. Pero, a pesar de todo, o gracias a las ausencias y a los besos, vivos.

Porque el cine concede a los seres humanos, en efecto, el derecho a la inmortalidad. El tránsito a la inmortalidad del cine puede contar con banda sonora de Nino Rota (Rota) e interpretación de Burt Lancaster como en *El gatopardo* (*Il Gattopardo,* 1963) de Luchino Visconti, cuando entre la contemplación de *La muerte del justo* de Greuze y el paso del viático al amanecer y el recitado de Giacomo Leopardi, con su *fedele stella,* el príncipe de Salina presiente su propia muerte, y más que la presiente en la novela de Lampedusa, cuando el reloj de arena de la existencia constata cómo sus granos se desploman, esta vez, de uno en uno, y comienza a contar los años que ha vivido, y los va enumerando y desglosando en todas sus fracciones temporales (Lampedusa, 1984, 254) Puede también ocuparse del fondo musical Ennio Morricone, mientras el Padre Gabriel O'Donnell-Jeremy Irons acude al encuentro con la muerte en una reducción jesuita en el Paraguay en *La misión* (*The Mission,* 1986) de Roland Joffé, aunque novela y guion sean de Robert Bolt.

Yo prefiero pensar en el final de *El hombre tranquilo* (*The Quiet Man,* 1952) de John Ford, música de Víctor Young adaptando *Patrick's day,* cuando todos los protagonistas saludan al espectador, llenos de vida, sonrientes y confiados. Tras el fallecimiento de Maureen O'Hara

en 2015 ninguno se encuentra entre nosotros. Perdón: ¿he dicho que Michaeleen Og Flynn, Mary Kate Danaher, el reverendo Playfair, el padre Lanergan, Red Will Danaher o Séan Thorntorn no se encuentran entre nosotros? ¿He dicho que Barry Fitzgerald, Maureen O'Hara, Arthur Shields, Ward Bond, Víctor McLaglen o John Wayne están muertos? Pero, ¿acaso alguien puede siquiera llegar a concebir algo así? ¿Son acaso mortales las formas de la felicidad? ¿Son acaso mortales sus protagonistas?

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COMPARATIVE STUDY ON INSTITUTIONAL AND MILITARY CHANGES IN XV CENTURY EUROPE

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Abstract: The article compares the changes in war and its relation with the creation of the State. The issue is studied as a phenomenon not only Hispanic but European, with which it is compared. In this way the work analizes the increase of state power in France, as a result of the professionalization of the Army, in England, following the Wars of the Roses, the Hungarian dynastic crisis and the mid-century war of succession XV in the duchy of Muscovy.

Keywords: War, State, military changes, Modern Age.

1.- Introduction

The transformations in the area of war and their correlations with the appearance of modern, State structures[1] were not a

[1] On the process that led to the appearance of the state as a form of government, see MARTÍNEZ PEÑAS, L., "El camino hacia el Estado como forma de organización político-social", en *Revista Aequitas. Estudios sobre Historia,*

phenomenon circumscribed to the Spanish Monarchy of the Catholic Kings[2]. Not even in the greater part of the innovations can it be considered that Isabella and Ferdinand were pioneers in their introduction and implementation: France and England had permanent troops before Spain; Hungry opted to promote light cavalry instead of men of arms before the Spanish Monarchy; the same Hungarian kings used the subsidies from the assemblies to finance their campaigns; the Muscovites introduced artillery factories and their massive use in the siege war before the war of Granada; the Burgundians used closed formations of regiments, etc.

2.- The France of Louis XI and Charles VIII[3]

France was one of the first States to initiate the professionalization of the army after more than a hundred years of conflict with England. With so much military pressure, the military institutions evolved towards formulas more and more efficient, coinciding with the step from a purely feudal system to what is called 'bastard feudalism', or *"féodalisme bâtard"*, where modern elements co-existed with elements of the medieval court[4].

Derecho e Instituciones, nº 11, 2018; and *Nolite te bastardes*. Valladolid, 2019.

[2] On that subject, see MARTÍNEZ PEÑAS, L. and FERNÁNDEZ RODRÍGUEZ, M., *La guerra y el nacimiento del Estado moderno*. Valladolid, 2014. War, as with diplomacy, is an essential element of international relations. On that subject, see MARTÍNEZ PEÑAS, L., *…Y lo llamarán paz*. Valladolid, 2018; and *El invierno*. Valladolid, 2019.

[3]This synopsis summarizes the content of MARTÍNEZ PEÑAS, L., and FERNÁNDEZ RODRÍGUEZ, M.: "Guerra, ejército y construcción del Estado Moderno: el caso francés frente al modelo hispánico", en *Glossae*, nº 16 (2013).

[4]The concept of "bastard feudalism" has its origins in British history to define the social, economic, and political system of England during the last years of the Hundred Years' War, and especially, of the Wars of the Roses.On that subject, see: MACFARLANE, K. B.: "Bastard feudalism", in MACFARLANE, K. B., *England in the fifteenth century*. Londres, 1981.

Louis XI and his successors reinforced the power of the municipalities so that they could exercise a leveling influence in each one of the regions. The French cities were allied with the Crown against the nobility[5]. The monarch created a governmental structure that undermined the power of the high nobility, creating a council in which, along with the prelates and the important gentry, were included the lesser nobility and the plebeians: members of the parliament, jurists, bankers, and even the doctors of the king[6]. They also made efforts to control the regional parliaments, entities that present common elements with the Castilian Court but of a regional character.

Louis XI created a powerful fiscal system, an essential element in the processes of centralization. Throughout his reign, the fiscal revenues went from 1,200,000 pounds to 4,600,000, an increase of nearly 400%. The majority of the taxes were levied on commerce and exchanges—as a system posterior to the Catholic Kings, so that it is not odd that the Crown promoted commerce, controlled the exportation of precious metals in agreement with the mercantilist doctrines[7], abolished the regional taxes from provinces like Normandy and Languedoc substituting them for a fixed, annual contribution to the Crown[8]. Close to half of the State resources were invested in the army, a constant until the revolution of 1789.

The redefinition of the State set forth by Louis XI was seen to be threatened by the war of the League of the Public Weal, a war of local powers against the Crown, of the periphery against the nucleus of the State[9]. The central figure of the trouble is Charles, younger brother of

[5]KENDALL, P.M.: *Louis XI.* Barcelona, 1971 p.16. Louis XI has been defined as "a bourgeois king" (CALMETTE, J.:*Le grand régne de Louis XI.* Paris, 1938, p.19.

[6]LE ROY LADURIE, E.: *L'État Royal 1460-1610*, Paris, 1987 p. 75.

[7] CHEVALIER, B. y CONTAMINE, P.: *La France à la fin du XV siècle; renouveau et apogée.* Paris, 1985, p. 84.

[8] LAVISSE, E.: *Histoire de France*, vol. IV, Paris, 1913 p. 337.

[9] LE ROY LADURIE, E.: "Louis XI: Le premier des grandes politiques", in

the king, supported by the same gentlemen that had supported Louis in the uprising against his father in 1440. These nobles controlled extensive territories configured as true States[10]. The league sought, in the framework of a medieval ideology, the *de facto* autonomy for Brittany and Burgundy and aspired to control the finances, appointments, the army, and the personage of the monarch[11].

The League gathered together the big families, descendants of the royal family or allied with them through marriage: Burgundy[12], Bourbon, Berry, Alecon, and Brittany, a total of twenty-one important lords capable of uniting 50,000 soldiers. The totality of the important cities of the kingdom remained loyal to the Crown: Amiens, Reims, Rouen, Paris, Orleans, Poitiers, Lyon, Bordeaux, and Montepellier[13].

Louis XI conceded part of the demands of the League in the Treaty of Conflans[14], but it was not enough to end the war, which resumed in 1467. The professional army created by Louis XI gave him a decisive advantage[15], defeating the League using some resources that call attention to themselves for their modernity: to the army with a permanent nucleus, we have to add the use of centralized fiscal instruments, such as the kingdom's silver reserves; guerilla tactics in

Figaro Litterarie-Histoire, Essais, from September 27, 2001.

[10] The nucleus of the real power was the territory of Ile-de-France (CALMETTE, J.: *Le grand régne de Louis XI*. París, 1938, p. 37).

[11] For Lavisse, the war was a series of tricks and treasons perpetrated by feudal lords in their own interests (LAVISSE: *Histoire de France*, vol. IV, p. 343).

[12]The Duke of Burgundy, Phillip, was not in favor of the confrontation, but, already old, let himself be influenced by his aggressive heir Charles—future Charles the Bold—for which he asked the parliament for a subsidy and called up the feudal Burgundian conscriptions (HARE: *The life of Louis XI*, p. 101).

[13] KENDALL: *Louis XI*, p. 126.

[14]MICHELET, J.: *Louis XI et Charles le Temeráire (1461-1477)*. Paris, 1853, p.15.

[15]"The Burgundian cavalry did not have any other school than the luxurious jousts in the marketplace of Bruges." (KENDALL, P. M.: *Louis XI*. Barcelona, 1971, p. 142).

the territories under enemy control; propaganda; and the exploitation of the support of the king among the rising "opinion nationale"[16]. At the end of the war, France had lost part of what it had won in the previous years and the security on the roads was nonexistent. The royal armies were practically annihilated given that the year-long delays in payments turned the combatants into plunderers[17].

In 1470, Louis XI decided to finish with the duke of Burgundy. In January of 1497, the army invaded Picardy, Amiens, Roye, and Montdidier, initiating a long war, which was decided in Nancy when the duke of Burgundy, Charles the Bold, died leading a cavalry charge. The Burgundy that his daughter Mary inherited was surrounded by enemies, ruined, militarily destroyed, and without allies. The Sates General of the Netherlands swore fidelity to Mary, but they obtained the right to gather without royal summons and to oppose declarations of war. Mary of Burgundy married Maximilian of Austria, which established the control of the Hapsburg over the greater part of the domains of the duchy of Burgundy.

The death of Louis XI began a new period of turbulence in France. His successor, his son Charles VIII, was thirteen years old and during the following eight years the kingdom was left in the hands of his older sister, Ann, and her husband, Pierre of Beaujeu, brother of the duke of Bourbon. A fight unleased in the Court for the control of the regency between bands led by the duke of Orleans, the duke of Bourbon, and the duke of Lorena. The situation led to a civil war between the regents and the faction led by the duke of Orleans, allied with the duke Francis II of Brittany. The advantages of an army with a professional nucleus were made manifest in Saint-Aubin-du-Cormier,

[16]The middle classes, at the beginning of the trouble, supported the League due to the complaints against the fiscal taxes imposed in the kingdom; but, after the agreements of 1467, at the renewal of hostilities, the population supported the Crown (WILLERT, P. F.: *Thereign of Lewis XI*. Londres, 1836, p. 86).
[17] LAVISSE: *Histoire de France*, vol. IV, pp. 350, 405-406.

on July 27, 1488, when the artillery and the troops of the Crown defeated their enemies.

The last big conflict defining the internal space of France was that of Brittany. Until 1341, Brittany was a domain of the kingdom of France, but that changed after five autonomist dukes. The Crown's patience ended when, in 1488, the troops of duke Francis II joined those from Orleans. Defeated, the people of Brittany signed the Treaty of Sablé, which stipulated that the daughters of the duke of Brittany could not marry without the consent of the king of France. The death of Francis one month later unleased a political fight for the marriage of his daughter and heir, Ann, who was thirteen years old. The complaints from the king of France regarding the guardianship of Ann were blocked by the foreign troops sent by the Catholic Kings, Maximilian of Austria, and Henry VII of England.

Ann, in 1490, agreed to marry Maximilian of Austria, but the marriage never took place given that Charles VIII used the violation of the Treaty of Sablé to invade Brittany in the so called "crazy war", forcing the duchess to marry him, uniting the lineages of France and Britain and integrating the dukedom with the patrimony of the kinds of France through the Banns of Marriage of 1532[18].

3.- The England of the Roses

For England, the XV century was a period of constant war, in the first half for the confrontations with France, and in the second half, for the civil wars called the Wars of the Roses. The cause of these was the fight for the throne between the House of Lancaster and the House of York. Nonetheless, there were systematic causes: In England, the king was in charge of a fiscal and legal system that had grown throughout the XV century for the necessities of the Hundred Years War. The

[18]LE ROY LADURIE: *L'État Royal*, p. 98.

nobility reacted with violence, accusing the monarch of having failed in his obligations as guarantor of the properties of the nobility lost in France[19].

The situation worsened while the Hundred Years War approached its conclusion; the decade of 1450 ended with the eruption of the war between Henry VI, of the House of Lancaster, and the nobility, led by the duke of York[20].

The English model gave importance to parliament, which neither the Spanish Courts nor the French States General had. After the battle of St. Albans, the Parliament left the government in the hands of York in the role of Lord Protector, but some months later the *Act of Resumption* was approved, which returned to the monarch the control of the finances[21]. York renounced and Queen Margarite of Anjou assumed control of the government, removing the officials named by the lord protector. The queen created her own power base centered around the Midlands, the Welch border, and Wales itself, grouping together the enemies of York[22]. The attempt to assassinate the Count of Warwick, a key member of the York supporters, caused the nobility of the House of York to abandon London and rebel against the queen, being defeated on Ludford Bridge.

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[19]CARPENTER, CH.: *The wars of the Roses. Politics and the constitution in England, c. 1437-1509*. Cambridge, 1997, p. 27.

[20]York had been isolated from the Court in the year 1452 after having pressured the king for the control of the administrative system (GROSS, A.: *The dissolution of the Lancastrian kingship. Sir John Fortescue and the crisis of monarchy in fifteenth-century England*. Stamford, 1996, p. 14). The duke retired to his Irish domains. (GILLINGHAM, J.: *The wars of roses. Peace and conflict in fifteenth-century England*. Londres, 1983, p. 72).

[21] Margarite of Anjou had married the king in 1444, at fifteen years of age, and the wars of the Roses took place at the peak of her youth, at the height of her character and of her capabilities (GROSS: *The dissolution of the Lancastrian kingship*, p. 46).

[22]CARPENTER: *The wars of the Roses*, pp. 141-142.

In 1460, after reconstructing their power in Calais, the York supporters invaded England, defeating the royal army in Northampton, capturing Henry VI, and executing Buckingham Shrewsbury and other dignitaries of Lancaster. York demanded the throne before the Parliament, but the Parliament rejected the petition of the duke, alleging temporary prescription for having waited almost sixty years without complaint before reclaiming their rights[23]. The Parliament offered a compromise solution, unsatisfactory for everyone: to keep Henry VI on the throne but with the duke of York governing as lord protector, proclaiming the duke heir to the throne.

A coexistence of that nature was unsustainable and the war resumed. On December 30, 1461, in Wakefield, York and his second son, Edmund of Rutland, died in battle. The eldest son of the duke, Eduard, new duke of York, reversed the situation on March 29, 1462, in the battle of Towton, the bloodiest ever fought on British soil, becoming king Eduard IV, despite the fact that the previous king remained living, taking refuge in Scotland, though he was captured in 1465 when he tried to recover his throne.

The year 1469 saw uprisings against the fiscal pressure and with the rupture of the York faction at Warwick's confronting the king for refusing to authorize the marriage of his sister with the count of Oxford. Chaos took over the island. To the internal war of the House of York, numerous rebellions joined together in favor of Henry VI, imprisoned in the Tower of London. The alliance of the Lancaster and the count of Warwick returned freedom and the throne to Henry VI. It was a fleeting parenthesis: Eduard IV defeated his enemies, and Henry VI, Warwick, and his brother Montagu were executed.

[23]LITZEN, V.: *A war of roses and lilies. The theme of Succession in sir John Fortescue´s works*. Helsinki, 1971, p. 10.

Eduard distributed the lands of the defeated among those who were loyal during the difficult times. Entire sectors of the aristocracy were removed from political and economic power. One of the most favored nobles was Richard of Gloucester, who received ample extensions of land in the north of England, a difficult and violent area, which was the bastion of the Lancaster and close to the unstable Scottish border. Richard built a private military apparatus without raising suspicion in the Crown[24].

On April 9, 1483, Eduard VI died suddenly. The heir, Eduard V, was a child of twelve and the limits of the York power circle had left him without a base in which to sustain a succession to the throne. Richard of Glouster went to London leading his troops and took the king under his custody, obtaining the appointment of Lord Protector. His government turned tyrannical. At the end of June, Gloucester reclaimed the throne despite the fact that, "It is difficult to justify the overthrow of a king that has done his work badly, but it is impossible to justify the overthrow of the son, still without having been crowned, of a king that governed well"[25]. Eduard V and his younger brother disappeared into the Tower of London, presumably assassinated by order of Gloucester.

The rein of Richard III, created through force rather than by right, was not long: the duke of Buckingham led a revolt in the autumn of 1482 in which both York as well as Lancaster joined together against the usurper, defending the right to the throne of Henry Tudor, the only living person who still had royal blood. On August 22, 1485, in Bosworth, charging against the enemy army, Richard III died, and Henry Tudor became Henry VII of England, ending nearly three decades of civil wars[26].

[24]CARPENTER: *The wars of the Roses*, p. 184.
[25]CARPENTER: *The wars of the Roses*, p. 211.
[26] Some authors have tried to put into context the extension and virulence of the wars of the Roses. Among them, John Gillingham is worth highlighting, who sustains that England was the most pacific country in the world in the XV

One of the causes of the wars of the Roses was that the growing royal power forced many nobles to make decisions that were incompatible with their own personal interests, their class loyalties, and their family relations. Queen Margaret tried to juggle an increase in the power of the Crown as an institution with the construction of a personal, territorial power around Coventry in the lands of Lancaster. That had the effect of converting the king, in the eyes of the nobility, into a private subject: to put it one way, he was duke of Lancaster before he was king of England, precisely the notion of medieval monarch—*primus inter pares*—that the previous kings had tried to overcome[27].

4.- The Hungry of Hunyadi and Corvinus

In the XV century, the feudal Hungarian monarchy experienced a dynastic crisis together with a process in which the nobility snatched from the crown a part of their resources by way of manorialism; so that crown went from being the owner of 15% of the land to only 5%. The nobility doubled its domains until controlling 40% of the kingdom. The cause was the concession of lands to the nobility in compensation for military services[28].

The dynastic crisis worsened in 1439 when King Albert died. The Garai and Cilli lineages supported his widow, Elizabeth, and her posthumous son, Ladislaus. Contrarily, the aristocracy that emerged in the kingdom previous to Albert—that of Sigismund of Luxembourg[29]-

century, given that in the interior almost fifty years of internal peace passed between the revolt of the Percy and the beginning of the war of the Roses; and even those, according to the author, were only conflicts of an intermittent and limited nature. (GILLINGHAM, *Thewarsof roses. Peace and conflict in fifteenth-century England*, p. 15).

[27]CARPENTER: *The wars of the Roses*, pp. 150-154.

[28]MAKKAI, L.: "The independent Hungarian feudal monarchy to the battle of Mohacs (1000-1526)", en VV.AA: *A history of Hungary*. Corvina, 1973, p. 93.

[29] The entry of Sigismund to the throne had been complex: in 1382, at the death

-demanded the separation of the Hungarian crown from the Austrian dynasties, inviting King Wladislaw II of Poland to assume the throne. The civil war erupted in 1440 and lasted for two years. The conflict transcended the question of dynasty to become a fight between the high nobility and the lesser nobility supported by the cities, desirous of a strong king as a shield against the ambitions of the nobles. But Elizabeth's army was annihilated in Bátaszék[30].

Wladislaw managed to crown himself king, but the supporters of Ladislaus maintained part of the country, protected by the emperor Frederic III. Large regions stayed in the hands of feudal lords, functioning as independent principalities, and the Bohemian mercenary Jiskra retook a large northern strip of Hungry. It is in this context of dismemberment of the state when János Hundayi,Transylvanian commandant who helped the enemies of Wladislaw[31] began to make

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of the king of Hungry and Poland, Louis I, the Polish nobles were against his daughter Mary being heir to both thrones. The queen mother, Elizabeth, achieved that the Polish throne passed to prince Jagellon of Lithuania, who adopted the name of Wladislav II of Poland and inaugurated the Jagellon dynasty. Simultaneously, the Hungarian throne passed to Sigismund of Luxembourg, margrave of Brandembourg and son of the Emperor Charles IV. The queen mother did not accept this line of succession and invited to the Hungarian throne Louis of Orleans while the majority of the Hungarian nobility rejected the continuation of the feminine line of succession, which would have made King Charles of Durazzo, king of Naples, last male member of the House of Anjou, who had governed Hungry in a previous epoch. In the subsequent anarchy, Charles managed to be crowned, but was assassinated one month later. Sigismund of Luxembourg returned to Hungry with the help of his brother, king of Bohemia, and was crowned king in March of 1387 (KONTLER, L.: *A history of Hungary. Milennium in Central Europe*. New York, 2002, p. 101).

[30]ÉNGEL, P.: "János Hunyadi: The decisive years of his career, 1440-1444", en BAK, J. M., KIRALY, B. K., (ed.): *From Hunyadi to Rákóczi. War and society in late medieval and early modern Hungary*. Nueva York, 1982, p. 116.

[31] Some authors sustain that Hunyadi could have been the illegitimate son of Sigismund of Austria, in whose court Hunyadi had lived as a child (MAKKAI:

himself known. Hunyadi had been educated as a *condottiero* in the Italian wars, to later reach notable prestige, already at the service of the Hungarian crown fighting the Turks. Hunyadi took control of the south of the country, helped by Miklos Ujlaki, and received important places, like Temesvarand and Belgrade[32]. In order to attract him, King Wladislaw named Hunyadi commandant of his armies. Hunyadi outfitted an army and launched an attack against the Turks, who had invaded Transylvania in 1442, repelling them; when the sultan Mehmet II prepared a large army in order to avenge this defeat, Hunyadi crossed the Carpathian Mountains with an army made up of 15,000 Hungarian soldiers and mercenaries of diverse origins, managing to throw the Turkish troops into disarray before they were in conditions to go on the offensive[33]. Under the influence of Hunyadi, and encouraged by the successes the year before, the king put himself at the head of a great offensive against the Ottomans, which succeeded in recovering Nish and Sofia, even though they had to retreat before the coming of winter. The next year, a new Hungarian offensive ended in an unprecedented disaster, when in Varna, Wladislaw's army was crushed by the Turks in a battle in which the king himself lost his life.

The king gone, the Hungarian norms of retribution recognized the child Ladislao of Austria, loser of the previous civil war, and named Hunyadi[34] regent. When the king took over the government in 1452, the general remained at the head of the army and led, together with the

"The independent Hungarian feudal monarchy to the ttle of Mohacs (1000-1526)", p. 96).

[32]ÉNGEL: "János Hunyadi: The decisive years of his career, 1440-1444", p. 118. 65 years passed before the Turks were in conditions to undertake another successful attack against her (KONTLER, L.: *A history of Hungary. Milennium in Central Europe*. New York, 2002, 118).

[33] The Hungarian historiography knows these actions as "the long campaign" (ÉNGEL: "János Hunyadi: The decisive years of his career, 1440-1444", p. 107.)

[34] Hunyadi was offered the crow, but he rejected it (ÉNGEL: "János Hunyadi: The decisive years of his career, 1440-1444", p. 115).

papal representative John of Capistrano, the offensive that was able to save Belgrade from the Turks who had besieged it. Hunyadi died shortly after this last victory, victim of an epidemic[35].

The death of Hunyadi, the Turkish threat, and the youth of the king shortened the internal balance of the kingdom. Hungry plunged into a new conflict between aristocratic factions. Members close to the Hunyadi lineage assassinated the count Ulrick Cilli. In retaliation, the Cilli managed to have Hunyadi's sons called to Buda, where the eldest was executed and the younger, Matias, imprisoned. Hunyadi's widow and her brother then took up arms against the crown. Ladislao V escaped to Prague, where he would die in exile at 17 years of age and without an heir[36].

The Hungarian factions came to an agreement and the authorities elected as Monarch the surviving son of Janos Hunyadi, Matthias, who would be known as Matthias Corvinus[37]. The designation of Matias brought peace. The Emperor did not accept the coronation of Hunyadi's son because it would have separated the House of Austria from the line of succession. In this way, a long series of wars began between the Emperor, who left the management of the Hungarian and Bohemian campaigns in the hands of his son and heir, Maximilian of Austria, and Matthias Corvinus' Hungry[38].

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[35]ÉNGEL: "János Hunyadi: The decisive years of his career, 1440-1444", p. 120. Jiskra was one of the few commandants, outside of the Turks, capable of facing up to Hunyadi, who never defeated him and could not force him to swear loyalty to Ladislao (KONTLER: *A history of Hungary*, p. 115.).

[36]MAKKAI: "The independent Hungarian feudal monarchy to the battle of Mohacs (1000-1526)", p. 99.

[37]The King of Bohemia, Jorge Podiebrad, freed him from his prison in Prague—where Ladislao had taken him in his escape—with Matthias' promise get married to his daughter Catalina (KONTLER: *A history of Hungary. Milennium in Central Europe*. p. 119).

[38] BENECKE, G.: *Maximilian I (1450-1519)*. Londres, 1982, p. 32.

Matthias, called "the second Atila"[39] by his enemies, became the great reformer of the Hungarian State, making decisive steps towards the centralization of the monarchy and the administration. The rejection of the Jagellon of Bohemia and Poland, and of the Habsbourg, submerged Hungry in costly wars which led to the creation of a permanent army. The international considerations and the defensive wars increased the fiscal pressure with the consequent development financial apparatus of the state. At the death of Corvinus, the modifications in the public professions and in the army were not continued by his successors[40], preventing Matthias's revolution from taking the fruits of modernity to Hungry[41], and leaving the country once again submerged in a fight for power between Maximilian of Austria, the two Jagellon brothers, kings of Bohemia and Poland, respectively, and Queen Beatrice of Naples—daughter of Ferdinand I of Naples and second cousin of Ferdinand the Catholic, widow of Matthias, who aspired to transmit the right to the throne to her hypothetical new husband, in this way becoming one of the most attractive marriage in Europe[42].

Corvinus consolidated his power in his army, hybridizing medieval ways with professional elements. The Hungarian army of the XV century had three elements: feudal conscriptions, *militia portalis*, and professional mercenaries[43]. The so-called *militia portalis,* whose

[39]ÉNGEL: "János Hunyadi: The decisive years of his career, 1440-1444", p. 103.

[40] BAK, J. M.: "Politics, society and defense in medieval and early modern Hungary", en BAK, J. M., KIRALY, B. K., (ed.): *From Hunyadi to Rákóczi. War and society in late medieval and early modern Hungary*. Nueva York, 1982, pp. 11-12.

[41]KIRALY, B. K.: "Society and war form mounted knights to the standing armies of absolute kings: Hungary and the West", en BAK, J. M., KIRALY, B. K., (ed.): *From Hunyadi to Rákóczi. War and society in late medieval and early modern Hungary*. Nueva York, 1982, p. 26.

[42]KONTLER: *A history of Hungary. Milennium in Central Europe*. p. 130.

[43]RÁZSÓ, G.: "The mercenary army of King Matthias Corvinus", en BAK, J.

name in Hungarian was *telekkatonaság*, had been created by Sigismund, and continued existing uninterruptedly until the year 1715[44]. This kind of militia from the cities lost importance in the military structure of Corvinus, centered on a nucleus of mercenaries known among his contemporaries as *Acies Negri* or *Exercitus Nigrorum*: the Black Army, an international army in which Hungarians, Poles, Czechs, Bohemians, Germans, and Slavs served. They had equipped their operative capacity with the Ottoman janissaries or with the disciplined infantry of the Hussites; nonetheless, differing from these cases, the majority of Corvinus' mercenaries were light cavalry, in response to the Turkish tactics. Under Corvinus, the Hungarian army developed an efficient, tactical doctrine that included the collaboration of the infantry, cavalry, and artillery, to which, assuming equal conditions, no enemy army was able to face. Only the Turks, with their overwhelming superiority in resources, were able to contain the *Acies Negri* that came to take Vienna on two occasions.

The principle problem the king had to resolve was economic: Hungry lacked the resources to maintain such permanent military machinery. For that they needed to obtain financial resources from abroad[45]. Furthermore, they began to raise money more and more frequently with subsidies from the kingdom, for a quantity equivalent to five times the ordinary assets, an exhausting financial effort for Hungry[46].

M., KIRALY, B. K., (ed.): *From Hunyadi to Rákóczi. War and society in late medieval and early modern Hungary*. Nueva York, 1982, p. 126.

[44]BOROSY, A.: "The militia portalis in Hungary before 1526", en BAK, J. M., KIRALY, B. K., (ed.): *From Hunyadi to Rákóczi. War and society in late medieval and early modern Hungary*. Nueva York, 1982, p. 63.

[45]RÁZSÓ: "The mercenary army of King Matthias Corvinus", pp. 127-132.

[46]KUBINYI, A.: "The road to defeat: Hungarian politics and defense in the jagiellonian period", en BAK, J. M., KIRALY, B. K., (ed.): *From Hunyadi to Rákóczi. War and society in late medieval and early modern Hungary*. Nueva York, 1982, pp. 160-161.

5.- The enlargement of the duchy of Muscovy

For Moscow, the first half of the XV century came marked by a civil war for the succession to the throne, which lasted from 1425 to 1453, when Vasily II managed to assure the throne, acquiring the monopoly of the armed forces and destroying most of the other important princes.

The origin of the war was the collision of two systems for the designation of the heir: the traditional, Muscovite, vertical succession and the lateral election system of Mongol origin, implanted by the Golden Horde by converting Muscovy into a vassal state, for which it made leader the oldest male of the governing generation—that is, that the brothers of the dead leader had priority over his sons. Said vassalage still remained in the XV century, but the Muscovites had gradually abandoned the Mongol system of succession[47]. The last case of lateral succession, that of Ivan II after the death of his brother, Semion, dated back to 1353 and had taken place in the absence of vertical descendents.

In 1425, when Vasily I designated his ten-year-old son, Vasily II, heir, for the first time in generations a prince from Muscovy had both lateral and vertical relatives, which led to the rejection of the lateral lineages, those being Yuri Dimitrievich, prince of Zvenigorod, and of Galich, uncle of the new king.

Vasily had to confront a civil war against Yuri, which would last several generations of both branches. After the victory of the Kliazma River, Yuri took power, but he had to return it to Vasily II months later, unable to attain the help of the Muscovy nobility and the control of the administration. Vasily's return to the throne was not supported by Yuri's sons, and a new generation of the lateral line, the princes Vasily Kosoy and Dimitry Shemyaka, resumed the civil war. In 1436, Vasily

[47]For example, HELLIE, R.: *Enserfment and military change in Muscovy*, Chicago, 1971, p. 78; also CRUMMEY, R. O.: *The formation of Muscovy, 1304-1613*. Londres, 1987, p. 69.

Kosoy was captured and blinded by Vasily II, but the war went on for another decade, and ended by blending with the eternal conflict between Muscovy and the Tartars. On July 7, 1445, the battle of Suzdal unfolded between Vasily II and these latter, who managed to capture the Muscovy leader, hurt in combat. Though Vasily was freed in November, that interval of time had been sufficient for Dimitry Shemyaka to take power in Moscow. Shemyaka captured Vasily II, accusing him of collusion with the Tartars, of having blinded VasilyKolsoy, and of extravagantly misspending public gold and silver, and he dictated a cruel sentence, but politically insufficient: Vasily II was blinded, but his life was spared.

Vasily II did not renounce his rights and the conflict, what up to that point had only involved the governing family, extended to the entire Muscovite nobility[48]. Vasily II took a year to recover Moscow, though the war lasted until 1453, when Shemyaka died from poisoning and, after 28 years of civil war, Vasily II managed to control the future course of Moscow[49].

His son, Ivan III, came to the throne in 1462 and he was the first leader of Muscovy to adopt the title of "Grand Prince of All Russians". In 1470, Ivan launched his first large-scale foreign campaign, against Novgorod, who he forced to pay compensations to Moscow, to give him lands, and to break his alliances with Lithuania. In 1478, he launched a campaign that ended with the annexation of Novgorod. To assure the control of the territory, he deported the leading class of the principality and confiscated their lands[50]. The subsequent military campaigns of

[48]Vasily II was careful to reward those who remained loyal without weakening the power of the prince. The possession of land was conditioned by faithful service, and the concession could be revoked otherwise (CRUMMEY: *The formation of Muscovy 1304-1613*, p. 78).

[49] MARTIN, J.: *Medieval Russia. 980-1584*. Cambridge, 1995, p. 244.

[50]Furthermore, he continued with a program of repression against any dissent. In the decade of 1480, thousands of arrests were made in Novgorod, the majority of which ended with the execution of the arrested (CRUMMEY: *The*

Ivan III and his son, Vasily III, continued with the same model, and in 1485 appended Tver, in 1510,Volok, and in 1521, Ryazan. To that we must add that Ivan, in his wars against Lithuania, had achieved the domain of the Chernigov and Smolensko principalities[51].

This territorial expansion undermined the internal distribution of power given that the arrival of Lithuanians and Tartars into the circle of power awakened the resentment of the Boyars, the ethnically Russian aristocracy. In 1478, Ivan put an end to the Boyar resistance in Novgorod and of their bishop, confiscating the territory and redistributing it among *pomest´ia*, a new form of land possession: the possession of the estates was given in exchange for military service to the prince, similar to the Ottoman timariots. In this distribution of lands, 1,500 Muscovite noblemen received 1,200,000 hectares of lands[52]. Ivan repeated the system in the successive territorial expansions, provoking an important social change: the military servers of the prince ceased to be the noblemen of the court and their armed retinues and came to be the medium-sized, rural landowners who had received their lands in exchange for that service[53].

formation of Muscovy 1304-1613, p. 89). Kollman affirms that the conquests of Ivan III were undertaken through brute force (KOLLMANN, N. S.: *By honor bound. State and society in early modern Russia*. Nueva York, 1999, p. 181).

[51]MARTIN: *Medieval Russia. 980-1584*, p. 254. The political situation in the region had changed in decades previous to 1450.The Orda had fragmented into independent khanates, like Kazan or Crimea, and the most powerful enemy on the borders of Muscovy had become Lithuania, with whom the successive tzars fought several wars in the last decades of the XV century and the beginning of the XVI.

[52]CRUMMEY: *The formation of Muscovy 1304-1613*, p. 90.

[53]DAVIES, B. L.: "The development of Russian Military Power, 1453-1815", in BLACK, J., (ed.): *European Warface, 1453-1815*. Londres, 1999, pp. 145-147.

Another change of great weight was the appearance of *mestnichestvo*, the complex system that established the relative status of each server of the prince with respect to the other servers. This *mestnichevo* had a vital influence on the performance of military and civilian charges, since no inferior in this social scale could be in command of a superior[54]. This system, unconnected to the blood-lines, and the proletarianization of armed service with the distributions of confiscated lands, undermined the power base of the old nobility and gave the princes a functionarial government and an enormous quantity of military resources unconnected to the nobility. The autonomous princes would have to integrate into the system to be able to maintain their access to power[55]. Of particular importance was the figure of the *diaki*, the secretaries, the genuine motor of the administration, diplomacy, taxation system, and economic management. Their numbers exploded during the reins of Ivan III and Vasily III. The *diaki* were the backbone of the administrative apparatus[56].

Ivan III and Vasily III reformed the institutions. At the systematic incorporation of firearms after the year 1470[57], an integral reform of the justice system followed[58], culminating in 1497, with the *Sudebnik*, a legal abstract that fixed the procedures of the justice administration and that made the governors judges in trials of the cases presented in their districts, translating the authority to judge from the nobility to the civil servants[59].

[54] MARTIN: *Medieval Russia. 980-1584*, pp. 283-284.
[55] MARTIN: *Medieval Russia. 980-1584*, p. 254.
[56]CRUMMEY: *The formation of Muscovy 1304-1613*, p. 106.
[57]OSTROWSKI, D.: "The growth of Muscovy", en PERRIE, M., (ed.): *The Cambridge History of Russia*. Cambridge, 2006, vol. I, p. 218.
[58]DAVIES, B. L.: "The development of Russian Military Power, 1453-1815", in BLACK, J., (ed.): *European Warface, 1453-1815*. Londres, 1999, pp. 149-150.
[59] MARTIN: *Medieval Russia. 980-1584*, p. 296.

The combination of modernized elements with the military order of the *pomest´ia* produced an unstoppable military apparatus for the rivals of Muscovy[60]. Ivan II used the contacts of his fiancée, Sophia Paleologa, to bring from the court of the Pope several Italian artillery masters. In 1494, the tzar already had a canon and gunpowder factory in the vicinity of the Kremlin. Thanks to that, Vaily III, in 1514, used 2000 canons during the siege of Smolensko. Only the Swedish monarchy was capable of facing the Muscovites, in the war of 1495-96, when the tzar could not take Vyborg and lost the fortress of Ivangorod[61].

The process of the modernization of the army, and of the State, in general, had to be defrayed through the increase of tax charges. Ivan III and his son, Vasily III, created a government and administration apparatus at the service of the prince, adapting the Mongolian-style organizational and exercise of power models to the symbols and theories of power of the Byzantine[62] orthodox, so that Ivan III and Vasily III constructed a system of government in which tradition and modernity, the old and the new, gave form to a more solid and powerful State[63].

6.- The Hispanic model in the European context

Monarchs like Matthias Corvinus, Edward IV, Henry VII, Louis XI, Ivan III, and, of course, Isabel and Ferdinand inherited kingdoms submerged in profound crisis or in need of changes. These kings managed to overcome these crises and create the bases of the modern state in their domains, with the exception of Edward IV in England,

[60]OSTROWSKI: "The growth of Muscovy", vol. I, p. 215.
[61]DAVIES: "The development of Russian Military Power, 1453-1815", p. 151.
[62]Some elements of the Mongolian construction of power were maintained; for example, the role of the Duma as unofficial limitation of the power of the prince, inherited from the assemblies of Mongolian warriors (MARTIN: *Medieval Russia. 980-1584*, pp. 281 y 288).
[63]CRUMMEY: *The formation of Muscovy 1304-1613*, p. 102.

who, if he managed to overcome the feudal models that gave most of the power to the nobility, he was not able to create a stable power base that guaranteed a peaceful succession to the throne. England had to overcome a generation of wars and await the arrival of the Tudor dynasty for the transition to modernity to be consolidated.

If there is one thing that the histories of the great European powers of the XV had in common, it is war, and more specifically, the long and heated internal conflicts in a generalized process of redefinition of the nature of power: in Castile, the war of Succession; in Aragon, the long Catalan conflicts; in Hungry, the civil war that erupted in 1440; in Muscovy, the very long conflict of succession unleashed by the death of Vasily I; in England, the Wars of the Roses; and in France, the war of the League of the Public Weal and the conflicts against Burgundy and Brittany. This phenomenon also took place in other states: the dynastic crisis of Navarra and the perennial fight between the Agramonteses and the Beaumonteses; the wars of the Throne of Naples against the Angevin nobility; the civil wars in the Nazrid Granada; the conflicts of the Empire with the Flemish cities; those of the duchy of Burgundy with the Swiss cantons, and a long etcetera of conflicts whose ultimate cause was the tension related to the distribution of power among the throne, the nobility, and the cities in the framework of the changes that the European states were undergoing.

In many cases, the triggering element was a dynastic question, which was the case in the Castilian, English, Hungarian, and Muscovite civil wars. Yet, a profound analysis points out that the opposing sides, representing dynastic lines and even different succession models, are the consequence, in the final analysis, of different concepts of the nature of the state. Around Joanna of Castile, nobles assembled who desired that the power of the crown continued to be weak; in Hungry, the war is a conflict between the high nobility and the second-level nobility; in England, part of the conflict of the Roses revolves around the process of centralization, begun by the Lancaster; and in Muscovy, the war is a manifestation of the clash between those who aspired to a duchy

constructed around a governmental nucleus and those who tried to maintain the decentralized models inherited from Mongolia. Only in France were the conflicts about the redistribution of power apparently divested from the vestment of dynastic conflict.

The modernization of the armies was not exclusive to the Hispanic monarchy, and in many matters, it was not pioneer. Charles VII of France had begun the process of creating a permanent army from 1445, when the expeditions against Lorena and the Swiss confederations exposed their military weaknesses. Charles VII created fifteen companies of a hundred *lanzas*[64]. At the head of each company was a veteran captain who was not of a noble family, which showed the desire of the monarch to create a military instrument at the service of the Crown. In 1448, the king imposed a similar measure for the infantry. These soldiers had to provide service when the monarch called them, a system that was revised once a month. Given that the monarch exempted them from paying taxes, they received the name of "*francarchers*", that is, free archers[65].

Louis XI increased the number of *lanzas* (men of arms and their accompanying mounts) from 1,500 to 5,000 (that is, around 30,000 combatants) and substituted the free archers for an army of 25,000 German, Swiss, Scottish, and Italian mercenaries, with an exorbitant cost to the kingdom. The presence of these armies, and their nearly constant movement around the kingdom, was a source of quarrels and vast expenses for the cities where they past through. In order to maintain discipline, the combatants were exempted from ordinary jurisdiction[66],

[64]Each one of these *lanzas* was made up of a man of arms, three mounted archers, a light horseman, and a page, so that each company was, in reality, made up of 600 men, and the units created by Charles VII came to 9000 combatants.

[65] WILLERT, P. F.: *Then reign of Lewis XI*. Londres, 1836, pp. 4-5.

[66]On the special jurisdictions, one can see the collective works *Estudios sobre jurisdicciones especiales*. Valladolid, 2015; *Reflexiones sobre jurisdicciones especiales*. Valladolid, 2016; *Análisis de jurisdicciones especiales*, Valladolid

placing them under the authority of their own legal officials, which had the opposite effect by leaving them to act with impunity. The battle of Guinegate against the Flemish loyal to the duke Maximilian[67] meant the end of the French armies based on an infantry composed of light archers, substituted for heavily armed infantrymen, whose cost had to paid for by cities through the imposition of a new tax[68].

In England, the first permanent military corps was the garrison of Calais, of around one thousand combatants, and the personal guard of the king, created in 1468[69]. The composition of the British armies in the XV century did not cease to evolve in accord with the military experiences in the Hundred Years war, the Scottish border wars[70], and the Wars of the Roses. In Agincourt, Henry V aligned a man of arms with every three archers; the army of 11,400 combatants of Eduard IV in 1475 had only 1,200 men of arms: one for every seven archers.

The reasons, varied as they were, in part responded to the English context, such as the massive use of long bows capable of puncturing armor. The weight of these made the knights very vulnerable to the arrows given that it was impossible to protect the horse, unable to support the weight of the armored horseman and the covering. When a knight was taken down, the weight of the armor made it very difficult for him to get up. For that, during the XV century, it was common for

2017; y *Especialidad y excepcionalidad como recursos jurídicos*. Valladolid, 2017.

[67] BENECKE: *Maximilian I (1450-1519)*, p. 33.

[68] HARE: *The life of Louis XI*, p. 243. Guinegate is a milestone in the military history of Europe given that it was the first time in which the tactics of closed formations of the Swiss pikemen were employed by a different army, the Burgundian, breaking the myth that only the Swiss were capable of using said formations.

[69]GILLINGHAM: *The wars of roses. Peace and conflict in fifteenth-century England*, p. 29.

[70] In that regard, see HILL, J. M.: "Gaelic warfare, 1453-1815", in BLACK, J., (ed.): *European Warface, 1453-1815*. Londres, 1999.

British armored men to fight on foot, called the "British method"; however, it is doubtful that this tactic was used systematically in the British civil wars, given that the archers would surely have slaughtered that kind of combatant[71].

The emergence of a strong state to whom modern military forces were at the service of increased fiscal pressure, one of the grave problems of the new monarchies, which required revenues far superior to their medieval equivalents. The formulas sought to achieve an increase in revenues had two pillars: taxes on mercantile activities and the petition of large-scale services, legalized by approval in the assemblies. The first model was especially important in France and the domains of the Catholic Kings, while the model of subsidies and services was utilized by Isabel and Ferdinand themselves in 1476 and in the courts that were celebrated after the year 1500, and by the Hungarian monarchy of Matthias Corvinus. In this last case, not even these subsidies were sufficient to sustain the needs of the Hungarian army, for which Hungry found itself recurring to foreign campaigns by which they could increase the tax base. France, whose tax system on commerce was insufficient, compensated for the deficit imposing a direct tax, the *tailles*, levying profits and properties[72].

The Catholic Kings sought new ways of acquiring money: they exploited the concessions of the papal bull of the Crusades, giving them an economic character; they obtained the administration of the mastery of the Military Orders, with great economic resources; they utilized the contribution of the Brotherhood in order to finance the expenses of the military activities… To have economic resources different from those of their counterparts gave Isabel and Ferdinand advantages that allowed them to accelerate the rhythm of the transformations and permitted the

[71]GILLINGHAM, *The wars of roses. Peace and conflict in fifteenth-century England*, pp. 36-37.
[72] KENDALL: *Louis XI*, p. 18.

armies of their monarchy to enjoy decisive advantages over their enemies[73].

[73]Furthermore, the accusation that it was out of economic interest that led to the creation of the Spanish Inquistion does not appear to have much foundation. The studies on this institution continue to offer new knowledge about the *Santo Oficio*, as is the case of PRADO RUBIO, E., "Narrativa audiovisual de ficción y docencia: la inquisición como ejemplo para la enseñanza histórico-jurídica", in *International Journal of Legal History*, nº 1, 2017; PRADO RUBIO, E., "Aproximación a las Inquisiciones en el cine", en PRADO RUBIO, E., MARTÍNEZ PEÑAS, L., y FERNÁNDEZ RODRÍGUEZ, M., (coord..), *Análisis sobre jurisdicciones especiales*. Valladolid, 2017. By the same researcher: *Pilar de llamas. Análisis histórico-jurídico de la Inquisición en la ficción cinematográfica*". Valladolid, 2020; "Inquisitorial process in Arturo Ripstein's film: "El Santo Oficio"", *Ihering. Cuadernos de Ciencias Jurídicas y Sociales*, nº 3, (2020); ""Here is the Story of Satán" The inquisitorial process through cinematographic fiction", in *International Journal of Legal History and Institutions*, nº 4 (2020); "An Approach to the Inquisition Representation in Audio-visual Fiction" en *International Journal of Legal History and Institutions*, nº 3 (2019); "Estereotipos referidos a la persecución inquisitorial de la brujería", in *Aequitas*, *Estudios sobre Historia, Derecho e Instituciones,* nº13, 2019; "Proceso inquisitorial en *El Santo Oficio* de Arturo Ripstein" in *Glossae*, nº 16, 2019; "El tormento inquisitorial y la representación audiovisual de la tortura judicial", in *Revista de Inquisición (Intolerancia y Derechos Humanos)*, nº 23, 2019. By MARTÍNEZ PEÑAS, L., "Las Instrucciones de Diego de Deza y la centralización de la Inquisición", en el libro homenaje al profesor David Torres; "Denunciation as the initiation of an inquisitorial proceeding", en *International Journal of Legal History and Institutions*, nº 4, 2020; "Particularidades procesales de principales delitos inquisitoriales "con sabor a herejía", en *Revista Aequitas. Estudios sobre Historia, Derecho e Instituciones*, nº 16, 2020; "Más allá de la hoguera: penas no capitales de la Inquisición española", en *Revista de Estudios Institucionales*, nº 12, 2020; "La construcción de los instrumentos jurídicos para la persecución eclesiástica de la herejía (312-1235)", en *Iurisdictio*, nº 1 (2020); "Proceso inquisitorial y proceso regio: apuntes para una tentativa de comparación", en *Ihering. Cuadernos de Ciencias Sociales y Jurídicas*, nº 3, 2020; "Los testigos en el proceso inquisitorial a través del Malleus Maleficarum", en *Ihering. Cuadernos de Ciencias Sociales y Jurídicas*, nº 2, 2019; "La convergencia

The advantages of the permanent armies were shown over and over again: throughout the war of the League of the Public Weal[74] and when the Muscovites defeated the Lithuanians, Tartars, and Russians, combining a quick introduction of firearms in their infantry, large trains of artillery, and a territorial cavalry dependent on the prince. Corvinus guaranteed the survival of his kingdom in the face of the Habsburg, the Jogalia and the Ottomans with his professional army. The Catholic Kings had the greatest achievements of their rein by the force of their arms: strengthening the throne in the War of Succession, the incorporation of the Canary Islands, the destruction of the kingdom of Granada, the annexation of Navarra, the incorporation of Naples, the establishment of positions in the north of Africa…

If one compares the Hispanic changes with the French, it seems that France had a chronological advantage over the Spanish monarchy regarding the military, but the wars of Naples supposed unquestionable Hispanic victories. The French army, in both wars, remained, in many sense, medieval. After the famous artillery train of Charles VIII, the nucleus of the French army continued to be feudal cavalry reinforced by the gendarmerie. But the time of the heavy, medieval cavalry ended, a lesson that Nemours payed for with his life in Cerignola: the infantry was the new queen of the battle-field. This change is one of the characteristic elements of the military evolution in Europe. France had been a pioneer in it, creating an infantry of ordinance, but it was suppressed during the regency of Ann and Peter of Beaujeu, returning to accentuate the weight of the cavalry[75]. For their part, the Catholic Kings had modernized their armies, which in the second war of Naples

entre brujería y herejía y su influencia en la actuación de la inquisición medieval", en *Revista de la Inquisición (Intolerancia y Derechos Humanos)*, nº 23, 2019.

[74] WILLERT: *The reign of Lewis XI*, p. 69; HARE: *The life of Louis XI*, p. 104.

[75] QUATREFAGES, R.: "Le systéme militaire des Habsbourg", in HERMANN, CH., (coord.): *Le premier âge de l´etat en Espagne (1450-1700).* Paris, 1989, p. 343.

were mostly made up of infantry hired by the crown: professional soldiers and, in many cases, veterans of earlier campaigns[76].

Another of the determining factors was the fact that all the reforms for reinforcing the power of the state grouped together were found to be more developed in the Hispanic kingdoms than in France, and their troops had behind them organizational, logistical, financial and diplomatic structures better adapted to maximize the military force of the monarchy. A key factor was the Spanish domination of the sea, possibly for having created a complex system of construction and shipping, the development in the seating formulas of private vessels, the establishment of key points in order to distribute supplies, and the reform of the dockyards in Sevilla. In order to assure their correct functioning, legal mechanisms of control were created, such as inspections, inquiries, reviews, and displays[77].

Unlike the French and Hispanic cases, where the crown, triumphant, sought the reconstruction of coexistence through the granting of pardons, in the British conflicts that did not happen and the battle for the kingdom involved a lot of private vengeance from the first confrontation in St. Albans: That three of the most notable noblemen of the kingdom (Somerset, Clifford, and Northumberland) preferred to die in battle than surrender is significant. The initial deaths and the hatred between the Percy, allies of Lancaster, and the Neville, allies of York, helped to convert the Wars of the Roses into a series of acts of revenge and executions in which the norm was the destruction and execution of

[76] We are speaking about professional soldiers, and not mercenaries, the difference between them being the fact that, though both are paid for their services, the professional soldiers serve their natural lord, while the mercenaries are at the service of a lord that is not his.

[77]With respect to the displays, see TEIJEIRO DE LA ROSA, J.: "Una antigua institución militar: el alarde, muestra o revista del comisario", en MARTÍNEZ PEÑAS, L., FERNÁNDEZ RODRÍGUEZ, M., y GRANDA, S., (coords.): *Perspectivas jurídicas e institucionales sobre guerra y ejército en la Monarquía hispánica*. Madrid, 2011.

the enemy. No other conflict of the epoch shows such a high number of deaths among the elite, and the consequences were grave: after three decades of carnage, Lancaster and York had mutually annihilated themselves, and the throne wound up in the collateral branch of lineage, the Tudor.

The civil wars were present in all of the monarchies of the XV century, a period of redesign of the reining Houses. Throughout Europe, the conflicts were produced at times in which the royal power confronted important crises, either for questions of succession, as in Castile, Hungry, and Muscovy, or provoked by other causes, as in England, where the claims of the York emerged from the loss of the French domains and the collapse of the royal power after Henry VI had suffered an attack in August of 1453, which left him immobile and unable to speak for eighteen months; only then did the House of York question the legitimacy of the Lancaster as kings[78].

Wars formed a part of the long process of internal re-definition of the state in Europe. Until 1494, the wars in Europe were a violent way to resolve internal problems: who governed England in the War of the Roses; in France, the distribution of power between the king and the nobility in the war of the League of the Public Weal, the regionalism of Brittany in the "crazy war", and that of Burgundy in the wars between Louis XI and Charles the Bold; the war of the Succession of Castile; the dynastic conflict and between powers in Hungry, the clash between the decentralized models or Mongol origin and the central power in Muscovy, etc. Put simply, wars were part of a process of territorial self-definition and of the distribution of internal power[79].

[78]GROSS: *The dissolution of the lancastrian kingship. Sin John Fortescue and the crisis of monarchy in fifteenth-century England*, p. 25.
[79]HALE, J. R.: *War and society in Renaissance Europe, 1460-1620*. New York, 1985, pp. 13-14.

The changes, as much military as political, were produced in a generalized way by all of the European monarchies together throughout the same period of time, the last five decades of the XV century. Similar processes were produced in the Spanish, French, Bohemian, Hungarian, Napoli, British, and Muscovite monarchies. The changes that led to the military revolution and the birth of the modern state responded to systematic phenomena, where the local determinants acted as catalysts or decelerating factors but did not have a decisively causal importance. The changes during the rein of the Catholic Kings were not exceptional: they happened in the greater par of the European monarchies. The differentiating factor was perhaps the speed and profundity with which these changes were implemented in the Spanish case. The reforms sketched out in previous reins were fully implanted in a very few years: a totally medieval army in 1476, in the battle of Toro, was already totally modern in tactic, recruitment, and financing in 1494, as a reflection of the process of modernization of the state carried out in the same period.

The pattern of wars in the Spanish monarchy coincided with that of the rest of Europe, with a first phase of conflicts in which the definition of the state was at stake, as much in its political sense as in its territorial sense, often with dynastic questions as triggers. When these wars ended, a second phase of foreign wars came about, such as those of Naples, the conflicts between Austria, Bohemia, and Hungry, the Muscovite wars against Novgorov and Lithuania, or the expedition of Edward IV of England against Burgundy.

The changes in the army and the state are part of an integral phenomenon in which the two aspects--military and institutional--acted as mutual catalysts, given that it was not possible to sustain a modern army in a state of feudal court. The technical changes in the armaments, by themselves, were not sufficient, as the defeat of the Burgundians facing the armies of Louis XI demonstrated, despite the Burgundian artillery being admired in all of Europe.

The small states could not continue the rhythm marked by these changes in the larger powers given that they could not get past the feudal models: they did not have the necessary demographic bases to sustain large armies of infantry nor the finances to assume the increase in costs of modern war. Unable to compete with the big powers, the lesser states could not defend themselves effectively from the big powers, which translated to the disappearance, in a few decades, of a significant number of powers: Granada, Navarra, Naples, the duchy of Milan, the quasi-independent powers of Brittany and Burgundy, as well as the Flemish cities subjected to the power of the Emperor, the Russian principalities suppressed by Muscovy, the north-African city-States that wound up being suppressed by Castile…[80]

[80]In that regard, see MARTÍNEZ PEÑAS, L., "Consideraciones estratégicas en la expansión africana en el tránsito a la Modernidad", en el libro colectivo *La presencia española en África: del fecho de Allende a la crisis de Perejil*. Valladolid, 2012. These possessions would have historical justification in the XX century at the creation of a Spanish Protectorate, whose central administration is analyzed in MARTÍNEZ PEÑAS, L., "La administración central del Protectorado (1912-1936)", en ALVADARO PLANAS, J., y DOMÍNGUEZ NADRÍA, J. C., (coords.), *Historia del Protectorado de Marruecos*. Madrid, 2014.

PASQUALE FIORE, IL DIVORZIO COME MEGLIO RELATIVO

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Abstract: Pasquale Fiore (1837-1914), a catholic-liberal jurist from Terlizzi, was a Professor of Law in several Italian Universities; in his booklet "Sulla controversia del divorzio in Italia: considerazioni", published in 1891, the Author intervened in a heated social and doctrinal discussion, debated across the whole Italian Peninsula, concerning the institution of divorce after the introduction of Pisanelli's code, in the light of the first petitions of women's emancipation. Professor Fiore analysed the social customs in mid-nineteenth century's Italy, divided between the liberal-reformist instances, based on french model of marriage-contract dissolved by mutual consent of the parties, and the catholic-reformist views, promoting the evangelical ideal of marriage-sacrament lasting for all eternity. The Author, a supporter of Villa's project, was a key voice in creating a climate of moderate possibilism to the introduction of divorce, defined as an "relativly better alternative" in order to protect the social and moral interests of the family.

Key Words: Pasquale Fiore, *Sulla controversia del divorzio*, Villa's project.

Summary: 1. L'Italia e il divorzio dopo il Codice Pisanelli. – 2. Il dibattito dottrinario – 3. Il vero campo e la moderazione del Fiore – 4. "Sulla controversia del divorzio in Italia: considerazioni" del 1891: una terza via – 5. Dalla concezione cattolica all'ammissione del divorzio – 6. Il principio d'indissolubilità tra scioglimento, separazione e nullità – 7. La Chiesa: il grande ostacolo – 8. Il progetto del Fiore ed il sostegno al Villa – 9. Le conclusioni.

1.- L'Italia e il divorzio dopo il Codice Pisanelli

L'unificazione nazionale portò con sé un generale clima di rinnovamento e di emancipazione sociale, veicolato dai governi della Destra laica e liberale[1], che intesero proseguire la svolta giurisdizionalista[2] avviata già nel Regno di Sardegna con le c.d. *Leggi Siccardi*[3], avocando allo Stato alcune delle prerogative sino ad allora esercitate in via esclusiva dalla Chiesa, tra le quali, preminente appariva la regolamentazione dell'istituto matrimoniale e delle sue cause di scioglimento[4].

[1] C. Ghisalberti, *Storia Costituzionale d'Italia 1848/1948,* Bari, Editori Laterza, 2010, pp.63-64.

[2] A. Piola, Voce: *Giurisdizionalismo,* in *Novissimo Digesto italiano*, vol. VII, Torino, Utet, 1975, pp. 983-985, «sistema di relazioni fra lo Stato e la Chiesa cattolica con subordinazione della seconda al primo».

[3] Leggi del Regno di Sardegna del 1850, n. 1001 del 1 marzo, n. 1013 del 9 aprile e n. 1037 del 5 giugno. «Con l'unificazione, la Destra Storica adottò nei confronti della Chiesa una politica restrittiva: con la L. n. 3036/1866 fu negato riconoscimento e capacità patrimoniale a tutti gli Ordini, corporazioni, e le congregazioni religiose regolari, incamerando nel demanio statale i loro beni; con la L. n. 3848/1867 furono soppressi tutti gli enti secolari ad esclusione di seminari, cattedrali, parrocchie, canonicati, fabbricerie ed ordinariati; con la L. 1402/1873 si estese alla neo-annessa provincia romana la legislazione precedente stabilendo però un regime speciale per gli enti della città di Roma e per le sedi suburbicarie». (cfr. G. Saredo, *Codice del diritto pubblico ecclesiastico del regno d'Italia,* Torino, Unione Tipografica Editrice, 1887-91).

[4] All'alba del XIX secolo, in tutti gli Stati della penisola, l'intera disciplina dell'istituto matrimoniale risultava, ancora, affidata alle cure della Chiesa Cattolica, tramite le secolari disposizioni previste dai canoni formalizzati durante il Concilio di Trento (1545 - 1563). Contestualmente, al di là delle alpi, la rivoluzione del 89 aveva mosso i primi passi verso

l'affermazione di un «proprio culto laico [che dovesse sostituire] in assoluto ogni altro» (cfr. A. Cavanna, *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico 2*, Milano, Dott. A. Giuffrè editore, 2005, pp. 437-438), scristianizzando l'intera Nazione; così, dopo la trasformazione dei beni ecclesiastici in beni dello Stato e dopo la soppressione degli ordini religiosi, il 20 settembre 1792, «l'Assemblea legislativa chiudeva la sua ultima seduta varando la disciplina del divorzio e laicizzando lo stato civile…dichiarando il matrimonio puro e semplice contratto» (*ivi*, pp. 440). Tuttavia, con il colpo di stato del 9 Termidoro dell'anno II, si assistette ad una virata conservatrice; infatti, i «*rescapés* auspicarono l'avvento di un regime…in grado di assicurare il ritorno alla normalità…[tramite] la ricostruzione…in primo luogo della famiglia…microcosmo specchio del macrocosmo sociale…[con] un atteggiamento di non celata diffidenza verso il divorzio» (*ivi*, pp. 527-528). Nondimeno, nonostante tali intendimenti, il *Code Civil* del 1804, in cui il «diritto privato era asservito a quello pubblico» (S. Solimano, *Verso il Codice Napoleone: il progetto di codice civile di Guy Jean-Baptiste Target (1798-1799),* Milano, Giuffrè, 1998, pp. 8; cfr. P. Mastrolia, *L'ombra lunga della tradizione. Cultura giuridica e prassi matrimoniale nel Regno di Napoli (1809-1815),* Torino, Giappichelli Editore, 2018, pp. 6-7; cfr. P. Grossi, *L'Europa del diritto*, Bari, Editori Laterza, 2009, pp. 142-144, «Napoleone conserva…l'idea rivoluzionaria del diritto come imprescindibile controllo del sociale e cemento necessario del potere. La codificazione si addice al…potere dispotico»), confermò il menzionato istituto e lo diffuse, in conformità alla concezione contrattualistica del matrimonio (cfr. *Codice di Napoleone il Grande. Traduzione ufficiale colla citazione delle leggi romane*, Lucca, Tipografia di Francesco Bertini, 1812, art. 233: «Il consenso scambievole e perseverante de' conjugi, espresso nella maniera prescritta dalla legge, sotto le condizioni, e dopo gli esperimenti determinati da essa, proverà sufficientemente che la vita comune è loro insopportabile, e ch'esiste, relativamente ai medesimi, una causa perentoria di divorzio»), nei vari Stati italiani, ai quali era stata gradualmente estesa la legislazione civile francese, durante il breve periodo della dominazione Napoleonica (cfr. S. Solimano *Amori in causa: Strategie matrimoniali nel Regno d'Italia napoleonico (1806-1814),* Torino, Giappichelli Editore, 2017, pp. 9-10: «Giuseppe Luisi, non ancora Ministro della Giustizia…si prodigò per adattare il *code civile* alle specificità del regno italico…l'anonimo estensore esortò ad effettuare un doveroso recupero della tradizione…[che] significava emendare le massime con quelle della Cattolica Religione, il divorzio primo fra tutti») ed, invero, prontamente abolito ovunque, persino in Francia, a seguito della Restaurazione (cfr. Legge "Bonald" del 1816 che abolì il divorzio in nome del cattolicesimo, proclamato religione di Stato dalla nuova Carta costituzionale concessa da Luigi XVIII; tale legge restò in vigore sino alla Legge "Naquet" del 1884 che reintrodusse il divorzio come sanzione. (Cfr. G. Cassano, *Il diritto di famiglia nei nuovi orientamenti giurisprudenziali*, Vol. 1, Milano, Giuffrè Editore, 2006, pp. 7-8). Pertanto, gli Stati italiani, tornati sotto i vecchi sovrani, ripristinarono le

A questi principi fu improntato il Codice civile[5] unitario del 1865 che dedicava al matrimonio il titolo V (artt. 53-158) del libro I.

Nonostante la ferma opposizione dei cattolici, il Pisanelli riuscì ad incassare prima il parere favorevole dell'apposita commissione del Senato e poi quello della Camera Elettiva, in seno alla quale dichiarò: «Può il matrimonio avere una sanzione più alta, la religiosa; ma questa è fuori dalla competenza dello Stato»[6], ribadendo, così, il diritto di quest'ultimo a regolare solo attraverso le proprie leggi l'intera materia del diritto di famiglia.

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legislazioni quo ante; così, agli inizi del Risorgimento la disciplina matrimoniale appariva nuovamente disomogenea, oscillando, tra «il sistema austriaco, ispirato ad un criterio di ampio rispetto dei diritti dello Stato, e quello Piemontese» (F. Franceschi, *I progetti per l'introduzione del divorzio in Italia in epoca post-unitaria*, *Stato, Chiese e pluralismo confessionale*, Rivista telematica n. 34, 2012, pp. 2), che lasciava, invece, interamente alla Chiesa la celebrazione del matrimonio" (cfr. *Codice Civile per gli Stati di S. M. il Re di Sardegna*, Torino, Stamperia Reale, 1837, art. 108: «il matrimonio si celebra giusta le regole, e colle solennità prescritte dalla Chiesa cattolica»).

[5] Sul Codice civile "Pisanelli" cfr.: Alberto Aquarone, *L'unificazione legislativa e i codici del 1865*, Milano, Dott. A. Giuffrè Editore, 1960; Mario Ascheri, *Lezioni di storia delle codificazioni e delle costituzioni*, Torino, G. Giappichelli Editore, 2008; Roberto Bonini, *Disegno storico del diritto privato italiano. Dal Codice civile del 1865 al Codice civile del 1942*, Bologna, Pàtron Editore, 1997; Severino Caprioli, *Codice civile. Struttura e vicende*, Milano, Dott. A. Giuffrè Editore, 2008; Salvatore Patti, *Codificazioni ed evoluzioni del diritto privato*, Bari, Laterza, 1999; Paolo Ungari, *L'età del Codice civile. Lotta per la codificazione e scuole di giurisprudenza nel Risorgimento*, Napoli, Edizioni scientifiche italiane, 1967; Carlo Ghisalberti, *La società del codice civile*, in *L'Italia nell'età napoleonica*, Atti del LVIII congresso di Storia del Risorgimento italiano (Milano, 2-5 ottobre 1996), Istituto per la storia del Risorgimento italiano, Roma 1997; C. Ghisalberti, *La sistematica nella codificazione del diritto civile*, in Clio, XXIV, 1988; C. Ghisalberti, *La codificazione del diritto in Italia.* 1865-1942, Laterza, Roma-Bari 1985; C. Ghisalberti, *Unità nazionale e unificazione giuridica in Italia. La codificazione del diritto nel Risorgimento*, Laterza, Roma-Bari 1979; C. Ghisalberti, *Istituzioni e società civile nell'età del Risorgimento,* Roma-Bari, Laterza, 2015; Elio Fazzalari, *Cento anni di legislazione sul processo civile (1865-1965)*, in *Rivista di diritto processuale*, 1965.

[6] F. Bochini e E. Quadri, *Diritto Privato*, Torino, G. Giappichelli Editore, 2018, pp. 416.

In tal modo, in base all'articolo 93[7],il matrimonio civile divenne l' unica forma di unione coniugale riconosciuta dallo Stato.

Ciò generò una condizione di incertezza negl'usi della popolazione: infatti «per diversi anni- afferma Paolo Ungari - vii fu ancora un numero assai alto di matrimoni celebrati con il solo rito religioso, con la conseguenza che migliaia di famiglie vennero a trovarsi in condizione di illegittimità…tanto che negli anni successivi vari parlamentari reclamarono l'esigenza di una legge che stabilisse la precedenza obbligatoria del matrimonio civile su quello religioso, vietando alle autorità ecclesiastiche di celebrare le nozze se queste non avessero prima ricevuto la sanzione civile»[8].

Il nuovo Codice, tuttavia, non predispose alcuna novità in tema di divorzio che lo differenziasse da quelli preunitari[9]; infatti, l'articolo 148[10] volle riaffermare l'indissolubilità del vincolo coniugale, ammettendo soltanto, in conformità con i canoni tridentini, la separazione[11], che divenne elemento comune tra l'ordinamento civile e quello canonico.

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[7] *Codice del Regno D'Italia*, Torino, Stamperia Reale, 1865, Art. 93: «Il matrimonio deve essere celebrato nella casa comunale e pubblicamente innanzi all'ufficiale dello stato civile del comune, ove uno degli sposi abbia il domicilio o la residenza».

[8] P. Ungari, *Storia del diritto di famiglia in Italia (1796*-1975), Bologna, Il Mulino, 2002, pp. 188-192;

[9] Cfr. S. Rodotà, *Diritti e libertà nella storia d'Italia. Conquiste e conflitti 1861-2011*, Roma, Donzelli Editore, 2011, pp. 27, «il rifarsi a vecchi modelli poteva apparire sufficiente al momento dell'unificazione…la logica che stava a fondamento dei codici del 1865…[manifestava] anzitutto un bisogno di razionalizzazione e di efficienza»

[10] *Codice del Regno D'Italia*, cit. Art. 148: «il matrimonio non si scioglie che con la morte di uno dei coniugi; è ammessa però la loro separazione personale».

[11] G. di Renzo Villata, *Separazione personale,* in *Enciclopedia del diritto*, XLI, Milano, Giuffrè Editore, 1989, pp. 135, «Alla base della separazione si pone il principio per cui il matrimonio è inteso come sacramento…che si caratterizza per perpetuità e indissolubilità, nel senso che il vincolo può essere sciolto unicamente con la morte di uno dei coniugi. Con la separazione personale, cessa la coabitazione dei coniugi…ma il vincolo matrimoniale rimane fermo».

Tale istituto, tuttavia, sollevava non poche perplessità; infatti, benché autorizzasse i coniugi a condurre esistenze separate, non scioglieva il vincolo nunziale, che conservava, pertanto, i propri effetti giuridici anche successori e che, per di più, poteva essere dichiarato solo allorché ricorressero i casi tassativi prescritti dall'articolo 150[12].

A tal proposito, Anna Maria Mozzoni[13] rilevava come quest'ultimo articolo, al secondo comma, avesse mantenuto la donna in una condizione di subalternità[14], allorché, pur nella vigenza del principio di reciprocità nei

[12] *Ivi,* Art. 150: «La separazione può essere domandata per causa di adulterio o di volontario abbandono, e per causa di eccessi, sevizie, minacce e ingiurie gravi. Non è ammessa l'azione di separazione per l'adulterio del marito, se non quando egli mantenga la concubina in casa o notoriamente in altro luogo, oppure concorrano circostanze tali che il fatto costituisca una ingiuria grave alla moglie».

[13] Anna Maria Mozzoni (1837 – 1920); le principali pubblicazioni: *La Donna e i suoi rapporti sociali ... in occasione della revisione del Codice Civile Italiano*, Milano, Tipografia Sociale, 1864; *La donna in faccia al progetto del nuovo codice civile italiano*, Milano, Tipografia Sociale 186); *Un passo avanti nella cultura femminile tesi e progetto*, Milano, Tipografia Internazionale, 1866; *Il Bonapartismo in Italia*, Milano, Tipografia Terzi, 1867; *traduzione italiana di J.S. Milla, La servitù delle donne*, Milano, R. Carrabba Ed., 1870*; Delle condizioni civili e politiche delle italiane: lettura tenuta in una pubblica radunanza a Bergam*o, Bergamo, Gaffuri e Gatti Stab. Tip., 1878; *I socialisti e l'emancipazione della donna*, Alessandria, Tip. Sociale, 1892; *Alle fanciulle che studiano*, Paterson, N.J. 1902; *Alle figlie del popolo*, Paterson, N. J., 1902. Cfr.: Francesco Mastroberti, *Il «Codice delle donne», Annali della Facoltà di Giurisprudenza di Taranto, Anno V,* Bari, Cacucci Editore, 2012; Rina Macrelli, *L'indegna schiavitù. Anna Maria Mozzoni e la lotta contro la prostituzione di Stato,* Roma, Editori Riuniti, 1981; Elisabetta Nicolaci, *Il "coraggio del vostro diritto": emancipazione e democrazia in Anna Maria Mozzoni,* Firenze, Centro Editoriale Toscano, 2004; Stefania Murari, *L'idea più avanzata del secolo: Anna Maria Mozzoni e il femminismo italiano,* Roma, Arcane Editrice, 2008.

[14] La condizione di subalternità della donna venne esaltata a partire dal medioevo, tramite l'introduzione del culto di alcune Sante come Godeleva, e Rita da Cascia, che divennero i punti di riferimento delle mogli infelici. Alla luce di tali esempi, la donna doveva sviluppare anzitutto la virtù della pazienza, tollerando l'ordine naturale imposto da Dio al mondo, in vista del vero obiettivo della propria transitoria permanenza sulla terra: il regno dei cieli. Pertanto, essa avrebbe dovuto saper accettare il proprio ruolo con un sorriso possibilmente sereno, sopportando la supremazia dell'uomo nonché la sua violenza correzionale, sino al Giudizio Universale. La violenza domestica fu, dunque, un elemento

doveri tra i coniugi[15], non avesse consentito alla prima l'azione di separazione per adulterio del marito, se non nel caso in cui la stessa fosse riuscita a dimostrare di aver dovuto subire l'umiliazione della presenza della concubina nella casa familiare, oppure l'ospitalità dell'amante in un altro luogo noto o che concorressero circostanze tali da rendere il fatto una grave ingiuria.

Inoltre, la pioniera del movimento femminista denunciava che, anche nella scelta del domicilio coniugale, potestà attribuita esclusivamente al marito[16], alla moglie sarebbe stato riconosciuto il diritto di separazione solo allorquando il primo non avesse voluto averne uno fisso ovvero non fosse stato adeguato alla condizione sociale dei coniugi[17], rilevando, a tal punto, un'ulteriore lacuna nel Progetto Pisanelli, allorché quest'ultimo non avesse introdotto un terzo caso di separazione, ossia quando il marito avesse deciso di risiedere in una località incompatibile con la salute della propria consorte.

In tale contesto, Salvatore Morelli[18] appena eletto in Parlamento, tra gli scranni della Sinistra storica, si fece principale promotore delle istanze

fisiologico del matrimonio fino a tutto l'antico regime, benché ne rappresentasse l'anima nera, costituendo ancor oggi un parziale tabù, in forza del quale si preferisce prospettare una visione edulcorata della famiglia in cui si sottolinea la tranquillità del focolare domestico. Fu solo tra l'otto ed il novecento che si affermò la più elaborata cultura della non violenza coniugale (cfr. M. Cavina, *Nozze di sangue. Storia della violenza coniugale,* Bari, Editori Laterza, 2011, pp. I-VII), benché «le reliquie del patriarcato permasero nella società europea ben al di là della loro sconfitta formale» (M. Cavina**,** *Il padre spodestato: l'autorità paterna dall'antichità a oggi*, Bari, Editori Laterza, 2007, pp. XIV).

[15] *Ivi,* Art. 130: «Il matrimonio impone ai coniugi la obbligazione reciproca della coabitazione, della fedeltà e della assistenza».

[16] *Ivi*, Art. 131: «Il marito è capo della famiglia: la moglie segue la condizione civile di lui, ne assume il cognome, ed è obbligata ad accompagnarlo dovunque egli creda opportuno di fissare la sua residenza».

[17] *Ivi*, Art, 152: «La moglie può chiedere la separazione quando il marito, senza alcun giusto motivo, non fissi una residenza, od avendone i mezzi, ricusi di fissarla in modo conveniente alla sua condizione».

[18] Salvatore Morelli (1824 -1880); le sue principali pubblicazioni: *Brindisi e Ferdinando II. o il passato il presente e l'avvenire di Brindisi: quadri storici*, Lecce, Tipi Del Vecchio,

divorziste e della questione femminile; infatti, preliminarmente, provò ad inserire lo scioglimento del matrimonio in un progetto di legge del 1867, tendente all'abolizione della schiavitù domestica[19], poi, nel 1874, propose una modifica del succitato art. 148, in base al quale sarebbe stato possibile il divorzio, purché preceduto dallo sperimento giudiziario della separazione personale[20], e, ancora, nel giugno 1875[21], prospettò un nuovo progetto sul divorzio, ma nessuna delle citate proposte fu mai discussa dall'Assemblea.

1848; *La donna e la scienza considerate come soli mezzi atti a risolvere il problema dell'avvenire*, Napoli, Stabilimento tipografico delle belle arti, 1861; *La donna e la scienza o La soluzione del problema sociale*, Napoli, Stabilimento tipografico dell'Ancora, 1863; *I tre disegni di legge sulla emancipazione della donna, riforma della pubblica istruzione e circoscrizione legale del culto cattolico nella Chiesa, preceduti da un manifesto di Giuseppe Garibaldi*, Firenze, Tipografia Franco-italiana di A. De Clemente, 1867; *Lettera politica del deputato Salvatore Morelli ai suoi elettori del collegio di Sessa Aurunca,* Napoli, Stabilimento tipo-lit. dei fratelli de Angelis, 1868; *La donna e la scienza o La soluzione del problema sociale*, Napoli, Società Tipografico-Editrice, 1869; *Riforme legislative proposte al Parlamento italiano dal deputato Salvatore Morelli il giorno 26 maggio 1875 per assicurare con nuove guarentigie giuridiche la sorte dei fanciulli e delle donne*, S.l., s.n., 1875; *Sulla riforma delle leggi penali con riferimento all'ordine della famiglia. Risposta del deputato Salvatore Morelli a Raffaele Conforti ministro guardasigilli,* Roma, Tipografia Botta, 1878; *Proposta di legge del deputato Salvatore Morelli sul divorzio svolta nella tornata dell'8 marzo 1880 e risposta del Ministro guardasigilli*, Roma, Edoardo Perino, 1880; *Sul romitorio di Belvedere*, 1844.

[19] S. Morelli, *Per lo scopo di abolire la schiavitù domestica con la reintegrazione giuridica della donna, accordando alle donne italiane i diritti civili e politici che si esercitano dagli altri cittadini del Regno*, in *Atti del Parlamento italiano*, Camera dei Deputati, Legislatura X, Sessione 1867, tornata del 18 giugno 1874.

[20] S. Morelli, *Per assicurare con guarentigie giuridiche la sorte dei fanciulli e delle donne*, in *Archivio storico*, Camera dei Deputati, vol. 196, XI Legislatura, Sessione III, Atto C.6 del 13 febbraio 1874.

[21] S. Morelli, *Per assicurare con nuove guarentigie la sorte dei fanciulli e delle donne*, in *Archivio storico*, Camera dei Deputati, vol. 216, Legislatura XII, Sessione I, Atto C.29 del 26 maggio 1875.

Nondimeno, l'avvento al potere della Sinistra, avvenuto nel 1876, con la nomina a Presidente del Consiglio di Agostino Depretis, fece sperare in un indirizzo politico più aperto e in un rinnovamento democratico del Paese; così, il Morelli, nel 1878, presentò un quarto progetto di legge[22]ed, infine, nel 1880, un quinto[23], trovando nel ministro guardasigilli, On. Tommaso Villa un valido sostegno.

Tuttavia, benché tale progetto fosse stato ammesso alla discussione, esso decadde automaticamente, in quanto, la prematura scomparsa del deputato proponente, avvenuta il 22 ottobre 1880, ne impedì la trattazione.

Fu così, che proprio il Villa, decise di proseguire sulla strada tracciata dal citato Onorevole, presentando, nella tornata del 1 febbraio 1881, un proprio disegno di legge sul divorzio che, non discusso, fu riproposto nella legislatura successiva, dal nuovo ministro guardasigilli On. Giuseppe Zanardelli, il 10 aprile 1883[24].

2.- Il dibattito dottrinario

L'anno successivo, grazie all'intensa attività propagandistica di Alfred-Joseph Naquet, fu reintrodotto, in Francia, l'istituto divorzile[25].

[22] S. Morelli, *Disposizioni concernenti il divorzio*, in *Archivio Storico*, Camera dei Deputati, vol. 283, fasc. 63, Legislatura XIII, Sessione II, Atto C.15 del 15 maggio 1878.
[23] S. Morelli, *Sul Divorzio*, in *Archivio storico*, Camera dei Deputati, vol. 296, fasc. 65, Legislatura XIII, Sessione III, Atto C.1 del 19 febbraio 1880.
[24] G. Zanardelli, *Disposizioni sul divorzio,* in *Archivio storico*, Camera dei Deputati, vol. 370, Legislatura XV, Sessione unica, Atto C.87 19.06.1883 - 16.02.1884.
[25] Con la legge del 27 luglio 1884 il divorzio venne reintrodotto nella legislazione francese, prevedendo lo scioglimento matrimoniale per adulterio di entrambi i coniugi, per eccessi, sevizie, gravi ingiurie, abbandono, e per condanna a pena infamante. Non venne consentito, invece, il divorzio per mutuo consenso, che non giustificava nemmeno la separazione; questa, tuttavia, poteva essere convertita in divorzio, su istanza di parte, dopo un termine di tre anni. (cfr. Carlo Crome, *Parte generale del Diritto privato francese moderno. Traduzione con note di A. Ascoli e F. Cammeo,* Milano, Società Editrice Libraria, 1906, pp. 15-17; F. Franceschi, *I progetti per l'introduzione del divorzio in Italia*

Tale circostanza propiziò, nel nostro Paese, la ripresa di un più energico dibattito sul tema, favorito, tra l'altro, dalla nascita del «Comitato promotore della legge sul divorzio, cui aderirono…Villa, Turati, Mantegazza, Zanardelli…[e che nel 1891 pubblicò] il primo numero del mensile *Il Divorzio*[26]»[27].

Di conseguenza, gli oppositori dell'istituto dovettero mobilitarsi; così iniziarono una dura offensiva contro la fazione divorzista, accusandola di avere legami con gruppi sovversivi di matrice socialista nonché di appartenere alla massoneria[28], rimarcando ove possibile l'origine giudaica[29]dei sostenitori, tra cui vi era l'On. Cesare Parenzo[30], per ventilare pretese macchinazioni della «razza maledetta da Dio», contro la civiltà cristiana[31], puntando a dimostrare come, in realtà, il movimento divorzista mirasse alla disgregazione delle strutture sociali del cattolicesimo.

in epoca post-unitaria, *Stato, Chiese e pluralismo confessionale*, Rivista telematica n. 34, 2012; pp. 27)

[26] La rivista diretta da G. Camillo de Benedetti, oltre al tema del divorzio si occupava anche delle tematiche ad esso affini, tre cui le successioni, la condizione della donna, la figliazione e la ricerca della paternità, con l'intento di riformare integralmente il diritto di famiglia; essa annoverava tra i suoi collaboratori: Pasquale Fiore, Giovanni Bovio, Enrico Ferri, Domenico Giuriati, Luigi Lucchini, Cesare Lombroso, Paolo Mantegazza, Alfredo Naquet, Cesare Parenzo, Filippo Turati, Tommaso Villa, Giuseppe Zanardelli. Cfr. P. Passanti*, Dalla tutela del lavoro femminile al libero amore. Il diritto della famiglia nella società dell'avvenire*, in *Lavoro e cittadinanza femminile. Anna Kuliscioff e la prima legge sul lavoro delle donne*, a cura di P. Passanti, Milano, Franco Angeli Editore, 2016, pp. 134.

[27] F. Franceschi, *I progetti per l'introduzione del divorzio in Italia in epoca post-unitaria*, *Stato, Chiese e pluralismo confessionale*, Rivista telematica n. 34, 2012; pp. 28.

[28] *La Civiltà Cattolica*, anno quarantesimosecondo, vol. XII della serie decimoquarta, Roma, Alessandro Befani, 1891, pp. 106.

[29] *Ivi*.

[30] *Disegno di legge Villa*, *Relazione Parenzo*, in *Atti del Parlamento italiano*, Camera dei Deputati, XIV Legislatura, Sessione 1880-1881, Raccolta Atti stampati, vol. VII, 159-A.

[31] A. Coletti, *Il divorzio in Italia. Storia di una battaglia civile e democratica*, Roma, Samonà e Savelli, pp. 45.

La questione, così, giunse ad interessare la dottrina civilistica dell'epoca[32], comportando una copiosa proliferazione di opere e di pamphlet sull'argomento.

Tra gli altri, gli scritti di Adolfo De Foresta[33] (1825 - 1886), di Domenico Giuriati[34] (1829 - 1904) nonché del succitato ministro Villa[35], espressero una posizione vicina all'idea rivoluzionaria, del matrimonio-

[32] La scelta del codice unitario di escludere il divorzio dal sistema normativo non acquietò i suoi sostenitori che tra il 1878 e il 1920 presentarono circa dieci progetti o disegni di legge, tutti destinati al fallimento, sicuramente Morelli, Villa, Zanardelli furono i principali promotori ma al loro fianco si schierarono anche Melchiorre, Gioia, Emilio Bianchi, Enrico Ferri, Maurizio Roccarino. (cfr. L. Garlati, *La famiglia tra passato e presente,* in *Diritto della famiglia*, di S. Patti e M. G. Cubeddu*,* Milano, Giuffrè Editore, 2011, pp. 44). Fra i divorzisti erano individuabili due correnti, una, minoritaria, promossa prevalentemente da radicali e socialisti, che propugnava lo scioglimento del matrimonio a partire da una concezione privato-contrattualistica, in nome della libertà individuale; l'altra, maggioritaria, sostenuta in particolare dalla Sinistra liberale, che proponeva una indissolubilità temperata, prospettando il divorzio come un istituto giuridico eccezionale, limitato da una precisa casistica e funzionale alla soluzione dei problemi sociali. Nella stessa logica binaria, fra gli antidivorzisti, accanto all'agguerrita componente clericale, avversa anche al matrimonio civile, erano presenti numerose personalità, fra le quali Salandra e Gabba, che sostenevano la prevalente natura pubblicistica del vincolo matrimoniale che considerava la famiglia come il luogo dell'educazione e della disciplina sociale. *(*Cfr. *C. Valsecchi, In difesa della famiglia? Divorzisti e antidivorzisti in Italia tra Otto e Novecento*, Milano, Dott. A. Giuffrè editore, 2004). Le due concezioni benché s'intersecassero venivano proposte in termini di contrapposizione frontale, al fine di concedere o negare i diritti; esemplare è in tal senso la netta divisione tra dimensione pubblica e privata della famiglia, presente nella voce *Famiglia* del *Digesto Italiano* (pp. 424-435), redatta da G. Manfredini nel 1895 (cfr. G. Cazzetta, *Codice Civile e identità giuridica nazionale. Percorsi e appunti per una storia delle codificazioni moderne,* Torino, G. Giappichelli Editore, 2018, pp. 57-59), in cui sembravano compendiati molti punti presenti nel Convegno fiorentino (cfr. E. De Troja, *Anna Franchi: l'indocile scrittura. Passione civile e critica d'arte,* in *Scrittura e memoria delle donne,* Firenze, Firenze University Press, 2016, pp. 36).

[33] A. De Foresta, *L'adulterio del marito, uguaglianza della donna – divorzio*, Milano, Fratelli Treves Editori, 1881.

[34] D. Giuriati, *Le leggi dell'amore*, Torino, Roux Frassati Editori, 1895

[35] T. Villa, *Relazione alla Camera dei Deputati*, tornata 1 febbraio 1881.

contratto di natura privata, mentre quelli di Enrico Cenni[36], di Antonio Salandra[37]e di Carlo F. Gabba[38] prospettarono una visione pubblicistico-conservatrice sintetizzabile in quattro punti comuni.

Infatti, essi sostenevano che: in primo luogo, l'introduzione del divorzio avrebbe indotto ad accrescere la leggerezza con cui si sarebbero contratti i matrimoni, comportando una repentina decadenza dei costumi, già ritenuti profondamente corrotti; in secondo luogo, la separazione, contrariamente all'istituto divorzile, ancorché protratta nel tempo, non avrebbe mai tolto la possibilità della riconciliazione; in terzo luogo, il divorzio avrebbe comportato per la prole un più profondo pregiudizio affettivo ed economico; in ultimo, l'opinione pubblica, quando non fosse stata indifferente, si mostrava fortemente contraria al progetto di riforma.

[36] E. Cenni, *Il divorzio considerato come contro natura ed antigiuridico*, Napoli, R. Tipografia Francesco Giannini & Figli, 1902.
[37] A. Salandra, *Il divorzio in Italia*, Roma, Forzani e C. Tipografia del Senato, 1882.
[38] C.F. Gabba, *Il Divorzio nella legislazione italiana,* Torino, Unione tipografico editrice, 1891.

In tale contesto, s'inseriva, fra le tante questioni trattate[39], in materia civile, da Pasquale Fiore[40], giurista terlizzese di ispirazione liberale ed ex

[39] Principali pubblicazioni di Pasquale Fiore: *Elementi di diritto Pubblico costituzionale ed amministrativo,* Cremona, 1862*; Il nuovo diritto internazionale pubblico,* Milano, 1865*; Diritto internazionale privato,* Firenze, 1869; *Del fallimento secondo il diritto internazionale privato,* Pisa, 1873; *Trattato di diritto internazionale pubblico*, Torino, 1879-84; *"Diritto internazionale Privato,* in quattro volumi, Firenze, 1869, Torino, 1888; *Digesto Italiano*, Torino, 1884-1921; *Il diritto civile italiano secondo la dottrina e la giurisprudenza,* Torino, 1886*; Delle disposizioni generali sulla pubblicazione interpretazione ed applicazione delle leggi,* Torino, 1886*; Ordinamento giuridico della società degli stati. Il diritto internazionale codificato e la sua sanzione giuridica,* Torino, 1890; *Sulla controversia del divorzio in Italia: considerazioni*, Torino, 1891; "*Dello stato e della condizione giuridica delle persone secondo la legge civile,* Napoli, 1893; *Elementi di diritto internazionale privato,* Torino, 1899*; Questioni di diritto su casi controversi,* Torino, 1904; *Della cittadinanza e del matrimonio*, Napoli, 1909; ad esse si aggiungano oltre quaranta opere minori, composte dal Fiore tra il 1890 ed il 1913. «L'Unione Tipografica Editrice Torino ha edito con amore e diligenza tutte le opere del Fiore, anche quelle pubblicate da altre Case editrici, formando così una biblioteca speciale, di cui fa parte l'intera collezione del Diritto civile italiano, che ha raggiunto i 40 volumi». (cfr. U. R. Marzano, *Pasquale Fiore, L'uomo e il giurista*, Bari, Società Tip. Editrice Pugliese, 1923, pp. 62). «I suoi articoli comparvero numerosi su: *Il Digesto italiano, La Legge, Il Filangieri, la Rivistadi diritto internazionale, l'Annuario dell'Istituto di diritto internazionale e anche su riviste straniere come il Journal de droit international privé, la France judiciaire, la Revue de droit international, la Revista de derecho internacional e la Revista de legislation y lunsprudentia de Madrid.Nel 1890 l'editore Marescq Ainé di Parigi».* (cfr. L. Nuzzo, *Storia di una fotografia: Pasquale Fiore a Madrid*, Lecce, seminario dell'Università del Salento, 2018/2019).

[40] Pasquale Fiore nacque a Terlizzi, in provincia di Bari, l'8 aprile 1837, da Annibale, medico-chirurgo, e da Marianna Salvemini. Fece i propri studi, prima presso il vicino Seminario Vescovile di Molfetta, dove venne ordinato sacerdote, poi presso la R. Università di Napoli, dove ebbe per maestri G. Pisanelli, G. Manna, E. Pessina e F. Pepere, che gli trasmisero ideali liberali. Dal 1869, svestito l'abito talare, pur conservando il celibato perpetuo, si dedicò alla professione di Avvocato e all'insegnamento del diritto in qualità di Professore Ordinario di Diritto internazionale all'Università di Urbino (1863), Straordinario di Diritto internazionale all'Università di Pisa (1865), Ordinario di Diritto internazionale all'Università di Torino (10 novembre 1875, periodo in cui svolse più attivamente l'attività legale), Ordinario di Diritto privato comparato (8 marzo 1882), di Diritto privato (24 settembre 1882) e di diritto internazionale all'Università di Napoli (15

prelato, già allievo del Pisanelli e, all'epoca, Professore Ordinario di diritto privato comparato, di diritto privato e di diritto internazionale all'Università di Napoli, la memoria *Sulla controversia del divorzio in Italia: Considerazioni*[41], che finì per costituire un *tertium genus***,** che apriva all'introduzione del divorzio come meglio relativo, finalizzato alla tutela della morale pubblica.

Tali posizioni furono espresse *de visu* nel terzo Congresso giuridico italiano, tenutosi a Firenze, tra il 7 e l'11 settembre 1891[42], in cui lo scontro politico-dottrinario raggiunse il proprio acme.

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marzo 1891). Nel corso della propria vita egli fu insignito di altissime onorificenze, tra le principali, va ricordato che: fu Membro ordinario della Società reale di Napoli, del Consiglio del contenzioso diplomatico, del Circolo giuridico di Napoli nonché dell'Istituto di Diritto Internazionale. Fu, inoltre, Commendatore dell'Ordine dei SS. Maurizio e Lazzaro, Ufficiale dell'Ordine della Corona d'Italia, Commendatore dell'Ordine della Corona d'Italia, Commendatore dell'Ordine del Salvatore di Grecia, Cavaliere di gran Croce dell'Ordine di Isabella la Cattolica, Dottore onorario in Diritto all'Università di Aberdeen, ed il 12.03.1910 venne nominato Senatore del Regno. Infine, spirò il 17.12.1914 a Napoli, dove risiedeva, ormai, da oltre trent'anni. (Cfr. U. R. Marzano, *Pasquale Fiore, L'uomo e il giurista*, Bari, Società Tip. Editrice Pugliese, 1923; Senato della Repubblica *Pasquale Fiore*, Scheda Senatore, Senatori d'Italia 1848-1943; P. Camponeschi, *Fiore Pasquale*, Dizionario Biografico degli Italiani, Volume 48, Istituto della Enciclopedia Italiana Treccani, Catanzaro, Arti Grafiche Abramo S.r.l., 1997, pp. 127-129; C. Villani, *Scrittori ed artisti pugliesi antichi moderni e contemporanei*, Trani, V. Vecchi tipografo editore, 1904, pp. 359 ss.; C. Villani*, Scrittori ed artisti pugliesi antichi moderni e contemporanei. Nuove addizioni*, Napoli, Alberto Morano Editore, 1920, pp. 83 ss.; D. Giusto, *Dizionario bio-bibliografico degli scrittori pugliesi viventi e dei morti nel presente secolo*, Napoli, Stabilimento tipografico letterario di L. De Bonis-Domo, 1893 pp. 91 ss.; A. De Gubernatis, *Dizionario biografico degli scrittori contemporanei*, Firenze, Coi tipi dei successori Le Monnier, 1879, p. 1162; L. Nuzzo, *Storia di una fotografia: Pasquale Fiore a Madrid*, Lecce, seminario dell'Università del Salento, 2018/2019).

[41] P. Fiore, *Sulla controversia del divorzio in Italia: considerazioni*, Torino, Unione Tipografico-Editrice, 1891.

[42] *La questione del divorzio ed il Congresso giuridico di Firenze*, *Corriere della Sera*, Milano, 10-11 settembre 1891, n. 248, pp. 1.

A tal riguardo occorre precisare che il Comitato organizzatore dello stesso affermò, inizialmente, di voler escludere la tematica divorzile dall'ordine dei lavori, considerando la «questione non essenzialmente giuridica, ma sociale»[43].

Nondimeno, appena conclusasi la cerimonia inaugurale, la serenità e la calma auspicate in avvio cedettero presto alla passione, così, il divorzio diventò il tema principale dell'intero convegno[44].

La rivista gesuita *La Civiltà Cattolica*, tuttavia, diffidava delle dichiarazioni espresse dal suddetto Comitato, in quanto, riteneva che «non si avea altro di mira che trovare il pretesto di un congresso per agitare la questione del divorzio…oggetto tanto vagheggiato dalla massoneria e dal giudaismo, che rallegrava un certo numero di giurisperiti nonché di appartenenti al foro, alla magistratura e all'università»[45] e che, pertanto, lo stesso fosse stato predisposto *ad hoc*.

Durante tale Congresso, la situazione parve, sin dal principio, talmente conflittuale che persino l'incarico di relatore, spettante di diritto, a Carlo F. Gabba[46] dell'Università di Pisa, fu attribuito a Gianpietro Chironi[47] dell'Università di Torino, in quanto, al primo si imputava

[43] *Ivi.*
[44] *Ivi*.
[45] *La Civiltà Cattolica*, cit., pp. 106.
[46] Al Gabba si contestavano, principalmente, le posizioni assunte negli scritti, *Le donne non avvocate* (Pisa, Tipografia T. Nistri e C., 1884) e *Della condizione giuridica delle donne* (in *Giurisprudenza italiana,* Torino, UTET, 1881) in cui lo stesso aveva asserito: «non di rado furono e vengono tuttodì esposte da giuristi e non giuristi aspirazioni esagerate ed assurde sotto i nomi assai vaghi di emancipazione, parificazione delle donne» (cfr., *ivi*, pp. 676-677) nonché l'affermazione: «il regno del divorzio sarà il regno dell'adulterio» (cfr. *Opinioni anglo-americane pro e contro il divorzio,* Firenze, Ufficio della rassegna nazionale, 1891, pp. 21);
[47] «Cosa curiosissima, si giunse a tal punto di cecità…che fu bandito ai quattro venti di aver trovato un relatore favorevole. Fulmine a ciel sereno venne da Roma, il giornale *Il Divorzio…*riportando un brano delle *Istituzioni di diritto civile* del Prof. Chironi, spirante avversione alla riforma, mise in burletta il Comitato e la scelta che aveva fatto. La

l'appartenenza alla fazione conservatrice[48]; ed invero, questi divenne il punto di riferimento della fronda antidivorzista, che intese supportare attivamente, anche attraverso la distribuzione, all'interno dell'Assise, di opuscoli polemici[49].

Allo stesso si contrappose il succitato On. Villa che, nel corso dei lavori, si dichiarò leader dei divorzisti[50], divenendo, pertanto, il principale bersaglio della suddetta rivista, che lo definì: «vero archimandrita della congrega del divorzio, perché massone in grado superiore ed uno dei più subdoli e ipocriti nemici della Chiesa cattolica…[accusandolo] di cupi raggiri, di artifici avvocateschi, di volgari sofismi, di gonfia retorica, e di un pessimo bastardume legislativo, scientifico, morale, teoretico e pratico»[51].

Invero, il giorno 9 settembre, proprio il Villa riuscì ad ottenere l'incarico di relatore[52], così, ebbe la possibilità di far votare il proprio ordine del giorno all'Assemblea Plenaria, conseguendo sul divorzio 106 voti favorevoli, 77 contrari e 2 astensioni[53].

Durante tale votazione, ci racconta il Camponeschi, il Fiore «espresse parere contrario al progetto di riforma, ma che, tuttavia, tramite il proprio opuscolo, contribuì alla realizzazione di un clima di moderato possibilismo»[54].

Commissione che aveva scelto il Chironi cade dalle nuvole ma come fare in tal frangente? scrivergli che se ne ritirasse parve sconveniente; dunque, si piego il capo e si sopportò il relatore contrario». (cfr. *La questione del divorzio ed il Congresso giuridico di Firenze*, cit.).

[48] *La questione del divorzio ed il Congresso giuridico di Firenze*, cit.

[49] *Ivi.*

[50] *Ivi.*

[51] *La Civiltà Cattolica*, cit., pp. 107.

[52] *La questione del divorzio ed il Congresso giuridico di Firenze*, cit.

[53] *La Civiltà Cattolica*, cit., pp. 107.

[54] P. Camponeschi, *Fiore Pasquale, Dizionario Biografico degli Italiani*, Volume 48, in *Istituto della Enciclopedia Italiana Treccani*, Catanzaro, Arti Grafiche Abramo S.r.l., 1997, pp. 127-129.

3. Il vero campo e la moderazione del Fiore

Nell'incipit del proprio libello il Fiore affermava di voler offrire il proprio contributo «colla speranza di dire cose nuove e di riportare la questione nel suo vero campo…[in quanto , egli riteneva che]…nel fervore della disputa…l'oggetto concreto…fosse stato perso di mira dagli uni e dagli altri»[55].

Per il Fiore, comunque, l'acceso clima conflittuale, creatosi attorno alla questione del divorzio, non avrebbe dovuto destare alcuna meraviglia, in quanto, tale tematica risultava di per sé idonea a «commuovere ed appassionare gli animi»[56], giacché, secondo la propria sensibilità, egli sosteneva che la vita morale di ogni stato «dipendesse in massima parte dall'ordinamento morale familiare»[57].

Per tale ragione, onde sfociare in argomentazioni ideologiche che avrebbero distolto ulteriormente il lettore dalla ricerca delle soluzioni, intese sviluppare il proprio ragionamento con un intento pacificatore ed un costante atteggiamento di rispetto verso le posizioni assunte dai colleghi.

Egli stesso, infatti, invitava i consociati alla moderazione, esortandoli a non «scagliare l'anatema contro chi la pensasse diversamente, essendochè tutti i giuristi serii e di buona fede, favorevoli o contrarii, debbono essere…convinti, che miriamo tutti alla stessa meta…accrescere…la saldezza dell'organismo più importante, la famiglia, e che la contraddizione dipende solo dal diverso modo di vedere»[58].

Da queste premesse, si avviava la dissertazione del Professore, finalizzata a scandagliare la questione divorzile, cercando di mantenere un

[55] P. Fiore*, op.* cit., pp. 8.
[56] *Ivi*, pp. 7.
[57] *Ivi.*
[58] *Ivi*, pp. 9.

punto di vista obiettivo, così, da poter vagliare asetticamente i "pro e i contro della proposta"[59] Villa, che, rilevava il Fiore, al momento della pubblicazione del proprio opuscolo, avvenuta addirittura ad un decennio di distanza, giacesse ancora abbandonata in un cassetto del ministero e non fosse mai stata discussa dall'Assemblea legislativa.

Egli era consapevole di come tale circostanza fosse il frutto di una condizione di stallo, dovuta all'identico fervore con il quale «persone autorevoli [incitavano l'opinione popolare, onde spingere il Governo a non ritardare la riforma, mentre altre] egualmente autorevoli…al certo non meno nobili e non meno oneste»[60] si battevano per impedirla.

Pertanto, il Fiore, affermava che «la discussione intorno all'opportunità di una legge sul divorzio fosse diventata al presente più viva…[e che, toccando] direttamente l'ordinamento della famiglia italiana»[61]avrebbe comportato un mutamento profondo dell'assetto statale, ragion per cui, un intervento normativo, gli appariva all'uopo improcrastinabile.

Egli, infatti, benché rifiutasse la concezione contrattualistica del matrimonio, sosteneva che, ferma restando la regola di diritto comune sull'indissolubilità del vincolo coniugale, la legge avrebbe dovuto far fronte alle situazioni eccezionali in cui la comunione morale tra i coniugi non fosse stata più possibile[62].

4. "Sulla controversia del divorzio in Italia: considerazioni" del 1891: una terza via

Da tali premesse nasceva *Sulla controversia del divorzio in Italia: considerazioni*, memoria dedicata a «Giuseppe Zanardelli, statista e

[59] *Ivi,* pp. 7.
[60] *Ivi.*
[61] *Ivi.*
[62] *ivi,* pp. 17.

giureconsulto»[63], al quale il Fiore volle rivolgersi, confidando che lo stesso «potesse confermare la sapiente tradizione giuridica italiana»[64], attraverso una nuova legge, che lungi dall'essere un'imitazione delle norme straniere, si ispirasse al principio della miglior tutela degli interessi sociali e morali della famiglia.

Di seguito, l'Autore annunciava che nell'affrontare la trattazione della problematica non avrebbe indugiato su inutili declamazioni o su argomenti storici, ritenendo che le leggi civili dovessero essere positivizzate solo con riferimento alla convenienza di ciascun popolo, avendo riguardo ai propri bisogni specifici, alle condizioni morali e politiche, nonché al grado di civiltà e alle condizioni contingenti e reali, nelle quali si fosse svolta la vita della società in una data epoca[65], invitando, contestualmente, a tener presente che nessun sistema di leggi materiali avrebbe mai potuto realizzare «l'ottimo assoluto»[66]; riprendendo, in tal modo, il concetto espresso da Gian Domenico Romagnosi secondo cui: «sotto il nome di diritto positivo s'intende il complesso delle regole moderatrici degli atti nostri fissate dall'umana autorità onde ottenere il meglio, ed evitare il peggio»[67].

Secondo il Fiore, pertanto, la problematica si sarebbe dovuta risolvere attraverso la soluzione di tre quesiti:

1. Ritenendo il carattere giuridico del matrimonio così come lo si trova stabilito a seconda del vigente codice civile, e considerando l'organamento del medesimo in rapporto alla sua natura ed alla sua finalità può convenire di mutare la regola legale della costituzione della famiglia?

[63] *ivi*, pp. 1.
[64] *ivi*, pp. 58.
[65] *ivi*, pp. 9.
[66] *ivi*, pp. 58.
[67] G. D. Romagnosi, *Assunto Primo della Scienza del Diritto Naturale,* Pavia, Pietro Bizzoni, 1827, pp. 169.

2. Ritenendo pure che la regola legale non debba essere mutata sostanzialmente. Dovrà reputarsi meglio di mantenere in ogni caso le regole dell'indissolubilità del vincolo coniugale fino alla morte dei coniugi, ovvero di ammettere in via eccezionale qualche deroga in certi casi singolari, non per la principale considerazione del rispetto dovuto alla libertà delle persone, ma massimamente per quella di provvedere meglio alla conservazione della morale sociale, ed alla migliore tutela dell'ordinamento stesso della famiglia?

3. Può reputarsi opportuno di attuare una riforma nelle presenti condizioni del nostro paese?[68]

5. Dalla concezione cattolica all'ammissione del divorzio

In ordine al primo quesito, il Giurisperito sosteneva che, all'epoca, la regola morale e legale attraverso cui si costituisse la famiglia italiana, non pareva essere in alcun modo in discussione, giacché, nella concezione comune, la società coniugale rappresentava per l'uomo e la donna «la più alta e la più completa unione di due individualità»[69], tesa al perfezionamento dei bisogni etici, nonché all'appagamento di quelli naturali e fisiologici, tra cui primeggiava la perfetta comunione dei sentimenti e degli affetti, seguita dall'ancestrale impulso di perpetuare sé stessi nella prole.

Il codice Pisanelli, inoltre, positivizzava tali principii, intendendo la stessa come l'unione in matrimonio, di cui all'art. 130[70], destinato

[68] P. Fiore, *op. cit.*, pp. 11.
[69] P. Fiore, *Della cittadinanza e del matrimonio,* vol. I, Napoli, Eugenio Margieri, 1909; pp. 272.
[70] *Codice del Regno D'Italia*, cit., Art. 130: «Il matrimonio impone ai coniugi la obbligazione reciproca della coabitazione, della fedeltà e della assistenza».

principalmente alla comunione di vita ed al pieno soddisfacimento di ogni affetto e di ogni desiderio onesto.

In tale contesto, il congiungimento sessuale, allo scopo di procreazione, era, infatti, reputato uno degli elementi essenziali dell'unione, specificando, tuttavia, che ove ci fosse stata la c.d. *impotentia generandi*, essa non avrebbe tolto alla società coniugale il proprio carattere e che sarebbe spettato, pertanto, all'altro coniuge, ove tale circostanza fosse stata ritenuta dirimente, esperire la apposita azione di annullamento ex art. 107 c.c.[71], dando, così, prevalenza al succitato elemento spirituale rispetto a quello naturale della *perpetuatio species*.

In tal senso, il Fiore accogliendo la definizione di Richard e Giraud[72], del matrimonio come «società perfetta e perpetua di vita, di spirito e di cuore»[73], faceva discendere il principio secondo cui la regola generale del matrimonio dovesse riposare nel concetto di stabilità ed indissolubilità del legame, affinché lo stesso potesse raggiungere i propri fini e che ove così non fosse stato, si sarebbe attentato alla struttura stessa dello Stato, che aveva proprio nella famiglia il suo più saldo fondamento.

Il Fiore, dunque, partiva da presupposti spiritualistici e cattolici e, sulla base di questi, rifiutava l'idea contrattualistica del matrimonio, che avrebbe attribuito ai coniugi «la piena facoltà per ciascuno di dissolvere i rapporti di famiglia»[74], finendo per garantire, paradossalmente, le passioni egoistiche nonché gli istinti più vili e mutevoli, «principio del più grande e pericoloso sovvertimento morale e sociale»[75].

Per l'Avvocato, infatti, «l'interesse generale della società…delle parti contraenti e della prole…esigevano imperiosamente…una istituzione

[71] *Ivi*, Art. 107: «L'impotenza manifesta e perpetua, quando sia anteriore al matrimonio, può essere proposta come causa di nullità dell'altro coniuge».
[72] P. Fiore, *op. cit*. pp. 272-273.
[73] Richard e Giraud, *Dizionario universale delle scienze ecclesiastiche,* Napoli, Stabilimento Tipografico di C. Batelli e C., 1847, pp. 597.
[74] P. Fiore, *Sulla Controversia Del Divorzio in Italia: considerazioni, op. cit*., pp. 15.
[75] *Ivi*.

sui generis»[76], che dovesse sì assicurare la più completa libertà ma solo nella fase genetica, prevedendo, per contrappasso stringenti limitazioni al momento del proprio disfacimento[77].

Il Fiore, fatte tali premesse, invitava gli uomini di buona fede a tener conto delle esigenze sociali già considerate dal codice "Pisanelli" che, a tal fine, aveva previsto la separazione[78], evidenziando come la stessa già costituisse una prima deroga al principio di indissolubilità del vincolo coniugale[79]

Tuttavia, egli rilevava, di seguito, che la separazione, non mirando allo scioglimento del rapporto giuridico ma alla sua sola modifica, avesse lasciato, *sine die* e nella piena ed esclusiva potestà dei coniugi la facoltà di far cessare ogni effetto della pronuncia giudiziale «colla volontaria riconciliazione»[80], insidiando la certezza del diritto.

Il Fiore proseguiva, quindi, la propria trattazione invitando a riflettere sull'ipotesi di separazioni costanti e permanenti, sostenendo che sarebbe stato necessario interrogarsi su quale sarebbe stato il meglio relativo, se l'indissolubilità del vincolo sino alla morte o un'apposita legge ad *hoc*, che potesse sciogliere un legame ormai irrimediabilmente compromesso[81].

Pertanto, lo stesso, assumeva una posizione mediana nel dibattito sul divorzio.

[76] *Ivi.*
[77] Cfr. *Ivi.*
[78] *Codice del Regno D'Italia*, cit., Art. 149: «Il diritto di chiedere la separazione spetta a coniugi nei soli casi determinati dalla legge».
[79] Cfr. P. Fiore, *op. cit*., pp. 24.
[80] *Ivi,* pp. 25.
[81] Cfr. *ivi, pp. 26-27.*

6. Il principio d'indissolubilità tra scioglimento, separazione e nullità

Con riferimento al secondo quesito, invece, il Giureconsulto riteneva che, incontestata la regola generale dell'indissolubilità, fosse giunto il momento di ammettere, in ragione di speciali utilità pubbliche, alcune particolari deroghe e che, pertanto, occorresse una normativa sullo scioglimento del matrimonio che assumesse la funzione di regola di polizia sociale.

Di conseguenza, egli intese schierarsi a favore del divorzio, purché lo stesso fosse disciplinato come un rimedio atto a ripristinare una condizione di normalità, che avesse consentito un nuovo ordine delle famiglie e della società, evitando il protrarsi di situazioni di scandalo.

Egli opinava che, ferma restando la disciplina di cui agli artt. 148-158 del Codice Civile del 1865, si sarebbe potuto accedere all'istituto divorzile solo dopo il trascorrere di un congruo lasso di tempo di separazione, al termine del quale si sarebbe dovuta accertare l'impossibilità di una riconciliazione dei coniugi e che solo nell'ipotesi in cui si fosse riscontrata l'irrealizzabilità della continuazione della comunione di vita, essenza stessa del vincolo nuziale, il giudice avrebbe potuto pronunciare lo scioglimento definitivo del matrimonio.

A tal proposito, il Giurisperito, precisamente, affermava che «per mantenere incolume l'ordine pubblico…reputiamo più adatto il divorzio»[82].

Quando, infatti, siano venuti a mancare all'unione coniugale i suoi caratteri propri e l'oggetto della sua finalità e quando, inoltre, siano stati adoperati ed esauriti i mezzi, di cui il potere umano può disporre per ripristinarli, ci sembra meglio che il legislatore dichiari, come è in realtà,

[82] *Ivi*, pp. 27.

che la società coniugale più non sussiste, e che ne pronunzi lo scioglimento, regolando egli stesso, nell'interesse dei coniugi e dei figli le conseguenze[83].

Il Fiore, tuttavia, metteva in guardia dal reputare possibile il divorzio ogniqualvolta ricorressero i motivi che giustificassero la separazione, ritenendo che, seguendo tale impostazione, si sarebbe sempre giunti ad una irrimediabile frattura della comunione di vita, rendendo impossibile il ricongiungimento, quandanche la separazione fosse stata causata da comuni elementi accidentali e transitori, che il mero trascorrere del tempo avrebbe probabilmente sopito.

Il Professore, pertanto, invitava a prendere atto che la legislazione italiana sul diritto di famiglia fosse ormai imperfetta e che le nuove istanze tese a riformarla non mirassero a sconvolgerla bensì a perfezionarla, modernizzandola.

Di seguito, egli esortava il governo a non seguire la via contrattualistica della piena libertà, sostenendo che anche «nei paesi in cui il divorzio fosse stato ammesso, si stesse percependo la necessità di renderlo meno frequente»[84] e che, a tal fine, si stessero introducendo procedure che assicurassero una maggior cautela nelle pronunce; ammonendolo sulla circostanza che, tuttavia, sarebbe ugualmente rovinoso tanto assecondare le peggiori esagerazioni dell'individualismo quanto arrestare l'azione legislativa, imponendo le proprie convinzioni religiose.

Di conseguenza, il Fiore si soffermava ad esaminare anche la principale soluzione offerta dai detrattori del divorzio, che proponevano, sulla falsariga al diritto canonico, l'introduzione di nuove fattispecie di nullità.

Così, egli asseriva che, convenendo tutte le parti sociali sulla incompletezza dell'ordinamento e riconoscendo unanimemente l'urgenza della riforma, la disputa sembrava essersi spostata, e che la nuova *summa*

[83] *Ivi.*
[84] *Ivi*, pp. 28.

divisio pareva, ormai, riguardare divorzisti e quanti avessero preferito l'introduzione di nuove cause di nullità.

Per il Fiore, tuttavia, tale ultima prospettiva pareva sollevare ulteriori problematiche; infatti, egli rilevava che il diritto canonico ritenesse ammissibili ben «13 cause di nullità»[85], e che quest'ultime se da un lato sembrassero salvaguardare l'indissolubilità del vincolo, dall'altro avrebbero potuto condurre al paradosso di dichiarare nullo persino un matrimonio celebrato nella decade precedente, quandanche l'unione avesse generato una discendenza, consentendo, di fatto, un ampio arbitrio al giudice ecclesiastico, sia nell'istruzione della causa sia sui motivi della pronuncia.

Il Giurista continuava poi la propria analisi, riflettendo sul fatto che, ferma restando la possibilità di addivenire ad un ulteriore ampliamento delle cause di nullità, attingendo dal modello canonico, ciò non avrebbe comunque offerto una valida soluzione alla questione di quanti, non rientrando nelle stesse, sarebbero stati comunque costretti a vivere in uno stato di separazione permanente.

Egli, ad esempio, invitava a considerare la posizione del coniuge incolpevole dell'incrinatura della comunione di vita, che, lasciato solo, sarebbe stato nell'impossibilità di celebrare nuove nozze e di conseguenza sarebbe stato costretto dallo Stato a dover scegliere se vivere assecondando i propri bisogni affettivi, ponendosi così in contrasto con l'ordinamento e con la morale della famiglia o ubbidire ad essi, ponendosi, questa volta, in contrasto con la legge della natura.

Per il Giurista, quindi, ove la comunione non fosse stata più raggiungibile attraverso i mezzi apprestati dal Legislatore, essa non avrebbe dovuto più reputarsi esistente, men che meno in virtù di una mera finzione legale, in quanto, tale costrizione avrebbe corrotto anche il coniuge onesto; egli, infatti, affermava: «non si può rendere legittima una

[85] *Ivi*, pp. 33.

condizione permanente, in cui la immoralità s'imporrebbe fatalmente, né si può condannare un uomo al celibato perpetuo»[86].

Inoltre, seguitava, asserendo che uno stato di separazione perpetua avrebbe influenzato negativamente entrambi i coniugi, perché, mantenerli legati ad un vincolo indissolubile, nonostante la frantumazione degli affetti, avrebbe contraddetto la naturale sensibilità dell'animo umano; infatti, in tale limbo, si sarebbe acuita una sofferenza morale che, facilmente, avrebbe potuto condurre all'odio reciproco nonché all'ostilità permanente; che «come la storia ci ammaestra…spinge talvolta al delitto, talvolta al suicidio»[87].

In tale contesto, anche il rapporto con i figli sarebbe stato pervertito ed essi sarebbero stati declassati a meri oggetti sui quali sfogare le proprie frustrazioni e le proprie vendette, come narrava Euripide, già nel V sec. a.C., nella celeberrima tragedia *Medea*.

7. La Chiesa: il grande ostacolo

Con riferimento al terzo quesito, il Fiore riteneva che il vero ostacolo da sormontare fosse costituito dall'opinione pubblica, alla quale bisognava, innanzitutto, rendere chiaro il contenuto e le finalità del progetto di riforma, «essendovi intorno…grande confusione»[88].

Il Giurista rilevava, inoltre, tre impedimenti alla stessa, il primo costituito dall'assenza, sul tema, di adunanze o altre manifestazioni popolari; il secondo, dal carattere eccezionale della legge che avrebbe interessato solo una minima parte della popolazione; il terzo, dalla

[86] U.R. Marzano, *Pasquale Fiore, L'uomo e il giurista*, Bari, Società Tip. Editrice Pugliese, 1923, pp. 32.
[87] P. Fiore, *Sulla Controversia Del Divorzio in Italia: considerazioni*, op. cit., pp. 37.
[88] U.R. Marzano, *op.* cit., pp. 34.

«religione di stato»[89] e dall'autorevolezza e cristallizzazione degli insegnamenti della Chiesa.

Nello specifico, quest'ultima risultava la più strenua oppositrice del divorzio; infatti, il suo rifiuto era dettato dalla propria dottrina millenaria, che proclamava il matrimonio sacro ed indissolubile, in forza dell'irrinunciabile principio *"quod Deus coniuxit homo non separat"*.

Per l'ordinamento canonico, invero, il «matrimonio occupava una posizione di grande rilievo, sia sotto il profilo umano e comunitario sia sotto quello più strettamente religioso e spirituale...ritenuto un istituto di diritto naturale che risaliva alla stessa costituzione originaria voluta da Dio creatore…[che] il Cristo volle ristabilire nella sua piena integrità…depurandolo dalle alterazioni che le legislazioni umane vi avevano apportato»[90].

Dunque, esso non appariva come un semplice prodotto delle vicende storico-culturali ma come il frutto del disegno divino, attestato già dal primo libro della Bibbia, la Genesi, che delineava l'essenza dell'istituto[91], poi riconfermato dalle parole del Figlio dell'Uomo, nella celebre disputa sul ripudio, con i Farisei[92], dalla quale emergeva la

[89] *Statuto Fondamentale del Regno*, Torino, Stamperia della gazzetta del popolo, 1884, Art. 1: «La Religione Cattolica, Apostolica e Romana è la sola Religione dello Stato. Gli altri culti ora esistenti sono tollerati conformemente alle leggi».

[90] P. Moneta, *Il matrimonio nullo nel diritto canonico e concordatario*, Bari, Cacucci Editore, 2008, pp. 16.

[91] Genesi 2, 24: «l'uomo lascerà la casa del padre e si unirà alla donna e i due saranno una sola carne».

[92] Matteo 19: «3 Allora gli si avvicinarono alcuni farisei per metterlo alla prova e gli chiesero: «È lecito ad un uomo ripudiare la propria moglie per qualsiasi motivo?». 4 Ed egli rispose: «Non avete letto che il Creatore da principio li creò maschio e femmina e disse: 5 Per questo l'uomo lascerà suo padre e sua madre e si unirà a sua moglie e i due saranno una carne sola? 6 Così che non sono più due, ma una carne sola. Quello dunque che Dio ha congiunto, l'uomo non lo separi». 7 Gli obiettarono: «Perché allora Mosè ha ordinato di darle l'atto di ripudio e mandarla via?». 8 Rispose loro Gesù: «Per la durezza del vostro cuore Mosè vi ha permesso di ripudiare le vostre mogli, ma da principio non

modernità del messaggio evangelico, che si rivolgeva sia al marito che alla moglie[93], riconoscendo ad entrambi pari dignità «nei diritti e nei doveri, [benché], le potenzialità [del testo Sacro, con riferimento alla questione] femminile, siano state ignorate sino alla seconda metà del Novecento»[94].

Il Fiore, a tal punto, invitava però il lettore a riflettere sul fatto che la dottrina ecclesiastica, per quanto qualificata, potesse far valere la propria autorità solo con riguardo ai credenti cattolici, e che a questi nulla avrebbe tolto l'introduzione del divorzio, potendo gli stessi riconoscere alla propria unione il carattere sacro e perpetuo, in armonia con gli insegnamenti della Chiesa.

Inoltre, egli reputava che la disciplina civile del matrimonio avrebbe dovuto aver riguardo al laico principio di libertà di coscienza, fondamento del diritto pubblico, che non poteva sopportare alcun tipo di restrizione in ragione delle credenze religiose degli uni o degli altri.

Il Fiore, tuttavia, riconosceva al Cristianesimo un'indispensabile funzione di guida delle anime, pertanto, accusava della decadenza morale della propria epoca, il diffuso scetticismo verso la fede religiosa che, dal XVIII secolo, aveva alimentato i dubbi verso il Sacro.

Egli sosteneva, infatti, che alla demolizione degli antichi totem, non fosse corrisposta l'edificazione di nuovi, e che gli uomini, privi ormai di una consolidata morale comune, si fossero chiusi in un incolpevole conservatorismo che assicurasse, ancorché nella veste di mere apparenze, una certa stabilità sociale.

Tale condizione, che trovava riscontro nel pensiero del Gabba, secondo cui il «matrimonio con la sua legge dell'indissolubilità era scuola

fu così. 9 Perciò io vi dico: Chiunque ripudia la propria moglie, se non in caso di concubinato, e ne sposa un'altra commette adulterio».

[93] Marco 10, 12, «se la moglie ripudia suo marito e ne sposa un altro, commette adulterio»;

[94] L. Scaraffia, *La questione femminile come problema giuridico, a cura di F. D'Agostino,* Roma, Arcane Editrice, 2017, pp. 155.

di moralità, perché spinge i coniugi alla moderazione e alla tolleranza…o ad appigliarsi talvolta all'espediente non del tutto spregevole di salvare le apparenze»[95], era criticata aspramente dal Fiore.

Quest'ultimo, infatti, asseriva che attraverso tale convinzione si ingenerasse nella collettività un diffuso senso di tolleranza che, specie con riferimento al matrimonio, trattasse le violazioni della fedeltà e della comunione con accondiscendenza, soprattutto allorché commesse dai mariti, finendo per fomentare l'immoralità, pervertendo il contenuto e gli ideali dell'istituto coniugale, salvaguardandone in una certa misura la forma.

Il Professore, di seguito, osservava che, nonostante l'arrocco della Chiesa nonché dell'ala conservatrice, il numero delle separazioni personali pronunciate in Italia mostrasse un trend costantemente in crescita, passando dalle585 del 1879 alle 859 del 1904[96], e che tale fenomeno avesse una maggior diffusione nelle regioni più avanzate, come quelle di Piemonte Lombardia e Toscana.

Da tali elementi, egli deduceva che il fenomeno sarebbe aumentato esponenzialmente con la diffusione «dell'istruzione e della cultura…[nonché con lo sviluppo] della dignità personale della donna, che d'ordinario era la più sacrificata»[97], e che pertanto occorresse una revisione del vigente impianto legislativo.

[95] C.F. Gabba, *op. cit*., pp. 80-84.
[96] A. Busco, "*Divorzi e Separazioni personali dei coniugi", in Annali di Statistica*, *Appendice agli atti della commissione per la statistica giudiziaria e notarile* (sessione del luglio 1898), Roma, Tipografia Nazionale Di G. Bertero E C., 1908.
[97] P. Fiore, *Sulla controversia del divorzio in Italia considerazioni*, op cit*,* pp. 45.

8.- Il progetto del Fiore ed il sostegno al Villa

Infine, alla luce delle succitate istanze, il Fiore s'interrogava su come modificare la legislazione italiana in tema di divorzio, onde assicurare il meglio relativo, sostenendo che la stessa dovesse essere una «legge di ordine pubblico, che mirasse soltanto a far cessare gl'inconvenienti sociali»[98], pertanto, sostanzialmente riassumibile in due articoli:

> "Art. 1. È ammesso lo scioglimento del matrimonio mediante divorzio nel solo caso di separazione giudiziaria pronunziata a norma del codice civile vigente, qualora lo stato di separazione sia perdurato per quattro anni continui, se vi siano figli, e per due anni se non ve ne siano, a contare dal giorno in cui la sentenza che pronunciò la separazione sia passata in cosa giudicata.
>
> Art. 2. Le disposizioni della presente legge saranno applicabili altresì alla separazione volontaria, se sia stata omologata dal tribunale prima dell'attuazione della legge, e sia perdurata per cinque anni se vi siano figli e per tre se non ve ne siano"[99].

Egli, quindi, concluse la trattazione della propria memoria, affermando che:

> "tutte le cure del legislatore dovrebbero essere poi massimamente volte a stabilire il procedimento e le più savie cautele, che potessero essere reputate le più adatte a giustificare la necessità dello scioglimento del vincolo coniugale, ed a regolare, una volta che il divorzio fosse stato pronunciato, la posizione dei figli e quella dei coniugi, tutelando giuridicamente i loro interessi morali nonché patrimoniali"[100].

[98] *Ivi*, pp. 57.
[99] *Ivi*.
[100] *Ivi*, pp. 58.

Nell'attesa che il proprio scritto potesse contribuire ad instaurare un clima di più pacato dialogo, il Fiore intese sostenere il progetto Villa del 1881, che secondo il giurista, pareva strutturato conformemente alle esigenze di disciplina di accadimenti accidentali e che, pertanto, avrebbe evitato la consueta anomalia della separazione personale che, delineata dal legislatore quale stato transitorio, si trasformava in concreto, salvo che in sparuti casi, in una condizione permanente, in cui l'unica via d'uscita sarebbe stata offerta dalla morte di uno dei coniugi[101].

9. Le conclusioni

In Conclusione, il dibattito politico-dottrinario sull'introduzione dell'istituto divorzile, finalizzato quanto meno a prospettare un temperamento del principio dell'indissolubilità del vincolo nunziale, venne alimentato, già alla vigilia della presentazione del codice Pisanelli, dalle opere di numerosi politici, giuristi e scrittori e si intensificò, specie nella seconda metà del secolo XIX, con il fiorire di una copiosa letteratura sull'argomento.

Il panorama editoriale italiano, infatti, si popolò non solo dei suddetti testi giuridici ma anche di numerosi romanzi, espressione di una nuova missione pedagogica dell'arte protesa all'educazione e alla modernizzazione della società., che squarciarono il velo dell'apparenza e del costume, per mostrare i drammi e le contraddizioni dell'istituzione famiglia[102], denunciando «le aporie, le incoerenze e le deformazioni di una società in rapida trasformazione, sempre meno allineata al modello giuridico regolato dal codice civile»[103].

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[101] *Codice del Regno D'Italia*, cit., Art. 148: «*Il matrimonio non si scioglie che colla morte di uno dei coniugi; è ammessa però la loro separazione personale*».

[102] S. Torre*, Il Diritto Incontra La Letteratura,* Napoli, Edizioni Scientifiche Italiane, 2017, pp. 44.

[103] E. Ragni, *Matrimonio e famiglia nella letteratura italiana, Le Certezze Svanite. Crisi della famiglia e del rapporto di coppia nel romanzo italiano dell'età giolittiana e del primo dopoguerra,* a cura di U. Åkerström e E. Tiozzo, Roma, Arcane Editore S.r.l., 2008, pp. 11-54.

Il divorzio, dunque, in quegli anni, aveva rappresentato indubbiamente una problematica che abbracciava, ad un tempo, l'ambiente politico, sociale, religioso, nonché internazionale[104], del neonato Regno d'Italia, retto ancora da fragili equilibri interni e timoroso di un ulteriore peggioramento dei propri rapporti con la Chiesa.

Tuttavia, nonostante tali difficoltà, nell'arco di un cinquantennio, il Parlamento italiano era riuscito comunque a dar vita ad oltre dieci disegni di legge per l'introduzione del divorzio, dai citati progetti del Morelli sino alla tentata riforma, del 1902[105], posta in essere dal Presidente del Consiglio Giuseppe Zanardelli, che aveva provocato le dimissioni del Ministro dei Lavori pubblici Gerolamo Giusso, dichiaratosi «offeso nei suoi sentimenti di cattolico»[106].

In tale contesto, il libello del Fiore, citato nelle opere di M. Roccarino[107] e di U. R. Marzano[108], scrittori a lui coevi, non si sa

[104] F. Peluso, *Separazione e divorzio. Causa celebre decisa dal Tribunale di Napoli*, Napoli, 1877: «La vicenda narrava la separazione di una coppia di coniugi, lui aristocratico napoletano, lei ricca donna di nazionalità inglese, residenti a Napoli, che avevano contratto matrimonio nel 1854 a Londra secondo il rito previsto dal Concilio di Trento. La convivenza era presto naufragata anche a seguito di una relazione amorosa della moglie con un giovane diplomatico londinese, sfociando in una complessa vicenda giudiziaria. Nel 1872 le parti avevano sottoscritto un accordo di separazione personale, voluto da entrambi. Ma pochi anni dopo, la donna, tornata a vivere in Inghilterra, chiedeva e otteneva dal giudice inglese il divorzio dal marito, al fine di potere coronare il sogno d'amore con l'amante. Venuto a conoscenza dell'accaduto, il marito si rivolgeva ai Tribunale civile di Napoli per chiedere la separazione per colpa dalla consorte, rea di averlo ingiuriato con il divorzio e l'infedeltà coniugale.
L'opuscolo riporta tutta la documentazione relativa alla storia raccontata: i verbali di udienza, gli atti della difesa del marito a firma di Giuseppe Pisanelli», cfr. S. Torre*, Il Diritto Incontra La Letteratura,* Napoli, Edizioni Scientifiche Italiane, 2017, pp. 38.
[105] B: Croce, *Storia d'Italia dal 1871 al 1915*, Milano, Adelphi, 1991, pp. 221: «l'ultimo atto anticlericale del governo italiano».
[106] G. Scirè, *Il divorzio in Italia. Parti, Chiesa, società civile dalla legge al referendum (1965-1974)*, Milano, Bruno Mondadori, 2007, pp. 19.
[107] M. Roccarino, *Il divorzio e la legislazione italiana. Stato odierno della questione*, Torino, Fratelli Bocca Editore, 1901.
[108] U. R. Marzano, *op. cit.*, pp. 21-37.

effettivamente quale rilevanza abbia avuto; tuttavia, secondo il Camponeschi ed il Nuzzo, esso contribuì, nell'ambito nazionale, alla realizzazione di un «clima di moderato possibilismo»[109].

Inoltre, nel 1909, il Fiore, seppur sotto una luce diversa, tornò, per l'ultima volta, ad affrontare la questione del divorzio[110], con riferimento al riconoscimento delle sentenze straniere; egli, infatti, osservava come la Corte di Cassazione d'Oltralpe, con la sentenza del 28 febbraio 1860[111], avesse modificato il proprio orientamento maggioritario, affermando che allo straniero divorziato dovesse essere consentito celebrare, in Francia, nuove nozze, allorché fosse stato in grado di provare che il matrimonio precedentemente contratto all'estero, fosse stato sciolto, in conformità della propria *Legge di cittadinanza*; rilevando, di seguito, come la stessa Corte, con la successiva sentenza del 15 luglio 1878[112], stesse consolidando tale impostazione.

Il Fiore evidenziava, ancora, come la giurisprudenza italiana si stesse uniformando a quella francese; a tal proposito, citava la sentenza, del 22 novembre 1884, della Corte d'Appello di Roma, nella causa di Maria Beccadelli dei Principi Camporeale[113], in cui, il Collegio rifacendosi all'art. 103 c.c., che imponeva allo straniero che volesse contrarre matrimonio nel regno, di presentare all'ufficio un *nullaosta* dell'autorità competente del proprio Paese, riconosceva la sentenza straniera ed autorizzava le nuove nozze.

l'Avvocato, pertanto, plaudeva a tale decisione, sostenendo che la stessa fosse rispettosa non solo del diritto internazionale ma persino di quello interno, quandanche quest'ultimo non ammettesse il divorzio tra i propri istituti vigenti[114].

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[109] cfr. P. Camponeschi, *op. cit*.; L. Nuzzo, *op. cit.*

[110] F. Pasquale, *Della cittadinanza e del matrimonio*, *op. cit. pp. 319-323*.

[111] Cass. 28 fev.1860, in *Dolloz,* vol. I, 1860, pp. 59.

[112] *Journal du droit international privé et de la jurisprudence comparée*, *vol. X*, 1878, pp. 499.

[113] C.F. Gabba, *Foro Italiano*, *vol. 10, parte prima: giurisprudenza civile e commerciale*, Roma, Società Editrice Il Foro Italiano ARL, 1885, pp. 178 a 187.

[114] P. Fiore, *Della cittadinanza e del matrimonio*, cit.

Con uno sguardo al panorama italiano, qualche anno più tardi, lo spirito liberal-riformista, che aveva caratterizzato il *Risorgimento,* pareva ormai del tutto esaurito; la Chiesa, infatti, aveva deciso di partecipare attivamente alla vita politica del Paese, assecondando la svolta conservatrice, prima attraverso il c.d. *Patto Gentiloni* del 1913 e poi, revocando il *non expedit*, che, nel 1919, permise la nascita del Partito Popolare Italiano di Don Luigi Sturzo, che impose sul divorzio il proprio «imperioso veto, in barba a tutti i ventisettembrini della dormiente democrazia italica»[115].

Invero, prima dell'avvento del fascismo e della stipula dei c.d. *Patti Lateranensi,* del 1929, un ultimo progetto di legge sul divorzio fu presentato dalla sinistra socialista radicale e repubblicana, nel 1920, che però non ebbe alcun seguito anche a causa della chiusura anticipata della sessione parlamentare in ragione della marcia su Roma[116].

Di conseguenza, il problema del divorzio venne nuovamente affrontato solo dopo la *Liberazione*, dall'Assemblea Costituente ma, come è a tutti noto, fu solo con la L. del 1 dicembre 1970, n. 898 che l'istituto dello scioglimento matrimoniale entrò a far parte del nostro Ordinamento.

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[115] U. R. Marzano, *op. cit.*, pp. 34.
[116] G. Scirè, *op. cit*., pp. 19.

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POPULAR PARTICIPATION IN THE 2019 CONSTITUTION OF THE REPUBLIC OF CUBA: CHALLENGES AND PROSPECTS FOR ITS DEVELOPMENT IN THE SPHERE OF PUBLIC ADMINISTRATION

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Abstract: In Cuba, the instrumentation of the mechanisms, guarantees, and spaces for the exercise of popular participation has experienced a rise with the promulgation of the 2019 constitutional text. Given the recent nature of these regulations, it is pertinent to base the guidelines that allow overcoming the challenges open by the current law of laws to the legal-constitutional instrumentation of citizen intervention in the Public Administration. For this, this work analyzes the theoretical positions related to popular participation as a process, giving way to the explanation of the scope of its materialization within the current norms;

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and, finally, it sets out guidelines that could serve to guide its technical-legal instrumentation in the administrative sphere.

Keywords: popular participation; Public administration; rights; Constitution

Summary: Introduction I. Popular participation as a set of rights that make up a process II. The relationship between popular participation and the activity of the Public Administration in the 2019 Constitution of the Republic of Cuba *II.1. Scope of the 2019 constitutional provisions on popular participation II.2 Guidelines to materialize popular participation in the sphere of Public Administration in accordance with the 2019 Constitution of the Republic of Cuba* III. Conclusions

1.- Introduction

The Cuban Constitution of 1976 gave way to the institutionality of the Revolution, which until then had legitimized itself as a source of Law, and which was reached after a broad process of popular participation in the elaboration of the great legal text. The Constitution, which was approved on February 24 of that year, summarizes the best of the aspirations of a hundred years of independence struggles and Marxist-Leninist thought and whose broadest expression is found in the preamble when declaring "our will that the law of the Law of the republic is governed by this deep desire, finally achieved, by José Martí: "I want the first law of our republic to be the cult of Cubans to the full dignity of man."

Consistent with the principle of socialist democracy that inspired the great text; it gives popular participation a preeminent place in its political-institutional design, especially in municipal matters, a space

for excellence for the most immediate possible concretion of the citizen-state relationship.

In total adherence to the spirit of its predecessor, the 2019 Charter reiterates the aforementioned declarations of principles, complementing them with a superior legal-political design in scope and complexity. This involves the challenge of legally channeling popular participation in all spheres of state action, including those related to Public Administration.

Consequently, the general objective assumed in this work is to base the guidelines that allow overcoming the challenges opened by the current law of laws for the purposes of the legal-constitutional implementation of political participation in the Public Administration.

To comply with it, we begin with the analysis of the theoretical positions that understand popular participation as a process; giving way to the explanation of the scope of its materialization in the current constitutional norms; and, finally, the guidelines that could serve to guide the technical-legal implementation of political participation in the Public Administration are explained in the face of the challenges posed by the provisions of the Cuban Constitution.

For this purpose, the methods of legal-doctrinal analysis were used, which facilitated the elaboration of the theoretical-conceptual framework, allowing to establish the existing doctrinal positions around the research object, as well as its results and perspectives; and legal comparison, to identify common points and prevailing approaches in the legal treatment of self-regulation in the analyzed legal norms. Both methods were supported by the documentary review technique, which made it possible to obtain real and reliable information on the object of investigation from the study of texts and laws in force on the subject in Cuba.

2.- Popular participation as a set of rights that make up a process

By referring to the term participation, we approach "a polysemic concept that is subject to multiple interpretations mediated by interests, by positions of power, by ideology, by values, by social position, by position within administrative and organizational structures, etc. The use or overuse that is made of the concept is, therefore, varied; and its intensity, depth or radicalism lose content as participation is understood more as an instrument to legitimize or accommodate in positions of power, that is, to achieve their own ends, or it can gain intensity, depth and radicalism if considered as a process, where what is significant is the process itself, participation itself understood as an objective in itself and not as an instrument to achieve particular ends but to achieve public ends "[2].

For the purposes of this article, the last meaning is taken as the civic and public essence of participation should not be confused with the results derived from it, so that participation is equivalent to "active involvement of citizens"[3]in making decisions. Claiming the original

[2]ALGUACIL GÓMEZ, J. The challenges of the new local power: participation as a relational strategy in local government. Recovered from: http://www.revistapolis.cl/polis%20final/12/doc/algua.doc, dated August 28, 2009.

[3] DILLA ALFONSO, H. "Thinking the alternative from participation", Issues No. 8, 1996. Recovered from: http://www.temas.cult.cu/articulo.php?titulo=Pensando%20la%20alternativa%20desde%20la%20participaci%F3n&autor=Haroldo%20Dilla%20Alfonso&datos=Investigador.%20Instituto%20de%20Filosof%EDa.&numero = 8% October-December 20% 201996 & link = magazines / 08 / 12dilla.pdf & num = 08 & name = Cultures% 20 found:% 20Cuba% 20y% 20los% 20Estados% 20Unidos as of November 20, 2010

content of the “public” categories[4] and "citizen"[5] from a perspective opposed to liberal individualism[6], making participation an expression of a commitment to one's own / collective versus the individual / private.

The guideline that makes participation possible is its fundamental / constitutional right. According to some, it belongs to the first generation of "Civil and Political Rights" since "they frame a vital space for the development of people in socio-political life"[7] Consequently, they are understood as one of those “rights of an individual nature, of a personal nature, which in general qualify the different edges of freedom as a human quality, express individual autonomy in the set of relationships and specify personal will in the diagram societal"[8]. It is for this reason that Pérez Royo declares that “the constitution recognizes the right to political participation as an exclusively citizen right (…). Such right is specified in the right to vote, which includes both the right to vote in the different forms of referendum provided for in the Constitution”[9].

[4]FERNÁNDEZ BULTÉ, J. Separata of Roman public law. Editorial Félix Varela, Havana, 2004, p. 8.
[5]Vine. FERNÁNDEZ LIRIA, C., FERNÁNDEZ LIRIA, P. and ALEGRA ZAHONERO, L. Education for citizenship. Democracy, Capitalism and the Rule of Law. Editorial José Martí, Havana, 2007.
[6]Vine. DE CABO DE LA VEGA, A. The public as a constitutional assumption, UNAM, Mexico, 1997.
[7]VILLABELLA ARMENGOL, C. “Human rights. Theoretical considerations of its legislation in the Cuban Constitution ”. In PÉREZ HERNÁNDEZ, L. (compiler): Selection of readings on the State and the law. Social workers training course, s / e, 2002, p. 126.
[8] Idem
[9]PÉREZ ROYO, J. Course on constitutional law. Fourth Edition, Marcial Pons, 1997, p. 309.

To the extent that human life has become more complex and the spaces for participation have also become complex, the right to participate has come to be understood not only from an individual perspective, but also collectively and with repercussions on the present or the immediate future and in the long term transcending other human generations. These are some of the reasons why the existence of a fifth generation of rights has been raised. Faced with these arguments, it is necessary to remember that the question of the classification of rights in generations is a purely epistemic matter and what is really important is to understand that, as Villabella points out, “all rights interact and complement each other, so that the "New figures" do not relieve, but settle together with the "old rights"; in all there is an "individual dimension" insofar as they correspond to the human being, which does not contradict the "collective environment" in which he operates; and in all the "positive action of the State" is necessary[10].

The content of these rights to participate has also been developed increasing in attributions and holders until being understood as the set of powers that allow, in a particular or collective way, “to take an active part in governmental decisions and not only, in any way, in the process leading to the adoption of the final resolution ”[11].

Taking the previous reflections on the nature and content of participation as a basis, it should be recognized, in order to fully develop, the character of the process. In this regard, the opinions of El Troudi, Harnecker, Bonilla can be contrasted[12] and Dilla Alfonso[13]. The

[10]VILLABELLA ARMENGOL, C. “Human rights. Theoretical considerations of its legislation in the Cuban Constitution”, p. 128.

[11]HERNÁNDEZ, AM Municipal Law. National Autonomous University of Mexico, 2003, p 381.

[12]EL TROUDI, H .; HARNECKER, M .; BONILLA, L. Tools for participation. Recovered fromhttp://www.rebelion.org/docs/97073.pdf, dated October 15, 2010.

[13] DILLA ALFONSO, H. (1996): "Thinking the alternative from

implications of such consideration are manifested in two fundamental senses: on the one hand there would be the recognition of its dynamic and progressive nature, in a dialectical relationship with the historical-political and socio-cultural environment in which it develops and, on the other, its conception as articulated set of mechanisms that make citizen intervention as immediate as possible at all stages of the public-political decision-making process.

On the first aspect of this idea of participation as a process, El Troudi, Harnecker, Bonilla point out that participation is "a dynamic through which citizens consciously and voluntarily engage in all the processes that affect them directly or indirectly [that] (…) It involves a long learning process. A slow cultural transformation"[14].

Regarding the second of the implications derived from the conception as a process of participation, the aforementioned authors maintain that "popular participation if it intends to implement a genuine municipal democracy must be developed through various mechanisms that allow it to cover the entire public decision-making process-politician (…) must be present in all decision-making processes in matters of public interest"[15].

These are two differentiated but closely linked consequences, since participation, in order to have the character of conscious, active and transformative intervention, demands a set of preconditions and concomitants to the act of participating and the acting subject that give real meaning to his actions, so that it become a genuine expression of his will.

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participation".

[14]EL TROUDI, H .; HARNECKER, M .; BONILLA, L. Tools for participation.

[15] Idem

3.- Relationship between popular participation and the activity of the Public Administration in the 2019 Constitution of the Republic of Cuba

In order to delve into the particular form that participation in Cuba takes, in light of the recently promulgated Body of law, it is necessary to specify a set of elements that determine the channels through which its legislative development and practical implementation must proceed.

II.1 Scope of the 2019 constitutional provisions on popular participation

The first thing that is noticed about the constitutional process that leads to the 2019 Cuban text and the reading of it is that it is a direct application rule. The issue of the direct effectiveness of the constitutional texts acquired a particular connotation from the promulgation of the charters of Ecuador and Bolivia in 2008 and 2009, respectively. This is due to the different types of guarantees that apply to them, giving special scope to the principle of constitutional supremacy.

At the same time, in the doctrine the notion has gained consensus that the Constitution has the character of a legal norm and, therefore, its dictates can be applied directly, discarding the forced requirement of developing laws so that they produce effects. This is accompanied by the possibility of rejecting unconstitutional norms through judicial protection and by the assumption that constitutional provisions configure the framework for the interpretation and application of laws, public and private acts, allowing their use for conflict resolution.

This conception is, at the same time, cause and result of the strengthening of the constitutional role, in full correspondence with its essence of maximum expression of popular sovereignty; ordering rule of the State and society; and primary source of rights. Therefore, the increasing democratization of both the process of elaboration of the great text and its application is justified.

The law of laws recently adopted in Cuba is a synthesis of such postulates. Consequently, in its Article 7, the recognition of the Constitution appears as "the supreme legal norm of the State" and, next, it states that "everyone is obliged to comply with it. The provisions and acts of the organs of the State, its directors, officials and employees, as well as of the organizations, entities and individuals are in accordance with what it provides."

Due to its location, constitutional supremacy is protected with preference, in a gender-species relationship, with respect to the principle of legality that previously governed the law. Thus, the constituent placed in Article 9 the obligation of everyone to "strictly comply with socialist legality", pointing out that "the organs of the State, its directors, officials and employees, in addition, ensure their respect in the life of all society and they act within the limits of their respective competences ".

By assuming this treatment, the Constitution exceeds its character as a political program or a minimum norm, reaching the entity of a true legal norm. The first consequence that this brings is that "its provisions do not need any mediation to be applied, not even when the constituent power itself has imposed the need for such mediation via legislative development"[16]. The protection to demand this conduct by

[16]MEDINACELI ROJAS, G. The direct application of the Constitution, Master Series Universidad Andina Simón Bolívar, Ecuador Headquarters, National Publishing Corporation, Quito, 2013, p. 26.

those involved is in its essence in the aforementioned Article 7, which has the rank of a fundamental principle (Chapter I) within the political foundations of the constitutional order (Title I).

A second consequence is "the possibility of judicial protection in the event that any infra-constitutional norm or state or private legal act seeks to contradict it"[17]. In other words, the Charter becomes a mandatory norm for judges, as well as for state officials and citizens, who must respect and apply it accordingly.[18].

The article of the Cuban text of 2019 preserves the control guidelines that, in terms of regulations, have ordered the system of state organs of the country, according to which it is provided that the superiors ensure that in acting, their subordinates do not contravene the Constitution and legality[19]. Added to this is the introduction of the protection of rights through a preferential, expedited and concentrated procedure.[20].

On these bases, compliance with the precepts that hold state institutions, including administrative ones, immediately enforceable, with respect for the principles of socialist democracy[21] in correspondence with the regulation of article 80 relative to the right to participate in the conformation, exercise and control of the power of the

[17] Idem

[18]GUASTINI, R. "The constitutionalization of the legal system: the Italian case." In CARBONELL, M. (Compiler). Neoconstitutionalism (s), Madrid, Trotta, 2003, pp. 55-56.

[19]Cf. Articles 108, paragraphs e) and g); 122, subsections h) and j); 179, clauses i) and j); and 191 subsection l).Constitution of the Republic of Cuba, Official Gazette of the Republic of Cuba, Extraordinary Edition No. 5, Havana, 10/4/2019.

[20] Cf. Article 92 in relation to Article 99. Constitution of the Republic of Cuba, 2019

[21] Cf. Article 101. Constitution of the Republic of Cuba, 2019

State and Article 200 regarding the rights of petition and citizen participation in the municipalities.

In the framework that delimits these precepts, it is possible to establish that the requirements of participation have a double nature: as content of a principle of operation of state bodies, and therefore of administrative bodies, and as a general right that has varied contents - giving instead of specific rights of different sizes - that have the uniqueness of expanding their scope at the local level.

II.2 Guidelines to materialize popular participation in the sphere of Public Administration in accordance with the 2019 Constitution of the Republic of Cuba

Taking the ideas set forth above as a precedent, a list of guidelines is then systematized that sets guidelines to materialize participation in the sphere of Public Administration, complying with the provisions of the great Cuban text of 2019.

1. Regulate the Cuban Public Administration as an instance of public service within the framework of the socialist, democratic, law and social justice state

As Pérez Hernández and Prieto Valdés point out[22]the State as a set of organs forms a coherent structure, a system of organs, differentiable from each other by the character they possess depending on the functions they have to fulfill in pursuit of the realization of the ends of the predominant political will. In such a way that, among the

[22]PÉREZ HERNÁNDEZ, L. and PRIETO VALDÉS, M. (2002). "State, Government and Administration. Conceptual differentiation regarding the Municipalities Law ". In PÉREZ HERNÁNDEZ, L. and PRIETO VALDÉS, M. (Compiladoras). Topics of Cuban Constitutional Law, Editorial Félix Varela, Havana, p. 188.

State organs, those of representative, executive, administrative, judicial, fiscal, control, defense and other character or function can be distinguished.

Due to its essence, what distinguishes the Public Administration is its organization as a service to the community and the State. This is the reason why its submission to other state organizations (political, legislative and judicial bodies) should be entrusted[23].

- Determine the structure of the administrative organization within the framework of the fundamental text

From the approach of García de Enterría and Fernández to the Public Administration, two fundamental features of this can be specified: its organizational character and its place within the state framework.

Determining the structure of the administrative organization within the framework of the recently approved fundamental text is a sine qua non for any other reflection on the subject. This issue, by itself, has complexities that warrant clarification.

At the central level, the Administration is configured, in general lines, in Chapter IV of Title VI "Structure of the State". According to Article 133, the Council of Ministers continues to be the highest executive and administrative body of the country and, from the rest of the articles in the first and third sections of said chapter, it is inferred that the dynamics of its operation do not have great variations, except for the inclusion of the figure of the Prime Minister (Second Section).

[23]GARCÍA DE ENTERRÍA, E and FERNÁNDEZ, R. Course in Administrative Law, volume 1. Editorial Civitas, Madrid, 1993, pp. 356-359.

However, the number, denomination, mission and functions of the ministries and other bodies that are part of the Central State Administration are pending development (Article 146).

In the province, to the notable innovations that the constituent makes, the indeterminacy of the administrative instance is added, which according to Article 178 will be organized and directed by the Governor once the law provides for its creation, structure and operation, as well as its relations with the national and municipal bodies of the People's Power. The greatest difficulty involved in this reservation of law is that the constituent body designed this instance as an intermediate level with coordination and harmonization functions. This supposes a sensible variation of the organizational forms, but without the legislator knowing more details of how to achieve such a purpose.

Within the municipal sphere, although the Administration Council is maintained, its configuration has been reserved to the development regulations (Articles 201 and 202), with the novelty of introducing the Mayor as its president (Article 203).

- The Cuban Public Administration as an expression of a socialist, democratic, state of law and social justice

The identity note of the Public Administration as part of the complex state organic organization acquires particular connotations in the case of Cuba under the 2019 Constitution. If it is assumed that it is a socialist state of law and social, democratic justice (Article 1) three singularizing elements quickly come into view. In the first place, that the national administrative entities provide services in order to satisfy the general needs of a society where the collective interests of a majority social class prevail, given the socialist nature of the system. Secondly, it stresses that the purpose of any action must obey the aspiration to materialize social justice, weighing this with preference with respect to

economic purposes. Consequently, and finally, all administrative activity will be subject - in addition to the rigorous state authorities - to the authority of the people, as a sovereign recognized within the legal-political design, thereby ensuring the realization of democracy.

2. Strengthen the rights of popular participation that affect the sphere of Public Administration

Although it is clear that, given the inspiration of the Cuban Charter, popular participation appears in it in relation to the basic principle of the functioning of the State, which is democracy, it is necessary to specify what legal nature per se it has within the Cuban Constitution.

- Legal nature of popular participation rights in Cuba

The precision revolves around whether it is possible to affirm that participation is a constitutional principle or reached the category of law by appearing positive as such. The value of specifying one nature or another is motivated by the effects that would derive from them, since the principles suppose a broader obligation, less limited in terms of realization, while a right directly confers powers on individuals who can be directly exercised and required by the existing mechanisms, in addition to possessing as they are, merely constitutional or fundamental in nature, a set of material guarantees for their exercise and defense.

The allusion to constitutional principles implies speaking of ideals that express consensus on the fundamental and priority objectives of society within a specific cultural and historical context, which serve as a guide around which the constitutional order is structured, and therefore also the rest of the legal system in general, considered as a whole. For this reason, the doctrine maintains that the principles are

norms with distinctive features as to what they prescribe, since “the principles are norms that order that something be done as much as possible, in relation to legal and factual possibilities. The principles are, therefore, optimization mandates that are characterized because they can be fulfilled to various degrees and because the orderly measure of their fulfillment depends not only on factual possibilities, but also on legal possibilities ”[24].

Consequently, their function is not directed, in the first place, to a direct application, but they function as referents to avoid, correct, remove and eliminate the norms that threaten or transgress them. "The principles have a normogenetic and systemic function: they are the foundations of legal rules and have a radiant suitability that allows them to objectively" connect "or" combine "any constitutional system. The principles are legal norms with a high degree of abstraction, whereas the rules have a relatively reduced abstraction. The legal order is, therefore, normally an interweaving of rules and principles ”[25] .

For its part, a right would imply the existence of "norms that, once certain guidelines have been verified, require, prohibit or allow something in definitive terms, without any exception"[26]. The rights are the result of norms that create legal relationships, attributing to the subjects of these the ownership of certain subjective rights, faculties and, sometimes, powers that legitimize them to act within the framework of said established relationship and even claim against violations committed that affect the normal performance of it.

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[24]ALEXY, R. "Legal system, legal principles and practical reason". Doxa, Notebooks of Philosophy of Law, No. 5, Seminar of Philosophy of Law of the University of Alicante, Center for Constitutional Studies, 1988, p. 143.

[25]CRUZ, PM On the republican principle. Recovered fromhttp://200.21.104.25/juridicas/downloads/Juridicas6%281%29_2.pdf, dated June 7, 2010.

[26] Idem

Derived from the foregoing, there should be no doubt about the nature of the right that participation has, although it is true that it has a gender character compared to other specific rights that allude to possibilities of involvement with particular forms.

- The rights of popular participation in Cuba extend to the sphere of Public Administration

Thus, the precept of article 80 generally gives way to the possibility of participating, indicating three great actions in which the content of this meta-right is specified: conformation, exercise and control of power. The aforementioned precept also states that in order to fulfill the task of intervening in power, citizens have the right to be registered in the electoral register; propose and nominate candidates; choose and be chosen; participate in elections, plebiscites, referendums, popular consultations and other forms of democratic participation; pronounce on the accountability presented by the elect; revoke the mandate of the elect; exercise the legislative initiative and reform of the Constitution; carry out public functions and positions, and be informed of the management of the organs and authorities of the State.

However, Title VI Rights, Duties and Guarantees provide other rights that give cause to popular intervention in power and are not included in the aforementioned relationship. Among them are the right to request and receive truthful, objective and timely information from the State, and to access that which is generated in State organs and entities (Article 53); freedom of thought, conscience and expression (Article 54); the rights to assembly, demonstration and association, for lawful and peaceful purposes (Article 56); and the right to address complaints and requests to the authorities, which are obliged to process them and give timely, pertinent, and substantiated responses (Article 61).

These provisions are complemented and enriched, in addition, with the guarantees contained in article 200. The wording is not the best way to leave rights sitting, but they allow us to assume that they are mechanisms to endow two rights with particularly broad content - complaint and participation - at the municipal level.

Within this catalog highlights the call for popular consultation for matters of local interest; correct attention to the approaches, complaints and requests of the population; the right of the population of the municipality to propose the analysis of issues within its competence; maintain an adequate level of information to the population about decisions of general interest that are adopted by the organs of People's Power; analyze, at the request of citizens, the agreements and provisions of their own or of subordinate municipal authorities, for estimating those that these harm their interests, both individual and collective, and adopt the corresponding measures, and; execute, within the framework of its competence, any other action that may be necessary in order to guarantee these rights.

Since the purpose of the constituent was, given the general nature of the constitutional norm, to establish the frameworks for participation in all spheres of public life, it is up to the interpreters, in this case in an exercise of free interpretation, to specify which of the Public intervention faculties would have a possible impact on the Public Administration, even though they are aware of the challenge of doing so without still having the ordering framework of the different administrative instances.

From the reading of Article 80 it is concluded that the nature of the mechanisms listed in the form of rights is, essentially, of a political nature. However, it is possible under his protection to request information related to administrative management (subsection f) in relation to Article 53) and take part in plebiscites, referendums,

consultations or legislative and constitutional initiatives that deal with such issues (subsections d) and g).

In addition, it is possible at all levels of the administration, in use of the freedom of thought, conscience and expression (Article 54) to express judgments or opinions, within the referred legal frameworks, to the performance of the administration and, consequently with it, direct complaints and requests to the authorities, which are obliged to process them and give the appropriate, pertinent and well-founded responses (Article 61).

At the local level, all the postulates contemplated within Article 200, have sufficient entity to give the population access to effective participation with respect to the municipal administration, since this is one of the fundamental actors within these spatial limits, with the addition that It is the one with the greatest connection with the life of citizens given its direct connection with meeting the needs of local society.

4.- Conclusions

1. Popular participation has generally been associated with intervention in political issues that have distanced it from the administrative sphere. However, in the doctrine the conception that the citizen interest in public life is not confined to a certain sphere of activity has gained consensus. Therefore, the idea that participation is a sequence of acts that allow varying levels of presence of the popular will in the decision-making process of the State has been sustained and, therefore, more than a specific act, it is a process that extends to all spheres of public development.

2. The Cuban Constitution of 2019 recognizes a broad conception of participation, which is embodied in a network of rights aimed at ensuring popular sovereignty, both centrally and locally. These rights, by virtue of the direct applicability of the Magna Carta, are enforceable and exercisable even in the face of the indeterminacy of state structures that await development regulations, which represents significant challenges for public authorities.

3. In order to overcome these challenges, it can be argued that the essential presuppositions to be implemented are: the regulation of the Cuban Public Administration from a conception of it as an instance of public service within the framework of the socialist, democratic, law and social justice State ; and the empowerment of the rights of popular participation that affect this sphere, from the understanding that it constitutes a meta-right closely linked to the principles and provisions of the great text.

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“HERE IS THE STORY OF SATAN”. THE INQUISITORIAL PROCESS THROUGH CINEMATOGRAPHIC FICTION

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1.-1920s Cinema and its context

The 1920s opened a new era of hope around the world. After the end of the Great War and with the recent creation of the League of Nations, it was hoped that any conflict that may threaten the new international balance could be prevented. However, the war backwash gave way to totalitarian regimes that jeopardized the main European powers afterwards. In sum, the man of the 1920s, in less than a decade, lived a rollercoaster that would gave way to a new era of peace expectations and opportunities, and it would end with the subsequent disillusion of the Great Depression[1].

[1] Even the countries that did not participate in the war were shaken by severe crises, as in the case of Spain. For further reading in relation to the topic, see FERNÁNDEZ RODRÍGUEZ, M., “El ocaso de la Restauración: la crisis de 1917 en España”, in SAN MIGUEL PÉREZ, E., *Los cañones de Versalles*. Madrid, 2019; FERNÁNDEZ RODRIGUEZ, M, “Bajo la amenaza de los sables : la ley de jurisdicciones”, in SAN MIGUEL PÉREZ, E., *En la Europa liberal: el poder y el infinito*. Madrid, 2019; about the historical development

Art, which has closely accompanied the human being, clearly shows the human feelings and concerns in those times. It is no wonder that some of the most moving films, released up to that point, came to light during this decade. One of the best examples is "The Cabinet of Dr. Caligari", from 1920. As the disasters of The Great War still resonated in Europe[2], this film challenges the authority of the high military ranks, reflected in this work by Dr. Caligari, the main character, after whom the film is named. This extravagant character commands a somnambulist to murder his enemies without any resistance, as a parallelism of the crimes committed by the soldiers during the war[3].

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that led to it, from the same author, see *Hombres desleales cercaron mi lecho*. Madrid, 2018; *El gobierno de los presidiarios*. Valladolid, 2021, in preparation; "Las tres Españas de 1808", en *Revista Aequitas. Estudios sobre Historia, Derecho e Instituciones*, nº 13 (2018); "Las reformas de marzo de 1820 y la recuperación de la normativa doceañista", en SAN MIGUEL PÉREZ, E., *En la Europa liberal: el Trienio, el paraíso y la señora Miur*. Madrid, 2020; and "La construcción jurídico-institucional del gobierno de Evaristo Pérez de Castro: Fernando VII frente al gobierno", en *Revista Aequitas. Estudios sobre Historia, Derecho e Instituciones*, nº 16, 2020.

[2] A thought on how that conflict was ended in MARTÍNEZ PEÑAS, L, "El diktat de Versalles y la rupture de la tradición negociadora europea", in SAN MIGUEL PÉREZ, E. *Los cañones de Versalles.* Madrid, 2019.

[3] The horror of the Great War has been also reflected in other forms of expression, as in the case of fiction narrative or board games. In relation to this last scope see MARTÍNEZ PEÑAS, L, y PRADO RUBIO, E., "La Primera Guerra Mundial en los juegos de mesa: dificultades en su uso docente", in VV. AA, *Il Mediterráneo e la grande guerra. Diritto, política, istituzioni.* Bari, 2016. About gamification, see MARTÍNEZ PEÑAS, L., "El problema de la banalización en el uso de técnicas docentes gamificadas", in *Alea Jacta Est. Revista on-line de gamificación, aprendizaje basado en juegos y serious games*, nº 2, 2020; and "Los juegos como instrumento de entrenamiento y análisis militar: del Kriegspiel a la Segunda Guerra Mundial", in SAN MIGUEL, E., *En la Europa Liberal: el poder y el infinito*. Madrid, 2019.

In 1925, the audio-visual narrative was explored as a propaganda tool in "Battleship Potemkin", by Eisenstein, one of the great soviet filmmakers of the time. This film, which clamours for the patriotic sentiment that started the Russian Revolution, has been honoured in several occasions in more recent movies[4]. The scene in which the stroller falls slowly and uncontrollably from a stairway while the shots where frightened people run from the czar soldiers are combined is particularly famous. Nowadays, this film is still being studied in college classrooms as the pinnacle of audio-visual narrative of cinema in those times.

In 1927, when the sound cinema bursts into the industry with "The Jazz Singer", "Metropolis", by Fritz Lang, is released. This film uses science fiction to unveil the friction between classes, which will later be used as feed for the resentment that will derive into the rise of the European totalitarian movements[5].

[4] Some examples of the movies that honoured this work would be "Brazil" (1985), "The Untouchables" (1987) or "The Godfather III (1990)".

[5] Another display of this disenchantment will be terrorism, particularly anarchist terrorism, analized in FERNÁNDEZ RODRÍGUEZ, M., "Wall street, 1920: el primer coche-bomba de la historia", in SAN MIGUEL PÉREZ, *Ajedrez en el Café Museum*. Madrid, 2020; "El terrorismo anarquista como amenaza internacional", in PRADO RUBIO, E., et al., (coords.), *Contrainsurgencia y orden público: aproximaciones hispánicas y globales*. Valladolid, 2020; and in MARTÍNEZ PEÑAS, L.., "La represión del anarquismo a través de la legislación y los procesos judiciales: origen y consecuencias de juicios contra la Mano Negra", in SAN MIGUEL, E., *En la Europa liberal: el trienio, el paraíso y la señora Muyr*. Madrid, 2020; and "Orden público y crímenes comunes durante la Restauración: el proceso a Juan Galán", en *Revista Aequitas. Estudios sobre Historia, Derecho e Instituciones*, nº 17, 2021, acepted.

2.- Carl Theodor Dreyer

Dreyer will be another of the directors forged in this inter-war period. This is an aspect that will be reflected in all his films as one of the few elements of integration of his filmography. Although he does not have a great production in terms of quantity, he left great works of the history of cinema:

> "The number of works that make up Dreyer's aesthetic itinerary is quite small, because the master, just like Flaherty, just made what he wanted to do, right or wrong – although he was the first one to acknowledge his own mistakes-, he never accepted to put his personality, no matter the amount he was offered, at the service of matters that did not interested him. During the first twelve years of his career, that is, from 1919 to 1931, he made ten films; during the following thirty-three years directed just three full-length films and half dozen documentaries. If we add twenty-two scripts, almost none of them original, written between 1912 and 1918, as well as another five for documentaries since 1947, we have the whole contribution of Dreyer to cinema; a great amount of work, that lasts for more than half a century"[6].

Despite of having a modest amount of works, the differences between his films are visible. He will try to transcend the German Expressionism with "Leaves from Satan's Book" and "Master of the House", which resembles "The Cabinet of Dr. Caligari"[7], leading it to a more realistic style that reaches its pinnacle in the work "The Passion of Joan of Arc"[8].

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[6] FERNÁNDEZ CUENCA, C., *Carl Theodore Dreyer.* Madrid, 1964, p. 5.
[7] FERNÁNDEZ CUENCA, *Carl Theodore Dreyer,* p. 13.
[8] In relation to the inquisitorial process of Joan of Arc, some of the more relevant cinematographic versions have already been covered in PRADO RUBIO, E., "Aproximación a la representación de las inquisiciones en la

In turn, the influence of Literary Naturalism will leave a mark on his first films, as it happens in "Dies Irae"[9].

Finally, it is important to make special mention to the photography and the decoration of Dreyer's work. Regarding the aesthetics of his films, in some of them it can be tracked the influence of other Danish artists of the time, as the painter Vilhelm Hammershøi[10]. Over the years other artists as Rembrandt or Jan Veemer will inspire mise-en-scene and the photography of Dreyer's works[11].

3.- Inquisitions and special jurisdictions in Dreyer's cinema

Although the aesthetics of his works and the narrative language will vary throughout the work, as will be seen, intolerance is an element that is present in all his stories. For some people, the religious fanatism will be what concerns the director the most[12]. In "The Passion of Joan of Arc", "Dies Irae" and in two of the chapters from "Leaves from Satan's Book" it is shown the devastating effect of this intransigence in the lives of the individuals. In all these examples, the director shows some of the phases of the inquisitorial process.

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ficción audiovisual" in FERNÁNDEZ RODRÍGUEZ, M., MARTÍNEZ PEÑAS, L. and PRADO RUBIO, E., *Análisis sobre jurisdicciones especiales.* Valladolid, 2017.

[9] DULCE SAN MIGUEL, J. A., "Carl Theodor Dreyer, un cineasta en el umbral del arte neoclásico", in *Comunicación y sociedad* vol. 13 no. 1, 2000, pp.71-72.

[10] LIÉBANA, E, "Dos pesos pesados de la cultura danesa: Dreyer y Hammershøi – tambiñen en España", in *Cuadernos de Filología Alemana,* 2010, no. 2, p. 207.

[11] DULCE SAN MIGUEL, "Carl Theodore Dreyer, un cineasta en el umbral del arte neoclásico", p. 85.

[12] FERNÁNDEZ CUENCE, *Carl Theodore Dreyer,* p. 6.

The Passion of Joan of Arc

The case shown in "The Passion of Joan of Arc" is well-known. Moreover, this is one of the most critically acclaimed works. For some people, "The Passion of Joan of Arc" is the best of the director:

> "Dreyer made a liturgical piece out of his Joan of Arc. The art of silent cinema concludes with it. Entirely filmed in close-ups, extracting all the dramatic force that can be performed from the faces, the film has remained as one of the masterpieces of cinema"[13].

Professor Enrique San Miguel, who has magnificent works related to cinema, history and law, has highlightened the role played by the actress who plays Joan of Arc, María Falconetti, of whom he writes that "no woman has ever said more with less"[14].

The selection of Joan of Arc's story was not arbitrary. The fact that the main character of this story is a woman tormented by the tyranny represented a similarity with another triumph by Dreyer, "Honour Your Wife", so the French production company Société Générale de Films wanted to try again with a title that reminded of the previous success[15].

In addition to the decoration and the use of light, the figure of the woman has a special prominence in most of his films:

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[13] MARTÍNEZ CARRIL, M., "Lo mítico y lo demoníaco en Dreyer" in *Cuadernos del Cine*, no. 7, 1962, pp. 44-45.
[14] SAN MIGUEL PÉREZ, E., *La lectora de Fonteyraud, Derecho Historia en el Cine*. La Edad Media. Madrid, 2013, p. 136.
[15] FERNÁNDEZ CUENCA, *Carl Theodore Dreyer,* p. 14.

> "His objective is to look for the spiritual truths and the beauty, and he uses women as main characters to transmit these values"[16].

Although other feminine historic figures were considered, such as Catherine of Medici or Marie Antoinette, the director chose to adapt Joseph Delteil's literary work about Joan of Arc, published in 1925. The influence of literature in Dreyer's work is visible. Most of his films are adaptations of novels:

> "His liking for literature and his conviction that in any good novel or comedy can exist the germ of a good film, on condition that the handling is appropriate, led him to advise the managers of Nordisk, in his capacity of consultant, to dispense with the exclusive attention to original plots and to search for, or he would search for, suggestive topics in libraries. Hence most of Dreyer's scripts are adaptations of novels"[17].

Apart from Delteil's work, his works are based on the real documents of the process[18]. It is noteworthy that this original documents were used as source for the movie due to the legal knowledge that it requires. However, it is worth recalling that Dreyer, before being director, he was a journalist. In fact, after the failure of "Vampyr"'s premiere, he takes his previous profession up again and goes in for cinema review apart from retaking his other field of expertise: the legal chronicle[19].

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[16] LIÉBANA, "Dos pesos pesados de la cultura danesa", p. 209.
[17] FERNÁNDEZ CUENCA, *Carl Theodore Dreyer,* pp. 7-8.
[18] MINGUET, J. M. "Carl Theodore Dreyer: Clasicismo y cine" in *Nosferatu. Cinema Magazine,* no. 5, 1991, p. 17.
[19] FERNÁNDEZ CUENCA, *Carl Theodor Dreyer.* P. 18.

It is also noteworthy that the court that is represented in this work is not part of the Spanish Inquisition, but of the Pontifical or Medieval Inquisition[20]. Before getting to the modern Inquisition, to which the Holy Office belongs and which the Catholic Kings start in Spain during the transition to the Modern Age, there were other courts whose specific function was to end with medieval heresy. This ones created the so-called Medieval Inquisition or Pontifical Inquisition, since the inquisitors depended directly from the Pope.

At first, the duty of persecuting heresy devolved upon the bishops and their ecclesiastic courts[21], also called episcopal courts. In the case of Spain, the bishops served also as judges during the medieval centuries, although heresy, since it was considered a lèse-majesté felony, was also persecuted by the royal legislation[22].

Meanwhile, in the XIII century, the Inquisition was created in Rome as an special institution to solve the problem of heresy at an international scale and originally to eradicate Cathars and Albigensians[23] since this problem had exceeded the capacities of the

[20] About Inquisition, see MARTÍNEZ PEÑAS, L., "La construcción de los instrumentos jurídicos para la persecución eclesiástica de la herejía (312-1235)", In *Iurisdictio*, nº 1 (2020); "Denunciation as the initiation of an inquisitorial proceeding", in *International Journal of Legal History and Institutions*, nº 4, 2020; "Particularidades procesales de principales delitos inquisitoriales "con sabor a herejía", in *Revista Aequitas. Estudios sobre Historia, Derecho e Instituciones*, nº 16, 2020; *El proceso inquisitorial*. Valladolid, 2021, in preparation; and "Más allá de la hoguera: penas no capitales de la Inquisición española", en *Revista de Estudios Institucionales*, nº 12, 2020.

[21] BENNASSAR, B., *Inquisición española: poder político y control social.* Barcelona, 1984, p. 41.

[22] ESPINAR MESA-MOLES, M. P., *Jurisdicción penal ordinaria e Inquisición en la Edad Moderna (a propósito del delito de bigamia)*, Madrid, 2013, p. 130.

[23] ESCUDERO, J.A., "Fernando el Católico y la introducción de la

bishops to solve it[24]. The Pontifical Inquisition dealt with Joan of Arc's process, since there were still some decades left until the creation of the Spanish Inquisition. On the other hand, little would have to do with the occurred events taking into account that the process took place in France and Bourgogne within the framework of the Hundred Years' War[25].

Despite the use of original sources, Dreyer decided to do an exercise of condensation in his work, trying to explain Joan's inquisitorial process as if it occurred in just one day, which is why the work does not reflect all the steps of the process nor the time passed:

> "The director makes his unifier dream come true: reduces to one single day the whole process and the twenty-nine cross-examinations to just one, as the action is limited to the Royal Chapel of the Rouen Castle and to dramatically adjoining places: the prison, the Saint-Ouen Cemetery and the city's old market"[26].

Inquisición" in *Revista de la Inquisición. (Intolerancia y Derechos Humanos),* no. 19, 2015, p. 13.

[24] GALVÁN RPDRÍGUEZ, E., *El Inquisitor General.* Mdrid, 2010, p. 15

[25] Thereon, read the chapter about this conflict in MARTIN PEÑAS, L., *El invierno. Visión jurídico-institucional sobre las relaciones internacionales en la Edad Media,* Valladolid, 2029; it is a thematic continuation to *Y lo llamarán paz. Visión jurídico-institucional de las relaciones internacionales en la Antigüedad.* Valladolid, 2018. About the way in which France overcame the crisis triggered by a century of war, see FERNÁNDEZ RODRÍGUEZ, M., and MARTÍNES PEÑAS, L., "Guerra, Ejército y construcción del Estado Moderno: el caso francés frente al Hispánico", in *Glossae. European Journal of Legal History,* no. 10, 2013.

[26] DULCE SAN MIGUEL, "Carl Theodore Dreyer, un cineasta en el umbral del arte neoclásico", p. 81.

Only some little parts of the inquisitorial process are shown in this work, such as the cross-examinations. Other sceneries will unveil more elements of the process, such as the prison, the torment or the act of faith, which concludes the film. There are few details in this work that indicate the epoch in which the narrated events occur, since both the clothes and the decoration are placed in the background, a usual detail in Dreyer's work[27]. The elapsing narrative time is not shown to the audience either. These details are dispensed, given the importance of the personal drama of the main character and hinting at the main message: the story of Joan of Arc has a "timeless and permanent" basis[28]. This idea will be retaken in "Leaves from Satan's Book", where Dreyer will seek to reflect the battle between good and evil through different spaces, times and characters.

Dies Irae

The story of "Dies Irae" takes place in Denmark, in the year 1623. This time the heretic felonies are persecuted by another court separated from the Pontifical Inquisition and the Spanish Inquisition. Other special jurisdictions emerged to solve the problem of heresy in those regions where the Inquisition was not implemented[29]. The work portraits based again on original documents of legal processes, a Danish court that seeks to punish witchery felonies[30].

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[27] GIMFERRER, P., *Cine y literatura.* Barcelona, 2000, p. 23-24.

[28] MARTÍNEZ CARRIL, "Lo místico y lo demoníaco en Dreyer", p. 45.

[29] On the study of different special jurisdictions see FERNÁNDEZ RODRÍGUEZ, M., MARTÍNEZ PEÑAS, L. and PRADO RUBIO, E., *Especialidad y excepcionalidad como recursos jurídicos* . Valladolid, 2017; FERNÁNDEZ RODRÍGUEZ , M. and MARTÍNEZ PEÑAS, L., *Reflexiones sobre jurisdicciones especiales.* Valladolid, 2016 and FERNÁNDEZ RODRÍGUEX, M., *Estudios sobre jurisdicciones especiales.* Valladolid, 2015.

[30] FERNÁNDEZ CUENCA, *Carl Theodor Dreyer,* p. 20. Although the author uses the term "Danish Inquisition" in this citation, I preferred to omit it since

As well as the rest of Europe, the inclusion of witchery as heresy is due to the assumption of pacts with the devil as inseparable part of the witch-like phenomenon. After the Reformation, the dominant Danish Church will be the Lutheran and the trials related to witchery felonies will be prosecuted by secular courts, mainly interested in the damages produced to other people by the defendants. Instead, this felonies remained out of the jurisdiction of Danish Lutheran Church[31]. A new rhetoric was born in the Reformation, which bound the witch-like rituals and practices with the Catholic Church, whose head, the Pope, was considered the Antichrist[32], which partially explains the attitude of the Reformed Church towards this criminal figure.

In spite of the differences with the Catholic Church, in the protestant world remain some of the stereotypes e iconography related to evil and the Devil, which are easy to track in Dreyer's cinema. In "Dies Irae", a billy goat appears in a shot outside of the main characters' house. The appearance of this animal on scene, taking into account its connection to the witch imagery and the story that the film narrates:

> "This billy goat, a tangible image of the Devil, had at dawn of humanity a precedent of a horned god, from prehistoric origin, that is part of the mythology of certain Scandinavian people and it somehow must have had a connection, although

in the Kingdom of Denmark had separated from the Catholic Church in 1536, so the heretic felonies remained on the hands of secular courts. HYHOLM KALLESTRUP, L., "The infected and the Guilty: On heresy and witchcraft in Post-Reformation Denmark" in NYHOLM KALLESTRUP, L y R. M. TOIVO (edit.) *Contesting Orthodoxy in Medieval and Early modern Europe.* Odense, 2016, p. 234.

[31] NYHOLM KALLESTRUP, "The infected and the Guilty", p. 235.

[32] NYHOLM KALLESTRUP, L. "When hell became too small. Constructing witchcraft in Post-Reformation Denmark" in KROGH, T., NYHOLM KALLESTRUP, L. and BUNDGARD CHRISTENSEN, C., *Cultural histories of crime in Denmark, 1500 to 2000*. London, 2017, pp. 21-22

> just in what was represented, with satyrs, fauns and silvani of the classic ancient times"[33].

This same image of the billy goat will be used in "Leaves from Satan's Book", although not in the chapter that deals with the Spanish Inquisition: the billy goat appears in the third chapter, set in the French Revolution, symbolizing the presence of evil in the extreme justice of the jacobines.

With regard to the details of the judicial processes in which the main character of "Dies Irae", accused of witchery, is involved, it can be highlighted its enormous resemblance with the inquisitorial process. This time, the judges, during the cross-examination, will ask the suspect to denounce other acquaintances who practice witchcraft. The torment phase will be present too, appearing the practise known as strappado, one of the most used by the Spanish Inquisition.

4.- The inquisitorial process of the Spanish Holy Office throughout "Leaves From Satan's Book"

Among all Dreyer's works in which religious intolerance and fanatism is condemned, only in one of them is the Spanish Court of the Holy Office the protagonist. For some authors, evil is represented in this movie through "the organised ignorance and the lack of appreciation"[34].

Unlike what happens in other examples of Dreyer's cinema, in this work, filmed in 1920 and released in 1921, the decoration follows naturalistic aesthetics, mainly in the chapter to be analysed, in which

[33] RAMOS BOSSINI, F., *Procesos por brujería en la historia del derecho (Inglaterra, siglos XVI y XVII)*. Madrid, 1984, p. 6
[34] FERNÁNDEZ CUENCA, *Carl Theodor Dreyer,* p. 9.

both the outside of a house and an Andalusian yard are reconstructed, as well as many other setting details, for example the one related to the actors' costumes, although some of the actors' makeup, specifically who incarnate the antagonists, still resembles the German expressionist cinema, aesthetics that Dreyer will give up, little by little, in future films.

"Leaves from Satan's Book" tells the story of how Satan is condemned to wander man's world. God damns Satan and forces him to tempt men to do wrong and, every time he manages it, the Devil shall remain hundred years more on Earth. However, if he finds a man capable of resisting the temptation, he shall be relieved of 1000 years of his punishment. God decides the fate of the fallen angel with these words: "Go out among them, take their shape. Take your time and manage to make them go against my will". The leitmotiv that connects all the stories of this film underlines the power of evil to manipulate the human weakness[35]. A struggle between good and evil that Dreyer has explored in most of his works:

> "In his most representative films, the most important element is the distinction between good and evil, the dreams and reality, the demonic and the nocturnal against naïve purity, something fundamentally Nordic and protestant"[36].

This is just the beginning of the film. After that, the work is divided into several chapters, in which some historical events, where fanatism ended with the life of innocent people, are reviewed. This division seeks to create a parallelism between different locations and epochs[37], rather than differentiate the stories. All the chapters share the

[35] MONTY, I., "Vida y obras de Carl Theodor Dreyer" in *Nosferatu. Revista de cine,* no. 5, 1991, p. 7.
[36] MARTÍNEZ CARRIL, "Lo místico y lo demoníaco en Dreyer", pp. 41-42.
[37] BORDWELL, D., *The films of Carl Theodor Dreyer.* London, 1981, p. 50.

struggle between intolerance and freedom. Throughout the stories of different characters, Dreyer shows the same essence of the conflict; Frequently, a confrontation between evil incarnated by the state and the tyranny of the masses against the freedom of the individuals, dragged to a fight they cannot win.

First, the work tells the story of Jesus' capture with the aid of the Hebrew community. In the second chapter the Spanish Inquisition of the XVI century plays the lead role. In this chapter, the character of the Devil is incarnated by the Grand Inquisitor. Then, the narration continues until the French Revolution, where the revolutionary courts delivery their own justice. Finally, the works ends in Finland, 1918, where the Bolshevik Revolution threatens the freedom and justice of the citizens. According to Matínez Carril, the work is too "naively and reactionarily simplistic" since it positions itself against the French Revolution and to brand as communism all progressist ideology[38]. In this sense, the actors that play antagonist characters, such as the communists in the fourth chapter or the jacobines in the third, are made up grotesquely with the intention to highlight simian features to make them look like beasts rather than humans.

This structure divided in chapters resembles the work "Intolerance", by Griffith[39]. Several authors have highlightened this resemblance and even Dreyer himself has admitted to be impressed with the montage of this famous American work[40]. However, as noted

[38] MARTÍNEZ CARRIL, "Lo místico y lo demoníaco en Dreyer", pp. 42-43.
[39] The narrative structure of this work caused sensation and even other great filmmakers of the time, such as Murnau, tried to honoured it using that same montage in other works. This is the case of "Satan" by Murnau, contemporary to "Leaves from Satan's Book" by Dreyer, but unfortunately, the film has disappeared. DULCE SAN MIGUEL, "Carl Theodor Dreyer, un cineasta en el umbral del arte neoclásico", p. 74.
[40] DULCE SAN MIGUEL, "Carl Theodor Dreyer, un cineasta en el umbral del arte neoclásico", p. 73; FERNÁNDEZ CUENCA, *Carl Theodor Dreyer*, pp.

by Minguet, on the one hand "Leaves from Satan's Book" is not an original script by Dreyer and, on the other hand, in this work each of the stories is told independently, whereas in "Intolerance" they are intertwined; therefore, the true inspiration of the first works of Dreyer must be sought in Swedish cinema, as stated by the film maker in an interview[41].

In the second chapter, which takes place in Spain, the court of the Holy Office plays the lead role. It is not the only time when a selection of the most important historical moments of cinema includes the Spanish Inquisition as the main character of one of the fragments, even above other special courts that sentenced heretic felonies as well. A more modern examples of this would be "History of the World" by Mel Brooks, released in 1981[42].

It is interesting the great popular repercussion and fame that this Spanish court[43] had and still has, taking into account that there were many others in different parts of the world persecuting the same felonies and in a similar way, although not virtually identical.

9-10; BORDWELL, *The films of Carl Theodor Dreyer*, p. 50; MARTÍNEZ CARRIL, "Lo místico y lo demoníaco en Dreyer", pp. 42-43.

[41] MINGUET, "Carl Theodor Dreyer: Clasicismo y cine", p. 21.

[42] The presence of the Spanish Inquisition has already been analysed in this work in PRADO RUBIO, E., "Aproximación a la representación de las inquisiciones en la ficción audiovisual" in FERNÁNDEZ RODRÍGUEZ, M., MARTÍNEZ PEÑAS, L. and PRADO RUBIO, E., *Análisis sobre jurisdicciones especiales*. Valladolid, 2017.

[43] Nowadays the comparisons and other references to the Spanish Inquisition are still used by journalists, politicians or demonstrators. In this references, this court is usually connected to freedom repression. With regard to the court's footprint in the contemporary Spanish culture: ABELLÁN, J.L., "La persistencia de la "mentalidad inquisitorial" en la vida y la cultura española contemporánea, y la teoría de "las dos Españas"" en ALCALÁ, A., (coord.) *Inquisición española y mentalidad inquisitorial*. Barcelona, 1984.

The repercussion of the Spanish Inquisition has often been exaggerated in this sense, as noted by Kamen. For this author, the use of torment and death sentence had much to do with the creation of the court's image that the romanticist novel exported in the XVIII and XIX centuries[44]. That is why, partly, the anti-Spanish legend remembered the Spanish Inquisition time and time again. Nonetheless, way before the modern Inquisition arrived in Spain, the crimes against the Christian faith. In Aragon, since the XIII century, there was already an Inquisition, the Pontifical, dependent on Rome and not on the Aragonese monarchy.

Three attempts were needed in Spain to impose an Inquisition under the power of the crown. First, John III, after asking for the establishment of the Inquisition in Castile, decides not to use the papal bull that granted him that power[45]. On the other hand, Henry IV takes one step further and asks the pontiff to nominate the inquisitors[46]. This new attempt does not get to materialize into a Castilian inquisition. It was not until the reign of the Catholic Kings when the new Inquisition or Spanish Inquisition started its activity with the difference that, in this case, the Kings themselves elected the first Grand Inquisitor: Friar Tomás de Torquemada[47].

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[44] KAMEN, H., "Cómo fue la Inquisición. Naturaleza del tribunal y contexto histórico" in Revista de la Inquisición. (Intolerancia y Derechos Humanos), nº2, 1992, p. 20.

[45] ESCUDERO, "Fernando el Católico y la introducción de la Inquisición", p. 15.

[46] GALVÁN RODRÍGUEZ, *El Inquisidor General*, p. 16.

[47] About the figure of the black friar and his relationship with Queen Isabella, see the epigraph on this matter in MARTÍNEZ PEÑAS, L., *El confesor del rey en el Antiguo Régimen*. Madrid, 2007. About the way in which the state apparatus was built during the reign of Ferdinand and Isabella see MARTÍNEZ PEÑAS, L., y FERNÁNDEZ RODRÍGUEZ, M., *La guerra y el nacimiento del Estado Moderno*. Valladolid, 2014; and FERNÁNDEZ RODRÍGUEZ, M., "Guerra y cambios institucionales en el contexto europeo del reinado de los

This second chapter of "Leaves from Satan's Book" starts with a black background in which the date and location in which the story will be told are detailed. This story takes place in the XVI century Seville. Then, on the same black background, the introduction to the chapter starts with the following text:

> "In the XVI century, the Inquisition possessed absolute power. From this epoch we know countless stories about the horrors of the Inquisition's torture chambers".

Once again, this takes up the cruel and heartless image of the court and, in particular, it mentions one of the most widely discussed aspects of the inquisitorial process in the popular culture: the inquisitorial torment. This practice was not exclusive of the Spanish Inquisition, which can also be seen in the Dreyer's works mentioned above, which represent other courts; despite this evidence, the torment is still an element repeatedly exploited by the audio-visual fiction in relation to the Holy Office.

The work tells the story of Mr. Gómez Castro, a scholar of what in this film are called "modern sciences", among which are astrology and astronomy.

Mr. Gómez has a daughter, Isabella, who has math lessons from the scholar monk Mr. Fernández. Thanks to the actors' expression, theatrical and stressed by the makeup, mainly in the case of the priest, the audience realizes that he is secretly in love with Isabella. The pleasant calm of the family is shattered when Mr. Gómez tells Isabella about his nephew, count Manuel, who will stay with them for some

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Reyes Católicos", in *Revista de la Inquisición, Intolerancia y Derechos Humanos,* nº 18, 2014, and "Comparative Study on Institutional and Military Changes in XV Century Europe", in *International Journal of Legal History and Institutions,* nº 3, 2020.

days, making use of his military leave. The count and Isabella are in love with each other, which inflicted great anguish in Mr. Fernández, who tries to recede from the temptation through penitence and pray, when he is visited by the "General Inquisitor"[48]. He asks Mr. Fernández to be part of the Inquisition. Although Mr. Fernández refuses the offer at first, his necessity to stay away from Isabella when count Manuel arrives makes him accept, at last, the trade. Meanwhile, the family's butler, José, spies on Mr. Gómez and searches for some evidence of heresy in his room and finally, he finds it: he steals some scrolls where, a moment ago, Mr. Gómez de Castro found out, using horoscopes, that his dead is nigh. José notifies the Inquisition, after which the process starts and they proceed to the arrest of the central characters, starting with Mr. Gómez de Castro and following, immediately, with Isabella.

5.- Denunciation, arrest and prison

As explained above, the inquisitorial process starts with the denunciation by the family's butler. This character, after inspecting the studio in several occasions, he finds a document with drawings related to astrology. He will be the one who tells the Grand Inquisitor about the use that Mr. Gómez does of the horoscopes and will make that many soldiers arrive at the house at night to proceed with the arrests.

There are three ways by which an inquisitorial process starts: by denunciation, by accusation or by investigation[49]. Following the work of professor Martínez Peñas[50], in the first example, all Christians are

[48] The term "General Inquisitor" is the one used in the film, but in the next mentions it will be chosen to use "Grand Inquisitor", more appropriate for the character's job within the Spanish Inquisition.

[49] CUEVAS TORRESANO, Mª L. DE LAS, "Inquisición y hechicería. Los procesos inquisitoriales de hechicería en el tribunal de Toledo durante la primera mitad del siglo XVII" in *Anales toledanos*, nº. 13, 1980, pp. 28

[50] This author writes about the persecution of the heresy crime in Flanders: in

required to notify the Inquisition if they have seen of know about someone that is committing heresy. In this case, at least in theory, the witness must warn the offender, so that they know they are committing a crime. In the case of the accusation, the second method, this must be performed before a notary and two honest persons, with the great risk that, if it was found that the accusation was false, the same sentence of the defendant would be applied to the accuser. Finally, the third way to start the process is by means of an investigation by the inquisitors after hearing rumours about heresy crimes[51]. Due to the risk that the accusers run if their testimony is proved to be a perjury, the most common way to start the trials was precisely by means of denunciation[52], which left the accuser aside from the parts of the inquisitorial process, becoming another of witnesses[53].

Revista de la Inquisición. (Intolerancia y Derechos Humanos), nº18, 2014 and MARTÍNEZ PEÑAS, L., "La legislación de Carlos V contra la herejía en los Países Bajos" in *Revista de la Inquisición. (Intolerancia y Derechos Humanos)*, nº16, 2012. The same author is developing a relevant research about Flanders in "La propuesta de solución del conflicto de Flandes por Luis de Requesens", in *Anuario de Historia del Derecho Español*, 2020; "Religion and law in the Netherland's crisis genesis: the jurisdictional question", en *International Journal of Legal History and Institutions*, nº 2, 2018; "**El Tercio de Cerdeña**", en *Revista de Historia Militar del Ejército de Tierra*, nº. 109, 2011; and "La intransigencia religiosa en los Países Bajos (1516-1566)", in ALVARADO PLANAS, J., *Estudios de Historia de la Intolerancia*. Messina, 2011.

[51] MARTÍNEZ PEÑAS, L., "Aproximación al estudio de la denuncia o delación como inicio del proceso inquisitorial" in Anuario de Historia del Derecho Español, 2015, p. 4-5.

[52] GARCÍA MARÍN, J. G., "Proceso inquisitorial- proceso regio. Las garantías del procesado" in *Revista de la Inquisición. (Intolerancia y Derechos Humanos)*, no. 7, Madrid, 1997, p. 139

[53] On the position of the suspects in the Medieval Inquisition, foundation of the Spanish Holy Office rulings, see MARTÍNEZ PEÑAS, L., "Los testigos en el proceso inquisitorial en el Malleus Maleficarum", in *Ihering. Cuadernos de Ciencias Jurídicas y Sociales*, No. 2, 2019.

In relation to the butler's entail with the Holy Office, it is not entirely clarified within the work. The Grand Inquisitor stated once, before Mr. Fernández, that José is "a friend loyal to the Inquisition". It could be a way to state that this character works for the court. It is well-known that the Holy Office required assistance where there was not enough personnel to develop its activities. In order to maintain the efficiency of the court, they created the figure of the familiar, a lay collaborator in the service of the Inquisition in exchange for certain privileges[54]. Nonetheless, although they could serve as spies, most of the cases started with complaints from regular individuals and not from familiars of the Inquisition[55]. As noted by Contreras, the familiars' duty "is not to report, but to trigger the denunciation", so they just send information to the court and wait for instruction from the inquisitors[56]. On the other hand, José, in this film, is the butler of Mr. Gómez de Castro and, according to Pérez Martón, in order to be part of the Holy Office apparatus, it was required, apart from having privileges, to belong to an above-average social and economic status, as well as the possibility to escalate[57], which makes it very unlikely, in terms of historical veracity, for the character to be a familiar of the Holy Office.

As it happens in other cinematographic pieces, the soldiers that help the Inquisition to arrest the suspects wait until night to capture their victims. This is a fact that has been repeated in cinematographic pieces that deal with the topic, although there is no record of that being a customary practice of the court. Some aspects of the process have

[54] KAMEN, H., *La Inquisición española*. Barcelona, 1985, p. 192.
[55] BENNASSAR, *Inquisición española: poder político y control social*, pp. 86-87.
[56] CONTRERAS, J., "La infraestructura social de la inquisición: comisarios y familiares" in ALCALÁ, A., (coord.) *Inquisición española y mentalidad inquisitorial*. Barcelona, 1984, p. 129.
[57] PÉREZ MARTÓN, A., "La doctrina jurídica y el proceso inquisitorial", in ESCUDERO, J.A. (edit.) *Perfiles jurídicos de la inquisición española*. Madrid, 1989, p. 290.

aggravated this type of myths connected to the activities of the Holy Office[58]. On the one hand, there was an important disconnection between the people and the tribunal, since in many places the Inquisition was not customarily present, therefore its activity was usually developed in larger centres of population[59]. In this sense, in rural areas and in smaller centres of population, there was barely contact with the court, except from the stories that came from other towns. Another element that definitely did not help to improve the image of the Holy Office was the Inquisitorial Secret, which prevented the accused, witnesses and public servants to talk about the court proceedings. The suspects held in some prisons could not be visited from their families either, and the names of the witnesses and the accusers were kept secret, so not even the accused knew this information in order to prepare their defence[60]. This fact is precisely one of the most condemned of the inquisitorial process.

With regard to the prisons, in the film, they seem to be packed. In the room where Isabella was held there were other people, both men and women, of different ages. It is worth noting that there is also a nun kept in the same cell. However, the accused of the Holy Office were kept in individual cells, since the isolation of the accused during the pre-trial stage of the case was an essential in the Holy Office's approach.

The place that is shown in the film looks soiled and resembles a stall. Although the health condition of this cell match the ones shown in most of the films where the prisons of the Holy Office are

[58] About the myths related to the Inquisition, Haliczer points to the philosophy of the Enlightment that led, eventually, to the abolition of the court: HALICZER, S., "La inquisición como mito y como historia: su abolición y el desarrollo de la ideología política española" in ALCALÁ, A., (coord.) *Inquisición española y mentalidad inquisitorial*. Barcelona, 1984.
[59] KAMEN, *La Inquisición española*, p. 220.
[60] BENNASSAR, *Inquisición española: poder político y control social*, p. 100.

represented, it is worth mentioning that, in some occasions, these were better than ordinary prisons. According to Pérez Martón, there were records of accused that had pretended to be heretic to be moved to penitentiary centres owned by the Inquisition[61]. Despite the fact that the prisons used by the Holy Office in cinema correspond to an unidimensional stereotype, there were in fact up to three types depending of the accused, as explained by Llorente:

> "Public prisons are those which held the convicts of cases that, even if they are not related to faith of heresy, belong to the court's knowledge by private privilege of the Spanish Kings, something that has been harmful in many cases. The intermediate prisons were intended for individuals, ministers and clerks of the Holy Office that have committed a crime or offence that needs to be punished in the exercise of the respective placement, without dealing with heresy or any connection with it. In these two types of prisons, the communication with other people is allowed, except from those cases in accordance with the general law of criminal procedures. Secret prisons are those in which the heretics or the presumed heretics are held, and where it is forbidden to communicate with other people, except from the court personnel, in those cases and the wariness provided by the constitutions, which I had already indicated"[62].

6.- The victims and their offences

Again, in this film, there can be tracked those elements of Dreyer's cinema that are recognizable and have been repeated in most of his works.

[61] PÉREZ MARTÓN, "La doctrina jurídica y el proceso inquisitorial", p. 300.
[62] LLORENTE, *Historia crítica de la Inquisición en España*, p. 229.

Although the first accused of heresy is a man, one of the victims of this Inquisition will be a woman: Isabella. For Liébana, the fact that most of the victims in Dreyer's films are women has a direct connection with the author's childhood[63]. Josefin Nilsson, the filmmaker's biological mother, who placed him for adoption when he was still very young, died by poisoning while she was trying to induced an abortion, something that Dreyer learn when he was 18 years old[64]. Regardless of leaving this event footprint in the filmmaker, both the tormented woman, the Decoration and the expressive close-ups are part of the most characteristic aspects of this author's work[65]. Both in "Dies Irae and "The Passion of Joan of Arc", the victims are women who have been sentenced by their respective courts.

In connection with the Spanish Court the Holy Office, was it really most common for the victims to be women? The answer must be negative, even in the case of witchcraft felonies[66]. In other European areas, the percent of women accused of witchcraft felonies rises to 80%[67], but this was not the case in the whole continent. Both the Spanish Holy Office and the Roman Inquisition charged witchcraft felonies to men and women almost in equal numbers[68].

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[63] LIÉBANA, E., "Dos pesos pesados de la cultura danesa", p. 210.
[64] MONTY, "Vida y obras de Carl Theodor Dreyer", p. 6.
[65] MONTY, "Vida y obras de Carl Theodor Dreyer", p. 7.
[66] On witchcraft and the crime of heresy in the Medieval Inquisition: MARTINEZ PEÑAS, L., "La convergencia entre brujería y herejía y su influencia en la Inquisición medieval" in *Revista de la Inquisición. (Intolerancia y Derechos Humanos)*, nº23, 2019.
[67] SCARRE, G., *Witchcraft and magic in 16th and 17th century Europe*. London, 1987, p. 12.
[68] BRIAN P. LEVACK, *The witch-hunt in early modern Europe*. London, 1995, 136.

Another detail worth mentioning is that the cause of Isabella's prosecution is never mentioned. Although several scenes about the cross-examination are shown, since it is a silent film and there are no dialogue boxes, there is no way of knowing what details Isabella is being asked about. The only information provided in the movie is that she is Mr. Gómez's daughter, of who has been proved the involvement in the practice of astrology. The Grand Inquisitor makes the following point:

> "Whoever asserts to read God's will in the starts is a heretic. You have already heard the evidences from José. Mr. Gómez is a heretic and so is his daughter."

With this sentence, the Inquisitor decides the fate of both characters.

The fact that the descendant of a heretic could also be accused of heresy refers to the concept of blood cleansing. The old Christians used "pig generation" to refer to families of new Christians[69]. For the Inquisition, the genealogy of the accused was important and it was customary to ask about it in the cross-examinations[70]. Regarding the crimes related to the practice of magic, as in this case, the ignominy resulted from the process was not limited to the accused, but it also affected the children and grandchildren if the crime was committed by the father, whereas in the mother's family the ignominy was limited to the children[71]. The sentence of one of the parents could entail a life full of misery for the offspring:

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[69] LLORENTE, J.A., *Historia crítica de la Inquisición en España*. Madrid, 1981, p. 124.

[70] CUEVAS TORRESANO, "Inquisición y hechicería ", p. 36.

[71] GARCÍA MARÍN, J.M., "Magia e inquisición: Derecho Penal y proceso inquisitorial en el siglo XVII" in ESCUDERO, J.A. (edit.) *Perfiles jurídicos de la inquisición española*. Madrid, 1989, p. 240

> "The offspring of those sentenced to death or of those the sentenced to life imprisonment after the "reconciliation" were punished with disqualification, that is, they suffered civil incapacity similar to the one of the accused themselves. They were not allowed to wear silk clothes and jewellery, carry weapons, ride horses or even riding mules. What is worse: it was impossible for them to apply for many vocations and professions. They could not neither join religious orders nor exercise any type of public service. The exercise of medicine, brokerage in fairs, textile trade and butchery were forbidden, at least in theory. They could not travel to the Indies"[72].

Nonetheless, in the story presented by this work, the effects of ignominy in Isabella's life are not visible, because she is sentenced to die at the stake. This fact may imply that the Mr. Gómez's sin can be passed on from parents to children. The same way, it is assume that Mr. Gómez is a magician, therefore Isabella may also be one. This fact involves the question of taking for granted that magicians and warlocks are born that way and it is not a matter of learning. Some cultures differentiate witches that were born with supernatural powers from the ones that learned rituals and complex knowledge[73]. For Henningsen, great connoisseur of witchcraft processes in Spain, this difference was also present in the peninsular world, which is reflected in the sentences of judicial procedures. Although the most extended idea in Europe was that witchcraft required learning, in some areas of Spain these crimes were connected to entire families, based on that almost biological notion[74].

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[72] BENNASSAR, *Inquisición española: poder político y control social*, p. 119.
[73] BETHENCOURT, F., "Portugal: a scrupulous inquisition", en ANKAELOO, B., y HENNINGSEN, G., (ed.), Early modern European witchcraft. New York, 1993, p. 414.
[74] HENNINGSEN, G., *El abogado de las brujas. Brujería vasca e Inquisición española*. Madrid, 1993, pp. 33-34.

The other victim of this work is Mr. Gómez de Castro. The film presents him as am educated and studious man, interested in astrology. As mentioned above, he is capable of predicting his end by reading the horoscope. The story that is told in this work about Mr. Gómez de Castro is nothing new. There are other examples of censorship about documents related to this type of arts way before the Spanish Inquisition was created. According to Lea, the first recorded censorship of books about astrology in Castile took place during the reign of John II. After the death of the marquis of Villena, his library was search on demand of the king and some of the works kept in that place were set on fire by royal command. The profile of the marquis bears a close resemblance with one of the main characters of this work, since it seems like it was an educated, studious man, interested in science, and that had gained fame as a magician[75]. In 1966, the film "El Greco" will retake the story of the marquis of Villena, although the cinematographic fiction will take the necessary measures to make the marquis give an explanation to the Grand Inquisitor Niño de Guevara, whose inquisitorial government took place several decades after the marquis passing.

In sum, the crimes that have been shown in the work until now are limited to the use of astrology to read the future. These activities, sometimes related to sorcery, were persecuted by secular laws before the existence of the inquisitorial courts. However, not all these actions have had the same handling. Astrology, for example, was very popular among some kings[76].

In legal terms, the astrologists have singular stereotypes, way different from the ones of the witches and some sorceresses. In this case, these accused were usually educated and studious men. Many of them migrated to the New World hoping to find new opportunities. In

[75] LEA, H. C., *Chapters from the religious history of Spain connected with the inquisition*. Philadelphia, 1980, p. 18.
[76] GARCÍA MARÍN, "Magia e inquisición", p. 207.

the Indies have been recorded several processes of astrologists that used "judiciary astrology", a method to know someone's future just by knowing some information about the birthday such as time and date[77].

For a very long time, astrology was not persecuted due to the deep-seatedness among the people[78], therefore, although the Church wanted to condemn it and what they did more than once, astrology had privileges that other "magic" practices did not[79]. The Inquisition chose to ban astrology in very particular cases. Under no circumstances neither the astrologists nor the books related to the subject could be used to unveil facts connected to the future of the people, since that affected, to some extent, the freedom of the people, something that theologists and qualifiers had considered a divine gift; therefore, predicting the future affected God's will. On the contrary, other predictions were accepted as licit, such as the ones related to the weather, the medicine, or the navigation[80]. In this sense, there is no doubt that the case shown in Dreyer's work matches with those examples in which astrology is seen as heresy because knowing the future goes against the freedom of the people.

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[77] HENNINGSEN, G., "La evangelización negra: difusión de la magia europea por la América colonial" in *Revista de la Inquisición. (Intolerancia y Derechos Humanos*), no. 3, 1994, p. 13.

[78] Pino Abad describes some of the ways by which the people could make use of the astrology, for example, to know at what time of the day would be more beneficial to make a bet, to know if someone was going to win or lose in the game o just to be luckier. PINO ABAD, M., "Jugadores ante la Inquisición: algunos ejemplos", in *Revista de la Inquisición. (Intolerancia y Derechos Humanos),* no. 20, 2016, p. 38.

[79] GARCÍA MARÍN, "Magia e inquisición", p. 214.

[80] PARDO TOMÁS, J., *Ciencia y censura: la inquisición española y los libros científicos en los siglos XVI y XVII*. Madrid, 1991, pp. 156-157.

7.- Torment and cross-examination

The torment is undoubtedly one of the most recognized elements by the public imagination as typical from the Spanish Inquisition. Nonetheless, it is worth noting that this practice was not exclusive from this court. As explained above, the torture chamber appears at the beginning of the chapter in a fixed shot and without any other character. There can be seen several instruments of torture, some of them repeatedly used in cinematographic fiction despite not bearing historic rigour[81]. It is no wonder that there has been great speculation and exaggeration about the instruments and methods of torment that the inquisitorial court used if the words that Llorente wrote in his work are taken into account:

> "I will not limit myself to write about how many genres of torment were in the Inquisition, since there are many works ¡n which it is exhaustively recorded, and it is safe to say that, at this point, no author has exaggerated anything, since I have read many processes that left me completely horrified, and that involve inhuman and cold souls in those inquisitors that witnessed the torture"[82].

Despite the considerable percentage of fiction that is usually added to the scenes related to the torment of the inquisitorial process, some details seem to be closer to reality. In this sense, Dreyer proves his knowledge about inquisitorial processes, although he repeats the same stereotypes of torment from other works, he essentially keeps the veracity of the process.

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[81] The stereotypes regarding the representation of the inquisitorial torment have already been discussed in PRADO RUBIO, E., "El tormento inquisitorial y la representación audiovisual de la tortura judicial" in *Revista de la Inquisición. (Intolerancia y Derechos Humanos)*, no. 25, 2019.

[82] LLORENTE, *Historia crítica de la Inquisición en España*, p. 233.

The first one to suffer the torture will be Mr. Gómez de Castro. The character appears suspended in mid-air with ropes tied by the back and the wrists. The method of torture that is used is correct according to the information that is available nowadays about inquisitorial torment. In this case, the inquisitors are using "the strappado", one of the three methods used by the court[83]. Another important detail is that at no time are the inquisitors the ones performing the torture. This was a task for the executioners that attended the session, who followed the orders of the Grand Inquisitor. Just like in the torment, the executioners were also responsible for leading the accused to the act of faith[84], although this figure is omitted in some films and replaced by the inquisitors, highlighting even more the stereotype of the judge that enjoys with his convicts' suffering.

In spite of what is extracted from a large amount of films, there were inquisitorial handbooks that advised against the use of torment due to its indecisive efficiency to obtain sincere confessions. Another matter that is not usually represented in films is the fact that the confession that are obtained by torture has to be voluntarily confirmed the next day, so it is not a foolproof method for the court, since it lacks prosecutive value if it is not confirmed[85]. In sum, as stated by Abellán, the torment was not the usual practice of the Spanish Inquisition:

> "In fact, in these conditions, the torture -on which it has been insisted so much when talking about the Inquisition- does not constitute its most characteristic aspect. As a matter of fact, nowadays we know that torture was barely performed -not even in 10% of the processes- and, in such cases, it was always in accordance with the maximum legal guarantees"[86].

[83] KAMEN, *La Inquisición española*, p. 232.
[84] MAQUEDA ABREU, C., *El auto de fe*. Madrid, 1992, p. 424.
[85] PÉREZ MARTÓN, "La doctrina jurídica y el proceso inquisitorial", p. 311.
[86] ABELLÁN, "La persistencia de la "mentalidad inquisitorial" en la vida y la cultura española contemporánea, y la teoría de "las dos Españas"", p. 549.

In this film, the Grand Inquisitor decides to stop the torment: "Untie him. The trial is over, for now". About this sentence, there are two questions worth mentioning: on the one hand, the word used for "trial" in the original version of the Danish film is "forhøret", whose most accurate translation would be "cross-examination"; on the other hand, this sentence implies that the torment will be retaken later.

With regard to the Spanish Inquisition, the torment was used to obtain confessions. In this sense, the torture was part of the cross-examination, it is not that trial as such. There are other examples of courts where it is more difficult to differentiate between the torture and the trial. In such cases, the torture did involve a trial as such, adopting the form of ordeals, as shown in the witchcraft processes in other countries, where the accused should undergo a test to prove their innocence. An example of this was the so called "swimming the witch", where the accused were tied by one hand and one foot and thrown to a deep river. Floating meant that the accused was guilty and drowning in the water proved their innocence[87].

In connection with the second question, it should be noted that it was not possible for the Spanish Inquisition to repeat the torment. Although was clear, at first, in that sense, the inquisitors frequently chose to "interrupt" the torment to retake it later if necessary, without considering it finished[88].

Mr. Gómez did not resisted the torment and died during the cross-examination. This ending was not the usual one in the torment sessions of the Inquisition, in fact, the torment was not applied to the inmates that might be seriously injured during the torture[89], so the chance for the inmate to die during the imposition of the question, as the Holy

[87] RUSSELL, J.B., *A history of witchcraft. Sorcerers, heretics and pagans*. London 1980, p. 80

[88] KAMEN, *La Inquisición española*, p. 231.

[89] PÉREZ MARTÓN, "La doctrina jurídica y el proceso inquisitorial", p. 310.

Office called it, was minimum, being the sessions supervised by doctors that were responsible for the convict's health.

8.- Characteristics of the Inquisition

About the figure of the inquisitor that is shown in this film repeats some of the most widely used stereotypes by the audio-visual fiction. On the one hand, the sentence that gives way to the chapter is about the Holy Office's control and it is qualified as "absolute power". The Inquisition in Spain depended on the crown, contrary to the Pontifical Inquisition, which gave the Spanish Kings some independence from Rome in terms of administration. Some authors state that the Inquisition helped the State to obtain independence and to emerge as a totalitarian monarchy[90]. One of the most widely known examples of how the Inquisition was such a useful tool for the Crown was the case of Antonio Pérez, with terrible consequences for the Black Legend[91]. This special characteristic of the Spanish Inquisition created some friction between Rome and the Kings of Spain. The Pope Sixtus IV even published a bull slandering the Holy Office, in which he complaint about the excessive profit-making intention of this institution[92]. Escudero exhaustively explains the interest of the Pope to discredit the Holy Office in order to regain the control of this institution[93].

[90] NETANYAHU, B., ¿Motivos o pretextos? La razón de la inquisición in ALCALÁ, A., (coord.) *Inquisición española y mentalidad inquisitorial*. Barcelona, 1984, p. 25.
[91] JUDERÍAS, J., *La leyenda negra*. Madrid, 2007, p. 223.
[92] BENNASSAR, *Inquisición española: poder político y control social*, p. 43.
[93] ESCUDERO, "Fernando el Católico y la introducción de la Inquisición", p. 21.

Despite the power that the new Inquisition accumulated, its superior jurisdiction over the bishops' jurisdiction was not so clear until Innocent VIII, who granted the privilege over the heresy crimes to the Spanish Inquisition, surpassing the episcopal power[94]:

> "Thus, a pontifical bull dated on November 1st, 1478, granted the formal authorization to introduce a new Inquisition. By virtue of this authorization, the Pope entitles the Catholic Kings to nominate three bishops, archbishops, secular or religious priests in each city or dioceses of the kingdoms of Spain invested with powers to investigate and punish heretics, with the same powers of the ordinary or any other pontifical inquisitors"[95]

Another detail that is subtracted from the Grand Inquisitor's dialogue involves the impunity of this institution's officials to obtain what they want. This character tries to convince Mr. Fernández to accept the inquisitor position by the following sentence: "My son, Why don't you put yourself at the service of the Inquisition? Remember: there is nothing that the Inquisition cannot attain". Did the inquisitors possess such privileges? The processes could be revised by the general visitations[96]. In case there were irregularities during the court's activity, an inspection was performed, as in the case of the Aragon Kingdom courts, whose chaotic administration made it the most visited by the Supreme order[97]. It is precisely in these general visitations where it was discovered that, in some cases, the title of inquisitor was not granted to

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[94] ALCALÁ, A., "Herejía y jerarquía. La polémica sobre el Tribunal de Inquisición como desacato y usurpación de la jurisdicción episcopal" in ESCUDERO, J.A. (edit.) *Perfiles jurídicos de la inquisición española*. Madrid, 1989, pp. 62-63.

[95] GALVÁN RODRÍGUEZ, *El Inquisidor General*, p. 16.

[96] PÉREZ MARTÓN, "La doctrina jurídica y el proceso inquisitorial", p. 322.

[97] GARCÍA CÁRCEL, R., "La Inquisición en la corona de Aragón", in Revista de la Inquisición. (Intolerancia y Derechos Humanos), no. 7, 1998, p. 160.

the most appropriate person, but the one who, at some point had paid the most on the lists, which even provoked the complaints of "graft, abuses and violence"[98].

With regard to the character of the Grand Inquisitor, the clearest literary reference can be found in Dostoyevsky[99]. The character played by Helge Nissen in this chapter is the Grand Inquisitor or "General Inquisitor". However, this same denomination is repeated in a large amount of films, due to the influence, undoubtedly, of the chapter "The General Inquisitor's Speech" from the work "The Karamazov Brothers" by Dostoyevsky[100].

Particularly, in the case of the Spanish Inquisition, the position of Grand Inquisitor was chosen by the kings, although the official nomination fell on the Pope. Within his functions, not only was the Grand Inquisitor entitled to nominate more inquisitors, but also was responsible for the censorship and the granting of licenses to read forbidden books or to enter in certain bookshops. In turn, he was also responsible for the inspections and could suspend from their position all the inquisitors he wanted[101].

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[98] SILVIA PRADA, N., "La comunicación política y el animus injuriandi en los Reinos de las Indias: el lenguaje ofensivo como arma de reclamo y desprestigio del enemigo" in CARRANZA VERA, C., CASTAÑEDA GARCÍA, R., Palabras de injuria y expresiones de disenso el lenguaje licencioso en Iberoamérica. México, 2016, p. 25-26.

[99] DULCE SAN MIGUEL, "Carl Theodor Dreyer, un cineasta en el umbral del arte neoclásico", p. 75.

[100] The influence of the Romanticist literature in the XIX century has already been covered in PRADO RUBIO, E., "La literatura romántica del siglo XIX como fuente de inspiración en la representación cinematográfica de los perfiles jurídicos del Santo Oficio" in SAN MIGUEL, E., *Los cañones de Versalles*. Madrid, 2019.

[101] GALVÁN RODRÍGUEZ, *El Inquisidor General*, p. 28.

Mr. Fernández, who decided to join the Inquisition to stay away from Isabella, incur the stereotypes that will be seen in multiple films. On the one hand, he self-flagellates to keep from thinking about Isabella, with whom he was obsessed, as the visions of her praying suggest, and he does it before a cross that ornaments a church[102]. Self-flagellation is a common stereotype in films that represent characters from the Spanish clergy, being shown as a way to highlight even more their fanatism compare to the one of other confession's bishops, an image that has been carried from the Reformation[103].

On the other hand, Mr. Fernández struggles to hold his desire towards Isabella, as he confesses to the Grand Inquisitor in the following dialogue extract:

> "-Grand Inquisitor: I command you to continue with the cross-examination in the torture chamber.
>
> - Mr. Fernández: I cannot control myself in the presence of that woman.
>
> - Grand Inquisitor:, How is the body of the heretic important, as long as the soul meets salvation?".

[102] About the cross that Mr. Fernández is contemplating in the altar while praying, it has a singular artistic style, that shares no similarity with the representations of the crucified Christ in Spain. This cross is more similar to the "Aaby Christ", a Danish cross of the XI century. Both in Spain and in other parts of Europe was the representation of Christ during the Modern Age much more dramatic, since the aim was to emphasize the pain and the suffering of the Passion of Christ, way different to the hieratic and rigid gesture. BURKE, P., *Visto y no visto. El uso de la imagen como documento histórico*. Barcelona, 2005, p. 63

[103] HAYWARD, F., *The Inquisition*. New York, 1966, p. 169.

Finally, inquisitor Fernández succumbs to his desire and takes advantage of Isabella. This type of abuses have been repeated in audio-visual fiction. In this sense, Pinto notes that the heresy crimes were extended little by little to include more behaviours rejected by the Church, as it happened to the applicants in confession[104]. There were enough cases of applicants to become one of the main concerns of the Spanish Holy Office, turning into the "invincible battle horse in America"[105]. From this crimes could the image of the clergy be extended to the Spanish inquisitors by means of lampoons and pamphlets:

> "The lampoons, wall posters and popular songs under inquisitorial suspect were those which advertised other creeds—Protestant, Muslim, or Jewish—, but also those which disagreed with certain aspects and mysteries of the Catholic doctrine. Given the identification between the Church and the State, it was not that strange that censorship and persecution of wall posters were applied to those who spread some of the abuses performed by the ecclesiastic representatives, in general, and the inquisitorial representatives, in particular"[106].

[104] PINTO, V., "Sobre el delito de la herejía (siglos XIII-XVI)" en ESCUDERO, J.A. (edit.) *Perfiles jurídicos de la inquisición española*. Madrid, 1989, p. 198-199.

[105] HENNINGSEN, "La evangelización negra", pp. 939-939.

[106] CASTILLO GÓMEZ, A., "Muros infames, palabras en la calle. Contestación religiosa y represión en el mundo hispánico" in CARRANZA VERA, C., CASTAÑEDA GARCÍA, R., *Palabras de injuria y expresiones de disenso el lenguaje licencioso en Iberoamérica*. México, 2016, p. 278.

The last thing that is told in the film about Isabella's end is that she has been sentenced to die at the stake, but there is no footage about that moment. In fiction narrative is very common for all the accused that fall into the hands of the Inquisition to receive this same sentence. Despite this fact, as several authors have confirmed, the first years after the creation of the Spanish Inquisition were the bloodier ones, when the court was busy with the processes of false converted, but with the passage of time, the acts of faith with sentenced to death were less and less frequent.[107]

Dreyer dedicated the last minutes of the chapter, which end the tale about the Spanish Inquisition, to Satan, who has participated in this story as Grand Inquisitor. Satan, after witness how Mr. Fernández fall into temptation, listens to God's voice who, by pronouncing his sentence, he insists: Keep on spreading evil!

[107] KAMEN, *La Inquisición española*, p. 249.

TRANSITIONAL JUSTICE AND THE INTERAMERICAN HUMAN RIGHTS SYSTEM

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1.- Introduction

Transitional justice is a modern concept which needs an explanation and which have been developed in Inter-American Human Rights Protection System. It is explained by historical circumstances but also by the protector role played by the Inter-American Court compared to the European Human Rights Court.

An approach to transitional justice implies at first some theorical appreciations in order to better understand the Inter-American development of this concept.

2.- An approach to transitional justice theory

Transitional justice concept is a theorical and practical construction of the second half of XXth century. It is essentially connected with the conjunction of two factual circumstances in the International Community: on the one hand, the fall of the Latin-

American military regimes, primarily, the Argentinian and the Chilean; and, in the other hand, the fall of the Soviet regimes with the progressive ending of the Cold War. Then, there is another element, a juridical appearance and progressive development of the Internal Human Rights Law (IHRL) as a differenced and autonomous area of the International Public Law (IPL) and which field of work is in the promotion and guarantee of Human Rights around the world and the development of effective mechanisms for their protection. IHRL has had an important influence in all IPL's domains of action. Villán Durán and Faleh Pérez summarize this perspective in the next way:

> "the progressive weight of human rights in international atmosphere has acted as spearhead, forcing the more significant contemporary transformations in actual IPL."[1]

The combination between factual and juridical phenomenons promoted a double analyse. It's true that in the doctrinal work, academics still studying transitional justice with a separated perspective because of the political theorical content of the first circumstances and the extremely juridical characterization of the second one. Despite this, Law and Politics are all present in transitional process and they play an important role even though transitional actor don't deal with them at the same time.

So, political point of view correspond to transitions' theory and juridical perspective takes on transitional justice. Their interrelation is defined by the fact that in the origin, development, stimulus or basis of transitional justice actions there is always a political transitional process maybe because transitional justice works as a complement to the democratic changes, maybe because transitional process may be

[1] C. VILLÁN DURÁN Y C. FALEH PÉREZ, *Manual de Derecho Internacional de los Derechos Humanos,* Ed. AEDIH y Universidad de Alcalá de Henares, XVI Máster en Protección Internacional de los Derechos Humanos, Alcalá de Henares, 2019, p. 16.

understood in a global way; it means, transitional process won't be complete as long as transitional justice actions are implemented.

A first approach, so, to transitional justice process might, necessarily starts with an analyse of the context, the political, economic and social context, in which it works. Transition means *"the action and effect of changing from a way of being to a different one"*[2]*;* specifically, political transition can be defined broadly as the change from a dictatorial regime to a democratic one, or as the change from a conflict or war situation to the end of the hostilities and the common construction of a pacific convivence and democracy.

In the first of its political meanings, that is, following Huntington's theory, a transition is temporary lapse during the one, the path from a dictatorial regime to a democratic one is produced, so, accord to him, transitional concept can always be replaced by the word democratization[3]. That implies some reflexions:

The first one is the delimitation of what we can understand as a dictatorial regime or following the reference author, Linz, as a modern non democratic regime, it means, an authoritarian regime[4]. It is a political system with pluralism, non responsible, without an ideology-guide but with characteristic ideas, without an intense or extended political mobilization excepting some precise moments of its development and with a leader or oligarchy which exercises the power between bad defined formal limits which are, also, substantially predictable.[5] The authoritaric category is an answer to a need which

[2] Definition included in the Dictionary of Real Academia Española. Avalaible in: https://dle.rae.es/?w=transici%C3%B3n

[3] S. P. HUNTINGTON, *La tercera ola*, Ed. Paidós, Colección Estado y Sociedad, Buenos Aires, 1994, p. 19.

[4] J. J. LINZ, *Transiciones a la democracia,* Revista Española de Investigaciones Sociológicas (REIS), nº51, 1990, pp. 7-34, p. 8. Avalaible in: https://dialnet.unirioja.es/servlet/articulo?codigo=248969

[5] J.J. LINZ, "Una teoría del régimen autoritario: el caso de España" in J. R.

appeared next to the Second World War in order to find a correct terminology in the discipline of political analyse which allowed them to study so different, but at the same time and paradoxically, similar regimes because of their proximity to totalitarian systems, as Francoist Spain, Salazar in Portugal, or the one-party and progressive regimes of the regions in process of development. They were all, systems of government where, as Raymond Aron exposed, *"there is not one-party, neither a lot of parties, they are not based on an electoral legitimacy, neither in a revolutionary one.* [6]

From those characteristics, we can conclude the following: first of all, in front of the anti-pluralist model chosen by totalitarisms, authoritarian regimes, have an structural pluralism following Almond's theory[7]; it implies that there is a recognition of a controlled, and limited to some groups which represent the regime interests in an organized and semi-ideologycal way, political participation. Those groups can become an important element in the regime's rupture or an encouragement to start a opening process which one of the possible start points of a transition.

Political participation during the authoritarian regime has son many importance and influence in the configuration of the political transitions and transitional justice actions because the way decisions are taken during the transitional process will imply different levels of responsibility and more or less transparency during the process and, concurrently, it will have an impact in the knowledge of truth. Some authors as Linz preferred using the concept, limited pluralism instead

MONTERO y T. J. MILEY (eds.), *Juan J. Linz. Sistemas totalitarios y regímenes autoritarios*, vol. III, Colección Obras Escogidas, Ed. Centro de Estudios Políticos y Constitucionales, Madrid, 2009, pp. 23-60, p. 28.

[6] R. ARON, *Sociologie des sociétés industrielles. Esquisse d'une théorie des régimes politiques,* Ed. Centre de Documentation Universitaire, Les Cours de la Soborne, Paris, 1958, p. 50-51.

[7] G. A. ALMOND, *Comparative political systems,* Journal of Politics, nº18, 1956, pp. 391-409.

of structural pluralism because they admitted a symbiosis between the represented groups of influence and the regime. It is easy to understand in the way, those groups are legitimized by their connivance with the power, and the regime's survival is based on the equilibrium between all those forces. As an example, Francoist Spain, illustrated this idea because, at the same time and since the coup d'état, an amalgam of military, catholic, traditionalist and, finally, Falangist forces coexisted. So, as Serrano Suñer said, the existence of only one party (Falange), didn't mean that:

> "it was the only instrument or the only power custodian (…) it has always existed due to a balanced politic and to preserve the survival of the power, a presence of unified elements, without arriving to join their interest or resolve in a total pre-eminence."[8]

Following with the example, one of the principal groups was a religion and it implies the characterization of the regime that historians have made naming the system as national-Catholicism. It is a sign of the semi-pluralism we were taking before because there is a catholic group with its own identity, leaders and autonomy but added into de national political dynamic.

Then, ideology-guide is nearer to what Geiger[9] named as mentality, it means, a sentiment of belonging, of proximity and emotional which determines patterns of action and which don't need the elaborated and intellectual development of a pure ideology. As an example, we can remember Getulio Vargas speech in Brazil of 1930's where there is no mention to a philosophical reference or neither to

[8] R. SERRANO SUÑER, *Entre Hendaya y Gibraltar (Noticia y reflexión frente a una leyenda sobre nuestra política en dos guerras),* Ed. Ediciones y publicaciones españolas, Madrid, 1947, p. 38-39.

[9] T. GEIGER, *Die soziale schichtung des deutschen wolkes,* Ed. Ferdinand Enke Verlag, Stuttgart, 1932, p. 77-79.

ideological principles; he appealed to feelings, to homeland; he asked for the represented groups' support:

> "protected by the support of public opinion, with the prestige given by Brazilians joining (…)relying on Armed Forces sympathy (…) stronger because justice and arms…"[10]

On third place, this instrumentalized pluralism and the absence of a political philosophy imply that participation, or better, its previous phase, mobilization, are put I a second place as a guarantee of regime stability; this doesn't mean, as, again, Linz established, the absolute inexistence of any king of political mobilization, but its canalization if there are strong mobilization precedents in the country history or in regime's origin, or, as Ridruejo exposed, citizens constituency to *"their private life sphere, without other interests or horizons, just as socially threaten groups by the popularization of the State and the traditional social statement want."*[11]

Finally, dynamics in the exercise of power for the authoritarian elite have a determinant influence in the following transitional process and they are connected with two factors: the survival or length of the regime from a temporal point of view; and the need or not to fight against an stronger or weaker opposition, mostly, these opposition movements which are evident for the public opinion. In other words, the presence of more stability in the authoritarian regime connected with an absence of permanent and explicit revolt periods and the longer duration of the regime, might become into a higher level of certainty and institucionalization of and in the exercise of power. Taking a look, again, to Spanish case, since the 1960's, there were changes in the

[10] G. VARGAS, *Nova política de Brasil. Da aliança liberal as realizaçoes do primeiro ano de governo 1930-1931*, Ed. Livraria José Olimpo, Río de Janeiro, 1938, p. 63.

[11] D. RIDRUEJO, *Escrito en España,* Ed. Losada, Buenos Aires, 1962, p. 90-91.

regime which affected economy and administrative structures; they weren't accompanied by an opening of the ideology-guide, but it allowed an economic growth and the development of bureaucratic institutions, essential to stimulating the transitional process because sociological studies support the connection between mobilization and association movements with a better level and quality of life, and not with educational elements. Inside this dynamic, la existence of a bureaucratic and institutional machinery prevent from an empty power during the democratization.

In short, the importance of put the attention, at least, in the essential characteristics of an authoritarian regime has its own useful because it conditions unavoidable and completely the transitional process, its nature, its time and the actions through the one it will be conducted. That's way the last of those four considerations which have been explained, groups the precedents and conditions in an exhaustive way the transitional process. The presence of a liberalization process during the regime and before the transitional action have started, the presence of what O'Donnell[12] defined as a process of gradual concessions which is controlled by the cupola of power, the most important difference with the social contract of the rule of Law, which implies a gradual giving of freedoms and fundamental rights, the civil and political ones, started by the regime which a defined purpose or in order to strengthen its intern, international, or both legitimacy. Liberalization means an increase of aperture but never an establishment because the capacity to take decisions stays in the cupola of power even if they don't exercise this competence in a monopolistic way; it always means more juridical security, more associationism, and a less tensed political atmosphere because two reasons:

[12] G. O'DONNELL Y P. SCHMITTER, *Transiciones desde un gobierno autoritario. Conclusiones tentativas sobre las democracias inciertas*, Ed. Prometeo, Bueno Aires, 2010.

On the one hand, the augmentation of expectations about an aperture or about the commencement of a transition, but, on the other hand, it gives birth to a responsibility into the political leaders of the incipient public opposition movements because on them relapse the weight of modelling more liberalizations exigences. Responsibility, here, means concretely that an excess in public confrontations can become into an authoritarian regression or, in other words, the end of the liberalization process. We can see an example in Polish transition in 1981 with the state of war declaration and the strongest repression by Joruzelski which started next to the strikes convocated by Solidarity Trade Union. It implied the lose of transitional expectations, at least, the pacifists ones.

Next to the existence or not of a liberalization process, there are two important factors which have a determinant influence in transitional process: first of all, the way the regime breaks, or the equivalent to *casus belli* in wars, which nature and characteristics will determine the existence of intern riots or a civil war, according to the intensity of the use of force, or, maybe, a pacific transition. And, secondly, the politic liderance which elements will be use to define the following politic institutionalized participation subdue to democratic game rules.

Related to the way the regime breaks, it's true that the type of authoritarian regime suppose a lot of particularities, but, it's also true that in order to analyse transitional justice actions, it's enough to make a distinction about democratization process linked with those regimes with are a result of what Huntington define as *"second counterwave"* [13], and those regimes with are a part of the third wave. Even though all transitional process in Latin America are more connected with the third Huntington wave of democratization, there are regimes in which its creation started with a burocratic-authoritarian reaction to the second wave. It means, the became authoritarian regimes since the 1960's as Peru (1962), Brazil and Bolivia(1964), Argentine (1966), Uruguay and

[13] S. P. HUNTINGTON, *op.cit*, p. 31.

Chile (1973). Other transitional process are only connected with, as an important part of the doctrine represented by Sartori say, the process of democracy universalization[14]. We are talking about Spain (1975), Ecuador (1978) and Portugal (1974).

All those process have in commun the temporal phase in where they were produced and the authoritarian characterization of the previous regime, but, we can't forget that govern models and transitional methods were different. In these two fields it's important to make a difference between, unique party dictators of soviet satellite, and military regimes originated by a coup d'État and which substituted a previous democratic govern or a civilian totalitarian regime and we must distinguish all of them from personal dictatures. It influenced transitional model; transitional models were established by Huntington[15], Linz[16] and Mainwaring[17] and it's useful to analyse old transitional process and to choose the perfect model to future transitions because:

> "The why and the how of democratization are interlaced, but, at this point of analyse, the emphasis change from the first, to the last, from causes to process: the paths in where political leaders and public servants ended with authoritarian systems in the 1970's and 1980's and arrive to create a democratic ones. Roads of change were various, as they were the original culprits who made easier the change." [18]

The ways of changing are three:

[14] G. SARTORI, *How far can free government travel?,* Journal of democracy, vol VI,nº3, 1992, pp. 101-111.
[15] S. P. HUNTINGTON, *op.cit*, p. 111.
[16] J. J. LINZ, *Transiciones…, op. cit.*
[17] D. SHARE y S. MAINWARING, *Transiciones vía transacción: la democracia en Brasil y en España,* Revista de Estudios Políticos, nº49, Enero-febrero, Madrid, 1986, pp. 87-136.
[18] S. P. HUNTINGTON, *op.cit*, p. 107.

First, transformation or reform. It supposed that transitional leadership is assumed by the political elites; there is a break or interruption of the regime but it is controlled by him. This model occurs in regimes in where there is a need of aperture, for example due to democratic conditions to be accepted in an international organization as European Union, or where there is a moderated opposition or when we are talking about long military regimes, well-established and with a solid institutional and economical experience so, in a conditional way, militaries transfer the power to civil authorities. It's a pacific transitional model which occurred in Spain, Chile, Brazil or Hungary.

Secondly, transfer or ruptform. It's a model based on the harmony between a weak regime and a fractured opposition. It's longer than the first one, boring, uncertain, and less pacific because it mixes democratic progress with authoritarian regressions, so there is a use of force as far as the regime and the opposition are not able to assume, from an economic perspective, the price of a high grade of repression or the price of an excessive mobilization. It's a model in which uncertainty and violence increase. Poland, Czech Republic, Nicaragua or South Africa are Good examples.

Finally, replacement or rupture. It's the most violent of the ways because it implies the need of a factor that shows the evidence of a shortage of agree with the regime as an important war defeat as occurred in Argentine with Maldives war in 1980; the lose of the support of an stronger country as occurred in Rumania after de fall of the Russian Soviet Federative Socialist Republic, or the union between military forces and social movements as occurred in Portugal. Violence is not the weakest element of this transitional way because the main characteristic is the union between military forces and social movements as far as the regime falls, and its subsequent fragmentation.

Concerning to political leadership during transitional process, the most important reference was studied by Linz in his study about leadership during Spanish transition. He underlined that there is a

conjunction between people as principal actor, and the game, sometimes lucky as in Spanish case, and other times unlucky, played by principal political leaders and second level politicians. It always needs an intelligent gestion and it's not only an amount of popular supports.[19] During transitional process, Linz put the attention in an important balance: even though social popularity of political leaderships is important, their positioning and their institutional strength can make up for a weaker social base. It is because transitional leaders' abilities are, as opposed to a party leader, negotiation capacity, communicative skill in order to make understandable to the nation, what is the democratization plan and time management. [20] In other words, leadership might not be populist as the previous regime was, it must be based on the personal acceptance of obligations and exigences of the democracy rules in order to make an important contribution and to start a new political, innovative culture founded on consensus, which encourages political debate and which allows this society in transition to build the institutional and social legitimacy of the future and democratic govern. Transitional leaderships work as a bridge, they play a role, a leadership, innovative which is different from the previous one, the authoritarian, and from the following one based on political parties.

The way in which transition is managed, conditions totally, the next transitional justice actions because the existence or not of a negotiation between authoritarian authorities and transitional semi-democratic one, implies the existence or not of amnesty laws, it means, the existence or not of judicial process for human rights violations committed during the dictature creation or not of Truth Commissions and their influence in the criminal responsibility, the participation or not in the political and democratic game of parties of the regime

[19] J.J. LINZ, "El liderazgo innovador en la transición a la democracia y en una nueva democracia" in J. R. MONTERO y T. J. MILEY (eds.), *Juan J. Linz. Democracias: quiebras, transiciones y retos,* vol. IV, Colección Obras Escogidas, Ed. Centro de Estudios Políticos y Constitucionales, Madrid, 2009, pp. 393-426, p. 393.
[20] *Íbidem*, p. 402 y 405.

supporters, and the legitimacy and configuration or democratic system and rule of law as the principal guarantees of non-repetition.

This last consideration connects with the essence of this study, why must we choose transitional period to apply transitional justice principles? Why democracy and rule of law, as a result of the transitional process are also, one of the minimum expression of transitional justice? The answer is not universal or easy, but it's important to make the difference between political transition and transitional justice actions because the first one is the origin of the second, and the second one, makes the first being complete and accomplished.

3.- Transitional justice in Latin America

To a better understanding of transitional justice, we must go a step further and make an analyse from the point of view of IHML. This perspective allows us to better understand the objective of transitional justice which the achieving of two conditions which, also, create the birth, development and guarantee of Human Rights, it means, democracy and peace.[21] The objective is, as Professor Rincon said, *"facing the crimes which have been committed."* [22]Ultimately, the aspiration is to combine the historical and political characteristics which condition transitions, with the restorative goal which is provide by transitional justice related to human rights violations committed during the authoritarian regime. It gives a complete analyse of the complexity of democratization. So, to difficulties and tensions of the political transitions, we add the *"stress between negotiation and impunity"* [23]

[21] T. CHRISTIANO, *An Instrumental Argument for a Human Right to Democracy*, Philosophy & Public Affairs, vol. 39, nº 2, 2011, pp. 142-176.
[22] T. RINCÓN, *Verdad, justicia y reparación. La justicia de la justicia transicional,* Ed. Universidad del Rosario, Bogotá, 2010, p. 26.
[23] OFFICE OF THE HIGH COMMISSIONER OF UNITED NATIONS TO HUMAN RIGHTS: *Reflexiones sobre la necesidad de aplicar los derechos a*

and the discussion between *"drawing a depth line on the past and loon to the future"* and *"the one who forget past mistakes are condemned to repeat them."* [24] In a very sensible moment which, in turn, formed by conflict and negotiation about the new rules of democratic game, uncertainty about the success of the transitional process and the imposition of limits of the power through the establishment of the rule of law.

The two points of view, act in a complementary way because, following Orozco, contextual elements give the limit to the intensity and strength of applicable norms[25], so, Pablo de Greiff was accurate when he said transitional justice is imperfect. [26]

Those difficulties are more evident when transitional justice is reduced to a minimum expression, named by Joinet Guidelines, to the right to sanction. From the victim perspective it's defined as *"the possibility of making worthy their rights by beneficing of an equitable*

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la verdad, a la justicia y a la reparación para poder superar el conflicto armado interno en Colombia y lograr una paz duradera y sostenible. Michael Frühling Intervention, Director of High Commissioner Office in Colombia in International Seminar *"Experiencias de alternatividad penal en procesos de paz"*, Barcelona, 28 February 2004. Avalaible in: http://www.hchr.org.co/publico/pronunciamientos/ponencias/imprimir.php3?texto=po0436.txt

[24] J. CHINCHÓN ÁLVAREZ, *Derecho Internacional y transiciones a la democracia y la paz: Hacia un modelo para el castigo de los crímenes pasados a través de la experiencia iberoamericana*, Ed. Ediciones Parthenon, Sevilla, 2007, p. 281. Avalaible in: http://eprints.ucm.es/37011/1/ISBN-8496226301.pdf

[25] I. OROZCO, *Justicia transicional en el tiempo del deber de memoria,* Ed. Temis, Bogotá, 2009.

[26] P. DE GREIFF, "Reparations efforts in international perspective: what a compensation contributes to the achievement of imperfect justice*",* en DOXTADER ERIK y VILLA-VICENCIO, CHARLES (eds.): *To repair the irreparable: reparations and reconstruction in South Africa*, Ed. David Philip Publishers, Claremont, 2004, pp. 321-359.

and effective appeal, especially in order to achieve the judgement of their oppressors and obtain a reparation." [27] From the State perspective, it implies the obligation of *"investigate human rights violations, persecute their authors and, if their guilt is established, sanction them."* [28] This is a criminal, restorative and punitive perspective which hit with one of basic elements of political transition, the balance between powers, and the manage of time because transitional justice may become a support element and a positive energy to transition and democratic consolidation; it might never become an element which increases the risk of authoritarian regression but it must only be a reaffirmation on the fight against impunity and the establishment of the rule of law. [29]

About this idea summarized by Arbour[30] in which social cohesion is an important element in transitional period but its value increases in the middle and long term when this cohesion is supported by the respect and the establishment of human rights protection mechanisms, and not by impunity which is only a short term success. Impunity is, in long term, a social breakdown element. On this

[27] COMISIÓN COLOMBIANA DE JURISTAS: *Principios internacionales sobre impunidad y reparaciones, las directrices de Joinet revisadas,* Documento E/CN.4/Sub. 2/1997/20/Rev.1 elaborado por la Comisión de Derechos Humanos, Subcomisión de Prevención de Discriminaciones y Protección a las Minorías, 49º período de sesiones, tema 9 del programa, parr.26, página 77. Available in: http://www.coljuristas.org/documentos/libros_e_informes/principios_sobre_impunidad_y_reparaciones.pdf

[28] *Íbidem*, parr. 27, p. 77.

[29] Y. PELED y N. N. ROUHANA, *Transitional justice and the right of return of the Palestinian refugees,* Theoretical Inquiries in Law, vol. V, nº2, 2004, pp. 317-332, p. 320.

[30] L. ARBOUR, *Economic and social justice for societies in transition,* Second Annual Transitional Justice Lecture hosted by the New York University School of Law Center of Human Rights and Global Justice and by the International Center for Transitional Justice, 25 octubre 2006, Ed. New York University School, New York, 2006, p. 16.

argument, transitional justice become a quadruple: justice, truth, reparation and non-repetition guarantees. The fact of circumscribe transitional justice in the frame of democratization doesn't mean that its mechanisms can't be used in other situations or can't become a part of a democratic society. [31] That's what General Secretary understood in his inform about *The rule of law and transitional justice in societies which suffer or have suffered conflicts* where he described it as:

> "all variety of process and mechanisms associate with the effort of a society in order to solve the problems which are connected with a past of high scale abuses, with the aim of make the culprits give an explanation, serve justice and achieve reconciliation." [32]

This point of view about transitional justice allows us to connect it with democratization process but also, with the perspective which have been defended by jurists as Greiff, Elster or Teitel[33], so we can also talk about transitional justice in those process which start with serious human rights violations and which finish with justice, explanations giving and the objectives chosen by Human Rights

[31] R. A. ALIJA FERNÁNDEZ, "La multidimensionalidad de la justicia transicional: un balance entre los límites internacionales y los límites de lo jurídico en J. BONET PÉREZ y R.A. ALIJA FERNÁNDEZ, *Impunidad, derechos humanos y justicia transicional,* Cuadernos Deusto de Derechos Humanos, nº53, Ed. Universidad de Deusto, Bilbao, 2009, pp. 93-167, p. 96

[32] UNITED NATIONS, *Report of the Secretary General to Security Council, "The rule of law and transitional justice in conflict and post-conflict societies",* UN Documents S/2004/616, 23 august 2004, parr. 8. Avalaible in: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PCS%20S%202004%20616.pdf

[33] R. RUBIO-MARÍN Y P. DE GREIFF, *International Journal of Transitional Justice*, Volume 1, Issue 3, 1 December 2007, pp. 318–337.

Commission of the United Nations.[34] The constant is that there is always some king of political changes. [35]

It's important to put the attention in the fact that if it's true that there is a part of the specialists which choose postconflit justice as the preferred concept, like Boraine, the unique association between transitional justice and arm conflicts aside the complexity of political transformations which are not necessarily a part of a war scenario but which, on the contrary, are always a part of transitional justice actions. Even if we restrict its application to wars, international or national one, this conflictive situation always is accompanied by a democratic shortfall because it always implies the cancellation of guarantees, even if it affects exclusively combatants and a suspension of the mechanisms of the rule of law as, for example, the innaplication of one of the most important human rights and values, security and life.

The connection between the existence of an armed conflict and transitional justice as a way of reparation was identified by Sassòli and Bouvier[36] when they demonstrated the existence of a concatenation of facts: serious human rights violations, social fracture, high probability of an armed conflict explosion, increase of the risk of unfulfillment to International Humanitarian Law (IHL) and more future difficulties to reconciliation. This connection allows us also to connect the need of transitional justice actions in the period subsequent an armed conflict because the progressive development of IHL made by International Committee of the Red Cross (ICRC) have changed the paradigm

[34] HUMAN RIGHTS COMMISSION, *Resolution 2005/70 of the 20 of april 2005*, preamble. Available in: http://ap.ohchr.org/ap.ohchr.org › documents › CHR › resolutions › E-CN_4-RES-2005-70

[35] R.G. TEITEL, *Transitional Justice Genealogy,* Harvard Human Rights Journal, nº16, 2003, pp. 69-94, p. 69.

[36] M. SASSÒLI Y A. BOUVIER, "International Humanitarian Law and International Human Rights Law" en M. SASSÒLI, A. BOUVIER y A. QUINTIN, *How does law protect in war?,* Ed. CICR, Ginebra, 1999, pp. 351-370, p. 359.

exposed by Escobar Hernández[37] according to which, IHL was always following armed conflicts because its goal was not to condemn the infractor State, but to secure the full exercise of rights and making the IHL become the protagonist through three mechanisms: prevention, control and sanction. [38]

On the last mechanism devolve upon the weight of transitional justice because it can be explained by the internationally assumed obligations in the field of IHL (war crimes) and also in the field of IHRL (crimes against humanity). So, if it's true that states have an appreciation degree in the way they manage their transition, some international norms of IHL, IHRL are, according to Professor Rincon, *"the hardest normative nucleus of transitional justice."* [39] Consequently, transitional justice is understood with a global point of view following what Human Rights Council of United Nations expressed in its resolution A/HR/9/28 on the 28th December 2008. [40]

Transitional justice has an international protection due to three reasons:

The first one is because there is a possibility of an international management of transitional justice actions. It means there is nothing that excuses international criminal procedures of their transitional impact so they are a useful tool to determine criminal individual

[37] C. ESCOBAR HERNÁNDEZ, "La protección internacional de los derechos humanos (I y II) en M. DÍEZ DE VELASCO (coord.), *Instituciones de derechos internacional público,* Ed. Tecnos, Madrid, 1999, pp. 535-585, p. 537.

[38] CRUZ ROJA ESPAÑOLA, *Manual básico de derechos humanos y derecho internacional humanitario,* Ed. Cruz Roja Española, Madrid, p. 45.

[39] T. RINCÓN, *op.cit.,* p. 25.

[40] HUMAN RIGHTS COUNCIL, *Inform about its 9 period of sessions* (8 to 24 september 2008), presented in General Assembly on the 2 december 2008, A/HRC/9/28, p. 35. Available in: ap.ohchr.org/documents/S/HRC/report/A_HRC_9_28.doc

responsibility. The same approach can be used with regional systems of human rights protection and their courts because they are able to determine State's obligations in the field of transitional justice regarding serious human rights violations which have been committed in the previous regime; those courts work, in this point, specially in the right to truth and the observance of the criminal principle a*ut dedere aut judicare* as Inter-American Human Rights Court (IAHRC) and European Court of Human Rights (ECHR) have established.

The second one is connected with the huge development and influence that IHRL have had in all IPL which have implied the presence of individual rights in transitional justice actions and, consequently, obligations under the care of the States. So, following, again, Professor Rincon, it's not to put human rights in transitional justice, but, focus transitional justice actions from the IHRL perspective.

The third one and the last is that even if political transition focuses on Constitutional Law, transitional justice also works on it because it includes guarantees of non-repetition.

All these ideas were summarized by Special Rapporteur Philip Alston on his inform of the 2nd May 2008 about extrajudicial, summary or arbitrary executions in which he expressed the complete contents of transitional justice in universal sphere including s*oft law* and the influence of progressive development of IHRL:

> "the creation of a commission or its announcement mustn't spare a government of the pression to fight against impunity of violations or help to keep quiet international petitions."[41]

[41] HUMAN RIGHTS COUNCIL, *Inform of Special Rapporteur Philip Alston about summary or arbitrary executions,* A/HRC/8/3, 2 may 2008, parr. 23. Avalaible in: http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=484d254c2

The triad composed by justice, reparation and truth isn't in the same level of recognition as the right to an appeal; for example, American Convention on Human Rights (ACHR) includes the right to an appeal on article 25, European Convention on Human Rights (ECHR) recognizes it on article 13 and African Charter does the same on its article 7 but anyone of these instruments recognize the triad. However, the triad has had a case law development, intensely in inter-American human rights protection space with the sentence related to Velasquez Rodriguez vs. Honduras on the 9th July 1998 in which circumstances of Angel Manfredo Velasquez disappearance and detention by armed forces were discussed. Also, Inter-American Commission on its Resolution 30/83 (confirmed by Resolution 20/86) when they talked about systematic disappearances committed with the States participation or acquiescence recognized the triad. The sentence we have just mentioned continues the interpretation initiated by the Inter-American Commission in 1985 when on its anual inform, the Commission understood that there is a right to justice relative to serious human rights violations and this right have two dimensions: an individual one which means the right of victims to access to justice, an a collective one which means that all the society has the right to know what happened.[42] This approach is a first manifestation of a right to justice and truth recognition. In the sentence we talked about, Inter-American Court made the first announcement about the existence of positive obligations in charge of States which contain investigation[43],

[42] COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, "Campos en los cuales han de tomarse medidas para dar mayor vigencia a los derechos humanos de conformidad con la Declaración Americana de los Derechos y Deberes del Hombre y la Convención Americana sobre Derechos Humanos" en *Informe Anual de la Comisión Interamericana de Derechos Humanos 1985-1986*, OEA/Ser. L/V/II.68, Doc. 8 Rev. 1, 26 september 1986, chap. V, p. 205

[43] Sentence of Inter-American Court of Human Rights in the case Velásquez Rodríguez vs. Honduras on the 9 july 1998, parr. 166, 174 y 177. Avalaible in: vhttp://www.corteidh.or.cr/docs/casos/articulos/seriec_04_esp.pdf

judgement[44], sanction[45], reparation[46] and the establishment of non-repetition guarantees in order to fight against the impunity of serious human rights violations through preventive mechanisms and a public and institutional system that assures the main exercise of human rights. [47] The sentence also included the range of those obligations to the point of establishing the international responsibility of the State in cases where there are serious violations of the human rights included in Inter-American Convention even if the behaviour isn't directly attributable to the democratic government, so

> "international responsibility of the State can exist, not in relation to the fact concretely, but in relation to the lack of diligencia in preventing the violation or in judging it in the terms expressed in the Convention." [48]

The importance of this sentence is due to its efficacity, defined in article 62.1 of the Inter-American Convention which determines Court's competence for its interpretation and application. It implies a doing obligation because, as the Court established,

> "if the State's institutions act in a way that favours impunity and the non-reestablishment, as far as possible, of victims' rights, we can affirm that it has reneged on its duty of guaranteeing the free and complete pleasure of rights to people under its jurisdiction." [49]

[44] *Íbidem,* parr. 172 y 173
[45] *Íbidem*
[46] *Íbidem*, parr. 166 y 174
[47] *Íbidem*, parr. 166, 172, 173, 174.
[48] *Íbidem*, parr. 172
[49] *Íbidem*, parr. 176

In subsequent sentences, the Court has also tackled the same obligation and its standards have been defined until arriving to consider in the sentence related to the case Los Niños de la Calle (Villagrán Morales and other vs. Guatemala) on the 19th November 1999 that this obligation

> "must be set out on seriously and never as a simple formality condemned in advance to fail… it must be assumed by the State as an own legal duty and never as a simple mange of individual interests which always depends on the procedural initiative taken by victims." [50]

Inter-American Court is really the unique organ with capacity and competence to decide and with binding decisions who has made a pronouncement against amnesties; until 2011, the Court didn't have an explicit announcement on this field, but Inter-American Commission have used the sentence related to case Velásquez Rodríguez vs. Honduras in order to disallow amnesty laws in its reports. [51] In the sentence related to case Barrios Altos vs. Peru on the 14th March 2001, the Court made a pronouncement about the compatibility between Peruvian amnesty laws nº 26479 and 26492 and the obligations contained in articles 1 and 2 of the Convention because those laws conceded immunity and impunity to military forces and politicians. On

[50] Sentence of Inter-American Court of Human Rights in the case "Niños de la Calle" (Villagrán Morales and others) vs. Guatemala on 19 november 1999, parr. 225 y 226. Available in: http://www.corteidh.or.cr/docs/casos/articulos/Seriec_63_esp.pdf

[51] - COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS: Informe Nº 8/00, Case 11.378. Haití, de 24 de febrero de 2000, parrs. 35 y 36. Avalaible in: https://www.cidh.oas.org/annualrep/99span/De%20Fondo/Haiti11378.htm

- COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS: Informe de fondo Nº 20/99, Case 11.317. Perú, on 23 february 1999, parrs. 159 y 160. Avalaible in: http://www.cidh.org/annualrep/98span/Fondo/Peru%2011.317.htm

this point, the Court agreed in analysing those laws as a limitation in the victims' access to justice and in the judgement of serious human rights violations, facts which supposed a violation of the State's positive obligations. [52] The Court remarqued:

> "the obvious incompatibility between auto-amnesty laws and the Convention. Those laws lack of juridical effects and they can't continue being an obstacle to investigations related to the facts that concern this case, neither to guilty identification and responsible sanction, they can't neither have a similar impact in other cases of the human rights contained in the Convention violations which have occurred in the Peru."[53]

The Court has had a solid jurisprudencial interpretation arriving even to make a hierarchical deliberation between social interest in the fight against the impunity of serious human rights violations and democratic decisions on the occasion of the case Gelman vs. Uruguay in which the law nº 15.848 was subdued to a referendum in two different times , the first in 1989 and the second in 2009. Under no circumstances the revocation won because of the public pression of military forces with a coup d'état. It's on this moment when the Court jurisprudence related to State's obligations in transitional justice became solid and consolidated because, following its previous sentences, the Court established that above democratic decisions, there are positive obligations that States must follow and accomplish in the three elements of transitional justice (the triad)cause the most important thing is not the way decisions are taken but its *ratio legis.*[54]

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[52] Sentence of Inter-American Court of Human Rights in the case Barrios Altos vs. Perú on 14 march 2001, parr. 45. Avalaible in: http://www.corteidh.or.cr/docs/casos/articulos/Seriec_75_esp.pdf

[53] *Ibidem,* parr. 44

[54] Sentence of Inter-American Court of Human Rights in the case Gelman vs. Uruguay on 24 february 2001, parr. 229. Avalaible in : http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_esp1.pdf

A first approach give us the opinion that there is not a national appreciation margin when we talk about the international binding of the right to justice; that's what The Inter-American Court said in the next way *"national conditions, without regard of their difficulty, don't release the state of its conventional obligations."*[55]

What it is really admitted is a modification of criminal laws since the succeed of truth commissions in South Africa but without an affectation of the rights of victims or accused people. It means to move closer the criminal procedures to restorative justice, right to truth and collaboration. That was the opinion expressed by most of judges in the Inter- American Court in the separated vote of the case Massacre El Mozote vs. Salvador in which there are some precisions about amnesty laws which are, also, a message to Colombian conflict. They have served to make a distinction between:

At first, between transitional process in which IHRL is applicated entirely from those in which because of their nature as a civil war or intern conflict, there is more violence and IHL is always applicated.

The second distinction is that here isn't an absolute prohibition in IHRL about amnesty laws. It exists some clarifications: for example, United Nations have said that *"peace agreements approved by United Nations can't promise amnesties for genocide, war crimes, crimes against humanity or serious violations of human rights."*[56] That's the same idea expressed in Rome Statute when it talks about *ratione materiae* jurisdiction of the ICC.

[55] Sentence of Inter-American Court of Human Rights in the case Goiburú and other vs. Paraguay on 22 september 2006, parr. 89. Avalaible in: http://www.corteidh.or.cr/docs/casos/articulos/seriec_153_esp.pdf

[56] UNITED NATIONS, *Report of the Secretary General to Security Council*, *op. cit.,* parr. 10.

The third is that even if amnesties are not conceived as a tool to peace, there is a possibility of using them in order to solve an armed conflict. It allows a flexibility in the interpretation of instruments which can be used in order to achieve peace. It allows amnesty to political crimes but it doesn't permit amnesties to serious human rights violations but it also leaves the door open to use new criminal law perspectives which arrive to integrate all the elements of transitional justice. [57] This argued vote was a clear and direct message to Colombia and these appreciations are being used in the Special Jurisdiction to Peace through the comprehensive system of truth, reparation and non-repetition.

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[57] Sentence of Inter-American Court of Human Rights in the case Masacres de El Mozote and adjoining places vs. El Salvador on 25 october 2012, Concurrent vote of judge García Sayán, pp. 151-160. Avalaible in: http://corteidh.or.cr/docs/casos/articulos/seriec_252_esp.pdf

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DENUNCIATION AS THE INITIATION OF AN INQUISITORIAL PROCEEDING[1]

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Abstract: The denunciation was the most important of the procedural methods to start an investigation of the Spanish Inquisition. This article analyzes its quantitative importance and other data, such as which groups reported most frequently and who they reported.

[1] This article in an action of Convenio Plurianual between Comunidad of Madrid Rey Juan Carlos University, line 1, "Programa de Estímulo a la investigación de jóvenes doctores", Ref. V793, DEFSEG-GAMES, "Diseño, implementación y análisis de procesos gamificados y serious games para la consolidación de una cultura de democrática de Seguridad y Defensa". Regarding the indifferent use of the term denunciation and the term delation, this is due to the fact that "denunciation was simply notifying the law about an offence having been committed, but the important feature was that the accuser mentioned to the judge the person who, according to the former, had committed the crime. It was, at the same time, the denunciation of a fact and the delation of an allegedly guilty person" (TOMÁS Y VALIENTE, Francisco, *El Derecho Penal de la monarquía absoluta (siglos XVI, XVII y XVIII)*. Madrid, 1992, p. 159).

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Key words: Inquisition, complaint, Spain, Modern History, Inquisitorial Process.

1.- Introduction

Prosecution of heresy crimes, the central point of inquisitorial activity, as a crime of lese-majesty dates back to early times. It was already mentioned in an imperial constitution on 22 February, 407, and in another from the year 472 contained in the Justinian Code. For crimes of lese-majesty, two proceedings for prosecution existed: an adversarial proceeding and an inquisitorial proceeding before the secular courts, ironically similar to that followed against Christians prosecuted in Roman Empire times. In subsequent centuries, emperors of the Sacred Empire followed the same system, until the emergence of an institution dedicated specifically to prosecuting heretics, the pontifical Inquisition, which applied an inquisitorial proceeding[3]. This system "was a method of investigation to determine evidence in all types of activities. The term *inquisitio* also describes one of the proceedings contained in civil and canon law -where it was

[3] PÉREZ MÁRTÍN, Antonio, "La doctrina jurídica y el proceso inquisitorial", en ESCUDERO, J. A. (ed.), *Perfiles jurídicos de la Inquisición española*. Madrid, 1989, p. 279.

consolidated through decretals[4]- in order to detect and punish the offences"[5].

In the legal context of the pontifical Inquisition, which started to operate in the Peninsula in 1232[6], delation played an important role in the procedure. When the inquisitor arrived at a town, after notifying of his arrival and swearing an oath of collaboration to the authorities, a public holiday was set so that the inhabitants went to church to listen to the inquisitor's sermon. He urged inhabitants to delate neighbours who had committed heresy. He read an edict which gave a specific deadline for filing denunciations, under threat of excommunication should they not comply and imposing a merciful penalty on those who admitted to being guilty on time. Delations were recorded in a book kept for this purpose, but procedures were not taken against the accused until the edict ran out, thus allowing them time to appear voluntarily. Once the

[4] FOCAULT, Michael, *La verdad y las formas jurídicas*. México, 1983, p. 75; PINTO, Virgilio, "Sobre el delito de herejía (siglos XIII-XVI)", en ESCUDERO, José Antonio, (ed.), *Perfiles jurídicos de la Inquisición española*. Madrid, 1989, p. 198.

[5] RUIZ, Teófilo R., "La inquisición medieval y la moderna: paralelos y contrastes", en ALCALÁ, Ángel, *Inquisición española y mentalidad inquisitorial*. Barcelona, 1984, p. 48. Along the same lines, WAKEFIELD, Walter Legger, *Crusade and inquisition in Southern France, 1100-1250*. Londres, 1974, p. 133. Regarding the relation between civil and canon proceedings, García Marín points out that there was hardly any difference between the two (GARCÍA MARÍN, José María, "Magia e inquisición: derecho penal y proceso inquisitorial en el siglo XVII", en ESCUDERO, José Antonio, (ed.), *Perfiles jurídicos de la Inquisición española*. Madrid, 1989, p. 206).

[6] It existed in the territories of the Realm of Aragon, but not in the Realm of Castille, however it is explained that the inquisitors came to operate in Castille without the institutions being established as such (RUIZ, "La inquisición medieval y la moderna: paralelos y contrastes", p. 51). Regarding the medieval Inquisition see LEA, Henry Charles, *A History of the Inquistion in the Middles Ages*, 3 vols. Nueva York, 1958, whose work on the Spanish Inquisition is also a vital reference: *Historia de la Inquisición española*. Madrid, 1982, 4 vols.

deadline was reached, the delator was summoned and informed about the three courses of action he could choose for proceedings to begin: by accusation, accusing the heretic, aware that the lex talionis would be enforced upon him should the accusation be false, thus very few chose this option;3 by denunciation, when the source of delation was not made public, thus the delator had to present witnesses to corroborate the truth of his accusation; by inquisition, when the delator stated that he did not know if the accused was a heretic, but was believed to be so, in which case the inquisition acted on its own initiative[7].

Therefore, it is not surprising that, later on, the proceedings of the Spanish Inquisition´s Holy Office included denunciation as one of the basic ways to begin proceedings. The first inquisitorial proceedings, those published by order of Torquemada in 1484, already contained in its articles the need to publish an edict which established a term for people to appear voluntarily before the authorities – edict of grace[8]-, which in the year 1500 came to be known as edict of faith and it became compulsory for Christians to denounce those who were suspected of heresy to the Holy Office [9]. Harsher penalties were imposed on those

[7] LLORENTE, José Antonio, *Historia crítica de la Inquisición en España*. Madrid, 1981, 4 vols; vol. I, pp. 106-107.

[8] "The term grace is, in actual fact, a speciality of the inquisitorial proceeding, which does not exist in the prosecution of other crimes and it is conceded not by custom but by the pope, who is the only person who can concede such pardon; as a special privilege the kings of Spain also have this power", which is delegated in the inquisitors (PÉREZ MÁRTÍN, "La doctrina jurídica y el proceso inquisitorial", p. 192). For professor Aguilera "In Torquemada's first cases, voluntary confession in the period of grace appears as a proceeding prior to the inquisitorial proceeding itself, which must only be intitiated when it is impossible to obtain self confession from the prisoner" (AGUILERA BARCHET, Bruno, "El procedimiento de la Inquisición española", en PÉREZ VILLANUEVA, José, y ESCANDELL BONET, Bartolomé, (dir.), *Historia de la Inquisición en España y América*, vol. II. Madrid, 1993, p. 348).

[9] There are a number of studies on inquisitorial jurisdiction and its nature. Amongst others, LÓPEZ VELA, Roberto, "Las estructuras administrativas del Santo Oficio", en PÉREZ VILLANUEVA, José, y ESCANDELL BONET,

who did not comply. At first, the edict of faith was not particularly effective, therefore the Inquisition increased its effect: in order to be eligible to the benefits it offered, denouncing oneself did not suffice. Accomplices and known heretics also had to be denounced and the sphere of activity was not only limited to heresy but also included other deviant behaviour, four of which stood out: issues related to Eucharist and Mary's virginity; searching for those who did not respect marriage; superstitions and witchcraft; and blasphemy [10].

Torquemada's first proceedings also included measures to protect the identity of the accusers by stipulating in point sixteen that whole copies of the witnesses' declarations should not be given to the accused, in order to protect the formers' identity, especially the delator's, who as main witness in the case, occupied a preeminent place in the proceedings[11]. However, aware of the importance of this figure in the proceedings, in order to prevent proceedings being perverted due to false denunciations, extremely harsh penalties were imposed on those accusers who made such denunciations.

Bartolomé, (dir.), *Historia de la Inquisición en España y América*, vol. II. Madrid, 1993; MARTÍNEZ DÍEZ, G., "La estructura del procedimiento inquisitorial", en la misma obra; GARCÍA RODRIGO, Francisco Javier, *Historia verdadera de la Inquisición*. Madrid, 1876, 2 vols; vol. I.; ALCALÁ, Ángel, "Herejía y jerarquía. La polémica sobre el tribunal de la Inquisición como desacato y usurpación de la jurisdicción episcopal", en ESCUDERO, José Antonio, (ed.), *Perfiles jurídicos de la Inquisición española*. Madrid, 1989; MARTÍNEZ MILLÁN, José María, "Los problemas de jurisdicción del Santo Oficio: la Junta Magna (1696)", en *Hispania Sacra*, n.º 37, 1985, pp. 205-261.

[10] VILLA CALLEJA, Ignacio, "La oportunidad previa al procedimiento: los edictos de fe (siglos XV-XIX)", en PÉREZ VILLANUEVA, José, y ESCANDELL BONET, Bartolomé, (dir.), *Historia de la Inquisición en España y América*, vol. II. Madrid, 1993, pp. 306 y 325.

[11] Regarding the Inquisition's proceedings, see GONZÁLEZ NOVALÍN, José Luis, "Las instrucciones de la Inquisición española. De Torquemada a Valdés (1484-1561)", en ESCUDERO, José Antonio, (ed.), *Perfiles jurídicos de la Inquisición española*. Madrid, 1989.

2.- Denunciation or delation as the initiation of inquisitorial proceedings[12]

The inquisitorial proceeding is an exception to the ordinary and criminal proceeding, in the context of legal culture pertaining to common law. It deals, moreover, with a summary proceeding, which, in order for it to be valid, considers many of the formalities of ordinary proceeding to be dispensable, such as fabricating libel and *litis contestatio,* although the absence of other elements certainly leads to annulment. It was indispensable, for example, to summon the defendant or his heirs, if the former had passed away, and the defendant and witnesses swearing an oath of truthfulness. This summary meant that, in practice, the inquisitorial proceeding varied greatly from case to case.

As well as being special and summary, another trait of the inquisitorial proceeding was that its main aim was to discover the objective truth and, therefore, determine if heresy or any other crimes which came under the Holy Office's jurisdiction had been committed. This search for the objective truth meant that a proceeding could not begin if founded reasons did not exist. Thus the three ways of beginning the proceeding were: accusation, denunciation or a bad reputation.

The first of these means, accusation, was made by an individual before a public notary and two honest people, who were not allowed to testify in the proceeding which was being initiated. The accuser became part of the proceeding and bore the burden of proof against the accused and was under the grave risk of being charged , that is to say, he could be given the penalty corresponding to the crime he was denouncing, if the accused was proved innocent[13]. As accusation

[12] Unless stated otherwise, Antonio Pérez Martín's indispensable work is followed in this section "La doctrina jurídica y el proceso inquisitorial", pp. 279-297.

[13] According to Eymerich, in the proceeding initiated by accusation, the accuser must be informed that he will be subjected to the lex talionis, in case

became obsolete, this practice disappeared. Thus, someone making false accusations was subjected to the punishment for false statements or libel, a considerably less severe risk [14].

The second means of beginning an inquisitorial proceeding was denunciation, based on the fact that it was compulsory for all Christians to denounce heretics to the inquisitors. Theoretically, before denouncing, the delator had to reprimand the accused so he stopped incurring in an error, and would only resort to the Inquisitor if the alleged heretic continued with his deviant behavior. Everybody was considered legally qualified to denounce, even those who in other proceedings would not have been allowed to take part, this was supported by the *favor fidei* or *in dubio pro fidei*, the notion that the inquisitorial proceeding was designed in such a way that, above any other legal good or procedural guarantee, no crime against faith would go unpunished[15].

Denunciations could be written or verbal and were recorded in a notarial document which stated the informer's name and surnames and the reason for the denunciation. Once the document had been written, it was read to the informer and, if he was in agreement with the content, he signed it. If he did not know how to write, he could draw a cross or

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he preferred instead to just play the role of delator (quoted in AGUILERA, "El procedimiento de la Inquisición española", p. 358).

[14] "In the adversarial proceeding, the initiation of the proceeding corresponds to an individual who accuses somebody and initiates and maintains legal action, both in the civil and criminal proceeding. It is the accuser's responsibility to look for the necessary means of evidence to support his accusation" (AGUILERA, "El procedimiento de la Inquisición española", p. 334). The inquisitorial treatise writer, in the case of Eymerich or de Peña, was against the lex talionis being applied to the accusers (GARCÍA MARÍN, José María, "Proceso inquisitorial-Proceso regio. Las garantías del acusado", en *Historia, Instituciones, Documentos*, nº 27, 2000, p. 77).

[15] GACTO, Enrique, "Aproximación al Derecho penal de la Inquisición", en ESCUDERO, José Antonio (ed.), *Perfiles jurídicos de la Inquisición española*. Madrid, 1989, p. 176.

the inquisitor could sign it for him. The basic difference between the denunciation and accusation was that the informer or delator was not part of the proceeding, which was left in the hands of the inquisitorial apparatus.

The third system for beginning an inquisitorial proceeding was the inquisition itself –*inquisitio*[16]-, based on rumours which reached the court about the existence of crimes included in its jurisdiction. In principle, it was a special proceeding which was only used in the absence of the previous ones, but the institution was named after it. The inquisitorial proceeding was created by canon law which appeared between the twelth and fourteenth century. It encouraged judges to begin and promote the proceeding in criminal cases[17]. In the Inquisition, the *inquisitio* was carried out by the institution when it heard about rumours or reputations regarding the existence of heresy crimes in a certain place or related to a certain person. This led to an investigation to determine the veracity of the news and, if necessary, those believed to be guilty were prosecuted. At least two witnesses had to confirm the rumour or suspicion during the investigation, otherwise the proceeding was annulled.

Although the Inquisition was established with the intention of the *inquisitio* being an ordinary system for beginning proceedings, the doctrine has affirmed that denunciation gradually became more predominant and substituted the *inquisitio* as promoter of inquisitorial proceedings. Therefore, proceedings were begun more and more frequently through delation by somebody providing a sworn statement to the inquisitors. After the delator gave his statement, the Inquisition took a statement from the accused. When the delator's and accused's

[16] In Spanish law, the *inquisitio* adopted the form of inquiry, that is to say "a diligent and legitimate investigation which the judge carried out to inquire about and establish the crimes which were committed" (TOMÁS Y VALIENTE, *El Derecho Penal de la monarquía absoluta*, p. 157).
[17] AGUILERA, "El procedimiento de la Inquisición española", p. 334.

statements were put together, this was called "summary proceeding" or simply "summary"[18].

3.- The problem with criminal proceedings

There is an issue related to the sample of proceedings which has posed particular methodological doubts: the jurisdiction of "familiares" (laymen authorized to assist the Inquisition) and officials[19].

Although the "familiar" is a figure which suddenly appeared in inquisitorial history – in Valencia, in 1501, there were already twenty five-, it gained force from 1530 onwards, when permanent courts were established and led to the existence of figures which maintained the presence of the Holy Office in towns where there was no court[20].

"Familiares" had no authority to arrest suspects, unless they satisfied three special conditions: the alleged crime was an issue which manifestly corresponded to the Inquisition, the information was so reliable that there was no doubt about the facts and there was a risk of the suspect fleeing. Only in those cases could a "familiar" make an arrest without the inquisitor's intervention[21]. However, traditionally,

[18] LLORENTE, *Historia crítica de la Inquisición en España*, vol. I, p. 224. This stage became so important that it came to be an independent part of the proceeding (AGUILERA, "El procedimiento de la Inquisición española", p. 365).

[19] Regarding the figure of the officials, the most recent study is JUANTO, Consuelo, "El comisario del Santo Oficio en las instrucciones inquisitoriales", en *Revista de la Inquisición (Intolerancia y Derechos Humanos)*, nº 18, 2014, pp. 95-11. Regarding this figure in America refer to MARTÍNEZ ROSALES, Alfonso, "Los comisarios de la Inquisición en la ciudad de San Luis de Potosí. 1621-1820", en *AGNM, Ramo de Inquisición*, vol. 1519, nº 2, pp. 409-428.

[20] BENNASSAR, *Inquisición española: poder político y control social*, p. 84.

[21] CONTRERAS, Jaime, "La infraestructura social de la Inquisición: comisarios y familiares", en ALCALÁ, Ángel, *Inquisición española y mentalidad inquisitorial*. Barcelona, 1984, p. 129.

they have been attributed a vital role as delator agents to the Holy Office. This idea has been reviewed by authors such as Cerrillo Cruz, who affirms:

> "On considering them the Inquisition's police [the "familiares"], having been attributed delator responsibilities which, however, judging from recent studies, they hardly ever took on basically due to two reasons. On the one hand, due to the very nature of the inquisitorial system which induced people to denounce one another, even within their own families, which Bennassar has called fear pedagogy. On the other hand, because, even supposing there is a need for a denouncer agent, it is difficult to believe, as Kamen says, that in places where there was only one "familiar" (there were many such places, by the way) the latter would be willing to risk his life to become a professional informer"[22].

One of the problems posed when it comes to evaluating the role played by "familiares" in denunciations before the Holy Office is derived from their legal privileges, since the right to be judged by the very Inquisition, and not by the courts of the realm, was one of the first privileges associated with "familiares", as a guarantee of independence with regard to civil powers[23]. In order to take this jurisdiction, the "familiar" had to be registered on a list which the Inquisition handed to the civil authorities. Lawsuits raised in this way before the inquisitorial courts had to be resolved in court at certain times so they did not interfere with the course of other proceedings[24].

[22] CERRILLO CRUZ, Gonzalo, "Aproximación al estatuto jurídico de los familiares de la Inquisición española", in *Manuscripts*, nº 17, 1999, p. 142.
[23] AHN, Inquisición, lib. 1224, fols. 42-48.
[24] CERRILLO, "Aproximación al estatuto jurídico de los familiares de la Inquisición española", p. 151.

Criminal jurisdiction, both from an active and passive point of view –denounce or be denounced-, did not stop during the Inquisition's existence, except for a brief period when Felipe II came to suspend it in Castille[25]. In this realm, criminal jurisdiction did not affect human lese-majeste crimes, rebellion, disobeying royal mandates, forgery, contempt of and opposing the authorities, treachery, violence, kidnapping women, public theft, breaking into homes, churches or monasteries, setting fire to houses or fields, and some other crimes considered "major crimes", whereas in Aragón they also excluded some crimes related to fraud[26]. Between 1553 and 1558, "familiares" were deprived of jurisdiction in matters related to managing pupils' property. The 1553 concord was the key document in all issues related to the figure of the "familiar", as it did not only limit jurisdiction but also established the maximum number of "familiares" and reformed the way they were distributed throughout the land in order to offer better coverage, thus leading to less "familiares" in urban areas and an increase in their number in rural areas. A similar agreement was negotiated with the Council of Aragon but the Aragonese pretentions to cut back the "familiares'" jurisdiction, and not only their privileges, meant an agreement was not reached until 1568[27].

The jurisdiction of "familiares" and inspectors was more limited as regards civil jurisdiction. In Castille, the 1553 concord deprived them of this jurisdiction and, although the Crown of Aragon continued to recognise this jurisdiction, it was limited to those cases where "familiares" or officials were the accused. As of 1646, it no longer came under the Holy Office's responsibilities[28].

[25] BN, Mss. 848, 238.

[26] CERRILLO, "Aproximación al estatuto jurídico de los familiares de la Inquisición española", p. 153.

[27] CONTRERAS, "La infraestructura social de la Inquisición: comisarios y familiares", pp. 131-132.

[28] CERRILLO, "Aproximación al estatuto jurídico de los familiares de la Inquisición española", p. 153.

This jurisdiction, both from a criminal and civil perspective, whether the person was linked to the Holy Office as accuser or accused, poses a serious problem when it comes to analysing the question of denunciations, since their different nature regarding proceedings of faith can be seen in various data: criminal proceedings – as referred to in inquisitorial documents – constitutes 12% of the total proceedings in the sample analysed, but it represents 100% of the proceedings initiated by accusation, where the accuser appears in the active part of the proceedings.

Despite these evident differences regarding proceedings of faith, it seems that analysis of criminal proceedings cannot be overlooked, since the Inquisition itself considered them part of its activity, however it differentiated them from the proceedings of faith. Both questions are brought to light when reviewing the list of activity in the court of Cordova[29], where both types of proceedings are documented as activities pertaining to the court. However, the proceedings of faith appear in the first section whilst the criminal ones are dealt with in a different section, and a subsequent one on the list. Given that the court itself dealt with criminal proceedings in this way, the sample also takes these cases into account, which is important when it comes to determining statistics related to how Inquisition proceedings were initiated.

4.- Denunciation and the initiation of proceedings in the Holy Office

The Pontifical Inquisition, especially in its early days, began almost all its proceedings by *inquisitio*, that is to say, based on rumours or suspicions that heresy existed in a place or person, with no accusation

[29] For example, those from the years 1584, 1585, 1586, 1592 o 1642 (AHN, Inquisición , leg. 1856, Exp.54).

or denunciation being filed[30]. Was it like this in the Hispanic Holy Office?

From the beginning, denunciation played an essential role in initiating proceedings. It is important to remember that, although the Inquisition granted measures of grace to those who confessed their crimes within the period stipulated by the edict, these benefits were only applicable if the confidant gave himself in and the other heretics did likewise- or people involved in the crime being dealt with- who he knew of[31]. In other words, grace was only granted to those who denounced their fellow religious members, therefore, only the delator or informer could aspire to these merciful measures.

63.94% of the proceedings analysed began with a denunciation. 23.68% began with an *inquisitio*, investigation by the Inquisition without a specific denunciation existing. The other 12.36% were initiated through accusations, however, as indicated, this percentage corresponds to the total criminal proceedings brought by or against "familiares", officials or other people who enjoyed inquisitorial jurisdiction[32]. Thus, accusation as a means of initiating a proceeding, is not found in faith issues [33].

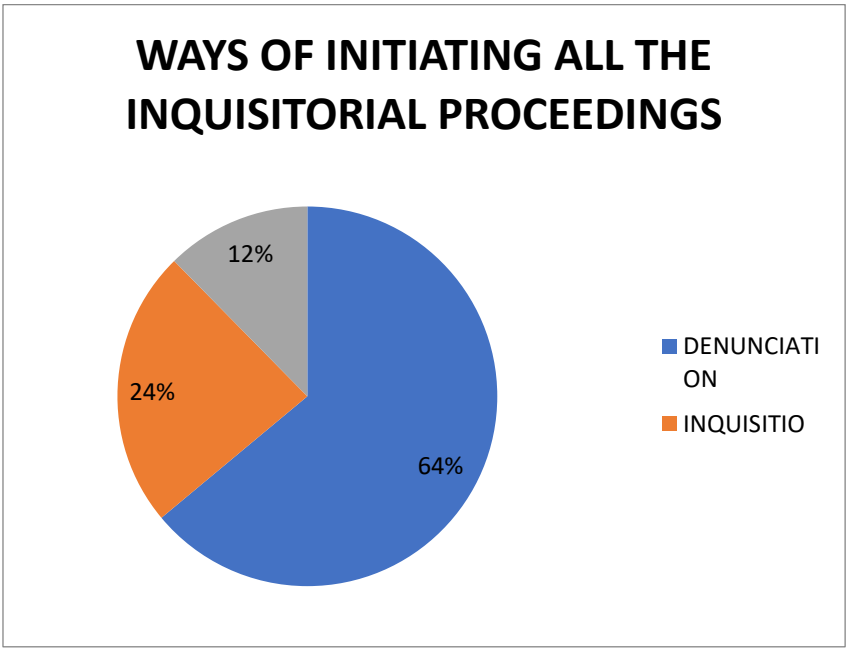
[30] AGUILERA, "El procedimiento de la Inquisición española", p. 358.

[31] KAMEN, Henry, *La Inquisición española*. Barcelona, 2005, p. 174.

[32] This jurisdiction was not exclusive to "familiares" and officials, it also applied to staff serving the aforementioned or the inquisitors; therefore, we can find criminal proceedings in the Inquisition like Pedro Aguas' denunciation, a "familiar" of the Holy Office, against those who have stabbed the shepherd who looks after his flocks (AHZ, Procesos Inquisitoriales, J/00031/001) or the proceeding against Juan Palomino for having injured the inquisitor's servant (AHZ, Procesos Inquisitoriales, J/00028/002).

[33] Regarding the criminal proceedings analysed, it is surprising to see that, far from being balanced, the number of cases amongst which the informer was under the jurisdiction of the Holy Office and those where he was the accused, in more than 75% of the cases, the "familiar" was the informer. This might be due to the fact that, whereas in the cases where the "familiar" is the informer several people can be prosecuted -like the proceedings filed by the heirs of

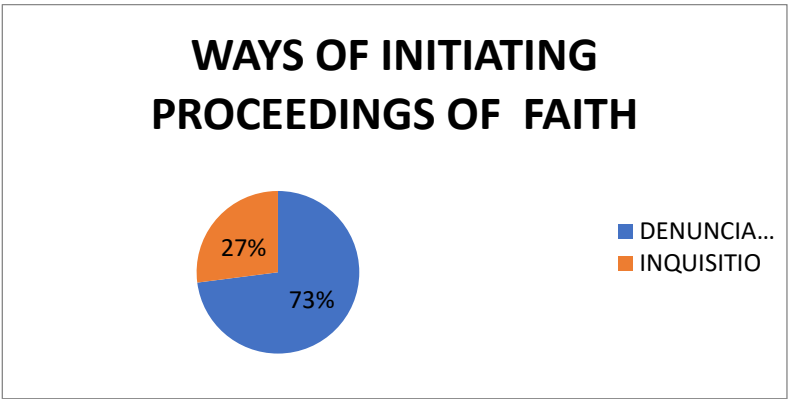
Graph 1:



- Source: Own design based on proceedings analysed-

Bujaroz Jerónimo Benedetes' "familiar", who accused four people of murdering him (AHPZ, Procesos Inquisitoriales, J/00038/001), or the proceeding initiated by Zaragoza Juan Labayen's "familiar", against two of his wife's lovers who, moreover, stole small objects from his house (AHPZ, Procesos Inquisitoriales, J/00031/008). When acting as the accused, he always does so in an individual way because any other person involved in the criminal case is not subjected to inquisitorial jurisdiction but rather to the courts of the realm.

Graph 2:



- Source: Own design based on proceedings analysed –

Thus, the proceedings analysed bring to light the substantial importance of denunciation as a means of initiating inquisitorial proceedings, assuming that more than 63% of the total proceedings were due to delation. This figure is as high as 73% if we refer exclusively to those which were subjected to faith issues.

There is still another detail which reinforces the predominant role of denunciations: whilst the majority of denunciations are individual –the average number prosecuted per case is 1.14[34]-, but the number of people prosecuted in *inquisitios* are usually involved in inquiries which

[34] Amongst proceedings initiated by denunciation where there was more than one person prosecuted we can mention, as an example, brother José Oliva's and Luis Pérez Gonzalo's proceeding (AHN, Inquisición, leg. 1733, doc. 10), brother Celedonio de San José's and another four religious members of his circle (AHN, Inquisición, leg. 1747, doc. 14), or that of nun Rita de San Ignacio and another two religious members (AHN, Inquisición, 3728, doc. 293), denounced before Inquisition by Francisco de Villarreal, canon of Urgel.

lead to multiple proceedings – the average number of people prosecuted in *inquisitios* is 6.1-. Thus, we find proceedings such as the one initiated in 1610 against five "elches" who were captured after disembarking in a Berber pillaging incursion[35]. This proceeding was carried out against twenty nine English sailors from the Hawkins fleet. They had to disembark on land after the naval war on 22 September, 1568. Another proceeding was for heresy against ten French pirates who were captured in 1570**[36]**. In other words, if we contemplate each *inquisitio* as a single case, regardless of the number of people involved in the prosecution, and we do the same for each denunciation, the weight of each denunciation is shown to be even greater: 93.39% of cases opened were due to faith issues, without taking into account the number of accused, 6.61% of the denunciations came about through *inquisitios*, and none through accusations[37].

Of course there were proceedings, few, initiated by *inquisitio* which ended up with only one person being prosecuted, like that of Antonio de Peralta Castañeda, which began when the inspector of the

[35] AHN, Inquisición, leg. 1821, doc. 15, fol. 3.

[36] Protestantism became so popular that all foreigners came under the shadow of heresy, which to a large extent shaped the activity related to the inquisitorial courts in the North of the península. They received specific orders from the Suprema in order to combat heresy which might spread through international trade. In this context, inquisitors collaborated with the ordinary law, responsable for smuggling, piracy, etc., whilst the Holy Office focused on matters related to conscience. However, continual friction between the two jursidictions forced the Suprema to urge its district courts to strictly limit their role of inquisitors to those cases which showed clear signs of heresy (CONTRERAS, "Estructura de la actividad procesal del Santo Oficio", pp. 616-617).

[37] This data seems to contradict affirmations like Jean Pierre Dedieu's, who pointed out that "rarely will one consider himself so affected by a dubious statement on religious matters as to take the initiative of delating since this only leads to problems" ("Denunciar-denunciarse. La delación inquisitorial en Castilla La Nueva en los siglos XVI y XVII", en *Revista de la Inquisición (Intolerancia y Derechos Humanos)*, nº 2, 1992, p. 95.

Inquisition in la Puebla de los Ángeles informed the court of Mexico of libels circulating in Puebla which contained dangerous doctrines, stating it was necessary to open a " highly secret" case, which led to Peralta being prosecuted in 1647[38]. Another one of these *inquisitio* against specific individuals gives an idea of the spiral which, on occasions, was caused by inquisitorial behaviour: Mario Betancourt, canon of the cathedral of Cartagena de Indias, was prosecuted when a friend associated with the cathedral of Caracas spoke in a sermon about the fertility of Christ and, when the authorities found out about this, they asked him to take back his words. In order to defend himself, this man wrote to his friend Betancourt, asking him to write a text defending the fact that his words were part of the orthodoxy. The canon from Cartagena did so and, when the Inquisition found out about the text, it began a proceeding against Betancourt, to clarify whether he shared his friend's alleged heretical ideas[39]. Along the same lines, we can find the case against Gonzalo Niño, inspector of the Inquisition, who denounced the existence of a house of bad reputation in the city of Cuzco and, immediately, he was prosecuted by the Holy Office in order to clarify the circumstances which had led one of its inspectors to discover the existence of such a place[40].

Those people prosecuted as a result of *inquisitios* are to a large degree laymen: 92%, whereas religious people under investigation by these means represent less than 8% of the accused. This could be due

[38] AHN, Inquisición, leg. 1729, doc. 6, fol. 14.

[39] AHN, Inquisición, leg. 4823, doc, 3, fol. 4. These are not the only cases where someone defending the orthodoxy of statements found it turned out expensive. Another example is the proceeding against Luis de Andrade and Francisco Galiano, prosecuted in 1725, whilst testifying in the trial of somebody else who was accused of proposition, when they stated that what the prisoner had said did not constitute heresy which, in turn, was interpreted by the inquisitors in this trial as a heretical proposition so they intitiated proceedings against Andrade and Galiano (AHN, Inquisición, leg. 1649, doc. 16, fol. 8).

[40] AHN, Inquisición, leg. 1646, doc. 9, fol. 10.

to the fact that the *inquisitio* was used against groups of foreigners who, due to different circumstances, such as shipwrecks or being taken prisoner in military actions, they ended up on Hispanic territory. When the Inquisition found out about this type of people being captured by the civil authorities, it often asked for them to be handed over, if they were from nations where protestant heresy had roots, in order to begin a proceeding to determine whether those captured professed the reformed ideas. Logically, amongst sailors, pirates and foreign soldiers, who formed a large part of the collective of those prosecuted by *inquisitio*, there were not many religious people.

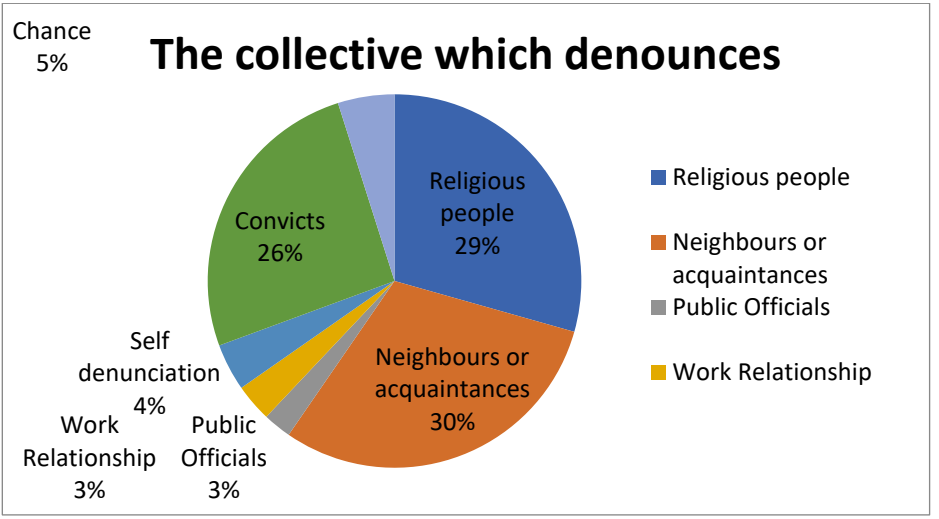
The sample reveals that the reason why many of the people prosecuted individually as a result of an *inquisitio* was related to books or texts they had written or were involved in them being published. They were considered heterodox. Apart from the examples seen in previous paragraphs, the proceeding against María Jacinta from Holy Trinity can be mentioned as falling under the same category. She was a mixed race woman who died with the reputation of a saint, but a book appeared after she died in which she affirmed, amongst other things, that her husband, an Indian called Nicolás, went up to heaven to talk to Christ. When the content of the book was known, the scandal ran through the city until it reached the Inquisition and its court immediately began an inquiry[41].

[41] AHN, Inquisición, leg. 1649, doc. 51, fol. 3.

5.- Those filing denunciations

When determining the origin of denunciations presented before the Inquisition, three collectives constitute more than 88% of the informers. They were neighbours or acquaintances of the accused, religious people or priests, and the king's or Inquisition's convicts, that is to say, people who had been arrested and who, during questioning or declarations, denounced other people.

Graph 3:



- Source: Own design-

The largest number of denunciations come from people close to the accused, amounting to almost a third of the total number of denunciations[42]. Most of these denunciations come from neighbours from the same place as the accused. This was the case of Toribio Ruiz del Valle, a fourty three year old weaver, who denounced his neighbour Diego de Ovalle, a Portuguese wine merchant, for being a Judaizer. Ruiz was walking along the streets of his town first thing in the morning when he saw a group of people reading a notice on a portico pillar which contained information about Judaizers' activities and he recognised Ovalle amongst them and denounced this fact before the Holy Office in 1627[43]. This is also the case of Pablo de Orejuela, a farm worker from New Granada who had the unfortunate idea of commenting to the blackskmith in his village he should "realize there was no hell", afterwards the blacksmith denounced him for heresy[44]. Something similar occurred to Francisco Perra, a sixty year old shepherd who, whilst eating by a fountain with other shepherds, commented that he was going to ruin his neighbour's reputation. One of the ones who heard him – afterwards, the informer- warned him that, if he did that, he should go to confess to find peace in his soul and the priest would not absolve him until he reestablished the reputation of the defamed. In response to this argument, Perra replied he usually lied to his confessor, which led to the former denouncing him before the Inquisition[45].

[42] From the collective "neighbours and acquaintances", denunciations filed by public officials and religious members have been extracted, as well as those where there was a work relationship or subordination between the informer and accused (slave and master, for example). These cases are contemplated within specific categories. Therefore, the category "neighbours and acquaintances" includes those cases in which the denunciation comes from a layman, who does not occupy a pubic post and has no relationship or subordination with the accused, but does belong to his habitual circle.

[43] AHN, Inquisición, leg. 1648, doc. 4, fol. 10. An analysis of the latest prosecutions against Judaizers in BUITRAGO GONZÁLEZ, José Luis, "Serranía críptica: la última gran persecución contra los judaizantes en la España del siglo XVIII", en *Revista de la Inquisición (Intolerancia y Derechos Humanos)*, nº 17, 2013, pp. 11-44.

[44] AHN, Inquisición, leg. 1621, doc. 12, fol. 10.

[45] AHN, Inquisición, leg. 1628, doc. 23, fol. 15.

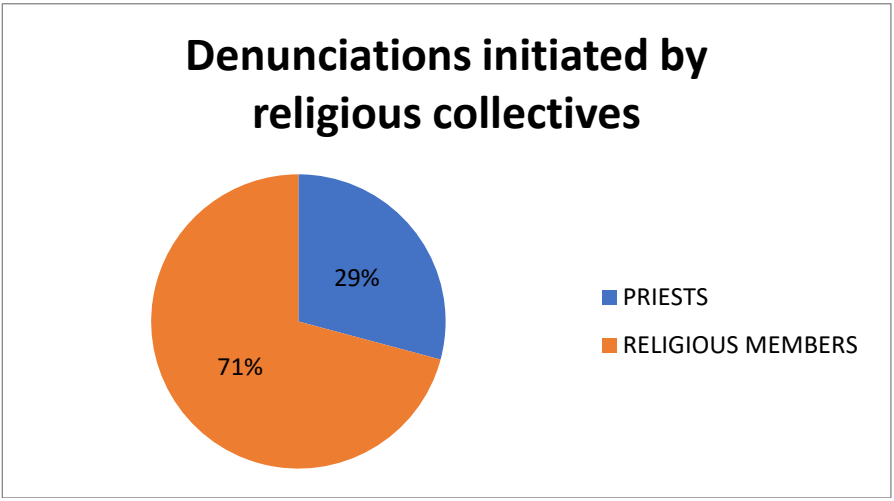
Some acts, which seem more like mischief than heresy, ended badly for the person committing this act, due to the denunciation filed by his neighbours. This was the case of four young people - the eldest, twenty years old- who, one evening, placed a hat on the cross next to the fountain in their village. Two neighbours saw and identified them and denounced them to the Inquisition for "disrespect to the Holy Cross"[46]. In other cases, a more or less innocent comment could lead to denunciation, as was the case with the butcher from Valencia. A neighbour denounced him for affirming that he had no ox meat left because the inquisitors had taken it to eat. The informer thought he was offending the Holy Office[47].In some cases, it was the family itself who filed the denunciation. However, this does not appear to have been a routine phenomenon in the inquisitorial world –apart from those cases where people already prosecuted delated relatives during the course of their own proceeding or during questioning-. In fact, in the sample, cases have been found where a free person caused a proceeding to be initiated by denouncing one of his relatives. We can find proceedings like that of Francisco de León, who was denounced by his own son– already a convict of the Inquisition- during questioning, he declared that, being the informer a child, Francisco took him to one side where nobody could hear them, and said to him "Christ's law is not a good one, Moises was the one to be followed"[48].

The lack of cases in the sample does not mean that denunciations by free "familiares" against their own parents did not exist at all, however, it does lead one to suppose, based on statistics, that it must have been an exception.

[46] AHN, Inquisición, leg. 1856, doc. 54, fol. 1.
[47] AHN, Inquisición, libro 960, fol. 1308.
[48] AHN, Inquisición, leg. 1729, doc. 13, fol. 4.

The collective of religious people and priests is responsible for an almost identical number of denunciations as those by neighbours and acquaintances. The former filed 29.62% of the total denunciations presented to the Holy Office. This category includes both secular clergy and members of the Religious Orders. The latter filed most denunciations - 71% of cases came from denunciations from religious circles – whereas secular priests represent 29% of the denunciations filed by this collective.

Graph 4:



- Source: Own design-

However, the pattern of denunciations is not the same for religious members as for priests: the former mainly denounce other religious members[49], whereas priests denounce more laymen. However, there are also cases like that of the monk Pedro de San Francisco, denounced by the priest in his village –Brother Pedro was the son of a baker in that village- for having said mass without the pertinent authorization to do so[50]. The denunciations filed against laymen amount to 44.8% of the total number of denunciations filed by monks, however, those filed by priests amount to 52.3%. This can partly be explained by the fact that the secular clergy carried out its duties in close contact with their community, whereas members of the Orders spent the majority of their time in convents where they were mainly in contact with other religious members and where quarrels characteristic of that community arose. This was the case that led the Holy Office to prosecute Brother Diego de la Cruz, who was denounced by one of his fellow colleagues at the monastery for criticising the Inquisition. This was worsened by the fact that during his arrest, Brother Diego "blasphemed against the integrity of this Holy Office in a violent manner"[51].

[49] The majority of orders were under the pope, therefore they escaped the bishops' authority, despite the fact that the inquisition constantly tried to control them in faith issues. In 1525 Carlos V obtained a papal charter which meant monks in Spain came under the Inquisition, but the pope gave this privilege back to the orders in 1534; this issue was finally resolved in favor of the Inquisition in the carters of 1592 and 1606, however the Jesuits conserved the privilege of only having to denounce faith issues to their superior, something which was systematically attacked by the Holy Office.

[50] AHN, Inquisición, leg. 1822, doc. 9, fol. 4. A bull by Gregorio XV on 6 August, 1574 empowering the Inquisitor General and his delegates to prosecute those who passed as priests. However, the inquisitors had already been prosecuting these cases before the bull was issued. It was issued to clarify friction which existed related to this matter with the plebeians from each diocese. For this reason, this clause was added to the edict for delations "if you know of anyone acting as such but not belonging to the priesthood who has claimed to be a priest or given the sacraments of Holy Mary's Church"

Amongst those prosecuted as a consequence of denunciations filed by a secular priest, we can mention cases like that of Cristóbal Medrano[52], José Ayllón[53] or Pedro Palacios, who was denounced by the priest from his village when "four of my parishoners, people of good faith, have told me how Pedro Palacios, a neighbour in this town, whilst playing cards, referring to the fact that he had bled a little from a knock he inflicted on himself, said the following proposition: if Christ had not redeemed the world, his blood was so noble that just a drop of it would suffice to redeem mankind"[54].

The acts which the priest came to know of through confession were particularly sensitive. The denunciation filed by a priest against Juan Metra, a reformed German who he delated for heresy, brings to light how fine the line could be drawn which separated the seal of confession from what could be revealed and, therefore, was susceptible to being used in a denunciation:

> "This summary started with a letter of delation, which the court received on 26 January this year,from Mr Francisco Ferraz, a priest, (…) in which he maintains that this prisoner said it was not a sin for men and women to come together in flesh, and he said to some women, whilst soliciting them and touching their private parts, that pleasing the body in reverence is not sinful"[55].

(LLORENTE, *Historia crítica de la Inquisición en España*, vol. III, p. 22).

[51] AHN, Inquisición, leg. 1732, doc. 32, fol. 6.

[52] AHN, Inquisición, leg. 1648, doc. 5, fol. 4.

[53] Ayllón, a young man aged twenty, was prosecuted for having been denounced by the village priest who caught him ripping a Holy Office poster off the wall (AHN, Inquisición, leg. 1731, doc. 52, fol. 5).

[54] AHN, Inquisición, leg. 1679, doc. 7, fol. 11.

[55] AHN, Inquisición, leg. 3726, doc. 235, fol. 1.

The delator, a priest, says that the women have referred to this in confession "although not expressly", therefore he interprets it as not coming under the seal of confession[56].

As regards the proceedings in which religious members intervene, they represent a third of the total proceedings which members of the Orders are involved in and show some patterns worth highlighting. First of all, religious members are those who most frequently appear as accusers rather than the accused as the religious member is the one who denounces in 81% of the cases. Moreover, when the role of accuser is taken on by the religious member, the victim of the denunciation is always a religious member. In the 380 proceedings analysed, there is not one layman or secular priest denounced by a religious member. This is easy to explain based on two reasons: first of all, the monastic life of nuns used to be stricter and more secluded than their masculine counterparts and, secondly, an important number of denunciations filed by nuns are against soliciting religious members, a crime which, due to its very nature, excludes laymen from participating in its commission. The importance of solicitation is evident in the denunciations filed by religious members before the Holy Office, more than 80% of the proceedings like that of father José de Buendía, which began in 1685 for soliciting a nun[57].

The third collective which denounces, almost on par with the previous ones, is that of people already under arrest in the royal or Inquisition's prisons subjected to their own proceedings. More than a quarter of the total number of delations came from this collective. When an accused was questioned, a large number of individuals were frequently taken before the Inquisition, delated by the person suffering the inquisitor's questions. A prime example of this is the proceeding against the luminaries of Valladolid, where a neighbour's denunciation led to Padilla being arrested and, when questioned, in turn, led to twenty

[56] AHN, Inquisición, leg. 3726, doc. 235, fol. 2.
[57] AHN, Inquisición, leg. 1648, doc. 20, fol. 1.

seven more people being prosecuted, delated by the aforementioned Padilla for belonging to doctor Cazalla's circle.

The importance of delations coming from people already prosecuted has traditionally been associated with the analysis of some of the Holy Office's procedural mechanisms, and particularly with torture. Although the question of torment –to use the inquisitorial terminology- is not contemplated in the purpose of this article. It is important to remember that torture was not a procedural instrument for forcing the prisoner to give information about possible accomplices or other crimes, related or not to his, but rather it was used to obtain the convict's confession itself, vital, according to the way the Inquisition thought since many of the crimes they pursued were related to thought or belief and, therefore, difficult –or even impossible- to prove without confession. Even so, it is obvious that torture or the possibility of it being used on an accused, played an important role when it came to provoking third parties being denounced by the convict who was being tormented or in a situation where he could be tormented. This was the case, for example, of Beatriz de Padilla, a woman who was handed over by the court of Cuenca after being denounced by a convict of the Holy Office for being a Muslim , María "la Zamorana", during the torment[58].

Although in this group the denunciations coming from convicts of the Inquisition constitute an overwhelming majority, we can also find cases where the informer is a prisoner from the king's prisons. An example of the proceeding against the Jesuit Luis López and the Dominican Gaspar Manuel, denounced by a prisoner of the king when he was about to die:

[58] Regarding the activity of the court of Cuenca, refer to LAMA, Enrique de la, "Cuenca y la Inquisición, reflexiones en torno a un libro", en *Anuario de Historia de la Iglesia*, n.º 22, 2013, pp. 323-355.

> "In the city of Loja in this reign a man named Juan Rodríguez was imprisoned and, although we were instructed in writing that he had to declare in this Holy Office, it seemed, as he was writing, that he was doing it more to escape from royal justice, we made sure that no obstacle should hinder his proceeding and if he remained alive, we should be advised, arresting him meanwhile. He was sentenced to death and executed. Before execution, he made the following declarations. The first is on a piece of paper which begins in the name of the Holy Trinity and the other, which begins at the point where he says the first declaration is true, which he wrote when he was being taken out for execution"[59].

Denunciations by prosecuted convicts are not the only ones which arise from prisons. Thus, the sheriff Juan Rodríguez was denounced by his work colleague Adrián Ortega in 1625, when after sharing some secrets, they laughed at the fact that "men are arrested by the sect", that is to say, the Holy Office arrested people for being protestants. Rodríguez commented the following:

> "On Palm Sunday, this confessor was sitting with Adrián Rodríguez, his prison companion, on the former's matress in his prison cell when Adrián told him to plead to God for the two of them to be in Flanders (…) neither at your mercy nor at mine, should a favour be lacking there" (…) in the situation we are in here, we would be better off in Flanders, there is no Inquisition there"[60].

[59] AHN, Inquisición, leg. 1659, doc. 55, fol. 3.
[60] AHN, Inquisición, leg. 1647, doc. 7, fols. 1-2.

On other occasions, the victims of denunciations which arose in the king's prisons were the convicts themselves. That happened to Bartolomé Tomás, denounced by the canon from the collegiate church of Daroca, who used to visit the convicts in the royal prisons. Chatting to Bartolomé, the priest suggested he pray to God and the prisoner replied "he would not resort to God because he owed God nothing, and God owed more to him than he to God". Outraged, the canon reminded Bartolomé that "hell was the punishment for evil people", the convict replied, once again with a sharp tongue, that "he would be happy to be amongst devils (…) that he believed the only hell which existed was being in that prison", subsequently the priest denounced him before the Inquisition for heresy[61].

Other people were unlucky enough to speak in the wrong place, at the wrong time and to the wrong people. 5% of denunciations come from people who did not know the person they were denouncing or had met that person by chance, with no stable contact between the informer and the accused. Amongst these cases we can mention the proceeding against Diego Fernández Rangel, denounced by a monk from San Agustín who he came across whilst a guest in the Inquisition's inspector's house in Zaragoza. The accused was the inspector's nephew. In an allegedly innocent chat with another guest, Fernández Rangel uttered some words which the monk interpreted as suspicious leading to heretic propositions, so he denounced Mr Diego before the Inquisition in 1623[62].

In this type of denunciations, it appears that fear played an important role due to the fact that the accuser found himself in the company of somebody who made or said something susceptible to denunciation before the Holy Office, and someone else amongst those present might denounce what happened and, therefore, whoever did

[61] AHN, Inquisición, leg. 3730, doc. 242, fol. 1.
[62] AHN, Inquisición, leg. 1620, doc. 4, fol. 3.

not denounce, would find himself in a delicate situation. This impression is corroborated by the following detail: unless it were a crime of bigamy, all the denunciations which were filed based on an accidental relationship between the informer and the accused refer to events which took place in the presence of a third party. The exception, as mentioned, was bigamy, a crime generally denounced by a person who knew the bigamist during the time of his first marriage and who, accidentally, comes across that person again during his second marriage. An example of such a case is the proceeding against Juan de Torres Palomino, denounced by Mr Mendo de Contreras, captain of one of the galleons in the race to the Indies:

> "Mr Mendo de Contreras, knight of the Santiago Order, captain of the galleons in the race to the Indies and claimed to be forty years old, who, unloading his conscience said and denounced Juan de Torres Palomino (…). Having made the journey from Spain to the Indies, he took Juan de Torres Palomino on board his galleon as a soldier of the company and when they arrived safely at the port of Cumana and remaining there some time, when he who is making the statement was going to return to Spain, the aforementioned fled and stayed at that port"[63].

Mendo returned to Cumana, in 1658 and "there he found Juan de Torres Palomino married to a creole, an errand girl of ours from that port and with children from that marriage from marrying her, according to the order of the Holy Mother Church". When the captain of the galleon returned to Spain "he knew that Juan de Torres Palomino, before going to the Indies, was married in his first marriage to Luisa de la Bella, according to the order of the Holy Mother Church", subsequently he denounced Torres before the Inquisition[64].

[63] AHN, Inquisición, leg. 1622, doc. 3, fol. 5.
[64] AHN, Inquisición, leg. 1622, doc. 3, fol. 5.

The norm was that the denounced facts should occur before a third party, as was the case with Isabel de Vargas, denounced by a guest who was staying at the same inn, due to some suspicious words she spilled out during the course of conversation, when, apart from the delator, several other women were present[65], or in the proceeding against Nicolás Baraiz Molinete, who was denounced by a religious member who he had coincided with during a sea crossing to America. In the presence of the informer, and some other people –including a second religious member, who also delated him-, Baraiz entered the stormy waters of canon law when he affirmed that only the General Inquisitor and members of the committee of the Suprema were inquisitors, whereas the rest were, in actual fact, only apostolic notaries[66]. Along the same lines, we find the denunciation against Esteban Escotí, filed by one of the two convicts who he shared a cell with for some hours in a prison in Turín, and who finished up singling him out for being a high ranking member of the Freemasonry, as allegedly had been stated by the accused himself during his stay in the cell[67].

Denunciations by public officials were not very common. However, it should be highlighted that, within this group, the most frequent ones were those filed by militaries – nearly 75% of the denunciations of this type-. This is the case of the proceeding like that against Juan Bautista Estech, a Florentine, denounced before the court of the Inquisition in the king's Court by a captain from the Regiment of Grenadiers from Corsica, who he chatted to in the Campana inn in the Preciados street.

[65] AHN, Inquisición, leg. 1865, doc. 2, fol. 3.
[66] AHN, Inquisición, leg. 1622, doc. 6, fol. 13. Sobre el Inquisidor General, su naturaleza, funciones y prerrogativas, ver GALVÁN RODRÍGUEZ, Eduardo, *El Inquisidor General*. Madrid, 2012.
[67] AHN, Inquisición, leg. 3724, doc. 198, fol. 5.

One of the topics of conversation was how to become immune to enemy bullets by using magic. The Florentine affirmed he had a book "which contained means to obtain women for dishonest purposes and become strong in arms by making a pact with the devil ", which led to him being denounced[68]. The informer is also a military in the case of Francisco de Andújar, a Spaniard from Santiago, who was denounced by a corporal under him before the Holy Office for having heard him utter, in the presence of other soldiers, the blasphemy "I reject God and all the saints"[69].

A last group of informers stands out: those who delate themselves before the inquisitorial courts, past the periods of grace stipulated for this purpose. Although a small percentage of the total, it is higher than would have been expected : one in every twenty five prosecuted by the Inquisition denounced themselves before the Holy Office, besides the edicts of grace.

This behaviour can be explained based on two phenomenon: the strength of religion in Spanish society as a whole and fear of being denounced by someone else. As regards the first, there are cases of people who denounce themselves concerned about saving their soul, like Nicolás del Castillo, who denounced himself before the Inquisition for bigamy[70]. The other great driving force of self denunciations was fear of being denounced by somebody else, which led the affected person to give himself in, hoping that such behavior would mean his faults would be looked upon benignly. This was the case of a Portuguese mule driver who, talking about "women's things", affirmed that it was not a sin for a man "to lie down with a woman"; hours later he denounced himself for fear that somebody who had heard him would do so. He claimed before the inquisitors that what he had meant to say was that it was not a sin for a man to lie down with a woman, if it was his wife[71].

[68] AHN, Inquisición, leg. 1867, doc. 5, fols. 4-5.

Some people who denounced themselves did so for less classifiable reasons, as is the case of Juan Antonio Berrocal, who gave himself in to the Inquisition in Manila, accusing himself of bigamy, after the archbishop of the city condemned him for this same crime on returning to Spain to live with his first wife. Berrocal, fearing that his wife's family would take due revenge for him having offended the family honour, gave himself in to the Inquisition hoping that the Holy Office's sentence would not force him to go back to his first wife[72]. Another heterodox case is that of Cristóbal Lucio, who married twice in Extremadura and fled to Margarita isle when this fact became common knowledge; after a serious of accidents at sea, Lucio arrived at the Havanna port on board a Dutch sloop in 1692. While the civil authorities questioned the crew, Cristóbal Lucío denounced himself before the Holy Office for bigamy, fearing that the civil authorities might think he was a pirate or the inquisition might prosecute him for heresy, on arriving at the port in a Dutch boat[73].

A detail which should be taken into account is the fact that delations based on indirect testimonies, that is to say, those in which the person who denounces did not witness the events, but was told about them by a third party. The idea spread by black legend and certain interpretations of the Inquisition, that anybody could end up in the hands of the Holy Office based on popular word of mouth does not coincide with the following data: in the sample analysed, denunciations from indirect testimonies amount to 4.11% of the total denunciations, which, in the context of all the proceedings, represents only 2.63% of the total number prosecuted by the Inquisition from indirect testimonies; or, to demonstrate it a more conclusive way, 97.37% of those prosecuted in the sample were based on delations by direct

[69] AHN, Inquisición, leg. 1620, doc. 21, fol. 4.
[70] AHN, Inquisición, leg. 53653, doc. 6, fol. 7.
[71] AHN, Inquisición, leg. 1856, doc. 41, fol. 4.
[72] AHN, Inquisición, leg. 1733, doc. 19, fol. 13.
[73] AHN, Inquisición, leg. 1622, doc. 10, fol. 7.

witnesses- or who affirmed to be so- of the crime they accused them of committing.

The proceeding against Mr Antonio de Torres y Mendoza can be mentioned as an example of this type of denunciation based on an indirect testimony. The aforementioned was "a resident in the city of La Paz, in the province of las Barcas in Peru where he worked as chief magistrate and ordinary governor". Torres was accused of having said "bad propositions on several occasions", by a Dominican monk, brother Alfonso Muñoz de Toledo, "general preacher who testified without being summoned in that city La Paz on 7 December, 1633, he said that his prelate had told him to look into this proposition which Mr Antonio de Torres had said", and brother Alonso thought it was heresy and denounced the chief magistrate before the Holy Office, without ever having heard him say it[74].

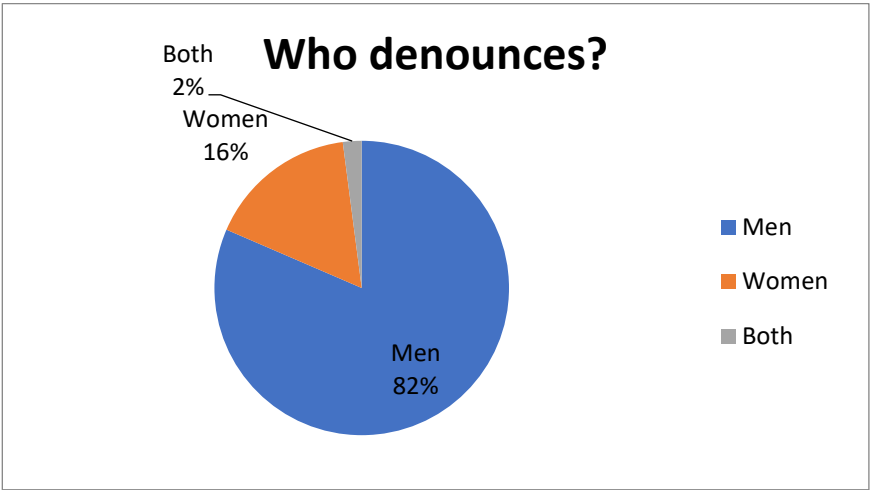
5.- Denunciation and types

As can be ascertained from the analysis of the sample , denunciation before the courts of the Inquisition was primarily carried out by males[75]:

[74] AHN, Inquisición, leg. 1649, doc. 48, fol. 3.

[75] There are, however, curious cases, such as that of Isidro and Joaquín Moreno, father and son, who were both denounced by a neighbouring married couple who heard them say whilst discussing philosophy, which the son was studying at university, that they doubted whether the virgin could have conceived without original sin (AHN, Inquisición, leg. 3730, doc. 261, fol. 1).

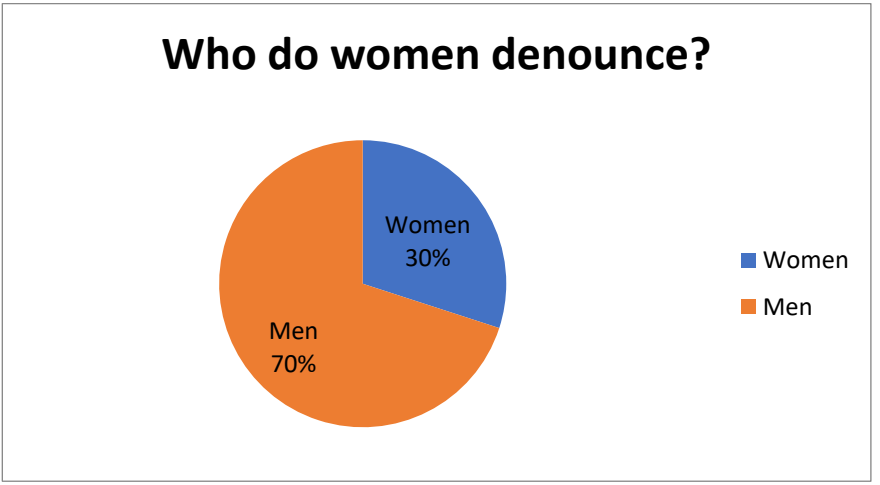
Graph 5:



- Source: Own design-

As regards gender, there is another detail which seems relevant: in cases where a woman was the informer, the majority of times the accused was a man, as shown in the graph:

Graph 6:



- Source: Own design-

This fact can be explained: the crime which women mainly denounced before the Holy Office courts was solicitation, since, on 18 of January, 1559, pope Paul IV issued a writ to the Inquisition authorizing the latter to persecute soliciting priests. The particular nature of the solicitation – meaning the confessor requested a favor of a sexual type to his confidant – meant that inquisitors were required to find out verbally whether the witnesses deserved credit and make a note of this in the margin on their testimonies. Since defamation was easy due to the nature of this crime, the Suprema ordered, on 27 February, 1573, that the inquisitors should not prosecute unless they were sure that the denunciation came from honest and credit worthy women. In the eighteenth century [76], even greater precautions were taken when it

[76] The Age of Enlightenment led to enormous changes for the Holy Office, which was forced to face circumstances and realities like those derived from

came to dealing with solicitation, as even after receiving the report on the honesty of the woman and bad reputation of the priest, the proceeding remained inactive until further denunciations were received. If this occurred, with two testimonies from honest people, the accusation was taken as semi-fully proved. The convict was questioned and, if he admitted to the crime, the inquisitor asked him if he thought his behavior was licit. If the answer was affirmative, this meant that the priest, apart from soliciting, was a heretic[77].

The crime of solicitation did not involve an act of faith, for fear of resulting in reluctance to confess. Instead, sentences were passed behind closed doors in the courtroom. It has been calculated that, from crimes of solicitation, less than 10% of the accused were convicted in the subsequent proceeding: "Ninety or more are of this nature, only through speaking in a rash and careless way, for not having calculated what a young woman is, how easily people believe they have appeal,

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the war of Succession and the change of dynasty, the Enlightenment, censorship and changes in society's and authorities' way of thinking. These matters are dealt with in studies such as GARCÍA CÁRCEL, Ricardo, "La Inquisición en el siglo XVIII", en ESCUDERO, José Antonio, (dir.), *La Iglesia en la Historia de España*, Madrid 2014; FERNÁNDEZ RODRÍGUEZ, Manuela, "Consideraciones sobre el impacto de la guerra de Sucesión en el Santo Oficio", en FERNÁNDEZ RODRÍGUEZ, Manuela, (coord.), *Guerra, Derecho y Política: aproximaciones a una interacción inevitable*. Valladolid, 2014; DOMÍNGUEZ SALGADO, María del Pilar, "Inquisición y Guerra de Sucesión (1700-1714)", en *Espacio, Tiempo y Forma*, Serie IV, Hª. Moderna, t. 8, 1995; o GALENDE DÍAZ, Juan Carlos, "El Santo Oficio durante la Guerra de Sucesión", *Cuadernos de Investigación Histórica*, nº 11, 1987. The Inquisition was a useful instrumente ven well into the nineteenth century, as shown by PINO ABAD, Miguel, "Algunos ejemplos de persecución inquisitorial a la prensa liberal en el exilio", en *Revista de la Inquisición (Intolerancia y Derechos Humanos)*, nº 18, 2014, pp. 53-81.

[77] LLORENTE, *Historia crítica de la Inquisición en España*, vol. III, pp. 22 y ss.

how flippantly people convince of having hurt the confessor's feelings and how glibly they say it to the other confessor"[78].

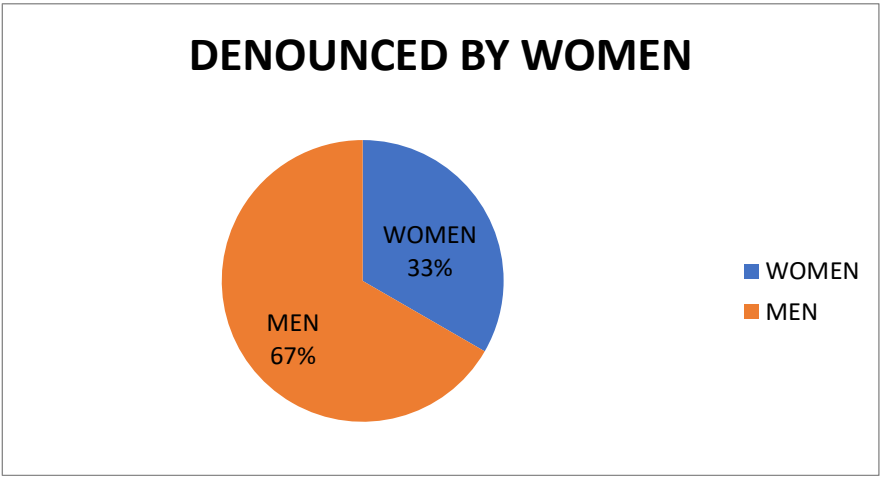
In the sample analysed, soliciting priests constitute 50% of all crimes denounced by women before the Inquisition, a detail which explains the preponderance of males amongst those denounced by women. In fact, excluding the crime of solicitation, the number of people delated by women before the Inquisition are 50% men and 50% women. A striking fact is that 9% of denunciations for solicitation did not come from women but from men. Although the percentage is small compared to the total, it is higher than would be expected, given the nature of this crime, which were committed under circumstances in which the presence of witnesses was difficult, especially males. The fact that denunciations for solicitation presented by men exist, however few there were, indicates that this practice received little empathy socially. As an example, we can find the denunciation against brother Diego de Lesáun, a Presbyterian from Puebla, who an Indian from the area denounced when he heard how the chieftain from a nearby town commented that the priest had approached a young woman, María de Velasco, who, since then, had not found the courage to go back to church[79].

The denunciation against priest Diego Carrillo del Castillo shows the way some of these solicitors behaved: a woman confessed to having an affair with a married man, this priest told her that was a mortal sin and no priest would absolve her and he could only do so if she agreed to having an affair with him[80]. Another young woman filed a denunciation and only her name, Joaquina, is given. The informer tells how the soliciting priest "made her go to his room at his home when she wanted to confess, he would lock the door from the inside and then set upon her"[81].

[78] LLORENTE, *Historia crítica de la Inquisición en España*, vol. III, p. 32.
[79] AHN, Inquisición, leg. 1730, doc. 9, fols. 71-73.
[80] AHN, Inquisición, leg. 1822, doc. 3, fol. 4.
[81] AHN, Inquisición, leg. 1867, doc. 5, fol. 13.

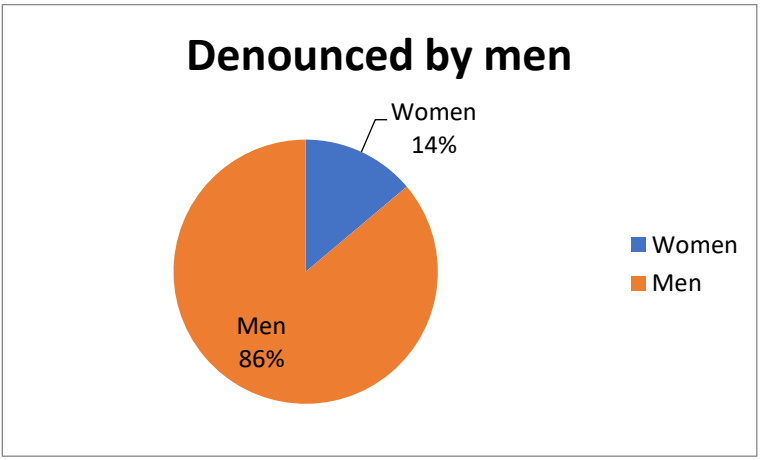
It is interesting to observe the fact that, even taking into account the statistics on crimes of solicitation, women denounce other women far more frequently than men denounce women:

Graph 7:



- Source: Own design-

Graph 8:



- Source: Own design -

Therefore, we can find denunciations like that filed against the marchioness of Gracia Real and her mother by Ángela Rodríguez, who had served as a maid at their home, for "reading the heretic Voltaire"[82], or that filed by four women against a "court lady", called Iphra Gómez, accusing her of blasphemy[83]. A woman denounced another one before the Cordova court of the Inquisition, when the latter asked her why she insisted on washing a corpse if, after death, its sole destination was earth[84].

[82] AHN, Inquisición, leg. 1867, doc. 5, fol. 53.
[83] AHN, Inquisición, leg. 1867, doc. 5, fol. 57. This case ended up being dismissed.
[84] AHN, Inquisición, leg. 1856, doc. 53, fol. 2.

This data, which shows how women were more inclined to denounce fellow women than men were to denounce women, does not coincide with some studies which have interpreted the persecution of certain crimes, such a witchcraft, as a fate of gender Holocaust[85]. Given these figures –and always taking into account what might be inferred from the study with larger samples-, it seems that the Spanish Holy Office was not used by men as a means of pressure in matters related to gender, at least as regards the mechanism for delation; it was rather the opposite, in percentages, it was far more frequent for women to delate other women.

The data does however coincide with an ample line of studies which determine witchcraft as one of the main reasons why men denounced women before the Inquisition. Witchcraft, sorcery and similar practices constitute almost 80% of the cases in which a man denounced a woman, such as the case of the negro slave María Ortiz Nieto, denounced by her master because "she had entrusted her soul to the devil"[86], or those of Antonia Monedero, María Josefa de Miras y María Rosa de More, who were denounced by a neighbor from Caravaca for practising satanic rituals and witchcraft[87].

6.- Conclusions

Based on this data, and, taking into account that increasing the number of documents analysed in the future will lead to modifications, the following conclusions can be anticipated:

[85] Refer to: HESTER, Marianne, *Lewd women and wicked witches: a study of the dynamics of male domination*, Londres, 1992; KATS, Steven T., *The Holocaust and mass death before the Modern Age*, Nueva York, 1994; o WILLIS, Deborah, *Malevolent nurture: witch-hunting and maternal power in Early Modern England*, Ithaca, 1995.
[86] AHN, Inquisición, leg. 1622, doc. 7, fol. 17.
[87] AHN, Inquisición, leg. 1869, doc. 44, fol. 3.

Regarding the mechanisms for initiating inquisitorial proceedings, it can be pointed out:

a) The vital importance of denunciation or delation as a means of initiating inquisitorial proceedings, constituting more than 60% of the total number of them. This percentage increases to 73% in the case of proceedings of faith and to 93% of the initiated cases of faith, if the number of people prosecuted in each case is not taken into account.

b) The *inquisitio* plays an important role when it comes to initiating proceedings and which frequently lead to cases with many people being prosecuted, whereas denunciations on most occasions were only against one suspect.

c) As regards the *inquisitio,* it is important to point out that many cases initiated in this way, where there was only one person prosecuted, were related to those responsible for writing books or libels and the statements contained within.

d) Accusation is still in force in criminal proceedings related to the jurisdiction of "familiares" and other people under inquisitorial jurisdiction, completely disappearing from proceedings of faith, which is logical, given the disadvantages of accusation in comparison to denunciation or delation.

e) In this study, criminal proceedings of those under the inquisitorial jurisdiction amounts to 12% of the total number of cases which reached the courts of the Holy Office, a percentage which is far from irrelevant –and which will possibly increase as more proceedings are reviewed since, for example, in the digitilized documentation published in DARA, from which only a small simple has been analyzed for this study, proportionally criminal proceedings are much greater

than proceedings of faith[88]-, therefore, it seems it would be worthwhile dedicating more attention to this part of inquisitorial proceedings for the historiography.

As regards the collectives which denounce, it is important to mention the following points:

a) Three social groups constitute almost 90% of the source of denunciations received by the Holy Office: neighbours of the accused, religious members and convicts already prosecuted.

b) There are very few cases of denunciations amongst relatives, and in all the cases the informer had already been prosecuted.

c) The secular clergy tended to denounce laymen more often than members of Religious Orders, which was logical given their respective circumstances.

d) Nuns intervened in the stage of denunciations primarily as accusers, which is related to the fact that the most frequent crime involving religious members is solicitation, which women cannot be denounced for.

e) The data shows how efficient the inquisitorial proceeding is for obtaining new denunciations when questioning convicts already prosecuted, amounting to more than 25% of the total denunciations.

Amongst the rest of the collectives who denounced, it is worthwhile highlighting the following conclusions:

[88] Documents and Archives of Aragón, URL: http://dara.aragon.es/opac/app/, consulted during December 2014 and January 2015.

a) Militaries played a major role in the percentage – small in comparison to the total- of denunciations filed by seniors, officials or State civil servants.

b) The number of self-denunciations past the periods of grace is surprising, a relevant indication both of Spanish society's genuine concern for their faith and the ultimate salvation of their soul – in many cases impeding denunciation – as well as fear of the inquisitorial apparatus and its effectiveness when it came to finding out about everything that was happening under its jurisdiction. This fear led others to denounce themselves rather than a third party doing so.

Regarding the relationship between denunciation and gender, the following points are highlighted:

a) Men were the ones who mainly delated others before the Holy Office, which is understandable in an essentially masculine legal culture.

b) Amongst denunciations filed by women, the majority corresponded to cases of solicitation, almost 50% of the total.

c) The percentage of women who denounced other women is surprising–high when compared to that of men-: 33% of the total, which amounts to 66% if we exclude solicitation, in which case the accused was necessarily a man. Based on this data, it does not seem that the denunciation mechanisms were used specifically as a type of gender weapon.

d) In the cases where men denounced women, an overwhelming percentage of them were due to alleged witchcraft, sorcery, Satanism or black magic being practised by women.

THE ROLE OF BASQUE SOCIETY IN THE END OF ETA

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Abstract: In March 2020, a decade had passed since ETA's last deadly attack. In 2011 it would declare the final ceasefire and in 2018 its dissolution. After half a century since its first murder and 59 years of macabre history, the terrorist organization has disappeared from the political scene. This article discusses how Basque society has changed during this period and to what extent it influenced the end of the armed group. From explicit support during the dictatorship, it passed to permissiveness, and then to silence, conditioned in many cases by a fear that was gradually lost, causing substantial changes.

1.- Introduction

Terrorist organizations try to impose their logic by frightening the population. They kill for political purposes because they want to force governments and citizens to accept their approach. In order to continue their activity they need the support of the population or the people they claim to represent, because without their support the struggle does not make sense. The Basque people decided to turn their backs on ETA and bring an end to it, after great police, judicial and political work, but one of the keys had been that the vast majority of Basques had stopped supporting them, which had forced them to change their strategy throughout their journey.

No death is justifiable but certain murders provoked a strong popular reaction from the population who had previously kept quiet, as with the murder of Gregorio Ordóñez in 1995, and then with other politicians, as well as. clearly and forcefully with the kidnapping and death of Miguel Ángel Blanco the organization even found itself with contrary reactions among its own ranks. Making a simile with Islamism, criticisms coming from the West against these radical groups with counterpropaged campaigns of Europe and USA, are not the same as those that have been launched from the Muslim-majority countries themselves who may also be backed by messages from renowned-renowned clergy and teachers of Islam.

It has just been a decade since the last murder of ETA, a French policeman who was shot down in the south of France in March 2010. This was the last fatal victim of an organization that perpetrated its first deadly attack in 1968 against a *Guardia Civil in the Basque Country.* In September 2010 ETA announced a verifiable ceasefire and one year after that, the final cessation of violence. What caused this decision? How has Basque society changed during this period of more than half a century of attacks? This study will analyze the evolution of the so-called Basque conflict throughout history, taking into account the

position of Basque society during the more than four decades of violence in Euskadi.

Apart from the clear differentiation between the period of dictatorship and democracy, a series of events will be established that have represented a turning point in this issue and will show how part of Basque society has gone from clearly supporting the armed gang, understanding and justifying their actions, to the silence of fear, and lastly to opposing and openly criticizing the violence, turning their backs on the group and their environment. In order to tackle, in all its magnitude, a matter so complicated from the political point of view and with so many sensitive points, the publications on this subject will be taken into account from clearly found positions, both by authors who defend the unity of Spain, Basque nationalists who opposed the violence of ETA, and that of people from the world of radical left nationalism, who do not condemn the murders of the group, and who justify their actions by being immersed in a war or armed conflict in which there are two sides each faced with victims.

2.- The use of violence for political objectives

In the interview carried out by Jordi Évole in the La Sexta program "Salvados", repentant ETA member Iñaki Rekarte recounted memories of one of the car bomb attacks, which left several dead. In this conversation, the change in this former terrorist who was part of ETA and killed several people is evident. From justifying the violence and carrying out attacks, to a declaration of repentance for an attack in Santander against a police car, in which three people who passed by on the street died: "I am sorry that I did that to them. I am very sorry "(*Salvados*, 10/05/2015).

In a democracy, terrorism does not accept the opinion of the majority as it is reflected in the ballot boxes and the constitution of the parliaments or assemblies of representatives. They are not willing to

submit to what the majority of the population dictates, because by means of voting, they do not get the followers they want. Instead, they use weapons to impose their ideas through fear and coercion. In this way they eliminate or at least minimize their opponents:

> *El objetivo del terrorismo no es convencer ni siquiera vencer, sino demostrar que no puede ser vencido: que es capaz de mantener indefinidamente la inquietud ciudadana y socavar así el crédito de las autoridades* (Unzueta, 1997: 17).

For Unzueta, when the terrorists get the population to reach an agreement with the armed group out of fear, they begin to win. We must differentiate between a terrorist and a psychopath: the latter is a murderer who kills because he has a pathology, and there is no rational logic in his actions or purpose. One cannot negotiate with a psychopath to stop killing in exchange for something. However, terrorists have a political purpose, and they kill following a strategy in order to bend the State and achieve objectives.

Most members of armed organizations do not enjoy it or gloat. They do not see their victims as people with a life, family and friends. They are simply military targets to shoot down, as in a war in which the soldier shoots without thinking that on the other side of the trench is a person like him.

Supporters of terrorist groups such as ETA see this activity as a just war, but in fact it should be compared to cold-blooded killings, the most bloody and painful attacks that have provoked internal criticism from certain sectors of the radical independent left. These terrorist groups are not opposed to using certain methods to achieve an end that justifies the means.

2.1.- Spearhead against The Franco Regime

During the Franco regime ETA had great social support, both from Basque society and part of Spanish society, since they were considered to be fighters and revolutionaries against the dictatorship. From moderate nationalism and part of the left, it was thought that ETA would abandon the armed struggle with the arrival of democracy, although history has shown that they were mistaken since the attacks would continue for more than three decades.

The first actions of the organization focused on sabotage until the first deadly ETA attack occurred in 1968, when the civil guard José Pardines was shot dead after stopping a vehicle in which several members of the organization were traveling, at a control point. The first premeditated victim was the inspector of the Social Political Brigade in San Sebastián, Melitón Manzanas. The theory of the spiral, action-repression-action, gains the sympathies of a large part of the population because they are considered heroes who are up against the dictatorship:

> *Así comenzó el trasvase emocional de importantes sectores del pueblo vasco hacia esos militantes que se jugaban la vida en aquellas circunstancias de terror franquista y que alcanzó el punto culminante en las movilizaciones del Proceso de Burgos (*Elorza, 2000: 140).

During the Franco regime ETA killed 43 people. The attack against the president of Carrero Blanco was the most spectacular and media-reported obtaining worldwide repercussions. This action raised sympathies in various sectors of opposition to the regime, who believed that in this way, the person who considered himself the successor to Franco had been eliminated. Santiago de Pablo reflects on the support and sympathy he received during this period:

> *El franquismo respondía con la represión, a veces indiscriminada, tal y como la propia organización esperaba, lo que no hizo sino incrementar la solidaridad con ETA tanto de la oposición antifranquista española como a nivel internacional (Pablo,2017: 28).*

The Burgos Process and the executions of 1975 provoked many protests and mobilizations in support of the ETA prisoners who were sentenced to death, both in the Basque Country and in the rest of Spain and other European cities.

2.2.-ETA after the Franco regime

After Franco died, the organization continued its attacks, but some of these actions provoked certain criticism from some of the sectors that, although they did not share the methods, showed some complacency. A few days after the dictator´s funeral, ETA killed the mayor of Oyarzun. In 1976, several politicians were assassinated, the mayor of Galdácano and the president of the Guipuzkoa Provincial Council; public officials linked to Francoism who had not been elected by public vote, so to a certain extent, they maintained the previous postulates and approaches.

That same year, ETA killed the businessman Ángel Berazadi, close to the PNV, ands promoter of the *ikastolas*[1], which indicates a substantial change in the direction of the attacks compared to those committed before then. This kidnapping had a major impact on society, especially the image of the businessman in a room reading a newspaper with a gun pointed at his head. On March 18, 1976, he was found dead in a ditch in a port near Elgoibar, the family was unable to gather the 200 million pesetas in ransom that they had been asked to pay in order

[1] Schools where the basque language is taught.

to save him, and he was assassinated. ABC called it: "*Salvaje asesinato a sangre fría" (*ABC 19/03/1976).

There was shock, but no significant signs of societal rejection by way of protests or similar acts. Spain was in a period of transition, and only a few months had passed since the death of the dictator. Berazadi was the first businessman killed by the armed group. According to the former PNV[2] president, Xabier Arzallus, in an interview with the ETB in 2016, they met with ETA to try to save the businessman's life. It was the first time that the Basque Nationalist Party had clearly criticized an act carried out by ETA. Arzallus acknowledges that many people were affected and that "it marked the beginning of a civil war".

On October 8, four months after the first democratic elections after forty years of dictatorship, the president of the Biscay Provincial Council was killed. Before the end of the year a new politician fell, in this case councilor at the Irún City Council. Continuing with actions against politicians, on September 29, 1980 there was an attack that had some similarities to that of Miguel Ángel Blanco in 1997, an act that was a turning point in the Basque conflict. They kidnapped and killed José Ignacio Astarán, a member of the UCD executive in Alava. On November 14, ETA used this method again, kidnapping and later assassinating the AP councilor in Santurce, Vicente Zorita. One has to wonder what changed in the decade and a half that had elapsed since the aforementioned kidnappings and murders, and activities that the organization carried out against the PP councilor in Ermua in which Basque society took to the streets.

At the beginning of the 80s, Francoism was still very recent. ETA aroused many sympathies for its fight against the dictatorship and it was still thought that they could abandon violence when democracy was established, which finally happened with the political-military branch. ETA opposed the construction of the Lemóniz nuclear power plant with

[2] Basque Natioanalist Party.

a campaign of attacks. Their roughest moment occurred on February 6, 1981 with the murder of the engineer José María Ryan, which caused the first citizen demonstrations against the organization.

One of the first major mobilizations against terrorism took place in Bilbao on October 21, 1983 when more than 100,000 people walked the streets to protest the murder of the pharmacy captain, Alberto Martín, who had previously been kidnapped. The march was led by the parents of the deceased, along with the President of the Basque government, Carlos Garaikoetxea, and a banner that read: "With the People, against ETA". It was not easy to reach an agreement on the content of this banner, the discrepancies between the political parties were collected by El País:

> *The Bilbao meeting failed due to lack of agreement on the banner. The PSOE proposed: "All against ETA and with the Army", and the PNV: "All against terror and for the future of the Basque Country". (El País, 1983: p.1*)

On February 23, 1984 the first socialist politician died at the hands of ETA. Senator Enrique Casas was shot several times at home on his doorstep. He was the first left-wing politician killed by ETA. The PSOE had been part of the nation´s government for just over a year and this was the first socialist victim. Until then, ETA had killed several Franco, UCD or AP political positions, but they had not crossed the line. This attack could be understood as an extension of the threat to the left-wing forces, or more specifically, at the time it was the party that governed the country.

Terror also spread to the nationalist sphere by the killing of Carlos Díaz Arcochaon, the Erztaintza superintendent of the autonomous police of the Basque Government led by the PNV, on the 7th of March 1985. The victim had been a lieutenant colonel in the Spanish Army until 1981, when he left his post to start the regional police. ETA justifies his murder for this reason and tries to disassociate

him from an attack on the Basque police as a whole, although years later their agents were targeted.

3.- Pacifism and the unity of the parties against terror

The end of ETA has several causes. First of all the police pressure and the judicial harassment set up in part by Judge Baltasar Garzón, which ended with the banning of Batasuna. This together with citizen resistance put ETA on the ropes.

At the end of the 80s something changed in Basque society. In August 1986, ETA killed Yoyes, a historical leader of the group who, after leaving ETA and living in France and Mexico, took up the reintegration program offered by the Government and returned to the Basque Country. After receiving several threats accusing her of being a snitch, a gunman shot her in front of her own son during the Ordizia town festival. The impact was such that even the daily newspaper of the abertzale left opened its cover with the headline: "*Atentado mortal en Ordizia contra Yoyes González"* "*Fatal attack in Ordizia against Yoyes González* EGIN, 1986: p.1). Although it does not speak of murder, the news lead highlights the motive for act so that it served as a warning: "She had returned from exile and had accepted the reintegration measures". ETA killed the first woman to hold high positions of responsibility in the group during the 1970s in order to intimidate other members of the organization. The commotion was very important, and it's worth remembering that the murdered woman's brother was a councilor of HB in this town, a political formation that did not condemn the attack, although the councilors of the City Council stated that they felt the same way about this death as they had about the other people who had died in the conflict.

This fact led to a fracture in Basque society and especially within the radical nationalist left itself. It is worth noting the case of the Basque singer Imanol Larzábal who, as a result of this attack, moved away from

ETA, where he had been a militant in the 70s, causing him to receive graffitied threats at his home:

> *También es verdad que desde entonces, y precisamente por la muerte de Yoyes, las cosas han cambiado. Hoy la mayoría de este pueblo ya no acepta esas cosas. Porque la sociedad ha estado acobardada por ETA, pero eso está cambiando, hasta que demos el salto definitivo" (ALAMEDA, 1986, p. 6).*

These statements by a person who was part of ETA and who felt deeply Basque and nationalistic, corroborate the approaches of this article. In 1987, *Gesto por la Paz (gesture for peace)* was born, which organized a silent protest every time there was a victim of an ETA attack or by the organization itself. These mobilizations provoked a change of strategy in the politicians and the parties with representation in the Congress of Deputies and later those in the Parliament of Vitoria, each signing agreements to which HB did not join.

On November 5th, 1987, the Madrid Pact was signed by the political parties with representation in Congress: PSOE, AP, CDS, CIU, PDP, PL, PNV, EE, PL y PCE, everyone except HP. The pact alluded directly to ETA and denounced the lack of legitimacy to represent the Basque people, asking them to abandon their weapons and use of violence. On January 12th, 1988, the Ajuria Enea pact was signed, which brought all of the Basque autonomous government parties together except for Herri Batasuna.

This minimum agreement came after one of the harshest years of terrorist violence, including two of the most serious attacks: Hipercor in Barcelona and the Guardia Civil *Police Station* in Zaragoza. In these attacks, several children and civilian adults died, and all they did was go shopping in a supermarket.

At this point, the dichotomy comes about between ETA's culpability for armed actions with fatalities, and the role Basque society played by keeping silent and looking the other way in the face of the attacks. The culprit is the terrorist who pulls the trigger or activates the bomb, but without the coverage of the rest of the command members, the informants who provide them with targets, and those who give them social and political cover, it would not be possible.

In the late 1990s and early 2000s, ETA targeted journalists. The media, both from Madrid or Barcelona and from the Basque Country were no longer afraid, and began to speak and write about the violence and persecution experienced in the Basque streets. The complicity of the silence at the end of the 70s and in the 80s included ordinary citizens, but also people who played relevant roles in society, from politicians, journalists, priests, etc.

In 1987, the first campaign to raise awareness about violence in the Basque Country was carried out by the Association for Human Rights of the Basque Country, whose motto was: "Against silence" which was followed in 1992 by "I don't shut up", "10.000 ideas for peace", and lastly in 1993 "I have an opinion too". The lives of all people are equal, but the consequences of all deaths are not the same due to the impact they have on the population as a whole.

In 1992, public television, both the regional ETB and the state-owned TVE in the territorial center of the Basque Country, joined the active fight against violence for the first time by supporting the campaign. This happened three years after the first major anti-violence demonstration that took place in Bilbao in 1989 under the motto "Peace now and peace always", which was a turning point in the fight against terror. The sector that supported the armed struggle was around 10-15%, as reflected in the polls with the votes that HB obtained in the most difficult moments. But a large part of Basque society was silent regarding the attacks since they preferred not to take sides. This

phenomenon is common in dictatorships; in this case, the dictatorship of terror.

It is a small part of society that supports the totalitarian system, there is another small sector that openly opposes public protests, taking the risk of being jailed or, in the Basque case, of suffering an attack. Lastly, there is a large part of society that is neutral and does not position itself because they want to be allowed to live in peace without getting into trouble:

> *"Hacer oídos sordos a la violencia, hacer como si no existiera, obviar que estaban matando, hiriendo, extorsionando, rompiendo la ciudad y la convivencia, agrediendo y provocando continua y sistemáticamente"* (Arregui, 1994: 50).

Many citizens turned away because they believed that the problem did not directly affect them, or that police forces and politicians had to end these radical actions and groups, and that they themselves had nothing to contribute. This situation is evident in the case of one of the people who wrote a card in the campaign for peace of the Human Rights Association that includes the publication of this entity:

> *"En el instituto donde trabajo mataron al padre de un alumno que era guardia civil. Ni él, ni nadie, alumno o profesor, se atrevió a decir nada. La mayor parte del instituto no llegó a enterarse. Entre 1000 personas que conviven 7 horas diarias no hubo una capaz de manifestar algo en voz alta. Las 1000 personas querían ocultar su vergüenza y hasta el comentario privado se lo recordaría*" (Arregui, 1994: 110).

These are harsh demonstrations but they show us how people lived in the Basque Country in the 1980s, the fear and self-blame of the victims that led them to hide and live their mourning in private.

Little by little, many Basques began to lose their fear of openly demonstrating against violence. The *Gesto por la Paz* association emerged as a pacifist movement born from the foundations of the Church in Biscay. From there they begin to carry out silent gatherings in the rest of the Basque Country and Navarre. This organization is gradually joined by another such as Bakea Orain, Denon Artean, the Association for Human Rights, etc.

In 1993 ELKARRI, a pacifist organization linked to the Basque National Liberation Movement (MLNV) or the KAS[3] alternative appeared, which offered itself as a mediator for negotiations between the Government and the armed organization.

Regarding football, there were also significant changes. Seeing banners with the anagram of ETA used to be common in the stadiums of San Mamés in Bilbao and in Anoeta in San Sebastián without being removed by the police. In Basque stadiums there were symbols of support for the terrorist group and in other stadiums in Spain there were Francoist and swastika flags with the same impunity. But this began to change in the mid-90s when a large group of the fans of Real Sociedad whistled at the display of an ETA banner in the area of the stadium where the most radical people were located and finally it was withdrawn during the course of the match.

3.1.- The blue ribbon and the loss of fear

On July 5th 1993, ETA kidnapped businessman Julio Iglesias Zamora, who was held for 116 days until October 29 of that year. ETA carried out many kidnappings throughout its history, some for economic purposes such as in this case, and others for political purposes.

[3] Koordinadora Abertzale Socialista (Basque Socialist Patriot Coordinator)

The difference between this kidnapping and the others was that part of Basque society, promoted by Gesto por la Paz, launched a campaign to support the kidnapped person and his family, demanding their release, "Julio Askatu", and staging this support with a blue bow in the shape of A which means Askatu (freedom). In May 1995, ETA kidnapped José María Aldaya, who was released in April 1996 after a ransom was paid. Once again the Basque people were mobilizing against this action, but ETA reacted with the green ribbon, coming back at the blue and with the slogan "Aldaya pays and stays silent". Jarrai and HB threatened the bearers of the blue ribbon and organized counter-demonstrations against those of Gesture for Peace that must be protected by the Ertzaintza that was already targeted by the organization.

An ETA command killed Gregorio Ordóñez, PP spokesman at the San Sebastián City Council a few months before the municipal elections in which he would have been at the top of the list. Something began to change that day in the Basque Country because the HB spokeswoman in the San Sebastian City Council, Begoña Garmendia, condemned the attack, a sentence that was not backed by her fellow councilors or the spokesman in the Basque Parliament, but something was moving in the patriotic nationalist left:

> *Tras "lamentar profundamente la muerte de Gregorio Ordóñez y mostrar su voluntad de expresar "con toda sinceridad mi condolencia a sus familiares y allegados", Garmendia afirma que "este atentado se caracteriza como una intervención de carácter armado en el campo de la lucha político-institucional, circunstancia, a mi entender, absolutamente rechazable"* (Guenada, 1995).

ETA continued to assassinate politicians, and on February 6, 1996 they ended the life of the historic socialist leader Fernando Múgica, brother of the Minister of Justice Enrique Múgica. A week later, the murder of Professor Francisco Tomás y Valiente, on February

14, 1996, began to change the history of ETA and of the popular support that it had maintained until then, and without which its maintenance would have been impossible for so long:

> *Desde un punto de vista estrictamente político, el considerable apoyo electoral tradicionalmente obtenido por HB ha permitido que ETA no sea considerada solo como un grupo de asesinos, sino como un problema político de gran magnitud (Jaúregui, 2000: 271).*

If with the murder of the PP politician there were many Basque voices who criticized this action, including the spokesperson for HB at the San Sebastián City Council, the murder of a university professor in his office at the Faculty of Law of the Autonomous University of Madrid, provoked a peaceful student revolt that stained their hands with white paint to raise their voices saying "*Basta Ya"* (Enough already).

There is a sector of the population that unconditionally supports ETA and that does not trust the information that comes from the enemy, which is everything that is disseminated by parties, media and associations that are not related to the MLNV because they believe that they want to manipulate and intoxicate them. This situation is considered to be an isolation from reality, which is currently called post-truth with the various examples that facilitate populisms of different signs, from Donald Trump's claims using falsified data, to the jihadist struggle, left and right extremisms, etc.

The self-deception of members of this organization means that they do not question certain approaches or ideas, especially the hard line, so as not to be relegated, expelled or purged from the organization, which puts its sights on the dissidents, and which ended up killing Yoyes, the historical leader who supported reintegration.

The manipulation or indoctrination they receive from the leadership makes them isolate themselves from reality in order to win this war of attrition. Propaganda and manipulation are common weapons of war and armed conflict. Dictatorial regimes try to manipulate and make their people believe that they are winning a war. Normally the ETA members who have decided to step forward and have renounced the armed struggle have done so from prison or from exile. After years in prison or while they are far from home, they realize that violence is not the way. Historical leaders, such as Soares Gamboa who came to publish a book on his reflections denouncing the atrocities of the group, was just one of the different cases that took this difficult step.

3.2.- The kidnapping of Miguel Ángel Blanco: a point of no return

On July 1, 1997, the Civil Guard released the prison official José Antonio Ortega Lara who had been kidnapped in January 1996 in the garage of his Burgos home after returning from work at the Logroño prison. ETA called for the regrouping of prisoners in the prisons of the Basque Country and Navarre. After 532 days of captivity, the *Guardia Civil* freed him from certain death in very harsh conditions, providing images that remind many of pictures of the prisoners of the Nazi death camps in World War II.

ETA didn't take long to react to this Security Forces coup, and a little more than a week later they kidnapped a Popular Party councilor in the Biscayan town of Ermua when he took the train to work in the neighboring town of Éibar by. The MLNV felt cornered after the peaceful revolt of the Basque people after the slow-motion murder of Miguel Ángel Blanco in 1997, and this represented an approach to moderate nationalism led by the PNV and EA. In this sense, it is worth noting the headlines of the EGIN, the newspaper in the vicinity of ETA that was closed by order of Judge Garzón in 1998 as a criminal instrument of the ETA-KAS network. On the release of the prison

official kidnapped by ETA for a year and a half, the newspaper headlined “Ortega returns to jail”.

That same month, with the kidnapping of Miguel Ángel Blanco, the covers were also striking. On July 13, the day after the term given by the terrorist group expired, with a large-sized photo of the San Fermín bull run, the headline at the top said: “The PP councillor appeared with two shots”. They do not accuse ETA, nor do they speak of an attack, much less a murder. A day later, when death was already confirmed, the cover stated: “The Government did not lift a finger and ETA shot at the PP councilior”. Despite the pressure of public opinion, EGIN blames the government for the murder, not ETA.

On the other hand, it is worth highlighting the cover of the nationalist newspaper DEIA, close to the PNV, which asked for the armed group for mercy on July 12: “Don´t kill them”. Other nations' newspapers were much more forceful, disregarding objectivity, as in the case of Diario16: “ETA did not listen to the voice of the people. Sons of bitches”.

In 1998 the Lizarra Pact was signed, which began a new stage for the armed organization with the declaration of an indefinite truce that ended in 2000 and which many politicians, journalists, and academics called the nationalist front.

In 2000, for the first time, the main problem for those surveyed by the CIS was ETA. During the 1980s, unemployment occupied that first position, surpassing terrorism which was the second concern in the so-called lead years. But as the decade progressed, drugs, citizen insecurity and the economy came to overcome terrorism as a concern of the Spanish population.

From 2000 to 2004, ETA terrorism almost continuously topped the list of concerns according to CIS surveys, but from then on, it gradually decreased as the group ´s activity decreased until the truce

and subsequent disappearance. It should be noted that the change occurs just when ETA ended the truce declared in 1998 and 1999.

4.- Pressure and rethinking of the methods

After the blow to the top of ETA in 1992 with the arrests of Bidart, they proposed a change of strategy and the targets moved towards the political class, something that ETA had already done in the late 70s and that raised criticism from ETAm but that finally assumed and flared up.

On April 26, 1995, the Democratic Alternative was presented, which replaced KAS as the judicial and political pressure to which it was subjected and which was based on the right of self-determination and the unification of Alava, Guipuzcoa, Biscay and Navarre.

In the 1996 elections, HB tried to use the campaign´s free electoral spaces to broadcast a video of three ETA hoods defending the propositions of the Democratic Alternative. It was a turning point in the fight against the terrorist network and for the connections between ETA and HB, which ended in the illegalization of the Nationalist coalition in 2002 by order of Judge Baltasar Garzón, who jailed the 23 members of the HB National Table for collaboration with the armed group, sentencing them to 7 years in prison. On July 15, 1998, the newspaper Egin, ETA´s informal communication media, was closed. The judicial harassment was gradually cornering the MLNV.

In 1999 EKIN was constituted as heir to the previous organization that was operational until 2011, when several police coups were dissolved, coinciding with ETA´s indefinite truce. In both networks there were youth organizations such as Jarrai or Segi, pro-amnesty managers, unions such as LAB, political parties such as HB or EH, newspapers such as EGIN and later Gara, feminist organizations

such as Egizan, or priests and other collectives of various kinds in this orbit.

4.1.- The unity of nationalism in the Lizarra Pact

In the summer of 1998, a year after the kidnapping and murder of Miguel Ángel Blanco, an agreement was negotiated between the Basque nationalist parties. It was a pact between PNV-EA and ETA that was closed with the signing of the Lizarra Pact with a series of points that set in motion the sovereignist front against the Spanish State. These events are a consequence of the so-called Ardanza Plan by the Lehendakari, which was launched in January 1998 and which was initially accepted by the President of the Spanish Government, José María Aznar, with some conditions. On January 16 the Lehendakari presented the Pacification Plan that proposes that ETA lay down its arms and HB join the institutional pact. On September 12, a pact was signed in the Navarre town of Estella-Lizarra by 23 groups, parties, associations, unions, etc.

The choice of this territory has historical connotations since Estella presented the first draft of a Basque autonomy statute in the Second Republic in 1931 with the participation of the Basque and Navarre mayors.

ETA changed its strategy, stopped putting death on the table, and sought a common front of nationalism that led to a truce decreed on September 16, four days after the signing of the agreement. The Government chaired by Aznar met with ETA in Zurich in May 1999.

ETA blames the PNV for breaking the truce due to what they consider to be a lack of courage and determination in the national construction process. From then on, a strong campaign of attacks was launched in which they especially attacked the public positions of the PP and the PSOE.

After the difficult start to the 21st century in terms of victims and attacks, on November 14, 2004, an act took place at the Anoeta Velodrome with the new management of Batasuna after the imprisonment of the HB National Bureau a few years prior. Arnaldo Otegui put a political proposal on the table, in which he announced that they would only use political and democratic channels. This outstanding event and turning point is also partly motivated by the meetings that Arnaldo Otegui, leader of Batasuna, was privately holding with Jesús Eguiguren, president of the Socialist Party of the Basque Country (PSE) since 2002.

5.- Search for a negotiated solution

All Spanish governments since the arrival of democracy have negotiated with ETA. When a government makes this decision, the first thing they want is to know the actual situation of the group, how it is doing, how strong it is, its claims, etc. They also want to enhance dissensions and internal divisions.

Usually in all terrorist organizations, as in other areas of society such as political parties, there are two clear lines: supporters of the negotiated path and those in favor of the hard line, who impose themselves in order to continue with the violence and weapons.

As in any negotiation process, there is propaganda on both sides and also information intoxication to lower enemy morale and influence their decisions, conditioning them with certain falsified and manipulated messages. As previously mentioned, every democratic government has negotiated with ETA, from Suárez's UCD that achieved the dissolution of ETApm, which the organization made official on September 30, 1982 in the pediment of Biarritz, announcing the dropping of their weapons and their self-dissolution.

A month later the PSOE won the general elections and Felipe González arrived at Moncloa. Between 1986 and 1989, the socialist government held a semi-public negotiation in Algiers that took place while ETA continued to commit attacks. In the midst of the negotiation process, the attack against the Barracks House in Zaragoza took place, causing the talks to stop from December 1987 until the end of the year 1988. Some authors argue that these conversations were only intended to declare a truce that would stop the bloodshed of the attacks and murders in the 80s.

Another attack that caused great commotion in Basque and Spanish society was that of May 1991 against the Barracks House at Vic (Barcelona). When these attacks occurred, involving the murders of civilians and children, ETA wanted to show force, and pressure the government in the negotiations in order to achieve its objectives, and for the government to yield as much as possible. They understood that by killing innocent people, the citizens would turn against the Government and force the reaching of agreements.

This approach can be questioned since it is taking for granted that the people turn against their leaders, and against a State that does not know how to protect them. However, it has been shown on various occasions, the eyes of the people did not turn against their rulers, but instead against the terrorists who kill. Perhaps one of the few exceptions can be found in the Islamist attacks in Madrid on 9/11, where part of the population turned against the Aznar government, partly due to the policy it carried out in support of the war when the majority of the population did not want it, but above all for failing to tell the truth by trying to blame ETA and hiding the authorship of the Islamist terrorists.

In 1995 HB presented the official Oldartzen paper that continued along the same line as in previous years, which supported ETA´s armed struggle because Euskadi was militarily occupied. 28.63% of the militants did not support this thesis and 16% supported an alternative text in which they argued that it is possible to disagree with ETA's

approach and which was defended, among others, by Patxi Zabaleta, who maintained critical positions with the leadership and then finally left HB and founded Aralar in 2001, a party of the abertzale left but which condemned violence.

The armed struggle came to an end in the 21st century. The director of the Gara newspaper, Iñaki Soto, met with the leadership of the terrorist group and from that conversation, a book was published in Basque that was translated into Spanish in 2019. The direction of ETA makes it clear that is a political organization that has used the path of violence to achieve its objectives:

> *"Para nosotros ETA siempre ha sido una organización política que desde un momento determinado a otro momento determinado, ha practicado la lucha armada. (...) No ha sido una organización militar que hace política"* (Soto, 2019: 183).

For ETA, Ireland has always been a reference, so once again they use the case of the IRA and the agreements made with the British government as an example against the Spanish case, in which it has not been possible to achieve these meeting points. In this sense, it is worth highlighting Otegui´s protests against the condemnation of violence and popular support:

> *"No condeno las acciones de ETA porque es una posición política. Hemos hecho algo más importante que condenar, sacar la lucha armada de la sociedad vasca"* (Webster, 2016)

The ETA leadership in the interview with the Gara journalist insisted that the organization considered the armed struggle essential but despite this, they have tried on several occasions to abandon violence and focus solely on political approaches. On several occasions, the MLNV has raised the need to leave violence behind, especially

during truces in which popular support for the group´s political wing rose, losing support after returning to the murders. On these occasions, hard-line supporters have always imposed themselves against the dissidents who have had to leave ETA or its satellite political parties, which now continue with the objectives of the group but using other methods, as highlighted by the group ´s leadership:

> *"A día de hoy la izquierda independentista es la que representa el proyecto político de ETA y creemos que estos instrumentos organizativos son mucho más eficaces para afrontar los desafíos del futuro*"(Soto, 2019: 230).

The latest ETA management acknowledges what has already been raised in this article and what various authors have previously defended. Despite the connection of ETA with HB, later Batasuna, the political branch f ETA according to the Spanish Justice, Arnaldo Otegui, a member of the National Table and spokesman for the organization, makes the importance of politics against violence clear in a documentary about the end of the armed group:

> *"Los problemas políticos los tienen que resolver los políticos de este país, no una organización armada y un estado"* (Webster, 2016).

Historically, radical nationalism defended the need for a negotiation between the Spanish State and ETA to solve the Basque conflict, but these declarations make it clear that the protagonist should not be the armed organization but the political party that gathers electoral support for these postulates.

After the approval of the negotiation path in the Congress of Deputies, the first secret contact between representatives of the PSOE and ETA takes place. Jesús Eguiguren, President of the PSE-PSOE travels to Geneva to meet with Josu Urrutikoetxea, "Josu Ternera", a

member of ETA from 1971 to 1989 when he was arrested and imprisoned. In the Swiss town they meet using the Henri Dunant Centeras an intermediary. Parallel to this negotiation, a political table was launched between leaders of the PSOE and Batasuna in the summer of 2006 after the terrorist group declared a truce on March 23.

In that same year, ETA´s political chief, Francisco Javier López Peña "Thierry" joined the negotiating process in Geneva. According to Eguiguren, the character of this leader brings the talks to a critical situation that leads to the ETA attack on T4 resulting in two deaths, perpetrated during a truce, thus breaking one of the rules established by the organization considered to be at war against the state. This act meant the end of the talks for President Zapatero. The response of the nationalist left did not take long, and Otegui organized a press conference in which he called for a return to the truce and negotiations.

This caused disappointment in the Basque society that was hopeful about this process, and tired of the violence. ETA was ware of this situation and the central government tries to promote this way forward, as highlighted by the then Interior Minister Alfredo Pérez Rubalcaba:

> "*Es un sector minoritaria de la sociedad vasca la que da su apoyo y aliento a ETA. Es ahí donde hay que hacer la batalla política*" (Webster, 2016).

In May 2007, the political talks with Batasuna ended and ETA announced the end of the ceasefire on June 5, 2007. This caused a change in Government and Justice policy, and on October 16, 2009 Arnaldo Otegui was arrested and imprisoned by order of Judge Baltasar Garzón.

A year after ETA committed the last deadly attack, on March 16, 2010 in France, the International Conference for the Resolution of the Basque Conflict was held in San Sebastián at the Aiete Palace in the

Donostia capital. Several international level groups, associations and personalities participated, and the Declaration of Aiete was approved, which contains the roadmap to achieving peace. Three days after this meeting ETA announced the definitive cessation of armed activity following the proposals of these international players. The scenery and consequences are similar to those which ook place after the Estella 1998 Pact, with the difference that in this case there was the presence of personalities from other countries, thus staging the long-awaited internationalization of the conflict to which the aberzale left traditionally aspired. As in the late 90s, a few days later ETA announced a truce, but in this case it was indefinite and definitive.

In the ETA declaration of dissolution in April 2018, the gang recognized the damage caused to the victims but did not ask for forgiveness. For some groups, especially those of the victims and constitutionalist political formations, this statement is not enough, while for other sectors of both Basque and Spanish society, it is enough to begin a new phase and look to the future:

> *"Somos conscientes de que hemos provocado mucho dolor. Queremos mostrar respeto a los muertos, heridos y víctimas que han causado las acciones de ETA, en la medida que han resultado damnificados por el conflicto, lo sentimos de veras"* (Soto, 2019: 198).

Along these same lines, regarding the deaths they declare that "I wish it had never happened", although they emphasize that they did not provoke the war, but it was the State that was at war against the Basque people. In short, they regret the damage but do not repent, and they feel justified in the existence of a conflict and in the right to self-defense. ETA and the abertzale left are not willing to accept the proposal of winners and losers that the Spanish Government raised because they consider it a humiliation that they want to impose on them.

ETA was not looking for indiscriminate killings with multiple deaths, but in such actions the objective was to cause material damage and that is why they gave prior warning of a bomb, to enable the eviction of the area as a shopping center, downtown streets, beaches, etc. Despite this, ETA management at the time of its dissolution acknowledges that "permanece en el fondo de nuestro corazón el daño causado con el atentado de Hipercor" (Soto, 2019: 240).

In the latest ETA newsletter, the Zutabe, which was published in April 2018, the organization recognizes 2,606 actions (attacks) and 774 deaths (murders). The use of these words signifies a lot in terms of the meanings, intent and propaganda that they seek. ETA speaks of ekintza (action in basque) so as not to mention attacks as this term carries negative terrorist connotations. It also speaks of deaths, not murders, and on many occasions refers to "executions" to justify that action. Regarding the number of victims, the Spanish Government puts them at 853.

The ETA leadership says that all of the deaths are painful, but especially those of the people who were not targeted by the group and died as so-called collateral damage, asking their relatives for forgiveness. Regarding using the name "terrorist" in reference to ETA, the organization's management says that those who use that term are calling all Basques who have supported them with social backing terrorists. Terrorist organizations have this support, which is what they rely on to impose their doctrine and fulfill their objectives. When they lose that support, the organization ends up disappearing. They try to impose their ideals by spreading terror to the entire population and imposing fear.

6.- Conclusions

The Basque Country and Spain as a whole have changed substantially in recent decades. ETA emerged in the middle of the dictatorship with the support of many opponents of Francoism, who, although they did not share their methods, understood the frustration of a citizenry subjected to the Franco regime. The arrival of democracy did not bring an end to the murders, and the organization was losing support, although it would still take time for society as a whole to turn its back on ETA.

Authors like Gurutz Jaúregui establish up to six phases in the evolution of citizen support for ETA. From the explicit support during the Franco regime, it goes to the implicit support in the early stages of democracy, to when the Constitution was approved in 1978 until 1982 when the PSOE won the elections. From that year until the murder of Yoyes, he considers it a time of indifference that gives way to implicit rejection until the attacks on the Barracks House in Zaragoza and the Hipercor in Barcelona in 1987. Fear was still present but part of Basque society was already showing their disagreement in small circles but not yet in public. With the appearance of Gesto por la Paz and other pacifist associations in the late 1980s, there was an active rejection, and people were already protesting in the street against the deaths caused by the terrorist attacks. The last and final phase would begin for this author after the kidnapping of Julio Iglesias Zamora in 1993 and the appearance of the blue ribbon and a strong citizen movement against terror.

The current lehendakari of the PNV Íñigo Urkullu, ratified the objective of this approach on the counterinsurgency movement that arose from the people against the terror of ETA in 2016:

> *"El factor más importante ha sido el de la evolución de la sociedad vasca en su conjunto. En la última década, desde 1997 hasta 2011, la sociedad vasca sale a la calle, no justifica*

lo que ETA y la izquierda abertzale siente esa sociedad" (Webster, 2016).

Many citizens feel the influence of the change in public opinion, which causes them to follow the path laid out by the majority. As reflected in this article, there has been a series of events that represented a turning point in popular support for ETA. Basque society was tired of death and violence, and this led to the loss of fear of expressing and openly protesting against the group and its members.

The media have also played a prominent role as it went from a neutral position on these issues to a forcefulness, that in some cases might even seem excessive because they forgot the objectivity that one should have when dealing with the news. Despite this, it should not be forgotten that every approach has a certain subjectivism, and at times it is difficult to stay on the sidelines when one is up against social pressure.

ETA lost social support and this caused a change of course in their approach, definitively abandoning the armed route because they had less and less support from the society they claimed to defend. It should not be forgotten either that this situation was also motivated by police and judicial pressure, which put the group in an almost critical situation with practically no operational capacity to carry out their attacks.

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REVIEWS

RECENSIONE A S. VINCI, *LA GIUSTIZIA PENALE NELLE SENTENZE DELLA CASSAZIONE NAPOLETANA (1809-1861)*, ES, NAPOLI 2019, ISBN 978-88-9391-546-5

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Il volume di Stefano Vinci offre un contributo agli studi sulla storia della giustizia penale del Regno di Napoli attraverso uno studio sulle sentenze dell'organo supremo di legittimità dal 1809 al 1861. I risultati della ricerca scientifica presentata dall'Autore risultano pregevoli per la mole documentaria consultata tra le carte manoscritte conservate nel fondo *Corte di Cassazione di Napoli* (inv. 916) *e Procura generale presso la Corte di Cassazione di Napoli* (Inv. 917) dell'Archivio di Stato di Napoli. A questa indagine si è accompagnata quella sulle principali raccolte di giurisprudenza prodotte nel corso degli anni, tra cui la serie delle decisioni criminali contenute nel *Supplimento alla Collezione delle leggi* edito per gli anni 1818-1819, i *Repertori* curati da Gennaro Paduano, Nicola Comerci e Giuseppe Amorosi per gli anni Venti, le *Quistioni di diritto* di Niccola Nicolini

per gli anni Quaranta, il *Corso completo di diritto penale* e *Le quistioni di diritto* di Santo Roberti per gli anni Cinquanta.

Tutti questi documenti hanno consentito di ricostruire la politica giudiziaria della Cassazione napoletana suddivisa nei seguenti periodi storici: *Gli anni della fondazione* (1809-1812), in cui la Cassazione mosse con vigore i primi passi per affermare la sua autorità rispetto ai malumori provenienti dai forensi del Regno, che avrebbero voluto un ritorno al sistema della doppia conforme; *L'introduzione del codice penale francese nel regno di Murat* (1812-1815), il cui varo determinò un significativo impegno da parte dei giudici supremi per favorire la corretta applicazione del nuovo testo di legge; il *Quinquennio aureo (1815-1820)*, in cui fu rivisitato l'ordinamento giudiziario ed introdotta la Suprema Corte di Giustizia, le cui sentenze ebbero una indiscussa autorità a tal punto da essere pubblicate in una raccolta ufficiale che, di fatto, le parificava ad atti di governo nell'obiettivo di garantire l'uniformità della giurisprudenza; il *Nonimestre costituzionale (1820-1821)*, il cui fermento parlamentare militante verso il rafforzamento dei poteri dell'organo supremo – ponendolo al di sopra di giudici, ministri e consiglieri di Stato, in considerazione delle attribuzioni derivanti dalla Costituzione spagnola – ebbe l'effetto di portare al vaglio di legittimità casi per responsabilità dei magistrati, consentiti dalla legge, come nell'ipotesi di "presa a parte" per denegata giustizia; *Gli anni Venti (1821-1830)*, in cui l'attività della Suprema corte subì un significativo decadimento qualitativo del suo organico, a seguito dello scrutinio dei magistrati operato da Ferdinando II e da un duro attacco mosso in seno alla Consulta generale; *Gli anni Trenta (1831-1847)*, nei quali, grazie al programma di moralizzazione dell'ordine giudiziario, l'organo supremo si arricchì di magistrati di buon livello, che favorirono una graduale riconquista della perduta autorità nei confronti delle corti di merito, ingaggiando una severa battaglia rivolta a censurare l'irregolare redazione delle decisioni. Ed infine, l'ultimo periodo è stato individuato nel *Decennio intercorrente tra i moti del 1848 e la fine del Regno (1848-1861)*, in cui la Suprema corte

svolse un importante ruolo di difesa della legge anche a baluardo dello statuto costituzionale, intervenendo in maniera incisiva su quei vizi sostanziali e procedurali perpetrati dai tribunali inferiori al fine di garantire l'uniformità della giurisprudenza.

In questo complesso quadro così delineato, Stefano Vinci è riuscito a dare una lettura originale ed innovativa della storia della giustizia del Regno di Napoli attraverso l'ottica della casistica giudiziaria. Si tratta di una disamina generale dell'evoluzione del diritto penale, degli eccessi di arbitrio ad opera dalle corti di merito, delle difficoltà interpretative, degli orientamenti ricorrenti, dei contrasti giurisprudenziali e dei dubbi di legge portati al vaglio del governo, che consente anche di verificare gli spazi di interpretazione della legge guadagnati dall'organo supremo e l'autorità del precedente giudiziario rispetto alle decisioni dei tribunali inferiori.

LA LECTURA Y EL HECHO: REFLEXIONES SOBRE *SUEÑOS EN MOVIMIENTO. DERECHO HISTORIA Y ESTADO EN LA LITERATURA Y EL CINE (1945-1969)*[1]

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A estas alturas, que el catedrático de Historia del Derecho y las Instituciones Enrique San Miguel publique un libro casi cada año para reflexionar sobre el impacto cultural de los modelos jurídicos e instucionales es uno de esos acontecimientos que no pueden ser noticia, puesto que han dejado de ser un suceso inesperado, pero que, sin embargo, alcanzan tal condición por la relevancia del evento, que, en el caso que ocupa a estas líneas, es un paseo más por el camino, apenas desbrozado, que recorre la línea que conecta la cultura, en su sentido más amplio y pleno, con las formas jurídicas e institucionales. Esto es, la creación personal -ya de un individuo, ya de una suma de los mismos, como es el cine- con la creación social -el Estado, las leyes, las instituciones-.

Está condenado al fracaso cualquier intento de enumerar con pretensión de totalidad el conjunto de las monografías y artículos que el profesor San Miguel ha dedicado al laberinto de espejos que forman

[1] Editorial Dykinson, Madrid, 2019.

la cultura y lo histórico-jurídico[2], y que han supuesto poner el pie en unas murallas para que, como las tropas del quinto Enrique en Harfleur, otros investigadores se lancen a la brecha[3]. Así pues, la primera nota que debe fijarse al hablar de este libro, al igual que de otras monografías

[2] De forma solo tentativa, y con la exclusiva guía de las preferencias personales, pueden mencionarse entre las monografías *La lectora de Fontevraud. Derecho e Historia en el cine. La Edad Media, El golpe de estado de Júpiter contra Saturno. Derecho y poder en el cine; La impaciencia del bien. La construcción europea en el derecho, la política y la literatura del siglo XX* o *El solo ofuscado: Derecho e Historia en el cine y la literatura. La Edad Moderna.* Entre los artículos y capítulos de libro, "¿Y qué importa si un exceso de amor los aturdió hasta que murieran?": La jurisdicción especial de Michael Collins", en VV.AA., *Análisis sobre jurisdicciones especiales*. Valladolid, 2017; "Un Estado de cine: Notas sobre el Derecho, las instituciones históricas de España y la inocencia según Hollywood", en VV.AA., De las Navas de Tolosa a la Constitución de Cádiz. Madrid, 2012; o "Del "Estado de poder" a la "inocencia" del príncipe: reflexiones sobre la Razón de Estado en la Monarquía Hispánica", en VV.AA., *Reflexiones sobre poder guerra y religión en la historia de España*. Madrid, 2011.

[3] El ejemplo más claro, en la Historia del Derecho, es Erika Prado Rubio, de cuya reciente, pero abundante producción científica pueden mencionarse, con la relación a este tema: *Pilar de llamas. Análisis histórico-jurídico de la Inquisición en la ficción cinematográfica*. Valladolid, 2020; "The inquisitorial torment and audiovisual representation of judicial torture", *IJOLHI*, nº 5, de 2021; "Inquisitorial process in Arturo Ripstein's film: "El Santo Oficio"", en *Ihering. Cuadernos de Ciencias Jurídicas y Sociales*, nº 3, 2020; ""Here is the Story of Satán" The inquisitorial process through cinematographic fiction", en *IJOLHI*, nº 4, 2020, "An Approach to the Inquisition Representation in Audio-visual Fiction" en *IJOLHI*, nº 3, 2019; "Estereotipos referidos a la persecución inquisitorial de la brujería", en *Aequitas*, nº13, 2019; "Proceso inquisitorial en *El Santo Oficio* de Arturo Ripstein" en *Glossae*, nº 16, 2019; "¡Sigue haciendo el mal!" Intolerancia y proceso inquisitorial en "Las páginas del libro de Satán" en SAN MIGUEL, E., *Ajedrez en el Café Museum*. Madrid, 2020; "Aproximación a la representación de las inquisiciones en la ficción audiovisual", en VV.AA., *Análisis sobre jurisdicciones especiales*. Valladolid, 2017;

de su autor, es la relevancia que supone el adentrarse con cada vez más profundidad en un campo de estudio interdisciplinar que, desde la perspectiva de la disciplina del autor, muy pocos han abordado.

Señalaba Michelangelo Antonioni, como oportunamente cita el profesor San Miguel en la introducción, que "un argumento provenga de una novela, de un periódico, de un episodio verdadero o inventado, no cambia nada las cosas. Una lectura es un hecho. Un hecho, cuando se evoca, es una lectura"[4]. La ficción construye la realidad de igual forma a lo que lo hace la realidad misma. En ocasiones la vida imite al arte -pensemos en los insurrectos de Varsovia huyendo por las alcantarillas como lo hacía Jean Valjean en el París revolucionario de *Los Miserables*-. Pero, con frecuencia, obras de ficción son la sopa primigenia en la que oclosionan proceso históricos -en cuanto que reales-. Véase un ejemplo simple: ¿Qué es más probable que inspire a un nacionalista escocés del siglo XXI, una realista crónica medieval de la batalla de Bannockburn o el *Braveheart* de Mel Gibson? No hace falta que aventuremos una opinión, tenemos hechos que brindan una respuesta demostrable: ¿qué inspiraba con más intensidad a los nacionalistas escoceses de finales del siglo XIX, las crónicas medievales o el *Rob Roy* de Walter Scott?

La ficción no es realidad, pero la ficción construye la realidad. Por tanto, la ficción es una más entre las muchas fuerzas que hacen girar las ruedas de la historia. Y es, y debe ser, en consecuencia, objeto de estudio por los historiadores. La comprensión de esta idea en el contexto de la disciplina de Historia del Derecho se debe al profesor San Miguel, y por eso si cada uno de sus libros sobre la materia son excelentes considerados individualmente, tomados en su conjunto en su conjunto, logran trascender la noción de monografía para formar un *corpus* de conocimiento mucho más amplio.

[4] SAN MIGUEL PÉREZ, Sueños en movimiento, p. 20.

Estructuralmente, el libro tiene dos partes claramente diferenciadas. En la primera de ellas, el autor reflexiona ampliamente sobre la concepción jurídica e institucional del Estado de Derecho tras la Segunda Guerra Mundial, afirmando que se trata de

> "Una solución política avanzada, más inteligente, más generosa, más compasiva y más sensible, capaz de integrar los derechos económicos y sociales, de abrirse a la movilidad social de acuerdo con la aplicación de los principios de igualdad, mérito y capacidad, y de potenciar una amplísima y exigente clase media, dotada de un acceso a la educación y a la asistencia sanitaria entendidos como derechos universales, y no meros servicios, y entendiendo el ejercicio y la efectiva tutela judicial de los derechos fundamentales como la clave de la estabilidad política"[5].

Esta primera parte de la obra está compuesta por diez capítulos que abarcan, casi con precisión matemática, la primera parte del libro. La segunda está formada por una selección de películas de muy diverso género y con primacía de la filmografía europea sobre la de la orilla occidental del Atlántico. Se trata de cincuenta y dos obras escogidas y analizadas con criterio impecable, tanto desde el punto de vista cinéfilo como desde el punto de vista de su relevancia para la materia sobre la que la monografía reflexiona: la relación entre la cultura y la construcción de un modelo jurídico-institucional en un tiempo concreto, en este caso, el Estado de Derecho en el mundo surgido de los escombros de la Segunda Guerra Mundial, por los que transitan los protagonistas de algunas de las cintas seleccionadas.

Como en toda selección de este tipo, siempre hay margen para la discrepancia y para poner en duda si una obra ausente hubiera sido mejor ejemplo un título ausente, pero la coherencia y solidez del criterio

[5] SAN MIGUEL, *Sueños en movimiento*, p. 17.

del autor hace que no se pueda negar que son todas las que están, aunque sea imposible que estén todas las que son.

Sueños en movimiento es un engranaje más de una realidad que sigue avanzando, la de la obra académica, científica y cultural del profesor San Miguel, pues su trabajo tiene esa triple vertiente. Cada nuevo engranaje de esa máquina destinada a funcionar como un todo es una pieza de orfebrería de enorme valor en sí misma, que contribuye a borrar los artificiosos, y a veces artificiales límites entre lo académico y lo cultural, puesto que *Sueños en movimiento* es, las monografías previas, tanto una reflexión cultural de hondo calado como una intensa aportación de conocimiento científico a su disciplina[6]. Un libro que avanza y que, al leerlo, impele a volver atrás, a revisionar las películas que menciona y contemplarlas con ojos nuevos. Y, a fin de cuentas, ¿escribir sobre historia puede, acaso, ser otra cosa que?

[6] Citado en SAN MIGUEL, E., "El cine sobre Berlín: la vida de nosotros".

INQUISICIÓN Y CINE. NOTA SOBRE *PILAR DE LLAMAS. ANÁLISIS HISTÓRICO-JURÍDICO DE LA INQUISICIÓN EN LA FICCIÓN CINEMATOGRÁFICA* DE ERIKA PRADO RUBIO, VALLADOLID, 2020

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Una de las tareas más gratas que he abordado durante el extraño año 2020 ha sido leer *Pilar de llamas. Análisis histórico-jurídico de la inquisición en la ficción cinematográfica.* La monografía elaborada por la profesora Erika Prado Rubio es su primer trabajo de gran extensión en autoría única, aunque también es la culminación de una larga investigación desarrollada por la autora sobre el imaginario cinematográfico de la institución de la Inquisición. Así, el número de trabajos que Erika Prado ha escrito sobre esta cuestión, previo a *Pilar de llamas*, es enorme y han sido publicados en múltiples soportes, revistas científicas de importante peso académico - indexadas en Scopus- revistas canónicas sobre la materia, como la Revista de la Inquisición, intolerancia y derechos humanos, capítulos de libro en publicaciones colectivas, manuales, textos divulgativos...[1] Por eso, el

[1] Ejemplo de lo anterior son "Estereotipos referidos a la persecución inquisitorial de la brujería", en *Aequitas, Estudios sobre Historia*, Derecho e Instituciones, nº13, 2019. "Proceso inquisitorial en El Santo Oficio de Arturo

texto que aquí se recensiona es deudor de un intenso trabajo previo desarrollado en los últimos años.

Tras un soberbio prólogo, la monografía está divida en tres partes, entre las que se distribuyen una decena de capítulos. La primera se ocupa de introducir la cuestión de estudio, las hipótesis de trabajo, la metodología y el estado de la cuestión. Exhibe aquí, la autora, una cuidada metodología perfectamente adecuada para el estudio de materias de carácter histórico-jurídico, cuyo primer paso se basa en la lectura y análisis de un buen número de obras generales y clásicas sobre la Inquisición. Autores como Llorente, García Rodrigo, Lea, Ángel Alcalá o Antonio Escudero no faltan, tampoco obras que, aunque no tratan estrictamente sobre la inquisición española, son imprescindibles para su comprensión y contextualización; como son las relativas a la inquisición medieval[2]. Además, la profesora Prado ha consultado con profusión monografías y artículos específicos sobre diversas instituciones, como la Suprema o el inquisidor general; sobre las distintas partes del proceso judicial inquisitorial; sobre delitos concretos como brujería, bigamia, solicitación, muy especialmente el primero, por su sobrerrepresentación en la ficción cinematográfica.

Ripstein" en *Glossae*, nº 16, 2019; "El tormento inquisitorial y la representación audiovisual de la tortura judicial", en *Revista de la Inquisición (Intolerancia y Derechos Humanos)*, nº 23, 2019; "¡Sigue haciendo el mal!" Intolerancia y proceso inquisitorial en "Las páginas del libro de Satán" en SAN MIGUEL, E., *Ajedrez en el Café Museum*, Madrid, 2020; "Hispania ludens: derecho e instituciones en la España de entreguerras a través de La piel de toro" en SAN MIGUEL, E., *Los cañones de Versalles,* FUE, 2019. "La literatura romántica del siglo XIX como fuente de inspiración en la representación cinematográfica de los perfiles jurídicos del Santo Oficio" en SAN MIGUEL, E., *En la Europa liberal: el poder y el infinito*, FUE, 2019.

[2] Numerosos estudios específicos abordan diversos aspectos de ella. Es el caso de MARTÍNEZ PEÑAS, L., "La convergencia entre brujería y herejía y su influencia en la actuación de la inquisición medieval", *Revista de la Inquisición,* 2019.

A medida que se avanza en la lectura se evidencia el conocimiento que la autora tiene sobre las fuentes para el estudio de una institución sobre la que existe una abrumadora cantidad de literatura científica. La grandeza del trabajo hecho en *Pilar de llamas* sin embargo, se encuentra en abordar todo ese acervo científico desde una perspectiva novedosa. El análisis científico sobre el modo en que la ficción cinematográfica ha plasmado la institución de la Inquisición. En este sentido, no se puede obviar que la formación en comunicación audiovisual de la autora enriquece la perspectiva de estudio con una visión pluridisciplinar, a la vez que suaviza los elementos más arduos del estudio, como son los estrictamente jurídicos o procesales.

La segunda parte, que abarca del capítulo cuarto al sexto, se centra en la percepción que el alumnado universitario - no únicamente español- tiene de la Inquisición. Para ello se ha realizado un estudio empírico basado en datos estadísticos recogidos por la autora que arroja resultados tales como que el conocimiento que sobre la Inquisición tienen los estudiantes universitarios es exiguo. A pesar de ello, los mismos datos señalan una preferencia a favor de la utilización de medios cinematográficos o audiovisuales para el estudio de la cuestión. En ese sentido, el estudio refleja que ejercicios realizados tiempo después del visionado de materiales audiovisuales, seleccionados por Erika Prado, confirmaron la efectividad del aprendizaje utilizando dichos medios. A las claras, los resultados obtenidos promueven la utilización de contenido cinematográfico y por eso son imprescindibles estudios como el realizado por la profesora Prado Rubio.

La última parte del libro está compuesta por un amplio análisis histórico-jurídico. Es en esta parte donde se pone de manifiesto el resultado de la investigación, es decir, aquí se analiza el rigor histórico con el que se aborda el fenómeno histórico-jurídico inquisitorial en la ficción audiovisual. Para conocer el marco cinematográfico escogido, la autora presenta un listado alfabético de las más de cincuenta obras visionadas, entre las que hay una enorme variedad de géneros, épocas, temas, nacionalidades, etc. Esas obras son las utilizadas para verificar

el rigor y precisión en el tratamiento de la Inquisición y su proyección fiel o distorsionada.

Destaca del análisis sobre la veracidad de lo mostrado en la ficción, en primer lugar, la confusión existente entre las diversas instituciones que se encargaron de perseguir la herejía, englobándose todas ellas bajo el paraguas Inquisición. También la transmisión de la idea de que la persecución de la herejía fue mayor, por parte de países católicos que protestantes[3]. Tres comportamientos aparecen sobrerrepresentados frente al resto: herejía, brujería y persecución de minorías religiosas, especialmente judeoconversos y protestantes. De forma minoritaria, señala la autora, tuvieron cabida otros como la censura. Respecto a los reos de la Inquisición también en el cine hay una presencia excesiva de mujeres, pues la brujería, delito principal en lo que a ficción inquisitorial se refiere, se hace recaer fundamentalmente en ellas. Ninguna de las cuestiones tiene apoyatura en las cifras reales, pues la Inquisición española mantuvo un saludable escepticismo respecto a la brujería y, de forma global, el 75% de las condenas del tribunal recayeron sobre varones.

Capítulo aparte merece el proceso, donde la realidad tampoco es la tónica imperante[4]. En este sentido es curiosa y valiosa la analogía que ofrece la autora sobre el modo en que se representan los arrestos de los acusados por la Inquisición asemejándolos a las prácticas de otras instituciones policiales vistas en el cine. Es el tormento la fase del proceso más veces reproducido, pero la ausencia de fidelidad en cuanto

[3] Al respecto puede verse MARTÍNEZ PEÑAS, L., "Las dificultades en la persecución de la herejía en Flandes: el caso de Brujas", *Revista de la Inquisición,* 2014.

[4] Al respecto del proceso han de destacarse los recientes trabajos de MARTÍNEZ PEÑAS, L., "Particularidades procesales de los principales delitos inquisitoriales "con sabor a herejía", *Revista Aequitas. Estudios sobre Historia, Derecho e Instituciones*, 2020. "Aproximación al estudio de la denuncia o delación como inicio del proceso inquisitorial", 2015.

a su uso y la creatividad de los instrumentos de tortura utilizados son destacados en el estudio. Otras fases, como el auto de fe, también se visualizan con frecuencia, no así otras formas de lectura de la sentencia. Tampoco tienen correspondencia en la ficción la existencia de personal subalterno de la inquisición, como calificadores, fiscales, abogados, notarios. La explicación la haya, Erika Prado Rubio, en la voluntad de mostrar que el proceso inquisitorial dependía en exceso de la discrecionalidad y el poder del inquisidor- cuya imagen en la mayoría de películas adolece de rasgos positivos- así como de omitir los elementos procesales favorables a la defensa.

Por último, un interesante apartado estudia el peso de la literatura en los estereotipos cinematográficos antedichos puesto que un buen número de películas sobre la Inquisición se basan en obras literarias[5].

Las conclusiones, parte fundamental del trabajo, son valiosas por su claridad expositiva, su brevedad y por la magnífica síntesis del resultado del análisis que la autora ha desarrollado en los capítulos precedentes. Son un buen punto final que perfeccionan el estudio previo. Para acabar, no puedo dejar de elogiar la escritura fluida, sin adornos, y con afán explicativo de la obra. Un trabajo así solo ha podido componerlo una profesora vocacional e investigadora de elevada madurez intelectual.

[5] Otros profesores de la URJC han investigado sobre la utilización de cinematografía y literatura en la enseñanza superior. Veáse por ejemplo SAN MIGUEL PÉREZ, E*., Sueños en movimiento. Derecho, Historia y Estado en la literatura y el cine (1945-1969)*, Dykinson, 2019. *La lectora de Fontevraud. Derecho e Historia en el Cine. La Edad Media.* Dykinson, 2013. MARTÍNEZ PEÑAS, L. "En el venturoso reino de Inglaterra. Derecho e instituciones en Ivanhoe". SAN MIGUEL PÉREZ, E., *En la Europa liberal.* FUE, 2018.