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## **COMMUNITY (CUSTOM) VS. STATE (LAW): THE DEBATE ABOUT PROPERTY IN THE PAPAL STATES IN THE 18<sup>TH</sup> – 19<sup>TH</sup> CENTURIES**

### **1. TWO MENTALITIES IN THE DEBATE ABOUT PROPERTY**

The long and complex path that we will now try to synthesize constitutes the attempt to retrace the history of property in the Papal States from the peculiar point of view of the various forms of property that can express themselves on the soil. This is the main key to understand the work that will allow us to read, behind the complex and abstract legal architecture of different ownership structures, the appearance of a culture that has permeated not only their external shapes, but also the way of manifesting themselves on the *res* or, in our case, on the soil, which is the primary observation point of this study<sup>1</sup>.

This research of a legal mentality has been possible thanks to the great quantity of information derived from the Archive of the Counts Falzacappa<sup>2</sup>. The

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<sup>1</sup> This methodological approach is suggested by Professor Paolo Grossi: “(...) guardare al rapporto fra uomo e cose non più dall’alto del soggetto, bensì ponendosi a livello delle cose e osservando dal basso quel rapporto, senza preconcetti individualistici e con una disponibilità totale a leggere le cose senza occhiali deformanti”. P. Grossi, *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*, Milano 1992, p. 604; P. Grossi, *Gli assetti fondiari collettivi e le loro peculiari fondazioni antropologiche*, “Archivio Scialoja - Bolla” 2012, issue 1, pp. 6-7.

<sup>2</sup> We are referring to the archive of the family of the Counts of Falzacappa of Tarquinia (Italy). The incredible quantity of documents, which emerged from the historical background, allowed us to develop a very detailed framework of the property issue in the pontifical territories from the 18<sup>th</sup> century until the end of the 19<sup>th</sup> century. All these documents, which have never been examined before, belong to an important personality of the proprietary events of the end of the 19<sup>th</sup> century, Count Casimiro Falzacappa, an expert agronomist and a refined jurist whose advice the ecclesiastical authorities will seek in order to implement the agrarian reforms. We certainly owe him the organisation and the collection of archival material according to a well-organised and premeditated structure; in particular, a big shelf with the texts regarding the civic uses is composed into around 30 large books in which the material has been divided into 6 themes: 1) Texts that

ancient documents that have been diligently collected by an important personality of the political events of the beginning of the 19<sup>th</sup> century, Casimiro Falzacappa, have given us the vivid picture of two opposed and irreconcilable mentalities; on the one hand, the one that supports the private property, seen as the prevalent model for the relation between man and soil, seal of a legal culture that is the typical element of modernity; on the other hand, the typical mentality of a different model based on a collective approach, that gives a primary role to community and not to the individual, and that, therefore, is expressed through collective forms of appropriation that constitute the faithful reflection of another legal culture, the medieval one.

The objective of this study, therefore, is to reconstruct two visions regarding the forms of appropriation that were the basis of political and legal discussion regarding the property of land in the Papal States, starting from the second half of the 18<sup>th</sup> century: on the one hand, the medieval voice, the expression of a form of property that gives central role to community; on the other hand, the “modern property”, that mainly recognizes the absolute power of the individual to affect the *res*.

These two perspectives, the old one and the new one, if we want to use the antonyms to define our history, express two ways of thinking that reflect two modalities of a living anthropological relationship between the self and the surrounding environment; the first one is centered on the role of the community as a mediator, while the second one is centered on the individual, seen as the only reference of the absolute relation with things.

Of course the term “modern”, in this case, doesn’t represent the origin of the individualistic logic behind the theory of property, it only represents the fact that this specific historical era – the legal modernity – has been characterised by the clear dominance of the individual property seen as a distinctive element of that era.

The key element of the attempt to really understand this debate is, first of all, man in his essence, as a being that stands in relation with others and with the environment, and this is the starting point of our research. In other words, throughout this journey that we are about to take, we will not exclusively find judgements, legislative works or law treatises, but we will also find the millenarian history of man and of his natural tendency to possess things that surround

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are favourable to the liberation of pastures, 2) Texts that oppose to this liberation, 3) Documents regarding the servitude to pasture, 4) Regulations, certificates, edicts, judgements related to community pastures, 5) Judicial trials for the releasement of the rights to pasture, 6) Projects of various pontifical commissions for the agrarian reform, mainly through the liquidation of the civic rights on private lands. From this short list we deduce that the division of the land was mediated by a real expert in agrarian Law and this is proved by the archive itself, which includes the correspondence between the Count and Monsignor Milella, secretary of the Pontifical Commission constituted to elaborate the law regarding the abolition of the right to pasture that will see the light of day in 1849.

him. From this point of view, property is not exclusively the history of a specific legal system – that of Italy, France, or any other country – but it is rather the history of man in general.

## 2. THE CAUSE OF THE CONFLICT

The first important element consists in understanding the origin of the debate about property in the Papal States, which can be identified in the extremely peculiar property system, typical of places that, ever since the beginning of the 20<sup>th</sup> century, had a legal agrarian regime that leads to hate and problems: the *ius pascendi in re aliena*, namely the right to pasture cattle on private lands<sup>3</sup>. This was a mixed modality of using the land that was massively used in the pontifical territory; due to its nature, it created a relation between two different and opposed interests: on the one hand, the owner of the land and, on the other hand, the community that was entitled to the collective rights to pasture.

Therefore, starting from the end of the 18<sup>th</sup> century, at first in a marginal way and later with more intensity, a serious property issue emerged regarding the modality to solve this problem of mixed use; a problem that, as we can imagine, absorbed the values and the ideas underlying the two mentalities that we have identified at the beginning of this work.

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<sup>3</sup> Regarding *ius pascendi in re aliena* see C. Falzacappa, *Sui pascoli comunali. Memoria del Conte Casimiro Falzacappa di Corneto*, Perugia 1842; L. Frezzini, *Sull'abolizione delle servitù di pascolo, legnatico e simili nelle provincie ex-pontificie*, Castelpiano 1889; G. Sercia G., F. Cancani Montani, *Il castello di Montalto di Castro, la tenuta della "Pescia Romana" e la Dogana dei pascoli del Patrimonio. Rapporti economico-giuridici fra la Camera Apostolica, i Farnese e gli abitanti di Montalto di Castro*, Roma 1926; P. Villani, *Ricerche sulla proprietà e sul regime fondiario del Lazio*, „Annuario storico italiano per l'età moderna e contemporanea” 1960, issue 12; A. Dani, *Aspetti e problemi giuridici della sopravvivenza degli usi civici in Toscana in età moderna e contemporanea*, „Archivio storico italiano” 1999, issue 157, pp. 285-326; C. Zendri, *Universitas, proprietà collettiva e servitù di pascolo nel tractatus de servitutibus di Bartolomeo Cipolla (CA. 1420-1475)*, (in:) P. Nervi (ed.), *Dominii collettivi e nuovi protagonismi per la promozione dello sviluppo rurale*, Atti della VI Riunione Scientifica, Trento, 9-10 novembre 2000, Padova 2002, pp. 105-129; S. Barbacetto, *Servitù di pascolo, civicus usus e beni comuni nell'opera di Giovanni Battista De Luca (1683)*, (in:) P. Nervi (ed.), *Cosa apprendere dalla proprietà collettiva. La consuetudine fra tradizione e modernità*, Atti della VIII Riunione Scientifica, Trento, 14-15 novembre 2002, Padova 2003, pp. 286-294; DANI A., *Le risorse naturali come beni comuni*, Arcidosso 2013; DANI A., *Profili giuridici del sistema senese dei pascoli tra XV e XVIII secolo*, (in:) A. Mattone, P. F. Simbula (eds.), *La pastorizia mediterranea. Storia e diritto*, Roma 2011, pp. 254-267; A. Dani, *Usi civici nello Stato di Siena di età medicea*, Bologna 2003.

Those who supported the individual property, endorsed the complete liquidation of the collective agrarian rights, which they considered as the legacy of a murky past and of an unacceptable social and economic theory. They supported the private property and the cult of the individual against the values expressed by the community, seen as a relational place of intermediation between man and land. This ideal inspired the judgements of the Roman Rota towards the end of the 18<sup>th</sup> century<sup>4</sup>, the work of the Economic Congregation<sup>5</sup>, the decisions of the Tribunal of the Roman Republic<sup>6</sup>, until the Pontifical Notification of 1849<sup>7</sup>.

Those who supported the collective property, on the other hand, considered that those civil rights inherited from the past were a patrimony that had to be preserved and that those rights should not be considered as deplorable burdens imposed on someone else's property, but as an actual form of *dominium* given to a community. The community itself, ever since the first attempts to destroy the collective rights, has been the defender of these types of property that others wanted to erase without even giving a fair compensation to their owners<sup>8</sup>. Regarding this, the Falzacappa Archive included the memorials submitted by the local Communities to the judicial and governmental bodies (pontifical and later republican), which helped us to understand with detail the legal and economic

<sup>4</sup> Coram Gamberini, decisio diei 19 aprilis 1822, Septempedana juris pascendi; coram Resta, decisio diei 22 martii 1803, Sutrina juris pascendi, Super bono jure; coram De Cursiis, decisio diei 9 junii 1840, Nepesina juris pascendi et registrendi; coram Cesarei, decisio diei 2 junii 1817, Praenestina juris pascendi; coram Bussio, decisio diei 9 junii 1755, Veliterna Juris pascendi; coram Bussio, decisio diei 26 maii 1755, Nepesina juris pascendi super facultate faciendi restrictus; coram Migazzi, decisio diei 22 martii 1751, Sutrina juris pascendi; coram Elephantiuto, decisio diei 17 martii 1752, Sutrina juris pascendi quoad facultatem faciendi restrictus; coram Spada, decisio diei 4 junii 1832, Terracinen juris pascendi et restringendi. Super bono jure; coram Bussio, decisio diei 25 ianuarii 1751, Balneorogien juris pascendi; coram Rusconi, votum decisivum 26 aprilis 1780, Mathelicen juris lignandi et pascendi.

<sup>5</sup> Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualità di rappresentanti della popolazione di Corneto, 1802; Sacra Congregazione Economica. Prospetto generale delle servitù di pascolo dello Stato desunto dai stati particolari degli Em.i Legati e Monsignori Delegati trasmessi alla segreteria di Stato, e da questi passati al Segretario della S. Congregazione Economica, Roma 1822.

<sup>6</sup> Tribunale civile del dipartimento del Tevere. Cornetana di manutenzione, o sia di Reintegrazione per i Consoli dell'Arte agraria di Corneto contro i Citt. Scipione Ex Marchese, Leonardo, ed altri Falzacappa, i fratelli Lucidi, ed altri consorti della Lite, Roma 1799; Tribunale Civile del Dipartimento del Tevere. Cornetana PER Li Cittadini Leonardo Falzacappa, Gaetano e Fratelli Lucidi, e Scipione Sacchetti CONTRO Li Sedicenti Consoli dell'Arte Agraria di Corneto. Risposta, Roma 1799.

<sup>7</sup> Notificazione della Commissione governativa di Stato, 15 novembre 1849.

<sup>8</sup> S. Rosati, *Comunità e territorio: la difesa civica dei diritti agrari collettivi nello stato pontificio (sec. XIX)*, „Archivio Scialoja-Bolla” 2018, issue 1, pp. 157-181.

reasons that opposed the liquidation of the collective agrarian rights<sup>9</sup>. The most interesting element is the awareness of the fact that the collective rights were real popular rights of property that belonged to a patrimony of custom that had such an ancient origin that it identified itself with the cultural identity of the citizens.

This is the primary cause of the debate on property in the pontifical territories, and its motivation is quite easy to understand. The fact that, based on different legal titles, various subjects, an individual one and a collective one, could access the same soil, caused uncertainties and animosities, especially in the period we are analysing, in which the individualistic mentality was increasingly stronger.

In particular, that mentality became stronger in the Papal States ever since the pontificate of Pius VII; this Pope put a lot of effort in the attempt to solve the tragic economic conditions of the state that, after the fall of the Jacobin government, suffered mostly from the lack of primary goods and the galloping inflation<sup>10</sup>.

In the economic field, the *opus magnum* of Pius VII was the *motu proprio* entitled *Il vivo impegno* of 15 September 1802, completely centered on the prevailing legal and economic idea that saw the individual property as the solution to every problem<sup>11</sup>. The strategy that had to be used to restore, in the pontifical countryside, the flourishing that the Roman citizens desired, is well specified in

<sup>9</sup> Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualità di rappresentanti della popolazione di Corneto, 1802; Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della città di Toscanella, Roma 1822; Memoria sul pascolo comune nel territorio di Viterbo per l'Università dell'Arte agraria di detta città, Roma 1823; Cornetana di Pascoli Civici per Gli Agricoltori, e Partecipanti de' Pascoli Comunali del Territorio di Corneto. Memoriale di fatto, e di ragione, Roma 1806; Tribunale civile del dipartimento del Tevere. Cornetana di manutenzione, o sia di Reintegrazione per i Consoli dell'Arte agraria di Corneto contro i Citt. Scipione Ex Marchese, Leonardo, ed altri Falzacappa, i fratelli Lucidi, ed altri consorti della Lite, Roma 1799; Tribunale Civile del Dipartimento del Tevere. Cornetana PER Li Cittadini Leonardo Falzacappa, Gaetano e Fratelli Lucidi, e Scipione Sacchetti CONTRO Li Sedicenti Consoli dell'Arte Agraria di Corneto. Risposta, Roma 1799; Tribunale Civile del Dipartimento del Tevere. Cornetana, Ristr. Di fatto, e di Ragione Con Sommario per la Seduta del di 8 Fiorile, Anno VII Repub., Roma 1799; Sentenza emanata dal Tribunale Civile del Dipartimento del Tevere a relazione del Cittadino Garofolini Giudice nella Causa Cornetana di pretesa reintegrazione ai pascoli Communal, Roma 1799.

<sup>10</sup> F. Marconcini, *Le grandi linee della politica terriera e demografica di Roma da Gregorio I Magno a Pio IX. Fatti, leggi e dottrine*, Torino n.d., pp. 157-158; D. Cecchi, *L'amministrazione pontificia nella Prima Restaurazione, 1800-1809*, Macerata, 1975; M. Caravale, A. Caracciolo, *Lo Stato pontificio da Martino V a Pio IX*, (in:) G. Galasso (ed.), *Storia d'Italia*, Torino 1971, pp. 576-580.

<sup>11</sup> "Lo stato moderno – as writes Pietro Barcellona – è la decisione di costruire un ordine della convivenza a partire da un'antropologia individualistica che assume l'individuo come soggetto di bisogno e come desiderio di possesso illimitato". P. Barcellona, *L'individualismo proprietario*, Torino, 1987, p. 12.

the *motu proprio* itself, which states that the division of the deserted and uncultivated lands of the Roman countryside into a greater number of parcels of land was likely to have positive consequences for both the community and the private owners<sup>12</sup>.

Therefore, the solution to the abandonment of the countryside was identified in the fragmentation of the big land ownerships into small parcels of land which must have been exploited at full capacity. The realization of this purpose faces various obstacles that were highlighted in this real agrarian code. One of the most serious and widespread obstacles to the better culture (this was the definition used in the *motu proprio*) was the presence of the civic use of pasture, seen as a collective use of the *ius pascendi* on a private land<sup>13</sup>.

We think that the *motu proprio Il vivo impegno* began, in the Papal States, a path of *reductio ad unum* of the forms of land appropriation in favour of the exclusive private property that very much represents the legal modernity<sup>14</sup>. On 15 September 1802, the date in which the papal provision was promulgated, the destiny of the pontifical countryside and the modality to intend the same forms of appropriation went towards a clear and univocal direction that would have continued undisturbed until the beginning of the 20<sup>th</sup> century, confirmed and ratified by all the pontifical provisions and by the Notification of 1849.

### 3. THE MEDIEVAL VOICE: COMMUNITY (CUSTOM)

The context of this situation, whose characteristics are already clear, is the framework of the two voices that we have mentioned and that create two extremely different legal definitions of the collective rights of property. Let's try to understand better the legal definitions that these two voices formulated, by understanding their values and culture.

We will start with the medieval voice, that firstly evokes the anthropological value of the collective and community moment in the relation between man and nature and, from the legal point of view, the theory of the divided *dominium*.

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<sup>12</sup> Pius PP. VII, *Motu proprio: Il vivo impegno* (15 settembre 1802), p. 8: "La ridente prospettiva delle innumerevoli avventurose conseguenze, che sarebbero certamente per derivarne tanto rapporto alla privata, che alla pubblica utilità ci ha sostenuti nelle nostre considerazioni, e dopo di esserci lungamente occupati intorno a tale oggetto, abbiamo trovato, che sicuramente si arriverebbe ad ottenere l'intento, ove l'immensa quantità de' Latifondi deserti, ed incolti, che al presente si scorge nelle Campagne Romane, venisse divisa in un maggior numero di possessi".

<sup>13</sup> Pius PP. VII, *Motu proprio: Il vivo impegno*..., pp. 23-24.

<sup>14</sup> P. Grossi, *Gli assetti*..., p. 8.

When we talk about the medieval voice regarding the theory of property, we must necessarily acknowledge the following aspects:

1) The central role of the community, as a social structure that defines the identity of the individual, mediates the relation with nature, and that distributes the powers on the territory that belongs to the community<sup>15</sup>.

2) The primacy of custom, which springs from below, from the soil, and can't be separated from it; it moves on the soil as a snake and it faithfully reflects the local reality with its geological, agronomic, economic, and ethnic structures<sup>16</sup>. This explains why the rights to pasture survived as a customary patrimony until the end on the 19<sup>th</sup> century; in fact, they are not the positivisation of the high political power of the legal expedients, but instead, they are values and convictions that are deeply rooted in the history of a community that finds its roots in the relation with the homeland<sup>17</sup>.

3) The primacy of the effectiveness, since it is the expression of a community and economy that is mostly agrarian, according to which law is based on the fundamental economic facts of cultivation and production, and on economically defined subjects such as the breeders, the farmers, and the woodsmen<sup>18</sup>.

4) The division of the absolute *dominium* that can be exercised on a land through a number of forms of property that is equivalent to the *utilitates* that can be obtained by such land (we refer to the examples that we have mentioned before, the various *iura* that could be classified as *ius pascendi*, *lignandi*, *serendi*, etc.); this is a consequence of the previous point, which gave legal relevance to the economic facts that occur in the reality of everyday life<sup>19</sup>.

These are the essential elements of a legal system that finds its structure in the early medieval world, but that ends up becoming a very strong mentality of the rural communities for many centuries; even though it will be eclipsed by the anthropological model of the predominant bourgeois culture, it will remain rooted in the lands from which it originated<sup>20</sup>.

The supporters of the *ius pascendi* can be related to this mentality not because they wanted to impose a medieval culture in the 19<sup>th</sup> century, but because their legal argumentation shows a sensibility and a way to interpret the property rela-

<sup>15</sup> P. Barcellona, *L'individualismo...*, pp. 110-111.

<sup>16</sup> P. Grossi, *L'Europa del diritto*, Bari 2007, p. 24.

<sup>17</sup> D. Quagliani, *La consuetudine come costituzione*, (in:) P. Nervi (ed.), *Dominii collettivi e autonomia*, Atti della V Riunione scientifica, Trento, 11-12 novembre 1999, Padova 2000, pp. 21-37.

<sup>18</sup> P. Grossi, *L'Europa del diritto...*, p. 32.

<sup>19</sup> U. Petronio, *Usi e demani civici. Fra tradizione storica e dogmatica giuridica*, (in:) E. Cortese (ed.), *La proprietà e le proprietà*, Atti del Convegno di Pontignano, 30 IX - 3 X 1985, Milano 1998, pp. 491-542.

<sup>20</sup> P. Grossi, *Il dominio...*, pp. 619-620.

tion that is typically medieval and that has been preserved, unaltered, by the customs that survived until the 19<sup>th</sup> century. Regarding this topic, they said that the *dominia* can be divided based on their extension or on the *utilitates* of the Lands; therefore, it is possible to divide the same Land based on the *dominium* of the natural fruits, namely of pasture, and on the one of the industrial fruits, namely of sowing, and we must presume that this division of the *dominia* has already been made; since the origin of the division is unknown, the property of the lands is divided into two parts, one of which exclusively has the right to seed and to collect the industrial fruits, while the other one only has the right to pasture, and to enjoy the natural fruit<sup>21</sup>.

The distinction described by the author of the document is very clear. The rights to pasture do not represent a burden on someone else's land for the benefit of the community but they consist in a real *dominium* granted to the citizens by ancient customs which is absolutely equal to the *dominium* of the individual owner of the land. The distinction between the two *dominia*, therefore, is identified in the two *utilitates* that can be obtained from that land: the natural fruits (in this case, the pastures) that belong to the citizens and the industrial fruits (the *ius serendi*) that belong to the individual owner who will also have the right to enjoy the *ius pascendi* with the community, if he is a local resident.

So, which legal culture hides behind this theory?

It is the legal culture of the medieval world; as Professor Paolo Grossi underlines, in this culture, every case of enjoyment can be *dominium*, beyond the excessive formalisation of the legal system<sup>22</sup>. As we have already pointed out, the property was divided into a number of *dominia* that was equivalent to the number of *utilitates* that could be obtained from the soil, a situation that faithfully reflected the peculiar and fascinating culture that was able to survive in the reality of the "pontifical" countryside throughout the 19<sup>th</sup> century.

We deduce that this concept of property, derived from the Middle Ages, from another interesting hint, which is the fact that the supporters of the collective rights, in order to demonstrate the legitimacy and the ancient existence of the rights to pasture, used the municipal statutes that, thanks to an adequate reform,

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<sup>21</sup> *Cornetana di Pascoli Civici per Gli Agricoltori, e Partecipanti de' Pascoli Comunali del Territorio di Corneto. Memoriale di fatto, e di ragione*, Roma 1806, No. 20, "(...) la divisione dei domini come può farsi nella estensione, così può anche eseguirsi nelle utilità dei Fondi, che perciò può nel medesimo fondo separarsi il dominio dei frutti naturali, cioè del pascolo, e dei frutti industriali, cioè della seminazione, che in fine questa distinzione dei dominj si deve presumere fin da principio accaduta, allorché ignorandosi l'origine, si trova il possesso fondiario diviso tra due, uno dei quali ha il solo diritto di seminare, e di percepirne il frutto industriale, l'altro quello di pascere, e di goderne il frutto naturale".

<sup>22</sup> P. Grossi, *Il dominio...*, p. 28.



had survived long after the end of the Middle Ages<sup>23</sup>. In fact, the historical period before modernity constituted an undeniable evidence of the diffusion and of the legal recognition of the rights to pasture<sup>24</sup>.

Specifically, with regard to the lands of the Papal States, we can demonstrate the existence not only of occasional norms in the municipal statutes regarding the enjoyment of the rights to pasture by the whole community, but also of agrarian associations regarding both the individual and the collective property. Therefore, while the *Arte degli Ortolani* (Craft of the Horticulturalists) handled all the cultivation activities that were normally exercised on fully owned lands, that were close to the town<sup>25</sup>, the “Arte Agraria” (Agrarian Craft) specifically regulated the rights to pasture exercised on the common or private lands<sup>26</sup>.

This is the proof of an equilibrium, that is really hard to preserve in reality, between the farmers and the pastors, two activities that were divided only in theory; in fact, the same person could be both a farmer and a pastor, and the same land could host, during different periods, both orchards and grazing animals.

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<sup>23</sup> *Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualità di rappresentanti della popolazione di Corneto*, 1802; *Sacra Congregazione Economica. Prospetto generale delle servitù di pascolo dello Stato desunto dai stati particolari degli Em.i Legati e Monsignori Delegati trasmesse alla segreteria di Stato, e da questi passati al Segretario della S. Congregazione Economica*, Roma 1822.

<sup>24</sup> For an initial historical and legal reconstruction of the agrarian statutes of Corneto (nowadays the name of the city is Tarquinia), Viterbo and Tuscania, see S. Rosati, *Lo statuto degli ortolani di Corneto del 1379. Studio storico-giuridico*, „Bollettino della Società tarquiniese d'arte e storia” 2013-2014, issue 40, pp. 137-171; S. Rosati, *The Medieval Statutes of Agricultural Corporations in the Territories of the Papal State. Historical-Juridical Study. Centuries XIV–XV*, (in:) *History of legal sources. The changing structure of law*, “Belgrade Law Review” 2018, pp. 165-173.

<sup>25</sup> The “arte degli ortolani” had the competence and the jurisdiction over all the essential activities connected to the horticultural practice, such as the irrigation, the weekly market, the pricing of fruits and vegetables and the solution of possible controversies among the members. Furthermore, this corporation presented, like many other medieval corporations, a strong religious and solidaristic nature which can be deduced directly from the norms of the statutes, which imposed, apart from the fulfilment of the religious commitments, a moral duty to offer reciprocal help to the other members during the exercise of the work activity and in any other occasion in which another member might be in difficulty. For an in-depth analysis see S. Rosati, *Lo statuto...*, pp. 157-169; S. Rosati, *The Medieval Statutes...*, pp. 165-173; T. Cuturi, *Le corporazioni delle arti nel comune di Viterbo. Studi dell'Avv. Torquato Cuturi*, Roma 1883; G. Giontella, *Gli statuti degli ortolani di Tuscania del 1422*, „Annali della Libera Università della Tuscia” 1971, issue 3, pp. 1-22; A. Cortonesi, *Il lavoro del contadino. Uomini, tecniche, colture nella Tuscia tardomedievale*, Bologna 1988.

<sup>26</sup> Regarding “Arte agraria” see M. Gori, *Università agraria Tarquinia. Centenario della fondazione 1894-1994*, Tarquinia 1994; N. Milella, *I papi e l'agricoltura nei domini della S. Sede*, pp. 90-93, 134-138.

Therefore, there was a great fragmentation not only of the property but also of the social groups that, from the point of view of the agricultural activity, could be entitled to different and frequently opposed interests. There were many interests to combine harmoniously that, throughout the centuries, our community tried to manage, sometimes effectively and sometimes not; this should make us understand why the property issue can't be reduced into a mere class struggle between owner and non-owner, but it rather represents a more intricate story in which economic interests, ideas, values and, inevitably, all the human weaknesses overlap<sup>27</sup>.

The last conclusion we can get from the memorials that were in favour of pastures has to do with their ownership. The fact of considering the *ius pascendi* as a real right of property assumed the idea that it should be acknowledged not as a good of the Municipality, which freely used it, but as a good that belonged to the individual members of the community *uti cives*. It was a guarantee measure, as Mannori points out when referring to the Tuscan countryside, that aims to avoid that the municipal institutions dispose of such goods with the result of impoverishing those who used the *utilitates* that could be obtained from their use<sup>28</sup>. The doctrine of the *ius commune*, widely cited by our lawyers, provided strong reasons to the supporters of the *ius pascendi*, who could refer, as we have seen, to the *auctoritas* of Cipolla<sup>29</sup>, Capobianco<sup>30</sup>, or De Luca, who caustically eliminated all doubts regarding the following statement «*quod est de dominio communitas dicitur de dominio civium*»<sup>31</sup>.

<sup>27</sup> For an in-depth analysis see M. Bloch, *La fine della comunità e la nascita dell'individualismo agrario nella Francia del XVIII secolo*, Milano 1979; M. Cafiero, *L'erba dei poveri. Comunità rurale e soppressione degli usi collettivi nel Lazio (secoli XVIII- XIX)*, Roma 1983; M. Caffiero, *La repubblica nella città del Papa: Roma 1798*, Roma 2005; M. Caffiero, *Tradizione o innovazione? Il sistema agrario consuetudinario e la questione degli usi collettivi tra XVII e XIX secolo*, (in:) D. Mattei (ed.), *Montalto di Castro. Storia di un territorio*, Vol. II, *Dal Cinquecento al Settecento*, Montalto 2012, pp. 13-20; R. Donarini, *Comunità rurali: beni comuni e beni collettivi*, (in:) A. Cortonesi, F. Viola (ed.), *Le comunità rurali e i loro statuti*. (Secoli XII – XV), Vol. I, Viterbo 2006, p. 115-132; Pescosolido G., *Usi civici e proprietà collettive nel Lazio dalla rivoluzione francese alla legislazione dello stato italiano*, (in:) *Comunità di villaggio e proprietà collettive in Italia e in Europa*, Pieve di Cadore 1986, pp. 77-103; S. Rosati, *Comunità...*, pp. 157-181.

<sup>28</sup> L. Mannori, *L'amministrazione del territorio nella Toscana granducale. Teoria e prassi fra antico regime e riforme*, Firenze 1988, pp. 40-41.

<sup>29</sup> C. Zendri vividly demonstrated how Bartolomeo Cipolla had a very clear idea of the distinction between the good of the community and the good of the individual by warning that one thing does not exclude the other, because the medieval jurist, differently than the modern one, has a more factual and concrete vision, to the extent that, according to Cipolla, the decision to consider man as an individual or as a *civis* was never definitive. C. Zendri, *Universitas...*, p. 115.

<sup>30</sup> G.F. Capobianco, *Tractatus de iure et officio Baronum erga Vassallos burgenses*, Neapoli 1622.

<sup>31</sup> G.B. De Luca, *Theatrum veritatis et iustitiae sive decisivi discursus per materias*, Vol. IV, *De servitutibus*, Venetiis 1716, ed. or. Romae 1669, disc. XLIII, n. 3. Regarding this, S. Barbacetto

#### 4. THE MODERN VOICE: STATE (LAW)

Let's move on now to the other voice, the "modern" one, based on the central role of the individual property, the only one that would have provided the economic revitalisation of the Papal States. This concept of property could not be reconciled with the medieval voice, which placed on the same level the two forms of *dominium*, meaning the *ius pascendi*, that belonged to the community, and the *ius serendi*, that belonged to the individual. This was unacceptable for the detractors of the communal pastures, who were increasingly accustomed by the predominant legal culture to imagine an exclusive *dominus*, uncontested on his land, hostile to any external interference.

In order to represent this mentality that, as we will be able to see, was adopted by the Papal States, we will use one of the most important documents of the debate about property in the Papal States, i.e. the Memorial of Count Casimiro Falzacappa, who stated that if a person, a class or a group has exclusively enjoyed the positive right to pasture when the land was uncultivated and opened, the constant custom guarantees to the users this type of right, but it doesn't guarantee a negative right with a prohibitive or restrictive function. Therefore, in case of positive right to pasture, this right can be denied by the owner of the land by simply enclosing or enhancing the land itself, and the right can be taken away without the obligation to pay a compensation to those who enjoyed it, because it is a precarious right that can be annulled by enclosing or cultivating the land<sup>32</sup>.

The literal meaning of this text is quite different from the one of the previous text written by the supporters of the right to pasture: it is not a real *dominium*, which can be suppressed only through the intervention of the Legislator through the exceptional use of the eminent *Dominium*, but it rather is a simple servitude or a precarious right that can be extinguished by simply enclosing the land or by cultivating it.

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has lucidly examined the XLIII discourse of the cardinal of Venosa and demonstrated that De Luca, in his *discursa* about the civic uses, was not referring to the Municipality seen as a public institution, a body that differs from its members, but to all the citizens, who are *in suo* owners. See S. Barbacetto, *Servitù di pascolo...*, pp. 286-294.

<sup>32</sup> C. Falzacappa, *Sui pascoli comunali. Memoria del Conte Casimiro Falzacappa di Corneto*, Perugia 1842, p. 8, "Se dunque un idividuo, o un ceto, od una università ha goduto del solo diritto di pascere affermativo allorquando il terreno era incolto ed aperto, e d'altronde, mentre la costante consuetudine garantisce agli utenti un siffatto diritto, non garantisce davvero il diritto negativo, o proibitivo di restringere (...) Dal che ne siegue, che quando trattasi del solo diritto di pascere affermativo, può questo togliersi dal proprietario del fondo con recingerlo, o migliorarlo, e può togliersi senza che sia tenuto a rifondere alcun indennizzo a quelli, che ne godevano, perché essendo il loro diritto precario, e risolubile nel caso di restrizione, o coltura, cessa necessariamente nel caso, in cui può aver luogo o l'una, o l'altra".

The definition of the precarious right used in the text exemplifies even better the notion of servitude; it gives us the idea of how vulnerable the collective rights were; their survival derived exclusively from the omissive behaviour of the owner of the land, who had not decided yet to eliminate the right to pasture by enclosing the land or by cultivating it. It was a legal construction created deliberately to realise the project of the individual property and based on a highly reductive vision of the value of custom, which is the main source of the collective rights<sup>33</sup>.

The intention of this legal classification was clear: to eliminate all the situations of mixed use by intervening on a custom that, as was the intention of the abolitionists, simply allowed the community to pasture the cattle, without any other negative pretension (such as the right to impede to the owner of the land to enclose or cultivate it).

Apart from the reductive classification of the rights to pasture by the individualists, there was another element against the supporters of the collective rights. If their memorials made constant references to the past – by continual referring, for example, to the medieval statutes – the article of Falzacappa and the other texts that are contrary to the servitudes in pastures are evidently connected to the contemporary, or at least the recent, cultural scenario. This element must be highlighted because it demonstrates how the two voices, even if they derive from the same era and belong to persons who lived in the same era and in the same territory, represent two different cultures and eras. Those who wanted to demonstrate the validity of the *ius pascendi* could not use as a reference the modern legal experience, in which the individualistic perspective of the relation man – land was predominant, but they had to refer to the medieval perspective, with its statutes and its agricultural corporations. In the medieval era, the medieval voice would have been the predominant one because it belonged to a mentality, to a legal and economic system based on the role this community played in the relation with nature and on the predominance of the pasture activity over a more intensive agriculture.

In this sense, the motivation of the supporters of the collective rights was weak, because they obtained their legitimization from an historical, economic

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<sup>33</sup> P. Grossi describes with his usual acuity how custom could no longer occupy, in the legal modernity, the same privileged space it occupied in the Middle Ages: “(...)è esemplare la sorte della consuetudine, una fonte che aveva avuto un ruolo notevole nell’evolversi della antica esperienza romana e addirittura predominante nella intera civiltà medievale, ma che, agli occhi della inesorabile strategia borghese, aveva il difetto, deleterio, di essere un fatto ripetuto nel tempo e destinato – per il suo particolarismo – a eludere ogni filtro e a minare, quindi, la saldezza del nuovo edificio giuridico. Il risultato fu un *riduzionismo* impietoso, impeditivo di un sostanziale pluralismo giuridico, con il pesante sacrificio di quella complessità che avrebbe dovuto, invece, rappresentare una ricchezza per l’ordine giuridico perché specchio coerente della sottostante complessità della società”. P. Grossi, *Ritorno al diritto*, Bari 2015, p. 37.

and cultural context that did not reflect any more the era in which they lived; this explains their constant connection with the past, with the medieval statutes, with the medieval corporations. All these motivations were inevitably going to clash with the modern argumentation of the abolitionists. By saying this, we don't want to imply that the connection with the previous legal experience was a sign of weakness; instead, we think that both voices should be considered in their own peculiarities. Nevertheless, in relation with the property issue and with the specific needs of that era, the lack of a constant connection with modernity must have been interpreted as weakness.

On the other hand, if we read the texts that were contrary to the *ius pascendi*, we would mostly find treatises of law or agrarian economy that had been written during the previous twenty years. The works of Gaetano Filangeri<sup>34</sup>, Pietro Verri<sup>35</sup>, Melchiorre Gioia<sup>36</sup>, Giuseppe Palmieri<sup>37</sup>, Melchiorre Delfico<sup>38</sup>, Adam Smith<sup>39</sup> along with the most recent European legislations about pastures, composed a big quantity of material that inevitably influenced the reader and persuaded him of the greater modernity of the abolitionist theses.

## 5. THE VICTORY OF THE MODERN VOICE

All these concerns profoundly influenced the Notification of 29<sup>th</sup> December 1849<sup>40</sup>, the only pontifical law that after one century of discussion in the court-rooms and in the government was issued by the regency of the State Government Commission (1849-1850)<sup>41</sup>. This text is the result of a troubled and complex

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<sup>34</sup> G. Filangeri, *La scienza della legislazione del cavalier Gaetano Filangeri. Edizione Prima Veneta diligentemente corretta e ripurgata*, Tomo II, appresso Giovanni Vitto in calle lunga a S. Maria Formosa, Venezia 1782.

<sup>35</sup> P. Verri, *Meditazioni sulla economia politica*, Stamperia dell'Enciclopedia, Livorno 1771.

<sup>36</sup> M. Gioia, *Opere minori di Melchiorre Gioia. Volume quindicesimo, Discussione economica sul Lario*, G. Ruggia (ed.), Lugano 1835.

<sup>37</sup> G. Palmieri, *Osservazioni sulle tariffe con applicazione al regno di Napoli in Scrittori classici italiani di economia politica. Parte moderna*, Tomo XXXVIII, nella stamperia e fonderia di G.G. De Stefanis a S. Zeno, Milano 1805.

<sup>38</sup> M. Delfico, *Memoria per l'abolizione e moderazione della servitù del pascolo invernale detto de' Regi Stucchi*, Venezia 1792.

<sup>39</sup> A. Smith, *Recherches sur la nature et le causes de la richesse des nations; par Adam Smith. Traduction nouvelle avec des notes et observations; par Germaine Garnier, de l'Institut National*, Vol. I, Paris 1802.

<sup>40</sup> Notificazione della Commissione governativa di Stato, 29 dicembre 1849.

<sup>41</sup> Regarding "the State Government Commission" see C. Lodolini Tupputi, *La commissione governativa di Stato nella restaurazione pontificia (17 luglio 1849 – 12 aprile 1850)*, Milano 1970;

debate that brought together all the convictions, feelings, interests, and theories that, ever since the beginning, had animated the property issue; this issue had always shown its social, cultural, political and economic soul. When the ministers were writing the Notification, they felt a strong sense of responsibility, because they understood that they were not simply introducing an abstract legal formula that was going to be applied mechanically in a negotiation, but they were having an impact on the life of entire communities, by modifying their customs, their way of working, their social relations. It was a huge task that inevitably gave rise to fears and doubts.

These fears are reflected in the final draft of the Law, which did not stipulate the general abolishment of the rights to pasture on someone else's lands or the liquidation of the rights to seed and to collect wood; these servitudes were not affected at all by the norm.

As established by Art. 1, the rights to pasture could be released only through the initiative of the private citizens who wanted to free their lands from the collective rights, and they had to pay a compensation to the owner of the abolished right: "I fondi soggetti alle servitù di pascere, di vendere le erbe, e di fidare possono affrancarsi colle forme e norme seguenti"<sup>42</sup>.

The compensation for the loss of the *ius pascendi* could take a form of an annual monetary performance or of granting a portion of land; this second option represented the ordinary modality to give a compensation to the owners of the rights to pasture in order to create, especially for the communities, some land resources that were to be distributed among the poorest classes. The monetary compensation, instead, was compulsorily assigned in four situations, of which we should mention the first two, which referred to the situation in which the rural servitudes were not used by the community but by private people, corporations, barons and they consisted in selling the grass for the cattle rather than in enjoying the land. The reason of this disposition probably was to prevent the agricultural corporations or the richest landowners, by eliminating the collective rights, from obtaining lands where they could perpetrate the irregularities and the abuses committed until that moment.

Therefore, from that moment on, anyone who was interested in releasing the land from the rights to pasture had to start, on its own initiative, the administrative procedure described in the Law and valid for any type of *ius pascendi* that affects someone else's land and the community lands.

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C. Lodolini Tupputi, *Atti della Commissione governativa di Stato nella restaurazione pontificia del 1849*, Milano 1972.

<sup>42</sup> Art. 1, Notificazione della Commissione governativa di Stato, 29 dicembre 1849. My translation: "The lands that are subjected to the servitude to pasture, to sell the grass and to entrust can be released according to the following modalities and norms".

The suggestion of Monsignor Nicola Milella, secretary of the Pontifical Commission constituted to elaborate this law<sup>43</sup>, was accepted; in order to eliminate every doubt and controversy regarding the legal nature of the collective rights – by verifying in each case and with great difficulties if the rights were the rights of *dominium*, of assignment, or based on custom – he preferred to create a single category.

This category included all the types of pasture in which was presumed the existence of an expressed title that consisted in a negative servitude (meaning those servitudes that do not exclusively legitimate the right to pasture, but that also legitimate the right to impede the enclosure or the enhancement the land): “I diritti, di cui all’articolo 1° per gli effetti della presente legge, si hanno come derivati da un titolo espresso, o presunto, e come aventi natura di servitù negativa, o proibitiva”<sup>44</sup>.

This is the most noble part of the regulation, because it gave a first and general legal recognition to all the rights of public use, a recognition that, nevertheless, would remain theoretical, because it was nullified by the following disposition established for the servitudes that derive from the custom and that do not generate any obligation to give a compensation.

Therefore, the owner had to proof the customary nature of the right in order to be exempted from the obligation to pay a compensation and he had to take charge of the application of the traditional discipline of the positive servitudes to pasture, which consisted in enclosing or enhancing the land: “È in facoltà del proprietario del fondo di esonerarsi dalla detta indennità dimostrando, che la servitù derivava da sola Consuetudine, ed era meramente affermativa o facoltativa, ed assumendo inoltre il peso di recingere il fondo, e ridurlo intieramente a miglior coltura”<sup>45</sup>.

As regards the procedure of liquidation of the pastures, it depended completely on the provincial Presidents that were more adequate, due to the territorial nature of their office, to know the specific cases that might happen in reality. To file a petition in front of the Provincial Authority, it was sufficient to submit a memorial that had to specify the location of the land, its area, its agricultural valuation and if it was registered both in the name of the owner and of the person entitled to the servitude: it was also necessary to specify with details the nature

<sup>43</sup> L. Milella, *I papi...*, pp. 90-93.

<sup>44</sup> Art. 9, Notificazione della Commissione governativa di Stato, 29 dicembre 1849. My translation: “In accordance with the regulations of this law, the rights mentioned in Art.1 derive from an expressed or presumed title and they consist in the negative or prohibitive servitudes”.

<sup>45</sup> Art. 10, Notificazione della Commissione governativa di Stato, 29 dicembre 1849. My translation: “The owner of the land can be exempted from paying the compensation if he demonstrates that the servitude derived exclusively from the custom, and it was merely positive or optional, and, furthermore, he has to bear the costs of the enclosing and of the better culture of the land”.

of the servitude that had to be released and the modality and the norms that were going to be applied for the compensation.

At that point, the request of liquidation was communicated to the President of the counter party (the owner of the *ius pascendi*), who had a maximum period of one month to accept, modify, or reject the proposal. In case of modification or rejection, the President had to promote a friendly settlement between the two parties. Once he had obtained the agreement, an expert selected by the parties or, in case of disagreement, three experts selected by the owner of the land, the person who used the pastures and the President, made an evaluation.

The result of the expert's evaluation was communicated to the parties and, if they accepted it, the verbal process regarding the releasement of the land and the nature of the compensation was written; otherwise, a friendly settlement was established in front of the President and, if it was unsuccessful, the President himself had to make a decision, which could be appealed in front of the superior administrative authorities.

The last regulations of the norm covered the most delicate part of the topic regarding the pastures, meaning the preservation, in favour of the community, of a big quantity of lands, that were the result of the liquidation, for the benefit of the *cives*. Therefore, if the collective rights belonged to all the citizens, the liquidation would have affected various lands and those lands would have composed a group of lands reserved to the Municipality, which would have adopted the rules to regulate their use in favour of the agriculturists and of the breeders, after receiving the approval of the Ecclesiastical Authorities.

The ancient procedure for the promulgation of a Law that abolished the "hateful servitude of pasturage" had finally come to an end, with a text that included 23 Articles and that summarised, in its clear and simple statements, decades of discussion, physical and doctrinal fights, legal battles, and changes of governance.

## 6. CONCLUSIONS

In this conclusion, we go back to the clash between past and present that we have described before.

It is true that both the medieval and the modern voice echoed together in the 19<sup>th</sup>-century debate, but this doesn't mean that they both had the same strength and the same ability to penetrate that specific historical moment. Therefore, it was obvious that the rights to pasture, as they were described by the defenders of the collective rights, would have prospered in the Middle Ages, when the way to define the anthropological relations, the mainly pastoral economy, the reduced



population of the countryside, the notion itself of the forms of appropriation were the ideal environment for them to take hold. The modern context was different: the population growth, the new technical acquisitions in the domain of agriculture and especially the predominant individualistic culture, an expression of the bourgeoisie, required a growingly intensive exploitation of the soil that was difficult to reconcile with the mixed use caused by the *ius pascendi*. By then, the prevalent legal culture was favourable to the individual owner, seen as the pillar of the economic system, and those who opposed to this concept were accused of anachronism. Fighting against the official bourgeois culture meant fighting a losing battle.

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### Summary

During the 18<sup>th</sup> century, an increasingly strong individualistic attitude in the way of understanding the relationship between man and the tangible world spread throughout Europe. The legal institution which, more than any other, suffered from the effects of this reductionism was the Property as victim of incredible compression in comparison to medieval world. The exclusive model that the new Enlightenment and the bourgeois mentality wanted to adopt was the individual Property, to the detriment of all those forms of possession documented in the Middle Ages. The present study intends to investigate, in the geographical context of the Papal States, the great juridical dispute between the individualistic model – endorsed by the Sacred Legislator – and that of a collectivistic nature defended by the Community.

### KEYWORDS

property, Papal States, *Jus pascendi*, 18<sup>th</sup>-19<sup>th</sup> centuries

### SŁOWA KLUCZOWE

własność, Państwo Kościelne, *Jus pascendi*, wiek XVIII, wiek XIX