

# What is the English Constitution? The Answer of John James Park in the Crucial Year 1832\*§

UGO BRUSCHI

ASSISTANT PROFESSOR OF MEDIEVAL AND MODERN LEGAL HISTORY AT  
THE UNIVERSITY OF BOLOGNA ALMA MATER STUDIORUM

DAVIDE ROSSI

ASSISTANT PROFESSOR OF MEDIEVAL AND MODERN LEGAL HISTORY AT  
THE UNIVERSITY OF TRIESTE

## SUMMARY

1. CONSTITUTIONAL DEVELOPMENTS FROM THE GLORIOUS REVOLUTION TO THE ACT OF SETTLEMENT. – 2. THE AFFIRMATION OF THE ROLE OF PRIME MINISTER AND OF RULE BY CABINET. – 3. TOWARDS THE CRUCIAL YEAR. – 4. THE LONG, EVENTFUL ROAD TO THE REPRESENTATION OF THE PEOPLE ACT. – 5. THE DOGMAS OF THE CONSTITUTION.

## ABSTRACT

*From the 1688 revolution to the beginning of 19<sup>th</sup> century, the English constitution underwent a deep transformation. While the divine right of Kings and the royal prerogative*

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\* Both form and contents of the lectures delivered in Trieste in March 2012 are here echoed to a reasonable extent (*Triestine Lectures*, Faculty of Law, field: *History and Technique of European Codes and Constitutions*). Footnotes are thus limited to references to actual quotations and to an essential bibliography.

This paper is the forerunner of a forthcoming book that will include the Italian translation of J. J. Park's work *The Dogmas of the Constitution*, along with its examination. As such, it was thought of, planned, discussed and revised together by both contributors. However, as the needs of each individual CV are involved as well, it is necessary to point out that the first and second paragraph come under UGO BRUSCHI's authorship, whereas the third, fourth and fifth paragraph under DAVIDE ROSSI's.

§ This paper has been submitted to an external referee.

waned, the role of Prime Minister and rule by Cabinet became paramount; a two-party system gradually imposed itself in the new-born "Great Britain". But this essential change went nearly unobserved by political thinkers and jurists of the time, with the notable exception of J.J. Park, who published *The Dogmas of the Constitution*, a sharp denunciation of the gap between theoretical and actual constitution, in 1832, the year of the Great Reform Act.

#### KEYWORDS

BRITISH CONSTITUTION - CONSTITUTIONAL THEORY - GLORIOUS REVOLUTION - GREAT REFORM ACT - J. J. PARK - PRIME MINISTER - RULE BY CABINET

*'If constitutional change has been gradual in Britain, it has certainly not been in a straight line of even progression. A cynic might describe it as long periods of lethargy interspersed with sudden bouts of energy'*<sup>1</sup>

#### 1 – CONSTITUTIONAL DEVELOPMENTS FROM THE GLORIOUS REVOLUTION TO THE ACT OF SETTLEMENT

In 1688 the Glorious Revolution was a turning point not just in the political history of England, but in the development of the Constitution as well. Having imposed on the fiercely anti-Catholic majority of his subjects a policy strongly bent on the rehabilitation of Catholics and a drive towards absolutism clearly reminiscent of the unlucky attempt of his father, the executed Charles I, King James II had to face a strong opposition in the country, and eventually gave up any attempt to defend his crown on the field. The Glorious Revolution (so called because bloodshed was avoided in England, although not in Ireland and in Scotland) ended with the King fleeing into exile and throwing the Great Seal of the Realm in the Thames (so it was said, at least), whereas William III of Orange (1650-1702; King of England 1689-1702) was called to the throne, and reigned along with Queen Mary Stuart, James's daughter. The new ruler was a strong Protestant prince with a keen military talent and had been called to England by an appeal of political and religious leaders of the country, after the birth of a Catholic heir to James II in June had brought the crisis to a head. William's strength depended both on the military force he deployed (mainly Dutch veterans) and on the fact that he was soon to become the only practical alternative to a civil war. Hardly anybody who had experienced the chaos generated by the fight between King and Parliament half a century earlier was likely to choose a new, violent

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<sup>1</sup> LORD HOLME OF CHELTENHAM, *The Changing British Constitution: Checks and Balances*, in Torre-Volpe (Eds.) *La Costituzione Britannica / The British Constitution*. Atti del convegno dell'Associazione di Diritto Pubblico Comparato ed Europeo. Bari, Università degli Studi, 29-30 maggio 2003, I-II, Giappichelli, Torino, 2005 (*Diritto Pubblico Comparato ed Europeo. Convegno*, V), pp. 567-573, at p. 567.

struggle. Nonetheless, William had to accept a compromise. After a conflict that had begun during the reign of Elizabeth I, and had reached tragic results during the reign of the Stuarts, parliamentary forces were not ready to assign the crown to a King who had not accepted clear legal restrictions to the power he was to wield. It must not be forgotten that the decision to forego the rights of James II and assign the throne to a new prince whose dynastic rights were weak was not an easy one, and led to a fracture in the front itself that had stood against the Stuart King. The interpretation of the flight of the King as an act that had left the throne 'vacant' (and not simply an abdication, that would have implied an heir) was not self-evident: the risk of turning hereditary into elective monarchy was clearly perceived. It is therefore unsurprising that in the following years attempts of the Jacobite forces to regain the crown were not without a certain backing in the country, and played also a role in the dialectics between the new-born parties, Whigs and Tories. These parties (curiously enough, their names were in the beginning terms of abuse...) had originated a few years before, during the 'Exclusion Crisis' (1678-1681), i.e. the attempt to exclude James, at the time Duke of York and heir presumptive, who had converted to Catholicism in 1669, from the succession of his brother, Charles II. The long crisis had ended with the dissolution of Parliament in March 1681, and James – who had been sent to Scotland for a few years – came back to London with his right to the throne untouched. At this juncture, the Tories had lined up with the King, whereas the Whigs had shared the feeling of suspect and fear at the prospective of a Catholic monarch that was widespread in the country. Generally speaking, the Tories envisaged a commanding monarchy and feared the return of a powerful parliamentary authority, while the Whigs aimed to a limitation of the prerogative powers of the monarch that had to be counterbalanced by a strong Parliament.

At the beginning of 1689, with James II exiled in France and William and his army in London, the 'Convention Parliament' had to face a rather complex constitutional dilemma. In the House of Lords there was a certain opposition against choosing the Prince of Orange as King; even most of the bishops whose resistance to James's Declaration of Indulgence had precipitated the crisis sided against this alteration to the established laws of succession, on the ground that such an option would be as illegal as the royal acts they had opposed beforehand. In the House of Commons, the Whig majority maintained that the King had broken the covenant with the people, thus neglecting his duties, and leaving the throne vacant. The idea of a vacant throne was not, anyhow, compatible with the traditional theory of hereditary succession, expressed in the old formula, *the King never dies*. This implies that at the death of the monarch, his/her heir immediately and automatically succeeds: if it was the Parliament's task to decide who was to ascend to the throne, an elective monarchy was virtually established. Such an idea was therefore opposed by moderates, who also disliked the concept of a contract between King and Nation. William and Mary refused the proposal to reign as regents while James lived, and afterwards as his heirs (the new-born Prince of

Wales had clearly been easily forgotten). In the end, the offer of the crown to William was a compromise not deprived of ambiguity: the Tories could call James's flight 'abdication' and his physical absence 'vacancy of the throne', whereas the Whigs could hint at the breach in the fundamental law of the country and to the infringement, on the King's part, of the covenant between him and his people. Anyhow, one thing was clear: no one was ready to be responsible for an explicitly revolutionary settlement.

The ascension to the throne of William and Mary, however, marked the beginning of a new era in the relations between Crown and Parliament: oddly enough at the beginning of the reign, neither the King nor the Parliament had any legitimacy without the other.<sup>2</sup> The new regime is usually described (but some historians disagree) in terms of a constitutional monarchy, although not of a parliamentary monarchy. As a matter of fact, the interpretation of the Glorious Revolution and the Bill of Rights as the beginning of parliamentary sovereignty was largely indebted to the Victorian constitutional theorist and jurist Albert Venn Dicey and should be abandoned as it overstates the implications of the 1688 settlement. The long struggle between King and Parliament, ended in 1689, had been concerned with the limits of sovereignty, and therefore it was highly unlikely that, after having imposed limits on the authority of the King, the new settlement would not vest any limit to the authority of Parliament: the risk of a potentially boundless power was clearly felt, and feared. In 1689 the supreme legislative power, despotically wielded by Stuart kings, had been transferred to the *King in Parliament*, that is to say the combination of the powers of the Crown and of the assembly in Westminster. After kings, parliaments and army had all endeavoured to monopolize power in the previous decades, although unsuccessfully, compromise seemed the only possible solution. It is therefore extremely unlikely that a boundless power would be granted to Parliament. More than in terms of parliamentary sovereignty, the new system can be described in terms of a parliamentary-based government. What was offered to William and Mary 'was therefore an expressly (and no longer impliedly) limited Crown'.<sup>3</sup>

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<sup>2</sup> 'The Convention Parliament was no Parliament. [...] Historically, Parliament was an agency of the crown, summoned by the sovereign, or at least in his name, as with the Parliaments which had forced out Edward II and Richard II. The Convention Parliament of 1689 had not been summoned in any king's name, but by an alien. It bore no resemblance to the Convention of 1660, which had merely asked the legal ruler to return to his own. But the Convention Parliament of 1689, without legal status, legislated the alien who had summoned it into king; and he then assented to a measure transforming the Convention into a regular Parliament. For legal purists all this was impossible' (LOVELL, *English Constitutional and Legal History. A Survey*, OUP, New York, 1962, pp. 394-395). On the ensuing paradox, see WICKS, *The Evolution of a Constitution. Eight Key Moments in British Constitutional History*, Hart Publishing, Oxford and Portland (Oregon), 2006, p. 15: 'In a revolution fought to preserve, rather than overthrow, the law, this was a curious basis for settlement, but 300 years of Crown and government rest upon this strange turn of events'.

<sup>3</sup> *Ibid.*, p. 11. It is to be admitted, though, that there is some evidence also for a reconstruction of the events as an affirmation of parliamentary sovereignty, especially with reference to the arbitrary dynastic change decided by the assembly at Westminster both in 1689 and with the

With the Declaration (= “An Act declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne”, 13<sup>th</sup> February 1689) and later the Bill of Rights, the role of Parliament and Rule of Law<sup>4</sup> were nonetheless recognized by King and Queen. The Rule of Law binds the sovereign, whose power can no longer be called absolute; there is a new cooperation in the exercise of power: *King in Parliament* as to the legislature, *King in Council* as to the executive and *King in His Court* as to the judiciary. As a result of the Bill, the powers of the sovereign were limited, and the rights of Parliament were set out. They included rules for freedom of speech in the House (*‘the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’*), along with conditions for regular elections to Parliament (*‘election of members of Parliament ought to be free’*) and the right to petition the King without fear of retribution. These issues had been a reason for disagreement between Crown and Parliament since the first parliaments of Queen Elizabeth I. In the context of the 1688 crisis, parliamentary forces realized that this was an excellent occasion to state the limits of the royal prerogative while testifying what rights belonged to MPs. The Crown had also to respect laws approved by the Parliament, without neglecting or suspending them (*‘the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parliament is illegal; the pretended power of dispensing with laws or the execution of laws by regall authority as it hath been assumed and exercised of late is illegal’*). Every royal interference with the law was banned: even though the sovereign is still the fount of justice, he cannot unilaterally establish new courts or act as a judge. The Bill of Rights also warranted that no taxation could be established by royal prerogative: the agreement of Parliament became thus necessary for the implementation of new taxes. Cruel and unusual sanctions were prohibited, and the right to bear arms was granted to non-Catholics. A further bugbear of the previous decades, a permanent army under control of a powerful leader, was excluded as well: *‘the raising or keeping a standing Army within the Kingdome in time of peace unlesse it be with consent of Parliament’* was banned; actually, though,

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Act of Settlement in 1701. GOLDSWORTHY, *The Sovereignty of Parliament. History and Philosophy*, Clarendon, Oxford, 1999, pp. 142 ff. claims that at times the power of *King (or Queen) in Parliament* was described as absolute, i.e. not subject to any *legal* remedy, even though it was not unlimited. See also *ibid.*, pp. 190-191, for a further possible distinction between ‘legality’ and ‘constitutionality’, and their relation to the limits of sovereignty. As a matter of fact, the solutions to the constitutional crisis in 1688 and to the impending one foreshadowed by the upcoming death of Queen Ann without an heir apparent were always the result of difficult compromise. This fact probably allows for very different interpretations of their outcome. It is not at all surprising that in 1689 *Some Observations Concerning the Regulating of Elections to Parliament*, by Anthony Ashley-Cooper, 1<sup>st</sup> Earl of Shaftesbury and one of the founders of the Whigs, appeared posthumously, displaying a sharp opening: *‘the Parliament of England is that supreme and absolute power, which gives life and motion to the English government’* (quoted in Browning (ed.), *English Historical Documents 1660-1714*, Routledge, London – New York, 1996, p. 211). Nonetheless, one cannot help wondering how many agreed, at court, between High Churchmen, between MPs, and even in the country as a whole?

4 Rule of Law had long been symbolised by *Magna Charta*, especially chapters 39-40.

permanent armies under the control of the King remained part of the political scene well into the Georgian era. Finally, with a decision that was later reinforced by the Act of Settlement, Catholics – and consorts of Catholics – were excluded from the succession to the crown: ‘all and every person and persons that is, are or shall be reconciled to or shall hold communion with the see or church of Rome or shall professe the popish religion or shall marry a papist shall be excluded and be for ever uncapable to inherit possesse or enjoy the Crowne and government of this realme’.

It is remarkable that, although a success for parliamentary forces, the Bill of Rights cannot altogether be considered as a sort of imposition on the new King, nor the sign of any acceptance, on his part, of the contract theories of government. The Declaration of Rights before the Bill had in truth echoed the one issued by William of Orange before landing to England with his army: in that masterpiece of propaganda<sup>5</sup> not only had William claimed his wife’s rights to the succession of James II, even calling in doubt the authentic birth of James’s new-born Catholic son, but, quite more poignantly, he had avowed that the aim of his journey to England was the defence of the ancient rights of the English people. These rights were perceived as a part of Common Law tradition against the Stuart’s attempt to create despotism, even though they were actually creations of more than a century’s struggle between Crown and Parliament. Once incorporated first in the Declaration and then (in a slightly different version) in the Bill of Rights, such privileges could not be denied by William, who had exhibited them just a few weeks before (30<sup>th</sup> September 1688). In answer to the so-called ‘invitation’ of the peers who were opposing James II, he had claimed that his expedition to England was ‘intended for no other design, but to have a free and lawful Parliament assembled as soon as possible’. Having been recognized as a traditional restraint on the power of the Crown, which existed before James II and whose denial had brought forth the King’s fall, the rights granted by the Bill could not be deemed an imposition on William, nor the acknowledgement of a contractual origin of his power.<sup>6</sup>

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5 William’s manifesto had a crucial impact: not only was it issued in around 60,000 copies (‘in an age in which even the best-selling political pamphlets were rarely printed in more than 2,000 or 3,000 copies’), but secret on its exact content was strictly guarded until the very last moment: cf. ISRAEL, *The Dutch Role in the Glorious Revolution*, in Israel (ed.), *The Anglo-Dutch Moment. Essays on the Glorious Revolution and Its World Impact*, CUP, Cambridge, 1991, pp. 105-162, at pp. 121-122.

6 The Prince of Orange had come to England with the purpose of obtaining English assistance for the United Provinces in their fight against France. In order to achieve this aim, William was ready to grant some limitation to the power of the Crown; in the interim between his landing at Torbay and his coronation he was tireless in his assertion that the new constitutional settlement that was taking shape was consistent with his Declaration. Cf. ISRAEL, *General Introduction*, in *The Anglo-Dutch Moment*, pp. 1-43, at pp. 17-19.

Most historians deny that the Declaration and the Bill of Rights amounted to a set of conditions that William had eventually to accept: a different position is held by SCHWOERER, *The Bill of Rights: Epitome of the Revolution of 1688-89*, in Pocock (ed.), *Three British Revolutions: 1641, 1688, 1776*, PUP, Princeton New Jersey, 1980, pp. 224-243, who maintains that the Bill was a radical document

Although it marks a border between Parliament's legislative power and the prerogative of the Crown, the Bill does not include the catalogue of rights a 21<sup>st</sup> century jurist would probably expect to find in such an important part of the English Constitution. As a matter of fact, this was not the aim of the Bill: it was meant to explicitly state the limitations on monarchic power. As such, it had first a political value, and only later a juridical one. Nor did it claim to be anything new: apparently the Bill was restoring an important legacy of the past, the ancient constitution (the adjective had at the time rather prevalent positive undertones) attacked by James II. The Bill provides a new settlement of power between Crown and Parliament:<sup>7</sup> individual rights emerge just as far as they are mirrored in their dialectic.

Although some limits to his power had been clearly declared, the King retained nonetheless the royal prerogative, i.e.:

- he was head of State and of Anglican Church;
- he appointed members of the Privy Council, high ranks of the Army, Navy, Church and civil service;
- he granted honours and gave titles and privileges;
- he was in charge of diplomacy, he issued declarations of war and peace, and formed international treaties;
- he summoned, prorogued and dissolved Parliament, he created peerages;
- he could refuse the royal assent to bills approved by the Parliament, thus preventing them to become law (= veto).

It is impossible to deny that he was still a *governing King*.

Anyhow, the real sanction of the revolution settlement was the new financial system put in place after the Glorious Revolution. It created a strong dependence of the monarch on the support of Parliament, in order to have enough supplies to carry out his policy. After 1688 it can be said (in Trevelyan's words), 'No King after James II has ever been in a financial position even to attempt to break the law or quarrel seriously with the House of Commons'.<sup>8</sup> It was largely because of the practical need to secure finances that Parliament (although in theory still called by the monarch) was continually in session. A difficult, lingering problem was thus solved: among the causes of the fight between Crown and Parliament earlier in the century had figured the reluctance of the tax-payers to contribute to the

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expressing the position of those that aimed to change not just the King, but kingship as well, although 'in sum, more was hoped for than was achieved in the Bill of Rights; more was achieved than has been always appreciated' (ibid., p. 237).

<sup>7</sup> A century afterwards Thomas Paine will censure this aspect of the Bill, dismissing it as 'but a bargain which the parts of government made with each other to divide profits, power and prestige': *The Rights of Man*, Penguin, Harmondsworth, 1969 [1792], p. 215.

<sup>8</sup> TREVELYAN, *The English Revolution 1688-89*, OUP, London, 1938, p. 180.

cost of unpopular policies, and their political ability through Parliament to refuse supplies. Given the new political context created by the Glorious Revolution, this contrast was finally solved, thanks to a psychological rallying of the 'middling' sort, gentry and nobility behind the Crown and its policies. This result was achieved after 1689, in the early stage of the wars against France; the consequent financial revolution solved the long-lasting financial problems of the Crown. The new system was based on a severe land tax, the beginning of an excise tax and the foundation of the Bank of England. But this new settlement was built on the concession of parliamentary control over both policies and resources to enforce them. Having thus created a strong need of the King for the cooperation of Parliament, it became quite unnecessary to enact that Parliament ought to be held frequently. In 1694, anyhow, the *Triennial Act* required general elections to be held at least every three years: it 'was the first statutory restriction upon the royal prerogative of dissolving Parliament and must be regarded as a significant curtailment of royal power'.<sup>9</sup> Between the tactics used by Parliament to control the executive, the practice of 'tacking' must be mentioned, too: it was usually used as a last resort, and it meant an attempt by Parliament to attach to money Bills clauses relating to other issues, in order to grant them the royal assent. One has to bear in mind, though, that if the Houses had the possibility to exercise a certain control over the monarch, the Crown had the opportunity to limit parliamentary authority thanks to the division between Whigs and Tories. As a matter of fact, in the political game, the measures proposed by the Crown could usually count on the support of one of the two parties, and a keen display of royal influence or of strategy could lead the monarch to command a majority in the House of Commons. The practice of balanced ministries usually followed by William and – more often than not – by his successor, was a step in the same direction.

Whereas William III was jealous of his prerogative, under the reign of Queen Ann I (1665-1714; Queen of England and later of Great Britain 1702-1714) a cabinet system received strong impulse. One should not forget, in this perspective, the importance of the Act of Settlement, passed in 1701, during the reign of William III: it stated that Catholic monarchs, and those married to Catholics as well, were excluded from the throne. Furthermore, the law required that not merely must the sovereign be a Protestant, but he must also be a member of the Church of England (unlike William III). It also stated that, on the death of William III, the throne would pass to Mary's sister, Ann. After her death, it would be the turn of Sophie of Hanover, grand-daughter of James I, and of her descendants. The perspective of the installation of a foreign house on the throne of England probably led Parliament to envisage limits to their authority, especially as far as foreign policy was concerned; independence of the judiciary was granted as well, providing that judges could not

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9 O'GORMAN, *The Long Eighteenth Century. British Political and Social History 1688-1832*, Arnold, London, 1997 (*The Arnold History of Britain*), p. 37.

be removed without the assent of Parliament.<sup>10</sup> It must also be remarked that the Act of Settlement put an end to the issues that had been left open by the Glorious Revolution. Whereas in 1688 the Convention Parliament had not dared to affirm its right to call a new house to the throne and had chosen a shortcut, pretending to believe in the abdication of James II and apparently forgetting the existence of a Catholic heir, in 1701 the Parliament's right to choose the King was virtually established: rightful succession relented in front of political necessity. Whatever remained of the old panoply of the divine right of kings was soon to disappear. Already in 1696, incidentally, the formula of the Oath of Association passed by Parliament had included the definition of William III as lawful King that had been carefully avoided in 1689.<sup>11</sup> At the beginning of the 18<sup>th</sup> century a new constitutional system was definitely born, whose legacy is still of vital importance nowadays.<sup>12</sup>

## 2 – THE AFFIRMATION OF THE ROLE OF PRIME MINISTER AND OF RULE BY CABINET

During the reign of Ann the role of Whigs and Tories acquired importance, as the Queen, unlike William III, was not able to use the rivalry between the two parties

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10 This newly-established independence of the judiciary must not be overestimated, though. Until 1761 the sovereign guarded the right to dismiss judges when ascending the throne, and even though such a prerogative was exercised only seldom, it implied that influence of the Crown was still going on. Furthermore, wages were usually late, and until 1799 pensions depended exclusively on the King's will. Moreover, even if the Crown had lost most power to damage judges, it was still possible to cajole them, by granting them honours, appointing them (or their relatives and friends) to posts, even creating them peers. This explains the scepticism with regard to the actual independence of judges that can be traced in 18<sup>th</sup> century sources. Cf. LEMMINGS, *Professors of the Law. Barristers and English Legal Culture in the Eighteenth Century*, OUP, Oxford, 2000, pp. 270-274.

11 'The Act of Settlement [...] was the final ratification of the Revolution of 1688, and in its pronouncements on the succession it frankly ignored the comforting illusion of "legality" which some people still cherished. These people said that after all Mary II was the "true" heir of James II and that William III was king because he was her husband, which was not impossible logic and had the precedent of Philip I and Mary I. The theory became a little more strained with Ann. [...] However, to move the succession to Sophia in 1701 could not be justified on such grounds; it was an outright assertion that Parliament was free to decide the matter as it thought best' (LOVELL, *English Constitutional and Legal History*, p. 396). It is noteworthy, though, that the dual monarchy of William and Mary was totally unprecedented: their equal share in the dignity of the title – albeit the exercise of royal power resided, during his lifetime, with the King alone – implied a position quite more authoritative than the one granted to Philip in the 1550s: cf. MORRILL, *the Sensible Revolution*, in *The Anglo-Dutch Moment*, pp. 73-104, at p. 84

12 'The Bill of Rights, the Habeas Corpus Act (1679), [...] and the legal guarantee of an independent judiciary, which was enshrined in the Act of Settlement (1701) demonstrate the important contribution that Parliament made to establish the modern rule of law within the English constitutional system. [...] The rule of law and the guarantees regarding an independent judiciary, serving as the precondition of effective legal protection [...] are based without doubt on the legal sovereignty of the King in Parliament': PERNTHALER, *The English Roots of European and Global Constitution*, in *La Costituzione Britannica / The British Constitution*, pp. 521-530, p. 528.

in order to affirm the Crown's policy. The figure of the Prime Minister (although the position of Prime Minister had no official recognition yet) gained a greater significance, too. This was one of the most remarkable features of the time, as far as the constitutional system was concerned, along with the growing importance of the Whig party. The most important event of Ann's reign was the birth of the Kingdom of Great Britain, after the *Act for the Union with Scotland* in 1707. The two kingdoms were unified as far as international legal personality, flag, great seal, army, navy, currency, taxation, units of measurement and political institutions were concerned, whereas the legal and the educational system of Scotland were preserved. The independence of the two churches in their government, discipline and worship was recognized as well. The Act of Union generated tension in the population, especially in Scotland where it was at times seen as an incorporation of the kingdom of Scotland in the kingdom of England. However, in 1707 a new entity was doubtlessly created, as it is confirmed by the beginning of new institutions. A new Parliament was born through the union of Scottish and English parliaments, although the unification was sometimes felt as an annexation, since the new Parliament was still based in Westminster Palace and it fulfilled the functions of the previous English one.<sup>13</sup> The outcome can also be read as the birth *de jure* of a new Parliament, whereas *de facto* it was still the old Parliament – with the integration of a few Scottish MPs – which was going on. The 1707 events can strengthen the opinion that the 1689 settlement did not imply an unlimited parliamentary sovereignty (or, at any rate, that such sovereignty came to an end in 1707), as not only did the *Act of Union* include explicit limitations to the powers of the Houses (e.g. as far as Scottish legal and ecclesiastic system was concerned), but also it did not imply, as a whole, any such authority.

It was with the House of Hanover, though, that the 'Whig supremacy' (1714-1760) began and that juridical and political realities grew increasingly separate. The Whigs indeed did give their support to the new dynasty, whereas the Tories had eventually to accept the new kings, but were never able to support unambiguously George I (1660-1727; King of Great Britain and King of Ireland 1714-1727) and George II (1683-1760; King 1727-1760). The position of the Tories became awkward, as they traditionally lined up with the King and the royal prerogative. The adhesion of a minority of Tories to the Jacobite rebellion of 1715 was also used by the Whigs to discredit their opponents. Meanwhile, in May 1716 the *Septennial Act* unilaterally extended the life of an elected Parliament from three to seven years, thus also strengthening the pre-eminence of the Whigs, who had largely won the 1715 general election. The act was amended in 1701, reducing the maximum term of Parliament to five years.

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<sup>13</sup> Also the fact that the number of MPs granted to Scotland was inferior to the one corresponding to the population of the two countries increased this sensation. On the other hand, it must be remarked that as far as tax payment was concerned, the number of Scottish MPs was quite superior to the one Scotland was entitled to, and in 1707 this was a rather more important parameter. Previous negotiations show that the final solution was a compromise.

The role of the Prime Minister was not altogether new. Royal favourites had been granted a position of leadership in the government of the country since the reign of Elizabeth I at the latest, and George Villiers, later Duke of Buckingham, had been *de facto* King in the last years of James I's and at the beginning of Charles I's reign, until his nearly absolute (and sometimes whimsical) rule was stopped by Felton's dagger in 1628. Later on, the Lord Treasurers and other eminent members of the Privy Council had enjoyed great autonomy from the King and played a role similar to that of the Prime Minister, until their fall – a fall that sometimes did not just cost them their office, but their wealth or their life as well. In the 18<sup>th</sup> century, though, the situation changed. Whereas clever politicians like Cecil and royal favourites like Buckingham had been trusted to the highest degree by Kings or Queens, and had often been attacked by the House of Commons or, at any rate, had to face its potential, if not always concrete, hostility, the new figure of the Prime Minister had to deal both with the Crown and with the Houses of Parliament, and his power was founded in both relationships. It must be noted that with the first kings of the house of Hanover the political role played by the Crown declined, as the monarchs were a bit of aliens in the British society (George I even spoke only little English) and therefore hardly envisaged personal political aims (with the relevant exception of foreign policy, especially as far as Hanover was concerned). The long lasting (and sometimes knotty) dialectics between King and Parliament of the previous century was thus transformed in subtler dialectic between the leader of the Cabinet, who enjoyed the confidence of a nearly absent King but relished in his own independence, and the Houses. A minister was no more just a counsellor – although a very influential one – of the monarch, but was undergoing a transformation: he became the man to whom the actual policy of the country was entrusted.

Words can sometimes tell an interesting story: as remarked above, the terms used to identify the two parties playing an essential role in British eighteenth-century constitutional history, Whig and Tory, were originally insults, and also 'Prime Minister' was long used derogatorily, implying unjustified royal favouritism. The first important leaders of the Cabinet, such as Godolphin and Harley during the reign of Queen Ann, had to defend themselves against the accusation of being a 'Prime Minister', as this was a non-existing office in the British constitution. After all, the first use of this title in an official act occurred two centuries later, in the *Chequers Estate Act* (1917), when the officer '*now popularly known as Prime Minister*' was allowed the use of a state-owned country house. One cannot help wondering that after such a long time in which Prime Ministers had been the heart of British government, the corresponding title was still deemed just depending on general use.

Even Sir Robert Walpole (1676-1745; *de facto* 'Prime Minister' 1721-1742), who actually created the role of Prime Minister, denied this title. When he was attacked on the ground that he was wielding a power and an office not accounted for in the constitution, he replied that, on the contrary, as one of the King's coun-

cil he had just one voice.<sup>14</sup> Regardless of what he said, anyway, a very relevant change occurred with Walpole: he created a new position and changed the balance of the constitution. Before him, every minister was appointed by the King and was individually responsible to him; with Walpole the leader of the Cabinet shouldered responsibility for the government as a whole. His power was rooted in the position he held in the Cabinet, and in his control over the House of Commons. Walpole united the Treasury – of which he was head – with the political leadership in the Commons. He was First Lord of the Treasurer and Chancellor of the Exchequer as well, thus displaying a strong authority over financial policy as a whole. His decision to sit within the House of Commons allowed him to have ascendancy over its members in every possible way, bribery (or, at any rate, a very unscrupulous use of patronage)<sup>15</sup> and propaganda not excluded. Walpole enjoyed a double confidence, both of the House and of the Crown. Moreover, he was leader of the dominant party, the Whigs, thus assuring a stronger control over Parliament. Walpole was a great leader of the House:<sup>16</sup> not only was he very good at manoeuvring MPs, he was also very often present during debates and using his oratory skills to win the day. In the long run, this state of affairs will lead to the birth of the party system as well.

The role of Prime Minister developed as a constitutional convention that emerged as necessary in the new settlement created in 1689. On the one hand, the increase of routine government business made it impossible for the monarch to exercise personal control, thus implying the assistance of a cabinet. Furthermore, the executive responsibilities of the Crown depended for their enforcement on parliamentary supplies, and therefore the need of an influential liaison between monarch and Parliament was deeply felt. A Prime Minister was just what was called for: the King needed a strong parliamentary leader in his closet, a man who could command a strong majority in the House of Commons. Otherwise, the risks of being unable to implement policies in face of a reluctant Parliament were too high: in order to rule Parliament, the head of the executive needed to sustain majority support in the Commons. Support of the King, although still crucial, was not sufficient to retain power. On the other hand, support of

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14 It is a bit of a paradox that the role of Walpole as Prime Minister was especially emphasized by the opposition (especially contemporary press).

15 The use of patronage was made easier by the progressive control of the Prime Minister over the granting of many honours that previously belonged to royal prerogative. Unlike his 19<sup>th</sup> century successors, Walpole did not use patronage in order to control his fellow cabinet or party members, but especially to win the support – or, at least, the neutrality – of political opponents: personal and public interest therefore overlapped.

16 The following Prime Ministers did not always share Walpole's decision: as late as 1902 Prime Minister Lord Salisbury chose to sit in the House of Lords (obviously no Prime Minister ever thought to follow his example after the *Parliament Act* in 1911). It is noteworthy, though, that when in 1767 even a remarkable statesman as Pitt the Elder decided to accept the earldom of Chatham and to go to the Lords, his choice fatally weakened the Cabinet (cf. O'GORMAN, *The Long Eighteenth Century*, p. 206).

the King was still essential, and the House of Commons needed a reliable interlocutor with the Crown. The double role played by the Prime Minister provided an answer and also led to a reduced freedom of choice for the King, who had to appoint a political leader who could command an important parliamentary majority, regardless of his own personal preferences. It is premature to say that the monarch had to choose the leader of the party which was returned to Parliament with a majority of seats after a general election, as in the 18<sup>th</sup> century ministers could not count on a reliable party support and had to create their own majorities; nonetheless, it was a step in that direction. When in the late Nineteenth century the emergence of strong disciplined political parties enabled the Cabinet to dominate the House of Commons and become the beneficiary of the sovereignty of Parliament, the Prime Ministers of the time were reaping what had been sown by their ingenious 18<sup>th</sup> century predecessors. It must be mentioned, though, that the new position of Prime Minister did not always have a smooth course, as their leadership depended more on their personal achievements than on party accomplishments: whereas eminent figures such as Walpole and Henry Pelham managed to perform the new office with remarkable skill, their successors could not sustain the same position.<sup>17</sup>

The personal character of Walpole's rule was also emphasized by his rivals and by contemporary opposition press. It was Henry St. John, Viscount Bolingbroke (1688-1751), Walpole's main competitor, who, deeply disliking his regime, described that period in terms of an antithesis between a 'court' and a 'country' party. As a matter of fact, this distinction was not new: an ideological and political contraposition between court and country has indeed been recently alleged between the possible causes of the English civil war. Its roots were at least dating back to the beginning of the Stuart era, if not to the last years of Elizabeth's reign. In Bolingbroke's interpretation, anyhow, this dichotomy had a different value, being more concerned with a moral attitude than with the structure of society. Furthermore, whereas in its antecedents the word 'country' was related to the world of counties, i.e. of local, and sometimes rural authorities, Bolingbroke used it as a reference to the Country as a whole, to the superior interests of Great Britain. The 'court party' was, according to Bolingbroke, a faction, more than a party, whose members were ready, for selfish reasons, to submit the Parliament to the predominance of the Crown. Such a choice would eventually lead to the ruin of the post-1688 order: the balance of the constitution, achieved with the Glorious Revolution, could be destroyed by a growing predominance of the Crown, or – even worse – by a deprivation of Parliament's authority, through preponderance of a personal rule and of selfish interests. One must bear in mind that the Whig supremacy was also marked by a strong decline of the Tories, who played an extremely limited role in the political life of the Country. They were cut

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17 In the long run, anyhow, even an authoritarian King like George III – who tried to impose ministers of his liking – could not overlook the stature gained by the figure of Prime Minister.

out from office and were a permanent minority in the House of Commons, also due to the nature of the franchise and to the distribution of borough seats that hindered their possibility of success in the infrequent elections. In Bolingbroke's opinion, therefore, the 'country party' was not exactly a party, but a sort of summoning to every honest man, in order to save the Country. In this effort, attention was paid to a larger involvement of the people, more than to the broad base of support commanded by the Tories in rural England: concern for public opinion was therefore not forgotten. Among the political differences between Bolingbroke's and Walpole's followers, the discussion on the value of the King's influence was primary. The role, once played by the royal prerogative, was now performed by the royal influence, which was usually expressed in granting honours and rewards to MPs. According to Bolingbroke, such a behaviour verged on corruption. It created dependence of the House of Commons on the Crown – and thus on the Cabinet – and could therefore bring to an end the well-balanced British constitution. On the contrary, Walpole's followers maintained that the influence of the Crown was necessary both in order to preserve the traditional balance in the constitution and to avoid the risks of too strict a separation between the branches of the legislature.

Two very important constitutional principles of the time being '*The King can do no wrong*' and '*The King cannot act alone*', countersignature of royal deeds became necessary. Likewise, ministers or undersecretaries had to be present, for instance, whenever the King met foreign diplomatists. Countersignature had existed before, but during Walpole's rule the ensuing accountability of ministers – that was previously only juridical – became political as well. However, even though many powers and prerogatives shifted from the Crown to the Cabinet, they were formally still part of the royal prerogative. Furthermore, the King played a key role in the executive and until 1781 he sat in the Cabinet as well. The shifting of such powers was due to constitutional conventions, but the executive power still wielded by the monarch acted as a counterbalance to the importance of Prime Ministers. A further factor restraining the Prime Minister's supremacy was that the Cabinet was not yet deemed to be collectively responsible for its policy. When in 1742 Walpole fell from power, only three Ministers shared the same fate. As a matter of fact, the idea of cabinet solidarity was hardly born: its members were usually appointed individually, not as a group, and they surely did not come into office on an agreed programme. Ministers were expected to agree just on certain issues, such as foreign policy, defence and finance.<sup>18</sup>

It was only during the reign of George III (1738-1820; King 1760-1820) that the fall of a Prime Minister led to the fall of the Cabinet. The King was, and still is, a controversial figure. He was the first Hanoverian King born in England,

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<sup>18</sup> 'Mid-eighteenth-century governments did not exist to carry programmes of legislation': DERRY, *Politics in the Age of Fox, Pitt and Liverpool: Continuity and Transformation*, Macmillan, London, 1990 (*British History in Perspective*), p. 10.

who spoke English as first language and was genuinely devoted to the Church of England; moreover at the time of his ascension to the throne, the political situation looked propitious. Satisfaction was not to last long, though. Judgement on George III's rule largely depends on a 'Whig' or a 'Tory' interpretation: according to the former, the King sought to increase the power of the Crown and threatened both the independence of Parliament and the constitutional balance; those who defend his behaviour maintain that he was simply exercising the powers granted by royal prerogative, powers that at the time were still in the King's availability. As a matter of fact, both interpretations 'rest in a static view of the political context' and forget that, during the half century of George's reign, the British Constitution underwent a substantial evolution: the behaviour of the King in the 1760s should be judged accordingly.<sup>19</sup> During his reign, both the executive and the role of Parliament expanded enormously, the function of an active opposition was acknowledged, public opinion grew in importance, Whig and Tory parties experienced essential transformations and – according to some historians, at least – a two-party system emerged. George III tended to a stronger government than his predecessors and embarked on direct action towards the House of Commons, not forgetting, in his own turn, a dubious use of the resources of patronage, which he sometimes denied to a Cabinet that was not of his liking.<sup>20</sup> The intense use of royal patronage in order to command a sustained majority in both chambers drew much criticism at the time, and crown influence was often attacked on the ground that it undermined the independence of Parliament, thus threatening the ancient liberties of English people. This blame is still sometimes echoed by historians, but it appears to have been overestimated. At any rate, the Crown's influence significantly declined during George's reign: both the number of placemen in the House of Commons and the strength of the Crown party in the House of Lords waned.

Surely the King played an active role in the formation of every ministry formed during his reign, even though the freedom of his choice was sometimes cornered by circumstances. At any rate, if the King's favour was still necessary for a successful ministry, it was not sufficient: the continued support of both Crown and Commons was essential. A Prime Minister who could not count on sufficient parliamentary support was doomed to failure, as the King's favourite, Lord Bute, had experienced in 1762. A dynamic survey of George III's reign shows, besides, how his influence over appointed ministers declined over time. At the beginning of his reign, he was surely a King with a policy, who summoned ministers in his closet to discuss (or even suggest) government action, and who attended Cabinet meetings. Gradually, also due to his declining health, the King stopped attending Cabinet meetings, or discussing beforehand with ministers affairs of state. It be-

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19 Cf. DICKINSON, *George III and Parliament* (2011) 30 *Parliamentary History*, pp. 395-413 (quotation at p. 397).

20 E.g. to the Fox-North coalition in 1782 (cf. DERRY, *Politics in the Age of Fox*, p. 42).

came frequent for the Cabinet to reach a decision without the monarch's advice and then report it to the King for approval. On the other hand, the monarch's repugnance for certain reforms could seriously hinder or even bring to a close the action of the Cabinet in that field (e.g. parliamentary reform). It is noteworthy how twice, during George III's reign, recourse to the royal veto was contemplated. The exercise of veto had been discontinued since 1708, but the King considered its use both against Fox's India Bill in 1783 and against the Catholic Relief Bill in 1807. He relented, though: in 1783 he forced repeal of the Bill on the Lords by circulating a letter that branded as his enemy those who would vote in favour of the measure, while in 1807 the Cabinet eventually abandoned the Bill. In the analysis of constitutional development, this hint is open to a double reading: the fact that the King thought to exercise it, shows that veto was not forgotten (and that George III was conscious of the extension of his prerogative); on the other hand, the fact that the monarch found a different way to express his displeasure and sink the unwelcome Bill, can be evidence that he was not ready to risk a serious constitutional crisis.

In 1782 Lord North (1732-1792) – Prime Minister since 1770 – was forced to resign after a motion of censure (concerning the war in America) in the House of Commons. It is noteworthy that the motion was never voted, since Lord North was aware that he would certainly be defeated. The whole Cabinet resigned. Although reshuffle under a new head of the Cabinet was by no means unheard of in the following years, this was a great step towards parliamentary government. In point of fact, the 1780s are a landmark in the constitutional evolution of Great Britain: in 1781 the King ceased to attend cabinet meetings; soon after he was forced to accept, much against his will, the resignation of his Prime Minister, who was no more able to command a majority in Parliament; furthermore, collective responsibility of the Cabinet emerged. After a brief attempt of a coalition government, featuring Lord North and Charles James Fox (1749-1806), George III decided to call Pitt the Younger (1759-1806; Prime Minister 1783-1801, 1804-1806) to lead a minority government. In 1783 the Prime Minister obtained from the King the dissolution of Parliament: since then, this important royal prerogative has actually passed to the Prime Minister. The continued support of both Crown and Commons was still essential, but the idea that confidence of the Houses is more essential than confidence of the sovereign developed decidedly, although the latter (for other ministers as well) guarded its importance at least up to 1832. With the Great Reform Act, as a matter of fact, the Crown virtually lost the capacity to influence heavily the results of general elections. Already in 1778 Lord North had warned the King about the necessity of *'one directing Minister who should plan the whole of the operations of government and control all other Departments of Administration, so as to make them cooperate zealously and actively with his designs'*.<sup>21</sup> Pitt the Younger was the right man for the task. It is with this extremely

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21 DICKINSON, *George III and Parliament*, p. 40.

young Prime Minister (he was 24) that a new era undeniably begun. Not only did he enjoy a political dominance in the Cabinet, but he was also an influent parliamentary leader, able to command a parliamentary majority not through a cunning use of patronage (as Walpole before him), but through his skills as parliamentarian and an ample consent built around his political figure. Furthermore, as First Lord of the Treasury and Chancellor of the Exchequer he was in charge of the economic policy and had therefore the possibility to carry out significant financial as well as administrative measures. Party discipline (that increased during 19<sup>th</sup> century) brought to a new settlement, the Prime Minister being more confident in his majority in the Commons and in his leadership, expressed in his ability to deal efficiently with the House, party institutions and voters as well. As a rule, 18<sup>th</sup> century Prime Ministers had been great parliamentary leaders, quite at ease in the debates of the House, and surely not inclined to public speech outside Parliament; during 19<sup>th</sup> and 20<sup>th</sup> century, on the contrary, a new model of Prime Minister appeared, often silent in the House, but ready to meet (and charm) his electors.

All in all, in the last years of George III's reign, constitutional conventions had reduced the powers of the monarch, handing most of them down to this new conventional figure, the Prime Minister. Formally, the Crown still wielded conspicuous power; in reality, it had been drastically reduced. Probably it was with the shift of power from the Crown to the Cabinet, along with the growth of a strong bond between Prime Minister and Parliament and of collective responsibility of the Cabinet, that the British constitutional monarchy was transformed into a parliamentary monarchy. The permanent office of Prime Minister – even though only in the 20<sup>th</sup> century it was officially recognized!<sup>22</sup> – was an essential element in such a revolution. So, although at the beginning of 18<sup>th</sup> century some circumstances had not been too dissimilar, a great change had taken place: the heart of the system was now in the House of Commons, whereas the House of Lords and the influence of the Crown had both faded. This situation led to a necessary permanent connection between the Cabinet and the House of Commons. The evolution of parliamentary forces was not as simple as it has sometimes been described, but a genuine two-party system was emerging. Even though Pitt cannot be straightforwardly called a Tory (he was labelled as such by Fox and his followers, who prided in their self-ascribed legacy of the Whig tradition) at the end of George's reign there was a governing party prepared to accept itself as a new Tory party and an opposition who called itself Whig. It is a vexed question whether (and to what extension) Pitt the Younger had enjoyed the benefits of Cabinet solidarity and of party discipline. His following in the Commons is difficult to estimate, too: surely a group of MPs politically identified with him, but the overwhelming majority he usually com-

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22 Up to the Thirties, the Prime Minister did not have the right to a salary as such, but just as First Lord of the Treasury. It is quite a paradox that the acknowledgment of a salary to the *Leader of the Opposition* took less time. Cf. TORRE, *Il Cabinet system da Thatcher a Blair: leadership e Costituzione*, in *La Costituzione Britannica / The British Constitution*, pp. 306-354, pp. 311-312, n. 13.

manded in the issues related to the Anglo-French Wars is most likely misleading. Probably these factors evolved during his rule. The situation was surely settled at the time of the ministry of Lord Liverpool (1770-1828; Prime Minister 1812-1827): Liverpool could rely on his colleagues following him were he forced to resign, on the decline of Crown influence, on a stronger control of party. It is significant that the figure of the leader of opposition<sup>23</sup> was consequently to gain a growing importance, too, but it must be remarked that in election the most dramatic victories were not won by an opposition seeking to gain office, but by the government.<sup>24</sup> A further key factor for the new balance of the constitution was the reduced number of MPs and Lords who thought of themselves as political independents.

What ensued was a wide distance between the mixed well-balanced theoretical constitution, and reality:

- much of the royal prerogative had been passed to the Prime Minister;
- the King being not accountable, Ministers were politically accountable to Parliament;
- Cabinet was now more homogeneous and the leadership of the Prime Minister undisputable;

nonetheless:

- the confidence of the King was still of vital importance;
- the House of Lords had powers similar to those of the House of Commons, except as far as finance was concerned;
- size of electorate was still small and elections were open to manipulation by the Cabinet.

The main features of the British constitution were probably born, with a strong Cabinet government, a parliamentary sovereignty, the first attempts to a single party control of government, and the accountability of the government to the Parliament (in fact, to the House of Commons) through the conventions of ministerial and collective responsibility.

### 3 – TOWARDS THE CRUCIAL YEAR

At the beginning of 19<sup>th</sup> century the monarchy was increasingly brought into disrepute: the mental illness of King George III, the disorientation of the Regency Period (1811-1820) and the dubious morality of King George IV (1762-1830; Prince

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23 On the theme of opposition, DE VERGOTTINI, *Lo «Shadow Cabinet»*. *Saggio comparativo sul rilievo costituzionale dell'opposizione nel regime parlamentare britannico*, Giuffrè, Milano, 1973 was in Italy a pioneer in this field with his work, particularly from p. 49 to p. 65.

24 DERRY, *Politics in the Age of Fox*, pp. 192-193.

Regent 1811-1820, King of the United Kingdom 1820-1830) put the Crown in a difficult position. Furthermore both politicians and the Anglican Church were charged with corruption.

The issue of Catholic Emancipation (i.e. the ending to political discriminations against Catholics) had long loomed over the ministries of the first quarter of 19<sup>th</sup> century. In 1801 Pitt had resigned when George III had refused to agree to Catholic Emancipation at the time of the union with Ireland: the King maintained that his coronation oath bound him to reject a measure that would weaken the privileged position of the Church of England. In 1807 the so-called Ministry of All the Talents had resigned after refusing the pledge asked by the King, never to raise the issue of Catholic Emancipation again. George IV was as stern as his father on the issue. Nonetheless, since 1807 every House of Commons (with a single exception) had passed a Catholic measure by a substantial majority,<sup>25</sup> and only the tenacious resistance of the House of Lords had prevented the passing of a Bill. Meanwhile, Catholic Emancipation had reached, during Lord Liverpool's government, the status of an 'open question': every member of the Cabinet was free to exercise his own judgement on it, regardless of cabinet solidarity, as soon as he stated that he was acting as an individual, and not as a member of government. In January 1828 George IV asked Lord Wellington (1769-1852; Prime Minister: 1828-1830, 1834), a Tory, to form a ministry, under the condition that Catholic Emancipation was not to be included in government measures. The Cabinet was nevertheless aware that the Catholic question had to be resolved, and that it was desirable to deal with it while the Ministry could still count on a reliable majority in the House of Lords. The effect of Wellington's pledge was just to put off emancipation for a few months, while conflict was exacerbated. Such a choice was counter-productive for the Prime Minister, as it caused rancour and bitterness in the Ultra wing of Tory party.<sup>26</sup> The last straw was the O'Connell case, an Irish politician who defeated the government candidate in a by-election rich in propaganda. O'Connell could not take his seat, as he was a Catholic: also in order to grant peace in Ireland, the Cabinet decided that Catholic emancipation could not be postponed. Thus in 1829 the Roman Catholic Relief Act was passed in spite of the strong opposition of King George IV and of the Anglican Church along with the personal dislike of the Prime Minister and of Home Secretary Robert Peel (1788-1850). The Act brought to an end political discrimination against Catholics, allowing them to become members of Parliament. According to Clark, the Emancipation Act marked the end of the Protestant Constitution, proving a real revolution in British constitutional history.<sup>27</sup> Not

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25 DAVIS, *The House of Lords, the Whigs and Catholic Emancipation 1806-1829*' (1999) 18 *Parliamentary History*, pp. 22-43, at p. 29.

26 DAVIS, *Wellington and the "Open Question": The Issue of Catholic Emancipation, 1821-1829*, (1997) 29 *Albion: a Quarterly Journal Concerned with British Studies*, pp. 39-55, at p. 54.

27 CLARK, *English Society 1660-1832: Religion, Ideology and Politics during the Ancien Regime*, 2<sup>nd</sup> edn, CUP, Cambridge, 2000, pp. 519 ff.

all historians agree, though. Anyhow, the Act made parliamentary reform easier. Ironically, disappointed Ultra Tories thought that reform of the franchise had become necessary, as ‘they pointed out that only government control over small boroughs had secured a majority for Catholic emancipation’, the measure having little support in the country.<sup>28</sup>

On 26<sup>th</sup> June 1830, King George IV’s death brought about the subsequent dissolution of Parliament. In the general election the Tory party won a majority, but support for Prime Minister Wellington was weak. His ill-timed position in strong defence of the existing system of government and against the need of reform led to his defeat in the House of Commons in a vote on a financial measure, and to his subsequent resignation. With the Whig Cabinet of Charles Grey (1764-1845; Prime Minister 1830-1834) the road towards the Reform Bill, that is to say, the improvement of the electoral system in Great Britain, was open.

It was in the same year, 1832, that John James Park (1795-1833) wrote *The Dogmas of the Constitution*, a book which was rather neglected at the time, but that ought to be appreciated for its lucid perception of the evolution of the British constitution since the Restoration, the careful use of historical precedents and criticism of current interpretations, and for drawing dramatically attention to the dangerous difference existing between practice and theory of the Constitution. It is the author himself who warns the reader that his book was written ‘in a period of overwhelming delusion’ and who describes that mood in the following, rather alarmed, terms: ‘a lying delusion which has become at length [...] not a folly merely, but a CRIME; since it is, perhaps, putting in risk the very existence of the Country’.<sup>29</sup>

J. J. Park was a scholar and an antiquarian since his adolescence. Having decided upon law as a career, in 1815 he got into Lincoln’s Inn and already in 1819 he published a treatise on the law of dowry, that was to be regarded as one of the standard books on the topic. He was called to the Bar in 1822. He soon gained a reputation as a critic of legal codification and of the ideas of Jeremy Bentham. In 1830 he also graduated at the German University of Göttingen: he came to know Friedrich Carl von Savigny and was an admirer of the German Historical School of Law.<sup>30</sup> In 1831 he was appointed professor of English Law and Jurisprudence at the King’s College, London: in *The Dogmas of the Constitution* he published some of the lectures delivered in his first course there. The College had been founded

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28 EVANS, *The Great Reform Act of 1832*, 2<sup>nd</sup> edn, Routledge, London – New York, 1994 (*Lancaster Pamphlets*), p. 43.

29 PARK, *The Dogmas of the Constitution*, Fellowes, London, 1832, pp. VII-VIII.

30 Since 1830 he will sign his works ‘Doctor of Law of Göttingen’. The extension of Park’s enthusiasm for the Historical School is open to question, though. Cf. VARELA SUANZES, *Estudio preliminar*, in *Los Dogmas de la Constitución. Cuatro lecciones, correspondientes a la primera, décima, undécima y decimotercera de un curso sobre teoría y práctica de la Constitución*. Edición y Estudio preliminar de J. Varela Suanzes. Traducción de I. F. Sarasola, Istmo, Madrid, 1999 (*Colección Fundamentos*, 157), pp. 7-51, at p. 14.

in 1829 by eminent figures linked with the more conservative wing of the Tory party and of Anglican Church, in nearly open contrast with the University College, founded in 1826 by Bentham and his followers.

Even though he taught in a Tory-oriented College, Park claimed nonetheless to be independent both from Tories and from Whigs. As he clearly states in the Preface of the *Dogmas*, his aim was not to speak either for Parliamentary Reform or against it, but to show the great and dangerous difference between the traditional Theory of the Constitution, and its Reality. He presents himself as a promoter, or a disciple at least, of a school of 'observational political science'. The Preface is dated 31<sup>st</sup> March 1832. It was a crucial moment for the Reform and for England as well.

#### 4 – THE LONG, EVENTFUL ROAD TO THE REPRESENTATION OF THE PEOPLE ACT

The goal of the Act was to 'take effectual measures for correcting divers abuses that have long prevailed in the choice of members to serve in the Commons House of Parliament'.

The House of Commons was then composed of 658 members; there were two types of constituencies, counties and boroughs. County members usually represented landholders, whereas borough members should have represented the mercantile and trading classes. Boroughs ranged from small villages to very populated cities and had been chosen since the Middle Ages, often in a rather whimsical or, at any rate, haphazard way. In the following centuries very little had been done to redress the situation, and large industrial cities such as Leeds, Manchester and Birmingham did not send their representatives to the House. Franchise was quite varied, too, but also in this respect the system had proved irrational.<sup>31</sup> Basically, the vast majority of individuals was unable to vote (just 13% approx. of adult males in England and Wales, around 1% in Scotland). In the constituencies figured 'rotten', 'pocket' and 'open' boroughs. Rotten boroughs were boroughs with a very limited number of voters: few than one hundred each, and some with only thirty-two (Dunwich), twenty-five (Camelford), or even less (Gatton, seven voters, and the most infamous of all, Old Sarum, whose eleven voters lived all elsewhere and had last been called upon actually to vote in an election in 1715). Predictably enough, in such boroughs the result of elections was always manipulated and corruption was not at all unheard of. Manipulation was not confined to 'rotten boroughs', though. Some constituencies were under the control of rich landowners, and were known as 'pocket boroughs' (i.e. they were 'in the pockets of their patrons'). Voters who resisted the influence of landlords were instead open to corruption, and in some boroughs (sometimes such as the open ones, where vote was free) electors were

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<sup>31</sup> 'It was not a system based on property, but the caricature of one' (BROCK, *The Great Reform Act*, Hutchinson & Co., London, 1973, p. 26).

even bribed collectively: 'the franchise was regarded as a form of property, not as a natural right'.<sup>32</sup> Attention must also be drawn to the fact that in many boroughs elections had become unnecessary, because the electors had financial or other strong inducements to vote for the candidate of the landowner, of the Crown, or of the government: an election was just a waste of time and money. Fewer than one-third of parliamentary seats were contested in the century before the Reform Act.<sup>33</sup> Attempts for reform had a long story behind their backs. Popular pressure for reform was particularly strong at the beginning of 19<sup>th</sup> century, also due to the demographic growth that in the first half of the century nearly doubled the population; nonetheless the House of Commons had rejected all the bills aiming at a global change in the system of representation.<sup>34</sup>

Seeing it through 21<sup>st</sup> century eyes, it is easy to find in the absence of a secret ballot the root cause of much corruption: when every elector's choice is bound to be publicly known, it is easier for votes to be bought and sold, and it is more difficult for the persuasive influence of a distinguished member of the elite to be resisted. It is noteworthy, however, that at the beginning of 19<sup>th</sup> century there was a different feeling on this issue: no attempt was made by the Whigs to introduce secret ballot in the Bill. As a matter of fact, it was regarded both as improper and as dangerous too, the elector being thus potentially able to sell his vote to more than a contender. Secret ballot had to wait until the 1872 Ballot Act.

The *Catholic Relief Act* and, later on, the fall of Wellington had brought substantial weakness to the Tories and so Whig Prime Minister Charles Grey had the chance to carry out Parliamentary reform.<sup>35</sup> On 1<sup>st</sup> March 1831, Lord John Russel brought forward the First Reform Bill<sup>36</sup> that was approved by one vote only (302 to 301), in the biggest parliamentary division ever recorded. It is worth stating that most resistance was directed against the new map of constituencies, rather than the

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32 DERRY, *Politics in the Age of Fox*, p. 18.

33 The number of constituencies that actually went to a poll had declined remarkably in the second half of 18<sup>th</sup> century (contested elections in county seats had already shrunk from 65% in 1705 to 8% in 1757: cf. STONE, *The Results of the English Revolutions of the Seventeenth Century*, in *Three British Revolutions*, pp. 23-108, at p. 88). It must be remembered, however, that the absence of a contest did not necessarily imply the absence of electoral competition. Cf. O'GORMAN, *The Long Eighteenth Century*, pp. 139-140.

34 It is notable, though, that some of the most remarkable statesmen in the second half of the century were elected for rotten boroughs, such as Pitt the Elder (elected for Old Sarum in 1735: cf. O'GORMAN, *The Long Eighteenth Century*, p. 181), while Pitt the Younger contested the Cambridge University seat, but lost, and was returned in a by-election for the pocket borough of Appleby.

35 'There was no reason for the Whigs ever to have come into office, had the Tories not imploded over religious issues' (EVANS, *The Great Reform Act*, p. 39). Incidentally, the commitment to parliamentary reform was basically the one important issue on which the members of the new Cabinet shared the same ideas...

36 'A well-kept secret, its extent and audacity now came as a bombshell' (CLARK, *English Society*, p. 541).

minor extension of the franchise: personal, selfish reasons surely played a role, but it was above all the link between population and representation underneath the Bill that was objected to, even by Whigs. The Ministry having also lost two votes on two motions, the Earl of Grey decided to ask the King to dissolve Parliament: the Whigs won an overwhelming majority in the elections. The Second Reform Bill was passed by a majority of 136 votes in July, and was then sent up to the House of Lords. Despite their well-known opposition to the reform, Lords were expected to abstain, rather than openly defy public will. Nonetheless, they rejected the Bill: the defeat of the Bill (rejected by 199 votes to 158) was worse than the Government had feared, and caused great concern. Should the King have been convinced to create new peers in order to approve the Bill, he would have been prevented to do so by the huge number of nominations required. Disorder followed, with riots at Derby, Nottingham, Bristol and in other towns.

The King was asked to prorogue Parliament and in the new session of December 1831 the Third Reform Bill was presented, and passed with even larger majorities in the following March (it was in this crucial moment that Park dated his *Preface*). Once more, opposition was strong between the Lords, but the opponents decided to change their tactics, being aware that another open rejection of the Bill could lead to a most serious social and political crisis. They chose, therefore, to propose wrecking amendments to the Bill. The Ministry saw only one alternative: the creation of a large number of pro-reform peerages, but the King denied his assent. Lord Grey tendered his resignation, and the Duke of Wellington was once more called to form a new government, while political agitation grew so much that a revolution was sometimes feared. The Duke being unable to form a ministry, William IV was eventually forced to call back Lord Grey and to consent to the creation of Whig Lords, but such a drastic measure was in the end unnecessary, as the King circulated a letter among Tory peers, warning them of the consequences of insisting in their opposition to the Bill.

On 7<sup>th</sup> June 1832 the Reform Bill became law. Nomination boroughs were reduced, and franchise was extended, although a few rotten boroughs remained and bribery of voters was still a problem. The Great Reform Act encompassed the middle classes in the ruling elite: as a whole the number of those entitled to vote rose in England and Wales<sup>37</sup> from around 439,000 (12.7% of adult males) to more than 652,000 (18%),<sup>38</sup> but working classes were still cut out from voting. Surely the Act had not been intended as a step towards democracy: on the contrary, its end was to hinder it and, as a compromise, it aimed to get the utmost that could be obtained from Parliament, and the minimum that could satisfy the country.<sup>39</sup>

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37 In the same year similar Reform Acts were passed for Scotland and Ireland, too.

38 EVANS, *The Great Reform Act*, Appendix 2, p. 75.

39 'The role of public opinion during the Reform Crisis can hardly be overestimated': O'GORMAN, *The Long Eighteenth Century*, p. 364.

Many MPs had believed that a measure of parliamentary reform was necessary in order to prevent a violent revolution. The Reform Act was not meant to be a milestone in the constitutional history of the country: it was a compromise dictated by a serious crisis. As such, it was very successful: the dangerous riots that had taken place before the passing of the Bill disappeared from the British political scene of the century; probably the procedures that led to the passage of the Act themselves, more than its circumscribed contents, harbingered a new idea of democracy. Afterwards, the pre-reform society was perceived as part of a lost, nearly forgotten world, to which there could be no return.<sup>40</sup> For all its faults, the Reform Act had opened a door on a new political world.<sup>41</sup>

## 5 – THE DOGMAS OF THE CONSTITUTION

If in his *Preface* J. J. Park was at pains not to show a position either for or against the Bill, the final pages of the *Dogmas* are a straightforward appeal against the Reform. Nonetheless, the aim of his work is not an opposition to the reform. On the contrary, what Park really wants is to highlight the wide gap existing between theoretical and actual Constitution.<sup>42</sup>

Park's main point is quite clear: any theory of the Constitution is doomed to fail as far as it is built too much on abstract ideas, and not on the perusal of what actually happens in the relations between powers and institutions. This is especially true in a country like the United Kingdom, whose constitution is unwritten and a few acts with constitutional value (such as Magna Charta or the Bill of Rights – that are not even mentioned in Park's book, anyway) are overshadowed by constitutional conventions and practices developed in the last century and a half. Where there is no written Constitution, principles can only be inferred by the observation of facts.<sup>43</sup> It is quite telling that, as the epigraph of his book, Park

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40 CLARK, *English Society*, p. 554.

41 EVANS, *The Great Reform Act*, p. 67. A door feared by some who had opposed the Bill, as in Peel's words: 'I was unwilling to open a door which I saw no prospect of being able to close' (quoted *ibid.*, p. 3).

42 'The traditional theory of the Constitution is either *right* or *wrong*. If it be *right*, the Constitution is practically obliterated by corrupt usage; and ought to be restored. If it be *wrong*, the practical corruption may be either the only mode, or one of several modes, of escaping from the theoretical fallacy. [...]' (PARK, *The Dogmas*, p. X).

43 'Gentlemen, I can conceive that, in a country which has a *written* constitution, the *writing* may still, in one sense, be denominated the constitution, although, by process of time and gradual departure, a different and undeclared mode of carrying on the government may prevail in practice; but in a country which has *no* written constitution, the constitution of that country can only be learnt by ascertaining the real mode in which, from time to time, the government has been carried on, the powers by which it has been effected, and the checks which have been brought into action' (*ibid.*, pp. 30-31).

chose a quote by Auguste Comte, '*Les savants doivent aujourd'hui élever la politique au rang des sciences d'observation*'.

Facts, and just facts, are therefore the only evidence of what the English Constitution really is, whereas historians as well as politicians and jurists keep on describing a Constitution that has not changed for the last six centuries. Furthermore, there is a linguistic problem as well: everybody has been accustomed for too long to speaking a language of *constitutional courtesy* that does not correspond to the truth of things. Powers and relations between them have consequently been constantly described in a ceremonious language that gave the wrong impression of a static Constitution, whereas beneath the use of the same officious words reality had altered: the use of such language can just lead to further misunderstanding on the nature of the constitutional settlement and to dangerous confusion in the country.

According to Park, the Constitution is similar to a living being: a plant, or even an animal.<sup>44</sup> Since 1688, it has radically changed, despite the fact that many did not perceive it, because they thought that every change was just depending on specific circumstances. Alterations were therefore considered the contingent fruit of necessity, or an aberration of the correct constitutional settlement: were they regarded as the positive exception to the rule, or as a distasteful event that it was best soon forgotten, those alterations were never accepted for what they really were, i.e. lasting elements of the new constitutional settlement. Park emphasized that this was especially true for the heart of the British Constitution, namely the relationship between Crown and Parliament and the consequent balance of power.

Park shows how a system previously governed by a balance between the three powers of State was transformed into another, in which the House of Commons grew absolutely predominant. He therefore denies the dichotomy between legislative and executive power and points out the fact that the Ministry actually controls legislative power as far as political relevant laws are concerned, Parliament being dominated by parties.<sup>45</sup> In evidence of that, Park alleges the fact that rejection of an important Bill brought in by the Ministry usually leads to their resignation. The royal prerogative, on the other hand, drastically declined.

According to this interpretation, the balance of power is still an essential element of the English constitution, but it moved into the House of Commons.<sup>46</sup>

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44 Quoting Sir John James Mackintosh, Parker wrote: 'government [...] is better illustrated by comparison with vegetables, or even animals, which may be, in a very high degree, improved by skill and care, which may be grievously injured by neglect, or destroyed by violence, but which cannot be produced by human contrivance' (*ibid.*, p. 85).

45 This was, at least, Park's perception: today some historians find this idea premature.

46 'For the last 150 years at least [...] the powers of government, which were previously carried on principally by force of the prerogative, have been essentially and substantially exercised and carried on in the House of Commons [...] which has thus come to take a part, and exercise a voice, in every act of the cabinet; - that, as a necessary condition to the concurrent preservation

Park shows the decisive implications of his analysis, not merely pointing out the factual interference between the theoretical competences of legislative and executive powers, but also recognizing that this shift of the balance creates a new constitutional system: 'this is acknowledged *here* and *there*, now and then, by many; but no writer will broadly lay down this ground, and follow it out in all its innumerable consequences, although it is as capable of demonstration as any proposition in Euclid'.<sup>47</sup>

It is not surprising that in his challenge to the received idea of the Constitution, Park found in William Blackstone (1723-1780), the author of the *Commentaries on the Laws of England* (1765-1769), his *bête noir*. The *Commentaries* had been a very successful book, and were part of the education of lawyers and jurists: Blackstone's approach to Constitution had been a little peculiar, and for instance he neglected the use of the locution 'constitutional law' and expounded the powers of King and Parliament while dealing with the rights of individuals. In the *Dogmas*, Park completely refused Blackstone's celebrated ideas of the English constitution as a nearly ideal mixed constitution, of the division of powers and of the balance.

Blackstone had described the Constitution in terms of:

- a mixed constitution (monarchy: Crown; aristocracy: House of Lords; democracy: House of Commons, freely elected by the people);
- division of powers (Legislature: Parliament + Crown; Executive: Crown; Judiciary: judges are independent from executive power, although not completely from the legislative, at least as far as the House of Lords retains competence);
- balance granted by the royal assent and by the role of impeachment.

Although he was aware of the reduced role played by the royal prerogative, Blackstone still gave great importance to the executive power of the Crown, and to the royal veto, but he forgot that the role of the Crown in the legislative power was then just a formal one (this was Park's opinion, at any rate).

It is noteworthy that Blackstone did not even mention:

- Whigs and Tories;
- the role of the Cabinet;

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of the *theoretic* constitution, in which the supreme power is supposed to reside in three co-equal elements, of the crown, the aristocracy, and the commonalty, each of those elements has come to be *represented* [...] in the Commons' house of parliament, in which the supreme power had concentrated; and that, as a consequence, collision between these several elements, *out of the house*, has no longer happened, except on extraordinary occasions, because their battles have been fought, and their trials of strength made, *in the house*' (ibid., pp. 7-8).

<sup>47</sup> Ibid., p. 9.

- the role of the opposition and the instruments used (motions, debates on budget...);
- powers and duties ‘of his Majesty’s great officers of state’, whereas he dealt with sheriffs, constables and petty officials...

Park can therefore easily attack Blackstone on the ground that the Constitution he described was far away from reality:

- whereas Blackstone stated that there is a merely executive, or law-executing government, called to carry into effect what was decided by the legislature, or law-making government, the Ministry ‘by some strange misconception of their functions’ always resigns when there is a strong contrast as to the contents of laws to be approved;
- Blackstone maintained that the legislative power of the Crown resides in the veto, but it has not been exercised for a very long time;<sup>48</sup> on the other hand, many bills are introduced by officers of the Crown in their official character and on their responsibility as such;
- instead of a legislative power governed by fluctuating majorities, the Parliament displays a highly organized system, based on parties;
- a strict separation of King, Lords and Commons is only formal.<sup>49</sup>

The Constitution had been completely transformed in the last century and a half, but its forms were in many instances rigidly preserved, therefore such a great alteration went nearly unobserved, and sometimes it was thought that the original Constitution still existed, and that the deviations from it were casual corruptions only.

According to Park, there was a new system of checks and balances, which had moved into the House of Commons, because it is necessary for the balance to be preserved where the whole power is exercised. This accounts for Park’s opposition to the Reform Bill, since he thought that it could put the balance in real danger.

Moreover, Park does not think that a strict division of powers is necessary; on the contrary, it would have the serious drawback of hindering or at any rate delaying the action of the State.<sup>50</sup> Anyway, freedom can be protected in other ways, and

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48 The last monarch to withhold royal assent to a Bill passed by the Parliament was Queen Ann, on the Scottish Militia Bill in 1708. During George III’s reign recourse to the royal veto had been contemplated. See above, § 2.

49 Park quotes Blackstone’s claim that ‘if ever it should happen that the independence of any one in the three branches of the legislature should be lost, or that it should become subservient to the views of either of the other two, there would be an end of our constitution’, and then proceeds to sharp criticism: ‘now, gentlemen, if «there would be an end of our constitution», there HAS been an end of our constitution long before the time when Mr. J. Blackstone wrote; for no such *essential* independence then existed, or has ever since existed, except in physical or external form’ (ibid., p. 41).

50 Ibid., pp. 115 ff.

it is in this perspective that Park highlights the role of public opinion. The role of separation of powers in the British Constitution having long depended on the interpretation of Montesquieu and De Lolme, today widespread belief that their ideas were the result of a misunderstanding can endorse Park's opinion on the matter. Far from being a model of separation of powers, the English Constitution entails in fact their integration and even union through the constitutional balance. The organic relationship between government and parliamentary majority is anyhow mitigated by the possibility of its dissolution: on the one hand, Parliament can unseat the Cabinet with a vote of no confidence; on the other hand, the Cabinet can always ask the monarch to dissolve Parliament.

Park maintains also that two difficult goals have to be reached. First of all, stability in the State must be assured, without resorting to low tricks, such as corruption – if his opposition to parliamentary reform hints at Toryism, his vehement denunciation of political corruption is in the purest Whig tradition. Besides, people's freedom must be established, but prejudices of the mass cannot be allowed to overcome scientific truths. With the benefit of hindsight, it can be said that such a balance was probably more difficult to achieve than the one between powers in the English constitution...

Overall, Park's position was in some way curious: he lined up with the most conservative Tories in their strong opposition to the Reform Bill; on the other hand, his interpretation of the Constitution was strictly indebted to Whig historians. Clearly, he was proud of his independence of thought, proved by the attacks he had to face both from Tories and from Whigs, which he mentions in the dignified closing speech in the last lecture of his course.<sup>51</sup> But such a detachment, in the turmoil of the crucial year 1832, perhaps decided the fate of his thesis, which met little success. Anyhow, although not a very successful book when it was written, *The Dogmas of the Constitution* succeeded in demonstrating that the English Constitution of the time did not date back to the Middle Ages, but had evolved since 1688. Incidentally, Park destroyed also the myth of the ancient Constitution, which had been a weapon in the political and historical debate at least since the Glorious Revolution, and showed how the constitutional order in the 1830s (the same order he fears the Reform Bill would overthrow) was largely indebted to an evolution that had brought forth a new balance, new institutions, and a new relationship between them. In many ways, Park's readings anticipated those included in a more popular book written a generation later, Walter Bagehot's *The English Constitution* (1867).<sup>52</sup>

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51 'In what I have offered you, I have consulted no man's pleasure, – I have performed no man's bidding. By Whigs I have been called Tory, – by Tories I have been called Whig; – perhaps the best proof that I am independent of either. Like an honest man, I have perhaps offended both parties' (ibid., p. 124).

52 Cf. VARELA SUANZES, *Estudio preliminar*, pp. 50-51 (it is important to bear in mind that Bagehot attended King's College ten years after the appearance of *The Dogmas of the Constitution*).

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