

THE NOTION OF SOVEREIGNTY IN THE CONSTITUTIONAL PROCESS OF CÁDIZ (1810-1812)*

When Cádiz spoke to the world – a paradigm of constitutional
communication in 19th century Europe

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RESUMEN:

En la interfaz de las ciencias jurídicas e históricas este estudio intenta analizar el proceso de constitucionalización en Cádiz como un proceso vívido de comunicación en el marco de una historia constitucional de Europa, bajo especial consideración de las influencias de la Escuela de Salamanca. La ambigüedad e indeterminación al respecto de las nociones fundamentales del constitucionalismo – por ejemplo al respecto de la noción de soberanía es decir del concepto del *pouvoir constituant* – son las principales características de los discursos públicos durante los procesos de constitucionalización en Europa. De esos discursos surge la autoridad que las Cortes Generales y Extraordinarias reclamaron en Cádiz con su fórmula de legitimación: «Las Cortes hablan a España y al mundo: la sencilla narración de sus actas es su proclama y su apología». Esa frase refleja además que en la Europa del siglo XIX, *Constitución* es el resultado de las interacciones conflictivas de un contexto social, de la práctica política y de los modelos resultantes de una interpretación constitucional. Reconsiderando los procesos consti-

* This work is the result of two theses realized under the supervision of Prof. Dr. Ulrike Müßig (in Spanish publications partly registered as Ulrike Müssig) Head of the Chair for Civil Law, German and European Legal History at the University of Passau (Germany) and principal investigator of the *Advanced Grant Reconsidering Constitutional Formation. Constitutional Communication by Drafting, Practice and Interpretation in 18th and 19th century Europe* (ReConFort) funded by the European Research Council. Furthermore, I want to express my gratitude to Prof. Dr. José Antonio Pérez Juan from the University Miguel Hernández/Elche for his support as well as to the *Ius Fugit* editorial department for the interest in this paper.

tucionales europeos con sus lazos transfronterizos y transatlánticos en el marco de una historia constitucional común, esa historia ha de entenderse como anunciante de los tiempos pasados y de las experiencias comunes que pueden ser hitos de orientación para la integración europea.

PALABRAS CLAVE:

Noción de soberanía, Escuela de Salamanca, comunicación constitucional, proceso de constitucionalización, discurso constitucional, historia constitucional de Europa.

ABSTRACT:

At the interface of legal and historical science, this work analyses the constitutionalisation process of Cádiz as a vivid process of communication within European constitutional history, with special consideration of the influences of the School of Salamanca. The ambiguity and vagueness of the fundamental notions of constitutionalism – for example regarding the notion of sovereignty or rather the *pouvoir constituant* – are the main characteristics of the public discourses during constitutionalisation processes in Europe. From these discourses derived the authority of the *Cortes Generales y Extraordinarias*, claimed in Cádiz by means of the legitimation formula: «The Cortes speak to Spain and to the world: the simple narration of their documents is their proclamation and apologia». This phrase also reflects that in 19th century Europe *Constitution* is the result of the social context, political practice, and models arising from constitutional interpretation. Reconsidering the constitutional processes with their transboundary and transatlantic links in the context of a common constitutional history, this history has to be understood as herald of former times and common experience, which can be used as a point of reference for the European integration.

KEYWORDS:

Notion of sovereignty, School of Salamanca, constitutional communication, constitutionalisation process, constitutional discourse, European constitutional history

«*Vox populi vox naturae est [...] ad pulchritudinem hujus mundi nihil tam necessarium quam varietas*».

(Fernando Vázquez; Contr. Illustr. I, chapter 11, § 34/chapter 21, § 14)

I. INTRODUCTION

Organizational concepts born in times of conflict educe constitutions and are the expression of political culture¹. Consequently, the concept of national sovereignty (*soberanía nacional*) is fundamental for the constitution² of the *Cortes Generales y Extraordinarias*, promulgated at their stronghold Cádiz³ on the 19th of March 1812⁴. This paper analyses the Cádiz constitutionalisation process⁵ as a vivid process of communication⁶ within a culturalistic constitutional history⁷. The notion of sovereignty in the debates of the Cortes is examined paradigmatically. The proceedings of the Cortes provide access to the conflicting conceptions of that notion in the statements of several political protagonists. A comparative history of early European constitutionalism⁸ is referenced by examining the notion

¹ See U. Müßig, 2006, pp. 1 ff. and concerning the aspect of political culture: U. Müßig, 2010, p. 176.

² The constitution of Cádiz is the first one in a line of ephemeral Spanish constitutions in the nineteenth century; in this context Théophile Gautier formulates in French: «*Une constitution sur l'Espagne, c'est une poignée de plâtre sur du granit*» (quoted from: T. Gautier, 1859, p. 20).

³ They sat isolated on the Isla de León under the protection of the English armada lying at anchor (see L. W. Bernecker/H. Pietschmann, 2005, p. 245).

⁴ Date according to this edition of the «*Constitución Política de la Monarquía Española*», in: Colección de Decretos y Órdenes que han expedido las Cortes Generales y Extraordinarias desde 24 de septiembre de 1810 hasta 24 de mayo de 1812, mandado publicar de Orden de las mismas, vol. 2, Madrid Imprenta Nacional 1820, p. 98; this date was at the same time the anniversary of Ferdinand VII's accession to the throne.

⁵ This process defines the Cortes-debates of Cádiz starting with the first decree on the 24th of September 1810 and ending with the approval of the constitutional text on the 18th of March 1812 before its solemn promulgation on the 19th of March 1812.

⁶ Or rather the Cortes-debates; it is intended to describe the notion of sovereignty of Cádiz as a paradigm of comparative constitutional history within the evolutionary understanding of constitutions thought by Müßig and especially in context of the aspect of constitutional communication of constitutional law fundamental concepts during European processes of constitutionalisation. (see i.a.: U. Müßig, 2014a, pp. 107-131).

⁷ So in Müßig, 2010, p. 175 f.

⁸ Here Walter Kirsch's definition is taken as a basis. He understands constitutionalism in the broader sense as a process of the overcoming of traditional forms of government through the promulgation of constitutions; see M. Kirsch, 1999, p. 1 ff. *Constitutionalismo* in the Spanish literature consulted for this work means, in contrast to the more narrow German linguistic use, also the basic condition of such a limitation of power («*La noción de constitucionalismo lleva implícito su mismo proceso de evolución histórica, del que no puede desprenderse*»); quoted from: A. Masferrer, 2011, note 1).

of sovereignty in the constituent assembly as a communication model. The influences of the School of Salamanca on the semantics of sovereignty will be given special consideration. Luis Sánchez Agesta compares the Spanish 19th century to a fever, which destroyed its ephemeral constitutions⁹ and suggests that the constitution of Cádiz represented an attempt to «erect the state on completely new fundamentals [...]»¹⁰, while Karl Friedrich Hartmann described this period as a time «rich in alterations»¹¹. The notion of sovereignty before and during the constitutional debates is described in contemporary literature as a little elites' burlesque¹², that diminished the importance of the constitutional principles communicated by the political groups as part of an oligarchic «stage spectacle»¹³.

II. DIARIOS DE LAS CORTES – SOURCE CRITICISM AND PRESENTATION

Two editions of the Cortes-proceedings with different publication dates are central to the present examination of the notion of sovereignty within the constitutionalisation process of Cádiz; the most relevant debates took place on the 28th and 29th of August, 1811¹⁴. Titled *Diario de las Discusiones y Actas de las Cortes* (Diary of the Cortes' discussions and files) the first copies of these proceedings were published in 1811 in eleven volumes¹⁵. The earlier edition, a *Prospecto Del Periodico Intitulado* (Prospect of the Untitled Periodical), indicates that it had been published under the constituent assemblies' «sovereign authority and con-

⁹ L. Sánchez Agesta, 1964, p. 18 (*span.:* «la fiebre con que el siglo XIX devoró las constituciones»).

¹⁰ Quoted from: *ibid.*

¹¹ K. F. Hartmann, 1820, p. XI.

¹² Differently motivated critics were authored: «Como á todos los demas españoles, se les tapó la boca, se les hechó un candado á sus labios, por decir lo así, [...]» (quoted from: J. C. Carnicero, 1830, p. 23); in representation of European conservatism Karl Ludwig von Haller wrote: *So z.B. erzeigt sich nun offenbar, dass es den spanischen Jakobinern, [...] nur allein darum zu tun ist [...] sich und ihre Anhänger einzig und ausschliessend zur Souveränität d.h. zur höchsten Gewalt zu erheben.* « [engl.: *So it shows up apparently that the Spanish Jacobins and their supporters only and exclusively want to elevated themselves to sovereignty, that means to the supreme force.*] (quoted from: K. L. von Haller, 1820, p. VI);

¹³ *espectáculo de gran escenografía*; quoted from: L. Sánchez Agesta, 1964, p. 19.

¹⁴ A. Fernández García, 2002, p. 35.

¹⁵ *Diario de las Discusiones y Actas de las Cortes, Cádiz en la Imprenta Real 1811 (D.D.A.C.)*. All the sources containing the debates at Cádiz are accessible in «Bayerische Staatsbibliothek digital» (Digital Bavarian State Library), the digital archive of the *Congreso de los Diputados* and the collection of the *Fundación Centro de Estudios Constitucionales 1812*; the author kept the original orthography of the sources. If not noted differently all English translations were made by the author of this paper.

trol»¹⁶. The date of publication and the place of printing prove the authenticity of this document and corroborate the intentions of the Cortes (described in this document) regarding constitutional communication¹⁷. The juxtaposition of the examined passages with the second accessible edition titled *Diario de Sesiones de las Cortes Generales y Extraordinarias* (Diary of Sessions of the General and Extraordinary Cortes), published in 1870 in seven volumes¹⁸, revealed no divergence. Modifications as a result of the euphoria about the end of the *Antiguo Régimen* after the transformation process –as Bernecker considers– from 1808 until the so-called «Six Revolutionary Years» (1868-1874) were not made in the context of a renewed attempt to communicate aspects of the constitutional process of the Cortes of Cádiz¹⁹.

III. FUNDAMENT OF THE APORIA CONCERNING THE NOTION OF SOVEREIGNTY IN EARLY CONSTITUTIONALISM

The principle of sovereignty is generally considered not only as substantial basic condition of constitutionalism but also as the central political idea of early modern age²⁰ and of the modern concept of constitution²¹. For that matter, numerous scientific works dealing with the problem of sovereignty advance different opinions of its meaning²². Consequently, it seems more useful to explore the origin

¹⁶ *Diario de las Discusiones y actas de las Cortes, que se ha de publicar baxo de la soberana autoridad é inspeccion del Congreso Nacional* (quoted from: *ibid.*, p. III).

¹⁷ This intention to communicate the authority and with that the sovereignty of the Cortes with the help of the publication of the proceedings gets more than evident: «*Y no satisfechas con haber dado á lá Isla de Leon el grandioso espectáculo de sus sesiones públicas, quieren que las disfruten tambien del modo posible todos los ausentes y venideros*»; (engl.: «*And not satisfied to have given on the Island of Leon the great spectacle of their public sessions, they want that they can be enjoyed if possible also by all the absent and coming*.»); special consideration seen from this point of view deserves the cross-border constitutional interest in 19th century Europe: «*Las Cortes hablan á España y al mundo: la sencilla narracion de sus actas es su proclama y su apología*»; (engl.: «*The Cortes talk to Spain and to the world: the simple narration of their documents is their proclaim and their apología*»); (quoted from: *ibid.*, p. III f. and V).

¹⁸ *Diario de sesiones de las Cortes Generales y Extraordinarias*: dieron principio el 24 de setiembre de 1810 y terminaron el 20 de setiembre de 1813, Madrid Imprenta de J. A. Garcia 1870 (D.S.C.).

¹⁹ Concerning the details of the historical context of this period see L. W. Bernecker/H. Pietschmann, 2005, p. 271 f.

²⁰ *Ibid.*, p. 239.

²¹ About the modern notion of constitution as idea of a fundamental state law that is the fundament of all political conditions, see D. Willoweit, 2013, p. 1.

²² In the sense of Jellinek: «*Bis tief in die Literatur des 19. Jahrhunderts, ja bis in die Gegenwart hinein, dauern die Unklarheiten und Verwirrungen in der Auffassung der Souveränität*» [engl.:

and meaning of this notion and to consider the historical context as a condition for understanding the idea of sovereignty²³. The notion of sovereignty was specifically discussed in younger legal literature as fundamental to the modern concept of state²⁴. Meanwhile, the notion of sovereignty is used in diverse contexts, and one must differentiate between personal sovereignty and the so-called institutional sovereignty, or the sovereignty of state²⁵.

1. A moment of history of the notion of sovereignty

The notion of sovereignty primarily evolved from certain historic-political conditions, being a constant historical concept that was compressed to a legal one²⁶. It is generally stated that the doctrine of sovereignty²⁷ and an early legal theory of state in Europe²⁸ emerged with the French jurist Jean Bodin, who in *Les Six livres de la République*²⁹ defined the community as a form of exercising power, and sovereignty as its essential and necessary element³⁰. His fundamental definition of the notion of sovereignty «*Maiestas est summa in cives ac subditos legibusque soluta potestas [...]*»³¹ invokes supreme power over subjects unbound by positive law, and includes an inward and outward dimension³². Bodin decisively influenced the evolution of modern-age concepts of sovereignty, by overcoming «the restriction of state authority articulated in the Latin terminology»³³. The main characteristic of an absolute monarch is his legislative power³⁴, from which further competences

Until the literature of 19th century, yes until present days, the unclarity and confusion within the understanding of sovereignty continue.] (quoted from: G. Jellinek, 1959, p. 41).

²³ J. Dennert, 1964, p. 56.

²⁴ H. Quaritsch, 1970, pp. 32 ff.; H. H. Hofmann, 1967, p. 49; U. Haltern, 2007, p. 1 und P. Salzborn/R. Voigt, 2010, p. 13; E. Kern., 1949, p. 49.

²⁵ J. Dennert, 1964, p. 6; G. Küchenhoff/E. Küchenhoff, 1960, p. 51.

²⁶ G. Jellinek, 1959, p. 435.

²⁷ The doctrine of sovereignty by Jean Bodin is the basis of the one of the community in Thomas Hobbes; so in: J. Dennert, 1964, p. 56; W. Mäder, 2007, p. 15.

²⁸ Also in: H. Quaritsch, 1990, col. 1715.

²⁹ *Les six livres de la république* was first published in 1576 in French. Bodin himself translated it into Latin and this redacted Latin version was published as *De Republica* in 1586; see M. Landmann, 1896, p. 8.

³⁰ «*République est vu droit gouvernement de plusieurs mesnages, & de ce qui leur est commun, avec puissance souveraine*» (quoted from: J. Bodin, 1579, p. 1; a German translation is contained in the translation by B. Wimmer J. Bodin, 1981, p. 98; «*State means the sovereign authority of government, oriented towards law, over a number of households and what they have in common*»; O. Brunner/W. Conze/R. Koselleck, 1990, p. 98 f.;

³¹ Quoted from: M. Landmann, 1896, p. 41.

³² *Ibid.*, p. 41.

³³ *Ibid.*, p. 107.

³⁴ Compare J. Dennert, 1964, p. 60 und H. Quaritsch, 1990, col. 1715.

arise³⁵. The notion of sovereignty in the political theory of Bodin's time was commonly used as collective name not as a paraphrase of an exclusive and single dominating power (Herrschaftsgewalt) in one kingdom³⁶. As significant the political thought initiated by Bodin during the French wars of religion³⁷ was the rediscovery of a «Thomism modernized by elements of Humanism»³⁸ in Spain. Spain's rise to supremacy in Europe during the so-called *Siglo de Oro* (Golden Age) was characterized by absolutistic efforts on the one hand and the aristocracy's attempt to preserve its privileges in the Cortes on the other hand³⁹. As denegation of developing absolutism the legal and political theories of the School of Salamanca emerged⁴⁰. Later they influenced the notion of sovereignty adopted by the monarchical members of the Cortes at Cádiz⁴¹. This school unrolled on one side a rational theological theory of the genesis and functionality of sovereignty, and on the other side the belief in rational law as an expression of divine will⁴². Between the early modern democratic legitimation of sovereignty and the need for a divine legitimation of government, late scholastic theories proved special flexibility. Their conception of sovereignty as a power conferred by the grace of God that constitutes the authority transferred from the people, was formulated in the context of the medieval *regimen señorial*⁴³ concepts of organization and found expression in the formula of compromise in article 3⁴⁴ an the preambles' double legitimation⁴⁵.

³⁵ M. Landmann, 1896, p. 128.

³⁶ H. Quartisch, 1970, p. 240.

³⁷ H. Quartisch, 1986, p. 49; K. Roth, Stuttgart 2010, p. 23.

³⁸ U. Bermbach, 1985, p. 146.

³⁹ *Ibid.*, p. 147.

⁴⁰ M. Walther, 2001, p. 281; Francisco de Vitoria is first considered their most important scholar, later Francisco Suárez. Fernando Vázquez was a student of De Vitoria (see U. Bermbach, 1985, pp. 149 ff.).

⁴¹ R. García, 1994, p. 18.

⁴² See M. Walther, 2001, p. 282.

⁴³ Regarding the formation of this *regimen señorial* (by others called feudalism) vid. J. A. Escudero, 2012, p. 305 ff.

⁴⁴ *La soberanía reside esencialmente en la Nación, y por lo mismo pertenece á esta exclusivamente el derecho de establecer sus leyes fundamentales*, (quoted from: D. Willoweit/ U. Seif, 2003, p. 430), [engl.: *The sovereignty resides essentially in the nation; in consequence whereof it alone possesses the right of making its fundamental laws*; cited from: Constitution of the Spanish Monarchy, printed 1814, p. 4].

⁴⁵ See i.a. U. Müßig, 2014b, p. 72; Preamble: «*by the grace of God and the constitution of the Spanish monarchy*» (quoted from: Constitution of the Spanish Monarchy, printed 1814, p. 4).

1.1. The impact of the School of Salamanca

The moral philosophy and canonistic of the *School of Salamanca* was not only an essential element during the development of a profane natural law of modern age adopted by monarchomachs⁴⁶, but also a doctrinal alternative to Bodin's absolutistic notion of sovereignty⁴⁷. Referring particularly to Fernando Vázquez, Althusius views the people as the holder of sovereignty⁴⁸. This theory does not mean a «sovereignty of the people in terms of a free community by will, that consists of equal citizens»⁴⁹ in accordance with Rousseau or rather the French national convention⁵⁰. As Althusius understands a people organized in estates⁵¹ and reflects the dualism of a cooperative monarchy, the monarchical members integrated this concept in their recourse on the *School of Salamanca* during the debates around the article 3 contained in the constitutional draft⁵². The historic popular sovereignty (*majestas populi*) serves as legitimation of a constituted authority (sovereignty) divided between the monarch and the people represented in estates⁵³.

IV. CULTURAL AND HISTORICAL CONTEXT

Contemporary history of Spain begins in 1808⁵⁴. At the beginning of the 19th century, Spain's *Antiguo Régimen* (Old Regime) was in crisis. The 1812 constitution of Cádiz, born during the process of constitutionalisation initiated in 1810, is known as the first genuine Spanish constitution and as answer to the French occupation after the resignation of Ferdinand VII⁵⁵. The old sovereign Ferdinand VII's captivity and the collapse of the *Antiguo Régimen* hardly explain why national sovereignty was neither claimed by the people themselves, nor by a represen-

⁴⁶ In answer to the beginning absolutism they emphasized the importance of the estates and their supremacy against the monarch. (see *ibid.*, p. 267).

⁴⁷ E. Reibstein, 1955, p. 21; O. Brunner/W. Conze/R. Koselleck, 1990, p. 124.

⁴⁸ E. Reibstein, 1955, pp. 1 ff.

⁴⁹ According to H. Hofmann, 1974, p. 366.

⁵⁰ U. Müßig, 2014b; A. Torres del Moral, 2012, p. 68 f.; A. Timmermann, 2007, p. 39; Rousseau's concept of popular sovereignty dominated among liberal representatives. Sovereignty now not only had to legitimize government but also was exercised permanently and based impartially and inalienably on the equality of man. In the constitutional documents of the American and French revolutions popular sovereignty is modified by representation. (O. Brunner/W. Conze/R. Koselleck, 1990, p. 126).

⁵¹ Germ. *Stände*, span. *Estamentos*.

⁵² H. Hofmann, 1974, p. 366.

⁵³ O. Brunner/W. Conze/R. Koselleck, 1990, p. 124.

⁵⁴ That is not generally accepted. For broader information: J. A. Junco: 2002, *passim*.

⁵⁵ J. L. Brey Blanco, 2011, p. 69.

tative assembly as in France; instead, the national sovereignty arose from an intermediate situation of revolutionary potential⁵⁶.

1. The crisis of the *Antiguo Régimen* or the interior Spanish conflict

The absolutistic reign of Carl IV evoked in Spain a general dissatisfaction, which started to turn against the political organization as a whole in 1808⁵⁷. This date is considered not only the beginning of the mentioned crisis of the *Antiguo Régimen* but also the beginning of the Spanish War of Independence (*Guerra de Independencia*; 1808-1814)⁵⁸. The importance of these special circumstances⁵⁹ cannot be overstated in reference to the notion of sovereignty in the Cortes. After the French revolution, the Spanish Peninsular War started with the popular revolt in Madrid on 2nd of May 1808. In the following month prior to the convocation of the general and extraordinary Cortes on the Isla of León on the 24th of September 1810, the necessary conditions that initiated the anti-Napoleonic resistance⁶⁰ arose. Provincial administrations (*juntas provinciales*) were set up to organize the guerrilla war under the command of the central administration (*Junta Central*) in Seville and later in Aranjuez⁶¹. After the supreme administration (*Junta Suprema Central y Gubernativa*) enacted a decree on the 22nd of May 1808 concerning the restitution and convocation of the Cortes⁶², the preparing commission (*Comisión de Cortes*) began with their *consulta al país*⁶³ in 1809; from the different results emanated the fundaments for the political groups of the Cortes at Cádiz and the ideological debate about the notion of sovereignty. Until the promulgation of the final constitutional text on the 19th of May 1812, debates took place around the constitutional commission's (*Comisión de Constitución*) draft⁶⁴.

⁵⁶ See A. Masferrer, 2011, p. 660.

⁵⁷ M. Artola Gallego, 1959, p. 288.

⁵⁸ See L. W. Bernecker/H. Pietschmann, 2005, p. 239.

⁵⁹ The same constitutional semantics of national sovereignty in the constitution of the Cortes and the French September Constitution can only be differentiated considering the historical context or rather the constitutional communication process (debates). (see U. Müßig, 2014a, p. 123).

⁶⁰ U. Müßig, 2014b, p. 80.

⁶¹ J. L. Brey Blanco, 2011, p. 72; L. W. Bernecker/H. Pietschmann, 2005, p. 243; F. Suárez, 1982, p. 16.

⁶² They claimed the procuration of the monarch and the national sovereignty already transferred on them. A. Timmermann, 2007, p. 27; A. Ramos Santana, 2014, p. 206.

⁶³ About the established conditions for a state reform: M. Artola Gallego, 1959, pp. 289; A. Timmermann, 2000, p. 576.

⁶⁴ Their members participated explicitly in the debates about the notion of sovereignty; this commission was composed of thirteen members among them Muñoz Torrero, Argüelles and Oliveros; concerning A. Timmermann, 2000, p. 572 and with more details ; F. Suárez, 1982, pp. 88 ff.

2. The constitutional concepts of the *Nuevo Régimen*

The «political revolution»⁶⁵, dominated predominantly by bourgeois or liberal representatives⁶⁶, aimed at the restoration of the state. The Cortes claimed the nation's power⁶⁷ to constitute an authority legitimized through the constitution⁶⁸. As the nation was invested with the *pouvoir constituant* (*poder constituyente*) all the powers derive from her⁶⁹.

2.1. National Sovereignty – Force, authority or leadership?⁷⁰

It is unquestioned that the terms power and authority are not congruent but both contained within the notion of sovereignty⁷¹. Depending on either a liberal or a historicizing perspective towards the utility of this notion different meanings were attributed⁷². Their relation to the semantics of national sovereignty within the process of the constitutionalisation of Cádiz is essential for the understanding of late scholastic influences on the perspectives of the different representatives.

⁶⁵ Denominates these revolutionary movement, that was directed against the Spanish absolutism and the French occupation; «*revolución política*» [engl.: *political revolution*] as contemporary denomination: F. Martínez Marina, 1813, p. XL; defined i.a. in: A. Timmermann, 2007, p. 34; M. Artola Gallego, 1975, p. 466.

⁶⁶ Predominantly clerics and jurists.

⁶⁷ Article 3 «*La soberanía reside esencialmente en la Nación, [...]*» (quoted from: D. Willoweit/ U. Seif, 2003, p. 430).

⁶⁸ Article 3 «*[...] y por lo mismo pertenece á esta exclusivamente el derecho de establecer sus leyes fundamentales*» (Quoted from: *ibid.*). As *pouvoir constitué* the Cortes formed the legislative together with the monarch (article 15) and the monarch formed the executive (article 16).

⁶⁹ The essential expression of sovereignty was the legislative power of the Cortes (article 15). Concerning this aspect: P. J. González Trevijano, 2011, p. 607; A. Timmermann, 2000, p. 579.

⁷⁰ Or domination; concerning the most difficult task to translate the German word *Herrschaft* into English; it is important to mention the translation: M. Weber, 1978, pp. 51 f.

⁷¹ Germ.: *Gewalt, Macht oder Herrschaft*. Not least concerning the original German term see the extensive clarification in: U. Müßig, 2010, p. 176. Base for a further analysis would be the etymology of the Spanish word *poder*, because *Gewalt, Macht und Herrschaft* would be a German translation. Within the proceedings of the 28th and 29th of august 1811 the word *poder* can be detected as the fundament of *potestad/autoridad soberana*. (see Bischof von Calahorra, D.D.A.C., vol. 8, p. 59).

⁷² The author of this paper intends to depict the common European heritage of a «*vocabulary of sovereignty*» with the focus on late scholastic influenced constitutional communication by interpretation. That is surely only a fraction of the doctrines virulent during this process. Within the research frame developed by professor Müßig I am leaving behind the identification patterns of national historiography by institutions and I refer to the approaches (to the notion of sovereignty) of Joaquín Francisco Pacheco and Raymond Carré de Malberg.

Miguel Artola Gallego defines *poder* in a Weberian sense as «the capacity to impose the own will against resistance» – as power⁷³. Consequently, he understands national sovereignty as the political nomination of a power within the meaning of a constituent power (*poder constituyente*)⁷⁴. Its institutionalisation⁷⁵ through the constitution that is legitimated by this constituent power, establishes the sovereignty of the constituted powers (*poderes constituidos*)⁷⁶. Thus, this postulate of national sovereignty was a legal construct, which «limited royal and attenuated popular sovereignty»⁷⁷. The sovereignty in terms of a constituted power was divided between king and Cortes (Art. 15)⁷⁸, because the power of the nation was institutionalised in this way. The members of the Cortes represented the nation⁷⁹. Consequently, the notion of sovereignty in Cádiz was an alternative concept to the unlimited popular sovereignty defined by the *volonté générale* as implemented by French national convent⁸⁰. The constituent power of the nation –the *poder constituyente* (Preamble, article 3)– was derived from God and constitutionalised the authority of the Cortes and the king as legislative (articles 15, 16). The notion of sovereignty in the constitutionalisation process of Cádiz has no single meaning. Within the interpretations articulated by constitutional communication, a differ-

⁷³ «es la capacidad [...] de llevar a la práctica su voluntad, incluso a pesar de otros [...]» (according to: M. Artola Gallego, 1975, p. 466); at his point the following classic definition of power by Max Weber gets discernible: «Power is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests», (quoted from: M. Weber, 1978, p. 28).

⁷⁴ M. Artola Gallego, 1975, p. 467 («La denominación del poder es la soberanía»); also in: J. L. Brey Blanco, 2011, p. 89.

⁷⁵ Müßig understands the institutionalisation of power as basic condition of authority in the sense of leadership (Herrschaft) (U. Müßig, 2010, p. 178, note 9). As what constitutionalisation can be understood.

⁷⁶ According to this conclusion the Cortes expressed in the *prospecto* of the *Diario de las Discusiones y actas de las Cortes* their «soberana autoridad» (p. I), what has to be understood in the meaning of leadership (sovereignty) or rather constituted state authority. Leadership in Max Weber's definition: «the probability that a command with a given specific content will be obeyed by a given group of persons»; coated from: M. Weber, 1978, p. 53. Müßig concludes in this context the basic condition for the persistence of leadership: the approval of the ones ruled by the *pouvoir constitués* constitutes sovereignty (see U. Müßig, 2014a, p. 107 an more in detail U. Müßig, 2010, pp. 176 f.).

⁷⁷ A full explanation: M. Kirsch, 1999, p. 83, note 129.

⁷⁸ Article 15 «La potestad de hacer las leyes reside en las Cortes con el Rey» (quoted from: D. Willoweit/ U. Seif, 2003, p. 432); [engl: «The legislative power belongs to the Cortes, together with the king», cited from: Constitution of the Spanish Monarchy, p. 6].

⁷⁹ The Cortes themselves conceded that their mandate is based on the consensus of their voters: «al pueblo deben su autoridad» or rather «vuestro cuerpo soberano os prepara la constitución» (quoted from: Prospecto des D.D.A.C., pp. III, IV); established the same way and compared with the interpretation of French national convent: A. Timmermann, 2007, p. 38 ff. or concerning the representative character A. Torres del Moral, 2012, p. 60.

⁸⁰ See A. Timmermann, 2007, p. 39.

entiation must be made between an early-modern age and a late scholastic⁸¹ dogmatic background. The analysis of the term *nation* is furthermore de rigueur for the scope of this work.

2.2. The *nación española*

«The nation is invested with sovereignty» as it says in the constitutional commission's first decree⁸². It is evident that nation was consequently understood as an «entity distinguishable and autonomous from king and people»⁸³ and that the analysis of the concepts contained in the proceedings, diverging among monarchical and liberal representatives, will provide further understanding. The significance of the idea of the Spanish nation is connected to the emerging nationalism on the Iberian Peninsula. Due to the research challenges of a European constitutional history this paper considers the idea of nation in terms of a legal concept, which has to be revealed not sticking to cultural or symbolical interpretations⁸⁴. The legal definition contained in article 1 does not impede to reject any equation of nation with people⁸⁵. Two main tendencies are notable, which shall not be related to the theory of state question on the democratic-representative character of nation⁸⁶. A first differentiation between people and nation was given by the French constituent assembly of 1791⁸⁷. Here nation means «the people as the political unit capable of action with the conscience of its political distinctiveness and the will for political existence, whereas the people that did not exist as nation was only a somehow ethnically or culturally unified association that not necessarily

⁸¹ J. Varela Suanzes-Carpegna, 1983, pp. 12 ff.

⁸² «*Los diputados que componen este Congreso, y que representan la Nación española, se declaran legítimamente constituidos en Cortes generales y extraordinarias, y que reside en ellas la soberanía nacional*» (quoted from: Colección de Decretos y Ordenes que han expedido las Cortes extraordinarias y Generales, Madrid 1820, vol. 1, p. 1), [engl.: «*The representatives that compose this Congress and who represent the Spanish Nation, declare themselves legitimately constituted in general and extraordinary Cortes and that in them resides the national sovereignty*»].

⁸³ Quoted from M. Kirsch, 1999, p. 83, note 129.

⁸⁴ Without any doubt Álvarez Junco's research on the symbolical and cultural dimensions of the idea of nation is a necessary reference: e.g. J. Álvarez Junco, 2015, p. 6 f.

⁸⁵ Article 1 «*La Nación Española es la reunión de todos los españoles de ambos hemisferios*» (quoted from: D. Willoweit/U. Seif, 2003, p. 430), [engl.: «*The Spanish nation consists of all the Spaniards of both hemispheres*»]; cited from: Constitution of the Spanish Monarchy, p. 4].

⁸⁶ Around the deduction of an early representative democracy out of the concept of national sovereignty see A. Torres del Moral, 2011, pp. 55-117.

⁸⁷ A. Timmermann, 2007, p. 38; A. Torres del Moral, 2011, p. 66.

existed as a political one»⁸⁸. Although the liberal members of the Cortes understood *nación* in a way influenced by the French process⁸⁹, concerning the holder of sovereignty, the monarchical representatives' apologia was led by late scholastically thoughts⁹⁰. During the debates in the Cortes a concept was manifested, according to which sovereignty of nation meant the mutual power of people and king with both together forming the entity of the nation⁹¹. The late scholastic concept of the *translatio imperii* did not recognize a loss of the dualistic element in the transmission of the supreme political power (sovereignty) from the people on the king. The monarchical representatives did not understand the people the way the Liberals did in accordance to the early constitutional and abstract idea of a partially egalitarian imagined people born out of natural state and politically unified as nation, but the social reality⁹². As a consequence *pueblo* means the totality of the unequal estates' individuals and different territories or rather kingdoms. The monarchical representative Antonio Llaneras could not object to the concept of organization deriving from national sovereignty, because: «*la Nación española [...] tiene cabeza que es Fernando VII, a quién V.M. en el primer día de su instalación juró solemnemente por soberano [...]*»⁹³. Even more precisely describes José Ramón Becerra the nation: «*El pueblo español, que nos ha diputado para presentarlo en estas cortes generales y extraordinarias, y nuestro amado soberano el señor don Fernando VII, que es su cabeza, forman un cuerpo moral, al que yo llamo la nación o monarquía española, [...]*»⁹⁴. The only sovereignty he admits for the nation and articulates clearly, that in the very moment, in which it is intended to transmit sovereignty on either the people or the king alone, the oath on the constitution would be broken and a despotic or democratic constitution would arise⁹⁵. In neither case the notion *cuerpo moral* used by Llamas is to identify with

⁸⁸ Quoted from: C. Schmitt, 1970, p. 79; similar definitions by: A. Torres del Moral, 2011, pp. 104 f.

⁸⁹ From: A. Timmermann, 2007, p. 38

⁹⁰ The historicism contained in the arguments of this group was related to the thinking of Friedrich Carl von Savigny in an interesting paper of Lloredo Alix: L. M. Lloredo Alix, e.g. p. 241.

⁹¹ J. Varela Suanzes-Carpegna, 1983, p. 179.

⁹² *Ibid.*, p. 182.

⁹³ [engl.: *the Spanish nation [...] has a head, that is Ferdinand VII, whom TM swore solemnly as sovereign on the first day of their installation*]; quoted from: D.D.A.C., vol. 8, p. 21.

⁹⁴ [engl.: *The Spanish people, who has deputed us to represent it in this general and extraordinary Cortes, and our beloved sovereign Ferdinand VII, who is its head, form a moral body, which I call the nation or the Spanish monarchy*]; quoted from: *ibid.*, p. 15.

⁹⁵ «*la soberanía real y verdadera sólo la admito en la nación, pues en el instante en que se conciba que puede estar separada, y ya que sea en el rey, o ya sea en el pueblo, queda destruida la constitución que se ha jurado mantener, porque precisamente deberá sucederle el gobierno despótico o el democrático, [...]*» (quoted from: *ibid.*), [engl.: «*the real and true*

the *corps moral* that receives through the social contract its *moi commun*⁹⁶. Here emerges the late scholastic concept of the *cuerpum mysticum*⁹⁷, that can be found in the works of Francisco Suárez⁹⁸. Here the nation –in which essentially resides the sovereignty (article 3)– is analogically understandable as an organic unity organized hierarchically according to the monarchical representatives mentioned before⁹⁹. The monarch is the head of that *cuervo moral*, consisting of himself and the people¹⁰⁰. That metaphorical equivalence between the concept of a human organism and the political community is characteristic of the late scholastic theory¹⁰¹. This group supported the articles 1 to 3 of the constitutional draft, because for them sovereignty was attributed to the king as head of the nation and the nation participated in it through the Cortes¹⁰². So the basic concept of national sovereignty was an equation for the old dualism between monarch and the people in the sense of a sovereign institution corresponding to the Spanish monarchies' historic constitution¹⁰³. They relieved the early constitutional idea of national sove-

*sovereignty I only admit to the nation, though in the instant in which one conceived that it could be separated, and yet that it would be with the king, or yet in the people, the constitution would be destroyed which was sworn to maintain, because precisely it would follow a despotic government and a democratic, [...]»]; during the debate around article 3 the definition appears even more precise: «[...] la nación española es aquel cuerpo moral que forman el pueblo español, y el soberano como su cabeza, y que constituyen lo que llamamos monarquía española»/«el soberano vuelva y esté unido todo el cuerpo moral que forma que llamo nación» (quoted from: *ibid.*, p. 63); [engl.: [...] the Spanish nation is that moral body formed by the Spanish people, and the sovereign as their head, and they form what we call the Spanish monarchy]/«the sovereign comes back and the moral body that forms what I call nation is unified»].*

⁹⁶ «au lieu de la personne particuliere de chaque contractant, cet acte d'association produit un corps moral [...] le quel reçoit de ce même acte son unité, son moi commun [...]» (quoted from: J.-J. Rousseau, 2010, p. 35).

⁹⁷ Details about the *Cuerpo Místico*: J. A. Maravall, 1973, pp. 190 ff.

⁹⁸ «Primo solum ut est aggregatum quoddam sine ullo ordine vel unione physica vel morali; [...] Alio modo ergo consideranda est hominum multitudo, quatenus speciali voluntate seu communi consensu in unum corpus politicum congregantur uno societatis vinculo et ut mutuo se iuvent in ordine ad unum finem politicum, quomodo efficiunt unum corpus mysticum, quod moraliter dici potest per se unum [...]» (quoted from: F. Suárez, 1973, p. 153).

⁹⁹ See J. Varela Suanzes-Carpegna, 1983, p. 211.

¹⁰⁰ With Suárez the *hominum multitudo* needs a head to be a moral *corpus mysticum*: «illudque consequenter indiget uno capite» (quoted from: F. Suárez, 1973, p. 153).

¹⁰¹ Maravall identifies the influence of humanism as condition for the perception of a political community; see J. A. Maravall, 1973, p. 58.

¹⁰² J. Varela Suanzes-Carpegna, 1983, p. 212.

¹⁰³ The overlapping of the ideas of monarchical and liberal representatives becomes evident, because both of them found historic legitimation in the national sovereignty, their diverging semantics during the debates of this notion however is revealed by the analysis of their communicated constitutional interpretation. Argüelles formulates the liberal position not only once: «La nación [...] víctima de un olvido tan funesto, y no menos desgraciada por haberse dejado despojar [...] de todos los derechos e instituciones que aseguraban la libertad de sus individuos, [...]» (quoted from: A. Argüelles, 2011, p. 78), [engl.: «The nation [...] victim

reignty from revolutionary content. Against this background, it might be correctly concluded that the notion of sovereignty of Cádiz really was a *tertium genus* communicating the lack of distinction¹⁰⁴ between the ideas of popular or rather monarchical sovereignty¹⁰⁵, even because the execution of sovereignty was conceived dualistically (articles 15, 16). Due to the circumstances, the monarchical representatives seemed in the defensive, but they succeeded in maintaining the impression of preserving traditional concepts¹⁰⁶. This explanation model of nation is essential to the meaning of national sovereignty or rather for the original character of the Cádiz constitutionalisation process.

V. THE REPRESENTATIVES AND THE IDEOLOGICAL CURRENTS IN EARLY SPANISH CONSTITUTIONALISM

The pronouncements of the representatives contained in the historic documents not only facilitate their assignment to a certain legal-historical concept of sovereignty, but even more call for analysis of their distinctness. As mentioned previously, the proceedings of the constituent assembly are an important aid in understanding the concepts of early constitutional concepts emanated between 1810 and 1812¹⁰⁷. During the debates in the Cortes not the existence of such a power but their origin and holder, were discussed. We must differentiate among three not always clearly separable groups within the Cortes. The first group was formed by the monarchical (*realistas*), the second by the American (*americanos*) and the third by the liberal (*liberales*) representatives¹⁰⁸. Basically these three con-

of so fateful oblivion, and not less disgraced for having allow to be deprived [...] of all the rights and institutions that guaranteed the liberty of its individuals»; I do not agree with Timmermann at this point, because not the constituent assembly but only some representatives believed the dualism to be finished. (see A. Timmermann, 2007, p. 39); J. Varela Suanzes-Carpegna, 1983, p. 212.

¹⁰⁴ This indecisiveness is characteristic for the European constitutional processes and expresses itself in their communication; see dazu U. Müßig, 2014a, p. 123.

¹⁰⁵ Concerning this aspect L. Sánchez Agesta, 1964, pp. 57 f. and some further facts by J. Varela Suanzes-Carpegna, 1983, p. 85, note 85.

¹⁰⁶ M. Artola Gallego, 1975, p. 468. It has to be stated clearly that the author is aware of the significance of traditionalism for the monarchical representatives' notion of sovereignty besides liberal elements within this period of Spanish constitutionalism. But as this paper focuses on the aspects of constitutional communication especially by interpretation the late scholastic substrate serves as point of comparison both in a synchronic comparison and in a diachronic projection of constitutional paradigms contributing to a comparative European constitutional history.

¹⁰⁷ Joaquín Varela correctly states that an qualification of this «*Congreso constituyente español [como] especie de panóptico ideológico [...]»* would be created; see J. Varela Suanzes-Carpegna, 1983, p. 7.

¹⁰⁸ *Ibid.*; p. 12; J. Varela Suanzes-Carpegna, 2007, p. 46.

stitutional tendencies within the Cortes of Cádiz are to be distinguished, as becomes clear in the constitutional ideologies advanced during the debates. The same were nonetheless alterable and flexible not least since political parties did not exist yet¹⁰⁹.

1. About origin and holder of sovereignty

Article 1 of the constitutional draft defines at first the Spanish nation as «*reunión de todos los españoles de ambos hemisferios*»¹¹⁰. Article 2 not only articulates the freedom and the independence of this nation, but also negates any claim for possession¹¹¹. In this way also the following wording of article 3 was proposed: «*La soberanía reside esencialmente en la nación, y por lo mismo le pertenece exclusivamente el derecho de establecer sus leyes fundamentales, y de adoptar la forma de gobierno que más la convenga*»¹¹². On these three drafts elaborated by the *Comisión de Constitución* followed the debate with argumentation, which allows conclusions about the relevant representatives' perspectives concerning the origin and holder of sovereignty. It will be shown that behind all these significantly different concepts a consensus existed that a new *Constitution* was not to be elaborated. For the monarchical representatives, this meant that the Spanish nation was already constituted and that the *leyes fundamentales* (fundamental laws) would still be effective. They sought an improvement and a new codification to prevent in the future all kinds of abuses or rather excesses of power by the monarch or his ministers. Thus, they aimed at a reform of the monarchy's historic constitution¹¹³. Only in this context the diverging concepts of organization behind the discussions about the notion of sovereignty and its meaning can be understood.

¹⁰⁹ See J. Varela Suanzes-Carpegna, 2007, p. 45 ff.

¹¹⁰ D.S.C., vol. 3, Sesión del día 25 de agosto de 1811, p. 1684; [engl.: «*The Spanish nation consists of all the Spaniards of both hemispheres*»]; cited from: Constitution of the Spanish Monarchy, p. 4].

¹¹¹ «*La Nación española es libre é independiente, y no es, ni puede ser, patrimonio de ninguna familia ni persona*»; quoted from: D.S.C., vol. 3, Sesión del día 28 de agosto de 1811, p. 1706; [engl.: «*The Spanish nation is free and independent, and neither is nor can be the patrimony of any family or person whatever*», cited from: Constitution of the Spanish Monarchy, p. 4].

¹¹² Quoted from: D.S.C., vol. 3, Sesión del día 28 de agosto de 1811, p. 1707; [engl.: *The sovereignty resides essentially in the nation; in consequence whereof it alone possesses the right of making its fundamental law*]; cited from: Constitution of the Spanish Monarchy, p. 4].

¹¹³ Preamble; «*[...] aseguren de un modo estable y permanente su entero cumplimiento*» (quoted from: D. Willoweit/U. Seif, 2003, p. 430); [engl.: «*assuring in a secure and permanent mode their complete execution*»].

2. The monarchical representatives' approach

A significant scholastic influence was especially notable under the monarchical representatives. Their thesis about origin, limits and holder of sovereignty was derived from a classical understanding of the *translatio imperii*. The monarchical representatives articulated vehemently their rejection of the theory of the enlightened social contract in the debates around article 3. The formulation of this constitutional norm demanded a widening more than an accentuation of the political scale of the concept of national sovereignty¹¹⁴, first promulgated in the decree from the 24th of September 1810. The rejection of Rousseau's social-contractual idea became especially evident in the thoughts of Francisco Javier Borrull y Vilanova¹¹⁵, because he meant to recognize this idea in the Spanish word *esencialmente* (essentially)¹¹⁶. Origin and legitimation of sovereignty¹¹⁷ seems unequivocal for everyone: «*Después de la invasión de los sarracenos se levanta la Monarquía de Asturias, y la soberanía está dividida entre rey y nación, y ambos de conformidad hacen las leyes*»¹¹⁸. Additionally, the bishop of Calahorra Francisco Mateo Aguiriano¹¹⁹ defends the contractual nature of Spanish monarchy: «*prescindiendo por ahora de si la potestad de los reyes les es dada inmediatamente por Dios*»¹²⁰. Furthermore, per scholastic tradition it was articulated that «*la potestad soberana es derivada de Dios a los*

¹¹⁴ L. Sánchez Agesta, 1964, pp. 87 f.: «*extendía más que subrayaba*».

¹¹⁵ Doctor iuris utriusque; see F. Suárez, 1982, p. 40.

¹¹⁶ «*Se propone igualmente en este artículo que la soberanía reside esencialmente en la nación. Yo reconozco la soberanía de ésta, y sólo me opongo a la palabra "esencialmente"; esto es, a que resida esencialmente en la misma: lo cual parece convenir con el sistema de varios autores que creyendo poder descubrir los sucesos más antiguos con el auxilio de conjeturas y presunciones tal vez demasiado vagas, atribuyen el origen de las sociedades a los diferentes pactos y convenios de los que se juntaban para formarlas. Pero yo, siguiendo un camino más seguro, encuentro el principio de las mismas en las familias de los antiguos patriarcas que usaban de una potestad suprema sobre sus hijos y descendientes, y no la habían adquirido en virtud de dichos pactos*», quoted from: D.D.A.C., vol. 8, p. 57; [engl.: «*At the same time it is proposed in this article, that sovereignty is essentially from the nation. I recognize the sovereignty of her, and I only oppose to the word "essentially"; that means, [I oppose] that she resides essentially in herself: this seems to correspond with the system of several authors, who attributed the origin of societies to the different pacts and agreements under which they subjugated themselves to form her, while believing to be able to discover the oldest processes with the help of the vaguest conjectures and presumptions probably*»].

¹¹⁷ Corresponding to the regularly mentioned definition by Max Weber leadership (here synonymous with sovereignty) is «*the probability that a command with a given specific content will be obeyed by a given group of persons*»; coined from: M. Weber, 1978, p. 53.

¹¹⁸ Quoted from: D.D.A.C., vol. 8, p. 57; [engl.: «*After the invasion of the Saracen, the Asturias monarchy was erected, and sovereignty was divided between king and nation, and both made the laws in agreement with each other*»].

¹¹⁹ Representatives from Castile; see F. Suárez, 1982, p. 32.

¹²⁰ Quoted from: D.D.A.C., vol. 8, p. 58; [engl.: «*going without this at the moment whether the authority of the kings is given them directly by God*»].

reyes mediante el pueblo¹²¹, en quien se dice residir primaria y esencialmente; y paso a manifestar la injusticia del artículo 3»¹²². In these words the academic background is clarified¹²³, because both Vázquez and Suárez concluded that authority could not be attributed to divine instalment¹²⁴. Continuing Aguiriano sets out contractual theories in the tradition of natural law «*que antes de elegirse determinada forma de gobierno reside dicha facultad en la comunidad o congregación de hombres [...]»*¹²⁵. With reference to the origin of the form of government that should be legitimized or rather restored, he establishes «*no se puede negar, por ser muy conforme al derecho natural del hombre, el que haya una potestad pública civil, [...] y también el que ésta tenga acción para depositarla en un sólo hombre, en muchos o en toda la comunidad baxo de estas o las otras condiciones; pactos ó limitaciones»*¹²⁶. Through this passage the parallel to the aristotelic and thomasian works about the natural origin of sovereignty (supreme power) becomes quite clear¹²⁷. For these representatives, the existence of nation's sovereignty as natural power depended on the existence of the community itself¹²⁸. Bearing in mind the contradiction towards the scholastic doctrine of indivisibility¹²⁹ Juan de Lera y Cano states: «*Pero*

¹²¹ Domingo de Soto, early scholar of the so called School of Salamanca declared state and authority (of state) to be natural and reasonable at the same time. He calls the authority (of state) a divine order, however the ruler is inserted by the community, which acts in accordance with a divine instruction; see E. Reibstein, 1955, p. 32.

¹²² Quoted from: *ibid*; [*the sovereign power derives from God to the king by means of the people, in whom [the sovereign power] resides primarily and essentially; and I am going on manifesting the injustice of article 3*].

¹²³ Fernando Vázquez de Menchaca establishes a theory of state that considered state authority (imperium) as phenomenon of rule of men over men. (to it E. Reibstein, 1955, pp. 17 ff., 127).

¹²⁴ E. Reibstein, 1955, p. 135.

¹²⁵ Quoted from: D.D.A.C., Bd. 8, p. 59; [engl.: «*that before elect a determined form of government this ability resides in the community o congregation of man.*].

¹²⁶ Quoted from: *ibid*; [engl.: «*one cannot negate, being in accordance with the natural law of man, the one who may have a civil public authority, [...] and even the one who may have action to deposit it in one man, in several or in the whole community under these or others conditions; contracts or limitations*»].

¹²⁷ Aristoteles: «*Daraus geht nun klar hervor, daß der Staat zu den von Natur aus bestehenden Dingen gehört und daß der Mensch von Natur aus ein staatsbezogenes Lebewesen ist [...]*» (quoted from: Aristoteles, 1989, p. 78); Thomas von Aquin: «*Wenn es also der natürlichen Bestimmung des Menschen entspricht, in Gesellschaft mit vielen zu leben, so muß unter den Menschen etwas sein, wodurch die vielen gelenkt werden. [...] So würde sich ja auch der Leib des Menschen [...] auflösen, wenn es nicht eine gemeinsame Kraft im Körper gäbe [...]*» (quoted from: T. de Aquino, 1975, p. 7)

¹²⁸ The Bishop of Clahorra even referred to Tomás de Aquino: «*dice [...] Santo Tomás [...] que en una comunidad perfecta era necesario un poder á quien perteneciese el Gobierno de ella [sic!] misma, porque el pueblo, segun la sentencia del Sábio [...] quedaria destruido faltando quien gobernase*» (quoted from: D.D.A.C., vol. 8, p. 59); [engl.: «*says [...] Saint Thomas*

*constituída ya la nación y elegida la forma de gobierno, ¿reside todavía la soberanía en ella?»¹³⁰. Furthermore he develops a solution for the aporia: «Digo que reside; Pero de diferente manera»¹³¹. The figure of a divided sovereignty (*soberanía compartida*) makes the monarchical members' notion of sovereignty a relative notion¹³². The nation was recognized as sovereign and as above all political organs, but only as the fundament of this power. In consequence the full sovereignty lay only apparently in the nation¹³³. Astonishing under the initially formulated aim of this work is the bishop of Calahorra's phrase, that resembles the thoughts of Fernando Vázquez, who closes the synopsis of a historical «theory of state» and postulates the confirmation of monarchy as the Spanish nation's form of government as: «cuya diferencia de comunicarse la potestad soberana constituye la variedad de formas de gobierno que ha habido y hay en la superficie de la tierra». [engl.: «whose difference in communicate the sovereign authority constitutes the variety of governmental forms that have existed and exist on the surface of the earth»]¹³⁴.*

2.1. The School of Salamanca's notion of sovereignty

Also in Spain, the term sovereignty won significance through the dualism between king and estates. Under the influence of the natural law systemized by the

[...] that in a perfect community a power is necessary to which government of herself belongs, because the people in accordance to the sentence of the wise [...] would be destroyed when there is no one to govern her»].

¹²⁹ M. Walther, 2001, p. 283.

¹³⁰ Quoted from: D.D.A.C., vol. 8, p. 76; [engl.: «Constituted yet the nation and chosen the form of government, does sovereignty still reside in her?»].

¹³¹ Quoted from: *ibid.*; [engl.: «I say that it resides; but in a different manner»].

¹³² A. Timmermann, 2007, p. 192; Althusius distinguished *majestas realis* und *majestas personalis*. (see H. Denzer, 1985, p. 267).

¹³³ Lera goes on: «Constituída la nación, conserva en sí lo que es inseparable de toda perfecta comunidad civil, que es el poder radical para gobernarse [...] ¿quien tendría el poder para elegir la [...] personas quien hubiesen de [...] ponerle las condicion con que hubiesen de entrar en el goce de ella [la soberanía]? Sola la nación, y esto en virtud de la soberanía que reside en ella radicalmente aun despues de haberse constituido» (quoted from: D.D.A.C., vol. 8, p. 77); [engl.: «Constituted the nation it preserves in itself what is inseparable from all perfect civil community, that is the radical power to govern [...] who would have the ability to elect the persons who would have to give [the nation] the conditions with which it would have entered to latch onto [sovereignty]»].

¹³⁴ Quoted from: *ibid.*; In the same way Aquiriano implemented not only the phrases formulated by Vázquez, according to which the system of government is not only a decision of the people but their diverse manifestations is one of our world's appeals («*vox populi, vox naturae est [...] ad pulchritudinem hujus mundi hihil tam necessarium quam varietas*»; cited in: E. Reibstein, 1955, p. 135.). He articulated the importance of the concept of sovereignty as medium of communication of a state's «constitution».

School of Salamanca a notion of sovereignty evolved that supported the monarchs' legitimation by the nexus of authority and law¹³⁵. In Spain, natural law was passed from the theologians to the jurists, and a divine right of the king could not be justified by reason. At this point, a doctrine developed according to which a ruler's rank is deduced from the people. The idea of medieval popular sovereignty (*populus*), based on a contractual concept, fall back upon the element of vote in an early divine right of king¹³⁶. Spanish late scholastic leverage on the constitutional discourse in Cádiz is clearly illustrated in the thesis of monarchical representatives, who used the concept of the *translatio imperii* concerning origin, limits and holder of sovereignty. Popular sovereignty regularly is seen as an idea of the modern age. Reibstein reconstructs the fundament of late scholastic understanding of sovereignty in part through the explanations of the Jesuit Jakob Laynez¹³⁷. Concerning the scholastic-oriented representatives' derivation concept of sovereignty, the following phrase of Laynez articulated during the Tridentinum is interesting: «that king's power comes from God, but it is wrong, that it is imminently from God, because it comes from God by means of the community»¹³⁸. Fundamental to the ideas of profane natural law were different doctrinal lines of moral-philosophical and canonical tradition, but within this lines, Reibstein is convinced, an agreement existed about the dependence of authority (*imperium, potestas*) on people's will, as the basis of late scholastic concept of a *translatio imperii*¹³⁹. This contract cannot be understood as a legal relation, but as a *mutua obligatio* perfected before God¹⁴⁰. The *gaditano* notion of sovereignty influenced by aristotalian-thomasian natural law, or rather, the Spanish late scholastic, implies the transition of a religious covenant concept to a secular religion-oriented contractual theory in the 16th century. Due to this transition, with its analogy to the biblical covenant concept, the sovereignty of the nation as the unity of the people and the monarch was possible¹⁴¹. The theory of the *translatio imperii* –upheld by the scholars of the *School of Salamanca*– was seen as the foundation of

¹³⁵ O. Brunner, 1967, p. 128; A. Timmermann, 2007, p. 128.

¹³⁶ Ibid., p. 128; A. Timmermann, 2007, p. 130; E. Reibstein, 1955, pp. 92 ff. The contractual idea in medieval context implies hierarchal and unequal distortions. But referring to the profound research into late scholastic sources of Reibstein either the idea of mere subjection is not appropriate.

¹³⁷ See E. Reibstein, 1955, p. 92.

¹³⁸ Quoted from: Ibid., p. 94.

¹³⁹ Reasoned from Vázquez's conclusion of a transmission of supreme authority from the people on the regent (*translatio imperii*), a transmission that leaves these rights at the people, appears justified here; according to: *ibid.*, p. 135.

¹⁴⁰ J. Dennert, 1964, p. 111 especially note 368.

¹⁴¹ About the change of religious covenant concept see G. Oestreich, 1967, p. 128; A. Timmermann, 2007, p. 140; the preamble implies this specific covenant in the meaning of an ability of Cortes to transfer government in accordance to divine will on the king: «*by the grace of God and the constitution of the Spanish monarchy*» (quoted from: Constitution of the Spanish Monarchy, p. 4).

the Spanish monarchy by the monarchical representatives and implied the sovereignty notion's ambiguity defined previously. The original sovereignty or rather the power *in radice* conferred to the nation (articles 1 and 3) and the constituted sovereignty or rather the sovereignty *in actu* (authority) was divided between the Cortes and the monarch (articles 15 and 16)¹⁴².

2.2. *The holder of sovereignty* – soberanía nacional and pueblos soberanos

Interesting links to the ideas communicated in the European context about the nation as holder of sovereignty or rather as constituent power emerge from the analysis of the constitutional documents created during the constitutionalisation process in New Granada. That this nation was already communicated by the constitutional commission's first decree as holder of sovereignty¹⁴³ and that it is evident how this nation was thought as a structure different to king and people¹⁴⁴, as mentioned before. Recapitulating the late scholastic meaning of the Spanish notion *pueblo* (people), denominating the unity of individuals of unequal estates in the different territories of Spanish corporate monarchy, the concepts of the *constitución antigua* diverge, although they had the same ideological basis. This historic constitution was reformed through the formula of compromise in article 3 according not only to the monarchical representatives but also to the creole elite in the Viceroyalty of New Granada or more precisely the province of Cundinamarca¹⁴⁵. Parting from Francisco Suárez's idea of the *cuerpum mysticum*¹⁴⁶ also virulent in Cádiz¹⁴⁷ these elite under-

¹⁴² J. Varela Suanzes-Carpegna, 1983, p. 65.

¹⁴³ «Los diputados que componen este Congreso, y que representan la Nación española. se declaran legítimamente constituidos en Cortes generales y extraordinarias, y que reside en ellas la soberanía nacional» (quoted from: Colección de Decretos y Ordenes que han expedido las Cortes extraordinarias y Generales, Madrid 1820, vol. 1, p. 1); [engl.: «The representatives composing this Congress and who represent the Spanish nation. They declared themselves legitimately constituted in general and extraordinary Cortes and that in them resides the national sovereignty»].

¹⁴⁴ Compare M. Kirsch, 1999, p. 83, note 129.

¹⁴⁵ The author refers to the process until the first Constitution of Cundinamarca promulgated on 4th of april 1811. Vid. Constitución de Cundinamarca. Su Capital de Santafé de Bogotá, en la Imprenta Patriótica de D. Nicolas Calvo y Quixano, año de 1811, p. 3: «Ha dictado, convenido, y sancionado las leyes fundamentales del Estado ó Código Constitucional que se ha publicado por medio de la Imprenta» The transatlantic comparative perspective strengthens the argument regarding the importance of constitutional communication for an evaluation of legal concepts contained in constitutional documents in 19th century.

¹⁴⁶ «Primo solum ut est aggregatum quoddam sine ullo ordine vel unione physica vel morali; [...] Alio modo ergo consideranda est hominum multitudo, quatenus speciali voluntate seu communi consensu in unum corpus politicum congregantur uno societatis vinculo et ut mutuo se iuvent ordine ad unum finem politicum, quomodo efficiunt unum corpus mysticum, quod moraliter dici potest per se unum [...]», (quoted from: F. Suárez, 1973, p. 153); concerning the notion *cuerpo moral*: J. A. Maravall, 1973, pp. 190 ff.

¹⁴⁷ A. Timmermann, 2007, p. 133; J. Varela Suanzes-Carpegna, 1983, e.g. p. 75 ff.

stood the sovereignty as divided between the parts (kingdoms) composing the monarchy or Spanish nation. Thus, a concept of the nation as the subject of sovereignty was articulated implicitly in Cádiz within a special theory of representation. In spite of the same semantics, the analysis of constitutional communication uncovers an unexpected amalgam of doctrinal premises mainly in the tradition of late scholastic and the *Derecho Indiano*¹⁴⁸.

3. The territorial theory of national representation in the Cortes of Cádiz

The analysis of the constitutional documents of the process in the province of Cundinamarca supports a more extensive understanding of the primary notions within the Spanish constitution of 1812 – nation and sovereignty. It is clear that a popular sovereignty in the sense of Rousseau's *volonté générale* and of the personified unlimited sovereignty of the people¹⁴⁹ in accordance to the French national convention 1792-1795 was neither pursued by the Cortes at Cádiz¹⁵⁰ nor initially in Cundinamarca until their constitutionalisation as a republic¹⁵¹. Consequently, it should be noted that the nation was composed (according to some members of the constitutional commission) of several politically active entities besides the monarch. Sovereignty *in habitu* was therefore legitimized as being held by each of these political entities: «[...] no convingo en que los diputados del congreso no representan a los pueblos que los han elegido. El que la congregación de diputados de pueblos que forman una sola nación¹⁵² representen la soberanía nacional, no destruye el

¹⁴⁸ Vgl. J. Varela Suanzes-Carpegna, 1990, p. 217-246.

¹⁴⁹ Although the traditional perceptions of popular sovereignty exist, diverging ones can be found for example in Friedrich Stahl: «[Der] radikale oder revolutionäre Constitutionismus [...] sieht das Wesen der constitutionellen Monarchie in der vollständigen und folgerichtigen Realisierung des Gedankens der Volkssouveränität» basierend auf «den in Spanien und Italien nachgebildeten Verfassungen»; [engl.: [The] radical and revolutionary constitutionalism [...] sees the nature of constitutional monarchy in the complete and logical realization of the idea of popular sovereignty» based on «the constitutions reproduced in Spain and Italy»]; from: F. Stahl, 1849, pp. 78 ff.

¹⁵⁰ About this aspect: U. Müßig, 2014, p. 69.

¹⁵¹ In general about the topic of hispanic-american constitutionalism e.g.: I. Álvarez Cuartero/J. Sánchez Gómez, 2007; A. Annino/M. Ternavasio, 2012; M. Chust/J. M. Serrano, 2007.

¹⁵² The provinces are represented by the *pueblos* of the different cities or rather their sovereignty *in habitu* is represented in their councils: «Mirad como se despreciaban las Ciudades, esos ilustres cuerpos que representaban los pueblos» (engl.: «Look how they despise the cities, this illustrious bodies that represent the peoples»); coated from: J. Gutierrez/C. de Torres, 1810, p. 110; furthermore: «Si las Cortes representan a la Nación, los cabildos representan un pueblo determinado»; as the representative in Cádiz: Castillo, D.S.C., 10 de enero de 1812, p. 2590; [engl.: «If the Cortes represent the nation, the councils represent a determined people»]. Besides the events in New Granada a verification of this *tertium comparationis* supports the personal examination of archive documents, concerning the province Paraguay

carácter de presentación particular de su respectiva provincia»¹⁵³. Such positions conflicted with those of the liberal Spanish representatives, who defended the idea of one homogeneous will embodied in the nation. This concept of a congregate of sovereign communities forming a sovereign nation was used in Cádiz as apologia of a return of the *soberanía de los pueblos* in the case of the dissolution of the contract with the monarch as constituted power¹⁵⁴.

4. Shared sovereignty and *derechos parciales* – sovereignty's (*poder constituyente*) communicated structure as legitimation of a modern form of government

«The research into no other basic notion of constitutional law is more necessary than into sovereignty»¹⁵⁵. The independence of the Spanish territories is normally understood as a rupture of the political dependencies with Spain; revo-

and Jesuit missions in the Viceroyalty of the Río de La Plata: «*En el Congreso gral –de esta Provincia celebrado el 24. Se ha convocado por unánime aclamación de más de doscientos vocales que atendieron á el la Acta del tenor [...] Que inmediatamente y sin disolverse esta Junta se procede al Reconocimiento y Solemne Juxta del Supremo Consejo de Regencia legitimo Representante de Nuestro Soberano el Sor Dn Fernando Sepmo respecto a que según los incontestables documentos que se han leydo [...] no puede dudarse de su legitima instalación y reconocimiento por las Provincias de España, Naciones aliadas [...]*» (partl. engl.: «[...] the legitimate installation and recognition through the Spanish provinces, allied nations [...]»); coated from: Vol. 211, No 13, Año 1810, Acta del reconocimiento de la Regencia de España y algunas resoluciones respecto a la Junta de Buenos Aires, Sección: Historia, Archivo Nacional de Asunción - examined and transcribed by the author himself in 2015. This transatlantic view might be a stunning attempt concerning a European constitutional history, keeping in mind Althusius as recipient of the School of Salamanca. As important early German state theorist he influenced German constitutional history or rather the Peace of Westphalia, developing a kind of *consociatio politica particularis/universitas provinciae* as unity of several elements with representation organs in the tradition of medieval popular sovereignty; compare O. von Gierke, 1968, pp. 24 f.; G. Menk, 1988, p. 261; concerning the attempt of an early modern common European theory of state and constitutional history a rigid separation of «national» traditions is not useful: M. Stolleis, 1977, p. 10.

¹⁵³ Cites the Chilean representative Leyva during the debate on the 26th of September 1811 about article 91 of the Constitution of Cádiz: D.D.A.C, Cádiz, 1811-1813, vol. 8, p. 459; [engl.: «[...] I do not agree, that the representatives of the congress do not represent the pueblos, that elected them. That the congregation of representatives of the pueblos that form one single nation represent the national sovereignty does not destroy the character of particularly representation of their respective province.]]».

¹⁵⁴ Joaquín Varela understands a territorialized sovereignty; compare Sanchez Ágesta, Luis, Sobre los orígenes del constitucionalismo hispánico. Comentario al libro de Joaquín Varela, in: Revista Española de Derecho Constitucional, 11 (1984), p. 247; and: L. Sánchez Ágesta, 1987, pp. 31 ff.

¹⁵⁵ Literal translation; compare G. Jellinek, 1966, p. 435.

lution is associated furthermore with the aspect of an institutional and dogmatic change in Hispanic America. Independence and revolution are two different phenomena, which can surge separately but are mostly connected. The Spanish War of Independence was consequently supported by traditionalists and by those who wanted a radical change of the political system¹⁵⁶. An overlapping of independency aspirations does not necessarily mean conformity concerning the aspired new institutional system¹⁵⁷. In the case of the Spanish territories, this independence process partly sought to preserve the old institutions with minimal alterations¹⁵⁸; others expected an institutional change besides others without clear position¹⁵⁹. The Castile and Indian (*indiano*) «states» were seen as closely unified elements in accordance to scholastic doctrine: *res publica* (*comunidades, pueblos, repúblicas*) and monarch¹⁶⁰. The kingship was seen as office with the duty to maintain justice for the good of the *res publica*¹⁶¹. While during the 17th and 18th century the right to resist tyrannical rulers was invoked¹⁶² a new legal argument accrued in the 19th century. After Carl IV's and Ferdinand VII's abdication and the proclamation of Joseph Bonaparte as Spanish king, the people refused their approval (absence of contract). With the erection of *juntas provinciales* the sovereignty *in habitu* was reclaimed in the name of the people. The interregnum caused the alteration of royal authority and the question was initially disputed, whether Ferdinand VII would be to recognize again as the king¹⁶³. While in Spain an even though theoretical order could solve this question, in Hispanic America the different positions clashed¹⁶⁴.

¹⁵⁶ A. García-Gallo, 1951, pp. 158 ff.

¹⁵⁷ Expressed in different constitutional solutions.

¹⁵⁸ M. André, 1939, *passim*.

¹⁵⁹ Concerning the topic of the creole elite's academic background; compare F. de Tejada, 1955, *passim*.

¹⁶⁰ Depicted abundantly in J. A. Maravall, 1944.

¹⁶¹ Novísima Recopilación de las leyes de España, 1805, Book III, Tit. VI, 1: «*El rey, según la significación del nombre, se dice regiente o regidor, y su propio officio es hacer juicio y justicia, porque de la celestial Magestad recibe el poderio temporal*»; [engl.: «*The King, according to the significance of the name, is called regent or ruler, and his personal office is to judge and make justice, because he receives his temporal power from the divine majesty*»].

¹⁶² Also after 1808 especially concerning Napoleon but also the *Consejo de Regencia*; «*Et eadem ratione, si rex iustam suam potestatem in tyrannidem verteret, illa in manifestam civitatis perniciem abutendo, posset populus naturali potestate as se defendum uti*»; quoted from: F. Suárez, 1965, Book III, Cap. III, 3.

¹⁶³ M. Giménez Fernández, 1947, pp. 57 ff.

¹⁶⁴ By some authors the situation there is called «constitutional laboratory»; compare: A. Anniño/M. Ternavasio, 2012.

4.1. *The territorial divisibility of sovereignty*

Assuming the Spanish monarchy to be a state-like structure (nation), the question concerning the divisibility of national sovereignty in the meaning of a real division of body-sovereignty emerges. Hermann Rehm developed an interesting theorem concerning the German sovereignty-discourse: concerning the divisibility of sovereignty, not the independence could be shared with another legal subject regarding the same territory, but the exclusive possession of sovereignty for one part of the own territory¹⁶⁵. Rehm explains this as «objective divisibility of sovereignty over the whole state-territory, as division of the quality of being supreme»¹⁶⁶. The reclamation of the *derechos parciales* by the *Colegio Constituyente* of Cundinamarca resembles in a different historical context German theory of state in late 19th century, according to which the idea of a sovereignty of Cortes existing exclusively only in a part of the monarchy would not be a contradiction to the notion of sovereignty. Referring to the abstract category of constitutional communication, common European experiences related to the idea of sovereignty are uncovered during the different processes of constitutional development even with a transatlantic link.

5. Liberalism in the Cortes of Cádiz

The liberal representatives' role within the Cádiz process of constitutionalisation is regularly evaluated very extensively in relevant Spanish-speaking literature. The reformative conclusions were more decisive than political and ideological cohesion¹⁶⁷ for the implementation of the national sovereignty. A traditional understanding of natural law and especially the concepts of Spanish late scholastic theory in the 16th and 17th century¹⁶⁸ influenced the thoughts of moderate liberal representatives¹⁶⁹ and the academic curricula¹⁷⁰. This influx can be demonstrated particularly in the debates about origin and limits of sovereignty or rather the concept of nation offered by the representatives Diego Muñoz Torrero

¹⁶⁵ H. Rehm, 1899, pp. 190 ff.

¹⁶⁶ Quoted from: *ibid.*, p. 198; to be thought in the way of a persistence of constitutional identities (state authority) of member states besides the sovereignty of a supreme structure (thinking of European integration process).

¹⁶⁷ Here Varela's evaluation has to be rejected; not only because within the liberal group existed definitely moderate tendencies especially concerning the notion of sovereignty; see A. Fernández García, 2002, p. 48 and A. Timmermann, 2000, p. 574.

¹⁶⁸ Varela, *Política y Constitución en España*, *ibid.* (note 106), p. 61.

¹⁶⁹ Varela, *La teoría del estado*, *ibid.* (note 78), pp. 39 ff.

¹⁷⁰ To be read in: A. Timmermann, 2000, p. 574.

and Antonio Oliveros¹⁷¹. At this point it should be mentioned that such an influence was limited to the named representatives and less their conclusions than their communicated interpretations proof a late scholastic substrate. In contrast to the groups of monarchical representatives these hints are superficial and restricted. While Muñoz Torrero means to demonstrate¹⁷² certain contradictions in the arguments formulated by the bishop of Calahorra he intends to emphasize the sovereignty of the Cortes. This is the reason why he argues: «*pero si la soberanía pertenece exclusivamente al Rey de España, ¿qué derecho tienen las Córtes para poner trabas ó restricciones al ejercicio de la potestad real?*»¹⁷³. Finally, he suggests the possibility of a limitation of royal authority «*reconocer la soberanía de la Nación*»¹⁷⁴, what appears as a «conclusion oriented to a modern natural law»¹⁷⁵. Late scholastic influence is documented, however, in the supralegal limitation of sovereignty. In the debate around the preamble of the constitution, Muñoz Torrero and Oliveros supported the formulated divine, natural and theological limitation of sovereignty¹⁷⁶. In correlation to their religious catholic background, the representatives recognized supralegal limitations «*Dios Todopoderoso, Padre, Hijo y Espíritu Santo, autor y Supremo Legislador de la Sociedad*»¹⁷⁷. Within the liberal group an inconsistent influence of Spanish late scholastic doctrines was confined to Muñoz Torrero and Oliveros. They accepted the monarchical authority through

¹⁷¹ Both these representatives were clerics and pupils of the University of Salamanca, first one furthermore its president; see J. Varela Suanzes-Carpegna, 1983, p. 39.

¹⁷² «*Dije también que el discurso del señor Obispo de Calahorra contiene algunas contradicciones [...]*»; [engl.: «*I also expressed that the bishop of Calahorra's discourse contains some contradictions [...]*»]; (quoted from: D.D.A.C., 29. August 1811, p. 85).

¹⁷³ Quoted from: *ibid.*; p. 86; [engl.: «*but if sovereignty belongs exclusively to the king of Spain, what right do have the Cortes to put limits and restrictions on the exercise of royal authority?*»].

¹⁷⁴ Quoted from: D.D.A.C., 29. August 1811, p. 86; [engl.: «*recognize the sovereignty of nation*»].

¹⁷⁵ The monarchical claim for government is limited by the sovereignty of the community. (see A. Timmermann, 2007, p. 153). A reception of enlightened natural law in the 18th century Spain is unquestionable; Muñoz Torrero as the director of the University of Salamanca was also influenced by Pufendorf and Grotius. (see J. Varela Suanzes-Carpegna, 2007, p. 49).

¹⁷⁶ Muñoz Torrero: «*Así esta parte se ha extendido con arreglo á lo que se ha practicado hasta ahora y á los principios que corresponden a la materia de que tratamos*»; [engl.: «*So this part was extended according to what was practiced until now and to the principals that corresponded to the topic we are dealing with*»]; Oliveros: «*Se invoca á la divinidad como que es quien puede dar una sancion á las leyes que los hombres no pueden dar. Esto basta á mi juicio para satisfacer á las dudas propuestas*»; [engl.: «*It is called upon the divinity as this would be who would sanction the laws that man cannot give*»]; (quoted from: D.D.A.C., pp. 9/11).

¹⁷⁷ Quoted from: D.D.A.C., p. 7; [engl.: «*In the name of Almighty God, Father, Son, and Holy Ghost, the author and supreme legislator of the universe*», quoted from: Constitution of the Spanish Monarchy, p. 4].

a contract of subjection¹⁷⁸. For them, a moderate monarchy resulted, which was valued as revolutionary¹⁷⁹. These pronouncements did not conflict with the legal concept or rather the liberal interpretation of national sovereignty¹⁸⁰, because the suprallegal limitations communicated in the preamble did not impede their refusal of a limitation by positive law¹⁸¹.

VI. THE LIMITATIONS OF SOVEREIGNTY AND THE *PODER CONSTITUYENTE*

The late scholastic theories concerning origin and attribution of sovereignty are moreover the limitations of sovereignty. Of interest at this stage are the resulting positive-legal limitations, which are imposed on the nation's sovereignty¹⁸². The discussion on these limitations was indispensably connected to the problem of the *poder constituyente* and consequently referred to the meaning of the *leyes fundamentales*¹⁸³. The historical continuity¹⁸⁴ postulated by Agustín de Argüelles¹⁸⁵ in the famous *Discurso Preliminar* (Preliminary Discourse) was the interface of the different doctrines, held by the representatives concerning the question on sovereignty¹⁸⁶ and fundamental to understanding at the same time. Assuming a contractual concept of late scholastic thought, the monarchical representatives¹⁸⁷ insisted on the limiting meaning of the *leyes fundamentales*. Thus, the nation disposed of its sovereignty by means of the contract, which should be expressed in

¹⁷⁸ Torrero: «[...] reconocido y proclamado rey de España por toda la nación» (quoted from: D.D.A.C., p. 84); [engl.: [...] recognized and proclaimed king of Spain for all the nation].

¹⁷⁹ A. Timmermann, 2007, p. 156.

¹⁸⁰ See J. Varela Suanzes-Carpegna, 2007, p. 63.

¹⁸¹ As an example Muñoz Torrero: «Como individuo de la comisión pido á V. M. que no permita se ponga en cuestion el decreto de 24 de Septiembre» (quoted from: D.D.A.C., vol. 8, pp. 62 f.); [engl.: «As individual of the commission I bag TM that you would not allow the decree of the 24th of September to be questioned»].

¹⁸² J. Varela Suanzes-Carpegna, 2007, pp. 121.

¹⁸³ Article 3 «[...] y por lo mismo pertenece a esta exclusivamente el derecho de establecer sus leyes fundamentales» (quoted from: D. Willoweit/ U. Seif, 2003, p. 430).

¹⁸⁴ See Argüelles, *Discurso Preliminar* a la Constitución de 1812, *ibid.* (note 98), pp. 1 ff.; «Nada ofrece la Comisión en su proyecto que no se halle consignado del modo más auténtico y solemne en los diferentes cuerpos de la legislación española [...]»; [engl.: «Nothing offers the Commission in its project that would not be consternated in the most authentic and solemn mode in the different collections of Spanish legislature»].

¹⁸⁵ Considering the texts of Argüelles his partly propagandistic attempts have to be kept in mind. His interpretative work, although, is part of the contemporary social context and together with political practice the Cádiz constitution was formed *vid.* U. Müßig, 2014a, p. 107.

¹⁸⁶ J. Varela Suanzes-Carpegna, 1983, p. 121.

¹⁸⁷ *Ibid.* (note 78); p. 74.

the *leyes fundamentales*¹⁸⁸. This group defended the guaranty of the limitation of royal sovereignty¹⁸⁹ by their interpretation of these *leyes fundamentales* as the Spanish monarchy's organizational framework¹⁹⁰. The fundamental laws erected through the natural sovereignty of the nation constituted the monarch's authority as executive (article 16) and as part of legislative (article 15). The monarchical representatives' notion of sovereignty, influenced by late scholastic ideas, moderated the monarch's authority through the participation of the nation represented in the Cortes¹⁹¹. In an analogous manner, the *leyes fundamentales* limited the nation's power or rather the power of the Cortes. Assuming the nation's historical continuity¹⁹², the monarchical representatives denied theoretically the nation's *poder constituyente* during the monarch's absence. Balancing these monarchical positions, Juan de Lera y Cano attributes a derived constituent power (*poder constituyente constituido*) to the Cortes of Cádiz¹⁹³.

VII. CONCLUSIONS

As Horst Dippel established, «the general relevance of the Cádiz constitution [...] [is the result of the fact], that this constitution is the most important attempt in the Europe of the first half of the 19th century to combine the nature of modern constitutionalism with the persisting constitutional order»¹⁹⁴. The constitution's

¹⁸⁸ In this way the Bishop of Calahorra: «*apropiándose a sí mismo de la soberanía que tenía cedida solemnemente con el contrato y pacto más relevante expresado en las leyes fundamentales*» (quoted from D.D.A.C, vol. 8, p. 61); [engl.: «*appropriating to herself the sovereignty that she had assigned solemnly with the contract and pact more relevantly expressed within the fundamental laws*»].

¹⁸⁹ According to Vitoria the transmission of the *auctoritas regis* applied to the people; this one remained *habitu non uso* with the people and applied to the monarch *usu non habitur* (see S. Castellote, 2007, pp. 26 f.).

¹⁹⁰ Lera: «*una monarquía baxo las condiciones que forman las leyes fundamentales*» (quoted from D.D.A.C, vol. 8, p. 76).

¹⁹¹ The limitation of the monarchical system as main topic of debate: H. Monhaupt, 2006, p. 87; Bishop of Calahorra: «*las Cortes, que compuestas de las tres clases representaban a la nación [...]*»; (quoted from D.D.A.C, vol. 8, p. 60); [engl.: «*the Cortes being composed of the three classes represented the nation [...]*»].

¹⁹² For example Llaneras: «*no para dar á la nacion española una nueva constitucion fundamental; sino para mejorar la que hay [...]*»; (quoted from D.D.A.C, vol. 8, p. 21); [engl.: «*not to give the Spanish nation a new fundamental constitution; but to improve the existing one*»].

¹⁹³ «*á entrar en el ejercicio de ella [soberanía], para conservarla á su legítimo Rey y descendientes*» (quoted from D.D.A.C, vol. 8, p. 77); [engl.: «*by entering to the execution of her [the sovereignty] to conserve her for her legitimate king and descendants*»].

¹⁹⁴ Quoted from: A. Sánchez Aranda, 2014, p. 178.

ambiguity especially concerning the fundamental concept of national sovereignty is susceptible to the most different interpretations¹⁹⁵. The analysis of late scholastic influence within the group of monarchical representatives indicates how the constitutional factum of a constituent power was intended to be negated by means of an ideological and historicizing fiction. The concept of the original sovereignty within the Cádiz constitutional process hardly is limited absolutely and is not only an expression of early modern doctrines. In accordance to the late scholastic doctrine, the conviction of sovereignty's natural origin is expressed during the debates of Cortes. Divine together with natural law were the limits of the *pouvoir constituant* formed by the Cortes at Cádiz. The Spanish *School of Salamanca* developed the original assumption of supralegal limitations on sovereignty that moderated the monarchical position¹⁹⁶. From a constitutional law point of view, the notion of sovereignty is a rupture with tradition, because the sovereignty conceded to the monarch was «essentially by the nation». The debates around the notion of sovereignty during the constitutionalisation process of Cádiz exemplify how the traditional or rather late scholastic echo was answered by these monarchical representatives defending monarchy. Furthermore, it was illustrated how interpretations were communicated on the basis of a shared national historicism to reach a consensus on the reform of the Old Regime. The 19th century's constitutionalism was characterized overall by indecisiveness of political protagonists tending between monarchical and popular sovereignty¹⁹⁷. For the successful consolidation of a new *forma de gobierno* a political subject was needed that could act in the name of the totality¹⁹⁸. Although Spanish early liberalism was an aggragation marked by monarchical, national and roman-catholic doctrines¹⁹⁹ in spite of its partly revolutionary demands, it successfully transformed the perception of the nation as moral body in the hand of the monarch: the nation was now seen as invested with the *pouvoir constituant* from which all other constituted powers derived²⁰⁰. Indeed, the commitment to national sovereignty was inspired by the 1791 French constitution²⁰¹, but the derivation of this concept revealed by the analysis of the respective constitutional communication of the Spanish process differed. It becomes apparent that sovereignty is not an absolute but an historic category²⁰². The 19th century's ambiguity and confusion around state-organisational core elements is evident within the aporia of a monarchical sovereignty per-

¹⁹⁵ A. Masferrer, 2011, p. 660.

¹⁹⁶ J. Varela Suanzes-Carpegna, 1983, p. 123.

¹⁹⁷ U. Müßig, 2008, p. 80; U. Müßig, 2014a, p. 123.

¹⁹⁸ J. L. Brey Blanco, 2011, p. 78.

¹⁹⁹ See A. Timmermann, 2000, pp. 573 f.

²⁰⁰ P. J. González-Trevijano Sánchez, 2011, p. 607.

sisting beside the sovereignty of the nation²⁰³. The notion of sovereignty in the debates in Cádiz is a compromise²⁰⁴ between late scholastic divine rights and secular popular sovereignty born out of the war against French rule as state of exception²⁰⁵: «*Huérfana España, [...] debía [...] el derecho que le asistía de constituirse*»²⁰⁶.

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²⁰¹ So L. Sánchez Agesta, 1964, p. 59; A. Timmermann, 2000, p. 572; A. Masferrer, 2011, p. 646.

²⁰² G. Jellinek, 1959, p. 487.

²⁰³ Ibid. (note 22), p. 473.

²⁰⁴ U. Müßig, 2014, p. 68.

²⁰⁵ Quoted from: H. Hofmann, 2006, p. 269.

²⁰⁶ Conde de Toreno: (*engl.: Orphan Spain, [...] owed [...] the right to be assisted in constitute itself*»), (quoted from: L. Sánchez Agesta, 1964, p. 56).

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