

# SOVEREIGNTY IN BRITISH LEGAL DOCTRINE\*

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I. INTRODUCTION.- II. FROM THE LOWER MIDDLE AGES TO THE REVOLUTION OF 1688.- 2.1. Bracton and Fortescue.- 2.2. The formulation of parliamentary sovereignty under the Tudors.- 2.3. Absolutism and Constitutionalism under the Stuarts.- 2.4. The Rule of Law and Parliamentary Sovereignty Parliament.- III. SOVEREIGNTY IN JOHN LOCKE'S "SECOND TREATISE ON CIVIL GOVERNMENT".- 3.1. Government by the consent of the governed.- 3.2. The separation of powers.- 3.3. The supremacy and limits of the legislature.- 3.4. The sovereignty of the people.- IV. FROM HUME TO PALEY.- 4.1. David Hume, Locke's critic: Parliament is sovereign, not the people.- 4.2. William Blackstone's ambivalent attitude.- V. FROM BENTHAM TO DICEY.- 5.1. Jeremy Bentham and the sovereignty of the electoral body.- 5.2. John Austin and the House of Commons as trustee of the electorate.- 5.3. Dicey and the distinction between juridical and political sovereignty

## I. INTRODUCTION

By titling this article 'Sovereignty in British Legal Doctrine' rather than 'The British Doctrine of Sovereignty' I wanted to underline that I am not only going to examine the doctrine of Parliamentary Sovereignty, genuinely British, but also the sovereignty of the people, which is common throughout western juridical and political theory. In reality, it is the juxtaposition between both doctrines of sovereignty that the following pages revolve around, which also address the link between Parliament and Judges or, expressed in a different manner, between the law and its judicial control. For that purpose we are going to analyse no less than six centuries of doctrinal thought, divided into four stages: the first of them extends from the Low Middle Ages to the Revolution of 1688; the second is based on one single author, John Locke, and one single book, "The Second Treatise on Civil Government", the importance of which for the subject matter that is dealt with here was decisive; the third concerns the work of three 18th century authors: Hume, Blackstone and Paley; and, finally, the fourth and last starts with an analysis of Bentham's doctrine, an author sitting between the 18th and 19th centuries, it continues with Austin and ends with Dicey.

British thought on sovereignty was not always linked to the current juridical order. Sometimes it took place on the periphery of that order or even against it, as it happened with Locke and specially with Bentham. In any case what we are interested in is not to examine the way in which the British Juridical order went about regulating sovereignty, but only how the doctrine understood this faculty, to whom it has been attributed and under what conditions. The references to the juridical order or to the institutions that this has created will be, then, those essential to understand the doctrinal thinking regarding sovereignty.

## II. FROM THE LOWER MIDDLE AGES TO THE REVOLUTION OF 1688

### 2.1. Bracton and Fortescue

The British Doctrine of Parliamentary Sovereignty surges towards the end of the 16th century, when it is attributed to Parliament, and not separately to the Monarch - as it was happening in Western Europe - the supreme or unlimited capacity to approve laws, which is the principal characteristic of sovereignty as it was highlighted - as we shall see later - by the creator of that concept, Jean Bodin.

That being so, it is then no less true that the doctrine of Parliamentary Sovereignty has clear medieval origins, as it was in the Middle Ages that the supremacy of this institution was affirmed in the juridical creation, although the unlimited character of this creation was not totally sustained.

The doctrine of the supremacy of Parliament is, at the same time, intimately linked to the medieval idea of the supremacy of the law - the rule of law - by virtue of which all public powers, including the King, must submit to the law, although at the time what was public and what was private was not clearly distinguished.

The submission of the King to the law was proclaimed by Henry de Bracton in *De Legibus et Consuetudinibus Angliae*, possibly written between 1272 and 1277[1] and that McIlwain considers the most important book on Law and Constitutionalism in England or any other European Nation[2].

In this book Bracton established a clear separation between the *gubernaculum* and the *jurisdictio*, that is, between the sphere of power or control - in the hands of the Monarch - and the sphere of the administration of justice, of which the Monarch was a part but to which he was, at the same time, subjected[3] Bracton recognises on the King of England an absolute freedom to approve and modify the juridical rules required to execute the *Gubernaculum* that received the name of *leges, constitutiones y assisae*, but in exchange he limited the jurisdiction of the King in what concerned the *lex terrae* that could only be approved (or simply confirmed) and repealed by the King when he could count with the consent of the barons of the kingdom assembled in the *Curia Regis*, an institution that in addition to exercising legislative and executive functions acted as the kingdom's Supreme Justice Tribunal[4]

This concept of law, negotiated between the King and his *Curia* included, in a very small way, written rules. This happened, for example, with the *Magna Carta* in 1215[5] the most relevant juridical document of the Lower English Middle Ages and with which, as Maitland recalls<sup>5</sup>, English Statute Law commences. It was a feudal contract by virtue of which King John committed himself to respect the privileges of 'freemen', that is, of noblemen and prelates, compelling himself to obtain their consent to the imposition of taxes, to respect their property and to faithfully comply with a body of procedural guarantees[6]

But the law emanating from the king and his barons was made up, primarily of unwritten customs, some very ancient, that the king and his Curia simply 'confirmed' rather than 'approved'. This is the customary law, or common law, that Bracton primarily refers to when he points out in one of the most important and best known paragraphs of his book, that it is the law that makes the king and not the other way around: *Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex faacit regem*[7]

In arguing the subordination of the king to the law - understood above all as custom - Bracton formulated a principle common to the whole of Europe that stood during the whole of the Middle Ages, despite the reception of Roman Law in continental Europe from the 12th century, a reception much less relevant in England than in the Continent. As Passerin D'Entreves wrote, "Contrary to the roman thesis that the laws and the Law are the creation of a legislature will that act consciously and deliberately, whether as the will of a particular ruler or of a specific community, medieval doctrine starts from a conception which is the exact antithesis of that one. The Law does not owe its existence to a willed act of creation but instead is conceived as an aspect of collective life, as custom; the legislative act is not a manifestation of a normative will, but a simple written record of what is already lived as Law in the use and customs of its men"[8]

Nevertheless it would be as erroneous to reduce medieval law - whether English or Continental - to customary law as to reduce our current law to written law. Not only because the English king, as it was previously mentioned, could dictate written rules, but also because this was the same character shared by some laws approved by the king with the acquiescence of his Curia, Surely not that many, but as important as the Magna Carta. From the laws approved by the king and his Curia would be born the so-called statute law and the common law.

Despite that, it is necessary to agree with Passerin D'Entreves that in England as much as in Continental Europe, the prevalent law in the Middle Ages was customary law, submission to which the king was required to swear before acceding to the throne. The Coronation Oath was the name given in England to this solemn swearing. The identification of law with custom instead of with written law becomes, in addition, of particular relevance to understand the role of the monarch as judge more than as legislator, that is, as titular of a function closer to the iurisdiction than to legislatio, to that of discoverer and enforcer of old law than to that of creator of new law[9]

There is no doubt that 'the rule of law' was perfected in England with the birth of Parliament, often dated to 1265 - three years before Bracton's death - when Simon of Monfort called the Curis Regis in an unusual way, requiring the presence of the representatives of the cities, which until then were not members of the Curia. During the second half of the 14th century Parliament was divided into two chambers that deliberated separately; that of the Lords, where prelates and noblemen sat, and that of the Commons, in which the representatives of the cities met. Also during that century and following a slow institutional differentiation initiated in the times of the Curis Regis, the King's Council or Concilium Regis, managed to extricate itself from the Parliament. That would

come to have great significance during the rule of the Tudors and the Stuarts, as we shall see later[10]

In two works written between 1470 and 1476, *De Laudibus Legum Angliae* and *The Governance of England* - notably influenced by the ideas that St Thomas Aquinas developed in "*De Regimine Principum*", one of great masterpieces of medieval political thought - Sir John Fortescue argued that while England was a *dominium politicum regale*, France, its secular enemy, was a simple *dominium regale*. What did the most important English political thinker of the 15th century wanted to express with that distinction? Simply that in England, contrary to France, the Monarch was subject to the law that he himself approved with the two Chambers of Parliament, the consent of which was also required to levy taxes[11] McIlwain recalls in this respect that for Fortescue the terms *politicum* and *regale* had a parallel meaning with those of *gubernaculum* and *jurisdiction* as previously used by Bracton[12] In this way Fortescue established an inextricable link between 'the rule of law' and the legislative supremacy of Parliament, over which the so-called dual-estate monarchy was based on the binomial King/Kingdom, the latter represented by the House of Lords and the Commons.

Certainly the dual-estate monarchy had its equivalent in other countries of Western Europe, such as France and Spain. In this latter country the Cortes of Castille and León were even dated one century before the English Parliament[13] However, while in 16th and 17th century France and Spain sovereignty was imputed on the King, in England it was attributed to Parliament, that is, to the sum or aggregate of the King, the Lords and the Commons. That difference in the doctrinal foundation of the Monarchy had its correlation in the institutional sphere: while in Spain the Cortes were seldom called to meet during these centuries and in France the General Estates no longer met after 16[14] the Lords and the Commons maintained their political presence during this period and despite the undoubted strengthening of the regal power during the times of the Tudors and the Stuarts.

## **2.2. The formulation of parliamentary sovereignty under the Tudors**

With the accession of the Tudors to the throne in 1485, a centralising process of the Monarchy developed in England similar to that which was taking place in Spain, Portugal and France. Just like in those nations, the main impetus of this process was the Monarch, strengthened to the detriment of the kingdom, that is, of the powers of the two Chambers that represented the kingdom: the Lords and the Commons. The Monarch intended and partly achieved to impose his law, then under the name of Ordinances and Proclamations - not only side by side and even in opposition to the statutes - that is, of the laws approved by parliament and sanctioned by the Monarch through 'royal assent' - but also against the common law. This last being a law that had itself acted as centralising element of the kingdom by superimposing itself on mere local juridical custom.

In order to carry out the political aims of the State, the King used what during the reign of Edward III, the first Tudor King, came to be known as the Privy Council. The King appointed at will the members of this Council, heir of the Concilium Regis and predecessor of Cabinet. Apart from assisting the Monarch and administering justice, the Privy Council made law in the name of the King, issuing Ordinances and Proclamations, the content of which varied as it covered all branches of the Administration, and eventually forming the body of administrative law called *ante litteram*. The Statute of Proclamations, approved in 1539, during the reign of Henry VIII, considerably widened the scope of these Proclamations that ranked along those laws approved by Parliament. This Statute was, nevertheless, abolished in 1547, during the first year of the reign of Edward VI<sup>14</sup>. In reality it was not easy to determine the juridical nature of the 'Proclamations' or their originating source within the system. It was generally recognised that they were inferior to the laws approved by Parliament and the common law, but some writers maintained that the King could suspend or even dispense with the application of laws, at least in some circumstances, as we shall see later.

One of the committees of the Privy Council was the feared Star Chamber that advised the King and exercised judicial functions. Its resolutions also sought to impose themselves on the judges of the common law. In addition to the Star Chamber - that would not be abolished until 1641 - other judicial organs depended from the Privy Council that acted in accordance with Roman Law, such as the Court of Request, the Courts of Chancery and Admiralty, and the High Commission, an ecclesiastical tribunal. All of them diminished the status of common law courts and impeded their expansion [15]

It must also be taken into account that from Henry VIII, English Monarchs - in addition to being Kings of England - became the head of the new Anglican Church, the break of which from the Roman Catholic Church was the last act in a long sequence of religious conflicts between the Crown and the Papacy that had their genesis with the Lutheran reform[16] However, it can not be forgotten that it was Parliament that legalised the break of the Church of England from Rome and named Henry VIII as its head, against the advice of Thomas Moore and executed for this reason in 1535. In this manner the English Parliament freed itself from canon law and proclaimed its sovereignty, not just its mere legislative supremacy.

In reality and despite the considerable strengthening of regal power during the 16th century, the sovereignty of Parliament was considered as the main equivalent of an English Constitution, perhaps the most substantial of all. This is what was argued by Sir Thomas Smith in *De Republica Anglorum*, a clear and concise work published in 1583 - six years after the death of its author - that includes the most important description of the English system of government during Tudor times. For Smith, Parliament - made up of the King and the two Chambers - represented and had the power of the whole of the kingdom, that of the mind and the body. In the Parliament, added Smith - advancing the modern individualistic idea of parliamentary representation - all Englishmen were present, either personally or through representation, so that the consent of Parliament was equivalent to the consent of each man[17]

Parliament, understood in that way, was the repository of the highest and most absolute power of the English Kingdom to which everyone was linked, from the King to the most humble of subjects. Parliament - as Smith concluded - abrogated old laws, made new ones, gave rulings for things past and those yet to come, changed the rights and properties of men, established forms of religion, altered weights and measures, provided for rules of succession to the Crown, defined doubtful rights in the absence of law, granted subsidies, sizes, rates and taxes; granted pardons and absolutions, rehabilitated in blood and name, and as supreme tribunal condemned and absolved[18]

Richard Hooker, in the eighth book of his most important work *Of the Lawes of Ecclesiastical Politie* - probably written in the last decade of the 16th century - insisted that it was in the English Parliament that the marrow of the government within this kingdom could be found. He understood that government was a "corporation that represented the whole kingdom" since it was made up of "the king and all his subjects", and that these, as it had been held by Smith, were understood to be present "either in person or through representatives"[19] For Hooker the power of making laws, the principal feature of "political power" - as Bodin had argued - "must belong to the whole and not to a part of the body politic", that is, to Parliament and not to the King or any of the Chambers individually[20]

It is necessary to take into account that for Smith as well as for Hooker - and even earlier for Fortescue - the sovereignty of Parliament was inseparable from the doctrine of the "mixed State" that Plato and Aristotle had expounded in antiquity and that Thomas Aquinas had collected in *"De Regimine Principum"*[21] However, these authors identified the State or mixed government with the subordination of the King to Parliament as an entity and, accordingly, with a government limited by law, that is, with the rule of law[22] On the other hand, early during the 17th century - as we shall see later - the idea of the mixed State was identified above all with the joining of the Monarch, the House of Lords and the House of Commons, in which the three 'proper' forms of Government as described by Plato and Aristotle were joined: the monarchy, the aristocracy and democracy. A union comparable only to that which had characterised the Constitution of the Roman Republic, praised by Polibio in Volume VI of his *"History of Rome"* and by Cicero in the first two books of *"De re publica"*.

In any case, what we are interested in highlighting is that the defence of the sovereignty of Parliament clearly distinguished 16th century English doctrine from that of the continent, in which the public power was imputed exclusively to the Monarch, who started to be considered not so much an entity subject to law but as its creator. This absolutist thesis was greatly assisted by some of Roman Law precedents, such as *princeps legibus solutus est; quod principi placuit. Legis habet vigorem; rex est animata lex; or Summa Sedes a nemine iudicatur* from Cannon Law.

It was on the basis of these principles that Jean Bodin, in his 1576 work *Les Six Livres de la Republique*, expressed the concept of sovereignty, the most

characteristic element of which was the supreme creation of law[23] Bodin, as it is well known, attributed sovereignty to the Monarch and criticised without any reservations, as Machiavello had done before him and Hobbes would do later, the theory of the 'mixed state', as the characteristic element of sovereign power was the unity and indivisibility of power[24] But in England, where the influence of Roman Law was weaker than in the Continent (unlike in Scotland)[25] the supreme power of the State continued being imputed to Parliament.

It is not - and let us be clear about this - that the concept of sovereignty was negated, that would have been equivalent to negating the reality of the modern State itself, but that instead of imputing it on the Monarch - as in the continent - it was chosen to impute it to a complex entity: the King with his Parliament[26]

### **2.3. Absolutism and Constitutionalism under the Stuarts**

Following the example of the Bourbons in France and the Spanish Hapsburgs, the Stuarts - even more than the Tudors - purported to end the institutional and regulatory limits of the Monarchy. To be more precise, if the Tudors purported to implement a de facto suppression of the old English Constitution, the Stuarts tried to do it de jure, impugning some of its basic principles. James I, the first king of this dynasty, defended the sovereignty of the Monarch and its divine origins in his essay *The True Law of Free Monarchies*, in which he held some premises completely foreign to English constitutional tradition. "The Monarchy - this intellectual king lectured Parliament on 21 March 1610 - is the most sublime thing on earth, for the kings are not only God's lieutenants on earth, sitting on God's throne, but even God calls the kings gods"[27]

Supporting the pretensions of James I, Francis Bacon argued that the authority of the Monarch was superior to the other two parts that made up Parliament - the Lords and the Commons - and that, consequently, the Monarch could dispense with complying with the laws given by Parliament in agreement with the king and also suspend their execution and even dictate Ordinances over them. Bacon, confronting the other institutional antagonist of absolutist rule, added that it wasn't the role of judges to make law, as held by Judge Coke, but only to interpret it: *ius dicere* and not *ius dare*[28]

Both the Commons and the Judges responded to this absolutist thesis. The first held that the supreme power of the State was not only in the hands of the King but in Parliament as a whole. In 1628, and later in 1641 and in 1642 - John A. Pollock wrote in this respect - the aim of the House of Commons was not to limit the powers of the sovereign, but to demand that the sovereign himself re-established those powers in legal terms. The King was a true King - or so parliamentarians thought - when he worked in Parliament with total respect for the law"[29]

For their part common law judges defended the supremacy of customary law, not only over the law of regal prerogative but even over the Statutes approved by Parliament, as stated by Chief Justice Sir Edward Coke in 1610 when he argued in *Bonham* that " it happens from our writings that in many cases the common law will control the laws of Parliament, and sometimes it will declare

them totally void, for when a Act of the Parliament is contrary to the law and reason, or incompatible, or impossible to execute, the common law will control it and proceed to declare its nullity"[30] In this way Coke declared himself in favour of judicial control of Parliamentary legislation, the need for which would be faced some years later in America with the aim of ensuring the supremacy of the laws approved by the British Parliament over the rules of colonial origin, which meant an undoubted precedent of the concept of judicial review that would be established in the United States from the Constitution of 1787[31]

As GP Gooch recalls, for Coke - the main inspiration behind the 1628 Petition of Rights, which defended the old principle that only Parliament could approve taxes - Parliament had the duty of declaring and defending the law, but not that of creating it[32]

To defend their arguments, common law judges - although not only them - called upon an idea of extraordinary importance: that of the Old Constitution. In this respect, Pocock, the most relevant student of this concept, highlighted that according to the doctrine of the 'Old Constitution' or of the 'Fundamental Laws', English law, far from being derived from the acts of any sovereign (or succession of sovereigns), originated from very ancient precedents. Sovereignty was nothing but the final authority that declares which was the pre-existing law[33] Glen Burgess also insisted on the paramount role played by the concept of the "Old Constitution" in the English political debate of the 17th century, but emphasised the central thesis sustained by Pocock, insisting that this 'Old Constitution' was not defended appealing only to its 'antiquity' and to its primarily customary foundations, as Sir Edward Coke would, but also to its conformity with a "rational system"[34]

In any case, it must be added that throughout the 17th century, common law judges were forced to accept - not without complaints - the supremacy of the Statutes approved by Parliament in exchange for Parliament's recognition of the importance of customary law within the system - only subject to the laws of Parliament - and the essential role of Judges in the Rule of Law. In reality the alliance between Parliament (particularly the Commons) and the common law judges was fundamental to the triumph of Constitutionalism over Absolutism. An alliance that facilitated the acknowledgement that additionally Parliament was the highest judicial authority in the kingdom.

Shortly before the breakout of the civil war, on 27 May 1642 to be precise, the thesis of the sovereignty of Parliament as an essential element of English Constitutional law was defended again. That day the Lords and the Commons declared, in opposition to Charles I, that Parliament was the Constitutionally authorised Council to 'preserve public peace and the security of the Kingdom'[35]

In June 1642 both chambers of Parliament resolved to forward a document to Charles I - known as the 'Nineteen Propositions' - in which they reminded him that Parliament was the King's 'Highest and Supreme Council' and the repository of the duty to resolve 'the great matters of the Kingdom and to name the high officers of the State[36]

In response to this document - that so strongly highlighted the sovereignty of Parliament - the closest advisors to the King approved another, again in 1642, which defended the old doctrine of the mixed State in a novel and transcendental manner for the future history of English constitutional theory. In this respect Pocock wrote that it had already been spoken in the past of a mixed monarchy, in the sense of a mixture of monarchy and law or of an equilibrium between the primacy of the monarch and the supremacy of the law. However, as Pocock added, what the advisors to Charles I proposed in their Answer to the Nineteen Proposition was something altogether different. It was a mixture of the monarchy and the other forms of government: monarchy in the person of the king, aristocracy in the Lords and democracy in the Commons. Each one of these parts should exercise a distinct kind of power: the king should decide; the Lords advise; and the Commons assent. For each one of these three powers had a specific 'virtue', destined without doubt to degenerate when the vigilance of the other two weakened. The equilibrium of the Constitution consisted in a distribution of powers with the aim of ensuring to each the possibility of preventing the corruption of the other two[37]

In a much more philosophical manner and, accordingly, less tied up to the political and constitutional fights of the times, the absolutist pretensions of Charles I - as against the supporters of Parliament and the Judges of the common law - had in Sir Robert Filmer and Thomas Hobbes two unconditional supporters. In 'The Patriarch', a work probably written between 1631 and 1642 - although published for the first time in 1680 - Filmer defended the absolutist thesis under the undoubted influence of Bodin, whose own 'Six Books on the Republic' had been translated into English in 1606. Filmer, nevertheless, based himself in a clearly patriarchal conception, foreign to the French jurist, but reasonably widespread at the beginning of the 17th century. Patriarchalism had been adopted - for example - by Adrian Saravia - an author of Flemish origin that had extracted his thesis from the Holy Scriptures, particularly from Genesis - John Buckeridge, Lancelot Andrewes and Thomas Jackson. Filmer directed his patriarchalist doctrine, above all, against two catholic thinkers, Cardinal Belarmino and the Jesuit Suarez, both in favour of the popular origin of regal power, as well as the Scottish protestant George Buchanan[38] In 'The Anarchy of a Limited or Mixed Monarchy', published in 1648, Filmer rebated, as Bodin as done before him, the theory of the mixed State, so closely linked, as we have seen, to the doctrine of the sovereignty of Parliament[39]

If from Filmer we go on to Hobbes, which means jumping from mediocrity to genius, it is necessary to remember that in 'Elements of Law' (the manuscript circulated in 16[40] a few months before the convocation of the 'Long Parliament') and in 'De Cive' (written in France and published in Latin in 1642), Hobbes had put forward a great part of his most relevant ideas. Nevertheless his most complete work was 'Leviathan', which saw the light of day in 1651, two years after the execution of Charles I. Here Hobbes defended regal sovereignty from an extraordinary and abstract contractualist doctrine, inspired in Grotius, and based on notions of the state of nature and the social pact which allowed him to take his doctrine to the ultimate consequences that Bodin had argued in a somewhat incoherent way. An author still attached to scholastic ideas of the

subjection pact and of the *leges imperii*, or fundamental laws of the kingdom, as well as the subordination of positive law to natural law and to divine law. These last theories were also argued by Smith and Hooker. With Hobbes, Aristotelian and Aquinas's political philosophy was demolished and the modern theory of the State was born in its place. A theory that allowed to completely purify the concept of sovereignty, liberating it from the ties to which the scholastic theories of power were leading. In effect, for the great English philosopher, the sovereign was not subject to the fundamental laws since its sovereignty was born, not from a social pact or bilateral contract entered between the King and his people, but from a social pact developed by individuals in the state of nature, that is, in a pre-judicial period. Accordingly positive law did not precede the State (as it had been argued in Medieval thought and even by Bodin himself by recognising the subjection of the sovereign to the fundamental laws), but by creation of the State. It is true that Hobbes continued recognising the supremacy of Natural Law over Positive Law, but he broke the nexus between Natural Law and Divine Law by sustaining a concept - taken from Grocius - purely inherent, not consequent, from Natural Law. A concept of law that could be thought - as this last writer said - even if God did not exist. In reality Hobbes reduced Natural Law to simple dictates of reason, convenient to follow, but to which he denied their judicial nature given that they lacked legitimate human legal power to impose their compliance, as argued in *Leviathan*<sup>40</sup>. In this way, Natural Law could be reduced to a single maxim: it is a requirement of Natural Law to accept to submit to Positive Law<sup>[41]</sup>

Hobbes transcends *jus-naturalism* and settles the basis of judicial positivism, later to be developed by Hume<sup>[42]</sup>

But Hobbes's theories upset the followers of the Monarch as much as those of Parliament: to the former, because of individualist and proto-democratic rationalism ; to the latter because its natural outcome was the defence of monarchical absolutism, although in reality this last conclusion was purely circumstantial and did not affect the nucleus of his reasoning: the articulation of a sovereign public power that represented the whole of society, as Aquinas had conceived. Of course Hobbes did not stop criticising the doctrine of the mixed state, understanding, as Bodin and Filmer had done before him, that it destroyed the concept of sovereignty itself<sup>[43]</sup>

Following the restoration of the Monarchy in 1660, putting to an end the republican regime installed by Cromwell, the conservatives and even the 'reactionaries' defenders of the old English Constitution again defended the supremacy of the laws over the regal 'Proclamations' in the same way as the privileges of the two Chambers of Parliament as against the pretensions of the Crown - now incarnated - first in the person of Charles II, and then in that of James II. These theories - of which Algernon Sidney was prominent in their defence, and for that very reason executed in the Tower of London<sup>[44]</sup> were expressed in a very important document: the Bill of Rights of 13 February 1689, where the political-juridical foundation of the 'glorious' revolution of 1688 can be found<sup>[45]</sup>

## 2.4. The Rule of Law and Parliamentary Sovereignty Parliament

This Bill of Rights - stated in this traditional manner to overcome the distrust of the Tories towards any idea of a social contract - encapsulated the aspirations that the Commons and, to an extent, what the Judges of the common law had sustained for the whole of the century in the fight to limit the powers of the Monarch. Aspirations that Locke would systematise in his "Second Treatise on Civil Government", as we shall see later on. Very particularly this Bill consecrated the two most relevant principles of English public law: the Rule of Law and the Sovereignty of Parliament. Two principles that, in the judgement of the revolutionaries of 1688, had been hollowed by James II, 'with the assistance of bad advisors, judges and ministers' which had forced the two Chambers of Parliament to make him abdicate[46]

By virtue of both principles, 'the spiritual and temporal Lords and the Commons, constituting the full and free representation of the nation', and with the aim of 'defending and ensuring the ancient rights and freedoms of the English', submitted William and Mary - as well as the future kings of England - to a body of restrictions. The first and most important of these was to submit to the laws approved by Parliament, expressly prohibiting their suspension or dispensing with their application - as James II had tried to do in 1687 and 1688 with the Declarations of Indulgence, as well as approving taxes without the consent of Parliament, as both James I and Charles I had respectively attempted, with the acknowledgement of the Court of Exchequer, in *Bate's Case* (1606) and the *Ship-Money Case* (1637).

The consent of Parliament was also considered necessary to recruit and maintain an Army within the boundaries of the Kingdom in times of peace. This important declaration recognised, at the same time, the right of subjects to petition the King as well as to carry weapons for their own defence. Lastly this document disposed that Parliamentary elections must be free, that freedom of expression within Parliament could not be controlled by any tribunal except Parliament itself, that unreasonable bails should not be demanded, that excessive fines or cruel and unusual punishments should not be imposed, that Juries should be conveniently chosen and that fines and confiscation of property - to be lawful - had to be ordained by means of a judicial sentence.

Two subsequent laws, approved during the reign of William III, completed and to a point ratified what was disposed in the 1689 Bill of Rights. It was the Triennial Act of 1694 by virtue of which the King was compelled to call Parliament at least once every three years[47] and the Act of Establishment, approved on 12 June 1701 with the fundamental aim of 'ensuring the succession of the Crown within the protestant line 1/4. and eliminate all the doubts and disputes that for this reason could arise 1/4'[48]

This Act, in addition to demanding that in future the heir to the Crown had to be in communion with the Church of England, prohibited 'to solicit the forgiveness of the Great Seal of England in the impeachment laid out by the Commons'. Lastly, but by no means least important, the Act of Establishment ratified the Rule of Law with these words: " the laws of England are laws acquired by its

people by virtue of birth and all the kings and queens that occupy their throne must conduct their government in accordance as it is disposed in those laws and its Ministers and officials must conduct themselves in the same manner".

### **III. SOVEREIGNTY IN JOHN LOCKE'S "SECOND TREATISE ON CIVIL GOVERNMENT"**

#### **3.1. Government by the consent of the governed**

As it is well known the principal theoretician of the 1688 revolution was John Locke, author of a key book in the development of English constitutional thinking and, in reality, of western constitutional thinking as well: An essay concerning the True Original Extent and End of Civil Government, first published in 1690, although Locke, as demonstrated by Peter Laslett, had written it some years before the 1688 revolution[49]

In this work Locke made his some theories that Hobbes had previously argued, particularly in Leviathan, such as the state of nature and the social pact. Hobbes had called upon both notions without contradicting their jus-rationalist suppositions. Hobbes did not care for the historical existence of the state of nature and the social pact, only for their instrumental value: they were hypotheses necessary to think rationally of the State as an artificial entity and, accordingly, expendable, lacking in history and substantially distinct from the animal kingdom[50] In his opinion the celebration of the social pact leads inexorably to individuals - until then in a State of Nature - ceding their rights to the sovereign, that is, the State, with the aim of guaranteeing external peace and internal security and accordingly, the existence of a society composed exclusively of equal and selfish individuals. A State conceived as *persona ficta*, in which the Monarch had to exercise all powers, without the people being able to depose him.

On the other hand, Locke's jus-naturalist suppositions, and particularly the notions of the state of nature and the social pact, indebted to the rationalist philosophy of its century (Descartes, Hobbes, Spinoza, Leibnitz) clearly contradicted their gnoseological presumptions, specially its critique of innate ideas. A critique that had been expanded in An Essay concerning Human Understanding. Locke published this work in 1690, although written earlier, where he makes his the empirical philosophy that Francis Bacon had developed in *Novum Organum* and that Newton would develop in the field of physics[51]

But what really was important to Locke in his Essay on Civil Government was to justify a new Monarchy, constitutional or, as he calls it, 'moderate'[52] using an expression with a clear Aquinas's flavour, based on the consent of the people[53] A type of monarchy that would shape the 1688 revolution and in which it could be seen - although, as it will be said, this was not the most widely accepted interpretation - if not the end of a non-historical state of nature, at least a renovation of a no less supposed English social pact, following the dissolution of the State as a result of the absolutist policies of James II.

On the other hand, the consequences extracted by Locke from the theories of the state of nature and the social pact were truly very different from those extracted by Hobbes. For Hobbes, the celebration of the social pact by individuals living in the state of nature necessarily implied ceding all their rights to the sovereign, that is, according to Hobbes, the Monarch. On the other hand, Locke, in a less consistent form, understands that after the social pact, individuals continued maintaining their "natural rights", since sovereignty resided with the whole of them, with the community or people. The State resulting from the social pact, the supreme organ of which was the legislative power, had precisely the basic aim of maintaining these "natural rights" to life, property and personal security, the protection of which was, in his judgement, the basic aim of the social pact and, consequently of abandoning the state of nature[54] In this way, Locke sustained a theory of the State as utilitarian as that of Hobbes, but in which the public power as a whole was based in the consent of the governed, and as theirs also revocable[55]

But what is now appropriate to underline is that Locke argued as much for the sovereignty of the legislative power as for the sovereignty of the people. A dual affirmation that according to Pollock is the weakest and most unsatisfactory aspect of his political theory[56] But before examining this matter, key to this work, it is necessary to briefly expound his doctrine of the separation of powers.

### **3.2. The separation of powers**

In his penetrating study *Constitutionalism and the Separation of Powers*, MJC Vile highlighted that the English Civil War constituted an important milestone in the doctrine of the separation of powers. Until then it was common to simply distinguish the legislative power from the executive, as - for example - Masilio de Pauda had done. During the Civil War it became common to add a third power, judicial power, to which both Buchanan and Hooker had made reference some years before and to which people such as George Lawson and Philip Hunton[57] had referred to during the mid-17th century.

When explaining the origin of powers in the state of nature, Locke appears to admit, in principle only two, the legislative and the executive. While the antecedent of the former was found in the faculty that all men had, in accordance with the Natural Law, to do what was considered convenient for their own security and for that of others, that of the latter was found in the faculty of punishing the abuses committed against the Natural Law[58]

However, when he defends the need to escape the State of Nature to effectively protect natural rights, Locke adds to these two powers a third one: judicial power. Locke, in effect, recalls that the protection of natural rights demands firstly; a law which is established, accepted, known and firm that serves by common consensus as the norm for what is just and unjust and as common measure so that with it all disputes that arise between men can be resolved; secondly; a judge recognised and impartial, with authority to resolve all differences, in accordance with the established law; and thirdly a sufficient power that backs and sustains the sentence when this is just and executes it accordingly[59]

Nevertheless, Locke - who used the word 'power' equally to refer to an organ and to a function, for which at times it is difficult to interpret his exposition - later on definitely abandons this tripartite classification of the organs or functions of the State, substituting it for a new one, according to which he distinguishes the legislative, executive and federalist functions, without mentioning the judicial function at all. Such an omission did not mean that he undervalued the importance of the judiciary at the heart the Constitutional State. On the contrary, as underlined by Vile, for Locke the main function of the State is essentially juridical. Consequently the State is the judge lacking in the State of Nature[60]

What was the reason why the English thinker does not mention the judiciary as an autonomous function or the Judicature as an organ or power distinct from the executive and the legislature? To answer that question it is required to take into account that in England there was no neat organic distinction between the judicial power and the legislative and no clear distinction between the legislative and judicial functions. If the House of Lords was - and still remains - the supreme Tribunal of the Kingdom, the Judges created law at the same time that they applied it, given that their judgements became precedents that linked them to the future when it came about to resolve similar cases[61]

In any case, the fundamental aim of Locke consisted in attributing to two distinctive organs the legislative power and the executive power, without prejudice to the relationship mechanisms that he established between both organs, to which we will refer to later. . Locke, in effect, holds that 'moderate monarchies' as much as from the other 'well constituted governments', the legislative and executive powers "are found in different hands"[62]

Previously he had made it clear that well ordered political communities and in which the well being of the people that make them up is taken into account, the legislative power usually is placed in the hands of several people properly convened, that is, in an Assembly[63] contrary to what happens with the executive power, that, being a 'permanent' power, exercised without interruption, tends to be attributed to a single person[64]

This attribute of the basic powers of the State to two distinct organs distinguished the "moderate monarchies" and the other "well constituted governments" from the "absolute monarchies", where "the prince holds in himself" both powers, for which "there is no judge or manner in which to appeal to someone capable of deciding with justice and impartiality as well as with authority to sentence, and who can not remedy or compensate any wrong or damage that the prince might have caused by himself or by his order"[65]

However, by pronouncing himself in favour of attributing the legislative and executive powers to different bodies, Locke did not only purported, although he did primarily, to denounce the absolute monarchy in which the King exercised both powers, but also in the assembly-type government based in the monopoly of those two powers by an Assembly. In this respect Locke no doubt had in mind the historical experience of the "Long Parliament (1640-1649) "true turnaround point in the political history of the English speaking races"[66]

No doubt that was the experience that Locke thought about when he pointed out that it was not "convenient, since it would be too strong a temptation for human weaknesses, that has the tendency to hang on to power, to trust the task of executing the laws to the same persons that have the duty to make them". The English philosopher added that, if the legislature and the executive were in the same hands, it run the grave risk that the laws would not be obeyed and that they would be drafted and applied in accordance with 'particular interests" and not with the interest of the whole community, which would be contrary "to the finality of society and of government"[67]

If the legislative power consisted in the faculty of approving laws, the executive, in Locke's judgement, included two functions: that properly called executive and the federative, the distinction of which constitutes Locke's most important contribution to the doctrine of the functions of the State[68] Both spheres tended to and should be attributed to the same entity, which is England was none other than the Monarch. "These two powers - he wrote - the executive and the federative, are in reality distinct in themselves; however, despite one encompassing the execution of the laws of society within it and to all those who are part of it, and the other is in charge of the security and the exterior interests of the population, with respect to whom it could be useful and prejudicial, it happens that almost always they are found together"[69]

But in addition to exercising the executive and federative powers, the Monarch could participate in the elaboration of the laws. In this respect Locke wrote, no doubt thinking in the Royal Assent, that in some political communities "the executive is delegated in one single person that also participates in the legislative power"[70] Likewise Locke considers that it was inherent upon the Monarch the faculty of calling and dissolving the Assembly[71] given that - again considering the Long Parliament - he estimates that "the constant or frequent meeting of the legislators and the long duration of their useless Assemblies, result by force heavy on the people, encouraging in the long term more dangerous inconveniences that those that were being attempted to avoid"[72]

This relevant constitutional position, through which he participated in the approval of the laws that he ordered and whose execution he directed, allowed even to affirm that the "supreme power" of the State rested upon the Monarch. "Not because he holds all the supreme power, which is the one that makes the laws, but because in him resides the supreme power of their execution, from whom all inferior magistrates derive their powers, 1/4 not being also a legislative organ superior to him, given that no law can be made without his consent"[73]

However, if it was not convenient for the Monarch to limit himself to executing the law, it was not convenient for the Parliament to limit itself to approved them either, instead it also had to control their execution, as it happened in the England of his day through the process of impeachment. A process established to demand the penal responsibility of the members of the executive - except that of the Monarch, without political or juridical responsibility - before the two Houses of Parliament. "[even when] the legislative power has entrusted the

powers to implement the laws made by Parliament, Parliament always retains the right to withdraw those powers if it finds cause for that purpose and likewise to punish any infraction"[74]

Without question Locke was as much in favour of attributing to two different organs the exercise of legislative and executive powers as to distribute between them the exercise of these powers. In other words: the English philosopher showed himself in favour not only of the separation of powers, but also of the doctrine of constitutional balance of power.

Although these two doctrines were usually accompanied by the old doctrine of the mixed state - as it will continue to occur after Locke, as we shall see later on - it can not, on the other hand, be considered that the English thinker was in support of the latter. Passerin D'Entreves observes in this respect that Locke did not pretend to divide sovereignty, but only its exercise under the supremacy of the legislative power, although the distinction between title to and exercise of sovereignty, forewarned by Bodin, was not formulated until the French Revolution[75] M.J.C. Vile, for his part, points out that Locke did not make too much emphasis in the theory of the mixed state, preferring instead to focus his analysis in the relationship between the Legislature and the Executive, with almost no reference to the House of Lords[76]

In reality, Locke only mentions the mixed forms of Government in passing in chapter X of the book currently under examination, dedicated to the different forms of the Commonwealth[77] while he only alludes to the House of Lords in the last chapter, and even then, indirectly: "let us assume - he wrote - that the legislative power has been granted simultaneously to three different persons: first, one only hereditary person that holds the supreme executive power in a permanent manner and, with this power, that of calling the other two within fixed periods; second, an Assembly constituted by a hereditary nobility; thirdly, an Assembly of representatives chosen, pro tempore, by the people"[78]

At the end of it all it is appropriate not to lose sight that in this book Locke does not try to specifically analyse the English Constitution, but that of the Free-State in general, although it becomes evident that he can not forget his native country, to which he refers constantly, although almost never naming it.

### **3.3. The supremacy and limits of the legislature**

Now, if in order to retain liberty it was necessary that the executive and legislative powers be in different hands, the later should be, according to Locke, the supreme power of the State given that " he who can impose laws on another, by nature, must be superior to him"[79] The supremacy of the legislature made the State, even when it was headed by a hereditary king, in a government with the consent of the governed, essential requirement to affirm its own legitimacy[80]

Attributing to the legislature - of which the King could be part of under the terms outlined - the supremacy in the heart of the State, the English philosopher was doing nothing more than to take refuge under some new contractual and

utilitarian suppositions, to the already old English doctrine of Parliamentary Sovereignty, formulated by Fortescue, Thomas Smith and Richard Hooker, the last being cited repeatedly quoted by Locke[81] And as the supremacy of the legislative power carries with it the supremacy of the law - we will see now what type of law - Locke also subscribed to the other great constitutional doctrine held in England from the days of Bracton: the rule of law.

Nevertheless, to Locke, the supremacy of the legislature did not imply that the Assembly had to absorb the executive power, not even to doubt its organic and functional autonomy, as the Long Parliament had attempted during the reign of Charles I.

Locke - Vile writes - clarifies time and again that no State organ is omnipotent, that the legislature and the executive have an autonomous status. By supremacy of the legislature Locke does not mean that the executive becomes a messenger, totally subordinate to the legislature in the exercise of its own functions. On the contrary, the power of the Legislature is circumscribed to the exercise of its own functions[82]

On the other hand, that the legislature was the supreme organ of the State does not mean that it was an unlimited or arbitrary entity. Its function, as that of the State as a whole, had to be limited to the assurance of "Natural Rights", that was the main aim of the social pact that had created it. From this point of view it could be affirmed that, at least implicitly, Locke came to recognise that the social pact or contract became an initial limit of the legislative power. That is how Nicola Matteucci understood it when he remembered that to Locke the legislative power was limited by the first and fundamental positive law that institutes it, that is, by the social contract, which is presented as a true constituent power, superior to the legislature; the theoretical base for a hierarchical distinction between constitutional and legislative rules[83]

But additionally, in the all-important chapter XI of his Essay of Civil Government, Locke expressly acknowledges other limits to the power of the legislature, imposed in this instance by "society", by "divine law" and by "natural law". That way, in effect, such power could not be attributed, as the Long Parliament had done during the Civil War, the faculty of governing by improvised and arbitrary decree, but that it was compelled to dispense justice and to point out the rights of the subjects by means of permanent and proclaimed laws, applied by known and appointed judges. The laws approved by the legislature had to be, additionally, general and identical for rich and poor, for the Court's Mandarin and for the farmer behind the plow, without any other finality except the good of the people. Nor was the Legislature allowed to impose taxes without the consent of the people, expressed directly or by means of its representative. Lastly, the legislature was forbidden to transfer the faculty of making laws to any other person, for it was only to the legislature that the people had delegated the power[84]

Pollock holds that by recognising such limits Locke joined a conception of sovereignty deeply ingrained within the students of the Common law from the beginnings of 17th century, through which it was accepted that natural justice or

the common right imposed certain limits that even the King in Parliament could not trespass; which meant that Judges had to ignore a law of the Parliament that was manifestly contrary to natural justice and which perhaps attempted to subvert the fundamentals of the Constitution, for example, if it purported to abolish the Monarchy or the House of Commons[85]

What is beyond doubt, as JW Gough recalls, is that although Locke recognised the "supremacy of parliament", he was not referring to its sovereignty in the Hobbessian sense of the term[86]

### **3.4. The sovereignty of the people**

In addition to the limits to which the legislature was subject, it is important not to lose sight that for Locke, above this power, there was the sovereign power of the people[87] Consistently with that thesis Locke held that the violation of the limits to which the legislature was subject justified the people's right of resistance. A right that Hobbes had previously expressly rejected and over which Locke expands in the last two chapters of his *Essay on Civil Government* titled "On tyranny " and " Of the dissolution of the Government". In Locke's judgement, the people, acting for just cause, had the right not only to replace its rulers, but also to change the form of the State itself, understanding for the people not the Parliament or even the House of Commons, but the political community as a distinct and separate entity[88]

Although Marsilio de Padua and the Monarchists and [MC1]had previously already defended the sovereignty of the people, Mcclean[89] - and above all Franklin[90] - have shown that from this perspective the most relevant influence on Locke was the doctrine that George Lawson had exposed in *Politica Sacra et Civiles*. In this work - written in 1657, although unpublished until 1660, prior to the return of Charles II, republished in 1689 - Lawson had managed to reconcile the doctrine of the mixed state with that of popular sovereignty, until then considered incompatible[91]

For Lawson, the conflict between the King and Parliament after the 1642 Civil War had provoked a complete dissolution of the State and the reversion of power to the people, the sole legitimate subject to constitute a new authority. Sovereignty then did not reside in the two Chambers of Parliament but in the people[92]

Although this conception was not considered during the time of James II, appearing too radical, Locke assumed it when writing his "Second Treatise on Civil Government", being the only political writer of relevance to do so. Locke read Lawson's work around 1679, just as he was preparing his response to Filmer. As Franklin wrote, not only the theory of the right to resist, but also the basic structure of the Second Treatise corresponds with Lawson's doctrine of on sovereignty'[93]

For Locke, Lawson's thesis on the dissolution of the State and the recovery of sovereignty by the people was the only validation to resolve the problem of the

right to resist within the framework - not only of the mixed Constitution - but also of any type of Constitution[94]

On the other hand the majority of his fellow Whigs did not accept Locke's thesis in this respect. Effectively faithful to the doctrine of parliamentary sovereignty, they wanted to reconcile the right of resistance against the tyrant (James II) with the respect of the independence of the King before parliament and even with the supremacy of the Monarch within the Constitution. That is what for example Whig publicist Gilbert Burnet maintained in *An Enquiry into Measures of Submission*, a pamphlet published in Holland in 1687, with the approval of William of Orange[95] The main objective of the Whigs was to enthrone this Monarch as King of England, not in the name of the people, but under his own right, preserving dynastic continuity. After all William's wife, Maria, was the daughter of James II, and she would have inherited the title of Queen following her husband's death[96]

Definitely then, in accepting the sovereignty of the people, Locke not only broke away from the otherwise so different absolutist theses of Filmer and Hobbes, but also from the classic English formulation of Parliamentary Sovereignty (of the King and the two legislative Chambers), held by Smith and before him by Hooker and afterwards by Hume and Blackstone, as we'll see now.

#### **IV. FROM HUME TO PALEY**

##### **4.1. David Hume, Locke's critic: Parliament is sovereign, not the people**

Following the publication of Locke's "Second Treatise on Civil Government", and until Hume's "Treatise on Human Nature", that is, between 1690 to 1739, political and constitutional debate in Great Britain was not particularly brilliant. Its most relevant protagonists were Robert Walpole, the all-powerful Whig Prime Minister to George I and George II, in power from 1721 to 1742, and Lord Bollaibroke, the most acute Tory publicist of the first half of the 18th century[97] However this debate was not centred on sovereignty nor, more particularly, whether it resided in the people or in parliament - a question resolved by the Septennial Act of 1716 clearly on the side of positive right[98] - but in the relationship between the King and his Ministers with the two Chambers of Parliament.

In this respect both writers remained faithful to Locke's doctrine of the separation of powers and of the "constitutional balance", although Bollaibroke also insisted in the 'mixed' character of the British Monarchy, something that Locke had not done. The question that radically separated Walpole from Bollaibroke resided in the reach of the 'influence' of the executive - the King and his Ministers - over the two Chambers of Parliament. An 'influence' that often was no more than pure corruption. While Walpole, interested defender of the incipient system of parliamentary government, considered this influence necessary and which required that the Ministers be members of one of the two Chambers of Parliament, Bollaibroke understood that such 'influence' questioned the separation of powers and destroyed the basis of the British

Constitution and the constitutional monarchy system of government that the 1688 revolution had created[99]

Contrary to Walpole and Bollinbroke, David Hume, who was not a politician but a great philosopher, confronted the always difficult problem of sovereignty, deconstructing with extraordinary lucidity and coherence the jus-naturalist doctrine and revitalising the old concept of parliamentary sovereignty[100]

Hume's theses on sovereignty were very original. They diverged from those held by the two great English parties, Whigs and Tories, or as he sometimes liked to describe them, following Bollinbroke, as 'the party of the country' and 'the party of the Court'[101] Effectively Hume radically differed from the Tory thesis of the divine right of kings and of passive obedience, but at the same time rejected the contractual foundation of the State, that in its version of Locke, although somewhat softened, was essential to Whig political ideology. In Hume's judgement it was a question of refuting "the speculative political systems proposed in this country, the religious of one party as much as the philosophical of the other"[102] Despite this equidistant perspective, Hume dedicated much more attention to the Whig thesis than he did to the Tory, the latter being, contrary to the former, as Hume himself recognised[103] clearly discredited.

Hume's enormous contribution consisted in criticising the metaphysics of the state of nature, of the social contract and of natural rights, sustained by the rationalist jus-naturalism- so fashionable in his century - without for that reason failing to construct an authentic utilitarians and individualistic theory of the State, the articulation of which was impossible from the conceptual schemes, organisational and moralising, of the traditional political philosophy that derived from Aristotle and Aquinas. Hume's theory of the State was, in reality, as individualist and utilitarian as that of Hobbes, the other great British philosopher. Nevertheless, unlike Hobbes, he did not sunk his roots in an inductive and rationalist method and, accordingly, priority, but in another one, deductive and empirical, based in observation and experience, in which the lessons provided by history played great relevance. Hume's method being highly precise, suggestive and influential[104]

By elaborating his philosophy in accordance with experience and observation, Hume openly criticises self-evident truths and, generally, every axiom not demonstrable empirically, starting with the very idea of Natural Law, that is, of some laws valid throughout time and place, established from an eternal and immutable morality, whether conceived as emanating divinely or, as Grotius had affirmed, *etiamsi daremus Deum non esse*.

For that reason, if Hobbes had destroyed the old transcendental Natural Law, based above all in the juridical-political philosophy elaborated by Aristotle and christianised and de-paganised by Aquinas, the most brilliant update of which was in the work of Francisco Suárez, Hume undressed the new rationalist Natural Law, essentially inherent, of its Protestant origins[105] at the same time that he administered a massive blow to natural and rational ethics and religion

in his Dialogues Concerning Natural Religions and in The Natural History of Religion[106]

In this way Hume decisively contributed to the reconstruction of political thought and the Theory of the State[107] although his contribution to constitutional theory in the strict sense deserves less interest and is indebted in great measure to Locke and Bolingbroke. In Hume's opinion, sociability was indivisible from human nature, as manifested by observation and experience[108]

But to state that society was of natural origin did not mean to negate that artifice or convention played a fundamental role in the creation of the most relevant social institutions, such as property. Quite on the contrary, Hume sustains that these institutions did not have a natural origin but that they were the result of 'conventions'[109] that is, of agreements that individuals tacitly accepted, conscientious that they were in their mutual interest. With the passage of time, these conventions became true regulatory rules of human conduct. Within them Hume highlights the 'rules of justice', destined to protect property and, currently, the basic mechanisms of what we now call market economy. In The Treatise on Human Nature - his first and most relevant book - the Scottish philosopher recalled that the three principal rules of justice were the 'stability of possession', the 'transfer by consent' and the 'compliance of promises'[110]

But the conventions had not only created the most relevant social and economical institutions, such as property and the market, but also political institutions, such as the State itself. In effect the State had an artificial or conventional origin. Its creation - along with the positive rights with which it was born - was made necessary as society had become more complex. As Hume wrote, the human animal - as he progresses, sees himself compelled to establish a political society with the aim of administering justice, without which there can be no peace, nor security nor mutual relations[111]

In that manner Hume reconciled the artificial character of the State, energetically affirmed by Hobbes and by the whole of the rationalist jus-naturalism after him, and the natural sociability of mankind, that Aristotle and Aquinas thinking had defended in order to sustain the natural essence of public power. But that the State - against what traditional jus-naturalism sustained - had a conventional origin, did not mean that it was the fruit of an expressed consent, reproduced in a pact or social contract - as rationalist jus-naturalism defended - and particularly Locke, the writer with whom Hume argues in this respect, nor that any such consent was the foundation of the State[112] In reality, the existence of a social pact was proven neither by history nor by experience in any place or time. On the contrary 'almost all governments in existence today or those which history remembers, were originally founded on usurpation or conquest, if not both, without any pretensions of free consent or subjection on the part of the people'[113]

Hume does not deny that the express and active consent of the people, reflected in a pact or social contract, could be considered a just reason for the State, Furthermore, he doesn't hesitate to point out that where it happens is without doubt the best and most sacred. He added that what he affirmed is that

rarely - if ever - happens; and consequently we also have to admit other foundations for the State since reason, history and experience show us that political societies have had a less precise and regular origin[114]

But Hume not only rejects the social contract for historical reasons (at the end of the day the less relevant in terms of contractualist arguments, specially for Hobbes and even for Locke), but above all for philosophical reasons. If such a pact or contract could not be considered as the creative or founding cause of the State - as it could easily be shown contrasting such theory with an observation of the historical reality - Hume points out that even where there such a pact or contract had existed at some stage, the criteria to legitimise the State was not to be found in this pact or contract (or in the expressed consent of the people that such a pact or contract implied), but in the utility of the State itself to satisfy the interests of its subjects. In his judgement, in effect, the pacts celebrated by the parents could not bind their descendants unless they implicitly accepted to continue by considering them useful. For that reason the duty of obedience to the State was not to be looked for in the expressed consent of each individual, reflected in a supposed contract or social pact, solemn and written, but in the conviction, born of simple common sense, that without the State 'society could not subsist'[115]

In reality the consent of the people - rather than active and reflected in a solemn form in the 'loyalty' and 'fidelity' of the subjects of the State - most often was tacit and passive, reflected in the loyalty and fidelity of the subjects to the State, not necessarily embodied in a Monarch for the mere fact of having been born under its dominion or to have passed to depend from it through the vicissitudes of history. 'Obedience and subjection end up being so familiar that the majority of men do not dig for their origin or cause'[116]

The legitimacy of the State, then, was strengthened with the passage of time, which allowed for the accommodation of the political institutions to the public opinion of each period[117] Time even legitimised what in its beginnings had been considered as illegitimate. In *The Treatise on Human Nature* he had already established that it was time and custom that conferred authority to all forms of government and to all princely successions, making power - originally founded only on injustice and violence - could, in the fullness of time become legal and compelling[118] Whelan recalls in this respect that for Hume 'long possession' or, what was virtually the same 'prescription' aside from being an important principle for the establishment of property, as juridical doctrine had been asserting for a considerable period of time, was in practise the most important criteria to legitimise the State, irrespective of its origins. A thesis that no one had asserted with such clarity until then - although Grocius and Vattel had opened the way for him - and that Burke would pick up later to formulate his doctrine of prescriptive government or prescriptive constitution[119]

From these premises Hume examines the old question of the right of resistance, essential element of the political-juridical debate regarding sovereignty . For Hume it was not a question of justifying this right when the juridical limits solemnly established by the community in the political contract were exceeded, as it was argued from traditional jus-naturalism, or when natural rights were

breached, as Locke had argued, but pure and simply when the State - a specific form of it - ceased to be useful for the individuals. A thesis that he had already advanced in *The Treatise on Human Nature* where he held that the State, being a simple human invention for the benefit of society, the compulsion to obey its orders ceased as benefits came to an end, as happens when it exercises an 'enormous tyranny and oppression'. An assumption under which it was legitimate to even raise up in arms against the supreme power[120] In his essay *Of Passive Obedience* he will again formulate this thesis. Here, after praising the irresponsibility of the King in Great Britain (summarised in the expressive principles *The King can do no wrong & the King can not act alone*) he affirmed that such irresponsibility should not be identified with the Monarch's absolute immunity. On the contrary, when he protects his minister, perseveres in injustice and usurps all the powers of the community, it is totally justified to recourse to the right of resistance in order to defend the Constitution, although the laws may not make express reference to this [recourse] because the remedy is not available in the normal course of events, nor can they appoint a magistrate with sufficient authority to punish the excesses of the prince. But as a right without a sanction would be an absurdity - Hume adds - the remedy in this instance is the extraordinary one of resistance, when matters reach such an extreme that it is the only way in which the constitution can be defended. A method this that had been used to depose Charles I and James II, although - in his judgement - it should never be accompanied, as it had happened in the case of Charles I, of tyranny, 'justly suppressed today by the right of the people and universally condemned as an infamous and ruinous method'[121]

Having discarded the jus-naturalist argument of popular sovereignty, Hume prefers to tackle the problem of the titularity of sovereignty within the framework of the British juridical order, not abstractly, adhering himself to the classical thesis of Parliamentary Sovereignty. However Hume did not limit himself to repeating the classical thesis of Thomas Smith or that of Richard Hooker, liberating them from Locke's add-on of popular sovereignty, but he introduced an important hue by underlining the primacy of the Commons over the Lords and of course over the Monarch. A primacy that he justified by considering that it was through the Lower House that public opinion was regularly expressed, as he pointed out in his essay *On the Independence of Parliament*[122] published in 1741, during the reign of George II and towards the end of Robert Walpole's long mandate as Prime Minister.

Hume - who in what concerned the relationship between the Crown and the two Houses of Parliament accepted the schemes of the mixed and balanced monarchy - in his judgement the best possible form of government, although he was closer to the thesis of Walpole than that of Bolingbroke[123] - held that the influence of the Crown resided in the executive power but recognised that such power was then completely subordinate to the legislature given that its exercise required large expenditure and the Commons had made their own the exclusive right to grant supply. The Scottish thinker added that the part of power that the Constitution granted to the House of Commons is so large that it allowed it to impose itself upon the other branches of government. In this respect he considers that the king's legislative power was an insufficient counterweight . That way in effect - no doubt taking into account that since the rejection by

Queen Anne I of the Scottish Militia Act of 1707, royal assent had not been denied to a law approved by the two Houses of Parliament - points out that although the Monarch had the right of veto in the elaboration of the laws, in practice he is given so little importance that when both Houses approve them it is certain that the laws will be proclaimed since royal assent is but a formality. On the other hand although it was true that the House of Lords constituted a powerful support for the Monarchy, given that its members were, at the same time, sustained by the Monarchy, experience as much as reason showed that the Lords had neither sufficient force nor authority to survive without such support[124]

Such a state of affairs did not mean however that the English Constitution was no longer a balanced Constitution, for although it was true that the Crown depended on the Commons, it was no less true that the Commons depended on the influence that the Crown exercised over them either directly or through the Ministers. Hume wrote that the Crown had so many charges at its disposition that as long as it could count with the support of the honest and disinterested elements of the House, it would always dominate its resolutions, at least in sufficient measure to free from danger the traditional constitution. For that reason Hume held that the royal influence was essential to maintain the mixed and balanced character of the constitution. This was a thesis that Walpole had been defending since 1721 against all those, like Bollinbroke, that accused him of monopolising power and destroying the basis of the Constitution. Hume wrote that such influence could be given any name of one's choosing; define it even as corruption or servitude; but it is to a certain degree and type inseparable from the Constitution's own nature and necessary for the maintenance of a mixed form of government. For that reason Hume concluded - citing Bollinbroke - instead of asserting in an inflexible manner that the dependency of Parliament was, to a certain degree, an infraction of British liberties, the party of the nation must have made certain concessions to its adversaries and limit itself to examine which was the most convenient degree of dependency, further than which it becomes dangerous for liberty[125]

In any case, it is appropriate to insist that Hume, more than interested in who was the sovereign, was concerned as to how sovereignty was exercised. This was a point of coherent departure not only with his own liberalism but also with his own most profound philosophical prepositions and, above all, with his theory of the origin and legitimacy of the State. Assuming the State, what was really important was to defend the most adequate form of government - or, if we prefer, the most useful - to vertebrate the rule of law or, to put it in different words, a government of laws, not of men[126] with the aim of ensuring in a constant and orderly manner the exercise of liberty. His attention was then not centred in the doctrine of sovereignty but in the theory of the State of Law. A State based as much on the principle of legality - that is, in the submission to general and uniform laws, previously known by the different branches and by all the subjects[127] - as in the division of powers and, very particularly, in the independence of the judges, given that Hume coinciding in this respect with Locke, understood that the whole machinery of government had, ultimately, no other motive than the administration of justice[128]

## 4.2. William Blackstone's ambivalent attitude

Following a series of conferences given in Oxford in the mid 1750s', William Blackstone published his Commentaries on the Laws of England between 1765 and 1769[129] In this work - of enormous success, not only with jurists but even among the educated public of the times[130] - Blackstone outlined a complete overview of the English juridical order. Something that only Bracton had tried to do previously before him, as F.W. Maitland recalls[131]

It is important to underline that Blackstone was a jurist highly gifted for the exegesis and exposition of norms. Nobody did both in the England of his period quite like him despite being the epitome as a juridical century in that country, but he lacked the talent for theoretical or dogmatic construction, as it becomes obvious when he reflects on the concept of sovereignty.

Blackstone coincides with Hume in criticising Locke's dualism between the supremacy of Parliament and popular sovereignty, but he could not escape it. Contrary to what had taken place with Hume who had defended his doctrine of parliamentary sovereignty in a coherent and penetrating critique of traditional jus-naturalism as well as Locke's rationalist variety, Blackstone tried to defend Parliamentary sovereignty without breaking with jus-naturalism, particularly the traditional form to which in reality he remained attached. In effect the English jurist, after denying the existence of the state of nature as a notion too coarse to be taken seriously[132] repeatedly stated that the original contract subscribed between the people and the King from premises was closer to the Aquina's notion of the pactum subjectionis than that of a true social pact defended by rationalist jus-naturalism and specifically by Locke.

In Blackstone's judgement the revolution of 1688 had brought up to date and legalised this contract so that disputes around its content - and even those regarding its very existence - would cease. This contract subsisted and through it the English people had imposed on the Monarch a composite of duties, the principal and first of which was to govern its people according to law[133] A duty that the English jurist, no doubt influenced by Montesquieu, considered innate to 'the Constitution of our Germanic ancestors in the continent'[134] In reality - Blackstone added - the limitation of royal authority was a principal essential to all the gothic systems of government established in Europe, although it was slowly eliminated by violence and fraud in the majority of continental kingdoms[135]

The duty of governing the people in accordance with the law was established in the common law and was reaffirmed in the oath of coronation. The English jurist added that this duty - that had its correlation in the loyalty of the subjects to the King - had been affirmed numerous times from the days of Bracton, who had insisted - Blackstone recalls - in that it was the law that made the king and not the reverse, in addition to distinguishing with great clarity, as Fortescue, between an absolute or despotic monarchy - established through conquests or violence - and a civil or political monarchy, such as the English, based on the consent of the governed[136]

Blackstone returned to refer to the original contract and to defend, always implicitly, the right to resist and the resumption of sovereignty by the people when he pointed out that if a future prince was intent in subverting the Constitution breaking the original contract between the King and the people, it would be legitimate for future generations - making use of the inherent although latent powers of society that no period, Constitution or contract could destroy or diminish - to force the King to abdicate, as it had happened in 1688 with James II[137] Shortly afterwards he justified the extraordinary recourse to the first principles when the social contracts are in danger of dissolution and a state of violence, fraud and oppression is established, which appears to be a cautious and elliptical defence of the right to resist in the face of tyrannical power or, as he says, he who acted outside of the established law[138]

However Blackstone left aside these jus-naturalist statements - certainly traditional - and the belated allusion to popular sovereignty when he commented on Locke's passage in the Second Treatise on Civil Government in which he held that the permanency of sovereignty in the people following the social pact and, therefore, its capacity to depose parliament when it acted in a manner contrary to the trust that the people had deposited in it. Blackstone's opinion leaves no doubt: in his judgement the conclusion extracted by Locke could be accepted in theory but never in practice given that there was no juridical process to put it into effect within the current order. He added that this devolution of power to the people implied the general dissolution of the form of government established by the people itself. And he concluded, accordingly, that as long as the current English Constitution remained in place it could be confirmed that the power of parliament was absolute and not subject to any controls[139]

In reality Blackstone expressly shows his discrepancy with Locke's interpretation of the 1688 revolution. In his judgement, the Convention that had been at the forefront of this revolution - which without doubt had opened a new era - had shown itself in favour of deposing James II for having subverted the Constitution, but without in any way accepting that the deviate conduct of the King implied a total dissolution of the State, as Locke had sustained, coinciding in this point with the 'extremists and visionary theories of some republicans'. Blackstone added that if Locke's arguments had succeeded society would reduced itself to an almost a state of nature; distinctions due to honour, rank, profession and property would disappear; sovereign power would have been annihilated and with it all legal doctrine which would have meant to leave in the hands of the people the freedom of building a new system of state upon a new foundation of polity[140]

What was then the function of the people according to the English Constitution?. Blackstone doesn't hesitate to answer 'to elect its representatives', that is, the members of the House of Commons[141] A branch of legislative power which - as Smith and Hooker had held a century and a half earlier - was represented as a whole in the social body[142] in such a way that the members of this House although elected for a particular district represented the kingdom as a whole, without being subject to the orders of their electors with whom they didn't even have to consult or take advice from unless they thought it prudent to do so[143]

It should be taken into account that Blackstone defines the State (although in some instances he refers to 'government') as a collective body made up of individuals united for their security and convenience with the object of acting together as a single man for which it was required to work through a uniform will[144] which was the Parliament.

In short, Blackstone appears at times in favour of the people's sovereignty and consequently, of their right to resist the tyrant, but in other instances, more often, holds the subordination of the people to the decisions of the sovereign Parliament. This attitude - which would deserve the criticism of writers in the recently created United States of America, such as James Wilson[145] - was certainly weak from an intellectual or philosophical point of view. But Blackstone was not a philosopher, not even a legal philosopher. He was a jurist. A jurist for whom the problems of the origin and the legitimacy of power, of the sovereignty of the right to resist, were embarrassing, and compromising. He did not dare to avoid them but nor could he face them with ease or convincingly. His ambivalent attitude can be summarised as this: if the people originally held the sovereignty, it continues to keep it after each actualisation of the contract with the King and, accordingly, after the adjustment of 1688, so that the people can validate its power before the King and compel him to abdicate when he breaches the contract, as it happened during the glorious revolution. However Blackstone now says that almost a century has elapsed since that date with the people of England enjoying their liberties. What is important now, and above all for a jurist occupied with the positive existent order, is not to get lost in philosophical arguments regarding the origin of power and the right to resist, which future generations will 'judge as they consider appropriate', but to remember that *hic et nunc* the sovereign, the only sovereign, the true sovereign, is Parliament. To start from this point is true constitutional law, the rest is juridical philosophy or, what is worse, demagoguery and incitement to anarchy, to the subversion of the existing order of which the English are so proud and that evokes such envy among the other nations of the European Continent that have been incapable of retaining their Germanic or gothic heritage, that 'spirit of freedom' inherent to that heritage, allowing that the Kings dominate their peoples.

But what was Parliament and who made up its composition? Blackstone replied by stating that it was a corporation, a body or aggregate politic, comprising the Monarch, the Lords and the Commons[146] In this respect it is necessary to take into account that the position adopted by Blackstone regarding the organisation of the powers is characterised by its fidelity to the doctrine of the mixed State although - as it had taken place earlier with Hume and Bolingbroke - with the add-on conceptions of Locke of constitutional balance and the separation of powers, this last one filtered by the ideas of Montesquieu, who made him recognise an independent judicial power[147]

According to such principles Blackstone points out that the British Constitution combined the three pure forms of government, the monarchy, the aristocracy and democracy, which were respectively embodied in the King, the House of Lords and the House of Commons, that is, in the three parts of that body politic

or corporation called the British Parliament, in which sovereignty resided. Blackstone added that if the supreme power resided in any of the three parts separately it would be exposed to the inconveniences of an absolute Monarchy, of the aristocracy or democracy, without it being advisable that power resided without any one of these three parts. If for example it resided in the King and the House of Lords, the laws could well be well drafted and executed but they would not always have the people as their aim; if it resided in the King and the Commons it would need that circumspection and caution that only the wisdom of Pairs provide; lastly if the supreme power resided in the two Houses of Parliament to the exclusion of the King it would be to tempt the abolition of royalty or to debilitate or even to totally destroy the strength of executive power[148]

It was then in Parliament, as a corporation or body composed of King, Lords and Commons where the supreme and absolute power of the State resided in England, and - consequently - the legislative power[149] given that the most relevant characteristic of sovereignty was precisely that of law making, to the extent that sovereignty and legislative power were synonymous terms; one could not exist without the other[150] The creation of laws - being really sovereign - could be limited neither for reason of the subject matter nor of the people involved. Parliament, he added, had uncontrolled and sovereign authority in making, confirming, widening, restricting, derogating, cancelling, reviving and interpreting the laws or the rights regarding matters of any kind, whether temporal or ecclesiastical, civil, military, maritime or criminal. Being so, the place where the absolute and despotic power - which must reside somewhere for all governments - was established in these Kingdoms [UK] in the British Parliament[151]

By virtue of its sovereignty Parliament could regulate or re-establish the succession of the Crown, as it had during the reigns of Henry VIII and William III, or to alter the established religion of the country, as it was done on several instances during the reigns of King Henry VIII and his three children, or even to change and re-establish the Constitution of the Kingdom and Parliament itself as it did through the Act of Union of 1707, and the different laws that regulated elections every three to seven years. Parliament could do everything that is not naturally impossible; for that reason - he argued - some had audaciously, and without scruples spoken of the omnipotence of Parliament[152]

The sovereignty of Parliament was then manifested above all in the passing of laws. A rule which - at the same time - reflected the highest authority that the Kingdom recognised on earth. When a law was properly approved - that is, with the consent of its three component parts, the King, the Lords and the Commons - it compelled all the inhabitants of the country and its dominions, including the King himself, without it being able to be altered, added-on, dispensed with, suspended or rejected other than through the same formalities and under the same authority that approved it[153]

However, conceiving Parliamentary sovereignty in such an absolute and unlimited manner, Blackstone fell in a new and no less important contradiction. In this case in respect of what he had held in the second part of the introduction

to the Commentaries titled 'Of the Nature of Laws in General'. Here, in effect, the English jurist had recognised the existence of a natural right, inspired in the divine right, that had to serve as the parameter to the positive law, so that it could not be in any way contradicted. Blackstone wrote that the natural right, dictated by God himself, was, of course, superior to any other right. It links and compels all nations and at all times; no human law is valid if it contradicts it; and the validity, strength and authority of human laws derive, directly or indirectly from the natural law[154] A thesis that is completely irreconcilable with his rotund affirmation of parliamentary sovereignty.

We can say that this traditional jus-naturalist conception, did not stop Blackstone from appealing to the natural rights of man, reclaimed by rationalist jus-naturalism so much in vogue in his day. Blackstone, mixing premises originating in one or another jus-naturalist school, understood that the natural rights of people derive from a immutable natural law[155] and, following Locke, argued that the most important aim of a society organised in a State was the protection of these rights[156] which he, again agreeing with Locke, reduces to three: the right to personal security, to personal liberty and to private property[157]

Such a starting point explains that Blackstone examined the constitutional organisation of the State within the framework of a book, the first of his 'Commentaries', dedicated to the rights of peoples, the first chapter of which was titled 'of the absolute rights of individuals'. Blackstone's reflections on the General Theory of Law lacked not only originality but also - what was always much worse - intellectual rigour. Ernest Barker has even said that they were no more than a confused mix of Locke and Montesquieu with writers from the school of natural law such as Puffendorf and Burlanlaqui, whose principal merit was the negative one of having contributed to the creation, as a reaction, of the analytical school of law, represented by Bentham and Austin[158] This same author, referring to the opposition between the theses argued by Blackstone in the 'Introduction' (supremacy of Natural Law) and the First Book (Parliamentary Sovereignty), recalls that a reader of the Commentaries could opt - at his election - for his doctrine on sovereignty that George III and the British parliament used in their cause against the American colonies, or for his doctrine of Natural Law and the natural rights to life, liberty and happiness, to which Jefferson called upon against Great Britain in the US Declaration of Independence[159]

Blackstone felt more comfortable reflecting on the Law from a historical perspective than from a philosophical one, from the specific to the abstract. It is for that reason that in his Commentaries he attempts to transform the debate regarding the natural rights of men into an exposition on the historical rights of Englishmen[160] Blackstone himself expressly recalled that the absolute rights of the English are usually called their freedoms. Freedoms that being founded in nature and in reason were simultaneously inherent to the English style of government[161] being recognised as much by the statutes approved by Parliament - from the Magna Carta to the Establishment Act - as by the common law[162] Two types of juridical rules, on which he expands in section III of the Introduction, titled 'Of the Laws of England'.

Blackstone recognised the major quantitative importance that the common law had in the English order of his day which he defined - in one instance - as that old collection of unwritten maxims and customs[163] the most significant source of which were judicial decisions. Blackstone observed that the judges were the repositories of the law, the living oracles that must decide in all doubtful cases and who are obliged by oath to resolve in accordance with the law of the land. Their knowledge of that law followed from experience and study and for being accustomed over many years to know the judgements of their predecessors[164]

The mechanism that allowed the continuity and the authority of the common law was precedent. It was true that the judge was at times required to revise it, but even in such cases judges did not purport to make new law, but to liberate the old from its incorrect interpretation, that is, new judicial decisions were limited to outlining that the original norm was not 'bad law', but simply 'no law'[165] As Stanley Latz suggests, Blackstone conceived the judge as a law-finder rather than a law-maker[166]

However the fact that he recognised the major quantitative importance of the common law over the law of the Parliament does not make him hold the primacy of the former over the latter, as Edward Coke had made and at times followed - as in the famous and celebrated case of *Bonham* in 1610. On the contrary, Blackstone argued that when the common law and statute differed, the former submits to the latter, but unless the contradiction could not be solved, the validity of both should be maintained[167] On the other hand Blackstone points out that no statute could be considered beyond reform by Parliament given that since Parliament was in reality the sovereign power, it is always equal in power and absolute authority, so that it could never be bound to the laws approved by the current or any preceding Parliaments[168]

On the basis of these premises it was not possible to accept the possibility that judges would control or annul parliamentary legislation when Parliament breached natural law, the common law or statute law. In Blackstone's judgement there was no constitutional backing for the idea that a law contrary to reason was invalid. He argued that if Parliament decided that something unreasonable be done then he didn't know of any power within the Constitution that was vested with the authority to control it[169] Concerning specifically judges, Blackstone added that if the freedom of the judge to reject a law of Parliament contrary to reason was admitted, it would place judicial power above legislative power which, as he understood it, would subvert any form of government[170]

Nevertheless Blackstone softened these statements by holding that when the execution of the laws approved by Parliament becomes impossible or when they resulted in absurd consequences or contrary to common reason, judges, starting from the basis that such effects and consequences were not predicted by parliament, then they had freedom to interpret such laws in accordance with equity[171] The English jurist added that there were in England, as well, Courts of Equity, competent solely in property related matters, without at any stage

being able to pronounce themselves in matters of a penal nature, subjected to a strict principle of legality[172] Without doubt Equity - made up of ethical or conscience rules was in Blackstone's judgement, necessary to moderate the rigour of judicial rules or to adapt them to the circumstances of the time and place, as Grotius had warned and whom he cites, but adding that it was necessary to be very cautious in resorting to equity in order not to destroy the law[173] He added that the law without equity, although hard and unpleasant, was made much less unpleasant for the common good than equity without law, which could convert every judge into a legislator and introduce much confusion[174]

But together with the unsalvageable contradictions perceived in Blackstone when he confirmed at times the sovereignty of the people, as when he holds the absolute freedom of the people to approve laws and, at the same time, the primacy of Natural Law, it is required to add that this writer at times referred to the Monarch as sovereign. It is also appropriate to take into account that in the Commentaries - very particularly in chapters VII and VIII of the First Book[175] - is to be found the best summary of the juridical statutes of the English Monarch since the days of Bracton. In these chapters Blackstone examined the position of the Monarch, at the time George III, in accordance with the law approved by the Parliament and with the common law. This last one a law interpreted and brought up-to-date by the judges, that Parliament had no derogated, and through which a substantial proportion of royal competencies had been delimited, particularly those known as [royal] prerogatives, over which Blackstone himself expanded, demonstrating a great mastery in mixing judicial and historical rigours[176]

Blackstone shows how by reason of the prerogative power the Monarch enjoyed a group of residual powers - which later would be called reserved powers - that Parliament had that for the monarch to retain. From a functional perspective these powers were not only of an executive character - although these were the most important - but also of a legislative nature as assent was additional to the royal prerogative and, accordingly, the veto or the ability to reject parliamentary proposals[177] In reality for Blackstone, the King of England continued being not only the chief but also the magistrate of the nation, to whom all the other organs of the State had to submit themselves. He added that in a certain way - as it happened under the great revolution of the Roman State - all the powers of the old Commonwealth had been concentrated in the new Emperor[178] In respect of Parliament, the Monarch was 'caput, principium, et finis', since apart from participating in the laws by means of assent it was his duty to call and dissolve the two houses of parliament[179]

It was then a conception of regal power that - as A.V. Dicey would recall - although against Constitutional reality, it was common to all the jurists of the time who had the custom of using old terms to designate new institutions[180]

What was the reason for the divorce between the Blackstonian conception of regal power and constitutional reality ? To the forgetfulness of constitutional conventions. In effect the English professor - when considering the position of the king focused only in his judicial position - delimited as much by

parliamentary law as by the common law, but on the other hand it didn't take into account the political position of the king, regulated by constitutional conventions cemented since the revolution of 1688.

This starting point explains why Blackstone speaks that the participation of the monarch in the legislative function had become in a mere formality, as Hume had written in his essay on the independence of Parliament. But above all this starting point explains why he makes no reference in the four volumes of his work at all to Cabinet or to the mechanisms to demand the political responsibility before the two Houses of Parliament.. Mechanisms very different to the impeachment, the process to demand penal responsibility to which Blackstone referred[181]

The re-establishment of Hume's theses in the work of William Paley A notable work was published in 1785: *The Principles of Moral and Political Philosophy*. Its author was William Paley, an Anglican priest, born in 1743 and Archdeacon of Carlisle[182] Paley drafted his 'Principles' following conferences given at Cambridge University, from which he had graduated [Christ's College] in 1763 and of which he would later become tutor and fellow[183]

In this work, particularly in his Book VI titled 'Elements of Political Knowledge' Paley studied the most relevant aspects of political and constitutional theory of the 18th century. Hume's influence is quite palpable specially when he faces the problem of the origin of society and the State, which in his opinion was found in patriarchal authority or in military imposition[184] never in a social contract as so many writers had maintained, at the head of which it was necessary to mention the 'venerable' Locke[185] Whether such a contract was considered as a 'fact' or as a 'fiction'[186] that is, whether its historical existence was affirmed or whether it was accepted as a mere hypothesis, the idea of a social contract - above being false - was unnecessary to give account of the origin and nature of society and public power[187] The conclusions extracted from the idea of the social contract were also dangerous, as it happened with the acknowledgement of a fundamental legislation by an Assembly or popular Convention, superior to the legally constituted Parliament, and in which certain rights were supposedly 'inherent', 'inalienable' and 'permanent', the violation of which legitimised the right to rebel against the authority of the State[188]

Briefly, as well as rejecting the notion of the social pact for intellectual reasons, Paley distrusted it for its proclivity to revolution or - although he didn't expressed it in these words - for being associated with Locke's old distinction between the sovereignty of the people and the supremacy of Parliament - as it had been made evident during the then recently emancipated English Colonies in America, an experience that Paley had clearly in mind while drafting the 'Principles', and as it would happen a few years later in France. As an alternative to this jus-rationalist doctrine, Paley - again following Hume - defended the doctrine of Parliamentary Sovereignty and recalled that in England no law approved could be declared unconstitutional, given that in that country the terms constitutional and unconstitutional meant nothing else except legal and illegal[189] This was something he considered advisable given that it allowed that the most politically relevant laws, as those in respect of the prince's

family, the successive order, the Prerogative of the Crown, the form and structure of the legislature, together with their respective powers, as well as its organisation, duration and mutual dependency of its constituting parts - although deserving of deferent treatment - were modified by Parliament in the same manner as the other laws, when convenience or utility would require it[190]

These laws, and others no less important as those related to the organisation and operation of the Administration of Justice, formed the British Constitution the sources of which were - in addition to the laws or statutes approved by parliament, the decisions of the tribunals and customary use from times immemorial[191] This Constitution articulated a mixed state or what was in effect the same, a limited monarchy which combined three types of government: monarchy, aristocracy and the republic, each one of them respectively represented by the King, the House of Lords and the House of Commons. The goodness of this mixed form consisted in uniting the advantages of the three individual forms whilst excluding their inconveniences.

Some advantages and some disadvantages that Paley analysed later in detail outlining a brilliant synthesis of the doctrine of the mixed and balanced constitution (in the judgement of M.J.C. Vile, the most penetrating of his century),[192] although by then this doctrine had little to do with constitutional reality, given the notable development that the parliamentary system of government had reached and of which Paley was aware[193] particularly after the dismissal of Lord North in 1782.

## **V. FROM BENTHAM TO DICEY**

### **5.1. Jeremy Bentham and the sovereignty of the electoral body**

The works of Jeremy Bentham became known during the last third of the 18th century and the first third of the 19th, one of the most singular and influential figures of his day. His first book was 'A Fragment on Government', published in 1776, when Bentham was only 28 years old, and which advanced a good proportion of the key ideas of utilitarian philosophy, which he would defend throughout his expansive life. This book was a type of adjustment of accounts with William Blackstone - his old teacher from Oxford and whose law lecturers[194] he had attended in 1763 - and to who he would also dedicate another book, 'A Comment on the Commentaries', which would remain unpublished until 1928[195] His obsession with the work of Blackstone - in Bentham's opinion as influential and just as plagued with conformism, topics and contradictions - lasted his whole life, to the point that at the very end he was working on a book, which he never finished titled 'A Familiar View of Blackstone: or say Blackstone Familiarised'[196]

Bentham headed his Fragment on Government with a phrase extracted from Montesquieu's Spirit of the Laws (specifically from chapter XV, Book XXX), that in the plume of the young English thinker became an acid reference to Blackstone's 'Commentaries': rien ne recule plus le progrès des connaissances

qu'un mauvais ouvrage d'un auteur célèbre: parce qu'avant d'instruire, il faut commencer par d'etromper'. What Bentham could not support was the self-complacent analysis that Blackstone had made of the English judicial order, which was so well summarised in the oft repeated phrase by Blackstone 'everything is as it should be'. Bentham reproaches his old teacher not to have been able to distinguish between juridical dogma and legislative policy or, in his own terminology, between expositive and critical jurisprudence, which had made him confused between what the law was and what it should be. The last point was in reality what concerned Bentham and what would continue to worry him later on, given that he never attempted to outlay the current order but instead to substantially reform it, not only the English system but every other than did not fit utilitarian ideas. As Bentham himself said, he was not an expositor of the Law, as Blackstone had been, but a censor .." As Bentham explained in the preface to A Fragment on Government, the duty of the expositor is to explain to us what the law is; the censor's is to indicate to us what he believes what the law ought to be. For that reason the expositor, mainly, busies himself determining or inquiring the facts; the censor in discussing the reasons. The being of the Law is entirely different in different countries, while the must be is very similar. For that reason the expositor a citizen of one country or another, while the censor is or must be a citizen of the world[197]

In his first work the young Bentham agreed that in Great Britain sovereignty resided in Parliament and even that it was there that it still lay. His opinion was then not too different in that with that held by David Hume - to whom Bentham's utilitarian philosophy owes so much - or even from what Edmund Burke was saying at the time, an author who had defended the purely representative character of the mandate of the members of the House of Commons in his celebrated "Bristol Address" in 1774 with arguments brilliantly presented, although not entirely original since they were already present in the works of Smith and Hooker and in an explicit form in the Commentaries of Blackstone himself[198]

On the question of sovereignty Bentham even agreed with Blackstone in pointing out the danger that meant for Parliament that its acts and laws could be annulled by the judges: he argued that giving the judges the power to annul the Acts of Parliament would transfer the supreme power of the assembly in the election of which the people had had at least some participation, to a group of men in the election of which they had not participated at all[199] On the other hand what Bentham did not tolerate was the ambiguous and contradictory return of his old and reviled teacher to the contractual theses. In reality the dominant preoccupation in Fragment on Government was to reject the fundamental subjects that served as the basis to Whig doctrine, and especially the fiction of the original contract[200] Bentham, in effect referring to Blackstone, wrote that in respect of the original contract, alternatively defended and ridiculed by Bentham, it could have been worthwhile to dedicate some pages to reach a precise notion regarding its utility and reality. The fact that in times past Blackstone had called attention upon himself made him deserving of being taken into account. For his part, Bentham wrote that he believed until he became aware of the Blackstone's reference, that such an argument had been demolished by Hume, believing that the contract was not talked about as much

as it had been earlier and that the indisputable prerogatives of humanity did not need to be founded in the shaky foundations of a fiction[201]

Bentham also made fun in this work of the laudatory and already antiquated interpretation that Blackstone had made of the British Monarchy as a mixed and balanced Monarchy based on the independence of the King, the Lords and the Commons. An interpretation that Edmund Burke had put in circulation very incisively in 'Thoughts on the Cause on the Present Discontents' a work that published in 1707[202] Bentham made clear, as Burke had done before him, that the King and the two Houses, far from being three organs or parts entirely independent, as Blackstone had argued - partly distancing himself from Hume - were closely interconnected; he wrote to the effect that those who considered the influence that the King and many Lords exercised over the election of the members of the House of Commons, the power that the King has to dissolve, that House just with a simple warning,; those who considered the influence that the King holds over both Chambers by means of the bestowing of royal honours and appointments and their destitution; those who on the other hand considered that the King depended on his sustenance on both Houses, but above all on the Commons (not to mention the many other circumstances which could be pointed out) could judge the veracity of Blackstone's opinions when he so emphatically made such assertions[203]

In a brief work published in 1795 titled Anarchical Fallacies, which only achieved great distribution in England and Continental Europe after it was translated into French by Etienne Dumont in 1816[204] Bentham, addressing himself now to French revolutionaries, again criticised the doctrines of popular sovereignty (or more precisely national sovereignty) and the division of powers that Tom Paine - the most conspicuous English representative in the doctrines of the French revolutionaries[205] - had defended in his very influential book 'The Rights of Man' published in 1791[206] Paine, who in 1776 had given to the printer a work highly critical of the British Constitutional system titled 'Common Sense'[207] held now, openly against Burke's "Reflections on the French Revolution" that in order to guarantee the natural rights of man it was necessary to create a Constitutional State inspired in popular or national sovereignty and in a rigid division of powers, as the Americans had done with the Constitution of 1787 and the French with the Declaration of Rights of 1789 and the 1791 Constitution. It is for that reason that he rejected a Constitution along British lines based on parliamentary sovereignty of which an hereditary King and aristocratic Lords formed part, and not in the sovereignty of the people or the nation to whom it belonged at all times the inherent and non-derogatory right to abolish any form of government that it considers inconvenient , and to establish what was convenient to its interests and happiness[208] A Constitution which mixed system of government was an imperfect whole, the discordant parts of which could only be fused through corruption[209]

Bentham detested as much as Paine did Burke's romantic historical perspective and his doctrine of the 'prescriptive constitution' based on precedent, prejudice and historical continuity, but just like Burke, perhaps even more so, he detested Paine's Rousseau-influenced rationalist jus-naturalism. His theses on sovereignty and the organisation of the powers of the State were for that reason,

very different from Paine's, and would remain that way even when Bentham embraced the democratic ideal, as we shall see soon.

Regarding the doctrine of sovereignty - glossing over the third article of the celebrated Declarations of the Rights of Man and the Citizen, approved by the French Constituting Assembly on the 26 August 1789, in which it was proclaimed that sovereignty resided essentially in the Nation and that, consequently, no corporation nor individual can exercise other authority not derived from it - Bentham argued that - at least in a general manner, as the article did - it was unsustainable to hold that the authority not founded in a popular election, in an expressed mandate of the nation, was an usurping authority contrary to natural law and therefore null, since that would mean considering as usurpers and null all then existing governments, except 'some democratic republics'. The maxim that contained this article was then 'an instrument of revolution'.<sup>[210]</sup> No doubt an incorrect interpretation given that the same people that approved this article did not refrain from creating a hereditary monarchy.

In respect of the doctrine of the division of powers Bentham argued that in a State there must be a sovereign power, such that rather than argue for a division of powers it was preferable to speak of a division of functions. Commenting on article 16 of the French Declaration of Rights, Bentham pointed out that the separation of powers that this article consecrated as an essential principle of every Constitution, was a confused idea extracted from an old political maxim: *Divide et impera* 1/4 The powers, separated and independent, did not form part in any way an entity. A State so constituted could not survive. If a supreme power was necessary to which all branches of government were subordinated, there had to be distinctions in the functions but there would be no division of powers, since a power that is not exercised except in accordance with the rules drawn up by a superior is not a separated power, it is a branch of that superior power, and has been granted by virtue of that fact, which can also recover it; such as it has been determined by the manner of its exercise, it can also modify that form as it pleases.<sup>[211]</sup>

But this first Bentham period - characterised by a conservative positivism, reformist and anti-revolutionary - was followed by a second characterised by a democratic positivism, obvious above all in the 'Constitutional Code'<sup>[212]</sup> where his thesis concerning sovereignty - although not about the division of powers - changed substantially. In the Constitutional Code - his most important work according to many students of the English philosophers<sup>[213]</sup> and with ever increasing interest in it<sup>[214]</sup> - Bentham, in the final stretch of his life, in effect moved away from the traditional doctrine of Parliamentary sovereignty, showing himself in favour of popular sovereignty although without abandoning his positivist premises, which to such an extent separated him from Paine, fellow democrat but jus-naturalist.

The gestation process of the Constitutional Code was very complicated. Bentham commenced drafting it in 1822 when he was almost 74 years old. Death caught up with him ten years later without completing it, although the first volume appeared in 1830, the only one that saw light during his life, with the title

'Constitutional Code: for the use of All Nations and All Governments professing Liberal Opinions'.[215] Bentham argued the principle of popular sovereignty at the beginning of the Constitutional Code[[216] although from purely positivist and utilitarian assumptions that would take him to substitute the always abstract notion of 'people' by the much more specific of 'Constituting Authority', composed by citizens to whom the order conferred an active electoral right, that is, all males over the age of 21 able to read.[217] The people so understood was the repository of sovereignty, not only its title but also a good proportion of its exercise given that, for example, it was its responsibility to elect the Legislative Assembly.[218]

Reasoning in this manner Bentham distinguished between popular sovereignty and Parliamentary supremacy, between the Constituting Authority and the Legislature. Parliament ought to be an omni-competent but not an omnipotent organ and consequently subject not to limits but rather to a number of controls.[219] In this respects he defended the revocation of Parliament at the initiative of a quarter of the electors, who could also destitute the members of the executive and the judiciary and demand from them their responsibilities through the Legislation Penal Judicatory.[220] On the other hand in the Constitutional Code Bentham remained faithful to his old critique of the doctrine of the division of powers which he classified as absurd. He also insisted in the need to substitute the idea of 'division' for 'dependency' of the different powers of the State to the entity elected by the people, although in a line much closer to that of an assembly system of government than that of a parliamentary system. In reality, in the model argued by Bentham in this work - after the electorate - Parliament was configured as the central entity of the State, to which all other entities, and specially the executive, had to be subordinate.

In effect parliament had to designate a Prime Minister, which in any case should not be called President, as in the United States, despite that country representing the constitutional model to which Bentham felt a closer affinity. However the Prime Minister was not to be a member of Parliament and did not even have access to it except through express invitation, so that he communicated with Parliament in writing, having to exhaustively inform the Assembly on every activity of government. On the other hand the Prime Minister could be dismissed by Parliament, although Bentham does not explicitly mention either censure motions or votes of confidence. Likewise he could be dismissed by the people, that is, the electors. The main function that Bentham conferred on the Prime Minister was to execute the orders of Parliament, to name and allocate Ministers and to direct the civil and military administration.[221] For their part Ministers had voice but no vote in Parliament, being capable of being dismissed by the Parliament and by the people as well as by the Prime Minister.[222]

The theses argued by Bentham in the Constitutional Code was then very far from the English Constitutional reality of the day and that which would evolve in the future, although they would not fall on deaf ears. On the contrary, his influence would be substantial among the critics of democracy argued by the British left during the last one hundred and fifty years.

## 5.2. John Austin and the House of Commons as trustee of the electorate

One of the most profound reflections on sovereignty in the history of British thought was undertaken by John Austin in a book published for the first time in 1832, the same year in which the Reform Act was approved, that would so much influenced the advance of the Cabinet system of government and even of democracy itself in Great Britain. This book - 'The Province of Jurisprudence Determined' - included the text from a series of conferences that Austin had been delivering since 1829 in the then recently created University of London.[223] The influence of Hobbes and Bentham is clearly perceptible through its pages. Of course Austin moved away from the author of Leviathan on some essential points as, for example, in everything relating to the origin of power, but was not reticent in confessing that he knew of no posterior work 'except our great contemporary Jeremy Bentham' that had formulated so many truths relating to the structure of the State and the most important juridical categories.[224] Bentham's influence over Austin was likewise notable, particularly in the field of juridical philosophy, give that in the political arena Austin's perspective was more conservative.[225]

In his book Austin tackled with extraordinary rigour and in a very clear and precise style, some problems essential to understand the British system of government from a juridical perspective. It is certain that Austin's Seminars did not constitute a course in Constitutional Law. On the other hand and as its title implied, it was one in Jurisprudence, that is, of the General Theory of the Law.[226] For that reason he only examined in passing what in some instances he significantly called the intricate system known as the British Constitution.[227] This does not mean that the reflections of the great English jurist did not become very interesting in order to best encapsulate the British doctrine of sovereignty.

Austin, following Bentham, understood that the aim of every political organisation, irrespective of its form of government, was to achieve the greatest possible advancement to human happiness[228] From this point of view, the State, as Locke had said, had to legitimise itself in the consent of the governed and only the people could be considered as the legitimate source of public order[229] However that did not imply acceptance of the contractual theory when it came around to explain the foundations of the State and its historical origins. More than that: the hypothesis of the social pact appeared to him unnecessary and prejudicial[230] As he understood it - coinciding with Hume and Bentham - it was not possible to speak of contract before the existence of law nor, therefore, of the State, in addition to which it became impossible to explain historically the existence of a social contract[231] The Constitution of each State and, accordingly, the form of government with which it was configured, were in reality the fruit of several generations and not the result of an original contract[232]

One of the most peculiar forms of government was that known as "limited monarchy". A form of government that could not be classified as monarchical but rather as aristocratic, since it was not one in which a single element exercised power but several. The king in a limited monarchy shared sovereignty

with others: for example with parliament. Strictly speaking the term 'limited monarchy' implied a contradiction in terms given that if it was a monarchy it could not be limited and if it was limited it could not be a monarchy. Where the king was not sovereign it made no sense to speak of a monarchy. Accordingly the so-called limited monarchy had to be considered as an aristocratic mode of government, but not monarchical, as Hobbes had made clear in *Leviathan*[233]

The limited monarchy was precisely the form of government existent in England. It was there that the King shared power with the House of Lords and the House of Commons. The three entities together formed the Parliament, which is where sovereignty resided[234] Although in reality, for Austin the organ where sovereignty resided was not the House of Commons but the electoral body charged with its periodic election, together with the House of Lords and the King. That is, Austin points out that the King and the Lords together with the House of Commons formed a tripartite body which was sovereign or supreme. However - he added - that speaking with greater precision, the members of the House of Commons are but mere trustees of the electoral body that elected them and, consequently, sovereignty always resided in the King and the Lords together with the electoral body that elected the House of Commons[235]

Austin was very critical of the doctrine of the division of powers, particularly with the distinction between the legislative and executive powers, just like it had been argued by other English writers such as Blackstone. For Austin to distinguish between the faculty of establishing laws or other juridical rules and the faculty of executing them was always very imprecise, among other reasons because what was understood by executive function (into which Austin included not only administrative but also judicial) implied or could imply the exercise of legislative functions. In reality Austin thought, as it was common in his time, that the doctrine of the division of powers - as argued by Blackstone and other celebrated writers during the 18th century - was so 'evidently false that its examination could not last more than a minute'. To prove its falsity Austin did not mention, as it was usual from Burke and Bentham, the narrow connection between Cabinet and the Commons in which Lord Russell and J.J. Park had insisted[236] instead preferring to recourse to other less abused examples. In that manner the great English jurist pointed out that many laws made by the British Parliament were subsidiary, that is they were thought for the proper execution of others, which meant that when the British Parliament made them it was not strictly speaking as a legislature but was instead carrying out executive functions, just as when the Justice Tribunals - in order to apply the law - issued rules of process in their sentences and warrants, that is, by means of orders issued for specific cases by the judiciary[237]

Austin also observed that in Great Britain the judicial function was exercised directly by the Parliament when it approved an Act of Attainder with the aim of punishing a conduct *ex post facto*, that is, without prior legal classification[238] Lastly, it became evident for Austin that the King did not only exercise executive functions but also others of a legislative character, for example when - as Captain General - he drafted juridical rules with respect to the organisation of the military. In the same way that the House of Lords and the House of Commons carried out functions of a judicial nature - and therefore executive or

administrative - when the first, in civil cases, became the final Appeals Tribunal and the second made pronouncements over the validity or otherwise of the election of its members[239] Austin concluded stating that the most precise manner of looking at the organisation of the powers of the State consisted in distinguishing between supreme and subordinate powers. The formers were those exercised by the sovereign itself, which in England was no other than the King, the House of Lords and the electoral body charged with electing the Commons; the latter were those exercised by the delegated authorities acting in its name, as it happened with the Tribunals of Justice or even with the King, the House of Commons and the House of Lords, when these three entities did not function as part of the sovereign body, that is, of the Parliament, but as entities independent of Parliament[240]

Austin distinguished between juridical and conventional rules in accordance with a purely positivist concept of law - inherited from Hobbes and Bentham - equivalent to the sovereign's mandate, who could directly established juridical rules (as it happened in England with the Acts) or through a subordinate authority (as with the judicial or judge-made law), or allowing juridical creation to private individuals such as in the field of private law[241] The juridical rules were only so when they could be argued before and enforced by the Courts. It is from this that the customs or conventions were not juridical rules but simply 'rules of conduct' which expressed political, moral and ethical principles[242] These rules of conduct were enormously important for public English law in the measure that the public law concerned the sovereign it was clear that a large part of the law was not law as such but simply positive morality or ethical principles[243] This is what happened with the rules that determined the 'Constitution of the State' or which determined the aims and procedures of public powers. Rules not juridical in the strictest sense, the knowledge of which was absolutely necessary in order to know the juridical rules per se, whether they were of parliamentary origin (statute laws) or judge-made (judiciary law)[244]

In reality, in England, the law could not be understood without knowledge of the Parliamentary Constitution and of the different rules through which the body sovereign legislated, although it is obvious that a large portion of the rules that determined the Constitution of the Parliament as well as those others that parliament followed when legislating, were only a right imposed by community opinion or simple ethical maxims that Parliament willingly observed[245] that is, simple customs or conventions to which Austin denies their juridical nature proper not being required by Tribunals, or simply as rules of constitutional propriety.

Austin maintained that it was a contradiction in terms to speak of limits to sovereignty. The sovereign could not be subject to juridical limits[246] Certainly in every politically independent society, that is, in every State, there are certain maxims that the sovereign habitually observes in its relationship with society. But such maxims are not, strictly speaking, law, that is, positive legality, but positive morality; they do not form part of the juridical order but of the constitutional order[247] It is then not possible to establish against the Sovereign, be it Parliament or the Monarch, 'legal' limits, only 'constitutional'

limits[248] In this manner Austin established the principal distinction (more like juxtaposition), in the heart of public English Law - particularly in respect of the study of the parliamentary monarchy - between 'legality' and 'constitutionality', that is, between juridical rules, created by parliament of Judges, and constitutional conventions. In that manner a law could, in his opinion, be unconstitutional but not for that reason 'illegal'[249] If, for example 'a law of the British Parliament attributed sovereignty upon the King, or to the King and the House of Lords, or the House of Commons, it would essentially alter the current structure of the State and could, consequently, be properly considered unconstitutional 1/4 But to call it illegal would be absurd, given that currently Parliament is sovereign in the United Kingdom and, accordingly, it is the source, directly and indirectly, of all the positive law, corresponding exclusively to it what it is that is juridically just and unjust'[250]

But although it was not possible to establish juridical limits, only moral ones (or said it in another manner; constitutional limits but not legal ones) the sovereign, that is, Parliament in accordance with the English Constitution, this did not imply that taken by themselves the members of Parliament, be they the House of Lords, the Commons or the King, would cease being subject to the law , in addition to 'positive morality'. In what concerned the King, English law consecrated juridical and political irresponsibility on the Monarch, but that was no reason so that taken separately, he would be juridically and politically compelled, that is, in accordance with the law and the Constitution, to comply with and obey the laws approved by the Parliament as a whole, although the order could not prevent any sanction in case that it wouldn't comply with it[251]

In an interesting study Sarah Austin confesses that her husband's book did not have too much impact[252] contrary to what had happened with the conferences on which it was based (that were not completely published until 1861, together with a course that John Austin taught at the Inner Temple in 1834) [253] Nevertheless Wilfrid E. Rumble recently showed that in Great Britain some juridical journals and others of a more general nature, immediately recounted Austin's book, its first edition in 1833 as much as the second in 1861 [254] while on the other hand his lectures had not enjoyed too much success[255]

What is beyond doubt is that Austin's reflections in 'The Province of Jurisprudence Determined' had enormous influence in Anglo-Saxon juridical and political thought since at least the second half of last century. The echo that these reflections - in reality something more than an echo - can be seen, for example, in the 'Considerations on Representative Government', that John Stuart Mill[256] wrote in 1861, but its influence was particularly important in the work of Albert Venn Dicey, the most outstanding British writer of the 19th century, with whom we will deal now.

### **5.3. Dicey and the distinction between juridical and political sovereignty**

Dicey is above all the author of a book that would have enormous repercussion in 20th century doctrine: his 'Introduction to the Study of the Law of the Constitution', the first edition of which dates from 1885 [257] In this book it is not

only John Austin's decisive impact that can be seen, but also Bentham's and Hobbes, who in all justice can be considered the precursor of modern juridical positivism, without demeaning the stellar roles of Hume and Kant. Nevertheless this marked intellectual ascendancy was no reason for Dicey holding very distinctive theses to those held by Hobbes, Bentham or even Austin in respect of the subject of the imputation of sovereignty. It could be said that Dicey's position consisted in liberating Blackstone's theses regarding parliamentary sovereignty of all their contradictions with the assistance of the positivist methods and to adapt them to the juridical reality of the second half of the 19th century. As a result Dicey formulated a theory of sovereignty, not original but coherent, clear, precise and current; exposing as well great brilliance. Qualities that explain its subsequent success.

With a firmness unknown until then Dicey held that in Great Britain - or in England as he preferred to say[258] - there was no sovereign other than Parliament. An institution that in his opinion was required to be understood as the joining of three bodies; the Queen, the House of Lords and the House of Commons[259] Understood in that manner, Parliamentary Sovereignty - and not simply its mere supremacy - was, from the juridical perspective 'the dominant characteristic of British political institutions'[260]

The principle of the sovereignty of parliament meant that it was in parliament where 'the right to do and undo any type of law' resided and that, consequently, no person or corporation was authorised by the Law of England 'to annul or derogate the legislation of Parliament'[261] However, as for Dicey, faithful to positivism, we could only speak of juridical rules when these were capable of enforcement by the courts of law[262] the principle of Parliamentary Sovereignty implied that these courts had to accept any Act of Parliament, or any part of it that consisted in approving a new law or in derogating a previous one whether partially or totally[263] Formulated in a negative sense, from the principle that Parliamentary Sovereignty, (the legal and doctrinal antecedents of which he deals with[264] Dicey extracts four main premises. The first of these being: neither the Queen, nor the House of Lords nor the House of Commons could separately be considered sovereign under English constitutional law. Only a rule jointly approved by these three bodies could be considered law and, accordingly, be obeyed as such by the other public powers and, specially, by the courts[265] In particular Dicey held that the Queen could not appeal to her prerogative to suspend or derogate a law approved by Parliament, while Parliament was empowered by law to diminish the powers of the regal prerogative. Both questions that in the past had led to many disputes, but that no longer held any interest[266]

Secondly Dicey held that the people (despite what Locke had argued) or even better, the electoral body (as Bentham had preferred to refer to), was not an absolute sovereign in Great Britain. According to Dicey the only right that electors had under the English Constitution was to elect the members of Parliament. Electors lacked any entitlement to initiate, sanction or reject the legislation of the Parliament. No Court will for one moment consider the argument that a law is invalid for being contrary to the opinion of the electorate, who can only express itself juridically through Parliament and in no other

manner[267] In this respect he also differed from Austin who, in Dicey's judgement, had not considered anything else other than 'juridical sovereignty' and another distinctive, 'political sovereignty'. The first belonged in Great Britain only to the Queen together with the Houses of Parliament. The second, at least during the 19th century, was exercised by the people or, with greater juridical precision, that section of the people capacitated by the system to form part of the electorate. Politically it could be said that the people or the electorate was sovereign in Great Britain, given that its will was that which the Queen made hers in Parliament. A Queen whose powers had been considerably curtailed as a result of the advances of the Cabinet System, as Walter Bagehot -somewhat exaggerating this curtailment - had highlighted in an entertaining and greatly influential book published some two decades prior to Dicey's.[268] But juridically the will of the electorate could not be argued absolutely before the Courts of Justice, at least while Parliament didn't declare this to be its will. Dicey pointed out that the political sense of the word 'sovereignty' was as important - if not more - than its juridical meaning. But the two meanings, although closely connected, were essentially distinct and in some part of his work Austin had confused them 1/4. No English judge would agree in considering Parliament, in its juridical sense, as a trustee of the electorate.[269]

Thirdly, Dicey held, with no less emphasis, that there was no contradiction between the judicial creation of law and Parliamentary sovereignty. Without doubt judges in England, in addition to applying the law also created it, their sentences conforming with a repertoire of precedents to which they were bound in order to resolve similar cases with which they were faced in the future.

However, once again agreeing with Hobbes, Bentham and Austin, and openly against Coke and even Locke, Dicey held that case law was always subordinate to the legislation of the Parliament[270] A thesis that made him hold that the laws of parliament approved by the required formalities, could not be declared invalid by the Courts when these considered them contrary to moral principles or international law[271] Such thesis, however, did not imply in any way to disregard the importance of case law, through which the common law was updated, but it also interpreted statute law, that is, the laws approved by parliament. The latter law being one to which both the executive and the citizenship were subordinate and without any room for a 'droit administratif' nor for any administrative jurisdiction. All of this in accordance with the 'rule of law' the other great principle of English Constitutional Law, Dicey dedicating a whole chapter to its relationship with Parliamentary sovereignty[272]

Fourthly and lastly, Dicey affirmed that the Parliament could not limit subsequent Parliaments, so that no law could be considered beyond reform[273] On the contrary, the doctrine of the legislative supremacy of Parliament was 'the very keystone of the law of the constitution'[274] This premise made him outline, in a very acute and brilliant manner, the link between the sovereignty of parliament and what his friend and colleague Lord Bryce had called the 'flexibility' of the British Constitution, or expressed in another way, between the sovereignty of Parliament and the non-existence of a rigid constitutional text and superior to the law, that - on the other hand - existed in the United States of America, a country in which the supremacy of the Constitution over the law had

been constructed parting from Locke's theses of the sovereignty of the people (the ultimate expression of which was the Constitution, fruit of its constituting power) whilst the consequent constitutional control of the law through the means of judicial review, apart from being a requirement of the federal principle, sank its doctrinal roots in the judicial tradition that the common law judges, with Coke at its helm, had created against the absolutism of the Stuarts and that Locke himself had made his in his 'Second Treatise on Civil Government'.<sup>[275]</sup>

Dicey pointed out that by virtue of its sovereignty, repeating what Blackstone and Paley had said previously, the Parliament of England could modify any law independently of its political importance, without the need to observe any special process. In reality there was no juridical distinction in England between constitutional and ordinary law. The consequence of this was that there was no authority in England with the right to annul a law of the Parliament alleging its Unconstitutionality.<sup>[276]</sup> Dicey concluded that England had laws that could be called fundamental or constitutional in the sense that they regulate matters of importance (for example, the succession of the Crown or the terms of the Union with Scotland) floating over the institutions. But there was no supreme law or one which could be used to verify the validity of the other laws. The first fundamental dogma of English Constitutional law was the absolute legislative sovereignty or the despotism of the King in parliament.<sup>[277]</sup>

As it was previously advanced, Dicey's observations regarding sovereignty have exercised an enormous influence during the 20th century<sup>[278]</sup> whose doctrine continued to consider the sovereignty of Parliament - not that of the people - as the dominant characteristic of the British Constitution (Sir Ivor Jennings)<sup>[279]</sup> or HL Hart's rule of recognising the British juridical system<sup>[280]</sup> or Geoffrey Marshall's ground norms of the system<sup>[281]</sup> However and as Colin R. Munro recognises<sup>[282]</sup> although Dicey's doctrine on sovereignty represents still today - at the doorstep of the 21st century - an unavoidable starting point, it is no less true that the most outstanding writers of this century have been highly critical of the consequences that Dicey extracted from his doctrine on sovereignty. Reason why there has been talk of a 'new perspective' of Parliamentary sovereignty, including among many Sir Ivor Jennings, E.C.S. Wade and G. Marshall<sup>[283]</sup>

Marshall, distancing himself from Dicey's rather rigid criteria, holds that it would conform with British law that in future Parliament could limit itself by means of a Bill of Rights, something which British doctrine has been demanding over the past twenty years, approved by a very qualified majority or by means of a referendum, so that the Courts of Law could consider invalid - being ultra vires, any subsequent law that contradicted this Bill of Rights unless this law was approved by an identical majority or approved by referendum by the electoral body<sup>[284]</sup> On the other hand, there is no doubt that during the current century the principle of Parliamentary sovereignty has had to face new and very difficult challenges. Particularly three: firstly that faced by the 1937 Statute of Westminster which compelled the reconsideration of the relationship between the British parliament and the Commonwealth<sup>[285]</sup> secondly that caused by Britain joining the European Economic Community in 1972, which put on the table the no less problematic relationship between the sovereignty of the British

Parliament and the primacy of European Community Law[286] thirdly that implied by the approval in 1997 of the Autonomy polls in Wales and Scotland, which have compelled a redefinition of the role of the Parliament of Westminster and its relationship with the two new legislative assemblies[287] Such challenges have forced a reconsideration of the validity of Parliamentary sovereignty in Great Britain today[288] where the debate regarding sovereignty has acquired great political importance and substantial academic interest, as it may be appropriate to outline on another occasion.

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[1] Published after his death since Bracton died in 1268, according to Samuel E Thorne's 'Introduction' to the bi-lingual Latin/English edition to *On the Laws and Customs of England*, translated with notes and revisions by S.E Thorne and published in association with Selden Society, The Belknap Press, Harvard University Press, Cambridge, Massachusetts, 1968, 4 Vol. Vol., 1. P.XL. Thorne's edition is based in the Latin edition of George E. Woodbine Bracton, *De Legibus et Consuetudinibus Angliae*, New Haven; Yale University Press, London: Humphrey Mifflord, Oxford University Press (OUP), 1915, 4 vol.

[2] Charles Howard McIlwain, *Cosntitucionalismo antiguo y moderno*, Centro de Estudios Constitucionales (CEC), Madrid, 1991, p.91.

[3] McIlwain, *op cit.* Pp.101-109

[4] F.W. Maitland, *The Constitutional History of England* (1908), edited by H.A.L. Fisher, Cambridge University Press (CUP), 1968, pp 54-92; Walter Ullmann, *Principios de Gobierno y Política en la Edad Media*, *Revista de Occidente*, Madrid, 1971, pp. 174-176 and McIlwain, *op. Cit.* Pp. 106-107

[5] F.W. Maitland, *The Constitutional History of England* (1908), *op cit.* P.15.

[6] "The substantial characteristic of the Magna Carta was that of its character as a pact between the king and the barons, strengthened by the promise of the former. It was a pact that could only be conceived within a feudal scheme 1/4" Walter Ullmann, *op. cit.* P.170. "The Magna Carta - the author added - sealed the future of the English Monarchy" *ib.* p.173.

[7] *On the Laws and Customs of England*, bilingual edition cited from Samuel E. Thorne, vol.II, p.33. Trans.: " the king must not be under man but under God and under the Law, because law makes the King"

[8] Alessandro Passerin D'Entrèves, *La Noción del Estado*, Centro de Estudios Universitarios, Madrid, 1970, p.103. Regarding the Medieval concept of law see also the classical work of Otto Von Gierke, *Die publicistischen Lehren des Mittelalters* (1881), to which Passerin himself refers. This work was recently translated into Spanish under the not too accurate title of *Teorías políticas de la Edad Media [Political Theories of the Middle Ages]"Estudio Preliminar'* by Benigno Pendás, "Introduction" by F.W. Maitland, Spanish Translation by Piedad García-Escudero, Centro de Estudios Constitucionales (CEC) Madrid, 1995. A commentary on this work can be found in *Política y Derecho en la Edad Media [Politics and Law in the Middle Ages]* by Joaquín Varela

Suanzes, "Revista Española de Derecho Constitucionales", no 49, January-April, Madrid, 1997, pp. 335-351. See also *Los Dos Cuerpos del Rey. Un estudio de Teología Política Medieval* [The two embodiments of the king. A study in Medieval Political Theology], Ernest H. Kantorowicz, Alianza Universidad, 1985, pp.114.

[9] Regarding the medieval concept of law, in addition to the aforementioned works, see also the first volume of the classic work by R.W. & A.J. Carlyle, *A History of Medieval Political Theory in the West*, Blackwood & Sons, Edinburgh, 1903, or, more accessible and summarised (in Spanish) the book by A.J. Carlyle *La libertad política. Historia de su concepto en la Edad Media y los tiempos modernos*, FCE, México, Madrid, Buenos Aires, pp.23.

[10] Regarding the origins of these three bodies - the Curia Regis, Parliament, and the Concilium Regis, see Maitland in *The Constitutional History of England*, op.cit. pp.54-105.

[11] Sir John Fortescue (1395-1477), *De laudibus Legum Angliae*, written circa 1470 and translated into English as *A Praside of the Laws of England*, Chapters IX & XVIII. Also *The Governance of England*, written between 1471 and 1476, chapters I to III. Both works in the very recent and accessible edition by Shelley Lockwood, *Sir John Fortescue, On the Laws and Governance of England*, Cambridge texts in the history of political thought, CUP, 1997.

[12] Macillwain, op. cit. P.111.

[13] Sir Ernest Barker recalled the exemplary value of the Spanish Cortes: "whomsoever attempts to know the origins of the institution of Parliament in Europe must not forget the early Spanish contribution and to keep in mind that the Spanish precedents have been acknowledged by some historians as one of the elements that contributed to the development of the English parliament during the 13th Century. *The Parliamentary System of Government*, in *Essays of Government*, Oxford University Press, 1965, p.59. Regarding the origins of the several European Parliaments see also the *Proceedings of the Conference on this subject held in León (Spain), September 1988 and published in 1990 by the Cortes de Castilla y León*, entitled "*Las Cortes de Castilla y León 1188-1988*", Valladolid, 2 Vol.

[14] O.Hood Phillips, *Constitutional and Administrative Law*, Sweets & Maxwell, London, 7th ed, 1987. This manual, although centred on current law, contains an interesting historical exposition concerning parliamentary Sovereignty in pp. 40-58

[15] Regarding the institutional development during the Tudors, see G.R. Elton, *The Tudor Constitution Documents and Documentary*, CUP, 2nd ed., 1986.

[16] In addition to being Kings of England and head of the Anglican Church, the Tudors were also Kings of Wales, as they had been since the *Statutum Walliae* of 1284, although the union with the Crown of England did not take place for all effects until the Act of Union of 1533.

[17] Geoffrey Marshall and Graeme C. Moodie argue that even in these paragraphs, Smith identified Parliament with the representation of the nation. See *Some Problems of the Constitution*, Hutchinson University Library, London, 5th ed., 1971, p.15

[18] Sir Thomas Smith, *De Republica Anglorum. A Discourse on the Commonwealth of England*, Book II, chapter 1, L Alston (ed), with an introduction by FW Maitland, CUP, 1906, pp. 48-49

[19] Richard Hooker, *Of the Laws of Ecclesiastical Politie*, Book VIII, ch. 6, Arthur Stephen McGrade, CUP, 1989, p 192. The date when Hooker wrote this book is in dispute. Raymond Aaron Houk, in the p. VII of his *Introduction to Hooker's Ecclesiastical Politie: Book VIII* Columbia University Press, New York, 1931) argues that the book was completed in 1593, a claim he repeats again in p.91 of his "Historical References". But in his Introduction, McGrade, unwilling to commit himself to an exact date, restricts himself to say that Hooker must have left this Book VIII ready to print, but that it wasn't published for the first time until 1648, several years after his death. *Ib*, p.XIV

[20] Of the Laws of Ecclesiastical Politie. Book VIII, ch.6. A recent and clear exposition of Hooker's Constitutional thinking can be found in Howell A. Lloyd, *Constitutionalism*, in *The Cambridge History of Political Thought, 1450-1700*, edited by J.H. Burns, CUP, 1991, pp.279-283. See also Paulette Carrive, *Richard Hooker, Théologie et Politique*, in *La Pensée Politique Anglaise de Hooker a Hume*, Presses Universitaires de France, Paris, 1994, pp. 3-31. Other less relevant authors during Elizabethan England, such as Merbury, Haywood and Craig, also defended parliamentary Sovereignty, as J.W. Allen recalls in *A History of Political Thought in the 16th Century*, London, 1941, pp. 247.

[21] Plato, *Las Leyes [The Laws]* book III; from the bilingual (Spanish-Greek) edition of IEP, Madrid, 1960, translation, notes and prologue by José Manuel Pabón and Manuel Fernández Galiano, Vol. 2; Aristotle, *Politica*, Books III, ch. 6-8, IV, ch. 4-12 and VI; from the bilingual (Spanish-Greek) edition from CEC, Madrid, 1983, translated by Julián Marías and María Araujo, Introduction by Julián Marías; St Thomas Aquinas, *De Regimine Principum*, Book I, ch. VI; from the Latin version by Marietti, Turín, reprinted 1971. Another version of this last work is the Spanish edition by Tecnos titled *La Monarquía [The Monarchy]*, Madrid, 3rd ed., 1995, Prologue, translation and notes by Laureano Robles and Angel Chueca.

[22] Sir John Fortescue, *The Governance of England*, op cit, ch. 2 &3.; Sir Thomas Smith, *De Republica Anglorum*, op. cit. Book I, ch. 6 and Book II, ch. I; Richard Hooker, *Of the Lawes of Ecclesiastical Politie*, op. cit., Book VIII, ch 3 to 6.

[23] For Bodin, in effect, "la première marque du prince souverain c'est la puissance de donner loi á tous en général et á chacun en particulier, qui est incommunicable aux sujets .. sous cette meme puissance de donner et casser la loi sont compris tous les autres droits et marques de souveraineté 1/4. Comme décerner la guerre ou faire la paix ; connaitre en dernier ressort des jugements de tous magistrats; instituer et destituer les plus grands officiers; imposer ou exempter les sujets de charges et subsides; octroyer graces et dispenses contre la rigueur des lois; hausser o baisser le titre, valeur et pied des monnaies 1/4" Jean Bodin, *Les Six Livres de la Republique*, Book I, Ch II. From Fayard's edition, *Corpus des Ouvres de Philosophie en Langue Francaise*. Fayard, Paris, 1986, 6 volumes.

[24] Jean Bodin, *Les Six Livres de la Republique*, Book II, ch I to VII.

[25] W. Ullmann expands on this in *Principios de Gobierno y Politica en la Edad media [Principles of Government and Politics during the Middle Ages]* Alianza Universidad, 1985, pp. 171, 207.

[26] In the words of García Pelayo " while in most continental countries the concentration of power was in the hands of the monarch, in England it was in the Parliament. The difference is primarily symbolic, but not in terms of quality of power; just like the continental monarch [s], parliament became supreme, not linked to prior Law but superior to it; in the same way in which in the continent maintained Parliaments or the General States, at times nominally, but remaining subordinate to the monarch, in the same way but the other way around, in England the monarch remained but finally subordinate to the parliament, to the extent of being able of defining the prerogative as the remnant of power that the Parliament left the king 1/4 What remains clear is that in England they had the same phenomenon of power concentration as in continental States; that is, the phenomenon of sovereignty, notwithstanding that there is another real object", Manuel García Pelayo, *Derecho Constitucional Comparado*, Alianza Universidad, Madrid, 1984, pp. 250-251, translation by Manuel Calzada.

[27] J.P. Kenyon, *The Stuart Constitution, 1603-1688, Documents and Commentary*, CUP, 2nd ed., 1986, p.11.

[28] G.P. Gooch, *Political Thought in England: from Bacon to Halifax*, OUP, London, 1955, reprinted by AMS Press, New York, 1977, pp. 13-22. In respect of the English political and constitutional debate during the times of the Stuarts, see also J.W. Allen, *English political Thought, 1603-1660*, London, 1983, Vol. 2, as well as the study by Conal Condren, *The Language of Politics in Seventeenth Century England*, St. Martin's Press, New York, 1994.

[29] John A. Pocock, *La ricostruzione di un imperio. Sovranità britannica e federalismo americano*, Piero Lacaita Editore, Manduria, Bari, Roma, 1996, p.16

[30] Mauro Capelletti, *Alcuni precedenti storici del controllo giudiziario delle leggi*, in Giuseppe Maranini (ed), *La Giustizia Costituzionale*, Vallecchi Editori, Florencia, p.23.

[31] Edward S. Corwin, *The "Higher Law" background of American Constitutional Law*, II, "Harvard Law review" No 3 (1929), pp. 366-380, and by the same author the first part of the same article in No 2 of the same Journal (1928); Mauro Capelletti, *Alcuni precedenti storici del controllo giudiziario delle leggi*, op. cit. pp. 119-120. Regarding this book see my own extensive commentary *Constitución y ley en los orígenes del Estado Liberal*, [Constitution and Law in the origins of the Liberal State] *Revista Española de Derecho Constitucional*, no 45, 1995, pp. 347-365.

[32] G.P. Gooch, *Political Thought in England*, op.cit. p. 44, see also, in general, pp. 41-49. As summarised by García Pelayo, "Coke's doctrine represents the reactionary thesis of historical law against the king's progressive thesis, and later, of the parliamentary party; that is, that in which the Law responds to a rationalised plan. It was contrary to cement sovereignty in any institution that wasn't the judiciary<sup>1/4</sup>." [translation by Manuel Calzada] *Derecho Constitucional Comparado*, op.cit., p.262. O.Hood Phillips recalls, nevertheless that Coke's obiter dicta in *Bonham* was contrary to those he held in *Institutes*; and added: as Law Officer, Coke defended the regal prerogative, as a Judge the supremacy of the Common Law (that he equipped with reason) and as parliamentarian the sovereignty of Parliament. *Constitutional and Administrative Law*, op. cit., p.48.

[33] *Ibid* p. 17. These theses were expounded by the same author in a very interesting earlier book, *The Ancient Constitution and the Feudal Law*, Cambridge, 1957, re-edited in 1987.

[34] Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1600-1642*, Macmillan, London, 1992, ch. 1 and 2.

[35] C.H. Macilwain, *The High Court of Parliament and its Supremacy*, 1912, p. 390. Prynne, in *Sovereign Power of Parliaments and Kingdoms*, published in 1643, tried to show that the basis of the Constitution rested in Parliament and not in the person of the King. Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth*, OUP, 1957, p. 48.

[36] His text can be found in *The Constitutional Documents of the Puritan Revolution, 1625-1660*, selected and edited by Samuel Rawson Gardiner, 3rd revised edition, OUP, reprinted 1968, 249-254.

[37] J.G. A. Pocock, *La ricostruzione di un impero* 1/4 op cit. pp. 24 and 25 as well as the commentary on that passage that Cesare Pinelli makes in that same book (pp.117-8) where he recalled the influence of that conception of government or mixed monarchy on Blackstone. Regarding the debate on sovereignty and the mixed monarchy, see also Corinne C. Weston and Janelle R. Greenberg, *Subjects and Sovereigns, the Great Debate over Sovereignty in Stuart England*, Cambridge, 1981; Michael J. Meedle, *Dangerous Positions: Mixed Government, estates, and the Answer to the XIX Propositions*, Alabama, 1985. M.J.C. Vile understood, differing from Pocock, that the English conception of the State as a mixture of monarchy, aristocracy and emocracy, embodied in the King, the Lords and the Commons, was already present in Fortescue and Smith. See M.J.C. Vile, *Constitutionalism and the Separation of Powers*, OUP, Oxford, 1967 p.37.

[38] Johann P. Sommerville, *Introduction to Filmer, Patriarcha and other writings*, CUP, Oxford, 1991, pp. XV-XVIII, XXXII to XXXIV. The complete title of this work was *Patriarcha. The naturall power of Kinges defended against the Unnaturall Liberty of the People*.

[39] *Ibid*, pp. 131-171

[40] Thomas Hobbes, *Leviathan or The Matter, Forme and Power of a Common-Wealth Ecclesiastical and Civil*, London, 1651. First part, ch. XV in fine. Penguin Books Edition , London, 1984, with an Introduction by C.B. Macpherson.

[41] *Ibid*, First part, Book 1, ch. XXVI

[42] See two articles by Norberto Bobbio, *Legge naturale e legge civile nella filosofia politica de Hobbes and Hobbes e il giusnaturalismo*, both in his book *Da Hobbes a Marx*, Morano editore, 2nd edition, 1971, pp. 11-74. M. Cattaneo, in his book *Il positivismo giuridico inglese. Hobbes, Bentham, Austin* (Milán, 1962), considers Hobbes as "the first representative of English positivism"., p.46.

[43] Thomas Hobbes, *Leviathan op. cit.* Second Part, chapter XXIX. In addition to the three works mentioned, a fourth book by Hobbes should be taken into account: *A Dialogue Between a Philosopher and a student of the common law of England* written around 1666 and which criticises some of the doctrines that Edward Coke had argued during the reigns of James I and Charles I regarding the role of the common law within the English juridical system. Spanish version by Miguel Angel Rodilla, Tecnos, Madrid, 1992.

[44] Regarding Sidney's political thought, particular that outlined in *Discourses concerning Government*, see G.P. Gooch, *Political Thought in England, Bacon to Halifax*, op.cit. pp. 126-132, see also Pauletter Carrive, *La vie et la pensée politique d'Algernon Sidney in La Pensée Politique Anglaise de Hooker a Hume*, op. cit. pp.248-268.

[45] It is advisable not to forget that, nevertheless, together with the re-establishment of the Parliamentary Sovereignty, the 1688 revolutionaries attempted to guarantee the unity of the State and of the Anglican Church. James II was an impediment for both given that his absolutist tendencies were as obvious as his Catholic sympathies. See also J.G.A. Pocock in *La ricostruzione de un imperio .. op.cit.*, pp. 39-44 concerning these two paradigms of the 1688 revolution.

[46] The text of the 1689 Bill of Rights can be found in W.C. Costin and J. Steven Watson, *The Law and Working of the Constitution. Documents*. Adam and Charles Black, London, 2nd ed., 1961, Vol. 2 1660-1914, Vol. 1 , pp. 67-74. For a Spanish translation of the declaration see Joaquín Varela Suanzes, "Textos basicos de la Historia Constitucional Comparada" CEC, Madrid, 1998, pp. 18-25.

[47] See J. Steven Watson, op cit., Vol. 1, pp. 79-80 for the text of the Act.

[48] *Ibid*, Vol. 1, pp. 92-96.

[49] Peter Laslett, *The English Revolution and Locke's Two Treatises of Government*, initially published in the *Cambridge Historical Journal*, Vol. 12, no. 1, pp. 40-55 and reproduced in *John Locke. Critical Assessments*, edited by Richard Ashcraft, Routledge, London & New York, 1991, Vol. 1, pp. 32-50. See also the recent article by J.R. Milton, *Dating Locke's Second Treatise in History of Political Thought*, Vol. XVI, no. 3, Autumn, 1995, pp. 356-7.

[50] C.B. Macpherson recalls than when Hobbes describes the State of Nature he is thinking of disorganised civil society, that is, bourgeois society without State, *Teoria politica del individualismo posesivo*, Fontanella, Barcelona, 1970, pp. 28.

[51] In respect Locke's gnoseology in *An Essay concerning Human Understanding*, see J. L. Mackie *Problems from Locke*, Clarendon Press, Oxford, 1976. See also the work of Shadia B. Drury, Douglass Odegard and Sterling P. Lamprecht in Vols II and IV of *John Locke, Critical Assessments*, edited by Richard Ashcraft, Routledge, London & New York, 1991. George Sabine synthesises Locke's incongruence when he points out that his political philosophy as a whole present the anomaly of a generally empirical thought theory , together with a scientific theory and a rationalist process. *Historia de la Teoría Política*, FCE, México-Madrid-Buenos Aires, 1981, p. 391.

[52] An Essay concerning the True Original Extent and End of Civil Government, chapter XIV, para. 159, Everyman's Library. John Locke, Two Treatises of Government, London, 1986, with an Introduction by W.S. Carpenter.

[53] Regarding the concept of Government by the consent of the governed, a key to Locke's political philosophy, see Jules Steinberg, Locke, Rousseau and the Idea of Consent. An Inquiry into the Liberal-Democratic Theory of Political Obligation. Greenwood Press, Westport, Connecticut, London, England, 1940, ch. 3 "Locke and the idea of consent" , pp. 53-79.

[54] Ibid, ch. IX, paras 123 and 124.

[55] An Essay Concerning the True Original Extent and End of Civil Government, ed. Cit. ch. I, II, and VII-XIV. In respect of the relationship between Hobbes and Locke, see ch. 7 of John Dunn's well known work The Political Thought of John Locke. An Historical Account of the Argument of the "Two Treatises of Government". CUP, 1969, pp. 77.

[56] Sir Frederick Pollock, Locke's Theory of the State, in John Locke, Critical Assessments, op.cit. Vol. III, p.8.

[57] M.J.C. Vile, Constitutionalism and the Separation of Powers, OUP, Oxford, 1967, ch. 2 & 3, pp. 55-57.

[58] An Essay concerning the True original Extent and End of Civil Government, ed. cit. ch. IX, Paras 128,129,130.

[59] Ibid, ch. IX, paras 124, 125 and 126.

[60] M.J.C. Vile, Constitutionalism 1/4 op. cit. p. 59.

[61] Nicola Matteucci, while outlining Locke's doctrine regarding the division of powers, recalls that from the English Middle Ages "the judicial instance was represented by the King - with the judges that depended on him - and by the Parliament, which was the Supreme Tribunal" Organizzazione del potere e libertà. Storia del costituzionalismo moderno. UTET, Turín, 1988, p. 104.

[62] An essay concerning the True Original Extent and End of Civil Government, ed. cit. ch. XIV, para 159.

[63] Ibid, ch. XII, para. 143.

[64] Ibid, ch. XII, para. 144.

[65] Ibid, ch. VII, paras. 90 & 91.

[66] George Macaulay Trevelyan, Historia Política de Inglaterra [English Political History]. Fondo de Cultura Económica, México, 2nd ed. 1984, p.284. According to this excellent - although of a somewhat insufferable nationalism - the Long Parliament did not only stop the English monarchy from becoming absolutist as others were common in Europe at the time, it also made a great experiment in the direct government of the country and of the Empire through the House of Commons.

[67] Ibid, Ch XII, para 143.

[68] As recalled by M.J.C. Vile in the book already cited, p.60. Regarding Locke's doctrine of the division of powers see pp. 58-67.

[69] An essay concerning the True Original Extent and End of Civil Government ed. cit, ch. XII, para. 147.

[70] Ibid, ch. XIII, paras 151, 155.

[71] Ibid, ch. XIII, paras 154

[72] Ibid, ch. XIII, paras 156

[73] Ibid, ch. XIII, paras 151. It should also be taken into account that in chapter XIV Locke granted the monarch wide prerogative powers, such as that of taking appropriate measures whilst the legislature was unable to meet. Para. 159. See also M.J.C. Vile, *op. cit.* p.65

[74] Ibid, ch. XIII, paras 143.

[75] Alessandro Passerin D'Entreves, *La Noción del Estado*. Centro de Estudios Universitarios, Madrid, 1970, p. 138, and generally Chapter 7, part 2. "Estado mixto y division de poder" .

[76] *Constitutionalism* 1/4 *op.cit.* p.64.

[77] *An essay concerning the True Original Extent and End of Civil Government* ed. cit., para. 132

[78] Ibid., para. 213.

[79] Ibid, ch. XIII, para. 150. Locke added that as the form of government depends on placing the supreme power, which is the legislative power, in one or another hand, the form of government of the State will depend on the manner in which the power to make laws is granted, because it is impossible to conceive that an inferior power give order to a superior one. Ibid, Ch. X, para 132.

[80] Ibid. ch. XI, XII and XIII.

[81] In Chapter II Locke had already referred to the 'judicious Locke', whose book *On the Lawes of Ecclesiastical Politie* he quotes with praise in paras 5 and 15 of this chapter, as well as throughout chapter XI.

[82] M.J.C. Vile, *Constitutionalism .. op.cit.* pp. 62-64.

[83] Nicola Matteucci, *op. cit.* pp.102-3

[84] *An Essay concerning the True Original Extent and End of Civil Government*, ed.cit. cap XI, paras 134-142, specially 142, a summary of the others.

[85] Sir Frederick Pollock, *Locke's Theory of the State*, *op. cit.* p.9.

[86] J.W. Gough, *Fundamental Laws in English Constitutional History*, OUP, 1955, reprint by Fred B. Rothman & Co, Colorado, USA, 1985, p.167.

[87] *An Essay concerning the True Original Extent and End of Civil Government*, ed.cit. cap XIII, para. 149 J.W. Gough writes that in the limits to the legislative power recognised by Locke, he perceives the influence of very ancient doctrines such as the maxim " 1/4. *Salus populi*". *Fundamental Law* 1/4 *op. cit.* p.168. Regarding this maxim Locke would go on to say in *An Essay concerning the True Original Extent and End of Civil Government*, ed. cit chapter XIII, para. 158 that .. *salus populi, suprema lex* is such a just and fundamental rule that whoever follows it with sincerity can not err dangerously.

[88] Regarding Locke's doctrine on the right of resistance see Julian H. Franklin, *John Locke and the Theory of Sovereignty. Mixed Monarchy and the Right of Resistance*, CUP, Cambridge, 1981, pp. 91-97. See also chapter 3 from Ruth W. Grant's *John Locke's Liberalism*, The University of Chicago press, Chicago & London, 1987.

[89] A.H. Maclean, George Lawson and John Locke in "Cambridge Historical Journal", IX, no. 1, 1947, pp 68-77, reproduced in the previously cited book John Locke. Critical Assessments, Vol. 1 pp. 110-119.

[90] John Locke and the Theory of Sovereignty .. op. cit. passim.

[91] In effect Franklin recalls that whilst the doctrine of popular sovereignty held by the monarchists during the XVI century was incompatible with the doctrine of the limited monarch as well as with that of the mixed monarchy, their profiles, on the other hand, not being altogether clear with the writers of the time, as Pocock highlighted, the constitutional theoreticians from the XVI century and early XVII century understood that the principle of popular sovereignty was incompatible with the partial independence that the king had to enjoy under a mixed or limited monarchy.

[92] Julian H. Franklin, John Locke and the Theory of Sovereignty, op. cit. pp. IX, 53, 87 and 88.

[93] Ibid., p. 89

[94] Ibid, pp. IX-X

[95] Ibid. pp. 98-99

[96] Ibid, p.100

[97] With regard to the political and constitutional life during this period see Basil Williams, The Whig Supremacy, 1714-1760 Oxford History of England, 2nd edition, revised by C.H. Stuart, OUP, 1962; R.R. Walcott Jr. English Party Politics in the Early Eighteenth Century, CUP, 1965; J.H. Plumb, The Growth of political stability in England, 1675-1725, London, 1967; W.A. Speck Tory and Whig. The Struggle in the Constituencies: 1701-1715, London, 1970; E. Neville Williams, The Eighteenth-Century Constitution, 1688-1715, OUP, 1985; Jeremy Black, Robert Walpole and the Nature of Politics in Early Eighteenth Century England, Macmillan, London, 1990.

[98] This Act established that the mandate of the Commons would last seven years - instead of three, as it had established under the Triennial Act 1694 - unless the monarch dissolved the Assembly at an earlier date. With the Septennial Act it was proposed to retard by four years elections that had they been held when they were due, could have been won by the party of the Stuarts or, as the act proclaimed "the Popish faction". This Act, affecting as it did the House of Commons itself that passed the legislation, came to recognise beyond dispute that sovereignty resided in the Parliament, that is, in the King, the Lords and the Commons, and not - as their detractors argued - in the people that after all had elected the Commons for a three year term rather than for seven years. For the text of this Act see W.C. Costin and Steven Watson, The Law and Working of the Constitution op.cit. Vol. 1, pp. 126-127. See also A.V. Dicey's commentary in An Introduction .. op.cit. pp. 44-48.

[99] In respect of the political and constitutional duel between Walpole and Bolingbroke, see M.J.C. Vile, Constitutionalism and the Separation of Powers, op.cit pp. 69-75; J.H. Plumb, Sir Robert Walpole, Vol. 1, The Making of a Minister, London, 1956 and Vol. 2, The King's Minister, 1961; H.T. Dickinson, Bolingbroke, Constable, London, 1976; Isaac Kramnick, Bolingbroke and his Circle. The Politics of Nostalgia in the Age of Walpole, Cornell University Press, Ithaca and London, 1992.

[100] A recent approximation to the theory of the State and the constitutional thinking of David Hume can be found in Joaquin Varela Suanzes, Estado y Monarquía en Hume, Revista del Centro de Estudios Constitucionales, No. 22, Madrid, 1995, pp. 59-90.

[101] For example, Of the parties of Great Britain, Vol., 3, pp. 133-144 of David Hume. The Philosophical Works, edited by Thomas Hill & Thomas Hodge Grose, Vol. 4, London, 1882-1886, reprinted by Scientia Verlag Aalen, 1964. Unless otherwise indicated, from hereon all citations regarding Hume will be from this edition, pointing out volume and page. The majority of

the works herein cited are brief essays under the title *Essays, Moral and Political*, published between 1741 and 1742, or from *Political Discourses*, published in 1752. A selection from both works was published between 1753 and 1754 under the title *Essays and Treatises on several subjects*, and in 1758 as *Essays Moral, Political and Literary*. This selection also included three essays, *Of Natural Character*, *Of the Original Contract*, and *Of Passive Obedience* - these last two of great relevance for the subject matter under discussion - that had been independently published in 1748.

[102] *Of passive obedience*, Vol. 3, pp. 460-1

[103] Hume had written that the simple name of the king deserve little respect and that to speak of him as God's representative on earth or to give any of those pompous sounding titles that in earlier times impressed the people would be laughable . Whether the British Government inclines more to Absolute Monarchy or to a Republic. Vol. 3, p.125.

[104] Regarding Hume influence in British thought during his century see the classic work of Leslie Stephen, *History of English Thought in the Eighteenth Century*, London, 1881, Vol.1, pp. 309 and Vol. 2, pp.179.

[105] F.A. Hayek insists in this in *The Legal and Political Philosophy of David Hume*, Vol. III from *Collected Works of F.A. Hayek*, The University of Chicago, 1991, pp. 101-118, where he highlights a little known facet of Hume: as a jurist or, more precisely, as legal scholar.

[106] Two books that can be read from Volumes 2 and 4 of the aforementioned work cited in note 101, David Hume, *The Philosophical Works*.

[107] David Parker insists in this respect in *Philosophy and Ideology in Hume's Political Thought*, Clarendon Press, Oxford, 1981, p.2

[108] According to Hume, man, having been born within the heart of a family, was by necessity compelled to maintain a social life by natural inclination and custom. See *Of the Origin of Government* Vol. 3, p.113.

[109] Regarding Hume's conception of Convention, a key concept of his political thought, see André-Louis Leroy, *David Hume*, Presses Universitaires de France, Paris, 1953, ch. XVI, reprinted by Arno Press, new York, 1979, pp. 225-240.

[110] *Treatise of Human Nature: Of the rules which determine property* ch.III, part II, Book III, Vol. II, pp. 273. Regarding the 'rules of justice', another fundamental concept of his theory of Law and the State, see José Martínez de Pisón, *Justicia y Orden Político en Hume*, CEC, Madrid, 1992, pp. 280-295.

[111] *Of the Origin of Government*, Vol. 3, p.113.

[112] Regarding the reflections of these two authors concerning the social contract see Ernest Baker in *The Theory of the Social Contract in Locke, Rousseau and Hume* in *Essays on Government*, OUP, 1965, pp. 86-119.

[113] *Of the Original Contract*, Vol. 3, pp. 447 & 450

[114] *Of the Original Contract*, Vol. 3, pp. 447 & 450

[115] *Ibid.* Vol. 3, pp. 455-6

[116] *Of the Original Contract*, Vol. 3, p. 455.

[117] *Of the Original Contract*, Vol. 2, pp. 300-304 and *Of The First principles of Government* Vol. 3, pp. 109-117. The word Government meaning 'State'.

[118] *A Treatise of Human Nature*, Vol. 2, p.328.

[119] Frederick G. Whelan, Time, revolution and prescriptive Right in Hume's Theory of Government, *Utilitas*, Vol. 7, no. 1, May 1995, pp. 98-107.

[120] *A Treatise of Human Nature*, Vol. 2, Book III, part II, ch. X, p. 325

[121] *Of Passive Obedience*, Vol. 3, pp. 462-3.

[122] *Of Passive Obedience*, Vol. 3, p. 120.

[123] In this respect see my previously cited article, *Estado y Monopolio en Hume*, pp. 80-90.

[124] *On the Independence of Parliament*, Vol. 3, p.120.

[125] *Ibid.* pp. 120-121. As a notation Hume added that 'with this influence of the Crown, in my opinion justified, I only refer to that born from the positions and honours that the monarch may grant. In respect to the practice of private bribery, it can be equipped to the practice of using spies, hardly justifiable in a good minister and infamous in a bad one<sup>1/4</sup>'

[126] *Of Civil Liberty*, Vol. 3, p.161. To Hume, the law was a source of total security and happiness, as he wrote in his essay *Of the Rise and Progress of the Arts and Sciences*, Vol. 3, p.185.

[127] *On the Independence of Parliament*, Vol. 3, p.116.

[128] *Of the Origin of Government*, Vol. 2, p. 300.

[129] From the 1814 edition in 4 Volumes, corrected by Varela Suanzes, printed at the revived Apollo press. All Blackstone's citations will be made from the first volume of this edition, with a warning whether from the Introduction or from the First Book. With the former I will cite the section and with the latter the chapter and the page.

[130] In addition to the eight editions published during the lifetime of the author, David Lieberman recalls that between 1783 and 1849, Blackstone's 'Commentaries' were edited fifteen times. Towards the middle of the 19th century, the work was revised in depth by H.J. Stephen and from that revision it continued to be published during the 20th century. David Lieberman, *The Province of Legislation determined. Legal Theory in 18th Century Britain*, CUP, 1989, pp. 31-2. See also, Sir William Holdsworth, *Some Makers of English Law*, CUP, 1938, pp. 238 and 266.

[131] Editorial Introduction to *Bracton's Note Book*, Vol. 3, London, 1887, apud D. Lieberman, *op.cit.* p. 31.

[132] *Commentaries*, Introduction, II., p.67. Equally, pp.64 and 68.

[133] *Ibid.*, 1. I, ch. VII. P.246.

[134] *Ibid.* 1, I. Ch. VI, p.242. Regarding the decisive influence of Montesquieu on Blackstone see F.T.H. Fletcher, *Montesquieu and English Politics (1750-1800)*, 1939, re-edited by Edward Arnold & Co., London, undated, pp. 107-151.

[135] *Ibid.* 1, I. Ch. VI, p.247.

[136] *Ibid.* 1, I, ch, VI, pp. 242-4

[137] *Ibid.*, 1, I. Ch. VII, p. 253

[138] *Ibid.* 1, I. Ch. VII, p. 258-9. Regarding the right of resistance in Blackstone, see E. Barker, *op. cit.* p. 146.

[139] *Ibid.*, 1, I. C. II, p. 174.

[140] *Ibid.* 1, I., ch. III, p. 223. Commenting on this paragraph, Stanley Katz wrote that Blackstone, as corresponding to a Whig historian, was an optimist, but as a political and realist conservative, he was conscious that a generalised acceptance of the right to revolution (although attractive in principle) could imply a continuous invitation to anarchy. With the aim of minimising the right to revolt, Blackstone had to justify the confidence in the existing institutions of government. Stanley Katz Introduction to the First Book of William Blackstone's Commentaries on the Laws of England . A Facsimile of the first edition of 1765-1769, The University of Chicago Press, Vol. 1, pp. X-XI.

[[141] Commentaries, I. I. Ch. II, p. 182

[142] *Ibid.* I. I. Ch. II, p. 171

[143] *Ibid.*, I. I, ch. II, p. 172

[144] *Ibid.*, Introduction, II, p. 72

[145] John V. Jeziarski, Parliament or People: James Wilson and Blackstone on the nature and location of Sovereignty, in *Journal of the History of Ideas*, XXXII, 1971, pp. 96-106.

[146] Commentaries, I. I. Ch. II, pp. 166 and 173.

[147] The seven initial chapters of the first book of his 'Commentaries', especially pp. 142-144, 160-168 and 252. See also M.J.C. Vile, *Constitutionalism and the Separation of Powers*, op. cit. pp. 102-105.

[148] Commentaries, Introduction, II, p. 71. See also, pp. 69-72 and I. I, ch. II, pp. 166-167.

[149] *Ibid.* I. I, ch. II, p. 160.

[150] *Ibid.* Introduction, II, p. 67. Blackstone added that it was an essential requisite in order to be able to speak about law that it be made by the sovereign, that is, by the legislative power (*Ibid.* . P. 67). In pp. 69 and 72 he insists in identifying sovereignty with the faculty of creating laws.

[151] *Ibid.* I. I, ch. II, p. 173.

[152] *Ibid.* I. I, ch. II, p. 173. See also p. 198.

[153] *Ibid.* I. I, ch. II, p. 198.

[154] *Ibid.* , Introduction, II, p. 62.

[155] *Ibid.* I. I, ch. I, p. 139.

[156] *Ibid.*

[157] *Ibid.*, I. I, ch. I, p. 144.

[158] Sir Ernest Barker, *Blackstone on the British Constitution*, in *Essays on Government*, OUP, 2nd ed., 1965, p. 129. See also pp. 135 and 136 note 2. Regarding Blackstone's jus-naturalism see also Michael Lobban, *Blackstone and the Science of Law*, in *The Historical Journal*, 30, 2, 1987, p. 312 and D. Lieberman, op. cit., pp. 37-38.

[159] Sir Ernest Baker, *Blackstone on the British Constitution*, op. cit. p. 136.

[160] See D. Lieberman, op. cit. pp. 40-49.

[161] Ibid., I. I, ch. I, p. 142.

[162] There had been attempts during the 17th century to equate the Magna Carta with the declarations of rights approved during that century, despite the fact that the Magna Carta had limited itself to guaranteeing the privileges of Estates, while the latter proclaimed the rights and liberties of all Englishmen, independently of their social background and within a very different constitutional context to that of the Middle Ages. It would not be only Blackstone that would continue with these historical extrapolations, but also a great proportion of subsequent historians, represented by Hallam, Stubbs, Gneist, Glasson and Boutmy. Reacting against these reactionary extrapolations were writers such as Petit-Dutaillis, Pollard, Pollock, Jolliffe and, above all, Maitland. See Manuel Garcia Pelayo, *Derecho Constitucional Comparado*, Alianza Universidad, Madrid, 1984, pp. 249-250.

[163] Commentaries, Introduction, I. P.39.

[164] Commentaries, Introduction, III, pp. 86-7.

[165] Ibid. p. 87.

[166] Stanley W. Katz, op. cit. p. VII

[167] Commentaries, Introduction, III, pp. 105-6.

[168] . Ibid. p. 106.

[169] Ibid. Introduction, III, p. 107.

[170] Ibid. p. 107. Regarding these extremes, see also D. Lieberman, op. cit. pp. 53-55.

[171] Ibid. p. 107.

[172] Ibid. p. 108. Roland Séroussi, in his recently translated book (into Spanish) *Introducción al Derecho Inglés y NorteAmericano* [Introduction to English and North-American Law] Ariel, Barcelona, 1998, recalls that until the last third of the 19th Century there were in England Courts of Equity " Litigants who did not agree with the decisions of the judges looked to the king for refuge and justice. The King, through the Lord Chancellor, a cleric in whom the conscience of the Crown resided, imposed justice by means of equity. Equity, based more on natural justice than in the strict letter of the law, was administered by the Lord Chancellor through equitable remedies, freely applying principles of conscience". P. 14, note 2. See also pp. 15-17.

[173] Ibid. Introduction, II, p. 81.

[174] Ibid. Introduction, II, p. 81. Regarding the concept and extent of equity in Blackstone see D. Lieberman, op. cit, pp. 71-87.

[175] Ibid. pp. 250-344

[176] Ibid. I. I. Ch. VII, p. 258.

[177] Regarding 'Royal Assent' ibid. I. I, ch. II, pp. 196-197.

[178] Ibid. I., I, ch. VII, p. 258.

[179] Ibid. I. I, ch. II, p. 166.

[180] Introduction to the study of the Law of the Constitution, op. cit. p. 7. See also E. Barker, op. cit., pp. 144-146.

[181] Book I, p. 252. It is highly significant that in chapter IX of Book I of the Commentaries, titled *Of Subordinate Magistrates* Blackstone does not examine the powers and duties of His

Majesty's Great Officers of State such as the Lord Treasurer, not being 'the object of our laws'.(p. 344) while in this very same chapter he stops to examine other officers of public administration, without doubt much less relevant from a constitutional perspective, such as the Sheriffs, Coroners, Justices of the Peace, Constables, or Surveyors../. (345 et al).

[182] *The Principles of Moral and Political Philosophy*, William Paley, M.A. Archdeacon of Carlisle, London, printed for R. Faulder, New Bond Street, MDCCLXXXV.

[183] A biography and a recompilation of the works of W. Paley in *The Works of William Paley* 1/4 with a life by Alexander Chalmers, 1819, 5 Volumes. New edition of Edmund Paley, 1830, 6 Volumes. A more recent biography in Martin Lowther Clarke. *Paley: evidence for the man*, 1974. Regarding Paley see also L. Stephen, op. cit. Vol. 1, pp. 407 et al, and Vol. 2, pp. 124 et al.

[184] *Principles* .. op. cit.. p. 399.

[185] *Ibid.* p. 414.

[186] *Ibid.* p. 417.

[187] *Ibid.* p. 414-6.

[188] *Ibid.* p. 417-422.

[189] *Ibid.* pp. 462 and 464.

[190] *Op. cit.* p. 427.

[191] *Ibid.* p. 463.

[192] *Constitutionalism and the Separation of Powers*, op. cit. , p. 106.

[193] For Paley's perspective in this respect see *The Principles of Moral and Political Philosophy*. op. cit. pp. 465-500.

[194] It should be taken into account that the full title of this book was "A Fragment on Government, being An Examination of what is delivered. On the subject of Government in general in the Introduction to Sir William Blackstone's Commentaries with a Preface in which is given a Critique on the Work at large".

[195] *A Comment on the Commentaries and A Fragment on Government*, edited by J. H. Burns and H.L. Hart, The Athlone Press, 1975.

[196] J.H. Burns, *Bentham and Blackstone: A Lifetime's Dialectic*, in *Utilitas*, OUP, Vol. 1 no. 1, may 1989, p22. See also Ian Doolittle, *Jeremy Bentham and Blackstone's Lectures*, in "The Bentham Newsletter" no. 6, May, 1982, p. 23.

[197] *A Fragment on Government*, CUP, 1988, with an Introduction by Ross Harrison, Preface, para. 13. See also J.H. Burns, *The Writings and Speeches of Edmund Burke*, edited by Paul Langford, OUP, 1981, Vol. III.

[198] The Bristol Address can be found in *The Writings and Speeches of Edmund Burke*, edited by Paul Langford, OUP, 1981 Vol. III.

[199] *A Fragment on Government* ch. IV, para. 32, as highlighted by Bentham.

[200] *Thoughts on the Cause of the Present Discontents*, in *The Writings and Speeches of Edmund Burke*, op. cit. Vol. II, pp. 241-323.

[201] *A Fragment on Government*, ch. 1, para. 36.

[202] Thoughts on the Cause of the Present Discontents, in *The Writings and Speeches of Edmund Burke*, op. cit. Vol. II, pp. 241-323. Regarding Burke's Constitutional thinking see also Michel Ganzin, *La Pensée Politique de Edmund Burke*, Librairie Générale de Droit et de Jurisprudence, Paris, 1972, ch. II, pp. 47-72. Regarding the political context of this work see J. Brewer, *Party Ideology and Popular Politics at the Accession of George III*, CUP, 1976, pp. 39-138.

[203] A Fragment on Government, op. cit. ch. III, para. 6.

[204] *Sophismes Anarchiques. Examen Critique de Diverses Déclataions de Droits de l'Homme et du Citoyen*, in *Jeremy Bentham's 'Ouvres en 4 Tomes'*, translated (into French) by P.E.L. Dumont & B. Laroche. Reprinted from the 1829 edition, Bruxelles, Scientia Verlag Aalen, 1969, t. 1, pp. 546-576. The first English edition appeared in 1824 with the aforementioned title of *Anarchical Fallacies*, but as part of a wider work called *The Book of Fallacies: from unfinished papers of Jeremy Bentham, by a friend*. Peregrine Bingham, Hunt, London, 1824.

[205] Leslie Stephen, *History of English Thought in the Eighteenth Century* (1902), Thoemmes Antiquarian Books, Bristol, 1991, II, p. 260. For a recent perspective on the thinking of Paine see Gregory Clacy's *Thomas Paine, Social and Political Thought*, Unwin Hyman, Boston, 1989; particularly pp. 63 onwards,. See also the brief study by Mark Philip, Paine, OUP, 1989.

[206] From the edition by penguin Books, London, 1984, with an Introduction by Eric Foner.

[207] This work can be found in *Thomas Paine, Political Writings*, CUP, 1989, edited and introduced by Bruce Kuklic, pp. 1-38.

[208] *Rights of Man*, ed. cit. p. 143.

[209] *Ibid.* p. 141.

[210] *Sophismes Anarchiques 1/4*, ed. cit. Vol. I, pp. 556-7.

[211] *Ibid.* t. I, p. 564. As F. Rose and B. Pendás recall, Bentham had held these theses regarding the division of powers in two prior works, *False Principle Division of Power* and *in British Parliamentary Reform*, both published in 1790, where he pointed out that the principal guarantee of freedom was not rooted in the division of public power but in the control (accountability) of those who governed by those who were governed. Frederick Rosen, *The origin of liberal utilitarianism: Jeremy Bentham and liberty*, in *Victorian Liberalism, Nineteenth Century Political Thought and Practice*, Routledge, London & New York, 1990, pp. 63-4, and Benigno Pendas García, *J. Bentham, : Política y Derecho en los Origenes del Estado Constitucional*, CEC, Madrid, 1988, pp. 281-288.

[212] Regarding these two stages, see J.R. Dindwiddy, "Bentham's Transition to Political Radicalism, 1809-1810" in *Journal of the History of Ideas*, no. XXXVI, pp. 683-700; J.H. Burns, *Jeremy Bentham: From radical Enlightenment to Philosophic Radicalism*, in *The Bentham Newsletter*, no. 8, June 1984, pp. 4-13,; See also Lea Campos Boralevi, *Un Riformatore tra due Rivoluzione: Jeremy Bentham*, en *Modelli nella storia del pensiero politico*, Saggi a cura di V.I. Comparato, Leo S. Olschki, 1989, Vol. II, pp. 117-142.

[213] As for example Stephen Conway, *See Bentham and the 19th Century Revolution in Government*, in *Victorian Liberalism*, op. cit. p. 76.

[214] The best work on the Constitutional Code is by Frederick Rosen, *Jeremy Bentham and Representative Democracy. A Study of the Constitutional Code*, Oxford, 1983, passim. Also of particular interest is the fifth chapter of the aforementioned book by Benigno Pendás García, *J. Bentham: Política y Derecho en los origenes del Estado Constitucional*; as well as the article by Josep Maria Colomer, *Teoría de la Democracia en el Utilitarismo (en torno al pensamiento político de Bentham)*., REP, no. 57, 1987.

[215] Regarding the lengthy process of this work see the Editorial Introduction to Vol. 1 to Constitutional Code, edited by F. Rosen and J.H. Burns in *The Collected Works of Jeremy Bentham*, OUP, 1991, pp. XI-XLV.

[216] Constitutional Code, op. cit, p. 25.

[217] Ibid. ch. V, pp.29 et al. In this way it modified in a much more democratic sense the theses that had been argued in *Principles of Legislation* (1802), in *Plan of Parliamentary Reform* (written in 1809 but published in 1817) and in *Radicalism not dangerous* (1820).

[218] Ch. IV and V, pp. 26-29.

[219] Ibid. ch. VI, pp. 41-42. Pendás recall in this regard that in a previous work, *Of Laws in General*, Bentham distinguished between the constituent power and the powers constituted when speaking of the 'originating power', exercise by the people, and the 'efficient power' held by the elected rulers, op. cit. p. 287. Bentham reiterates the subordination of the Parliament to the sovereign, that is, to the people or electoral body, in ch. VII, section 11, p. 145.

[220] Ibid. ch. IV, p. 26; Ch. V, pp. 31-2; and Ch. VI, p. 111. Pendás points out that Bentham rejected the judicial review of Unconstitutional legislation because this conflicted with the principle of the omni-competence of the legislator; accordingly, it had to be the people that would proceed to its invalidity and, if necessary, to move penal sanctions against members of the legislature that approved anti-constitutional offences., op. cit., p. 286.

[221] Constitutional Code, op. cit. ch. VIII.

[222] Ibid. Ch. IX.

[223] To this general title the following sub-title was added " being the first part of a series of lectures on Jurisprudence or the philosophy of positive law"., from the 1970 reprint by Burt Franklin, New York, 3, Volumes, with a beautiful Preface to the second edition (1861), p.1-36 by his wife, Sara Austin.

[224] *The Province of Jurisprudence Determined*, ed. cit, Vol. 1, pp. 249-251, see in general,, pp. 248-253. Where we can find and intelligent and detailed defence of the work of Hobbes.

[225] In respect of the relationship between Bentham and Austin, in which the wife of the latter had a great deal of involvement, see Joseph Hamburger, *Trouble Lives: John & Sarah Austin*, University of Toronto Press, Toronto, 1985. See also, A.D.E.Lewis, *John Austin (1790-1859), Pupil of Bentham*, in "The Bentham Newsletter", march, 1979, no. 2, pp. 18-29.

[226] Regarding the term 'jurisprudence' in English Juridical Science in general and in Austin in particular, see Gustav Radbruch, *Der Geist des englischen Rechts*, 1958; Italian translation, *Lo Spirito del Diritto Inglese*, Giuffré, Milan, 1962, pp. 49-50.

[227] Vol. 1, p. 133. In another occasion he confesses that he is not concerned with examining the respective merits or otherwise of the different forms of government. Ibid. Vol. 1, p. 247.

[228] I, p. 264.

[229] Ibid, Vol. Pp. 271-2.

[230] Ibid., Vol. 1, p. 284, See generally pp. 264-316.

[231] Ibid., Vol. 1, pp, 284, 293, 296, 303.

[232] Ibid. Vol. 1, p. 304.

[233] Ibid. Vol. 1, pp. 195-197.

[234] Ibid. Vol. 1, p. 201.

[235] Ibid. Vol. 1, p. 201.

[236] Joaquín Varela Suanzes, *La Monarquía en la teoría constitucional británica durante el primer tercio del siglo XIX*, in "Revista de Estudios Políticos", no. 96, April-June 1997, pp. 9-41  
Idem, *Esudio Preliminar a los Dogmas de la Constitución*, John James Park, Akal-Itsmo, Madrid, 1999 (printing).

[237] Ibid. Vol. 1, pp. 207-8.

[238] Ibid. Vol. 1, p. 208.

[239] Ibid. Vol. 1, p. 209.

[240] Ibid. Vol. 1, p. 210.

[241] Ibid. Vol. 1, pp. 1-25, 118-121, and 169-170. Austin makes his the words of Hobbes; "the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be law" Ibid, pp. 169-70.

[242] "Strictly speaking, customs or writings and opinions of lawyers are Law in so far as they have been recognized by judicial decisions. And no further. As we already Shawn, there can be no law without a judicial sanction, and until a custom has been adopted as Law by Courts of Justice, it is always uncertain whether it will be sustained by that sanction or not" Ibid, Vol. II, p. 236.

[243] Ibid., Vol. II, p.436.

[244] Ibid., Vol. II, p.436. See also pp. 321-378. Austin expands on the differences between the laws made by Parliament and those made by the Judges, holding different opinions from Bentham in respect of judge-made law and the inevitable matter of codification.

[245] Ibid., Vol. II, p.437.

[246] Ibid., Vol. I, p.225. Of course for Austin sovereignty was not a factual concept, sociological, but purely juridical and, therefore, formal. Something that Sir William R. Anson appears not to understand - or at least not to share - when he criticises Austin's insistence in the unitarian and indivisible character of sovereignty. *The Law and Custom of the Constitution*, OUP, 1922, Vol. 1., pp. 1-4.

[247] Ibid., Vol. I, p.226-229.

[248] Ibid., Vol. I, pp. 230-231 and 236-238.

[249] Ibid., Vol. I, pp.228-231.

[250] Ibid., Vol. I, p.231-2.

[251] Vol. 1, pp.237-240 and 263.

[252] Ibid., pp. XIV-XV.

[253] The content of these Conferences and the Course are found in Volumes II and III of the cited work cited with the title , in the first edition from 1861, *Lectures on Jurisprudence*, being the sequel to "The Province of Jurisprudence Determined", to which are added Notes and Fragments now first published from the original Manuscripts".

[254] Wilfrid E. Rumble, Nineteenth-Century Perceptions of John Austin: Utilitarianism and the Reviews of the Province of Jurisprudence Determined, in *A Journal of Utilitarian Studies*, Vol. 3, no 2, November, 1991, pp. 199-216.

[255] Wilfrid E. Rumble, Austin in the Classroom: Why were his Courses on Jurisprudence Unpopular?, in *The Journal of Legal History*, Vol. 17, April 1996, no. 1, pp. 17-40.

[256] It should be taken into account that J.S. Mill was initiated into the study of Law by Austin during the winter of 1821-1822, as he acknowledges in his autobiography, where he draws a penetrating profile of Austin, full of warmth and admiration. *Autobiografía*, Alianza Editorial, Madrid, 1986, pp. 83 and 91-93.

[257] From the 10th edition, MacMillan, London, 1959, with an Introduction by E.C.S. Wade, pp. XIX to CXCVIII.

[258] E.C.S. Wade and G.G. Phillips recall that in the days of Dicey it was common to speak of England as synonymous of Great Britain or the United Kingdom. E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law*, Longman, 11th edition, London, 1993, p. 69.

[259] *Op. cit.* p. 39.

[260] *Ibid.*, p. 39.

[261] *Ibid.*, pp. 39-40.

[262] *Ibid.*, p. 40.

[263] *Ibid.*, p. 40.

[264] *Ibid.*, pp. 41-50. See also Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth*, *op. cit.*, p.27.

[265] *Ibid.*, pp. 50-58.

[266] *Ibid.*, pp. 63-64

[267] *Ibid.*, p. 59.

[268] Walter Bagehot, *The English Constitution (1867)*. From the edition by Fontana Press with an Introduction by Richard Crossman, London, 1993. With regard to the assessment that Walter Bagehot made of the role that Queen Victoria played in political affairs - which became known only after having access to her personal correspondence - see *The Cabinet System*, CUP, 3rd edition, 1961, p. 353; J.H. Hanham, *The Nineteenth Century Constitution, 1815-1914. Documents and Commentaries*, CUP, 1969, p. 24; David Lindsay Keir, *The Constitutional History of Great Britain Since 1485*, Adams and Charles Black, 9th edition, London, 1965, p. 493.

[269] *Ibid.*, pp. 74-75. See generally pp. 71-85. To Sir Ivor Jennings, the 'juridical sovereignty' to which Dicey refers is not absolute sovereignty. It was a mere juridical concept, a form of expression used by jurists to refer to the relationship between Parliament and the Justice Tribunals. *The Law and the Constitution*, University of London Press, 5th edition, 1959, pp. 149. A juridically unfounded critique of the theses of Dicey in the same volume, pp. 144-176.

[270] *Ibid.*, p. 60.

[271] *Ibid.*, p. 61.

[272] The XIII and last of the Second Part, pp. 406-414.

[273] *Ibid.*, pp. 64-70.

[274] *Ibid.*, p. 70.

[275] In respect of these extremes, see Joaquín Varela Suanzes, *Constitución y Ley en los orígenes del Estado Liberal*, in "Revista Española de Derecho Constitucional" no. 45, Sept-Dec, 1995, pp. 347-365.

[276] *Ibid.*, pp 87-91. The reference by Dicey to Bryce in p. 91 Regarding the connection - not circumscribed to Great Britain, but rather valid for the great part of Constitutional Europe during the 19th century - between parliamentary sovereignty, constitutional flexibility and the impossibility of articulating a constitutional control of the laws, see *Sobre la rigidez constitucional*, Alessandro Pace & Joaquín Varela, in *La rigidez de las constituciones escritas*, "Cuadernos y Debates", no. 58, CEC, Madrid, pp. 81-114.

[277] *Ibid.*, p. 145.

[278] Regarding this influence, that later was not limited to the doctrine of Parliamentary Sovereignty, see the long Introduction by E.C.S. Wade to the 10th edition of *Introduction to the Study of the Law of the Constitution*, MacMillan, London, 1959, pp. XIX to CXCVIII. See also the recent study by John F. Mceldowney, *Dicey in Historical Perspective. A Review Essay*, in Patrick McAuslan and John Mceddowney, *Law Legitimacy and the Constitution*. See also Julia Stapleton, *Dicey and his Legacy*, in "History of Political Thought", Vol. XVI, no. 2, Summer 1995, pp. 234-256.

[279] Sir Ivor Jennings, *The Law and the Constitution*, University of London Press, 5th edition, 1959, p.144.

[280] H.L. Hart, *The Concept of Law*, OUP, 2nd edition, 1994, pp. 149-150.

[281] Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth*, OUP, 1957, p. 1. Citing one single author of a very long possible list, O.Hood Phillips also points out that the most important characteristic of British Constitutional Law is the legislative supremacy at times referred to as "sovereignty" of the Parliament of the United Kingdom. *Constitutional and Administrative Law*, Sweet & Maxwell, London, 7th edition, 1987, p.25..

[282] Colin R. Mumro, *Studies in Constitutional Law*, Butterworths, London, 1987, p. 82. Nevertheless this writer moves away from the doctrine of sovereignty argued by Dicey, pp. 83-108.

[283] As recalled by Geoffrey Marshall in *Constitutional Theory*, OUP, 1980, p.43.

[284] Geoffrey Marshall in *Constitutional Theory*, op.cit. p. 42,. See also Sidney Kentridge, *Parliamentary Supremacy and the Judiciary under a Bill of Rights: some lessons from the Commonwealth*, in "Public Law", Spring, 1997, pp. 96-112.

[285] In this regard see the previously cited monograph by Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth*, OUP, 1957.

[286] In this respect see Lawrence Collins, *European Community Law in the United Kingdom*, British manuals of Constitutional and Administrative Law, such as, for example, that of O. Hood Phillips, Sweet & Maxwell, 7th edition, London, 1987, pp. 71-82; E.C.S. Wade and A.W. Bradley, Longman, London & New York, 11th edition, 1993, pp. 90-98; H.W.R. Wade, *Sovereignty: Revolution or Evolution?*, in "The Law Quarterly Review" vol. 112, October 1996, London, pp. 568-575; John Eekelaar, *The Death of Parliamentary Sovereignty. A Comment*, in "The Law Quarterly Review", Vol. 113, April 1997, London, pp. 185-187.

[287] Regarding Scotland, see *Scotland's Parliament. Fundamentals for a new Scotland Act*, in "The Constitutional Unit", Faculty of Law, University College, London, 1997.

[288] Sir Stephen Sedley, *The Sound of Silence: Constitutional Law without a Constitution*, in "The Law Quarterly Review", Vol. 110, April 1994, London, pp. 270-291; A.W. Bradley, *The Sovereignty of Parliament in perpetuity?* op. cit., pp. 79-107; Colin Turpin, *British Government and the Constitution*, Butterworths, 3rd edition, London, 1995, pp. 20-36; Geoffrey Marshall, *Parliamentary Sovereignty: the new horizons*, in "Public Law", Spring, 1997, pp. 1-5.