

Memory of collective identity and Law: On the category of "Historical Constitutional Law" (Customs and Law, Rights and Law) and its administration in the Basque Country*

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INTRODUCTION

What we know as the Basque Country today consists of the provinces of Basse Navarre, Zuberoa, and Lapurdi in France, and Alava, Gipuzkoa, Bizkaia and Navarra in Spain. These territories lie on either side of the western end of the Pyrenees, both inland and along the Atlantic coast. From a physiographical viewpoint, however, there are two different Basque territories, one on the north or oceanic side, the other, the interior, on the south or Mediterranean side. In the oceanic area, there is a "valley section"¹, like the region between the Scottish Highlands and Lowlands, *Goiberri* and *Beterrri*, both with very different historical dynamics, and the coast. In the 16th century, Garibay, once secretary to King Philip II, and who wrote books on Spanish and world history, noted the difference between the Basques of the mountains and rural areas, who lived close to

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keeps and castles, and the Basques of the valleys, the urban Basques.²

The territory of Vasconia was described by the “cosmographer of Ravenna”³ in the 7th century and in the 16th century, a translator named Joannes Leizarraga used and applied the name Euskal Herria, both in the geographical sense and as a synonym for the Basque community as a whole.⁴ A. Oihenart published the “Notitia utriusque Vasconiae”, the history of Vasconia, in Paris in 1637⁵. But when W. Humboldt, the Prussian intellectual and politician, arrived in the Basque Country in 1801, he was surprised to find that the inhabitants were not known by a single common name:

“When one wishes to refer to the Basque nation in its entirety, one is perplexed at being unable to find a term that is acceptable to Spaniards, French and Germans. The French have no general denomination. They use *biscayens*, when they speak of the inhabitants of the peninsula; *basques* when they refer to French Basques and where necessary they have recourse to the old name: *cantabres* (...). The inhabitants themselves take their names from the provinces: *vizcainos*, *guipuzcoanos*, *alaveses*.. Thus has this unhappy people lost even the unity of its name.”

Humboldt concludes that “when one wishes to speak of the people that live in the area encompassed by the French Basque Country, the Spanish Basque provinces and Navarra, use Basques;”⁶ However, it must be noted that the common denomination in euskara, (Basque language) *Euskaldunak*, avoids the problem altogether.

Today there are two different autonomous public administrations in Euskal Herria - Vasconia, the territory of the Basque people: the Basque government administers the western region, the Navarrese government the east, while the North has no specific administration as it forms part of the French *Département des Pyrenées Atlantiques*.

In the 19th and 20th centuries, Basque history viewed from the Spanish side has gradually evolved into “the Basque question”⁷. The Basque Country has enjoyed successful economic development, and underwent an industrial revolution at the end of the 19th century.

The interpretation and administration of the past can come to form part of present-day juridico-political law. A European example might be that of Basque society, but also, in a broader sense, those societies that are governed by an historical constitution, such as the case of the United Kingdom.

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Memory is not only something that refers to the past but also has its impact on contemporary culture, since contemporary societies can only define themselves in their historicity. The differential and particular characteristic of every human collectivity is universality inherent *per se*. The rupturist distinction of time between past and future is being replaced by a continuous, constant flow in an uninterrupted circle, in which humans feel themselves to be heirs as well as creators. From this perspective, categories such as historical rights begin to acquire a greater plausibility, in particular for those peoples that have lived in an oral tradition, with barely any writings of their own or with late written codifications of their individual and collective rights. The oral tradition, which gives evidence of a mode of life and of the relations of a community with its surroundings, becomes a legitimate source for their rights in as much as they are the subjects of a collectivity. Recourse to memory becomes essential in all communities and individuals with a will for future projection. But memories must be analysed and criticized to produce history.

The administration of the past is directly related to the microphysics of power and in particular with the legitimation of a given power, whether dominant or adominant . Historically, appeal has been made to dynasty, to race, to religion, to language, to common history in the search for stable forms for the legitimation of an established power, for the organisation of political communities. Nowadays it is the unitary will, the daily plebiscite, that is appealed to, but this is not sufficient. The new modernity in its critique of the 19th and 20th centuries demands the inclusion of collective memory, the communitarian dimension of the individual subject endowed with universal rights.

“Mythology and symbolism have always provided “maps” and “moralities”; today, ethnic mythologies and national symbolismes can furnish the maps and moralites of modern nations, once the have been reconstructed and reinterpreted to meet modern needs.”⁸

Do human rights apply to collective subjects?

The source of Law can be the statutory law of the State or the original law of the community. In this sense, historical law derives from the practice and memory of the original law of the community and not necessarily from the institutions or recognition of the new nation-state. But in any moment

change is possible because there is not necessarily determination by the past. Memory and History locate peoples in the present day.⁹

In this contribution we will offer our view of what “the past” - its construction and administration - consists of in Basque society. This society is at present politically divided; it forms part of Western Europe; it was incorporated for a long period of time within the two great Spanish and French monarchies; and it was successful in its process of economic modernisation (it is a European region with an early industrialisation). At present in the Basque society of the Spanish state, one half of the population is calling for the widening of the self-government that it enjoys, as a continuation and updating of its historical power of self-government, “historical law”, in order to exercise political sovereignty and to constitute a political nation recognised within the European Union, and it appeals to historical law and the right to self-determination. The other half is content with the self-government established by the Statute of Autonomy and the Spanish Constitution, the First Additional Article of which states that it protects the historical rights of the *foral* territories, that is to say of Vasconia. Interpretation of the past is risky and difficult in divided societies since it is also interpretation of the present.

Language, law, “moralities” are the constitutive elements of a collective identity. In this contribution we will try to set out how the interpretation of the past has been administered in the Ancien Regime and in the present day and with what consequences, since it is incorporated into the juridico-political law in force through the category “Historical Rights”.

The use of this category in the modern sense in the Basque Country was begun by Pablo Alzola in 1890 to refer the foral political-administrative institutions and their powers, abolished as a consequence of the Spanish Parliamentary law of 21st July 1876. In 1917, the manifesto of the Basque provincial institutions made use of this category to appeal for political autonomy in the framework of the Spanish state.

In the field of law it is necessary to at least briefly indicate that in origine private law, circumscribed to lineage or to the family, extended its ambit of application to new public social spheres in the modern period that began in the 16th century, and that in the liberal revolution of the 19th century the public administration acquired increasing relevance. In this way, the usages of the past pass into the sphere of the public administration and the institutions

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that depend on it. Lineage and defence of the noble status of the different lineages was of great importance in the Ancien Regime. But law was extended to territorialisation and finally became fixed on the communities that made up the territory. At present, the state does not hold a monopoly of the administration of historical memory, which it formerly exercised directly or through academic institutions. The centres of socialisation of the interpretation of the past have multiplied and the school syllabus is not at present the most important or significant when it comes to establishing the contents of the past in the individual and collective memory of a society. The Constitutional Tribunal of the Spanish state, the Parliament of Spain and the Basque territorial assemblies have become interpreters and administrators of historical law, of the memory of the historical institutions. The present day juridico-political law of Navarra, officially the Foral Community of Navarra, its autonomous public power, was justified by appeal to historical continuity in such a way that the conservatives (with the support of the Spanish Socialist Workers Party) were able to prevent a referendum to approve the *Ley de mejoramiento del Fuero*; by virtue of this the Navarrese had already taken a permanent decision in favour of the above formula.

COMPOSITE MONARCHY AND THE FORMATION OF THE NEW NATION-STATE IN EUROPE AND THE IBERIAN PENINSULA : THE NEW MYTHS FOR LEGITIMISING THE ROYAL POWER.

Attention should be drawn to the ruptures in European society of the 15-16th centuries and that which took place at the end of the XVIII century and into the 19th century.

In the former there was a reinforcement of the power of the king and his network of loyalties; he was able to form composite administrative monarchies, taking the form of empire.

During the 17th century the Spanish empire broke up: Lisbon became the center of the Portuguese state and empire and Madrid in Castille, the capital of the Spanish empire. Portugal, Castille, Aragon-Catalunya and the Navarrese Kingdom were a political community but 17th century Conde-duque Olivares formulated the unity of Spain and this provoked the reaction of Portugal and Catalunya. The new Spanish myth-symbol complex with its

centre in Castille came into being.

In the second rupture, the new state formula was that spread from France by Napoleon and it became established in the form of the nation state model. The nation state is a one of the models for the political articulation of different societies. The tension between uniformity and differentiability is apparent in the reflections made by W. Humboldt in 1801 referring to the Basque Country and the Spanish monarchy, but they can be extended to the other monarchies of Europe.

“How should the Basque nation be treated by the Spanish Monarchy (since, for the French Republic, the Basque districts can only have a very secondary importance) to make its strength and its activity as advantageous for Spain as possible? (...) The second question has a higher practical interest, even more so now since it is frequently the case that different peoples are united in the same State. But it must be freely confessed that until now more thought has been given only to getting rid of the difficulties which disparity sets up, than in making use of the good which peculiarity brings with it.”¹⁰

He who controls the past controls the future. In consequence, the powers organised around the King had their chroniclers their interpretation of historical events, since in the Ancien Regime history, historical legitimacy, is a source of legislation and authority. The organisation of the academies in the 18th century and their development of the so-called national histories were to be the sign of the established dominant power. The academies became the administrators of history and political leaders studied history as a formula for representing problems of the present in the past. History became the framework of representation of a community for the conquest of immortality and the immutability of the established mechanisms of power.

Currently, the Royal Academy of History is attempting to control the contents of the history text books used in schools in order to guarantee a single and homogenised History of Spain. In the report published on June 27th 2000, the Academy attacked the histories of Spain produced in the political and cultural communities of Catalonia, the Basque Country and Galicia, without any critical vision of the history produced from the postulates of Castille. The Academy publishes books on the “being” of Spain - for the Academy it is literally a question of “to be or not to be” - cultivating and

frequently fomenting essentialism and a concept of the eternal History of Spain, one that attributes a messianic role to Spain within universal history.¹¹ This is a mythomoteur of enormous energy and, in consequence, local history is by definition a morbid accident, a contradictory dysfunction of national history, the only one that merits the rationality of the Enlightenment.¹² But what is the history of Spain within, for instance, American or global history?

It should thus come as no surprise that at the end of the XIX century the Basques were a people without history. At the Congr s de la Tradition Basque held in St. Juan de Luz in 1897, the following question was formulated: Do the Basques have a history? Hence one must also pose the question of the administration of the negation of the history of certain human communities.

The political communities that resisted the discourse of the dominant power articulated historical discourses, complementary in some cases, alternative or divergent in others, as can be observed in the European historiographies. The representative assemblies of territorial communities were the bodies that endeavoured to elaborate historical discourses in order to legitimate their power; these were drawn up by jurists contracted for this purpose. In the 18th century, for example, at the height of the French Revolution, Polverel¹³ was contracted to administer the past of the Kingdom of Navarra and to defend the rights of the Navarrese, that is to say, the Basques of the territory of *Ultrapuertos*, in the new political constitution of France. He failed in his aims and they were dispossessed of the historical rights corresponding to them by virtue of their historical legitimacy.

Nevertheless, my case study refers to the same period, in which the protagonists were later to be the Basque territorial communities within the framework of the Iberian peninsula.

The success of the process of socio-economic modernisation in the Basque Country of Spain was without doubt a decisive factor in the relative success in the 20th century of the project of a Basque nation. But the first Basque *nationalitarian* formulation was devised by a French Basque, Agustin Chaho, in Bayonne; he held a republican ideology and unsuccessfully defended the *communitarian* rights of the valleys of the Pyrenees and their collective organisations. Nonetheless, he was the creator of new myths and legends that enjoyed great success in historical-romantic literature.

We thus have two agencies of power and of administration of the past: the nation-state and the territorial communities, with collective

representative assemblies. Evidently, in a society of classes history can also be interpreted from an aristocratic, bourgeois or plebeian-popular perspective. Differences of fortune and opportunity within the community also condition how the past is viewed.

CHANGES/CONTINUITIES OF THE MYTHS AND THE IMAGINED COMMUNITY

The oral character of their culture was an element of great importance amongst the Basques. Until the 16th century, a cosmivision of natural phenomena, a cultural mythology that sanctioned values (see the Dictionary of Basque Mythology by J. M. Barandiaran) was transmitted, which coincides with elements of the plebeian culture of Western Europe.

What is myth? It is the reality of the imagination, the myth exercises protection of a culture on the defensive, as well as preserving the sacred collective dimension of the individual in society. Myth is a force of action and interpretation in which chronological historical time is not operative; instead a permanent interpretation or administration of history takes place, of a lasting time, with changes in its form and flow. Oral transmission endured, and at the plebeian and popular level the verses of the “*repentistas*” are evidence of the working of the characteristics that define the collective community.

In the 16th century the gestation of a series of myths and legends took place, which became historical dogmas in Bizkaia and the western Basque Country and contributed to the formation of the political mentality with consequences for historical interpretation and also for juridico-political law. The falsification of history, is frequent in Spanish 16th century history. The historical dogmas were to be operative in the administration of the past carried out by jurists at the service of the theses of the representative assemblies of the Basque territories in order to oppose the royal resolutions and those of the *audiencias* (law-courts), such as that of Valladolid. The institutionalisation of the Assemblies can be interpreted as representing the republican-plebeian atmosphere against Royal power and chiefs of the lineages. Thus, for example, in a fiscal lawsuit of the Valladolid *audiencia* the collective *hidalgua* (noble status) of the inhabitants of the *seigneurie* of Vizcaya was denied; the *Junta General* of Vizcaya entrusted Licenciado Poza with its defence and wrote *De Nobilitate in proprietate*, incorporating into its doctrine the legend of the battle

of Arrigorriaga, the figure of *Jaun Zuria*, the *Senor*, and the pact with the community for the defence of its rights. This myth was to be used in 1893 by Sabino Arana, the founder of Basque nationalism in Bilbao, in order to justify and reclaim the originally independent status of Bizkaia and to formulate the bases of his nationalism which was initially circumscribed to a partial territory of Vasconia, that of Biscay.

Other dogmas were “*Cantabrisimo*”, the absence of Roman domination and hence an originally independent status, the pact between the *Senor* and the community, as two subjects of power, and igualitarian society and primitive monotheism.

In Navarra, the conquest of the Kingdom of Navarra by Castilian troops was the element that conditioned subsequent historiography and the administration by the *Cortes* of Navarra of history in its juridico-political allegations. A jurist of the parliament of Navarra, A. Oihenart, who lived in St. Palais, in French Navarra, in the French Basque Country, carried out the transition from a *Navarrista* historiography to one with a “Vascon” (Basque) character. In 1637, he published the *Notitia Utriusque Vasconiae, Tum Ibericae, Tum Aquitanicae*.

Memory, constitutive element of subject-individual freedom and subject-national community

That the recourse to memory is essential in all communities and individuals with a will to projection is an interpretation emphasised by J.G. Herder in his *Philosophy of History for the Education of Humanity*, written in 1791. “What is the nation?” E. Renan asked in 1882, to suggest that communities are not predestined in a providential way to realise an ideal. He concludes with his well-known formula of the daily plebiscite, and hence the ideal is realised in daily plebiscites. Then history, its management, becomes instituted as a central element. Herder and Renan, in the end formulate a positive vision towards universal harmony, whether by way of providence or by way of rationalism.

One can wonder how a collectivity or society becomes a nationality, agent of political power. History, the margin of historical interpretation has its importance, as do the customs of collective memory. The appeal to dynasty, to race, to history, to religion, to language, to a common mythology with past glories and a unitary will and the maintenance of this attitude from day

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to day can become the referential unity of the community.

At the end of the 20th century we are living in a society without memory, the present is lived without reference to the past or to the future. However, collective memory is an ingredient of integration, cohesion and adaptation to changing realities.

THE CONSTRUCTION AND DECONSTRUCTION OR THE ADMINISTRATION OF POLITICAL MYTHS IN THE BASQUE COUNTRY

Memory manifests itself in time, it is constructed and deconstructed in the life experience of individuals and their communities.

For the evaluation of a memory of collective identity it is necessary to establish it in a time of long duration. The changes brought about in the 15th and 16th centuries following a long internal civil struggle made possible the consolidation of representative assemblies in territories of Vasconia. Different political subjects were constructed in these *Juntas*, facing the growing bureaucracy of the monarchy and also facing the chiefs of the lineages of the sides in conflict. In the context of a double dialectic - of the internal cohesion of the community facing the chiefs of the lineages, bearers of a social structure founded on ties of consanguinity; and of the affirmation of the power of self-government facing the absolutist monarchy - a new power was built around the representative assemblies that aspired to represent the community. The result was the construction of a politico-administrative regime, which was called *foral*, legitimised with an intellectual discourse, whose principles were inspired by collective historical memory, installed in the Judeo-Christian cosmivision of the Bible. The expulsion of the different groups, (jews, gypsies, blacks) that were distorting the homogeneity of the collective was the method employed. Purity of blood constituted the political argument and myth *par excellence*.

The endurance over time of the representative *Juntas Generales* - political governments that developed solid public administrations up until 1876, and self government of the Basque countries - is an unforgettable experience of government, which served to mature a *foral* community, an imagined one but also with a real juridical and institutional foundation.¹⁴

The consolidation of the Bourbons on the Spanish throne in 1713 and the abolition of the political regimes of the composite Spanish monarchy -

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the Kingdom of Aragon was assimilated to the public laws of Castille - meant that the situation in the Basque countries became an exception in the new context of political and administrative unification.

The impact of the French Revolution generated the birth of a new collective agent, the people or the nation, politically sovereign, for the introduction of every type of change. The military categories of love for the fatherland, defence of the country's honour, the nation, came to form part of the circle of civil society. Donde se decia Real ahora se afirma el pueblo o la nación.

Contemporary to this, the jurists of the *Juntas Generales*, all of whom were fervent reformists and enlightened encyclopaedists, appealed to the *foral* constitution, that is to the historical constitution of the Basques.

The consequences of the French Revolution, the immigration of the French clergy and their relocation in the Basque Country, gave rise to a widespread fear about the consequences of the Enlightenment and some clergymen elaborated a counter-revolutionary body of thought appealing to the collective historical memory.

The poem *Antxinako enuskaldunen alabantzak*, "the glories of the ancient Basques", probably written around the year 1800, after the War of the French Convention, is the paradigmatic text *par excellence* for knowing the political myths. In the narrative the question is asked about the cause of the permanent collective wrongs suffered by the Basques: And the reply is given that it is because of their defence of the faith of Christ, their old laws and the Basque language. These arguments, with the exception of the religious reference, have survived in the collective memory up until the present day. In sum, it reflects the struggle for the collective existence of the community, a doctrine taken up by Basque nationalism. In the historical community there is no historical time, rather there is another conception of time and continuity.

We can see "how historicist intellectuals press "science" and scientific method into the service of poetic construct"¹⁵ of national mythologies and "myths of ethnic origins and descent". Communal culture linked with Asssemblies is the basis of Basque political civilisation and its myth-symbol complex.

In the 19th century civil wars between Liberals and Carlists, revolutionaries and counter-revolutionaries in Spain, Basque society appears identified as the region of resistance to revolutionary change, although the

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political élites were aligned with Liberalism. Nevertheless, the first civil war, from 1833 to 1839, was also the object of a communitarian-ethnic interpretation or dimension, which embodied the resistance of the mountains, the highlands, in the work published in 1836 by Agustin Chaho in Paris: *Voyage a Navarre pendant l'insurrection des Basques*. The war ended in the Basque Country by an agreement between the military forces of the two sides on August 31st 1839, but mention is made in the agreement, with the intervention of Lord Hay, representative of the United Kingdom, of the question of the *fueros*, of the history of the Basque representative institutions. Thus in September and October the question was debated in the Spanish national parliament, and a law of the Spanish parliament once again introduced the *fueros* (old customs and law) into the constitutional scene: the Law of October 25th 1839, which functioned in practice as an Additional Law to the Constitution. The historical *fueros* should be adapted to Spanish juridico-constitutional law. The national parliament was raised as the new instance for their interpretation. The Basque representative assemblies, except in Navarra, were re-established and in their turn were raised as interpreters of *historical* tradition, that to say, the historical background.

Following the political abolition of the *foral* system, in 1876, at the end of the 19th century a formulation of nationalism emerged that was clearly anti-Spanish and had an exclusive character; this was in a climate and at a time of successful industrial revolution. A century later, in 1979, representative institutions were recovered. This is without any doubt one of the elements that contributes to the consolidation of a collective political identity that goes beyond the merely cultural or "ethnic" formulations. It is a sign of continuity, of perseverance in favour of political self-government.

19TH CENTURY: THE DEBATE BETWEEN THE FUEROS (HISTORICAL CUSTOMS AND LAW OF THE PEOPLE THE BASQUE TERRITORIES OR "FORAL CONSTITUTION") AND THE SPANISH LIBERAL CONSTITUTION: AN EXAMPLE OF THE ADMINISTRATION OF THE PAST.

In 1793, following the declaration of war between the French Republic and the Spanish monarchy, there was a meeting of the delegates of the *Juntas Generales* of Bizakaia, Gipuzkoa and Alava. In the first paragraph they set out

their “desire to conserve their *Fueros*, *Franquezas* (franchises) and Freedoms” in the face of recently introduced juridical and political novelties. Immediately after this appear questions relating to iron, the iron inspector in Cadiz, the exportation of iron ore, the prohibition preventing the free circulation of money, foreign products and the taxes charged on the products of Basque proto-industry at the customs posts. They were concerned with “*improving the Constitution of the Country and consolidating the Brotherhood which they wished to perpetuate*”. In France the new constitution had been proclaimed, while the Basque ruling élite had created a society of Friends of the Country and had thus shown itself to be identified with Enlightenment values. In social terms, this élite represented an aristocracy impregnated with bourgeois values and it aimed to perfect the historical constitution in such a way that the social edifice would not suffer damage or revolution, but reform, thus enabling them to conserve their political protagonism and political leadership.

In 1808, the first debate took place in Bayonne concerning Napoleon’s constitutional project for Spain. The representatives of the Basque representative assemblies responded to the summons, circulated by the duke of Berge in 1808, to attend the meeting at Bayonne convened to discuss and approve the new political Constitution for Spain, which would put an end to the backward character of the Spanish monarchy as it was perceived by the French and pro-French revolutionaries. The meeting was attended by outstanding institutional representatives from the Deputations of Bizkaia, Gipuzkoa, Alava and the Kingdom of Navarra, the Consulates of Bilbao and San Sebastian and the Church, amongst others. The delegates from the Basque Deputations, belonging to the titled aristocracy, but closely linked with the practices of the commercial bourgeoisie of the cities, with whom they were closely joined through matrimonial policy, set forth in their contributions a politico-ideological discourse forged in the final years of the Bourbon monarchy. According to which their province was politically and administratively self-governed by its own constitution, which was qualified as *foral*. The marquis of Montehermoso, Hortuño Aguirre, deputy of the province of Alava, declared that without the “*foral* constitution” the inhabitants of Alava would face ruin¹⁶. José María Lardizábal also mentioned the Constitution of Gipuzkoa¹⁷. Juan José María Yandiola, representative of Bizkaia, delivered the most ideological and politically reasoned speech in defence of the historical Constitution of Bizkaia. In his reflections he

intelligently analysed the effects of the new liberal constitutions on the Historical Constitution, concluding that Bizkaia had built a liberal constitution “*avant la lettre*”. Hence: “There was need in Spain of a Constitution, and V.M.I. and R. have done well in giving it one: but Vizcaya has one that has given happiness to its inhabitants for several centuries and without which they cannot exist”¹⁸, for which reason the political existence and the survival of the inhabitants of the provinces mentioned above were inseparably joined to the fate of their particular constitutions.

Evidently, with the liberal revolution a new problematic arose with the formation of citizens subject to rights. Within the ambit of the *Juntas Generales*, in the dialectic towards the centre of monarchical power as well as towards the interior of society, different historical myths and dogmas were forged as we have mentioned.

The liberal revolution brought about the deconstruction of the institutional and imagined edifice, while amongst the popular classes the latter survived but following another rhythm. The forceful emergence of myths and dogmas of the new politico-administrative model, the Spanish nation-state, which arose from the disintegration of the empire structure, did not bring the disappearance of institutions that served to articulate an ambit of discussion and representation of power. The Catalan and Galician renaissance flourished in the XIX century, but only the Basques conserved their own politico-administrative and juridical edifice until 1876, the remains of the imagined *foral* community.

The representative *Juntas* continued to function and play the role of reproduction and social diffusion. There was a strengthening of common organisation, by which I mean the meetings of the *Conferencias*, and at these the function of administrator and interpreter of history was performed by the jurist-lawyer until 1876 and from 1900 onwards by “*the chronicler of the Vascongadas provinces*”.

In the XIX century formulations were produced concerning the Basques as a cultural nation, particularly in the French Basque Country, and concerning the Basques as a political nation in the framework of the new Spanish state.

THE FUEROS/CONSTITUTION DEBATE CAN BE SUMMARISED IN THE FOLLOWING TERMS:

The *Fueros* were the expression of a public power and represented the juridico-political personality of the Basque Territories. They found expression in a system of self-government, with powers and institutions, with their own autonomous and original law. At the same time they established and articulated relations with other higher political entities, the crown, the state; unions with the Basque instance as well as with the Spanish instance were interpreted by the representative *Juntas Generales* as *pars anexa*.

Basque nationalism recreates this tradition and in the 20th century provides an oral transmission of the ideological foundations for collective identification and the process of national socialisation. But the problem is always posed in terms of political power and self-government, and the appeal to memory is a system of communitarian legitimation. Political power is the permanent line of continuity and the legitimating intellectual construct is altered and adapted according to the dictates of the principles of the legitimation of power.

Scientific bodies, literary societies, journals, are some of the nuclei within which the new imagined communities emerge. Historiography, history as a legal instrument of legitimation and its evolution play a relevant role. The analysis of historiography offers us the intellectual level, analysis of the popular verses spread through oral literature refers us to the popular imaginary. The *matxinadas* or social revolts are references to the breakdown of natural justice and of the need for reconstruction.

During the fascist dictatorship, when the attempt was made by Franco to impose a single Spanish nation, the political collective memory of the Basques, deconstructed by the public power, took refuge in oral family memory. It was in the circles of primary socialisation where Basque nationalism was conserved and reproduced. With the obtention of a political and fiscal power in 1981, the appeal was made to the collective political subject, and at the present time the debate is between those who consider that the ceiling of self-government is sufficient and those who call for a status as nation-state in the framework of the European Union, that is to say the *sobernatitas* (*those in favour of sovereignty*).

In the contemporary metropolitan areas we are witnessing an accelerated process of deconstruction of historical memory, the utilisation of the category

of time as a formula for analysing social reality, by this means the dimension of change is prevented. This is a new social and cultural reality that also destroys the discourse of identity.

HISTORICAL CONSTITUTIONAL LAW AND THE CONSTITUTION OF 1978

Since the promulgation of the Spanish Constitution of 1978 the idea of the historical law of the foral territories, (the Basque Country) has acquired constitutional standing, since the First Additional Disposition states that it protects historical foral statutory law. Its interpretation resulted in contradictory resolutions by the Constitutional Tribunal between 1984 and 1988. On the former occasion the need was raised to request an investigation that would be capable of delimiting what those rights were, but in 1988 it was specified that the result of the investigation could not replace the legal mandates.

However, as becomes clear in other rulings, the delimitation of powers is made with reference to historical LAW¹⁹. Since the Law of October 25th 1839 the historical right contained in the foral system has been the object of confrontation with the Liberal constitution.²⁰ This was a case of two different juridical matrixes, but in political terms there would be room for realising a synthesis as a formula for preserving the politico-institutional personality of a community²¹.

From 1844 onwards, the *fuerrista* liberal élites, and those on the Carlist side who called themselves *fuerristas*, attempted to apply a formula of permanent updating, given that the body had been re-established that could legitimate successive decisions, in so far as as it was the depository of forality: the *Juntas Generales*.

The minutes²² of the *Conferencias*, meetings of the delegates of the Basque *Juntas Generales*, offer a doctrine of historical interpretation, a type of operationalisation facing the problematical contradiction between the *Fueros* and the Constitution, carried out by the political leaders of the 19th century. The minutes reflect the idea of historical right in relation to the *foral* system and the efforts to adapt it to the Constitution. The legislative dynamic established in the Spanish *Cortes* ignored that reality. Following the suppression of the *Pase Foral*, the relocation of the customs posts and the establishment of the judicial system, the education laws, the laws of armed corps and the

law of disentailment were all applied in disregard of the *foral* system. Others such as the statistics law were the object of negotiation. The overall dimension of the system began to disappear, giving way to what would be called residual *fueros*²³. However, the Deputations, meeting in *Conferencias*, maintained a level of interlocution, which in some cases, depending on the political conjuncture, achieved a certain adaptation, which we could interpret as the updating of historical right in the Spanish constitutional framework.²⁴

We must not overlook the fact that emblematic elements of the “historical constitutional law,” such as exemption from terrestrial military service, the independent tax system or its own institutions (the *Juntas Generales*), condensed the expression of the *foral* system that continued to be in force.

In the light of the minutes of the *Conferencias*, an evaluation can be made of the maturity or decline of historical right in the 19th century. In the opinion of Gregorio Monreal maturity was reached in the 19th century²⁵, while in that of Juan Pablo Fusi a “stage of full *foral* maturity” was reached after 1839²⁶. Nonetheless, P. Alzola understood that *foral* autonomy reached the highest development of its powers in the period of the Economic Concerts. His contemporary and political opponent F. Sagaminaga defended the idea that the *Fuero* could not be reduced to “a mere code of provincial administration,” attributing it with a clear content and significance of political power. At the end of the 19th century, the “Euskara” personality *par excellence*, Arturo Campion, replaced *fueros* with Basque nationalism, following the doctrine that Sabino Arana formulated in Bilbao from 1893 onwards, the same year as the great political and social *fueros* mobilisation in Navarra, the so-called *Gamazada*, in opposition to the project of fiscal centralisation and a reduction of residual *fueros*. A. Campion referred to the new “Basque nationalist” concept as a “new expression, old design”.

In these interpretations we must not overlook the acts of force that took place and the standstill brought about in the global perspective of the *fuero* with the progressive presence of the state in the new public tasks, which it assumed to the detriment of the evolution and updating of the *foral* system. But the social strength of the traditional dynamic was sufficiently vigorous to achieve a new framework for asserting the political personality of the community in the framework of the constitutional system. The *foral* system was a mechanism of cohesion and integration in the process of building a modern political community in the Basque Country. Now then, if we judge

the frustrations of the liberals - moderate *fueristas* - it seems evident that they did not manage to legally establish the degree of autonomous development that they wanted (close to a "dual federalism") within the framework of the new liberal Spanish state, and the dominant current of Spanish liberal constitutionalism, inspired by a unitarian project (there were also federalist and Iberianist projects), truncated their project. From 1877 onwards, in spite of the Law of July 21st 1876 that abolished the exceptional situation that had been introduced by the Law of 1839, the weight of institutional inertia and the balance of forces made possible the creation of a differentiated fiscal community, without delimitation of its powers in juridico-political terms²⁷.

The analysis of the minutes of the *Conferencias* is one of the documentary sources that makes it possible to become acquainted with the different interpretations regarding Basque historical statutory law and their updating. In reality, this is an opportunity for evaluating the degree to which they were updated during a specific constitutional system, together with the limitations of juridical dogmatism, in order to perceive the changing socio-political realities. It is possible, without anachronisms, to reflect on and measure the level of theoretical, ideological and practical development achieved by the *foral* system in a period as intense and broad as that between 1775 and 1936. Evidently, we are unable to evaluate the development of the *Foral* administration in terms of the public administration of the modern nation state²⁸; but there was obviously an underlying philosophy or political vision in the *Foral* political administration to create a political community. It is my understanding that the origins and formation of the different political cultures, amongst them the Spanish and Basque nationalisms in the Basque Country, can and should be reinterpreted in the light of this fabulous politico-administrative experience that is represented by the federal organisation of the territorial Deputations and their periodic meetings, referred to by the name *Conferencias*: a type of *anfitionia*, the confederation of city-states of Ancient Greece, but which in the Basque Country also occurs in the territorial assemblies formed by the federation of the municipal councils. But will this type of *anfitionia* be accepted by the historical culture of the mythologies of the nation-states? An analysis of recent historiography shows that historians are participants in the discourses of historical "renationalisation" of their respective national identities in the states of Great Britain, France, Germany and Italy, a neo-nationalist renaissance in combination with a new European identity. Once

again historians are to be found in the roles of providing historical legitimacy to these nation-states²⁹. In my opinion, the new history of Telepolis, the virtual city, is another experience in historical production for the new human collectivities.

NOTAS:

¹ GEDEES P.: *Cities in Evolution*. London, 1915. CARO BAROJA J.: *Vasconiana*. Madrid, 1957.

² CARO BAROJA J.: *Los vascos y la historia a través de Garibay*. San Sebastian, 1972.

³ See "Wasconia" territory in *Mappemonde de Saint-Sever*. (11 century) Council Library. Zurich). LARRAÑAGA K., "De "wasco" a "Wasconia" y "Vascongadas". *Disquisiciones sobre ciertos corrimientos onomáticos en la alta edad media*" In : Langaik, N°8-9. Pamplona, 1985, p. 64.

⁴ *I Leicarraga -s Baskische Bücher von 1571 (Neues Testament, Kalender und Abc) im genauen Abdruck herausgegeben von Th. Linschmann und H. Schuchardt*. (Strassburg 1900) *Iesus Christ gure Iaunaren Testamentu berria othoitzga ecclesiaticoen forma Catechismea. Kalendrea ABC edo Christinoen instructionea*. Bilbo, Euskaltzaindia, 1990.

⁵ OIHENART A., *Notitia Utriusque Vasconiae, tum Ibericae, tum Aquitanicae*. (Paris 1637) Vitoria-Gasteiz, Basque Parliament, 1992 (facsimile ed.).

⁶ Wilhelm von Humboldt. *Gesammelte Schriften*. Herausgegeben von der Königlich-Preussischen Akademie der Wissenschaften. Fünftzehnter Band. Wilhelm von Humboldts Tagebücher, Herausgegeben von Albert Leitzmann Zweiter Band. 1799-1835. Berlin B.Behr's Verlag Berlin, 1920, pp.1-3. HUMBOLT W. *Los Vascos*. Translated by Telesforo Aranzadi, En *Guillermo de Humboldt y el Pais Vasco*, San Sebastian, Eusko Ikaskuntza, 1925, pp 117-118. Michelena L.: *Los vascos y su nombre*" *Revista Internacional de Estudios Vascos*, T. XXIX, 1984, p. 11-29.

⁷ EGAÑA J., *Ensayo sobre la naturaleza y trascendencia de la legislación foral de las provincias vascongadas*. Madrid, 1850.

⁸ SMITH Anthony D., *The ethnic origins of Nations*. Oxford, 1989, p.202.

⁹ CLAVERO B., "Derechos humanos(individuales) y derechos históricos(colectivos) "in *Derechos históricos y constitucionalismo útil*. Bilbao, Fundación BBV, 2000, 63-77. "La

historia no es nada extemporanea en el edificio de unos derechos no sólo individuales, sino también colectivos. La naturaleza produce individuos y humanidad, mientras que es la historia la que genera culturas y pueblos”.

¹⁰ Wilhelm von Humboldt, *Gesammelte Schriften. Herausgegeben von der Königlich Preussischen Akademie der Wissenschaften. Fünftzehnter Band. Wilhelm von Humboldts, Tagebücher*, Herausgegeben von Albert Leitzmann, Zweiter Band. 1799-1835. (Berlin B. Behres Verlag). Berlin, 1920. HUMBOLDT W, Los vascos. Trasl. Telesforo Aranzadi, In *Guillermo de Humboldt y el País Vasco*. San Sebastian, (Eusko Ikaskuntza) 1925, p. 120. “Firstly, I will communicate the observations I wrote down during my stay in Spanish and French Vasconia and I will make every effort to provide the reader by means of these with a clear conception of this small country and its inhabitants. This is necessary in order to gain a just understanding of a great part of the language with which, naturally, the customs of the nation and the local of the country are interwoven; but even without that, it is interesting to move into the midst of an intelligent, inspiring and active nation that inhabits the north of a southern country and the mountains of a coast, being for this reason a seafaring and mountainous people, and one which combines in its character what in other parts is only to be found in isolation; and which, besides, in the time when I visited it, possessed a free constitution and formed a federative state, divided into many small municipalities separated in their turn by localities; thus, because of the situation, the legislation and the liveliness of character, I was often reminded of the small free states of ancient Greece.”. Humboldt W. “Anuncio de una publicación sobre la lengua y nación vascas: su punto de vista y contenido”. In GARATE J., *Guillermo de Humboldt. Estudio de sus trabajos sobre Vasconia*. Bilbao, 1933, p.120.

¹¹ *España. Reflexiones sobre el ser de España*. Madrid, Real Academia española de la Historia, 1997.

¹² In the historiographical introduction to the official history of Spain written by R. Menendez Pidal in 1947 it states, “El localismo como accidente morboso” con la siguiente conclusión: “Por el contrario, federalismo, cantonalismo y nacionalismo modernos vienen ellos por sí a destruir la unidad multiseccular y no logran estabilizarse; lejos de representar la España auténtica no responden sino a un momento anormal y transitorio, desmayo de las fuerzas vitales que no puede prolongarse sin grave peligro. Aparecen como una enfermedad, cuando las fuerzas de la nación se apocan extremadamente; pues toda enfermedad consiste en el autonomismo de algún órgano que se niega a cooperar al funcionamiento vital unitario del cuerpo”.

¹³ POLVEREL, *Constitution du royaume de Navarre et ses rapports avec la France*. Paris, 1789. DESTREE A. *La Basse navarre et ses institutions de 1620 a la révolution*. Zaragoza, 1955. MAÑARICUA A., *Historiografía de Vizcaya. Desde Lope Garcia de Salazar a Labayru*. Bilbao, 1973. GOIHENETCHE J., *Les Basques et leur histoire. Mythes et réalités*. Baiona, 1993. CATALAN D.”Introducción. España en su historiografía: de objeto a sujeto de

la historia", en, MENENDEZ PIDAL R., *Los españoles en la historia*, (ed. 1951), Madrid, 1991, p.16.

¹⁴ AGIRREAZKUENAGA J. "The abolition of the Representative Assemblies in the Basques Provinces during the Rise of the Liberal Revolution(1789-1876)" *Parliaments, Estates and Representation*, Vol. 14, nº2, 1994.

¹⁵ SMITH A., *op.cit.* p. 191

¹⁶ "...their ruin would be inevitable, through lack of the Constitution that they enjoy, which is the origin and the source of the happiness of all the inhabitants", Minutes of Bayonne, p. 107.

¹⁷ *Colección de Documentos inéditos de la Historia de Guipúzcoa*. San Sebastián, 1958. Pp. 103-104.

¹⁸ *Ibidem.* P.109.

¹⁹ HERRERO DE MIÑON, M. *Idea de los derechos históricos*. Madrid, 1991, pp. 24-25.

²⁰ AGIRREAZKUENAGA J., "The making of the "Basque" political institutions: the federal association of the representative assemblies during the Liberal Revolution (1793-1833), *Parliaments, Estates and Representation*, 17, 1997.

²¹ CLAVERO, B. "El cambio político a examen clásico: de la diarquía jurisdiccional a la monocracia constitucional". *Antiguo Régimen y liberalismo. Homenaje a Miguel Artola*. Madrid, 1994, pp 127-135.

²² AGIRREAZKUENAGA J. (ed.) *La articulación político-institucional de Vasconia: Actas de las Conferencias firmadas por los representantes de Alava, Bizkaia, Gipuzkoa y eventualmente de Navarra (1775-1936)*. Bilbao, Diputación Foral de Bizkaia, 1995, 2 vols.

²³ PORRES, J. *Política y derecho. Los derechos históricos vascos*. Oñati, HAEE/IVAP, 1992, p.82.

²⁴ AGIRREAZKUENAGA J., "People, State Forms and Representative Assemblies : The Making of the "Basque"Political Institutions from the Sixteenth to the Nineteenth Centuries" *Parliaments, Estates and Representation*, 16, 1996.

²⁵ MONREAL, G. "La crisis de las instituciones forales públicas vascas", *II Congreso Mundial Vasco. Historia de Euskal Herria, Economía, sociedad y cultura durante el Antiguo Régimen*. San Sebastián, 1988, pp. 5-36. "Entidad y problemas de la cuestión de los derechos históricos vascos", *Jornadas de estudios sobre la actualización de los derechos históricos vascos*. Bilbao, 1986, pp. 49-82.

²⁶ FUSI, J.P. "Introducción", *España. Autonomías*. Madrid, 1989, p.19.

²⁷ OLABARRI, I., "Un conflicto entre nacionalismos: la 'cuestión regional' en España, 1808-1939", La España de las Autonomías. Madrid, 1985, pp. 69-147.

²⁸ ALONSO E. *Continuidades y discontinuidades de la administración provincial en el País Vasco. 1839-1978. Una "esencia" de los derechos históricos*. Oñati, IVAP-HAEE, 1999

²⁹ "Apologias for the nation-state in Western Europe since 1800" in *Writing national histories. Western Europe since 1800*. (edt. S. Berger, M. Donovan, K. Passmore). London, 1999, pp. 3-13. "Historians today would do well not to continue the unholy alliance with governments and states in constructing diverse forms of national identity, but rather to show up these identities as multi-faceted, fragile, contested and continually in a state of making and remaking".

RESUMO: O Direito desempenha um papel relevante na formação, consolidação e exercício da identidade nacional basca na história ibérica e europeia. Constituições históricas são decisivas para a sustentação das identidades, tanto no caso do País Basco como no da Grã-Bretanha, por exemplo. A legitimação da comunidade nacional e do poder real, na estrutura da monarquia espanhola, é um fator relevante para a compreensão e a explicação do caminho histórico encetado, de constituir a identidade política basca pela lei e pelo direito.

PALAVRAS-CHAVES: identidade nacional, memória histórica, política, autonomia, mito