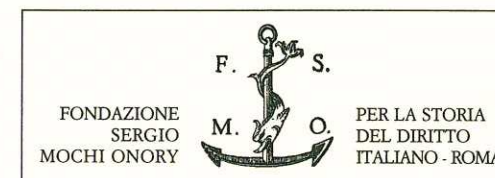


ANNO LXXXVI

2013

VOL. LXXXVI

RIVISTA
DI
STORIA DEL DIRITTO ITALIANO



AMMINISTRAZIONE DELLA
RIVISTA DI STORIA DEL DIRITTO ITALIANO
TORINO

Edizione: Amministrazione della Rivista di Storia del diritto italiano
C.L.E. - Lungo Dora Siena, 100 - Torino (cp. 10153)
amministrazione.rivista@storiadiritto.it

Direttore responsabile: Gian Savino Pene Vidari (e-mail: giansavino.penevidari@unito.it)
Comitato di direzione: i membri del Consiglio della Fondazione Sergio Mochi Onory per la Storia del diritto italiano: Giusandrea Mochi Onory (presidente), Mario Caravale, Ennio Cortese, Laura Moscati, Gian Savino Pene Vidari, Ugo Petronio, Umberto Santarelli, Isidoro Soffietti, Stefano Solimano, Vittorio Viora (segretario).

Consiglio scientifico: O. Abbamonte; R. Ajello; P. Alvazzi del Frate; M. Ascheri; M. Bellomo; L. Berlinguer; I. Birocchi; A. Campitelli; P. Cappellini; S. Caprioli; M. Caravale; A.R. Cassi; M. Cavina; G. Cazzetta; A. Cernigliaro; G. Chiodi; G. Cianferotti; F. Colao; E. Conte; E. Cortese; P. Costa; A. De Martino; E. Dezza; M.G. Di Renzo Villata; M.R. Di Simone; A. Errera; R. Ferrante; M. Fioravanti; P. Fiorelli; L. Garlati; E. Genta Ternavasio; C. Ghisalberti; P. Grossi; L. Lacchè; L. Loschiavo; F. Liotta; D. Marrara; L. Martone; G. Masetto; A. Mazzacane; E. Mazzaresse Fardella; M. Meccarelli; F. Migliorino; M. Miletti; G. Minnucci; E. Mongiano; M. Montorzi; L. Moscati, C.M. Moschetti; P. Nardi; G. Pace Gravina; A. Padoa Schioppa; A. Padovani; B. Pasciuta; G.S. Pene Vidari; U. Petronio; V. Piergiovanni; D. Quaglioni; A. Romano; G. Rossi; U. Santarelli; N. Sarti; R. Savelli; A. Sciumè; L. Sinisi; I. Soffietti; S. Solimano; B. Sordi; E. Spagnesi; G. Speciale; C. Storti; E. Tavilla; C. Valsecchi; G. Zordan.

Condizioni di pubblicazione

I collaboratori sono pregati di far pervenire i loro testi, perfettamente rifiniti secondo le regole e modalità editoriali della rivista, in formato digitale alla sede della direzione, previo accordo col direttore responsabile. Si procederà all'edizione del contributo se considerato di contenuto e livello scientifico adeguato alla tradizione ed alle caratteristiche della rivista, sentitopo il parere di almeno due componenti il consiglio scientifico o di affermati studiosi italiani o stranieri del settore. Di ogni articolo pubblicato la rivista offre in dono agli autori, oltre al PDF, 15 estratti cartacei.

Le pubblicazioni inviate alla rivista (possibilmente in doppio esemplare) saranno ricordate fra i "libri ricevuti" e potranno essere adeguatamente segnalate nel "Bollettino bibliografico". I cambi di riviste o di altri periodici dovranno essere concordati con la direzione.

Condizioni amministrative

L'abbonamento è annuale. Il prezzo per l'annata 86 (2013) è di € 50 per l'Italia e di € 75 per l'estero; quello per l'annata 87 (2014) è di € 50 per l'Italia e di € 90 per l'estero a causa dell'aumento delle spese postali per l'estero.

I conti correnti bancari dell'Amministrazione della Rivista di storia del diritto italiano sono mutati a causa di ristrutturazioni bancarie. Essi sono (a scelta):

- Banca Reale: IBAN: IT23K0313801100000013003066; BIC: BRTOITTT (XXX) Filiale Umberto, corso Matteotti 10 bis, Torino
- Banca Prossima: IBAN: IT04W0335901600100000117108; BIC: BCITITMX



Rivista associata alla «Unione Stampa Periodica Italiana»
ISSN. 0390.6744

PAOLO GROSSI

IL MESSAGGIO GIURIDICO DELL'EUROPA E LA SUA VITALITÀ: IERI, OGGI, DOMANI*

SOMMARIO: 1. L'Europa del diritto e i suoi tempi storici. – 2. Il messaggio 'europeo' dello *ius commune* medievale. – 3. Tra moderno e pos-moderno: l'avvio di un nuovo messaggio 'europeo'. – 4. L'Europa del diritto: le diversità nell'unità. – 5. Il ruolo della Corte di Giustizia nella formazione di un diritto 'europeo': il problema della individuazione dei diritti fondamentali. – 6. Il diritto europeo e il suo bisogno di principi: il ruolo della scienza giuridica. – 7. L'Europa del diritto e la odierna globalizzazione giuridica.

Desidero esprimere con molta sincerità un sentimento di viva gratitudine al Direttore, Professor Thomas Duve, per l'invito a tenere il discorso inaugurale di una nuova fase nella ormai lunga vita dell'Istituto francofurtense. Si tratta, per uno storico del diritto, di un autentico onore: dal 1964, data della sua fondazione, il Max-Planck-Institut für europäische Rechtsgeschichte, grazie all'opera di Direttori che erano (e sono) dei grandi scienziati universalmente ammirati – Helmut Coing, Dieter Simon, Michael Stolleis, Thomas Duve – ha fatto compiere grossi passi in avanti alla riflessione storico-giuridica sulle età medievale e moderna imponendosi come il massimo centro di ricerca a livello mondiale.

Se, in passato, sono stato onorato di far parte del 'wissenschaftlicher Beirat' e del 'Fach-Beirat' dell'Istituto, oggi lo sono per la mia presenza in questa data faustissima e in una cerimonia tanto significativa. Grazie mille, Thomas.

1. L'Europa del diritto e i suoi tempi storici

La porzione occidentale del continente eurasiatico (appunto, l'Europa) ha costituito durante l'età moderna soltanto una espressione geografica,

*Discorso di apertura, tenuto (in versione tedesca) a Frankfurt am Main il 2 settembre 2013, in avvio del Symposium su "Europäische Normativität-Globalhistorische Perspektiven", organizzato dal Max-Planck-Institut für europäische Rechtsgeschichte.

ENRICO GENTA

*ELEMENTS OF EUROPEAN PUBLIC LAW
(JUS INTER PRINCIPES) IN THE 18TH CENTURY*

SUMMARY: 1. The "Society of Rulers and their Advisers". – 2. The sovereign nature of International Law. – 3. The Learned Jurists and *jus inter principes*. – 4. "Indifference" of International Law to principles of Natural Law. – 5. The Sources of rules *inter reges*. – 6. A class-based Law?

1. *The "Society of Rulers and their Advisers"*

I am well aware that it is extremely difficult to succeed in identifying constants, or even "fundamental elements", in an area of law which, as I aim to demonstrate, has opted, throughout history, for a case-based model and for a class-based law, avoiding the abstract generalisations and logical cohesion of doctrinarian solutions.

What is more, and although it is obvious, we must not overlook the fact that the presentation of elements of international law considered basic, necessarily has something artificial about it; it is done *a posteriori*, as the fruit of a process of historiographical re-elaboration, which is possible today because the various stages of the route travelled are visible. In this case, possibly more so than in others, the legal historian must recognise the extreme fragility of the ground on which he wishes to erect his building, and must be aware of a certain arbitrariness in its "construction".

That said, it is common knowledge that the temptation to "settle things" remains strong among jurists; any "model" can be extremely seductive because of its possible exploitation. As a result, armed with the necessary methodological prudence, we will attempt to select and present a possible model, identifying the highest possible number of

* Edito con un contributo del Dipartimento di Giurisprudenza dell'Università degli Studi di Torino grazie a fondi dell'Università italo-francese.

interesting components, to provide a working tool that, as such, has a certain organicity, but is also sufficiently ductile and flexible. We will therefore be able to verify whether or not the elements selected correspond to the paradigms of the legal "doctrine" which, as we know, was founded firmly on Natural Law in the late 17th and early 18th centuries.

A few brief remarks, to illustrate my approach and my basic convictions, which for the sake of brevity I will not be able to motivate in full here. I will limit myself to saying that they are the result of both my studies of several 17th and 18th century authors, some of whom focus on identifying theoretical aspects, while others are primarily inspired by practice, and my examination of abundant archive documentation, which I have consulted as part of specific research over the years. I cannot of course claim that the results that I think I have reached will be accepted by all, even though they are sufficiently verifiable in my opinion.

Having said that, I would first of all like to underline that the protagonists of the historical and diplomatic events of that period, which is usually described as the age of absolute monarchy, are certainly the sovereigns, but that they are supported by ambassadors, advisers, ministers and warriors, whose role has often been undervalued, or at least considered secondary. All together, these figures constitute what, in a book dedicated to international law in the first half of the 18th century, I defined as the "society of rulers and their ministers"¹. This society occupies a clearly defined and highly significant space in the complex scenario of the infinite *sociétés* of the ancien régime: here we must mention Althusius, who highlighted the persisting role of the *consociationes privatae*².

If we go on to examine the mentality and behaviour of this "society", it is easy to note the essential role of *Force*, which we can indicate as a first fundamental element, that characterises international law: "force" can take many forms – military, political, diplomatic, economic and social – and it is the platform which, according to its magnitude, allows a government's programmes to be realised to a greater or lesser degree, within the State and towards the outside world, where they come up against the other realities that exist in the world of European powers.

¹ E. GENTA, *Principi e regole internazionali tra forza e costume. Le relazioni anglo-sabaude nella prima metà del Settecento*, Napoli, 2004.

² See C. ZWIERLEIN, *Consociatio*, in F. INGRAVALLE-C. MALANDRINO (eds), *Il lessico della Politica di Johannes Althusius*, Firenze 2005, pp. 143-168.

Detailed verification of the vast amount of existing documentation enables us to realise that the aforesaid "society" works towards the realization, or the confirmation, of an *Order* that is lasting and shared: the values underpinning this Order can be found in a long series of considerations contained in numerous, theological, political and legal medieval works, which we cannot list here, but which form the intimate, strong fabric of what we can clearly identify as the 'Europe of law'³.

We could also point out that the society we are referring to believes in an order that is *negotiated* rather than *imposed*.

Force and *Order* are therefore fundamental, albeit potentially conflicting elements, of what must correctly be defined as *jus inter principes* (literally law between princes), to underline the significance of the figure of the sovereign who, although he is surrounded by "consociates", as we said, will for a long time remain the formal, although perhaps not always substantial, holder of particular power for the organisation and management of the many aspects related to the coexistence of the various States.

2. *The sovereign nature of International Law*

At this point the thorny issue of "sovereignty" emerges, of its magnitude, and its metamorphoses, particularly in the period between the end of the Middle Ages and the Modern Age. This is an issue that I have no qualms about describing as infinite, and analysing it in depth would demand capabilities well beyond those in my possession, particularly if circumscribed by the space available here⁴. So I will avoid the reckless ambition of airing such a huge question here, and will limit myself to pointing to an additional element of the model that we are trying to construct, which is the *sovereign nature* of international law, or to be more precise, the fact that *this law belongs to the sphere of sovereignty*.

However this should be clarified in more detail: the sovereignty that the law regulating relations between States "belongs to" (we must remember that these relations are structured on the "State of statuses")

³ P. GROSSI, *L'Europa del diritto*, Bari 2007.

⁴ See, *ex multis*, E. CORTESE, *Il problema della sovranità nel pensiero giuridico medievale*, Roma 1982; D. QUAGLIONI, *I limiti della sovranità. Il pensiero di Jean Bodin nella cultura politica e giuridica dell'età moderna*, Padova 1992; S.D. KRASNER, *Sovereignty. Organized Hypocrisy*, Princeton 1999.

is not the one whose requirements Bodin, who is primarily a dogmatic and abstract author, defines for modern political science, but must be understood as *feudal superiority*. This concept does not disappear at the end of the Middle Ages, but is fuelled by the phenomenon of the revival of the feudal system. So we should not be surprised that even after the Treaties of Utrecht and Rastadt, for example, the Empire, which is still at the peak of the European feudal system, should reiterate its authority: in the early 18th century Joseph I had still received formal recognition of his superiority from all his Italian vassals⁵.

For a long time the European princes, who obtained almost unanimous recognition of their power to make war and peace, share this prerogative with their advisers: the classification that fits them best is that of *suzerains*, rather than *souverains*, to adopt a well-known distinction.

3. *The Learned Jurists and jus inter principes*

We can now approach the crucial aspect of relations between the world of law and the "sovereign" political power. As we all know, and as we will take for granted here, the latter does not appropriate until much later the legislative power, which is traditionally governed by the "society" of European jurists, which from the Bologna rebirth on, play a hegemonic role, preventing the ambitions of princes for a long time: for centuries, law was the "business of jurists", who firmly locked the doors of the building containing the principles and rules that they and only they administered⁶.

Now this model does *not* seem to be perfectly applicable to the principles and rules of international law, which we could say completely escaped jurists for a long time. It consists substantially in *customs*, in other words in rules that are mainly oral, which found their authority on the presumption of their antiquity and their recognition by a more or less extensive group of users. And so far we could say that nothing excludes or diminishes the rule of the jurists: for a long time they, like Rogerio and others⁷, have tried to master the phenomenon of custom.

⁵ See G. ASTUTI, *La formazione dello Stato moderno in Italia*, Torino 1957, p. 88 ss.

⁶ See for example R.C. VAN CAENEGEM, *Legal History. A European Perspective*, London 1991: *Law in the Medieval World*, p. 115 ss.

⁷ Lately, E. CORTESE, *Rogerio (Frogerius)*, in *Dizionario Biografico dei Giuristi Italiani (XII-XX secolo)*, II, Bologna 2013, pp. 1716-1717.

But in the case of international custom, in part from its first, obvious peculiarity, in other words the extremely small size of the group that is party to these principles and rules, we are struck by the fact that the "society of rulers and their ministers" constitutes a *consociatio* which, in the long centuries of the construction of European law, has only involved jurists indirectly as professional figures; the sovereigns and their closest collaborators, whose opinion and situations have indirectly conditioned millions of "users", have been the holders and creators of these principles and rules, the custodians of an ancient knowledge that has evolved entirely independently of the paradigms of the learned medieval lawyers, planned and imposed with the force of their scientific constructions.

The peculiarity of this legal complexity is confirmed by the fact that the learned jurists who noticed, not infrequently, that *jus inter reges* was extraneous to their 'system', expressed their awkwardness by describing it as *jus gentium*, and imagining that it might be identified with the *naturalis ratio*. But by doing this, they often did not grasp the true essence of that law which, far from reflecting Roman principles or doctrinal models, had on the contrary acquired all the connotations of a typical *class-based law*.

In this perspective, the *custom* element acquires considerable importance: this term opens the door onto a scenario that appears, at least at first glance, to be "marginally legal", both for the complex and articulated values that custom implies, and for the crucial aspect of obligation.

Violation of the law entails the coercion of the State, but the violation of custom would entail the censure of society. This contraposition is actually neither exact nor interesting, first of all because it is influenced by positivist (19th century) conceptions and is therefore anachronistic if it is applied to the historical period we are examining, but also because it underestimates the power of custom which, as many legal philosophers have successfully demonstrated, is by no means negligible: the sanction of custom often has an effect of "punishment and prevention" that overrides the model standard and the legal standard. I do not intend to split hairs here, but we know that very often the principles of custom have been "pre-regulations", in other words, they have represented the matrix of "real" legal rules: this is the phenomenon of the "juridification" of the rules of custom, which have overflowed into the world of law.

I will conclude this point rapidly by inviting you to reflect on the fact that non-lawfulness, discontinuity, episodiness, fragmentation and

irregularity, which are all factors closely linked to the phenomenon of custom, must be seen, within the fluid and subtle world of relations *inter reges*, not as defects but as values, which are shared in full by the society of princes and their advisers, through the long centuries of the Middle and post-Middle Ages.

4. "Indifference" of International Law to principles of Natural Law

But it is even more interesting to underline that even in the age of rationalism the fundamental nucleus of international rules, which was already quite autonomous in the Middle Ages, manages to avoid the hegemonic control of doctrinarians, who are the upholders of *naturalis ratio* and of abstractly universal rules with a philosophical matrix.

This assertion reflects a conviction I have held for some time: there is no space to provide the necessary proof here, and I therefore ask you to reason *as if* this assertion had been validly verified. As a result, we could list its *self-sufficiency* and *indifference* to the sum of the formal principles of sapiential law alongside the other factors mentioned so far.

This is also the same as saying that the law that regulates relations between sovereigns is a *pre-absolutist, pre-modern law*, which is highly conditioned by the feudal past which, as we know, has some peculiar values which persist in what Marc Bloch has defined as "the warrior idea" and the "contract idea", referring you for the sake of brevity to the abundant literature on the subject.

If we take this argument as demonstrated, we can also say that its contraposition to – and not its identity with! – natural law, whose most certain connotation is the fact that it is supremely "modern" and therefore rational, derives inevitably from the quality of international law as pre-modern law.

In the absence, at least here, of comprehensive and circumstantial bibliographical and documental proof, and limiting ourselves to the words of Wicquefort⁸, who we must consider an author who is indubi-

⁸ De WICQUEFORT, *L'ambassadeur et ses fonctions*, Cologne 1690. We could also see, G. BRAGACCIA, *L'ambasciatore*, Padova 1626; A. LUPA, *L'ambasciatore invidiato*, Venezia 1639; J. GAILHARD, *The Complete Gentleman, or Directions for the Education of Youth as to their Breeding at Home and Travelling Abroad. In two Treatises*, London 1678; J.B. DE CHEVRE-MONT, *La Connaissance du monde ou l'art de bien élever la jeunesse pour les divers états de la vie*, Paris 1694; F. DE CALLIERES, *De la manière de négocier avec les souverains*, Paris 1716;

tably an outstanding exponent of the values of that *societas*, it is fairly easy to see that not only are the arguments and convictions of the 17th and 18th century law *inter principes* discordant with the new model of natural law, but in many ways actually contradict it: the components of the society of rulers and their ministers do not base their behaviour on *naturalis ratio*, they do not believe in abstractly universal rules, they do not in the least think that *that* law is the business of jurists or philosophers, and they do not assert a legal "system", but express an autonomous and case-based approach in all their deeds that is strictly self-referential.

Grotius' success, which goes beyond the many editions and unquestioned spread of his work, was not in my mind sufficient to persuade our *consociatio* to accept the "revolution of paradigms induced by the superiority of natural law"⁹. All of Wicquefort's extensive work, dedicated to *L'Ambassadeur et ses fonctions*, is pervaded by a strong sense of what is almost hostility towards jurists and "gens de lettres" in general, "qui ont contracté une trop grande habitude avec les livres, qui ont trop fort liaison avec les préjugés des docteurs, et qui ont plus de lecture que de bon sens". Jurists lay themselves open to the mortal risk of "pedanticism", which is extremely dangerous in diplomatic negotiations.

The presumed universality of the new rationalist principles is not sustainable in the practice of law between princes, in which "il n'y a point de preceptes ni aussi d'exemples à donner, parce qu'elle change avec les affaires que l'ambassadeur a à négocier, qui sont infinies, et presque toutes d'une différente nature": hence the exclusive importance of the case-based method. From this perspective it is clear that the capacity to negotiate is the most important quality, which is learned "à la Cour, et dans les affaires, non au collège, ni dans les livres".

"Indifference" to principles of natural law seems to be a constant. To be more accurate in our analysis of relations between the "world of jurists" and the "world of the law between sovereigns", we should point out that the contribution of the former was significant in trying to

J. DE LA SARRAZ DU FRANQUESNAY, *Le Ministre public dans les cours étrangères, ses fonctions et ses prérogatives*, Paris 1731.

⁹ S. MANNONI, *Relazioni internazionali*, in M. FIORAVANTI (ed.), *Lo Stato moderno in Europa*, Bari 2003, pp. 206-229.

distinguish – concretely above all – between the figures of the various diplomatic agents (legates, ambassadors, envoys, residents, etc.); the writings on this issue of Alberico Gentili, *De legationibus* (1585) and Cocceji, *Disputatio ordinaria ex jure gentium de repraesentativa legatorum qualitate* (1680), published in Heidelberg, are particularly significant.

For that matter, the theoretical aspects had the upper hand in these works, aiming, from a constructivist viewpoint, to develop general and abstract rules, which implied a revision of the concept of sovereignty; all in all, this could not but trigger strong diffidence within the “society of rulers and their ministers”.

In other words, we can therefore note that this society was not only not ready for references to natural law, but actively rejected them.

But even the tradition of neo-Roman *ius commune* is not very useful: “La jurisprudence fondée sur la connoissance de l’histoire du droit romain est une pièce admirable pour un Ministre, mais il y a fort peu de gens qui s’y appliquent: parce que mesmes la plupart des Docteurs qui l’enseignent, ne l’entendent pas, ou s’ils l’entendent, ils ne se veulent pas donner la peine de l’apprendre à leurs disciples”. The culture that any negotiator must have is therefore strictly historical.

Wicquefort’s work is also very interesting because it gives us a concrete vision of how to define the society of princes and their ministers, which controls European destinies: in fact, the accepted definition, of a typical *feudal, pre-modern* association appears correct and interesting but it would probably be a mistake if we were to exaggerate its elite, exclusive dimension¹⁰. In setting down the requisites for the perfect diplomat, the author is clearly very convinced that “birth”, although an important element, is not essential; “Il y a fort peu d’hommes qui fassent honneur à la dignité, dont la naissance ou la fortune les a revestus...”; elegant aristocrats are fine when it comes to showing off rather than negotiating successfully; the great Jacques Coeur “estoit marchand, mais de la façon que les Fuggers l’étoient à Augsbourg, les Wertmullers et Vidmans à Venise, et que plusieurs des meilleures familles le sont à Gennes...”; and Michel Particelli d’Emery, a merchant from Lyons became the

¹⁰ The role of medieval chivalry to investigate about the origins of humanitarian international law has been specially appreciated by E. GREPPI, *Il Cristianesimo e il diritto internazionale umanitario dei conflitti armati*, in “*Aequitas sive Deus*. Studi in onore di Rinaldo Bertolino”, Torino 2011, pp. 844-864.

French king’s ambassador to the Court of Savoy. The specific nature of internationalist science means that even notoriously learned people have to learn it in the field: when he became a legate to negotiate with the Christian princes, the highly cultured Cardinale Bessarione “découvrit son ignorance, et fit voir qu’il n’en savoit pas les premiers principes”. In other words, a base birth is a disadvantage, but can be “relevée par des qualités éminentes”.

Regarding the fact that it is essential, in order to move comfortably in the world of law *inter reges*, to be versed in “d’autres choses, que celles qui se trouvent dans les livres”, and that the skills of the good “negotiator”, are literally often found in merchants, the society we are examining reveals among its distinctive traits, even the unexpected gift of *openness*; this society is *more open* than one might think, if we were to attribute supreme importance to the “courtesan” factor, which distinguishes it: but we know that innumerable new men were able to emerge from the princely courts of Europe over the centuries.

5. *The Sources of rules inter reges*

Because we are discussing the sources of law between sovereigns, I would like to insist again on what I see as the leading role of *custom* in relation to agreements and treaties.

In complete opposition to the (now outdated) internationalistic doctrine that believed, from a positivist perspective, that the validity of custom lay in the fact that it was the fruit of a tacit agreement between states, it is my opinion that, for the historical period we are considering, the exact opposite is in fact true: the standard that gives effectiveness to agreements is founded on custom¹¹. If, today, “all international standards ... are susceptible to abrogation or changes because of custom”¹², this was all the more true in the early 18th century: we can therefore think plausibly of a pact that is confirmed and supported by custom, and not the other way round.

The relationship between custom and treaty would be different if we were to consider as a “tacit agreement” the shared adhesion to a

¹¹ G. CANSACCHI, *Istituzioni di diritto internazionale pubblico*, Torino 1960, p. 21 ss.; GENTA, *op. cit.*, p. 124; G.F. DE MARTENS, *Précis du droit des gens moderne de l’Europe*, Paris 1864, I, p. 183 (first published in 1788).

¹² G. MORELLI, *Nozioni di diritto internazionale*, Padova 1963, p. 31.

pact based on ancient values, founded on the complex and impalpable weave of the civil usages of Christian, feudal and pre-modern Europe. From this perspective, the pact would acquire force from the "désir de passer aux yeux des étrangers pour une nation éclairée, civilisée et bien intentionnée"¹³.

In other words, the rules contained in treaties express their effectiveness not so much because of the obligatory forecasts that they contain, which remain substantially subjected to the good will of those signing up to them, and to their sense of *honour*, but rather because of the custom that gives value to them.

On this point, rather harshly, Wicquefort¹⁴ removes many illusions from those who trusted in the rationality of the systematic constructions of the legal philosophers: "Les Princes n'observent les traités, que tant qu'il leur plaist, et que c'est l'intérêt ou le caprice, et non la bonne foy qui conduit leurs actions"; or, also, "Les Princes ne font point de Traité, sinon avec cette condition tacite, qu'ils ne l'observeront, que tant qu'ils le pourront faire, sans prejudice de leurs intérêts. Leur intention est d'en tirer tout le profit, et d'en laisser toutes les incommodités et tout le peril à leur compagnon s'ils peuvent...". But his is not cynicism, he is not complaisant about what usually happens, but believes it is honest to tell things as they are: quoting Machiavelli, he refers to "what Princes do, and not what they ought to do".

The result is that, if the agreement – *le Traité* – the source of rules *inter reges*, presents the aforesaid limitations, which substantially condition the generalised credibility of the formula of natural law and rationalism *pacta sunt servanda*, the obligations contained in the treaty (which users of the law *inter reges* not infrequently consider Procustes' bed...) acquire the dimension of *virtual law*.

To which we must add the fact that negotiations and their results, i.e. the treaties, were the fruit of the broadly *autonomous* activities of diplomatic ministers who, far from sharing philosophers' and jurists' faith in the abstract general rules of the doctrine, were usually in agreement with each other, believing in values such as glory, prestige, honour, prudence, *politesse*, etc..

¹³ DE MARTENS, *Précis du droit des gens moderne de l'Europe*, Paris 1864, p. 194: "... Il se peut de meme que ce qui a été réglé par Traité soit ensuite déclaré aboli ou changé par l'usage...".

¹⁴ *Op. cit.*, from p. 126.

One more element that I consider worthy of note, and one that is significantly absent from many comments on this issue by jurists, is the concept of *limited war*, one that is essential in my opinion to understand the substance of the rules of law existing *inter principes*. This concept, which was dominant up until the French Revolution, implies that European sovereigns, even when they were plotting against one of their colleagues, very rarely wanted his total ruin or the destruction of his state: the enemy then was not an ideological adversary, and the wars of the 17th and 18th centuries did not involve the entire structure of the state, partly for logistic reasons.

6. *A class-based Law?*

To conclude this brief presentation, which obviously does not claim to be exhaustive but, as I mentioned, intends to provide tools of interpretation, I would like to summarise my comments so far:

The world of relations between sovereigns is a *consociatio* of individuals (princes and advisors) who hold broad prerogatives, reserved to them, in the use of principles and rules designed to organise the coexistence of the various European potentates. First of all, we therefore have to underline that these principles and rules belong exclusively to the sovereignty. Secondly, we must point out that the relationships are conditioned by the *force* of each state, but this is not the only, or the predominant element of the system, because that "society" believes in *order*, in the juridical sense of the term.

The aforesaid "society" is *open*, in the sense that it can be accessed (even if this is not easy) by anyone who is competent and deserving.

The operating rules have an essential *habitual matrix*; in particular, the *custom* factor is very significant. It should be seen within a *typical class-based* dimension, as a sum of values originating from the Middle Ages, and attributable in full to the feudal world: most of these rules (which find an authoritative expression in the behaviour of that *consociatio*) are therefore *pre-modern*, in the sense that they cannot be attributed to legal modernity. The latter is identified with natural law, which intends to organise the complex system of international law by identifying rational and, as such, general laws. But these "laws" *do not affect* the sum of principles and rules of *jus inter reges*, which, in view of

the premises set, remains a self-sufficient form of law that is indifferent to the doctrine of natural law: the custom's development escaped the control of the learned jurists.

The importance of custom is fundamental: it therefore constitutes the first source of law between states: the effectiveness and survival of agreement, which is expressed in treaties, depends on a customary type of standard; the law contained in the treaties therefore has clear characteristics of *virtuality*.

In particular, the concept of *limited war* is recognised in the historical period under examination (late 17th and early 18th centuries) as a value shared by the society of rulers and their ministers.

In the light of these considerations, we can say that for the purposes of an examination of the values underpinning international law in Europe in the first half of the 18th century, it is more interesting to underline not so much the usual alternative of 'positive law-spontaneous law' (more suitable for subsequent periods), but *the class-based* nature of this law, which remains persistently reluctant to accept the law of nature (which Bentham, with an entirely different approach, later defined as a "dark ghost") and, with it, the resulting constructions of the doctrine of natural law.

In the 18th century, law *inter principes* is still the law of a *consociatio* of individuals: in the gradual evolution of a metamorphosis, this law takes the first steps towards becoming the law of a society between states.