Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:25 Page Number: 161

8

Constitutionalism

ANTONIO TRAMPUS

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Was Emer de Vattel a constitutionalist? To what extent can the *Law of Nations* be considered a treatise on constitutional theory? To answer these questions, I will refer to several different case studies to illustrate and analyse the use of Vattel for the constitutional debate between the eighteenth and nineteenth century. In fact, as José M. Portillo Valdés wrote, sixty years before the Spanish constitution of June 1808, Vattel was the first who explained that only independent and sovereign entities could be labelled nations and his expression 'free and independent' would be used by many of the emerging republics in America and Europe.[1]

In the first half of the eighteenth century, the 1713 Peace of Utrecht and the 1718 Peace of Passarowitz had profoundly changed the international landscape, both through religious pacification, the weakening of the dynastic element and through the recognition that competition between states was by then more and more frequently of a commercial nature, rather than purely military. In consequence of this, the ancient moral code of conduct between states was gradually replaced by a system of legal norms based on the political will of the princes and nations. It was therefore necessary to look for the theoretical bases of this new system, and the philosophical texts of the past no longer provided satisfactory answers, nor did they use a language suited to the new times.

Vattel was aware of these changes and above all of the fact that in order to understand the new international order it was necessary to start from the point

[1] J. M. Portillo Valdés, *Early Constitutionalism in the Spanish World*, in S. Hensel, U. Bock, K. Dircksen and H.-U. Thamer (eds.), *Constitutional Cultures. On the Concept and Representation of Constitutions in the Atlantic World* (Newcastle, 2012), 48–49; A. Trampus, *Emer de Vattel and the Politics of Good Government. Constitutionalism, Small States and the International System* (Cham, 2020).

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:25 Page Number: 162

of departure, from the nature and function of the state and from the use of natural law to explain the mechanisms through which political relationships between single individuals and between the various communities of people are formed. As Martti Koskienniemi explained, during the eighteenth century we can find two types of narrative of constitutionalism. The first one, 'began to describe European politics in terms of a historical perspective on a "system" in which apparent diversity is reduced to the diplomatic practices that articulated Vattel's contemporaries' sense that, despite all the conflict, there was a historical and cultural unity that still bound European nations into a single commonwealth'.[2] The second one concerns a parallel and differently oriented stream of 'constitutionalism' from the catholic realm, in connection with the rationalism of St Thomas and the debates on divine-natural law. Christian Wolff's idea of *Civitas Maxima* represents a synthesis of this approach. But, as Koskenniemi observed, 'every commentary on Vattel begins by stressing his debt to the German rationalist philosopher Christian Wolff – and in the same breath highlighting his dissociation from Wolff's idea of the *Civitas Maxima*, "a supreme State" into which individual States have been combined "because they wish to promote the common good"'.[3]

Vattel dedicated the whole first part of his *Law of Nations* to the discussion of this problem, giving a long and detailed explanation of what exactly was meant by states, nations and constitutions, and also what was meant by sovereignty. The first book, in short, appeared more as a treatise on constitutional philosophy, which explained what the minimum criteria should be for achieving formal equality between states and which, in this sense, laid the foundations for modern constitutionalism.[4] At the same time, the pages which the *Law of Nations* dedicated to the internal constitution of states, to the subject of political consensus and the legitimacy of sovereignty indicated that to reach formal equality between the states it was necessary to study the mechanisms through which the political will of a nation was expressed, to study too the problem of the legitimation of sovereignty and, finally, to investigate the origins and the function of constituent power in line with a concept central in modern constitutionalism that Vattel, in 1758, was one of the first to define in this way.

[2] M. Koskenniemi, '"International Community" from Dante to Vattel', in V. Chetail and P. Haggenmacher (eds.), *Vattel's International Law in a XXIst Century Perspective / Le droit International de Vattel vu du XXIe siècle* (The Hague, 2011), 51–75.

[3] Ibid., 51.

[4] In this sense one can speak of Emer de Vattel's 'constitutionalism', and I am in agreement with the considerations expressed by Koskenniemi, '"International Community" from Dante to Vattel', 70–71.

PROOF

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:25 Page Number: 163

THE GOOD GOVERNMENT AS CONSTITUTIONAL ENACTMENT

If one central political question was whether the rule of men or the rule of law was to be preferred, it had to be distinguished from the question of which was the best form of government. The concept of 'good government', which became central to Vattel's reflection on constitutionalism, was therefore known in the history of Western political culture from the classical to the modern age, but before the *Law of Nations* the term was used to describe a political practice, to denote a way of exercising sovereignty, and was not yet in itself a conceptual category. This concept, to which Vattel devoted many pages of the *Law of Nations*, is central to understanding the similarities and differences between the classical tradition, natural law and the birth of political modernity expressed in both the democratic and liberal experience of the nineteenth century. The concept of good government posited the primacy of the rule of law as the precondition for the 'good ruler', who governed by respecting laws that he could not freely control, either because they transcended him (such as those handed down by God), or because they were part of the natural order of things, or again because they were established collectively through the constitution of the state.[5] It is striking from this perspective to see that Vattel referred to Christian Wolff and the German cameralism and their State theory. From these sources Vattel drew a normative conception of the constitutional state and of good government. Good government, in this interpretation, consists of the principles and rules by which the internal security of the state is established and maintained. These are based primarily on the obedience of the people to government: compliance that can be spontaneous or result from the impossibility of resistance. Good government consisted of the principles by which the internal security and preservation of the state was established and maintained. According to Joseph von Sonnenfels (1732–1817), one of the most important interpreters in the eighteenth century of the idea of good government in State administration, it consisted principally in the observation of the law and of carrying out all the activities of state within the limits of the law.[6]

[5] P. Costa, 'The Rule of Law: A Historical Introduction', in P. Costa and D. Zoro (eds.), *The Rule of Law: History, Theory and Criticism* (Dordrecht, 2007), 73–150.

[6] K. Tribe, *Governing Economy: The Reformation of German Economic Discourse 1750–1840* (Cambridge, 1988), 55–90; E. Nokkala and N. B. Miller (eds.), *Cameralism and the Enlightenment. Happiness, Governance and Reform in Transnational Perspective* (London, 2019), chapter 12.

PROOF

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:25 Page Number: 164

The latter concept, to which Vattel devoted many pages of the *Law of Nations*, is central to grasping the commonalities and divergences between the classical tradition, natural-law thinking and the transition to political modernity. Specifically, the concept of good government offered the possibility to contemplate the forming and reforming of new laws without the necessity to change the form of government.

Vattel's definition of constitution is found in Book I, *Of Nations considered in themselves*:

> The fundamental regulation that determines the manner in which the public authority is to be executed, is what forms the *constitution of the state*. In this is seen the form in which the nation acts in quality of a body-politic, – how and by whom the people are to be governed, – and what are the rights and duties of the governors. (*LN*, I-III-4)

According to Vattel, 'good government' is a corollary of this constitution and of 'the perfection of a state'.[7] Subsequently, 'its aptitude to attain the ends of society, must then depend on its constitution'. Chapter VI was dedicated to the *Principal Objects of a good Government; and first to provide for the Necessities of the Nation* and showed what was meant by a state being perfected constitutionally, and in its policies and laws. Here, Vattel stated that the 'first object of a good Government is to provide the necessities of the Nation'. It was the task of 'good government' to produce a 'happy plenty of all the necessaries of life' by managing the labour market, preventing emigration, fostering a healthy climate for industriousness in the fields of agriculture and domestic and foreign trade and in monetary policy (*LN*, I-IV-7).

The *Second Object of a good Government*, following Vattel, was *to procure the true Happiness of the Nation*, in other words was connected with how 'good government' went beyond the provision of physical needs. Vattel argued that the state had to 'instruct the people to seek felicity . . . in their own perfection'. Therefore the state had a duty 'to teach them the means of obtaining it', in much the same way as 'the education of youth'

[7] At this point I take up the formulations that I have exposed in Trampus, *Emer de Vattel and the Politics of Good Government*, chapter 3.

PROOF

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:25 Page Number: 165

deserved 'the attention of the government' given that 'literature and the polite arts' served to 'enlighten the mind, and soften the manners'. Moreover, it was 'necessary to inspire the people with the love of virtue, and the abhorrence of vice'. These feelings were the foundation of a perfect patriotism that kept the citizens of the nation united by being seen to be mutually advantageous to them all and thereby to the state: 'The grand secret of giving to the virtues of individuals a turn so advantageous to the state, is to inspire the citizens with an ardent love for their country' (*LN*, I-XI-110).

Then, in chapter XIV, Vattel rehearsed the same scheme, as he did several times in the *Law of Nations*, but replaced the discussion of good government in the internal constitution of the state with the concept of good government in the interstate system:

> The third Object of a good Government [is] to fortify itself against external attacks. One of the ends of political society is to defend itself with its combined strength against all external insult or violence. . . . To increase the number of the citizens as far as it is possible or convenient . . . The wealth of a nation constitutes a considerable part of its power, especially in modern times. (*LN*, I-XIV-177)

It was in this way that good government provided not only a solvent for the historical–political contradictions that eighteenth-century Italian political reformist thought ran into, but also provided a guideline for the reconsideration of the position of Italian small states in the competitive international arena of the time.

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This process was accomplished, Vattel claimed, when, in order to become relevant on the international stage, a state or nation had to become a *constitutional state*, with all that that entailed. A constitution exists when there are laws made specifically with the public good in mind, such as those that relate to the body itself and the essence of society or the fundamental laws relating to the form of government and the organisation of powers: 'those, in a word, which together form the constitution of the state, are the *fundamental laws*' (*LN*, I-III-29).

CONSTITUTING AND CONSTITUTED POWER

The cornerstone of Vattel's political thought is the idea of legal autonomy, which connected his notions of individual self-preservation and perfection to

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 166

the concept of the state. On this basis, each society of men that has united itself politically is, according to natural law, free and sovereign, irrespective of what degree of power or political and economic autonomy it possessed. Even when placed under the protection of another state, or in a situation of military inequality, a state remained free and sovereign. Vattel famously reasoned that states, as societies of men, stood in the same relation to one another with regards to their rights and obligations as individuals within any state[8].

Vattel also postulated – and was perhaps the first in Europe to do so – the distinction between *constituting power as political will* and *constituted power*. In fact:

> The consequences of a good or bad constitution being of such importance, and the nation being strictly obliged to procure, as far as possible, the best and most convenient one, it has a right to every thing necessary to enable it to fulfil this obligation. It is then manifest that a nation has an indisputable right to form, maintain, and perfect its constitution, – to regulate at pleasure every thing relating to the government, – and that no person can have a just right to hinder it. Government is established only for the sake of the nation, with a view to its safety and happiness. (*LN*, I-III-31)

The concept of a constituted power derives from the new government: 'they may quit a society which seems to have dissolved itself in order to unite again under another form: they have a right to retire elsewhere, to sell their lands, and take with them all their effects' (*LN*, I-III-33).

As a consequence, 'it essentially belongs to the society to make laws both in relation to the manner in which it desires to be governed, and to the conduct of the citizens: – this is called the *legislative power*'. Therefore 'a nation has an indisputable right to form, maintain, and perfect its constitution', while, as regards legislative powers, 'the nation may intrust the exercise of it to the prince, or to an assembly; or to that assembly and the prince jointly' (*LN*, I-III-34).

This type of constitutional state was therefore the real subject destined to act in international politics to safeguard the natural rights of society and of individuals from within the system that presupposed the attainment of formal equality of all states, large and small. Moderation in the conduct of war (*ius in bello*) ensues from this, as does the notable importance attributed to the purpose of neutrality. The state must first promote the common good of its citizens, basing its authority on the consent of the governed and recognising the right of people to choose their own laws without outside interference. Needless to say, these were arguments that could be adapted to serve the

[8] F. G. Whelan, 'Vattel's doctrine of the State', *History of Political Thought* 9.1 (1988), 59–90.

PROOF

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 167

reform policies of eighteenth-century Europe, in particular those aimed at advancing general wellbeing and public happiness.[9] The common good of a nation, according to Vattel, was directly linked to the role of trade and political economy, which were not meant to support politics of power but to look after the primary needs of the population, and agriculture rather than manufacturing. He believed that domestic monopolies damaged the rights of citizens but accepted the use of monopolies at the international level – as a means of protecting a nation's trade – as long as they were restricted to the need of sustaining the life of a population.[10]

As we might note, this insistence on the relationship between state and nation and on the internal constitution of the states corresponded to the idea that the main aim of the *Law of Nations* was to provide a logic for the rationalisation of interstate conflict.[11] While this historiographical judgement of Vattel's *Law of Nations* is typical of the work's reception ever since its publication, it fails to do justice to Vattel's views on the resolution of interstate conflict. The solution to these conflicts, in fact, could only come after all the problems arising from the internal political organisation of the states had been resolved and clarified. In fact, Vattel directly engaged with the key political challenges of his time by very narrowly circumscribing war as a situation in which a state rightly pursued its laws by strength,[12] and he tried to align this notion of war as a sanction with a framework for the reform of European politics.[13] The reader's attention is directed on the parts of the work that deal with the constitutional dimension of the state and more specifically with the law of nations and of international society. This argumentative methodology demonstrate a clear interest in the theory of sovereignty outlined by means of the general layout of the work, as well as in the formation process of sovereign

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[9] J. C. Laursen, H. Blom and L. Simonutti (eds.), *Monarchism in the Age of Enlightenment. Liberty, Patriotism and Common Good* (Toronto, 2007), chapter 11.

[10] I. Nakhimovski, 'Vattel's theory of the international order: Commerce and the balance of power in the *Law of Nations*', *History of European Ideas* 33 (2007), 157–173, 168–170.

[11] I. Nakhimovsky, 'Carl Schmitt's Vattel and the *Law of Nations* between Enlightenment and revolution', *Grotiana* 31 (2010), 141–164.

[12] For instance, *LN*, II-III-7. See S. Zurbuchen, 'Vattel's law of nations and just war theory', *History of European Ideas* 35 (2009), 408–417.

[13] See Nakhimovsky, 'Vattel's theory of the international order', 157–173; K. Stapelbroek, 'Universal society, commerce and the rights of neutral trade: Martin Hübner, Emer de Vattel and Ferdinando Galiani', *COLLeGIUM: Studies Across Disciplines in the Humanities and Social Sciences* 3 (2008), 63–89. More reflections on Vattel's conceptions of war in I. Hunter 'Vattel's Law of Nations: Diplomatic casuistry for the protestant nation', *Grotiana* 31 (2010), 108–140 or P. Kalmanovitz, 'Sovereignty, pluralism, and regular war: Wolff and Vattel's Enlightenment critique of just war', *Political Theory* 46 (2018), 218–241.

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 168

authority with regard to the exercise of power by the prince and the rights of majesty (*LN*, I-I-45).

If we enter further into the text of the *Law of Nations* to analyse other traces of this reading, we may observe how the underscoring is particularly dense in the sections to do with the characteristics, rights and obligations of the nation, and also in the one which affirms the principle that all nations are free and independent in nature, just as men are (*LN*, prelim.). Vattel commented on the fact that there was a customary right of nations that competed with positive law (*LN*, I-I-27), that the nation was born out of a natural compulsion and could exist and survive independently of the state and its transformations (*LN*, I-II-14). Consequently, only the nation itself had the right to change its constitution and choose its form of government (*LN*, I-II-31), and a sovereign had a duty to understand the nation or nations within his state (*LN*, I-IV-44). The first book is also the book in which Vattel explained that, while the nation is *ipso jure* the founder of the constitution, exercising a right which is inherent and cannot be delegated, the legislative authority – as a constituted power – could only be entrusted to the prince, or to an assembly or to this assembly and prince together.

CONSTITUTIONAL EXPERIMENTS

Compared to the theoretical aspects of Vattel's *Law of Nations*, the constitutional debates and experiments in which Vattel's work was used are much less known. The Mediterranean area, and Sicily in particular, is one of the earliest occasions in which the *Law of Nations* was used in a debate on questions concerning the political and constitutional organisation of a state. After the death of Charles III of Bourbon, when Sicily faced the danger of reunification to the Spanish crown and thus needed to establish the legitimacy of its independence and sovereignty, Vincenzo Gaglio (1735–1777), a young jurist from Girgenti (now Agrigento), got to work using Vattel in support of his arguments.

The publication in 1759 of his *Saggio sopra il diritto della natura e delle genti e della politica* (*Essay on the Law of Nature and Nations and Politics*) was not therefore the result of an unconsidered decision by its author. Rather, Gaglio's aim was not only to intervene in the debate on the foundations of natural law and the relationship between law and morality, but also to reflect on the problem of sovereignty, on the relationship between the prince and the autonomy of the island and on the relationship between the law of nature and the royal right to administer the internal civil and political life of Sicily. As stated in his own account, his twin goal was to educate young people in the

PROOF

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 169

study of public law – a science still neglected in Italy – and to ensure the good government of cities, republics and societies. The final part of the work tackled the question of which was the best form of government.[14] While recognising that the most natural way to organise power was that of the monarchy, Gaglio claimed that natural law fulfilled the function of inspiring and guiding the authority of the prince and of subjecting this to limits and conditions by listing his duties towards his subjects. This preference for monarchy was justified by the fact that a democratic government could, in the normal way of things, raise to the highest offices citizens who enjoyed the highest level of support but who often turned out to be the least capable of governing. The intrinsic weakness of mixed governments, on the other hand, was the influence of external powers that laid bare their lack of stability.[15]

During the late eighteenth century, Vattel's *Law of Nations* came to be used and adapted also in the Grand Duchy of Tuscany. The book was pressed into the service of the process of constitutionalisation and state transformation carried out in the wake of the American Revolution, events that have up to now been little explored because of the scant attention paid to Vattel's work by the historiography.

Peter Leopold's constitutional project for Tuscany of 1779 clearly demonstrated that in order to tackle the crisis of the *ancien régime* it was no longer enough to institute partial reforms, but rather it was vital to take direct action on the state's constitutional composition. His plan indicated that all of this could be achieved through renewed collaboration between the ancient local communities and the intermediary powers. The objective was to bring in a model of a constitution of classes ('costituzione per ceti') established through clear agreement, to replace the dialectic between centralisation and decentralisation that characterised other European arrangements.[16] The project was thus based on the recognition of the role of institutions and local communities, on the duty of the peripheral government towards local agencies and on the network of judicial administrations which would enable all parts of society to participate in the programme of reforms.[17]

The project hinged on the adherence to a physiocratic form of economic policy that enabled the role and function of the communities to be enhanced while leaving the organisation of the territory almost intact, limiting itself in

[14] V. Gaglio, *Saggio sopra il diritto della natura e delle genti* (Palermo, 1759), 99–115.

[15] Ibid., 103–198, with reference to Bodin.

[16] B. Sordi, *L'amministrazione illuminata. Riforma delle comunità e progetti di costituzione nella Toscana leopoldina* (Milan, 1991); L. Mannori and B. Sordi, *Storia del diritto amministrativo* (Rome, 2003), 194–195.

[17] Sordi, *L'amministrazione illuminata*, 14–15.

PROOF

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 170

fact to rationalising and optimising the existing structures. The decisive phase came in March 1779 when Peter Leopold began to reflect on the possibility of drafting a true and proper constitution for Tuscany. The moment was particularly delicate because it coincided with the aftermath of the American Revolution and the stiffening of the policies of his brother Joseph II of Habsburg, who was becoming increasingly despotic.[18] According to the interpreters, Peter Leopold's work proceeded more or less autonomously, at least initially, partly because his family experience had taught him that in Tuscany reformist propositions tended to succumb to conservative pressure.[19] Indeed, it was in the years 1778–1780 that he reordered all the early thoughts and ideas that had accumulated in his mind.

In the spring of 1779 Peter Leopold thus came to set out his first ideas on the project for the creation of the states.[20] This was a series of notes that he had developed step by step as the debate on the reform of the territorial administration progressed, and it was this that he used, soon afterwards, for the first draft for a planned constitution.[21] The text demonstrates his commitment to the rereading of the great tradition of European natural law which from Hobbes, Pufendorf, Locke and Wolff had reached Montesquieu, Rousseau and the Physiocrats, amongst whom was Turgot.[22] The echo of the teachings of Locke and natural law was clear, linked to an ever-growing concern to take into account all the needs of Tuscan society. Nevertheless, apart from these suggestions, it has been difficult for scholars to identify the sources that Peter Leopold drew on, apart from the Pennsylvania Constitution to which he referred explicitly.[23] Peter Leopold's project has echoes of the *Law of Nations*, especially where his concept of fundamental law seemed to evoke older pacts that were typical of the Germanic world, but no in-depth study has been made of this hypothesis. However, a more direct comparison with the *Law of Nations* makes it possible to discern Vattel's influence with some degree of precision. In particular, reference was made to Vattel's first book,

[18] A. Wandruska, *Leopold II* (Vienna, 1963). See also Peter Leopold, *Relazioni sul governo della Toscana*, vol. 1–3, ed. A. Silvestrini (Florence, 1969–1974).

[19] F. Diaz, *Francesco Maria Gianni. Dalla burocrazia alla politica sotto Pietro Leopoldo di Toscana* (Milan, 1966), 282.

[20] Florence, State Archive, Segreteria di Gabinetto, filza 167, ins. 21 'Idee sopra il progetto'.

[21] Florence, State Archive, Segreteria di Gabinetto. Appendice, filza 10, ins. 1.

[22] J. Zimmermann, *Das Verfassungsproject des Grossherzogs Peter Leopold von Toskana* (Heidelberg, 1901), 83; A. Wandruszka, 'Joseph II und das Verfassungsproject Leopolds II', *Historische Zeitschrift* 190 (1960); A. Wandruszka, *Pietro Leopoldo* (Florence, 1968), 387, 393.

[23] These documents are in Vienna, Haus- Hof- und Staatsarchiv, Familienarchiv, Sammelbände, Kart. 13, 'Fogli da aggiungersi alli Stati generali', ins. 10-11, 12, 'Constitution de la république de Pennsylvanie'.

PROOF

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 171

in which one finds the first theorisations of the difference between constitution and fundamental law, and between constituent power and legislative power (*LN*, XXXI, XXIV). This is also the book in which it is explained that while 'the nation is *ipso jure* the founder of the constitution', exercising a right which is inherent and cannot be delegated, the legislative authority – as a constituted power – could only be entrusted 'to the prince, or to an assembly or to this assembly and prince together'.

The first lines of Peter Leopold's project openly declared that for him the state was a 'society of men grouped together under a government'[24] and in this sense there was clear agreement with Vattel, according to whom 'nations or states are the political corps, societies of men united together to gain their health and advantage' (*LN*, prelim.). In these lines there was a recognisable consonance with the *incipit* of the Pennsylvania Constitution and with the Declaration of Independence of the American colonies. Yet they also harkened back, in this case, to the words of Vattel (who had been an inspiration to the American revolutionaries) where he affirmed that: 'the Nations are free and independent of one another, because men are naturally free and independent; the second general law of their society is that each nation should be left to the peaceable enjoyment of this freedom, which is in its nature' (*LN*, I-ii-15). However, it was Peter Leopold's shift from the image of the 'states' towards the formulation of a 'management contract' which presupposed the idea of a constitution no longer only deducible from a pre-established order but conceived, following Vattel's example, as an expression of the freedom of a nation that was able to establish the rules of its own political existence.[25] Then, according to Peter Leopold:

> by fundamental law of the state one means the contract with which authority has been accorded to the social states, and which limits and prescribes the duties and obligations, the faculty and authority of subjects or of the members that make up society, towards their first magistrate or towards the one who is charged with executive power, be it a sovereign or a magistrate, and their duties and obligations towards the subjects.[26]

In this case, too, the agreement with the *Law of Nations* is notable, since Vattel had explained that:

[24] Florence, State Archive, Segreteria di Gabinetto, filza 167, ins. 21 'Idee sopra il progetto'.

[25] Sordi, *L'amministrazione illuminata*, 326–327; see also M. Valensise, 'La constitution française', in K. M. Baker (ed.), *The French Revolution and the Creation of Modern Political Culture*, vol. 1, *The Political Culture of the Old Regime* (Oxford, 1987), 445–446.

[26] 'Idee sopra il progetto', c. 11r.

PROOF

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 172

> the fundamental rule which determines the way in which the public authority must be exercised is that which forms the constitution of the state. In it one sees the forms on which the nation acts in its qualities as a political body; how and by whom the people must be governed, what are the rights and the duties of those who govern. (*LN*, I-III-27)

Thus the solution seemed to him to be that of establishing 'a corps of public representation' that brought together the 'general deputies' who had been elected by all the provincial delegates to 'run the affairs of the whole country'.[27] Even here there is an idea of representation not dissimilar to that of Vattel (*LN*, I-III-34).

FROM THE AMERICAN CONSTITUTION TO THE FRENCH REVOLUTION AND CADIZ

For more than a hundred years Vattel's *Law of Nations* has attracted the attention of American historians, jurists and political philosophers. The uninterrupted discussion on Vattel's reception and success in American Revolution have been accompanied by discussions about the relevance of its author's ideas in the controversies within the framework of the British constitution. In recent years, renewed scholarship situates the Declaration of Independence in the context of Vattel's emerging structure of the international society as a society of independent states. Most of the documents written in preparation for the 1787 constitution contain suggestions or indirect references to the *Law of Nations*. Vattel's work was read as a guide for the creation of a new republic as glorious evidence of divine tolerance after wartime and as a point of constitutional and civil order for the reassertion of peace and progress.[28] As Max N. Edling wrote, 'if the peace pact was one purpose of the federal treaty, the other was to allow thirteen sovereign republics to act in unison as one nation against external powers'.[29] The law of nations established that all nations were equal. According to Vattel, 'A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom' (*LN*, I-XVIII-VII). The equality of states extended beyond their size to apply also to their form. 'Whether they were democratic

[27] Ibid., c. 19r.

[28] J. M. Opal, *Avenging the People. Andrew Jackson, the Rule of Law and the American Nation* (Cambridge, MA, 2017). See also G. S. Wood, *Creation American Republic 1776–1787* (London, 1998), 273–276. Perhaps refer also to Chapter 10 by Mark Somos.

[29] M. N. Edling, 'Peace pact and nation: An international interpretation of the constitution of the United States', *Past & Present* 240.1 (2018), 267–303, at 291.

PROOF

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 173

or monarchical, unitary states or federal republics, they were all *nations* in relation to each other'.[30]

Vattel's work was often referred in the American constitutional debate. Such as during the First and the Second Continental Congresses in 1774–1775 and 1781, the Committee of Foreign Affairs between 1777 and 1781 and the Confederation's Congress between 1781 and 1789. The most recent studies on the reception of Vattel's *Law of Nations* in the United States are based on intertextuality and 'silent intertextuality' through the analysis colonial source and different political documents. They focus their attention on the crucial period between 1762 and 1776 in order to demonstrate that Vattel's treatise was available to the American colonies and in the constitutional debate already in 1762.[31]

During his long journey through time, Vattel's treatise has been subjected to many processes that reflect the transformation of constitutional contexts and changes in international geopolitics. In the years between the French Revolution and the birth of the Napoleonic Empire, the European states took part in an intense constitutional debate linked to the possibility of adopting written constitutions based on the model of the French ones, giving thought both to that of the constitutional monarchy of 1791 and the republican constitutions of 1793 and 1795. At the same time, the problem for many states was that of distinguishing themselves from France in order to preserve and promote their legal and philosophical tradition. Thus, Vattel was once again at the centre of attention because the *Droit des gens* had been one of the sources and reference points for authors of the European Enlightenment (Beccaria, Blackstone) and therefore served as a cultural bridge via which they could acquire the basic principles for their new constitutional texts.[32]

To Italian eyes the *Law of Nations* offered a *trait d'union* between the Western natural law tradition and the republican conception of the constitutional state. It did so particularly in book one of the *Law of Nations*, where Vattel outlined the theory of the state and of constitutional sovereignty that

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[30] M. M. Edling, 'Peace pact and nation: An international interpretation of the constitution of the United States', *Past & Present* 240.1 (2018), 267–303. See also E. D. Dickinson, 'The Law of Nations as part of national law of the United States', *University of Pennsylvania Law Review* 101 (1952), 26–56.

[31] A. J. Bellia Jr. and B. R. Clark, 'The Law of Nations as constitutional law', *Virginia Law Review* 98.4 (2012), 729–838; W. Ossipow and D. Gerber, 'The reception of Vattel's Law of Nations in the American colonies: From James Oatis and John Adams to the declaration of independence', *American Journal of Legal History* 57 (2017), 1–35.

[32] For the systematic use of Vattel by Beccaria see *Des délits et des peins*, ed. P. Audegean (Lyon, 2009), 312–313, 317, 323, 330, 333, 352, 356, 361, 368, 377, 384, 388, 393.

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 174

had in those years been taken up in France by Sieyès. Even though it had not come into force, Sieyès's constitutional project was widely admired for the distinction it made between the various functions of the constituent power, which was responsible for determining the fundamental laws and functions of the constituted or legislative power that had to form the non-fundamental laws.[33] It is difficult to reconstruct with any precision all the genealogies through which the discourse on the natural rights of man moved, by way of the culture of natural law, to the written constitutions of the late eighteenth century.

Nonetheless, there is no doubt that the texts of the mid-century authors, including Vattel, played an important role within this heritage of the natural law culture. Not by chance, as it has been pointed out by other authors, it was Burlamaqui who coined the expression 'Droits de l'homme'" (1747) and hence the English 'rights of man', which came from the London translation of 1748.[34] Vattel – like most of his contemporaries – did not yet use the expression, but the *Law of Nations* contained a catalogue of those rights and the rights of the citizen, which reinterpreted the natural law tradition and which his contemporaries had no difficulty in interpreting in combination, together with the work of Burlamaqui and other authors.

The debate that took place in the Italian republics after Napoleon's army had entered Milan (1796) revolved around two crucial elements: the first was that of how to formulate the *Declarations of rights* (*Dichiarazioni dei diritti*) so as to avoid them being a simple copy of the French declaration of 1789. This concern explains why the declarations became statements about the *rights and duties* of man and citizen, thus exhibiting the influence of natural law. The other crucial element related to the list of rights and the choice of which of these to include in or to omit from the declarations and the constitutions. And it is in this debate that the contribution and practical use of the *Law of Nations* can be most accurately identified.

This reasoning applies in particular to the inclusion in the constitutions of the right of resistance and the right to asylum. The key text in the Mediterranean sphere was the *Progetto di costituzione per la repubblica napoletana presentato al governo provvisorio nel 1799*, which was important because it was made up of three parts: the report from the committee charged with drafting it, the declaration of rights and duties and the constitution.[35] The text was written in large part by Francesco Mario Pagano, one of the most

[33] O. Beaud, *La Puissance de l'État* (Paris, 1994), 206.

[34] L. Hunt, *Inventing Human Rights. A History* (New York, 2007), 231. Perhaps refer also to Chapter 11, by Nathaniel Boyd.

[35] F. Morelli and A. Trampus (eds.), *Progetto di costituzione della Repubblica napoletana presentato al governo provvisorio dal comitato di legislazione*, introduction by A. M. Rao (Venice, 2008), 66.

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Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 175

important men of Enlightenment in the Italian peninsula. Unfortunately the Neapolitan constitution never came into force because the republic was defeated by the Bourbons and their English allies and its protagonists were all hanged, but it is nevertheless possible to identify within it the legacy of the culture of the Italian Enlightenment and the influence of the natural law tradition handed down by Vattel.

The first point to which we must pay attention concerns the formulation of the right of resistance. The Neapolitan declaration of human rights is the only Italian text to define this as a right of man, since in general the other Italian declarations, modelled on the French constitution of the year III, only contained a definition of the arbitrary acts committed in violation of the rights of man, namely those carried out by the political authority outside of the examples and conventions established by the law. It is true that the Declaration of Independence of the United States of America had previously stated that one of the natural and imprescriptible human rights was the freedom to resist oppression, but the Neapolitan text went into greater detail, seeking to distinguish between man in the state of nature and man in the social state. Therefore, the natural right of resistance as a human right had to remain inactive as long as the man and the citizen acted independently, since otherwise the result would have been to encourage anarchy. The right of resistance was activated instead in the political sphere, when what was a natural law became a civil right and was exercised collectively by the entire population against any tyrannical authority that abused its constitutional powers.[36] Accordingly, in the Neapolitan declaration we find a typical formulation of the right of resistance that derives not so much from the revolutionary culture as from the natural law tradition, in the sense that it is not an expression and the consequence of the popular will, but, as it was for Vattel, the reflection of a natural right resulting from the abuse of power and the excess of tyranny that end up violating constitutional guarantees.[37]

The other point is that of whether the right to asylum was a human right, and through this we can again measure the use of the *Droit des gens* in the constitutional debates of late eighteenth-century. Traditionally, the granting of asylum was considered a means of asserting political power, given that it was born as a religious institution, in the form of a power and thus of a concession dependant – in Catholic countries – on the sovereignty and authority of the Catholic Church, first in the exercise of religious power and then of temporal

[36] Ibid., 123–124, 132.

[37] V. Chetail, 'Vattel et la sémantique du droit des gens: une tentative de reconstruction critique', in *Vattel's International Law in a XXIst Century Perspective*, 405.

PROOF

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 176

power. The culture of European natural law reserved much attention to the right to asylum construed as a protection of foreigners, reflecting on its compatibility with the full exercise of sovereignty by a state and affirming the existence of a right of access for foreigners seeking refuge in the territory of another state on the basis of natural law and the *ius gentium*. Grotius had thus clarified the dual nature of asylum, as a natural law of the subject and as a prerogative of the sovereign in granting it. Pufendorf had studied the matter in depth, recognising the humanitarian and solidarity character of asylum, but without recognising the existence of a natural law obligation for the state to receive and grant shelter indiscriminately to all foreigners. On the one hand, therefore, hospitality became a common human duty, while on the other the interest of the host state was safeguarded for the sake of its particular interests. Wolff in turn had confirmed the imperfect nature of this right due to the fact that it was subordinated to the discretionary judgement of the sovereign.[38]

This picture was complicated further since Vattel linked the right to asylum to a series of other freedoms and rights that measured itself against political authority. Asylum as 'constitutional' right became a point of intersection between the problem of detachment from one's homeland (either voluntary, imposed or ordered) and that of arriving in other countries (expressed through asylum, but also through welcome and shelter).[39] The request for asylum could be the consequence of a judicial sentence (such as banishment and forced exile); or it could be a right of a person who left his country not as a result of a conviction, but as the voluntary exercise of a specific personal right that could be considered a form of passive resistance. From this derived the analysis of the duties of nations towards those who required asylum, and of the right to determine whether or not to accept a foreigner in one's territory. According to Vattel, a nation could not refuse, in the name of natural law, the even perpetual acceptance of a person expelled from his homeland, and if that person was denied entry it had to be for precise reasons that were carefully examined: among these could be the impossibility of being able to provide for the needs of both the nation and the foreigner at the same time.

Within the constitutional tradition and that of international law, the *Law of Nations*, in which the right to asylum was presented and discussed, continued to serve as an important cultural bridge, thereby facilitating the inclusion of

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[38] L. von Bar, A *History of Continental Criminal Law* (Boston, 1916), 88–92; G. Loescher (ed.), *Refugees and the Asylum Dilemma in the West* (Pennsylvania, 1992); F. Mastromartino, *Il diritto d'asilo. Teoria e storia di un istituto giuridico controverso* (Turin, 2012).

[39] A. Carrera, 'The citizen's right to leave his country: The concept of exile in Vattel's *Droit des gens*', in K. Stapelnroek and A. Trampus (eds.), *The Legacy of Vattel's Droit des gens* (Cham, 2019), 77–93.

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 177

this right in the general category of human rights.[40] A demonstration of this, once again, was the draft Neapolitan constitution of 1799, in which the exercise of the right to asylum was reintroduced (albeit being confined to the general dispositions), in the wake of the provisions of the draft French constitution of 1793. Vattel's reflection on asylum would continue to be at the root of European political thought through the nineteenth century.[41]

The last great season of influence of Vattel's work on European constitutionalism was probably the experience of the Cadiz constitution. In Spain, the *Law of Nations* was banned by the Inquisition in 1779, but the work still circulated in private libraries and indirectly in university teaching. In the culture of the first liberals and in writing the Cadiz constitution (1812), Vattel's work explained a great influence and several articles of the Constitution (especially the third article) have been suggested or copied from the *Law of Nations*.[42] Though the *Droit des gens* was not a specific expression of the Enlightenment culture, but instead claimed continuity with the natural law tradition of previous centuries, it became associated with many of the works by eighteenth-century authors that to varying degrees were connected to constitutional debates. This happened because the *Droit des gens*, with a level of awareness on the part of its author that still remains difficult to determine, took as central elements of its entire reasoning certain problems, such as the function of the constitutional state in the interstate system and the relationship between the exercise of good government and the wellbeing of citizens, destined to be at the centre of modern political debate, along with the concepts of nation, homeland and citizenship.[43]

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[40] M. R. García Mora, *International Law and Asylum as a Human Right* (Washington, 1956), 38–40; P. P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel* (The Hague, 1960), 293; A. Grahl-Madsen, *The Status of Refugees in International Law: Asylum, Entry and Sojourn* (Leiden, 1966), vol. 2, 16.

[41] For a comprehensive discussion on this right with reference to Vattel, see L. Glanville, 'Historical thinking about human protection. Insights from Vattel', in B. J. Steele and E. A. Heinze (eds.), *Routledge Handbook of Ethics and International Relations* (London, 2018), 308–317.

[42] J. M. Portillo Valdés, *Revolución de nación. Orígenes de la cultura constitucional en España* (Madrid, 2000), 122–155; F. Tomás y Valiente, *Génesis de la Constitución de 1812. De muchas leyes fundamentales a una sola constitución* (Pamplona, 2012), 34–35; A. Fernández García, *Las Cortes y la Constitución de Cádiz* (Madrid, 2010), 47; E. Fiocchi Malaspina, 'Vattel's *Le droit des gens* and the Constitution of Cádiz', in D. Repeto García (ed.), *Las Cortes de Cádiz y la Historia Parlamentaria* (Cádiz, 2012), 33–40; E. González Diez, 'La monarquía constitucionalizada por la nación', in L. Palacio Bañuelos and I. Ruiz Rodríguez (eds.), *Cádiz 1812. Origen del constitucionalismo español* (Madrid, 2013), 139.

[43] More references in Trampus, *Emer de Vattel and the Politics of Good Government*, chapter 13.

Comp. by: KARTHIGA G Stage: Proof Chapter No.: 8 Title Name: Schroder
Date:17/3/21 Time:22:26:26 Page Number: 178

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