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JOURNAL OF CATALAN INTELLECTUAL HISTORY,
Volume 1, Issue 2, 2011 | Print ISSN 2014-1572 / Online ISSN 2014-1564
DOI 10.2436/20.3001.02.12 | Pp. 161-177
<http://revistes.iec.cat/index.php/JOCIH>

Catalan Legal Mind and the Legal Catalan Mind. A brief overview on Legal and Political Principles

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abstract

This paper constitutes a short introduction to Catalan political and legal thought. I have tried to summarize the essentials of a particular way to understand institutions, legal systems and political behavior which are historical in nature. Several researchers, historians, jurists, and political scientists are addressing the traditional subject of Catalan pactism with a renewed interest. This paper is conceived as a reflection on this trend. I distinguish between ‘Catalan legal mind’ and ‘the Legal Catalan Mind’ which started up at the beginning of the 16th c., was consolidated during the 17th, and eventually produced what is known as “political pactism” in the 19th c. and 20th c.

key words

legal pactism, late legal pactism, Catalan legal mind, legal Catalan mind, political pactism, Catalan legal tradition, imperialism, modern state, Spanish political thought, Krausism, modernism.

1. Introduction: Catalan Legal Mind

Strictly speaking, as I am neither a legal historian nor a lawyer, when I first read the list of venerable and very important books from the Middle Ages and the Renaissance that constitute the core of this great Exhibition –els *Usatges* de Barcelona, els *Costums* de Tortosa, el *Llibre del Consolat de Mar*...– I felt that trying to introduce nine centuries of Catalan political thought in thirty minutes was redundant: it was a perfect example of the *rauxa, folie, madness* that such books tried to prevent¹.

¹ This text was written as an invited lecture to the Symposium *Mediterranean Mirror: Catalan Law in an International Context. Symposium*, held at the Elmer Holmes Bobst Library, New

However, after reflecting a bit on it, I thought that perhaps talking as a Catalan citizen and not as an expert, talking from a cultural point of view, would shed some light on the understanding of those ancient but sound texts.

Therefore, the title I chose for my talk was “The Legal Catalan Mind”. Still, a bit confusing, as Mary Ann Newman quickly made me take note. In plain English it sounds surely better to say “the Catalan Legal Mind”.

What I would really like to state is not that Catalans have a special sense for law and the state, but rather the contrary: not having a state, having a fragile law, the shadow of the law and the state has become over time one of the most characteristic features of Catalan patterns of behavior: *the Legal Catalan Mind*. I don't think this is a modern phenomenon: we may trace it back to the beginning of the Middle Ages, to medieval *pactism*, to the defense of personal freedom, to the importance of contracts, to the willingness of dialogue and dialectics as a form of political thought, to the rebuttal and dislike of the king's *imperium* and absolute power.

Perhaps we could start by pointing out this quality of both precise and metaphorical resonance of legal Catalan language, which is Roman in origin, but enriched with people's experiences and with all the languages written and spoken in Europe and in the Mediterranean area (Provençal, German, Arabic, French, Italian...). The Catalan language is a powerful tool to think rationally and to convey emotional states alike, sometimes in a surprising manner.

The great critic and writer Rafael Cansinos Assens (1882–1964), who was born in Sevilla and lived almost all his life in Madrid, where he eventually died, furnishes a perfect example of this surprising Janus-like quality. One of his friends, Josep Subirà, made him know in translation a book on Gipsy childhood by the poet Juli Vallmitjana (1873–1937). The book was neatly translated into Spanish as *Vidas de niños* [*Childrens' lives*] and Cansinos liked it very much. But he disliked it also for he could not understand the original Catalan title, *Com comencem a patir* [How do we start suffering]: *¿Cabe algo más lastimoso que el título de este libro –Cómo empezamos a sufrir– floración epigráfica de toda una filosofía?* [Cansinos (1925)1998: 203]².

We'd better bear in mind this *epigraphic blossom* of the philosophical *pathos* when we encounter particular medieval terms. Catalan political and legal terms may be directly expressive of the straightforward experience of things, roles and

York University, on April 27th, 2007. This final version is an updating of the original one, to be published in the framework of a research on dialogue, mediation, and political forms. See <http://www.llibreblancmediacio.cat>, and Casanovas (2011a).

2 “Is there anything more pathetic than the title of this book –When we began to suffer- epigraphic blossom of a whole philosophy?”

facts. The kings' financial expert was termed *Mestre Racional* [*Magister Rationalis*]. But *l'Any de plor* [literally, 'the weeping year'], was not a metaphor, but the legal status of widows, the name of an institution lasting a year after the husband's death under the old Catalan Civil Law. *Sometent* –the arms call to defend a city– means exactly what it means: *so emetent* [shouting, making sounds]. The *mostassaf* did not mean a muslim, but the role of a tax collector in the city market. A legal claim was not simply named a *demanda*, but a *clam*, an 'outcry'. And *pràctic* is the Catalan old name for 'lawyer'. Translation can be spared in this latter case.

2. Medieval and late pactism

Language alone does not make law, but this tinted way of talking and thinking gives a hint of its nature and content: law belongs and remains close to people's experience and to their daily life. Catalan legal mind –at least the way in which it has been described by Tomàs Mieres (1400-1474), Lluís de Peguera (1540-1610), Antoni d'Olibà (1560-1620), Joan-Pere Fontanella (1576-1649), Joan-Pau Xammar (1593-1666) and other 15th, 16th c. and 17th c. legal writers³– has to be understood as reasonable, bottom-to-top oriented, experience-prone, flexible (variable according to the circumstances) and close to professional fields (especially merchants and all sort of craftsmen)⁴.

Perhaps we should stress at this point how the different states (*estaments*) had a duty to a dialogue among themselves and how in this way they limited the power of the monarchy that follows from this principle. In the Catalan scholarly tradition this is known as *legal pactism* (*pactisme jurídic*)⁵, which establishes the legal value of political agreements over the pure normative form of prescriptive law⁶.

3 For a summary of bio-bibliographies of these ancient Catalan jurists, cfr. Baró i Queralt (2009). An overview, somewhat biased, in Elías de Tejada (1948, 1963-65).

4 See Maspons i Anglès (1932). The "legal feeling" was first stressed by Cots i Gorchs (1955).

5 *Pacte* means 'covenant'. However, I will follow here the usual translation of *pactism* for *pactisme*, keeping the Latin roots of the term.

6 See on *legal pactism* in the Catalan history, Jaume Sobrequés i Callicó (1982). Sobrequés shows that this kind of pactism was a political practice spread over the country. According to him, the first theoretical formulation of this principle may be found in *El llibre Dotzè del Crestià* (1385-86) written by the priest and political thinker Francesc Eiximenis. See for a technical discussion Vallet de Goytisolo (1980a, 1980b). See, against this interpretation, Lalinde Abadía (1980). For a general discussion on the theological and philosophical groundings, see Legaz Lacambra (1980).

At the beginning of the 11th c., feudal law –*Dieu et mon droit*, the subjective declaration of power– is limited by the reception of the Roman conception of law. *Jurisdictio* means that the king’s power amounts to creating the law, but for the same performative act, the king is limited by the same law he has created and told his people. Above the king *et son droit* there is a natural (rational) and superior (divine) law.

Legal pactism, then, may be explained as follows: the presence of such mediation allowed binding obligations to arise between the king’s *potestas* and his subjects, who remained originally free to assume the agreement. Therefore, all the subjects’ duties and obligations ought to be assumed through a negotiated act, a formal and mutual agreement, a covenant.

In Cathalonia rex solus non condit leges, sed rex cum populo, et eis adstringitur etiam rex sicut caeteri, et eius iurat se observatarum in ingressu sui regiminis in uim (Fontanella, 1662, Dec., cap. 65, n.2.): ‘In Catalonia, the king cannot legislate alone, but rather the king and the people alike, and acts bind the king as much as the people, and, since they are enhanced, the king swears to their compliance, and laws not only bind him but also the persons he may have delegated his authority to.’⁷

This position has many consequences: (i) In all public acts and regulations the sovereign has to negotiate (*legislació paccionada*); (ii) justice has to be administered through shared procedural rules (“*justícia paccionada amb cognició de causa per directum*”); (iii) subjects are not bound by any show of the king’s will (*immunitas plebis*), (iv) *Ius oritur ex facto* (Fontanella, 1662); ‘law comes from facts’; (v) customary law prevails over other sources of law: *tollit legem* (Socarrats, 1556): (a) *pacte és llei*, (b) *tracte és tracte*, (c) *tractes rompen lleis*; (vi) law is not binding and cannot be enforced in cases which go against equity or natural reason. Law *emerges* or, using a contemporary concept, ‘supervenies’ only from the natural understanding that its application is right.

The judicial swearing of Catalan judges under Pere II (Const. vol. I ll. 1, ti. 48, llei 8, 1283) said: ... *e los plets qui vendran en mon poder espatxaré, de mon poder, com pus tost poré, segons Dret e rahó*. The ruling of the judge ought to be ‘according to law and reason’, not according to the law alone. This is close to the due process of law established in the British Magna Carta of 1215 (Annex 5), but goes even beyond it, and goes far beyond any modern principle of legality or rule of law.

At least on two different occasions, in 1251 (Jaume I) and in 1639 the General Courts (Parliament) received a proposition to abolish legislation itself

as a way of ruling, for the benefit of the ‘natural sense’ of judges (‘el seny natural’, *suo omnino sensui et naturali rationi*).

What can we make out of such legal principles? It is a case of medieval ancient Law, that is clear. And we should avoid idealizing it: as in many Mediterranean medieval societies in Europe, slavery, piracy and state struggles did exist in Catalonia. The Catalan marine contracts (*contracte de noliatge*) usually contained piracy clauses, and the long struggle between estates in Barcelona during the 14th and 15th centuries (*La Busca* vs. *La Biga*) led to the pogrom against the Jew district (*Call*) in 1391 (Carrère, 1971). However, Catalan law was mainly a law for all the citizens (not only for the nobility and *ciutadans honrats*) and it contained the regulations for a merchant and city-oriented society, where the agreement between the king and people living in cities excluded and limited the gothic (feudal) law existing in the lands of earls (*baronies*) and, conversely, integrated extensively the Church (*el braç eclesiàstic*, the ecclesiastic arm).

There is a general agreement among legal historians –e.g. Ferran Valls i Taberner, Francesc Maspons i Anglès, and most recently, Victor Ferro and Tomàs de Montagut, among many others– that Catalan public law followed those principles and adapted its institutions from the 12th to the 18th century, when Philippe the Fifth abrogated all Catalan public and self-government laws with the suspension of the privileges and abolition of the *Consejo de Aragón* (1706) and the *Decreto de Nueva Planta* (1714–16)⁸.

Quite recently, historians have made several distinctions among medieval, Renaissance and *late pactism*. Antoni Simon (2007: 29), following Skinner (1978), links pactism to the allocation of sovereignty, and he summarizes it in three great lines of thought: (i) monarchists concentrate sovereignty in the figure of *princeps* (the king); (ii) *corporate sovereignty*, or shared sovereignty between king and community; (iii) and *popular sovereignty*, in which community takes the power over the king.

Late pactism would be originated in Catalonia at the beginning of the 16th c. and it followed especially in the 17th c., because of the emergence of professional lawyers and jurists in Catalan thought. This uprising of lawyers pertaining to institutions such the *Reial Audiència*, substitutes the lack of political thinkers in a strong sense. I will deal further with this issue later on.

I like to think broadly that legal *pactism*, besides naturalism, is a kind of old European legal realism as well. Now, I intend to concentrate on sovereignty and the origins of the theory of the state.

8 See Víctor ferro (1986), Tomàs de Montagut et al. (2001).

3. The law of the modern state

In France, Jean Bodin (*Les six livres de la République*, 1576) and, in the following century, Jean Domat (*Les loix civiles dans leur ordre naturel. Traité des Loix*, 1680), the lawyer of Louis the XIV, set the grounds for the king's unlimited sovereignty assumed by absolute monarchies. The structure they proposed was simple, but very effective, as it was based on an Aristotelian syllogism and on a renewal of Aquinas' political theology. The structure of the state is rule-dependant, and the enhancement and enforcement of law meant that the individuals were to keep due obedience under its power. *La raison écrite* de Domat went in one only direction: to assure the absolute power of the Monarch through Roman law and its identification with Christianity and natural law. The equation worked, since the law of the king was rational, Christian and natural at the same time⁹.

This helps us to see the core of the problem: it was not possible to set a dialogue with the law but rather it was necessary to comply with it. Humanists have opposed this theory strongly. During the 16th c. Erasmus, Rudolph Agricola, and Joan Lluís Vives used dialectical reasons. Following the path of ancient Rhetorics, Pierre de la Ramée (Ramus), in his *Dialectica* (1555) conceives an interesting dialogical model whereby reasoning is split up into two parts: *inventio* and *iudicium*. *Inventio* is the topical part, in which speakers, thinkers, would choose the topic and would negotiate among them how to reach a decision on the issue¹⁰. *Iudicium* corresponds only to the deductive and mechanical development of the syllogism (we would say in modern logics, 'proposition'). However, in legal reasoning, the first part of this cognitive walkthrough quickly disappeared in the next centuries. According to the theory of absolute power, judges, magistrates, officers have to implement and enforce the law and rather not talk about or discuss norms, rules or decisions relating to the subjects.

Ramism was highly influential in England and central Europe. But Pierre de la Ramée, who was Huguenot and was murdered on the night of St. Barthelme (1572), never entered the Catalan thought¹¹. Other French doctrines –like Jansenism and the *Logique de Port Royal*– dealing with language, reasoning, free speech and free thinking were cut off in the next century,

9 See on the significance of Jean Domat for the French public law, André-Jean Arnaud (1969).

10 See on the structure of Ramus work, Walter J. Ong [(1958) 2004]. See also Grau i Arau (1999).

11 Barcelona never was a center for the Humanist thought. Miquel Batllori [(1956) 1995: 83], following Bataillon, quotes only Miquel Mai as an Erasmist minor figure in the 16th c. But he also offers an explanation for this: the Inquisition, as an extension of the imperial power, was especially attentive in Catalonia.

using violence if necessary. Absolute monarchs leant heavily on Catholicism and political theology.

This was especially true for Spanish legal thinkers after 1492 and the discovery of America. In the 16th c., within the context of the so-called *Spanish Second wave of Scholasticism*, the School of Natural Law of Salamanca and Granada flourished. Thinkers like Francisco de Vitoria, Domingo de Soto, Francisco Suárez –very important from the ontological point of view– had to address problems such as the limitation of imperial power, the good government, the right of war and the relationship between the emperor and the Pope. In brief, they furnished Charles the First and Philip the Second with an entirely new theory of the state because for the first time in Europe their thought went on the broad lines of a universal world. Especially Vitoria, Suárez, Vázquez de Menchaca, and Bartolomé de las Casas, on the grounds of human reason and divine power, tried to limit and set clear boundaries onto such an imperial power.

Let us go back to Catalonia: this universality is precisely what Catalan writers and thinkers of the 15th, 16th and 17th centuries lack. The great historian Vicens Vives put it vividly in a highly-read book (*Notícia de Catalunya*, 1954), and even used a strong metaphor to point it out: power is the Minotaur and Catalan people had a *coactive impuissance* (*impotència coercitiva*) with regard to it. Castile started to take off.

However, in spite of it, the number of Catalan jurists and lawyers increased, and they were increasingly integrated into the elite of Nobile and civil society in Barcelona, as shown by recent works and biographies¹². It is worthwhile to mention here the tensions and sovereignty disputes known as *plets de sobirania* that started up at the beginning of 17th century. Monarchic institutions linked to the king's power in Catalonia (Consell d'Aragó, Virrei, Audiència) and more territorial ones (Braços, Diputació, Consell de Cent) quarreled for authority and influence¹³. This was, technically speaking, a work for lawyers that nevertheless could not challenge the Spanish power only with the law of the land (*constitucions*). Broadly speaking, legal formalism substitutes real political strength. Josep Fontanella, Joan Pere's son, wandering from embassy to embassy in 1648 suffered in the flesh this contention on the occasion of the Treaty of Westphalia (Busquets, 2001).

12 *De officio judicis et advocati*, written by Joan Pau Xammar (1639), asserts that lawyers and jurists had the status of *ciutadans honrats*. Cfr. Amelang (1987) on this social trend; Palos (1996), on Joan Pere Fontanella; Baró i Queral (2009) for an overview.

13 Cfr. Simon, *op. cit.* pp. 33 and ff.

However, the American gold was not enough to turn Spain into a self-sustained country. So, there was hunger, the plague and war. Since the 16th century, Castile suffered nine general wars, and Catalonia eleven. As a result, the internal structure of the State –while officially active– was unable to integrate all the lands of Spain into a single country (that would include Portugal, Catalonia and the Basque country). Therefore, “when the time came for further modernization (16th-18th centuries), the State was too clumsy, inefficient, and encumbered with parasitical bodies and offices for it to take place” (Giner, 1984: 5). However, we may keep in mind that the struggles were not between abstract entities –such as ‘Catalonia’ and ‘Castile’– but between specific organs of political power acting from above, often upon plain people¹⁴.

From 1640 to 1700, the historical landscape shows an array of Catalan identities and counter-identities struggling between two absolute states, Spain and France, in a longstanding war, which took place on Catalan land. However, the main problem was not whether the Catalan were Spanish or French, or successively both at different time. It was to survive, especially in the Pyrenees and in the North of Catalonia. Hyacinthe Rigaud, the favorite painter of Louis the Fourteenth, was born in Perpinyà. Oscar Jané (2006) nicely recalls us that his real name was Jacint Rigau. This could be a beautiful metaphor of the reactive, adaptive, hidden ambiguity of Catalan identity from 1640 to 1700, and the threshold of the new Legal Catalan Mind.

4. Political pactism: the Legal Catalan Mind

What are the features of this way of thinking and behaving that I have called *the Legal Catalan Mind*?

I contend that some features of the old Catalan legal mind –pragmatic, experience-centered, bottom-to-top, rather than top-down, reasonable, flexible, cooperative, and deliberative– are partially reflected in the concrete social and economic life of the 19th and 20th centuries. But with the implicit assumption that things are the way they are thought and felt, more than the way they really are. After all, who knows how they are in reality? This means combining fiction with practical reason, warm affection with mental distance, improvisation with a sometimes exaggerated and procedural formalism, and political resilience with the contemporary leftovers of the ancient legal pactism, molded on the legalist structure of late Catalan pactism; that is to say, *political pactism*.

Legal pactism may be understood as a European medieval form of legal realism, where the merchant-like communitarian interests of Catalan towns are combined with strong feudal links with the peasant countryside and with the early monarchy which developed a *thalasocracy*, a military Mediterranean expansion mixing both ways of understanding social bonds. In such a situation, law is adapted to citizens and filtered mostly through judicial means by professional lawyers (similar to chancellors).

Political pactism may be understood the other way round. In late absolutism, when the protection of merchants, goods and values not a strict priority and, on the contrary, power turns into a political goal in itself, the military and administrative ruling of the state is concentrated as a privilege of nobility. Monarchs have to create permanent armies and a stable hierarchy of administrative bodies to manage aristocratic power, to get taxes from people and to rule the population. Law is linked to this hierarchical structure as a practical way of exercising a top-down power. In this situation there is a permanent jeopardy for societies under the military menace of superior forces, and *political pactism* is internally a way to better organize and preserve some homogeneity, and it may be externally understood as a way to survive and adapt to a hostile environment.

After the defeat against the Spanish army of Philippe V, the effects of the *Nueva Planta* policies (1712-1714) were certainly devastating for Catalan public life. No parliament, no independent courts, and the law becoming nothing but pure compliance. Barcelona had a humiliating internal military surveillance (*la Ciutadella*) and was even deprived of the right to have a university, partially as a kind of royal punishment and partially to avoid further turmoil in the city (Batllori, 1997). It is true that the social and economic tissue of the “defeated Catalonia” –borrowing the expressive title of Ernest Lluch’s study– would find the time to recover from its critical past¹⁵. As a matter of fact, the industrial bourgeois classes of modern Catalonia emerged from the economic growth of the 18th century. But the price for such resilience was turning political claims into a kind of political, cultural and legal privacy. Again, in the 19th century, the Catalan leading industrial class failed in its proposal to build a modern state centered in Spain as a common nation (Vilar, 1979). Middle classes in Spanish towns, including Madrid, were not bourgeois classes related to industry. The return of the university from Cervera to Barcelona in 1837 springs what was called *la Renaixença*, a cultural and political Renaissance much more than a public legal one.

15 However, see the observations on the existence of signs of political resilience during all the 18th c. made by Albareda (2007).

Political and legal claims concentrated on the private aspect of law all along the 19th century. I quote the Grievances Report (*Memorial de Greuges*) presented to the king Alfonso XII in 1885:

De la oposición de caracteres entre los dos grupos proviene también la diversidad de tendencias, instituciones, ideales en las varias regiones españolas. El carácter generalizador, el afán de predominio del castellano está impreso en cada una de las páginas de su legislación propia. Su base es la autoridad; su objetivo la igualdad en la obediencia de la masa del pueblo. El carácter analítico catalán está asimismo impreso en cada una de las instituciones de su derecho indígena. Su base es la libertad civil; su objeto, el desarrollo relativo de las varias comarcas a que se aplica. La tendencia uniformista castellana teme hasta la prepotencia de la familia, y la organiza débilmente, sobre todo al relacionarla con la propiedad, en tanto que el respeto a la libertad civil del grupo catalán, le lleva a considerarla institución familiar como piedra angular de su derecho. El afán de predominio castellano tritura los bienes de los plebeyos y aglomera los de los nobles, quizá para preparar por este medio soldados y capitanes, en tanto que la legislación y costumbres jurídicas catalanas, ajenas a este afán, tienden a conservar la propiedad en la familia media, y contrarían su aglomeración en manos de los potentados, que han de enajenar por enfiteusis¹⁶.

The 19th century in Catalonia was legally focused on the conservation of Catalan civil law. However, the old right over the land (*enfiteusi, rabassa morta, lluisme, cabrevació...*) together with the Catalan inheritance system (*hereu, lligítimes...*) led to a longstanding conflict between peasants and owners (Salvador, 1985). There is a specific word to qualify this legal conservatism focused on the defense of

16 Excerpt from *Memorial de Greuges* (*Grievances Report*), submitted to the Spanish king Alfonso XII in 1885, written by Valentí Almirall and the lawyers Joan Permanyer i Ayats, Francesc Romaní i Puigdendolas, and Josep Pella i Forgas, in Bosch (2006). The full title of the document was: *Memoria en defensa de los intereses morales y materiales de Cataluña, presentada a su Majestad el Rey en virtud del acuerdo tomado en la Lonja de Barcelona el 11 de enero de 1885*. "Such diversity of trends, institutions, and ideas among the Spanish regions stems from the opposition of characters. The Castilian's eagerness towards a domain position and its proneness to generalization is printed in every single page of the Castilian own legislation. Its basis is authority; its aim is the lump's uniformity in terms of obedience. The Catalan analytic character is printed as well on each institution born from its native law. Its basis is civil freedom; its purpose, the relative development of the regions to which this law is applied to. The Spanish trend towards uniformity is even in awe of the force of the family, and therefore this institution is organized in a very feeble manner, especially as far as property is concerned. Otherwise, the Catalan respect for civil liberties makes him consider the family institution as the keystone of Catalan law. Castilian's eagerness towards a domain position grinds the commoners' property up and agglomerates the nobles'. This may be so in order to prepare soldiers and captains, while Catalan laws and legal custom, in which this eagerness does not exist, tend to enable the mean family to keep its property, and counteract the agglomeration of property in noble hands. The nobles' properties are alienated by emphyteusis."

the family, the property and real estate in the countryside: *pairalisme*. The social struggles within the Catalan industrial society, mostly textile, at the beginning of the 20th c. may be linked to this unsolved situation inherited from the past, where liberalism and conservatism opposed each other while anarchism and socialism flourished among new forms of labor and exploitation¹⁷. I agree with the political scientist Isidre Molas in stating that the models of Catalan political thought of the 20th century actually comes from the 19th century.

Molas (1997) splits up into two great moulds or epistemic matrices the origins of Catalan modern political nationalism. They would correspond *grosso modo* to political communitarianism (nation as a community, *Gemeinschaft*, centered on the specific forms of Catalan culture), and to political individualism (nation as a *Gesellschaft*, society of individuals, sharing rights and political aims). This could be used to understand the Catalan political thought of the late 19th c. –works by Catholic or Ecclesiastic thinkers such as Morgadas, Collell, Torras i Bages, and works by liberal and socialist writers like Almirall, Alomar or Prat de la Riba as well. Both traditions converge on several forms of regionalism, nationalism, iberism or autonomism (Molas 1997). The three main books are: *La tradició catalana* (1892), by the bishop Torras i Bages, *Lo catalanisme* (1886) by Valentí Almirall, and *La nacionalitat catalana* (1906), by Enric Prat de la Riba¹⁸. Independence was left out of their formulations (Colomines, 1993).

I will not discuss them now. I will just say that even Torras' main reference, Jaume Balmes, the Catalan philosopher who wrote mainly from 1840 until his early death in 1848, had to set a hidden agenda referring to this political pactism when he wrote *El protestantismo comparado con el catolicismo* (1842–1844). He never quoted the rich Catalan legal tradition which was his own. He could have been accused of Austracism or Carlism¹⁹.

Coming to the end, I prefer to focus on the second main feature of the Legal Catalan Mind and political pactism: what I have called elsewhere *reverse nationalism* (Casanovas, 2006). I will use a comparison between the Catalan and Spanish political thought to explain it and to shed some light on the surprising absence of state theory in Catalonia.

17 See, for a good description of Catalan industrialism, Gary W. McDonogh, (1986); for a description of the political and legal conditions of the Civil Catalan Codification process, see Siobhán Harty (2002).

18 See some interesting papers on Torres i Bages, Almirall and Prat de la Riba contained in the collective volume on political Catalan thinkers (Balcells et al. 1988).

19 I have recently developed this argument (Casanovas, 2011b).

The construction of a liberal State was one of the first objectives of the main political thinkers in the second half of 19th c. in Spain. After the dark period of Fernando VII and the *Restauración* (1876), institutions like la Institución Libre de Enseñanza (ILE) educated the progressive leaders of different parties (Liberal, Republican, and Socialist). They were called *Krausistas* (because of an obscure German thinker, Krause, introduced in Spain by Sanz del Río and loosely followed by Giner de los Ríos).

Francisco Giner de los Ríos, Gumersindo de Azcárate, Adolfo Posada, Nicolás Salmerón, among others, introduced the philosophy of law and the state in Spain. They were Catholic, harmonicists, pedagogical, uniform. The liberal State was thought of as a rule of law that would build up the nation, Spain, and would make all Spaniards free and equal. Public law, as normative form, would constitute the state, but the substance, the content of it would be wealth, education and social egalitarianism. They rejected federalism, because they thought that material and social ends could not be reached through the chunks or particles of a federal political form. Therefore, they sustained a kind of soft administrative centralism.

However, the second generation of Krausists performed an interesting historical criticism on the remaining features of the old Spanish state. Fernando de los Ríos Alonso, in a lecture held at Columbia and at the Harvard International Conference of Philosophy in October 1926, set the bases of such a criticism: the State-Church theory. According to him, absolute power in the 16th and 17th c. Spanish state led to a public organization with a totalitarian religious scope. The state was a State-Church because “when total ends are assigned to the state, and the right to specify the means to reach them is arrogated to it excluding social organisms, then the distinction between church and state disappears” (F. de los Ríos, 1927)²⁰.

In the Francoist era, after the Civil Spanish War and World War II, the spirit of such a criticism was pursued from the exile by many Catalan historians. Pere Bosch i Gimpera (1980: 234-35) clearly states it in his Memoirs: “In the Spanish Empire, there are many things that anticipate some of the ideas and methods of the German Nazism”²¹.

20 I borrow this quotation from Virgilio Zapatero (1999: 217). The original paper was published by the Instituto de las Españas, New York 1927. The first lecture at Columbia was entitled “Religión y Estado en la España del siglo XVI” (October 6th, 1926). The Harvard communication, “Carácter religioso del Estado español en el siglo XVI y su influjo en el derecho colonial”.

21 The same idea is fully developed when Bosch-Gimpera explains his “theory of superstructures”. According to this theory, since the Visigoths, the attempts to produce a unification of the Spanish nation produced in fact the autonomization of the government elites as a politi-

Political Catalanism wrote on Catalonia, but thought of the state. Krausism wrote on the state but thought of Spain. Krausists could be wrong, but their proposal was to build up first a nation overcoming social conflicts. The construction of a liberal state was only the second step. On the contrary, since 1918, Catalan thinkers known as *Noucentistes* assumed that Catalonia was an accomplished nation. And being already a nation, they assumed the social *homogeneity* of the components. They dreamed of a state without any reference to a corresponding theory of social change and social integration. Anarchists and socialists violently replied to this naivety in the twenties and thirties, just before the Civil War.

5. Conclusions

Dialogue has taken in Catalonia many different forms since the 12th century. I have distinguished three of them, based on the idea of pact or covenant between prince and the community: early pactism, late pactism, and political pactism. The first one is proactive, and constitutes what I have termed the *Catalan Legal Mind*, a legal attitude which leads to a contractual and constitutionalist view of power. The latter two, one molding the other, are reactive, defensive, based on a formalist conception of law and the state, and foster the creation of legal elites. Political pactism leads to *the Legal Catalan Mind*, a sort of attitudinal pattern that may feed and contain several opposed and even contradictory thesis on society, the nation and the state.

Perhaps this belief is a Romantic heritage, the shadow of ancient Catalan law. However, it would be worthwhile for modern political pactism not to forget the lessons of the old legal pactism: *In Cathalonia rex solus non condit leges, sed rex cum populo*.

Aknowledgements

This research focuses on the historical side of dialogue and dialectics as groundings of law, sustained by the following projects: *ONTOMEDIA*. CSO-2008-05536-SOCI, TSI-020501-2008-131, IDT-2009SGR-0608. I am also grateful to the Catalan Center, and especially to Mary-Anne Newman, for the original

cal body separated from the social reality of people. See the papers “El Imperio no es España” (1947), and “El problema religioso en España” (1947) in *El problema de las Españas* (1981: 178-222).

invitation in 2007, and the warm reception. Marta Poblet, Joan-Josep Vallbé, and Núria Casellas assisted me when writing this lecture.

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