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A New Image of the History of the European Constitutionalism. Some Remarks on the Monograph Entitled Reconsidering Constitutional Formation in National Sovereignty. A Comparative Analysis of the Juridification by Constitution, *ed. by Ulrike Müßig, Springer Open, 2016*

Abstract

The reviewed monograph deserves the attention of both legal historians and constitutionalists, since it deals with the forming of European constitutionalism on the three levels: doctrinal, historical and comparative. Sovereignty of the nation was a fundamental principle of European constitutionalism and parliamentarism. The presented description of the process of juridification of national sovereignty based on the Polish, Spanish, Belgian and Italian constitutional models, considerably broadened the research field to be exploited by those interested in the origins of the European constitutional experience, both that of permanent and ephemeral nature. This experience makes up a common tradition reflective of the European constitutional pattern which in the present-day Europe is referred to as the "state of law" (*Rechtsstaat*).

Keywords: ReConFort-project, sovereignty of the nation, precedence of Constitution, Polish Constitution of 1791, Spanish Constitution of Cadiz of 1812, Belgian Constitution of 1831, Albertinian Statute of 1848

Słowa klucze: ReConFort-projekt, suwerenność narodu, nadrzędność konstytucji, polska konstytucja 1791, hiszpańska konstytucja z Kadyksu 1812, belgijska konstytucja 1831, Statut Albertyński 1848

The reviewed monograph presents the achievements of the research team that came to being under the guidance of principal investigator professor Ulrike Müßig (Chair of Civil Law, German and European Legal History, University of Passau) within the frame of the Advanced Grant as awarded by the European Research Council. The publication is composed of two parts. The first part contains the essay by U. Müßig who is the principal investigator of the grant. In this essay the authoress presented the assumptions, goal and methodology of the research project entitled: "Reconsidering Constitutional Formation

(ReConFort). Constitutional Communication by Drafting, Practice and Interpretation in eighteenth and nineteenth century Europe".[1] After a short description of the program of studies on the European constitutionalism the authoress passed on to analyse the early European constitutions. She did it from the perspective of the concept of sovereignty of nation as the major source of the emergence of the constitutions and as the main idea round which the constitutional discussion was centred. The question of sovereignty of the nation as found in the European constitutions of the 18th and 19th centuries was outlined in the introductory part of the volume, and was developed in its second part. The latter includes three detailed contributions devoted to the following selected constitutions: the Belgian of 1831, the Albertinian Statute of the Kingdom of Sardinia, and the Polish Constitution of 1791.

The monograph discussed in the present review should arouse particular interest of legal historians since the research project of U. Müßig, which was awarded an Advanced Grant by the European Research Council, tries to shed a new light on the process of forming European constitutionalism. Let us ask: what does the original approach of the ReConFort-Project toward the history of European constitutionalism consist in?

Firstly, the authoress of the Project suggests the reconsidering of the European constitutional formation. To carry out this task she selected the examples of five Constitutions, and specifically: the Polish one of 1791, the Spanish Constitution of Cadiz (1812), the Belgian one of 1831, the Albertinian Statute of 1848 and the Frankfurt Constitution of 1849. The point is that previously the attention of legal historians was focused mostly on the sources of English, American or French constitutionalism. The analysis of constitutional debates that preluded the emergence of the aforementioned constitutions might contribute to the arrival at a more complementary image of the history of European constitutionalism. Also the depicting of the birth of constitutional system in the geographic and time-based space different from the one with which the previous research has been concerned, is certainly a considerable merit of the reviewed publication.

Secondly, the ReConFort project exploited a concept of broader understanding of the Constitution which was defined as "an evolutionary achievement of the interplay of the constitutional text with its contemporary societal context, with the political practice and with the respective constitutional interpretation". With so dynamic approach toward to the Constitution the text of the latter full achieves its significance only when the social circumstances of the appearance of this text, as well as the political debate and the constitutional practice are taken into consideration. The researcher is therefore required to resort to the varied source material, including the documents illustrative of legislative work of the law-creating assemblies, alternative projects, the opinions articulated in the professional journals and in political publicism, and also in the correspondence produced both by the supports and opponents of the constitutional changes. This kind of methodological approach toward the study of the origin of constitutionalism is doubtless an innovatory one, but makes up also a great challenge which may be sometimes difficult to meet since the sources and materials are considerably dispersed.

[1] U. Müssig, *Reconsidering Constitutional Formation: Research Challenges of Comparative Constitutional History*, "Giornale di Storia Constitutionale" 2014, no. 27 (1), p. 107–108.

Thirdly, the ReConFort project prefers the problems-, and not the complex-oriented description of the selected five European constitutions. The description is expected to be made throughout prism of four criteria: (1) Constituent Sovereignty/National Sovereignty (the reviewed volume is devoted to this question); (2) Precedence of Constitution (this is question designed to be elaborated in the next volume),[2]; (3) Judiciary as Constituted Power; (4) Justiciability of Politics.

While conducting their research on the course that was taken by the constitutional discussion, the participants in the project focus their attention on the idea of sovereignty, primacy of the Constitution, separation of powers and guarantees of the independence of the judiciary. These are the issues that the project participants are planning to incorporate into the synchronous and diachronic comparative formula. The comparative common ground is expected to be formed, on one hand, by conveying the discussed ideas on to the provisions of the Constitution (juridification by Constitution). On the other hand – in case of the Constitutions whose binding force is continued for longer time – the comparative aspect is expected to be determined both by their functioning in practice as well as by their interpretation. The ambitious research plan of the ReConFort-Project was partly materialized by the present monograph which provides the reader with the first opportunity to assess its results.

One should share the view of the authoress presented in her introductory essay. She claims that the comparative criterion of the concept of sovereignty of the nation must go beyond the lexical layer. The point is that one and the same terminology contains different content. The notion of the sovereignty of the nation as conceived of by the Polish nobility differs from that conceived of by the Spanish Cortes in the Constitution adopted by their members in Cadiz in 1812. The only linking element detectable in the approach adopted toward the sovereignty of the nation and found in Poland, Spain, France, Belgium may be the fact that in each of these countries the idea of the sovereignty of the nation was a political *fiat* of the constitutional model of state power. The authoress understands the Constitution as a legal codification needed to fix the political order as a legal order. Due to this she considers the mode by which the sovereignty of the nation, as a political category, becomes reflected in the provisions of the Constitution – to be *tertia comparationis.* From the point of view of the authoress the assessment of the process of juridification of sovereignty by Constitution determines the comparative scale applicable to the Constitutions selected for the research.

The implementation of any idea and introducing it into the legal order requires however a thorough definition of this idea. The reconstruction of the designations of the principle of sovereignty of nation obviously draws the attention of the researcher to the French thought of political and constitutional nature because this thought laid the foundations for the birth of European constitutionalism. It is true that some states legitimated a new political order by means of the will of the nation. By doing this they exploited their own experience and doctrine. In case of the Polish Nobiliary Republic this was the idea of nobiliary republicanism, in Spain – that would be the doctrine of the law of nature as

[2] At the University of Passau, in 19–21.09.2016 there was held a seminar in which the ReConFort team participated. At this seminar there were presented the results of research on the principle of superiority of Constitution. The discussed results will be presented in the second volume that is being elaborated by the participants in the project.

promoted by the school of Salamanca. Nevertheless the French debate that took place at the time of revolutionary passing from absolutism to constitutionalism, almost everywhere left its stamp on the understanding of the sovereignty of the nation conceived of as the source of limiting royal power. It seems justified therefore to recall the French approach to the sovereignty of the nation (people) as an indispensable guide to the description of how the sovereignty was adapted in the respective Constitutions.

One should also agree with the authoress that the appearance, in the 18th century, of the public life, unhampered by censorship, was of significant character for the disputes on the constitutional shape of the state. A free parliamentary debate, development of the press, the possibility of publishing casual printed materials, all these made up a space within which there was possible the development of the free exchange of opinions. One may even claim that the European constitutionalism stems from two ideas that indissolubly grew into one: the written constitution and the freedom of speech and press. In Europa that was abandoning absolutism these two political values functioned as an indispensable safeguard of the emancipation of burghers. On the other hand in the Republic of the Two Nations (Poland–Lithuania) freedom of speech was the foundation of the republican system. It was the basic element of political freedom of nobility and the instrument that from the 16th century on allowed to control state power.[3] The reminder about the leading role played by the Polish legislation in protection of the freedom of speech is indispensable in this place since the authoress illustrates the progress of the contemporary public debate and presents the manner in which the American revolution was perceived in the Polish constitutional debate.

The distinguishing of the Polish constitutional debate form that point of view is on all accounts justified. In the Polish Nobiliary Republic the heart of political struggle was indeed a sharp dispute between the supporters and opponents of the concept of hereditary monarchy. This was the question that absorbed the greatest attention of publicism of the Four-Year Seym era. From the point of view of patriotic camp the hereditary monarchy was a safeguard of freedom and independence of the state while from the perspective of the magnate-supported camp – such monarchy would be tantamount to the loss of freedom, to the tyranny and despotism. The publicism of the time, while searching for the arguments for each of these two perspectives, used to invoke American revolution. Some publicists perceived the freedom- and independence-emphasizing tones of the lat-

[3] The Seym – adopted law of 1775 proclaimed: "The citizen's freedom […] consists exactly in potentia sentiendi et dicendi. It is improper to impose a ban on or to rid of this gift allowed by God. Therefore while complying with the law of 1669 […] nobody […] even if at the public meetings can be brought to accountability before the courts". The firm Cardinal Laws of 28 January of 1791, in their Article XI, confirmed this protection of the freedom of speech. They proclaimed: "Also a free utterance, even if not made at public meetings and also the freedom of expressing one's thought or opinion, whether in written form or in print, when supplied with a signature, is guaranteed to be made without any approval […] but is subject to accountability before the Court if someone with a written or printed piece exhorted to rebellion or if he inflicted a harm on the reputation of his neighbour". According to the law of 1791 that was passsed on the basis of the Constitution of 3rd May 1791 the Commission of the Police was to see to it "that freedom of writing and printing be undisturbed". On this see A. Grześkowiak-Krwawicz, *Dyskusja o wolności słowa w czasach stanisławowskich*, "Kwartalnik Historyczny" 1995, vol. 102, no. 1, p. 53ff; and also A. Dziadzio, *Polski model „rządów prawa" a europejska wizja „państwa prawa" w XIX wieku* [in:] *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, vol. 1, Kraków 2012, p. 143.

ter while others emphasized those aspect of American revolution which confirmed their anti-monarchical and republican concepts.

The authoress successfully documents the clash between two major constitutional images as detectable in the publicistic discussion. Simultaneously she depicts an extraordinary intellectual broad-mindedness of the Polish political elites on both sides of the political conflict. The significance of the Polish republican thought – as invoked in the introduction to the volume – for the legitimizing of the limited position of the King as formulated in the Constitution, was fully confirmed in the contribution by Anna Tarnowska on *The sovereignty issue in the public discussion in the era of the Polish 3rd May Constitution (1788–1792)*. It is from the presented analysis of the Polish discourse on the sovereignty of the nation that it may be found that this discourse was not an ideological dispute referring to the substance of the sovereignty since sovereignty of the nobiliary nation was incorporated into the constitutional system of the Republic as early as the 16th century. These were the nobles who still remained the original sovereign. The sovereign power of the king was always derivative of the will of nobiliary nation which would elect their king by free election *viritim* (i.e. by the entirety of the nobles).[4] What remained a key question in this discussion could be boiled down to the problem: how to most fully secure the sovereign power of the nation in the Constitution in the sense that the nation be externally independent and internally enjoying political freedom. All participants in the debate of the time considered it indisputable that the supreme legislative power of the nation was vested in the representatives of the nation or the Seym conceived of as the "temple of the law-creation power". Creating laws was obviously one of the pillars of the nobiliary freedom according to the principle "nihil de nobis sine nobis". This was the axiom of the nobiliary world outlook which took it for granted that the superior role in the 3rd May Constitution of 1791 fell to the Seym. This "omnipotence" of the Seym was legitimized by the will of the sovereign nation, this will being expressed by the representatives of the latter. The power of the king, in its turn, had its source in the Constitution. The legitimizing of this power was therefore of normative nature.

For these reasons the political struggle in Poland focussed on the question of whether the throne was expected to be hereditary or not, and on the scope of the royal power. What inevitably resulted from this struggle was a considerable limitation of royal power. This limitation had to be imposed in order to override the nobiliary dogma referring to the hereditary monarchy which was regarded as a direct road leading to the absolutism and consequently to the loss of freedom. In her interesting and multi-aspect study, A. Tarnowska is right when, while making concluding remarks on the nature of the Polish constitutionalizing of the sovereignty of the nation, she invokes a characteristic quotation selected from the writings of one of the participants in the Polish constitutional debate. According to its author, who was a supporter of constitutional reforms, the component of the true freedom was not made up by the election of the king but by the power of the nation based on the Constitution, the one which describes "royal power with reasonable provision", guarantees the rights of man, vests legislative power in the hands

[4] In the Diary of the Seym held in 1592 it may be found that the nobles considered themselves to be the exclusive sovereign. This confirmed by the line in which they stated that: "Each of us is the heir of this kingdom in which we elect a king who is expected to command us in accordance with law". D. Pietrzyk-Reeves, *Kontynuacja i zmiany w polskim republikanizmie XVII i XVIII wieku*, CPH, 2015, vol. 67, no. 1, p. 45.

of the representatives of the nation and entrusts the executive power to the magistracies elected by parliament.

In the era of Great Seym (1788–1792) the concept of preponderance of sovereignty of the nation became a dominant idea. No wonder therefore that in the Nobiliary Republic's Constitution of 1791 the sovereignty of the nation became safeguarded by the legislative power of the House of Deputies (the Senate disposed only of the suspending *veto* while the King lost his right to give assent to the bills passed in the Seym) and by the accountability of ministers before the Seym both in the political as well as in the constitutional sense. The King lost his independent position in matters of internal policy since he was the one who "doing nothing by himself" needed a countersignature (an endorsement) on his acts as made by the appropriate minister. By countersigning the King's decisions it was the minister, and not the monarch, who could be brought to accountability before the Seym. The laws that were later passed in order the implement the provisions of the Constitution delimited the scope of activities of the State authorities, thereby guaranteeing basic civic rights of an individual including even his right to privacy, this being left unmentioned in both the American and French list of fundamental civic rights.[5]

Without such an open public discussion that took part in the Nobiliary Republic over the assumptions of the future Constitution it would not be possible to override the resistance of the majority of the nobles toward the idea of hereditary monarchy. This was only the adoption of the 3rd May Constitution in 1791 that induced the numerous defendants of the free election of the monarch to reconcile with the constitutional change. By doing this they assumed that "any constitution that was willed by the nation was good".[6] The support given to the constitution by its earlier adversaries became possible due, among others, to the fact that the dominant position of the Seym *vis-à-vis* the royal power was, in a way, an identification sign of fundamental assumptions of the 3rd May Constitution. Ulrike Müßig considers this distinguishing feature of the Polish 18th century constitutionalism to be a manifestation of juridification of the sovereignty of the nation whose emanation was exactly the existence of the political and constitutional responsibility of the ministers before the Seym, as well as a limited scope of royal power. One should on principle agree with such approach of the authoress toward the Polish understanding of the constitutional significance of sovereignty of the nation.[7] What might comple-

[5] Cf. A. Dziadzio, *Polnische Version des Rechtsstaates vom Ende des 18 Jahrhunderts (System des Verfassungsrechts 1791)* [in:] *Parliaments: The law, the Practice and the Representations: From the Middle Ages to the Present Day*, eds. M.H. de Cruz Coelho, M.M. Tavares Ribeiro, Lisbon 2010, p. 112. The fact that in the 3rd May Constitution of 1791 the declaration of basic civic rights is absent does not deprive it of the status of the constitutional document that introduced an early model of "Rechtsstaat". By way of comparison we may emphasize that the Constitution of a the Second German Empire of 1871 is considered to be an example of "Rechtsstaat" despite the fact that it did not contain any list of civic rights of an individual. The point is that the citizens were granted their basic rights in the laws that were passed in ordinary way.

[6] Cf. R. Lis, *Między Konstytucją 3 maja a Targowicą. Poglądy polskich republikantów w latach 1791–1793*, CPH, 2012, vol. 64, no. 2, p.161ff. These lines were written by Adam Wawrzyniec Rzewuski. He was the nephew of Field Hetman Seweryn Rzewuski whose opinion against the hereditary throne was, by February 1792, rejected by the majoriy of Seymiks.

[7] However one cannot share the opinion of the authoress that the political responsibility of ministers in the Polish Constitution resembles the American impeachment. The point is that the procedure of dismissal of the minister as provided for by Art.7 of the 3rd May Constitution referred exclusively to the situation when the acts of the minister, which were fully within the boundaries of law, were not supported by the Seym and fell

ment this picture would be the fact that the King indeed exercised the governmental power through the ministers whom he nominated but the administration was vested in the hands of Great Commissions nominated by the Seym. The ministers who together with the King composed the "Guard of Law" did not dispose of their own departments but performed their management through the collegial organs that were dependent on the Seym. This dualism in the organization of the executive power ("the government" that was dependent on the King and the "administration" which was subjected to the Seym) was the next guarantee securing the position of the sovereign Seym and excluding the development of the King's personal rule.

The parliamentary governmental system was not the only thing that differentiated the Polish constitutional model from that of the United States or that of France. The authoress emphasized that the Polish Constitution was the only one which *expressis verbis* declared the superior position of the Constitution and assumed that all laws passed by the Seym should be consistent with it. Without speculating in advance on the potential conclusions of the ReConFort research team about the forming of the principle of the primacy of the Constitution (since this is the subject to which a separate publication – vol. II,[8] will be devoted) it seems advisable to reflect on what laid the foundations for this peculiarity of Polish Constitution. The ideological groundwork for the acceptance in the 3rd May Constitution of the idea that the latter is superior in relation to ordinary laws lay, it seems, in the attachment of the Polish nobles to the concept of firm cardinal laws viewed as a guarantee of nobiliary liberties. Within the canon of nobiliary outlook upon the state there functioned the conviction that anyone who at any time exercised power at the top agency was bound by the cardinal laws as an upper rank of law order. It was therefore not accidental that the adoption of the 3rd May Constitution was preceded by the passing of the "firm cardinal laws".[9]

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short of the latter's expectations. The law on the Seyms defined this procedure as a "vote-of-no confidence". The American model of the presidential government consists exactly in this that it lacks this form of responsibility of the representatives of the executive to the legislative body. In the 3rd May Constitution the ministers, irrespective of their political responsibility, could be also brought to accountability for "any crimes", i.e. they were constitutionally (penal) responsible, this responsibility applying both to the person and to the property of the minister. This kind of the responsibility may be juxtaposed only with the American impeachment. On that see K. Baran, *Procedure in Polish-Lithuanian Parliaments from Sixteenth to Eighteenth Centuries*, "Parliaments, Estates and Representation" 2002, vol. 22, ed. H.J. Cohn, Published by ASHGATE for the International Commission for the History of Representative and Parliamentary Institutions, p. 69. What I would also consider to be e defect is the absence in the text of the original names of the discussed institutions as well as the lack of uniform principles in translating them into English. For example "Izba Poselska" of the Polish Parliament is translated in one place as "the Messenger's Chamber" but in some other place as "the House of Representatives", this occurring on one and the same page of the volume. This may lead to misunderstanding since "the House of Representatives" is the regular name of the lower house of American Congress. The reader therefore may be misled and think that in the USA… the Senate has the right to apply a suspending *veto* with respect to the bills adopted by the House of Representatives (cf. p. 34). An obvious mistake is also detectable in the title of the subchapter which mentions 1788 as the date of the adoption of the Constitution of 3rd May! (p. 29).

[8] Cf. footnote no. 2.

[9] Also the 3rd May Constitution was classified into a superior rank category. Its preambule proclaimed that "we declare that this Constitution be considered saint and firm until the nation, within law-specified period of time, should not regard it as advisable to change any of its Articles". According to the law on the extraordinary constitutional Seym the latter was expected to be convened every 25 years in order to revise the

The essence of the late 18th century Republic's constitutional problem lay in the fundamental revaluation of the constitutional foundations of the liberty-based paradigm of the Nobiliary Republic. It was no longer the free election of the monarch and the *liberum veto* that were expected to make up the catalogue of cardinal laws but the direct opposite of the aforementioned principles, and namely the hereditary monarchy and the voting by majority in the Seym. The 3rd May Constitution was designed to override the old constitutional system in order to rescue the State from losing its independence. "Restoring the government" was believed to be the most effective measure safeguarding "the true freedom and entirety of Poland" – these were the lines contained in the Declaration produced by the Seym after the Constitution was adopted.[10] The principle of superiority of the Constitution was designed to put a stop to the attempts at returning to the previous constitutional system. It was feared that the opponents of the Constitution might try to dismantle it. The Seym therefore tried to take every passible means to secure a durability of the adopted Constitution. In order to achieve that the Seym resorted both to the legal constructions as well as to penal measures. To the group of legal principles the objective of which was prevent the restoring of the old constitutional system there belonged the principle of superiority of the Constitution articulated in its preamble as well as the preventive procedure designed to control the constitutionality of the projects of laws and applied by the Seym Deputation.[11] In the aforementioned Declaration of the assembled estates the Seym again emphasized that all "old and present day laws that contradict the Constitution" were abolished.[12] The Seym simultaneously adopted a position that the one who would dare publicly criticize the Constitution or would tend toward its overthrowing should be recognized as "an enemy to the motherland" and punished by the Seym Court in the most severe manner.

The 3rd May Constitution created an original form of political system that on one hand was deeply rooted in the republican tradition of the old-time Poland but, on the other hand, it also corresponded to the theories on the sovereignty of the nation popular in the era of Enlightenment. It may be believed that only to same extent the system thus introduced resulted from something like conscious imitation. But it is more probable that

provisions of the Constitution. Cf. *Volumina Legum* (hereinafter VL), vol. IX, Kraków, published by Akademia Umiejętności, 1889, p. 241.

[10] Cf. *ibidem*, p. 225.

[11] The law on the Seyms of 1791 provided for the forming of the Seym Deputation whose task would be "to see to it that no project of law should tend toward infringement of the Constitution and the firm cardinal laws". Among the tasks with which the Deputation was charged there was the introductory (preventive) control of constitutionality of the project that could be filed by every deputy. If the project contained the provisions that infringed the constitutional principles the Deputation called on the author of the project to modify it or to drop it. If the author of the project did not do that the project was submitted to the session of the House of the Deputies with the remarks made on it by the Deputation. It was the Deputation composed of 13 members which decided whether the project was inconsistent with the Constitution. They did it by majority vote. Thus the Deputation performed the function of the Seym-sponsored constitutional tribunal. The position adopted by the Deputation was morally but not legally binding on the deputies sitting in the lower house. If however the project of the law infringed the basic civic rights of an individual it was ignored by the Deputation and could not make up a subject matter of the sessions of the ordinary Seym. The point is that the change of the firm cardinal laws was exclusively within the competence of the Constitutional Seym that was expected to be convened every 25 years. Cf. VL, vol. IX, p. 258.

[12] Cf. *ibidem*, p. 225.

concurrent ideas came to being independently of one another. Such reflection appears when we confront the constitutional thought of Jean-Jacques Rousseau and Emmanuel Joseph Sieyés, the confrontation being made in the reviewed volume. The difference of views presented by the French thinkers naturally made up the background of the Polish constitutional discourse. In the Polish constitutional model the trace of the Sieyés' political doctrine seems to be particularly perceptible.[13]

Similarities refer both to the question of identifying the sovereign power of the nation with the idea of political representation as well as to the distinction between the constituent power and constituted (i.e. legislative) power. It was in a surprising way that the Sieyés ideas converged with the Polish constitutional practice. From the point of view of Sieyés the nation and its will preceded the Constitution in this sense that the nation was not bound by it and could change the Constitution. However, the legislative power and the positive law were subject to the Constitution. Thus the legislative power could not change the Constitution. In this sense the Constitution was a fundamental law. What was obvious for Sieyés' was that executive power derived its legitimation from the Constitution.[14] There is no doubt therefore that the Polish constitutional experiment of the end of the 18th century was closer to the image of sovereign power as conceived of by Sieyés' than to that conceived of by J.J. Rousseau although the thought of the latter had a direct relationship with the assessment of the constitutional system of the old Nobiliary Republic.

In compliance with the chronological course of events but also in compliance with the ReConFort research plan, the next fragment of the volume was devoted to the discussion of sovereignty of nation in the Cadiz Constitution of 1812. Unlike in case of the Polish, Belgian or Italian Constitutions, in case of Spanish Constitution there appeared – apart from what U. Müßig wrote in her sketch – no separate analysis. This seems to be to the detriment of the complex review of the European Constitutions. A too synthetic look upon to Spanish debate that was concerned with the sovereignty of the nation naturally limited the presentation of the stance on the problem as adopted by all important participants in the debate, and particularly those who defended the old order. The Spanish Cadiz Constitution deserved more complex elaboration due to its liberal dimension (Art. 4 and Art. 13) and due to the fact that it *expressis verbis* (Art. 3) defined sovereignty of the nation as the right of the nation to adopt fundamental laws (*leyes fundamentals*).

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[13] Emmanuel-Joseph Sieyés' political activities were well known in Poland. His brochures were printed and distributed. Cf. E.J. Sieyés, *Czym jest stan trzeci? Esej o przywilejach*, Wydawnictwo Sejmowe, Warszawa 2016, p. 5.

[14] R. Kubben, *Parliament and Pamphlet: Sieyes' Qu'est-ce que le tiers état? And the Missing link between Medieval and Modern constitutionalism* [in:] *Parliaments: The Law, the Practice and the Representations: From the Middle Ages to the Present Day*, eds. M.H. de Cruz Coelho, M.M. Tavares Ribeiro, Lisbon 2010, p. 395. The ground for the ideological concurrence of Sieyés' views and those contained in the constitutional project of the 3rd May Constitution could be provided by the principle of fundamental laws of monarchy as detectable in the pre-revolutionary France. This principle would resemble the Polish principle of cardinal laws. Irrespective of political consequences of the two constitutional principles what they had in common was the idea that their original source lay in the Canon law concept, the concept which proclaimed that the one who exercised power was bound by law. In a similar way the Spanish concept of *leyes fundamentales* – understood as the order that is superior to the rights of the legislator and that functions as the source which legitimizes executive power – grew out of the Catholic concept of natural rights worked out by the scholastics of Salamanca.

One should share the view adopted by the authoress according to which Art. 3 of the Spanish Constitution does not amount to the rejection of the monarchy but only points to what is a constituent power in the state. These remarks should however be supplemented with the observation that such interpretation was alien to the opponents of the new Constitution. According to the lines written by one of them (Miguel de Lardizabal y Uribe) to proclaim the sovereignty of the nation and introduce republic or democracy amounts to one and the same. While following what has been established by the literature on the subject, the authoress presents the secularised concept of sovereignty of authorities as developed by the scholastics of Salamanca who recognized the secular and not divine origin of monarchical power. They thought that the sovereign power derives from God and passes on to the King by means of the people in whom the sovereign power resides primarily and essentially. Sovereign power as a source of human power was therefore derivative of the power disposed of by the community as such.[15]

The scholastic concept of the nation viewed as the body that wields sovereign power was repeatedly invoked by the liberal representatives of the Cortes when they polemized with the conservative camp. One of these representatives, while answering his adversary, posed a rhetoric question: "If sovereignty belonged exclusively to the King of Spain what right would the Cortes dispose of in order to limit the monarchical power?" (Diego Muñioz Torrero). The quotation that the authoress selected was well reflective of the essence of the Spanish controversy over a sovereign power in the constitutional state. Like – earlier – the constitutional system of the Nobiliary Republic of Poland-Lithuania, thus also the Spanish Constitution of 1812 safeguarded the power of the nation by recognizing the superior position of the Cortes in the constitutional system. However, in its solutions the Spanish Constitution did not go as far as the Polish Constitution did since it did not introduce political, but only constitutional (i.e. penal) responsibility of ministers.[16]

Unlike in Poland, in Spain the legislative power was exercised by the Cortes together with the King. In this case the Spanish solution was reflective of the Spanish tradition of the King co-operating with the nation in the law-creating process.[17] What however the King was entitled to was only the suspending *veto* with respect to the laws adopted by the Cortes. According to the Cadiz Constitution of 19th March 1812 the person of the King was saint, untouchable and could not be brought to accountability (Art. 168). All the acts that the King issued required the countersignature (endorsement) as made by the Secretary of State. Otherwise they were not effective. Like in the Polish-Lithuanian Nobiliary Republic, thus also in Spain the sovereign nation, by requiring ministerial countersignature on royal acts, safeguarded itself against the personal rule of the monarch. As an organ of the executive power the monarch acted through his ministers who were responsible to parliament for the official acts of the King. It was a typical feature

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[15] M. Müller, *The Notion of Sovereignty in the Constitutional Process of Cádiz (1810–1812)*, "Jus Fugit" 2016, no. 19, p. 194ff.

[16] The authoress wrongly assumes that Art. 226 of the Constitution made the ministers politically responsible. The contents of the provision distinctly shows that it was their constitutional (penal) responsibility that came into play. Also Art.134 item 25 referred to penal, and not political responsibility.

[17] M. Müller, *The Notion…*, p. 194. In Poland the fear that the King who inherits the throne may introduce the personal type of rule which would limit the position of the Seym, decided on depriving the monarch of his share in the law-creating process although previously he had such share.

of the juridification of sovereignty of the nation in the European constitutionalism. It consisted in the limiting – through the Constitution – of the executive power of the King. The King was expected to rule while assisted by his ministers who were constitutionally responsible to parliament.

In further part of her study U. Müßig devoted a considerable attention to the Norwegian Constitution although the latter was omitted in the ReConFort project. This Constitution arose the interest of the authoress since the Norwegian *Grunnloven* of 1814 made up an excellent example of how the dispute between the parliament and the King over the interpretation of the provisions of the Constitution could change the constitutional system of the state. The Norwegian experience shows in the most distinct way that the constitutionalism should be also viewed from the perspective of constitutional practice. Without that perspective the image of the historically shaped constitutionalism may be found to be incomplete. Despite the fact that the Norwegian constitutional dispute referred to the issue of secondary importance, i.e. to the question of the participation of ministers in parliamentary sessions, it in fact turned into a long-lasting struggle for deciding to whom there belonged the sovereign state power: to the parliament or to the King.

What should be found to be an interesting underplot in the discussion was the analysis of the legal opinion drawn up by the professors of law in Christiani (Oslo) in 1880. In their legal argumentation the research representatives, while acknowledging the King's right to *veto* the parliamentary law if the latter changed the Constitution, took into consideration both the superiority of the Constitution as well as the distinction between the constituent and the legislative power. Through this contrasting of the two functions performed by the representative of the nation there resulted the conclusion that ordinary legislator had no right to change the Constitution. This meant that only monarch's absolute *veto* as imposed on the law which tended to change the Constitution could prevent the legislative from exceeding its constitutional function. The point is that the Constitution provided only for the King's suspending *veto* that could be applied to ordinary laws adopted by parliament. The parliament eventually forced through the interpretation of the Constitution which was advantageous to it, thereby forcing the King to give consent to parliamentary responsibility of ministers. One may only raise a doubt whether 1884 should really be considered to be the date of emergence of parliamentarism in Norway. The doubt is due in the fact that King Oskar II exercised his power by personal rule and ignored the lay-out of political forces in parliament.

After an interesting divagation on the forming of Norwegian constitutionalism the authoress passed on to the making of general remarks on the forming and on the content of the Belgian Constitution of 1831 and on the *Statuto Albertino* of 1848. While producing her general assessment of the Belgian Constitution, the authoress is found to be caution in expressing a firm opinion suggesting that in Belgium there existed from beginning classical parliamentary monarchy. It is true that due to the constitutional custom there developed in this country the parliamentary responsibility of ministers but Belgium was far from introducing the principle that "the King reigns but does not rule". On should share the authoress' opinion about the ministers in Belgium being subject to double responsibility. Apart from being supported by the parliament they had to be trusted by the King. When the monarch lost his confidence in them they had to resign their posts. The authoress is also right when she treats the evolution of the *Statuto Albertino* toward

parliamentary system of government as a case study of the process of juridification of sovereignty by means of the Constitution.

The synthetic image of the both Constitutions was supplemented by a deep insight made into the Belgian and Italian constitutional discourse. Particularly thorough and source-based analysis of the origin of Art. 25 of the Belgian Constitution was made by Brecht Deseure in his publication *National Sovereignty in the Belgian Constitution of 1831: On the Meaning(s) of Article 25*. This Article anchored the entire state power in the sovereignty of the nation without defining the sovereign. The Constitution provided that these were exclusively the members of parliament who were the representatives of the nation. The principle of monarchical government was rejected in Art. 78. The King had no other powers then those formally attributed to him by the Constitution and by ordinary laws established under the Constitution. The analysis of press articles and the speeches delivered by the members of National Congress as well as the study of views expressed by legal doctrine, allowed the author to arrive at a conclusion that the notions "people" and the "nation" meant the same in the Belgian debate. The parliament that controlled the activities of the King by bringing to accountability the constitutional minister was – in the course of time – capable of imposing upon the King the duty to appoint ministers who were trusted by the representative of the nation. Thus we may say that on one hand the Belgian Constitution created in its provisions the premises for forming, by way of custom, parliamentary responsibility of ministers, yet on the other hand the King's *veto vis-a-vis* the parliament-adopted laws and the magistracies who were subject to the monarch, allowed him to preserve a part of state niveau under his control.

While the discussion of the Belgian Constitution, drew the attention of the reader to a larger extent on the doctrinal approach toward the sovereignty of the nation, the presentation of the *Albertine Statute* of 1848 seemed to be more dynamic. In his publication *The Omnipotence of Parliament in the Legitimisation Process of 'Representative Government' under the Albertine Statute (1848–1861)* Giuseppe Mecca demonstrates the Italian constitutional document of 1848 within a longer period of development. He combines the purely constitutional elements, those that contain the analysis of provisions, with political events that affected the constitutional practice. What he particularly subjects to assessment is the defining of the constitutional system as "representative government" (Art. 2, St.Alb.). The author emphasizes that although the *Albertine Statute*, which was authoritatively granted by the monarch, was modelled upon the French Constitutional Charter of 1814, it nevertheless conceived of the monarchical principle in its own different way since it accepted the principle that the power derived from the will of the nation. While invoking the views of publicism and those of research of his time, the author drew the attention of the reader to the fact that the theory of the "omnipotence of Parliament" was a corrective between the monarchical principle and the excesses of popular sovereignty. This theory made up also the basis for the elaborating of parliamentary system.

The reviewed monograph deserves the attention of both legal historians as well as constitutionalists since it deals with the forming of European constitutionalism on the three levels: the doctrinal, the historical and the comparative. The principle of national sovereignty was therefore the most important factor in the formation of the European constitutionalism and parliamentarism. The description of the process of juridification of

sovereignty of the nation that was presented in the discussed volume on the basis of the Polish, Spanish, Belgian and Italian constitutional models considerably broadened the research field to be exploited by those interested in the origins of the European constitutional experience, both that of permanent as well as of ephemeral nature. This experience makes up a common tradition reflective of the European constitutional pattern which in the present-day Europe is referred to as the "state of law" (*Rechtsstaat*).

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