

wealth of every citizen»<sup>75</sup>. In a word, they are the national affairs.

As for another core term *civitas*, it is an abstract noun of *civis* (citizen), indicating citizens as a whole or their organizations. The first meaning shows the component of person in a city, which is obviously not the same as city's material parts like houses, streets or walls. The second meaning expresses the division of citizens (e.g. they were divided into five classes according to property) and mutual relationship of different parts (e.g. there were various kinds of Citizen Assembly). So the expression of *civitas* maintains the nature of inter-subject relationship of Aristotle's constitutional concept.

The auxiliary terms, *status*, meaning identity and state, is similar to *constitutio*, which means institution, structure and body. They are used as synonym in rhetoric to indicate the case issue. In his *Institutio Oratoria* Marcus Fabius Quintilianus (about 35-95) said: «What we call *status* is called *constitutio* by others...»<sup>76</sup>. Here he told us that the two words are equivalent. Cicero was just the person in 'others', who used *constitutio* 91 times in *De inventione*, all of which indicated what Greek rhetorician Hermagoras (1 century B.C.) expressed with *status*. For instance, Hermagoras thought there were four *status* including fact, defi-

<sup>75</sup> CICERO, *On the Laws*, cit., 87.

<sup>76</sup> See *L' 'Institutio Oratoria' di Marco Fabio Quintiliano*, I, eds. R. Faranda, P. Pecchiura, Torino, 1968m 359.

### *Nota introduttiva* di ALDO PETRUCCI

Non è la prima volta che il Prof. Xu Guodong pubblica un articolo in una rivista italiana<sup>1</sup>, ma è la prima volta che lo fa in lingua inglese, trattandosi del testo di una conferenza tradotta dal cinese perché destinata ad un pubblico anglosassone<sup>2</sup>. La lettura del suo contenuto credo debba essere preceduta da una rapida presentazione della figura dell'autore e del ruolo dell'Università di Xiamen nella diffusione del diritto romano in Cina.

Dopo la laurea in Giurisprudenza presso l'Università del Sud-ovest di Scienze Politiche e Giurisprudenza di Chongqing ed il conseguimento prima di un Master in diritto civile presso l'Università della Cina di Scienze Politiche e Giurisprudenza di Pechino e di un Dottorato – sempre in diritto civile – presso l'Istituto di for-

<sup>1</sup> Si vd., ad es., *L'insegnamento del diritto romano nelle Università della Cina*, in *D@S*, I, 2002; *La struttura basilare del progetto di codice civile per la R.P.C. dell'Università del Centro-Sud di Scienze Politiche e Giurisprudenza di Wuban e le Istituzioni di Gaio*, in *Africana. Rivista di studi extraeuropei*, 2002, 175 ss.; *Buona fede oggettiva e buona fede soggettiva nel diritto romano*, in *D@S*, II, 2003; *Le fonti del diritto civile nel sistema cinese*, in *D@S*, IV, 2005; *Note introduttive all'esame della struttura dei tre principali Progetti di Codice civile per la RPC attualmente in fase di elaborazione*, in *Roma e America*, XXIII, 2007, 31 ss.

<sup>2</sup> Ma pronunciata, in una sintesi in italiano, anche davanti agli studenti del primo anno del Dipartimento di Giurisprudenza dell'Università di Pisa in occasione della visita effettuata dal Prof. Xu il 7 maggio 2013.

mazione post-laurea dell'Accademia delle Scienze sociali a Pechino, Xu Guodong vince il concorso di professore associato e prende servizio nella Facoltà di Diritto economico dell'Università Centro-Meridionale di Scienze Politiche e Giurisprudenza di Wuhan, da dove approda, nel 1994, all'Università di Roma Tor Vergata come Professore visitatore del Dipartimento di Storia e Teoria del Diritto.

Per oltre due anni, fino al 1997, il Prof. Xu approfondisce la propria formazione romanistica sotto la guida del prof. Sandro Schipani e partecipa nel 1995 al Corso di perfezionamento in diritto romano dell'Università di Roma, La Sapienza. Rientrato in Cina, fonda l'Istituto dei Codici Civili e Commerciali nell'Università Centro-meridionale di Scienze Politiche e di Giurisprudenza di Wuhan e, una volta divenuto Professore ordinario, nel 2000, si trasferisce presso la *Law School* dell'Università di Xiamen, dove dà vita, nello stesso anno, all'Istituto di diritto romano, di cui è Direttore, ed alla rivista *Roman Law and Modern Civil Law, The Annals of Institute of Roman Law, Xiamen University*, pubblicata in cinese con cadenza annuale e della quale è anche Direttore. In tale Università riveste, inoltre, la carica di Coordinatore dei Dottorandi in Giurisprudenza della *Law School* e di Redattore Capo della collana sui Codici Civili Stranieri.

Gli interessi scientifici del Prof. Xu spaziano dal diritto romano (privato e pubblico) al diritto

of constitution. As for the core term *res publica*, it is the adjective of *populus* (people) that means 'the possessions of people'. It is a change of objectivism as Aristotle's constitutional concept of 'one group' becomes that of 'some possessions'. But in Latin the real meaning of *populus* is totally different from what we understand today as it refers to infantry or armed group<sup>71</sup>. Later it gradually involves into «the set of specific persons attending People's Assembly, where people can express their wills in the organized form which is created for themselves»<sup>72</sup>. Such 'people' are all members of attending People's Assembly, namely the full citizens. So 'people' are not a concept of all people but those who have full civil and military rights and obligations, also the full citizens in Aristotle's sense. It is not equivalent to the whole population as it excludes women and children<sup>73</sup>. The concept of constitution based on this word is patriarchal. In the real world the possessions of people were just Roman national property different from that of private people or local government<sup>74</sup>. Metaphysically Cicero took them as «the master of law, judgment, war, peace, negotiation, right and

<sup>71</sup> P. CATALANO, *Populus Romanus Quirites*, Torino, 1974, 108 f.

<sup>72</sup> See R. ORESTANO, *Il problema delle persone giuridiche*, Torino, 1974, 108 f.

<sup>73</sup> See P. CATALANO, *Populus*, cit., 114.

<sup>74</sup> See X. GUODONG, *Roman Private Law: Text and Analysis*, SP, 2007, 123.

2.26.47<sup>66</sup>; *de leg.* 3.5.12<sup>67</sup>), *genus civitatis* (*rep.* 2.23.-43<sup>68</sup>) etc. to express constitution<sup>69</sup>. We can also notice that Cicero occasionally used the word *constitutio*<sup>70</sup>, which is the favourite of modern people.

In the aspect of constitution, Cicero's basic rule of word formation is: *res publica* and *civitas* as the core terms plus auxiliary terms like those indicating state, form or structure was a con-stitutional phrase. The analysis of those core terms and auxiliary terms can restore his concept

<sup>66</sup> He said: «This constitution is indeed good but it is easy to get worse». *Ibid.*, 175. The constitution here is also a monarchic one.

<sup>67</sup> He said: «The commonwealth is bound up with the magistrates and those in charge, and from their organization can be understood what sort of constitution each is». CICERO, *On the Laws*, tr. W. Huansheng, SPPH, 2006, 187.

<sup>68</sup> He said: «In fact, the monarchic form of constitution itself not only is not to be criticized, but probably should be ranked far ahead of the other simple forms». CICERO, *On the Laws*, cit., 57, 170.

<sup>69</sup> Here I have to criticize the article of Chilean great Roman law scholar Guzmán Brito though it gave me many inspirations. He indicated the constitutional meaning of the Latin word *status* with terrific wisdom, but other Latin words with the same meaning were overlooked. See A. GUZMÁN BRITO, *El vocabulario*, cit., passim.

<sup>70</sup> Guzmán Brito thinks the word can be translated into 'formation' because Cicero used it to indicate mixed constitution, namely the mixed institution of monarchy, aristocracy and democracy. See A. GUZMÁN BRITO, *El vocabulario*, cit., passim.

civile ed alle codificazioni civili moderne e si sono concretizzati nella pubblicazione di numerosi scritti su questi argomenti, tra cui ci limitiamo a ricordare, con i titoli tradotti in italiano, *La Costruzione sui Principi Fondamentali di Diritto Civile: il Superamento degli Svantaggi delle Leggi Scritte* (Beijing, 1992), *I Dibattiti sulle Linee di Pensiero per codificare il Codice Civile Cinese* (Beijing, 2001), ed il *Manuale di Diritto Civile*, di cui è un coautore (Beijing, costantemente aggiornato). Ad essi vanno aggiunti: il *Commentarius ad Institutiones Iustiniani* (Beijing, 2005) e la *Explicatio principiorum iuris civilis* (Beijing, 2012); le traduzioni in cinese, direttamente dal latino, di selezioni di testi del *Corpus iuris civilis* giustiniano in tema di atti giuridici e di *delicta* e *crimina* (raccolti in due volumi dei *Corporis iuris civilis fragmenta selecta* pubblicati dalla Casa Editrice dell'Università di Scienze Politiche e di Giurisprudenza della Cina di Pechino nel 1998), delle Istituzioni di Giustiniano (edite sempre dalla Casa Editrice dell'Università di Scienze Politiche e di Giurisprudenza della Cina di Pechino nel 1999), delle XII Tavole (*Un'analisi comparativa delle quattro traduzioni cinesi delle XII Tavole*, in *Ricerca della verità*, 2002 (6), Harbin) e dei *Topica* di Cicerone (editi nella rivista dell'Università di Nanchino *Nanjing Daxue falü pinglun*, 2008 (1)), e più di cento articoli e saggi in libri e riviste cinesi e straniere.

Alla notevole produzione scientifica si accompagna una costante attività di insegnamento, che comprende i corsi di Diritto privato romano,

Storia del diritto romano, Diritto civile (parte generale) e Filosofia del diritto civile.

Se è innegabile il ruolo propulsivo svolto da Xu Guodong nell'attuale conoscenza del diritto romano e della tradizione romanistico-civilista occidentale in tutta la Cina, non è probabilmente un caso che provenga proprio dalla Facoltà giuridica dell'Università di Xiamen (o Amoy, se vogliamo usare il nome ancor oggi più comune in inglese), data la posizione di avanguardia assunta dalla stessa in tale direzione durante il XX secolo.

Anche su questo vale la pena spendere qualche parola.

Le autorità cinesi della fase finale della Dinastia Qing (terminata nel 1911) ritenevano che la forza dei Paesi occidentali derivasse anche dalle loro leggi e che pertanto uno dei punti chiave della riforma destinata al potenziamento dello Stato avrebbe dovuto essere quello di recepire i loro ordinamenti giuridici. Vennero così fondate in pochi anni quarantasette Scuole di diritto in tutta la Cina, a cominciare da quella di Pechino, istituita nel 1904; in esse l'organizzazione dei corsi e la scelta dei manuali seguivano da vicino il modello del Giappone e giapponesi erano molti insegnanti. Il corso di diritto romano era obbligatorio ed era tenuto al primo anno con due ore di lezione alla settimana.

Dopo la Rivoluzione del 1911 e la caduta dell'Impero, le Scuole di diritto furono inglobate nelle Università sul modello della Scuola Superio-

frequently used one. In his *De re publica*, he used the phrase many times, saying: «When the control of everything is in the hands of one person, we call that person a king and that type of constitution a monarchy». Then he continued to talk about aristocracy and democracy<sup>60</sup>. So it is not hard to see the three forms of government in the title of *πολιτεία* of the Greeks are all put together by Cicero in the title of *status*. They are the same. In addition Cicero also used *forma rei publicae* (*rep.* 1.34.53<sup>61</sup>), *conformatio rei publicae* (*rep.* 1.45.69<sup>62</sup>), *constitutio rei publicae* (*rep.* 1.45,69<sup>63</sup>), *forma civitatis* (*rep.* 2.23.43<sup>64</sup>), *genus rei publicae* (*rep.* 2.23.43<sup>65</sup>;

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<sup>60</sup> See CICERO, *On the State*, trans. W. Huansheng, SPPH, 2006,79.

<sup>61</sup> He said: «These problems, and others like them, are the arguments adduced by those who particularly favor this kind of constitution» *Ibid.*, 93. Please note that the problems here are whether the country is ruled by majority or minority.

<sup>62</sup> He said: «That does not occur in this combined and moderately mixed form of constitution...». *Ibid.*, 118. Please note that the term of 'mixed constitution' occurs.

<sup>63</sup> He said: «This constitution has, in the first place, a certain degree of fairness». *Ibid.* Please note that this paragraph finally uses *constitutio* to indicate constitution, but here it specifically refers to mixed constitution.

<sup>64</sup> He said: «And that type of constitution is the most unstable because through a single person's fault it can be sent headlong in the most destructive direction». *Ibid.*, 168. The constitution here is a monarchic one.

<sup>65</sup> He said: «If I approved of any of the simple forms of constitution...». *Ibid.*, 170.

mental rules of writing<sup>57</sup> and the like. But in works of Francis Bacon (1561-1626), the word is still used to express constitution<sup>58</sup>.

### 1.2.2 *Other Latin Words used by Cicero to indicate Constitution.*

Also in his *De divinatione*, Cicero paraphrased Plato's book name πολιτεία into the Latin word *res publica*: «From the fact that Plato's *Politia* was bitten by the mice in my house I should worry about *res publica* of Roma». Here Cicero jokingly equaled the Greek style word *politia* to the authentic Latin word *res publica*<sup>59</sup>. In this way the meaning of 'state' in a multitude of meanings of πολιτεία was set to be equivalent to that of *res publica*, generating the problem of which Latin word can express the 'constitution' meaning of πολιτεία. Cicero used quite a few Latin words to finish the task. *Status rei publicae* (national institution or constitution) was the most

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*Politia Anglicae: An Anglican Summa*, 1617.

<sup>57</sup> See A. DECEMBRIUS, *Politia Litterariae*, 1540.

<sup>58</sup> He said: «In fact, unless humanities have devoted to researching religion and theology for centuries and civil constitution especially the monarchy one goes in opposite direction of fashion and today...». F. BACON, *The New Organon, Maxim, Nature and Explanation of Human Kingdom* <http://www.Thelatinlibrary.com/bacon/bacon.liber1.shtm> l.

<sup>59</sup> The equivalent may prove the correspondence of his *De Republica* and Plato's πολιτεία. See Cic. *divinat.*

re della Capitale, che si trasformò nell'Università di Pechino nel maggio del 1912. Negli anni Venti e Trenta le Facoltà giuridiche continuarono a svilupparsi secondo le linee già avviate, conservando quasi ovunque il diritto romano come corso obbligatorio, con la sola sostituzione di professori cinesi a quelli giapponesi e francesi. Fra tutte una funzione di spicco è assunta proprio dalla 'Law School' dell'Università di Xiamen grazie alla figura di Chen Chaobi<sup>3</sup>.

Egli, nato nel 1905 a Yancheng, nella provincia dello Jiangsu, era entrato nell'Università Centrale (la futura Università di Nanchino) nel 1922 e, dopo la laurea in Giurisprudenza, era stato ammesso alla Facoltà giuridica dell'Università di Louvain in Belgio, dove, nel 1932, aveva conseguito il dottorato. Al suo rientro in Cina, trascorsi alcuni anni di insegnamento presso l'Istituto di educazione giuridica dello Jiangsu, era stato infine chiamato ad assumere le cattedre di diritto romano e diritto privato internazionale nella Facoltà di Giurisprudenza dell'Università di Xiamen nel 1942, non muovendosi più da questa Università per il resto della vita. Il suo manuale *Diritto Romano* è pubblicato nel 1936 dalla Casa Editrice del Commercio come un libro della Collana Universitaria e lo si usa a Taiwan ancor oggi. Questo libro si divide in due tomi per una lunghezza di 682

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<sup>3</sup> Per la cui ricostruzione mi è stato di grande utilità proprio l'articolo di X. GUODONG, *L'insegnamento del diritto romano nelle Università della Cina*, citato nella nota 1.

pagine, con una ricca bibliografia di testi sia francesi che inglesi.

Nel 1952, quando la Facoltà di Giurisprudenza viene soppressa dalle autorità della neonata Repubblica Popolare Cinese, Chen Chaobi diviene professore della Facoltà di letteratura cinese, fino al pensionamento avvenuto nel 1976. Morto Mao in quello stesso anno, con l'ascesa del nuovo leader Deng Xiaoping si abbandona per sempre la politica della 'Grande Rivoluzione Culturale' e ad essa si sostituisce quella di apertura al mondo occidentale, creando così le condizioni per una restaurazione dell'educazione universitaria e in particolare di quella giuridica.

Dopo la rinascita della Facoltà giuridica dell'Università di Xiamen, Chen Chaobi è richiamato in servizio e tra il 1979 ed il 1982 compone tutte le voci relative al diritto romano per la *Grande Enciclopedia della Cina*, scrive due articoli intitolati, rispettivamente, *Sull'eredità del diritto romano* e *La posizione storica del diritto romano ed i suoi vantaggi*, ed istituisce un primo ciclo di Dottorato di ricerca in diritto romano, per formare tre giovani specialisti della materia, lasciando però la sua opera incompiuta per la morte occorsa nel 1982. È quindi un suo grande merito aver contribuito al riconoscimento dell'imprescindibile importanza dell'eredità del diritto romano nella formazione dei giuristi della 'nuova' Cina.

Risulta in tal modo evidente come le attività di Chen Chaobi prima e di Xu Guodong oggi co-

help and support mutually. In this way any horror will be driven and everything is supplied to the public. The sequence of flying is fairly arranged in turn: the last can become the first and vice versa. They do not need to obey a king, a master or a kind of horror except a social community. They respect and defend each other with freedom. Writers observe such natural morality, record some of them as constitution and finally confirm it as the basic of the love of fellow citizens»<sup>54</sup>. It is undoubtedly a description of human constitution from the experience of birds<sup>55</sup>. Some people of later generations use *politia* to describe religious organizations<sup>56</sup> and even the funda-

<sup>54</sup>[http://monumenta.ch/latein/text.php?tabelle=Cassiodorus&rumpfid.Cassiodorus,%20Variae,%2009&domain=&lang=0&links=&inframe=1&hide\\_apparatus=1&PHPSESSID=d50aa7dfb8375b58150d3f0236c403fc](http://monumenta.ch/latein/text.php?tabelle=Cassiodorus&rumpfid.Cassiodorus,%20Variae,%2009&domain=&lang=0&links=&inframe=1&hide_apparatus=1&PHPSESSID=d50aa7dfb8375b58150d3f0236c403fc).

<sup>55</sup> Please compare the description of gold time of human society by Lucius Annaeus Seneca (4 B.C. -65 A.D.: at that time people followed the natural rules, shared the natural gifts and had public ownership. No one may surpass others or be surpassed by others. People lived in harmony with everything distributed equally. The strong had not begun to oppress the weak and the greedy people did not hoard things in one side so that others lost the means of survival. Everyone concerned about others as themselves, weapon was not used, human blood was in the hand and people's hate aimed to the beast only. (But the murder did exist as a result of fear or provocation).? See SENECA, *Short Life with Happiness: Essays on Morality*, tr. Z. Youchun, Z. Jianjun, SHJPC, 1989, 211-212.

<sup>56</sup> See R. MOCKET - M. ANDREW SCREECH, *Doctrina et*

translated Plato's πολιτεία into the Latin word *politia* in his *De divinatione* (44 B.C.)<sup>51</sup>. Since then *politia* owned a Greek blood but reserved two meanings: national institutions and the title name of Plato's book<sup>52</sup>. But the transformation from πολιτεία to *politia* may take place earlier as Cato the old (234.149 B.C.) once used the word to describe the constitution of Carthage. He said: «In this place, some persons hope the constitution to contain three parts: people, aristocracy and lord» (*Quidam hoc loco volunt tres partes politiae comprehensas, populi, optimatum, regiae potestatis*)<sup>53</sup>. In fact he lived in an earlier era than Cicero, but his *Origins*, containing the sentence above, was not kept completely, so it was also probable that posterity changed the term in accordance with their modern usage. Anyway now that *politia* was created people began to use it frequently. *Variae* 9.2 of Flavius Magnus Aurelius Cassiodorus (about 485-580) is a good example. He used the word to describe the human rules refined according to the life order of crane groups. The words were as follows: «Cranes begin to adopt a moral harmony. No one pursues the first place as they are of no ambition of inequality. They guide,

<sup>51</sup>You should see what Socrates said in *Politia* of Plato. See Cic. *de divinatio*. 1.29.60: <http://www.thelatinlibrary.com/cicero/divinatione2.shtml>.

<sup>52</sup> See *Latin Chinese Dictionary*, ed. X. Daren, TCP, 1988, 423.

<sup>53</sup> See CATO THE CENSOR, *Origins*, fr. 80 Peter, in *Historicorum Romanorum Fragmenta* (= Serv. *ad Aeneid.* 4.682).

stituiscono uno degli assi portanti della scienza romanistica cinese.

Venendo ora al testo della conferenza riportato qui di seguito, non intendo entrare nel merito delle affermazioni e conclusioni che contiene, sulle quali naturalmente ciascuno è libero di esprimere il proprio giudizio; vorrei invece sottolineare l'interesse che può avere per i lettori italiani ed europei di vedere l'interpretazione data da uno studioso cinese al fenomeno della formazione del sintagma 'costituzione' nel corso delle varie esperienze giuridiche, iniziando da quelle delle società greche antiche per giungere ai moderni stati nazionali del XIX e XX secolo. Soprattutto, l'importanza di questa ricerca, al di là della poca bibliografia citata rispetto all'esistente e della selezione pressoché esclusiva di autori anglosassoni (giustificabile per il tipo di pubblico cui è rivolta), è rappresentata dal richiamare l'attenzione della comunità scientifica cinese ed internazionale sul ruolo che possono svolgere le indagini storiche fin dall'Antichità anche nel campo dei concetti del diritto costituzionale.

È infatti sotto gli occhi di tutti quanto poco siano attratti da questo genere di indagini (ovviamente con le dovute eccezioni) gli attuali costituzionalisti occidentali, i quali, ove anche lo facciano, tendono a limitare i propri orizzonti tutt'al più al XVIII secolo. Xu Guodong si propone invece, come emerge in sede di conclusioni, di contribuire fattivamente alla discussione sviluppatasi

in seno alla dottrina cinese circa la genesi del concetto di costituzione e del termine più consono per indicarlo. E solo per questo il suo percorso di ricostruzione storica è degno di elogio, anche qualora non se ne accettino certi passaggi e deduzioni.

Un'ultima avvertenza. Il testo della conferenza viene riprodotto nella versione originale, senza aggiunte o modifiche (se si eccettua l'eliminazione di alcuni refusi), ed anche le note sono lasciate così come le ha redatte l'autore, con le citazioni e le abbreviazioni che si fanno di consueto nelle pubblicazioni scientifiche cinesi.

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constitutional theorists including Aristotle came from democratic Athens, so it is reasonable for them to regard democracy as the right form of constitution. Secondly, the subjects (at least the positive ones) in Aristotle's constitutional thought solely contained his so-called full citizens and the scope was smaller than that of modern people, who include everyone of a country. Finally from another point of view the extension of his constitution is wider as it involves all aspects of national life<sup>47</sup>. Consequently the Spartan constitution was interpreted as a life style and legislation by people today<sup>48</sup>. In the description of Plutarch and Xenophon we can learn that it even contained the marriage system, the teaching method for the youth etc.<sup>49</sup> But for modern people constitution is just a supreme law, one part of the national life<sup>50</sup>.

## 1.2 *The latinization of πολιτεία*

### 1.2.1 *From πολιτεία to Politia.*

Academically all Romans are students of Greeks and so is the case of constitution. It is generally believed that Cicero (106-43 B.C.)

<sup>47</sup> See A.H.J. GREENIDGE, *A Handbook*, cit., 6.

<sup>48</sup> See SENOFONTE, *Costituzione*, cit.

<sup>49</sup> See PLUTARCH, *Lives of the Noble Grecians and Romans: Lycurgus*, I, ed. H. Hongxi, tr. W. Pengpeng, TCP, 1990; SENOFONTE, *Costituzione*, cit.

<sup>50</sup> See A.H.J. GREENIDGE, *A Handbook*, cit., 4.



the national state with large population cannot use constitutional government as people are not familiar with each other<sup>43</sup>. So we can conclude that his comprehension of constitution was a product of a small state with small population.

**City-state.** It means citizenship and territory, both of which are factors of subject and object respectively. As for the former, Aristotle thought it should not have a large size or democracy would be impossible. The latter should be beside the sea so that a good environment and plentiful water would be available, etc.<sup>44</sup>

**Government.** It is the administrative department in the frame of constitution. Aristotle specifically emphasized that government should take the responsibility to teach its people<sup>45</sup>.

It is out of question that Aristotle's understanding of constitution is different from that of modern people. Firstly, what he thought is narrower in scope. He excluded those made by a non-city-state while some modern people believe that each state has a constitution no matter what type it is<sup>46</sup>. The reason of this discrepancy mainly lies in the fact that all Greek

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*de Constitución Política* in *Rev. Est. Hist. Jur.*, 2002, 267 ff.

<sup>43</sup> See ARISTOTLE, *The Politics*, cit., 111.

<sup>44</sup> *Ibid.*, 358-375.

<sup>45</sup> *Ibid.*, 358-402 ss.

<sup>46</sup> See *Constitution*, ed. and tr. The Institute of Law SASS, CKP, 1982, 1.

## A STUDY ON THE ORIGIN AND EVOLUTION OF WORDS THAT MEANS CONSTITUTIONAL LAW IN WESTERN LANGUAGE\*

### 1. 1 *Origin of the word Constitution in Greece.*

#### 1.1.1 *The Constitutional Practices among the Nations in Mediterranean.*

As Chinese scholars often begin their discussion about constitution from the Latin word *constitutio*, it has reasons and necessities for us to sort out the origin of the special word in Greek basing on the available materials in spite of the fact that other western nations in ancient times also had experiences of group living.<sup>4</sup>

Homer (9th century B.C.) possibly was the first Greek writer for discussing the constitutional phenomena. In Chapter 2 of his great epic

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\* Work in Chinese of Xu Guodong, Ordinary Professor of Roman Law and Director of the Institute of Roman Law at the Law School of the University of Xiamen, Fujian, P.R. of China, translated into English by Zhao Yi.

<sup>4</sup> About the defective research on the origin of the word constitution, see H JINGUANG - Z. BAOQING, *Origin of the Word Constitution*, in *ZSS*, IV, 1999; W. GUANGHUI, *The Evolution of Constitution as Fundamental Law*, in *CJL*, II, 2000; J. JINSHENG - Q. JIE, *The Nature of Constitution through the Origin of it*, in *TH*, 2006, 6; W. DINGHUA, *The Comparison of Ancient Constitutional Concept between China and West Countries*, in *CCNUJP*, IV, 2007.

*Iliad* he detailed Mycenaean constitutional institution: the King, the Senate, the Assembly of Soldiers and the Herald who contacted them.<sup>5</sup> It is obviously a Spartan-like structure. Following him was the famous writer Herodotus (484 -424 B.C.) who in the name of two Persians, *Otanes* and *Megabysus*, distinguished dictatorship, democracy and oligarchy and then analyzed the advantages and disadvantages of the three regimes in his *Histories*.<sup>6</sup> How great these words were! The earliest types of constitution in the eyes of the power owners were put forward for the following generations. In *The Geography*<sup>7</sup> Strabo (63/64-24 B.C.) also discussed constitutions of some other states like those of Sparta<sup>8</sup>, Tarsus<sup>9</sup> and Galata<sup>10</sup>. According to the study of contemporary scholars, Greek city-states of Greece had their own constitution which can be categorized as oligarchic, mixed and democratic. The oligarchic government was more popularly established in city-states such as Thessaly cities (Larisa, the

<sup>5</sup> See G. MOSCA, *The Ruling Class*, tr. H. Hepeng, YP, 2002, 412, nt. 1; see also HOMER, *Iliad* tr. L. Niansheng and Wang Huansheng, PLPH, 1997, 30 ff.

<sup>6</sup> See HERODOTUS, *The Histories*, I, tr. W. Yizhu, TCP, 1959, 231 ff.

<sup>7</sup> See STRABO, *The Geography*, IV, Oxford, 1927, 366.

<sup>8</sup> *Ibid.* vol. 8 ch. 5.

<sup>9</sup>Tarsus is an ancient city-state in present Turkey, see voice Tarsus, in *The Bible Encyclopedia*, on <http://www.bible-history.com/isbe/T/TARSUS/>.

<sup>10</sup> Galata is also an ancient city-state in present Turkey.

were mostly kept in his *Politics* where *πολιτεία* was used about 102 times<sup>39</sup>. If we categorize them, we can find Aristotle's comprehension as follows:

**Constitution or regime.** Sometimes Aristotle used the word to express a constitution with the sovereignty in the hands of majority while sometimes an ideal one or one that could be improved via democracy<sup>40</sup>. In a word what he understood was the institution of people's sovereignty as *πολιτεία* simply came from *πολιτης* (citizen) in Greek and only full citizenship could be the subject of constitution. Aristotle divided people into full citizens and partial citizens. The former were those who could deal with judicial affairs and work in the government while partial citizens included children and senior persons with no longer the age of military service<sup>41</sup>. The description was obviously based on Athens' democracy, connecting constitution with people's sovereignty but rejecting the involvement of children and old people. In an autocratic state where soldiers could only be subjects rather than citizens there did not exist constitution. But Aristotle also admitted the deformed constitution so that he could use *πολιτεία* to indicate a mixed regime of democracy and oligarchy.<sup>42</sup> He thought

<sup>39</sup> See ARISTOTLE, *The Politics*, cit., 479-80.

<sup>40</sup> See W.A. DUNNING, *History*, cit., 37.

<sup>41</sup> See ARISTOTLE, *The Politics*, cit., 111.

<sup>42</sup>See A. GUZMÁN BRITO, *El vocabulario histórico para la idea*

thoughts.

In his *Statesman* (*Politikòs*), Plato detailed the theory of regime and deduced six regimes through introducing two parameters of the number of owners of supreme power and whether they were ruled by law:

|                             |                          |
|-----------------------------|--------------------------|
| Ruled by law                | Not ruled by law         |
| One man with supreme power  | Constitutional monarchy  |
| Minority with supreme power | Aristocracy              |
|                             | Oligarchy                |
| Majority with supreme power | Constitutional democracy |
|                             | Extreme democracy        |

In his *Laws*, Plato pointed out that there were only two basic governments: monarchy and democracy. All the others came from them.<sup>36</sup>

As Plato's student Aristotle (384-322 B.C.) furthered to research the actual forms of πολιτεία. He once wrote a book called *The Constitution of Countries* in which political institutions from 158 countries were studied including Greek and the barbarian<sup>37</sup>. But it was lost in the history and *The Athenian Constitution*<sup>38</sup> and the above-mentioned *Corinthian Constitution* were just part of it. Luckily the fruits of Aristotle's study

<sup>36</sup> See PLATO, *Laws*, tr. Z. Zhiren, H. Qinhua, SPPH, 2001, 94.

<sup>37</sup> See W.A. DUNNING, *History*, cit., 26.

<sup>38</sup> See ARISTOTLE, *The Athenian Constitution*, tr. R. Zhi, L. Ye, TCP, 1973.

country of Penestoi, Pharsalus, Pherae), Malians, Opuntians Locrians, Thebes, Megara, Sicyon and Corinth. The mixed regime was accepted in Sparta and cities in the island of Crete. The democratic government solely took place in Athens<sup>11</sup>. What should be mentioned here is that almost every city-state in Greece had a very long history with possibly various kinds of constitution. A city-state once adopting oligarchy does not mean they had no other constitution.

Oligarchy is a kind of institution in which the majority is ruled by the minority or the rich.<sup>12</sup> In other words it is an aristocracy not ruled by law. This kind of constitution performed differently in different Greek city-states. For example the main public offices especially military positions in Thessaly cities were long monopolized by aristocratic families in spite of the existence of a liberal constitution<sup>13</sup>. In Malians, the privileged class was formed by hoplites and high-ranking officials had to be elected from the members of them<sup>14</sup>. Heavy infantry was firstly created from 7th century B.C., which means they could fight intensively rather than individually so as to have a broader support from the masses. Consisting of soldiers from the middle class, they

<sup>11</sup> See A.H.J. GREENIDGE, *A Handbook of Greek Constitutional History*, London, 1911, 60 ff.

<sup>12</sup> *Ibid.*, 60.

<sup>13</sup> *Ibid.*, 63.

<sup>14</sup> *Ibid.*, 64.

struggled to break up the monopoly of the noble and open political positions to the middle class<sup>15</sup>. But if they precluded the enjoyment of power of other classes, another kind of oligarchy was formed. Opuntians Locrians practiced a oligarchy of a thousand men who were elected from the most venerable and wealthy families constituted with landlords<sup>16</sup>. Thebes is the rival of Athens whose type of government fluctuated between democracy and oligarchy from time to time depending on the need of maintaining the *status* of being dominate<sup>17</sup>. The same story also happened in Megara, a city between Athens and Sparta and is easy to be influenced by both of them<sup>18</sup>. The once oligarchic government with a racial taint in Sicyon meant the rule of Dorians for the earlier arrivals Achaeans<sup>19</sup>. The constitution of Corinth was stereotyped by Aristotle in his Corinthian Constitution<sup>20</sup>. After deporting the tyrant Cypselides, the constitution of Corinth divided the whole citizens into eight phyles of which there was one dominating phyle treated as the privileged while the others as the civilians. The public affairs were undertaken by both the privileged phyle and one phyle from the civilians.

<sup>15</sup> See A. ANDREWS, *The Greek Tyrants*, tr. Z. Song, TCP, 1997, 29 ff.

<sup>16</sup> A.H.J. GREENIDGE, *A Handbook*, cit., 65.

<sup>17</sup> *Ibid.*, 67.

<sup>18</sup> *Ibid.*, 69.

<sup>19</sup> *Ibid.*, 71.

<sup>20</sup> A. ANDREWS, *The Greek Tyrants*, cit., 52.

created. It means the *status* of citizens, right as a citizen, citizen life, government, administration, policy, constitution, democracy and state<sup>32</sup>. Xenophon (430-354 B.C.)'s *Constitution of Sparta* is just the translation of *Lakedaimonion Politeia*<sup>33</sup>. Plato (427 – 347 B.C.)'s *Republic* has also a Greek title called πολιτεία. Until Cicero's transformation from πολιτεία to *res publica* it became possible for the book title to be translated into 'republic'. Interestingly the book mentioned πολιτεία only four times, three of which expressed the meaning of constitution or political institution and one of which indicated the meaning of state. Plato used this terminology to describe five different constitutions, in which the typical regime of Sparta acted through the love of glory: oligarchy meant the rich administrate the poor, democracy as the opposition of oligarchy showed people hymn liberty with a result of anarchy, tyranny meant no one had discipline and society existed in chaos<sup>34</sup> and the last one, monarchy, was hereditary<sup>35</sup>. Although πολιτεία didn't occur frequently in the book, Plato's research on constitution was unprecedented and unparalleled. Of course the theory was the natural accumulation of Greek relevant

<sup>32</sup> See K. FEYERABEND, *Pocket Greek Dictionary: Classical Greek-English*, Berlin-Munich, 1988, 312.

<sup>33</sup> See SENOFONTE, *Costituzione degli Spartani*, trad. it., Milano, 2009, V.

<sup>34</sup> See PLATO, *Republic*, tr. G. Binhe, Z. Zhuming, TCP, 1986, 314.

<sup>35</sup> *Ibid.*, 313.

male citizen above 20 could attend it<sup>28</sup>. As what Pericles said in the funeral of soldiers: «The reason why our institution is called democracy is that the power belongs to the whole citizens»<sup>29</sup>.

The Greek story ends here. Carthaginians, not from Greece, belonged to the Phoenicians. But their constitution is worth introducing in that it had something in common with that of Greece and that it was the research object even for Greek people. The constitution of Carthage was quite similar with that of Sparta as it also contained the institutions like the King, the Senate, and the Citizen Assembly<sup>30</sup>. There were also two elected kings without hereditary post. The Senate was composed of 104 people taking on the similar function as the Supervisory Council in Sparta. The Citizen Assembly discussed every agenda no matter it was issued by the kings and the Senate or not<sup>31</sup>.

### 1.1.2 *The Formation of the Term Constitution and its Theory in Greece.*

Based on the constitutional experience among the nations in Mediterranean, the Greek word of constitution πολιτεία (*politeia* in Latin) was finally

<sup>28</sup> *Ibid.*, 64.

<sup>29</sup> See THUCYDIDES, *History of the Peloponnesian War*, I, tr. X. Defeng, TCP, 1985, 130.

<sup>30</sup> See POLYBIUS, *The Histories*, cit., 345.

<sup>31</sup> See ARISTOTLE, *The Politics*, cit., 98ss.

The former had priority on public affairs while the latter had contingent power of decision. The act refused by the former could not be discussed by the latter.<sup>21</sup>

From the statements mentioned above, the oligarchy in Greece was formed via different reasons, including those of birth, wealth, military system, race as well as hybrid, all of which belonged to the rule by the minority.

Mixed regime was in Sparta. It was a *magnum opus* of Lycurgus (800?-30 B.C.), the first constitution maker according to Polybius (B.C. 204-B.C 122).<sup>22</sup> Lycurgus categorized his people into three classes: the ruling Spartiates, the tributary Perioeci, and the Helot slaves. Politically there were two kings who shared the same authority. The Senate included 28 elected and tenured senators. There was also a General Assembly of the Spartans. At last there was a Supervisory Council including five people of whom the term of office was one year<sup>23</sup>. Spartan constitution was unwritten. Mixed constitution also existed in Crete, which differs from Sparta in that it was not a city-state but an island consisting of 43 independent cities, of which the most important

<sup>21</sup> See H. LUTZ, *The Corinthian Constitution after the Fall of Cypselides*, in TCR, X, 1896,419.

<sup>22</sup> See POLYBIUS, *Histories*, trans. Ian Scott-Kivert, 1979, 303.

<sup>23</sup> See W.A. DUNNING, *History of political theories*, I, tr. X. Yiwei, JPCL, 2009, 5.

three were Cnossus, Gortyn, the one owning the Gortyn Code<sup>24</sup>, and Cydonia<sup>25</sup>. Their constitutions were alike with a general name called the Crete Constitution. They were similar with the Spartan constitution but with stronger color of oligarchy. The class was also similarly divided into officials, the Senate and civilians. There were ten head officials called Cosmins exercising previous king's power like judging important civil cases. They were chosen by general people from the nobles only and had one year of term of office. In this way the noble families took turns to take office. Senators were elected by people from the ones who had experiences of being an Cosmin. The Senators didn't have term limit but can quit their positions. Criminal cases were dealt with by the Senate and Cosmins jointly. People, made up with the class of free people, attended Citizen Assembly, which had the function of electing and approving the decision of the Senate and Cosmins<sup>26</sup>.

The democratic constitution was in Athens but its earliest one was of aristocracy. Solon's constitutional reform (594 B.C.) relieved the institution instead of changing it thoroughly. Kleisthenes, Athens' chief executive (506 B.C.),

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<sup>24</sup> See *New Translation of Ancient History II: The Law Code of Gortyn*, trans. H. Hitao, Hep, 1992.

<sup>25</sup> A.H.J. GREENIDGE, *A Handbook*, cit., 65.

<sup>26</sup> See ARISTOTLE, *Politics*, tr. W. Shoupeng, TCP, 1965, 94 ff.; see also A.H.J. GREENIDGE, *A Handbook*, cit., 119.

established a democratic constitution for which he was called 'the father of democracy'. The structure of it was made up with three organs: Citizen Assembly, Five Hundred People Commission and Ten Commander Council. They performed supreme power, executing and military function respectively. In order to form the latter two organs, Kleisthenes divided Athens into three zones: the city and suburb of Athens, inner central area and the coast. Each zone was future separated into ten parts and each part was called a Three-Partition. A Tribe, also a constituency called *demos*, was composed of three Three-Partitions out of three zones. Fifty representatives were elected out of each constituency and so five hundred representatives from ten constituencies did the job of preparing bills and agenda, managing financial and diplomatic affairs and dealing with the usual business when the Citizen Assembly closed. Every tribe selected a commander who led the tribal army and the Ten Commander Council was formed to control the whole army<sup>27</sup>. From 443 B.C., Pericles intensified the democratic color of the constitution through opening all positions of the government to all classes and appointing official positions to general people via drawing lots. The Citizen Assembly was set to be the supreme power organ in which meetings was held every ten days and any

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<sup>27</sup> See *Western History of Constitution*. eds. H. Qinhua, Z. Haibin, PUP, 2006, 63.

nitio, nature and procedure<sup>77</sup> and so did Cicero's understanding toward *constitutio*<sup>78</sup>. So *constitutio* is the translation of the Greek counterpart of *status*. But in later works after *De inventione* he only used the terminology of *status*<sup>79</sup>. Isidore (about 560-636) in his *Etymologies* also said: «Among orators *status* was said to be what made up (*consistit*) a case, namely *constitutio*. From the issue the Greek used the word  $\sigma\acute{\alpha}\sigma\iota\varsigma$ <sup>80</sup>. The Latin liked *status* not only in the aspect of destroying the argument of the other party but also of discussing a case consisting of two parts. So *status* includes accusing and defending»<sup>81</sup>. The statement not only reveals the synonymous relation of *status* and *constitutio* but also shows their difference. The Greek considered *status* as a reason of refuting while the Latin took its counterpart *constitutio* as the composition of parties in a case as well as their mutual attacking and defending, adding plural factors of opposite subjects in the content of *constitutio*. The analysis of Isidore furthered to prove that *constitutio* is not the noun of *constituere*

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<sup>77</sup> See Y. YING - C. SHUZHEN, *Recognition, Analysis and Application of the Theory of Conflicting Point*, in *Rhetoric*, 2009, 2.

<sup>78</sup> See CICERO, *The Complete Works of Cicero: Rhetoric*, tr. W. Xiaochao, PPH, 2007, 148.

<sup>79</sup> See Authors quoted above n. 1.

<sup>80</sup> It is a Greek word equivalent to the Latin word *status*.

<sup>81</sup> See Isid. *etym.* 2.5.1, on <http://www.thelatinlibrary.com/isidore/2.shtml>.

(meaning put, arrange, create)<sup>82</sup> but that of *consistere*, including two parts of *con* and *sistere* with the former indicating ‘together’ and the latter ‘settle, build, maintain’<sup>83</sup>. Combining the two parts *consistere* means ‘settle together’, ‘build together’, ‘arrange’ and ‘organize’<sup>84</sup>. Hence the sense of ‘multi-subject interaction’ was promoted through the replacement of status with *constitutio*. When Cicero used *constitutio* to express a certain constitution, he seemed to emphasize the pluralism of constitutional subjects and their mutual resistance. Pluralism embodied two factors: the monarchic and aristocratic one representing the elite class and the democratic one of common people. They were not always harmonious but fighting and seeking compromise in order to pursue the development of the country. The struggle and integration between civilians and noblemen in Roman Republic provided good examples.

Of course Cicero’s use of *constitutio* may be influenced by the theory of constitution (physique) of Greek famous doctor Hippocrates (460-377 B.C.). In Chapter 4 of his *On Human Nature* he created such theory. He said: «The

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<sup>82</sup>English etymology dictionary always considers constitution as the noun of *constituere*. See ‘constitution’: <http://www.etymonline.com/index.php?search=constituti on&searchmode=none>.

<sup>83</sup> See X. GUODONG, *Roman Private Law*, cit., 509.

<sup>84</sup> *Ibid.*, 126.



constitution is composed of blood, phlegm, jaundice and black bile within human body. If these factors act well, the person will be healthy and vice versa»<sup>85</sup>. Here he spoke of physique *constitutio*<sup>86</sup>, the same word indicating controversial issue (*constitutio*). They also describe their objects in a similar way: human body has four fluids as a criminal case has four controversial issues. A person will be strong if these body fluids cooperate well just as a successful defending depends on the reasonable application of these four issues. Thus it is not strange to describe two phenomena with one word. Anyway Cicero made good use of the chance so that he put the color of medicine in the defensive theory and connected curing in medicine with defending in law.

Now I will return to the analysis of auxiliary terms. *Forma* means form and so is *conformatio*. They are close. *Genus* means kind. The common feature of the five words is to express the ‘attribute’ of one thing, through which they acquire their own meaning in a certain condition of time and space. Linguistically the organizational form of national or civil societies could be infinite but Cicero simply divided it into three

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<sup>85</sup> See A. CASTIGLIONI, *History of Medicine*, I, tr. C. Zhifan, GNUP, 2003, 120.

<sup>86</sup> I do not know its Greek and Latin word, but its French counterpart is ‘constitueé’, so I may guess that it is also used in Latin translation of relevant works of Hippocrates. See *Oeuvres Complètes d’Hippocrate: traduction nouvelle avec le texte*, VI, Paris, 39.

types instead of Plato's six based on the constitutional theory of the Greeks. They were monarchy, aristocracy and democracy in a sense of pure forms. But they may blend and Cicero named such mixed constitution *constitutio*, which integrate all advantages of these three constitutions<sup>87</sup>. In this way Cicero dismantled the Greek word πολιτεία, which has too many meanings like state and constitution in Greek. Through Cicero's work *res publica* (state) is still state while *status* (constitution) is not state itself but a kind of identity or attribute of state.

Why did Cicero abandon *politia* and create so many new words? The first possible answer is to avoid the mistaken association of *politia* with the inherent Latin word *impolitia*. *In* (*im* behind consonant) is a negative prefix in Latin. But *impolitia*, with the meaning of 'uncarefully'<sup>88</sup>, is not the opposite of *politia* but that of polite. *Impolitia* means negligence and carelessness<sup>89</sup>. In *The Attic Nights* Aulus Gellius used the word to specifically indicate the situation of a knight's failing to take good care of his horse<sup>90</sup>. The second answer is to localize the Greek termino-

<sup>87</sup> He said: «I preferred to have something outstanding and monarchic in a commonwealth; of some things being set aside for the judgment and wished of the people». CICERO, *On the Laws*, cit., 118.

<sup>88</sup> See X. GUODONG, *Roman Private Law*, cit., 423.

<sup>89</sup> *Ibid.*, 273.

<sup>90</sup> See AULUS GELLIUS, *The Attic Nights*, I, tr. W. Beloe, London, 1795, 265.

making up for the limitation of such drawbacks, I will be much more satisfied. Of course, if my argument can provide the believers who favor the view that constitution exists since ancient time with some strong support in the discussion on whether the constitution in China is only the output of bourgeoisie revolution or it exists since ancient time, I will be more pleased<sup>130</sup>. Although the ancient constitutions existed in the city-state with small population and were characterized by class constitution while modern constitutions are based on the nation-territory states as well as characterized by all its people, there is no denying that the latter comes from the former and it is obvious that the continuity exists between both parties.

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<sup>130</sup> The discussion happened in the 1980s, Lai Yuanjin's *On the Origin of Constitution*, WUJPS, 1981, 2, held the view that constitution exists since ancient times; Chen Shoucheng and Cui Zhuolan's *Constitution began in the time of bourgeoisie revolution by bourgeoisie: a discussion with Lai Yuanjin* (1982) 1 WUJPS thought that constitution is the result of bourgeoisie revolution; later Lai Yuanjin anti-criticized Chen Shoucheng and Cui Zhuolan's criticism, see L. YUANJIN, *Historicism Principles should be Emphasized in Constitutional Research: A Reply to Chen Shoucheng and Cui Zhuolan*, on WUJPS, II, 1982.

constitution. Of course, it is still used to describe varied constitution of people in the field of medicine.

However, before the above jobs were finished by Vattel, people used other terms to represent the constitution, some of which seemed to be totally irrelevant to constitution, such as *ordinatio civitatis*, *ordo civitatis*, *regimen*, political law. Some of them were obviously other expressions of constitution like basic law, institutional law, charter and state law. The establishment of these words reflected the understanding of establishers towards constitution. For instance, Thomas Aquinas, the founder of *ordinatio civitatis* and *ordo civitatis*, partly went back to the Aristotle's understanding of inter-subject relationship. But he eliminated Aristotle's democratic colors and regarded it as the thing which regulated the relationship of the rulers and the ruled. To our disappointment, our research on constitutional history always focuses on *constitutio* and hardly takes notice of the existence and the meaning of the constitutional expressions which seem to be totally irrelevant to constitution in the history of constitutionalism. As a matter of fact, *constitutio* was used to express constitution occasionally before 1758 and it only represented a certain kind of constitution. If we only emphasize the word and overlook others, we cannot do continuous but intermittent study of constitutionalism thought. And if the paper can play a role of

logy. Academically the Romans borrowed many terminologies from Greek. But this borrowing was not without any choice. Some of them were Latinized. A good example is the logic terminology *eidos*, which was Latinized to *species* or even *forma*. Sometimes the purpose of the transformation is just for the convenience of declension<sup>91</sup>. Whatever, Cicero's word formation avoided too many meanings focusing on one word like *πολιτεία*. For example the Latin words mentioned above indicating constitution completely abandon the meaning of 'city-state', especially excluding the understanding of 'city' and 'government'.

### 1.2.3 *The following-up of other Roman Jurists after Cicero.*

May one ask whether Cicero was the sole person to express constitution with the word *status*? The answer is no. At least two Latin jurists after Cicero also used the word to indicate it. The first one is Pomponius, whose text of D.1.2.2.24 recorded a 'coup': During the Roman Republic, *Decemviri*, a ten-man commission entrusted to make the Law of Twelve Tables, tasted the fantasy of power and were reluctant to relinquish it. Claudius, one of them, even took over a girl called Virginia by force. Finally *Decemviri* were

<sup>91</sup> Cic. *top.* 6.30. See CICERO, *Topics*, tr. X. Guodong, NJLR, 2008, 8.

overthrown. Here, Pomponius concluded with a sentence «and the constitution resumed its former condition» (*Ita rursus res publica suum statum recepit*)<sup>92</sup>. The second author is Ulpian (170-228), who said in D.1.1.1.2: «Public law is that which has reference to Roman constitution; private law is that which concerns the interests of individuals; for there are some things which are useful to the public, and others which are of benefit to private persons». This text has extremely large amount of citations because it is considered to firstly put forward the division of public and private law and the standard of interest concerning this division<sup>93</sup>. But it is actually mistranslated by people in the background of not knowing the constitutional terminology of Latin. The first sentence is usually translated as «Public law is that which has reference to the administration of the Roman public affairs»<sup>94</sup>. Actually, what uniquely differentiates the expression of Ulpian from that of Pomponius is that the latter used *rei publicae*

<sup>92</sup> About the text of Pomponius, see *Digesta*, I, tr. L. Zhiming, CUPSLP, 2008, 38 f. It is a pity that the translator does not understand the proper constitutional meaning of *rei publicae status*, using 'In this way, the republic restored its previous state again' instead.

<sup>93</sup> For a good example, see *Dictionary of Chinese Law: Jurisprudence*, PPC, 1997, 639; Y. TIAN, *On the Sea Property Law*, CLPH, 2004, 36; C. PING-G. GUILIN-H. JIARU, *New Perspective on the Basic Theory of Chinese Economic Law*, CLPH, 2005, 196.

<sup>94</sup> *Digesta*, I, cit., 7.

medical science and rhetoric achievement in his time, Cicero made another phrase *rei publicae constitutio* to express constitution, which reserved Greek constitutional thought of inter-subject relationships and stressed the diversity of constitutional subjects as well as the confrontation of them, implying the statement that contradiction was the basic reality of constitutionalism and the driving force of its progress. If the explanation is true, the verb form of *constitutio* should be *consistere* instead of *constituere* in that the word *consistere* was multiple resonances. It was specifically used by Cicero to express his favorite concept of mixed constitution, which was also highly evaluated by Polybius<sup>129</sup>. It is not an occasional choice as the condition of a country whose constitutional factors are mixed well is the same as the condition of people whose various body fluids are matched well, both of which can be described as *constitutio*. But the usage disappeared quickly. For more than one thousand years after Cicero, *constitutio* left the garden of constitution and became a specific noun of indicating emperors' edicts. But it still kept contact with the word *consistere* and the mixed constitution of Cicero. It was not until 1758 that Vattel restored its constitutional meaning. Since then the word began to be used specifically to represent

<sup>129</sup> See POLYBIUS, *Histories*, cit., 303. He said that the best constitution should include three factors as monarchy, aristocracy and democracy.

to indicate some certain constitutional documents or an overall of constitutions and administrative laws, but here I have no time to discuss. What is more, the words I have analyzed in previous paragraphs are not mutually exclusive. For instance, French may use fundamental law, political law and constitution simultaneously, and Germans also use ‘Konstitution’ even Constitution in addition to ‘Verfassung’.

#### 1.4 Conclusion.

To sum sup, the most ancient term for constitution is *πολιτεία*, established on the basis of the constitutionalist experience of the ancient Greek peoples, representing a kind of constitutional concept of ‘Inter-subject relationships’. At the same time the democratic thought entered into it. The principle of calling an undemocratic constitution as constitution is exactly the same as naming a dead person as person or referring to counterfeit money as money. Afterwards the term for constitution evolved based on the clue of ancient Greek thought. Cicero Latinized *πολιτεία*, objectified the concept of constitution basically and made the phrase *rei publicae status* to express constitution. Thus constitution was interpreted as the form of public affairs which consisted of varied forms as monarchy, oligopoly and democracy. On the other hand, based on the

status to indicate constitution while the former used *rei Romanae status. Publicus*, the adjective of people, basically equals to *Romanus*, the adjective of Roman people. But the former is wider and the latter is more specific<sup>95</sup>. Hence the famous text of Ulpian in fact told the division of constitution and private law though he put constitution in the same meaning as public law, reflecting his wider understanding of constitution compared to modern definition. Therefore constitution is not a part of public law but the whole of it.

Significantly, the use of *constitutio* by Cicero was abandoned after only 250 years when Ulpian, who regarded *status* as constitution, began to use *constitutio* to express rule, permission and institution. Examples of ‘rule’ is in Ulp. 45 *ad Sab. D.* 47. 1.1pr., which says the civil law (*civilis constitutio*) prescribes that heirs shall not be liable to penal actions any more than other successors..., and in Paul. 7 *ad Sab. D.* 47.2.16, saying that it is not a rule of law (*iuris constitutio*) that a father cannot bring an action for theft against his son.... The example of ‘permission’ is in Ulp. 23 *ad ed. D.*15.1.7.3, saying that a son and a slave can all have a *peculium* as in this instance everything depends upon the grant of the master (*domini*

<sup>95</sup> The entry of National Constitution in Italian legal Encyclopedia also thinks Roman people use *rei Romanae status* to express constitution, see *Enc. dir.*, VI, Milano, 1962, 133.

*constitutione*). The example of ‘institution’ is in Florent. 9 *inst.* D. 1.5.4.1, saying that slavery is an institution of the Law of Nations (*constitutio iuris gentium*). How diverse the usage could be!

In the sixteenth century Hugo Donellus still defined *constitutio* with the meaning of rule: «*constitutio* is what is ordered, granted or prohibited. If it is an order or a permission, it is an justified thing; otherwise, it is prohibition»<sup>96</sup>.

#### 1.2.4 *The Latin Terms for the Constitution used by Thomas Aquinas and his Colleagues.*

Nearly one thousand years after Ulpian there emerged writers who continued to discuss the appropriate Latin forms for πολιτεία at their era. Thomas Aquinas (1225-1274) and Petrus de Alvernia (about 1240-1304) successively finished commenting the *Politics* of Aristotle in Latin. The former commented the first three volumes and the latter continued to finish it. The book of *Politics* that they were in accordance with had been translated into Latin by a Belgian priest William de Moerbeke (1215-1286) in 1260<sup>97</sup>. The interesting thing is that the translator gave up the effort that Cicero made in the Latinization of πολιτεία and merely translated it as *politia*, a certain choice of simplification. So St. Thomas and Petrus de Alvernia met the problem of how

<sup>96</sup> See H. DONELLUS, *Opera omnia*, I, Romae, 1828, 26.

<sup>97</sup> See A. GUZMÁN BRITO, *El vocabulario*, cit., passim.

structure of national organization’.<sup>126</sup> So ‘Verfassung’ itself has the meaning of ‘institution’ instead of ‘law’. Carl Schmitt (1888-1985) said: «All things, including every person and every stuff, every enterprise and every organization, are in ‘Verfassung’ in a certain way, and every possible thing may have a ‘Verfassung’ ... ‘Verfassung’ may describe a country itself as a united political organization or a special and specific state pattern and form»<sup>127</sup>. So it is not hard to understand that Schmitt’s use of ‘Verfassung’ integrated his understanding of Greek and Roman culture. He said nothing but three meanings of ‘Verfassung’: the first is the meaning equivalent to Regime, which means that everything has its institution; the second equals to the ‘state’ meaning of ‘πολιτεία’; the third indicates πολιτεία’s typical constitutional meaning. As a conclusion, ‘Verfassung’ can be translated into law of institution. In the same time of regarding ‘Verfassung’ as constitution, institution in Germany is always related to the word ‘Konstitution’<sup>128</sup> which refers to the constitution in language of Holland, Norway and Sweden.

What I need to mention here is that ‘Charte’, ‘Staatsrecht’ and some other words are also used

<sup>126</sup> See M. STOLLEIS, *Public law in Germany, 1800-1914*, tr. L. Yong, LPC, 2007, 393.

<sup>127</sup> C. SCHMITT, *Constitutional Theory*, cit., 1.

<sup>128</sup> See voice *Konstitution*, on <http://de.wikipedia.org/wiki/Konstitution>.

and then they were formed in *consistorium* and passed through seven times of reading<sup>124</sup>. A *constitutio* is finally made. Thus the word itself embodies the character of controversial views and legislative democracy, expressing the meaning of Cicero's mixed constitution in another way.

Interestingly it becomes the most prevalent vocabulary to indicate constitution in modern society. In 1758 Swiss jurist Emmeric de Vattel (1714-1767) wrote in his *The law of nations or the natural law principle*: «The constitution of a state is the fundamental rule of deciding how the public power performs»<sup>125</sup>. His words use constitution to express the modern constitutional thought and have strong spirit of the times as the word was no longer used in times of emperors' edicts and it separates the institution of city-states from the problem of the ruling class, emphasizing the power-controlling nature of the law. So the corresponding expressions in Italian, Spanish, Portuguese and Scandinavian arise soon.

### 1.3.4 'Verfassung'.

It is a German terminology to indicate constitution and is also an abbreviation of 'Verfassungsrecht'. Sir Lei Yong translated it as 'legal

<sup>124</sup> *Ibid.*, 253.

<sup>125</sup> See E. DE VATTEL, *Le droit des gens, ou principes de la loi naturelle*, Londres, 1758, 31.

to use the familiar Latin word known by people at that time to explain and compare the ancient word *politia*.

Thomas Aquinas used three words to express the *πολιτεία* of Aristotle. The first was *ordinatio civitatis*. He said in the comment for *πολιτεία* in Volume III, Chapter 1 of Aristotle's *Politics*: «Nothing is said as *politia* but the *ordinatio* of a city-state as it concerns all the officers in the city-state especially those senior officers. By inference, due to the citizen groups of a city-state, namely the *status* of citizens of it, completely composed of the people who rule it, the arrangement of such status is just *politia* itself» (*Et dicit quod politia nihil est aliud quam ordinatio civitatis quantum ad omnes principatus qui sunt in civitate, sed praecipue quantum ad maximum principatum, qui dominatur omnibus aliis principatibus. Et hoc ideo, quia politeuma civitatis id est positio ordinis in civitate, tota consistit in eo qui dominatur civitati; et talis impositio ordinis est ipsa politia*)<sup>98</sup>. The paragraph talks about the content of a constitution, consisting of the ruled and the ruling class generated by the ruling. The second word is *ordo civitatis* (order and class). In another two places of the same comment Thomas Aquinas said: «*politia* is just the class division of city-state citizens» (*politia nihil aliud est quam ordo inhabitantium civitatem*);<sup>99</sup> In the sense of the ruling

<sup>98</sup> *Corpus Thomisticum Index Thomisticum*, ed. R. Busa Sj, on <http://www.corpusthomicum.org/it/index.age>.

<sup>99</sup> *Ibid.*

class *politia* is the citizen group and varied city-states must be divided according to the difference of rulers (*politia nihil est aliud quam politeuma, quod significat ordinem dominantium in civitate. Necesse est quod distinguantur politiae secundum diversitatem dominantium*)<sup>100</sup>. The third word is *regimen*. Aquinas used it to represent the six constitutions in Aristotle's sense. He said: «There are six kinds of *ordinatio* in a city-state... If it is ruled by the minority and is elected according to the virtue, such *regimen* is called as aristocracy because the welfare of the majority is well looked after»<sup>101</sup>. In the context *ordinatio* and *regimen* are set as synonym, jointly representing the constitution of Aristotle. Aquinas even said in another place: «*Politia* is the regime of the city-states»<sup>102</sup>.

In his great works of *Summa Theologiae*, Aquinas completely used *regimen* to represent the six constitutions of Aristotle<sup>103</sup>.

Compared with Aristotle's constitutional theories above, it is obvious that Aquinas established it on the basis of theory of class, emphasizing that the constitution was the system of rules composed of the rulers and the ruling class. The nature was to promote the rule of the minority for majority and to take the consti-

<sup>100</sup> *Ibid.*

<sup>101</sup> See A. GUZMÁN BRITO, *El vocabulario*, cit.

<sup>102</sup> See *Corpus Thomisticum*, cit.

<sup>103</sup> See ST. THOMAS AQUINAS, *Summa Theologiae, A Concise Translation*, ed. T. McDermott, 1989, 290.

Apparently the terms of political law also departs from the European tradition of making constitutional vocabulary around *πολιτεία*, but this is not the case. Political law can be seen as a sophisticated modern translation of *πολιτεία* due to the same etyma of *πολιτεία* and *πολιτικά* (politics).

### 1.3.3 *Constitution.*

Cicero first used it to indicate a mixed constitution, then it turned into a terminology of emperors' edicts. In Digest of Justinian the word *constitutio* appeared 268 times, and apart from the above-mentioned 4 exceptions, all the others have the same meaning. Why? It can be explained when considering *constitutio* as its verb form *consistere*. Although *constitutio* was issued by emperors, it was actually made by emperors' *consistorium*, which originated from the verb *consistere*, having the meaning of 'co-settle', 'co-construct', 'arrange' and 'organize'. *Consistorium* illustrated the places for doing these actions (the suffix of *orium* means a place). Indeed, in case of emperors' decision-making absence, the *consistorium* mainly consisted of the outgoing or the current chief executive<sup>123</sup>. All laws, edicts and judgments are drafted by *scrinia* in the guidance of the chief executives like a financial executive,

<sup>123</sup> G. CICOGLA, *Consilium Principis, Consistorium*, Torino, 1902, 265.



types, the first of which was generally involved in human wisdom resulting from all society and the second of which regulated every special society<sup>120</sup>. The second one was also like *πολιτεία* but with a narrower range because it was put into the equal position with police law. Therefore it could only be a branch of public law and someone even regarded it as a second social contract so as to regulate the government form<sup>121</sup>. Such kind of political law had the same meaning as constitution, so the fundamental law of the Kingdom of the Two Sicilies in 1821 was directly named ‘*costituzione politica*’<sup>122</sup>.

The appearance of political law symbols the obvious combination of modern constitutional theory and social contract theory as the constitutional theories in Greece and Rome were obscure in the basis of social contract theory. According to Rousseau’s view, there were two kinds of social contracts. The first was the contract of associate, through which people ended their mutually isolated state and formed a community. The second was the contract of government, in which people as a whole transferred the right of ruling to the ruler. The latter was seen as constitution.

<sup>120</sup> See C.L. DE SECONDAT MONTESQUIEU, *The Spirit of Laws*, I, tr. Z. Yanshen, TCP, 1963, 173.

<sup>121</sup> See M.A. MACAREL, *Eléments de droit politique*, Bruxelles, 1834, 4.

<sup>122</sup> *Costituzione Politica del Regno delle Due Sicilie*, Napoli, 1821.

tutional theory of the system of aristocracy or oligopoly as the whole of his constitutional theory. While such understanding accorded with the practice of many ancient Greek city-states it was never promoted by Aristotle who lived in the atmosphere of Greek democracy. Aquinas’s *ordo civitatis*, *ordinatio civitatis* and *regimen* are interrelated. *Ordo* is the meaning of class. *Ordinatio*, indicating class order, is the abstraction of *ordo*. The original meaning of *regimen* is rudder, extending to the meaning of ruler and leader.<sup>104</sup> So Aristotle’s six constitutional forms is just the division caused by the difference of rulers in Aquinas’ viewpoint. Therefore he simply named the division as *regimen* so as to attach his constitutional theory with strong color of cybernetics. In a nutshell, Aquinas tore the democratic veil once over the constitutional concept, describing it as the class rule relationship which might not please everyone. His change perhaps reflected the political reality at that time. After all, the Greek democracy was no longer in existence.

The Latin vocabulary Petrus de Alvernia used for explaining Aristotle’s *politia* is almost the same as Aquinas’, just adding *res publica* as *ordinatio* of city-states<sup>105</sup>. This is a clumsy inheriting of Cicero’s achievement. Saying ‘Inheriting’ means that the translator used the word *res publica* like

<sup>104</sup> See *Latin Chinese Dictionary*, cit., 469.

<sup>105</sup> See A. GUZMÁN BRITO, *El vocabulario*, cit., passim.

Cicero and saying ‘clumsy’ is because the translator failed to understand the constitutional expression of Cicero, not using auxiliary terms but core terms. In addition, Petrus de Alvernia added the word *ordo principatum* (class of officers) for expressing the constitution (*Politia enim est ordo principatum in civitate*)<sup>106</sup>. But there is nothing new but the abbreviation of Aquinas’ *ordinatio civitatis*.

Finally only regimen got the inheritance in these innovative terms for constitution. The proof is that *De regimine principis* was written by Tolomeo de Lucca (about 1227-1327), one of Aquinas’ students in 1298. The book is a complement for Aquinas’ incomplete *On the Kingdom*. After 1261, Giovanni da Viterbo (13th century) accomplished a famous work *De regimine civitatis*. Around the 1285, Egidio Romano Colonna (about 1274-1316) wrote *De regimine principis*<sup>107</sup>. Bartolus (1314-1357) also finished *Tractatus de regimine civitatis*. How about these works’ constitutional nature? Bartolus’ book may be taken as an example. The very beginning of it makes it clear that there are six types of government, the first half of which are democracy, aristocracy and monarchy and the second three is the corrupt edition of the former, namely anarchy, oligarchy and tyrant respectively<sup>108</sup>. Rea-

<sup>106</sup> See *Corpus Thomisticum*, cit.

<sup>107</sup> See A. GUZMÁN BRITO, *El vocabulario*, cit.

<sup>108</sup> See *Treatise on City Government according to Bartolus of Sassoferrato*, ed. S. Lane, on <http://www.fordham.edu>

*Philosophical Dictionary*, in which he set up the entry of fundamental law and defined it as the phenomenon: if people are desirous of having bread, they must sow corn; that if they wish for clothing, they must cultivate flax and hemp; that every owner of a field should have the uncontrolled management and dominion over it.<sup>118</sup> The word was most distinctively used in Bonn’s *Grundgesetz* in 1949.

### 1.3.2 Political Law.

After national states were founded, the concept of political law appeared. Rousseau (1712-1778) was the most well-known user, who published Social contract theory in 1762 with a subtitle called *Principes du droit politique*<sup>119</sup>. Montesquieu (1689-1755) was another noted user, writing it 41 times in his *The Spirits of Laws*. Political law in his thought was divided into two

<sup>118</sup> See VOLTAIRE, *Dictionnaire Philosophique*, IX, Paris, 1827, 202.

<sup>119</sup> As far as the meaning of ‘droit politique’ in the subtitle is concerned, different English translators have different understanding, causing their various translation like political law or political right. Italian scholar Giovanni Incorvati concludes with ‘political law’ after his research of these differences, thinking such political law aims to respect other basic rights. See G. INCORVATI, *Du contrat social ou principes des droit politique*, in *Jean-Jacques Rousseau. Social contract theory in 1762, principle of democracy. International Conference*, Sassari, 20-21 Sept. 2010.

the rules of succession to the throne and primogeniture<sup>114</sup>. The establishment of the name of fundamental law broke away from the European tradition of making constitutional vocabulary around the Greek word *πολιτεία* and announced the beginning of the nationalized constitutional vocabulary. But the name more or less connected spiritually to Greek tradition as a result of Aristotle's expression that constitution is the law beyond the other laws<sup>115</sup>. Meanwhile it returned to Cicero's way of objectivism. In other words constitution was regarded as the treatment of some affairs rather than the operation of the organization of some people though the affairs should be specialized as the relation of the foundation of a house with its other parts. Since then it was put into wide practice. In Legislation, Georg Jellinek (1851-1911) thought the concept of German fundamental law has emerged since the signing of The Peace Treaty of Westphalia (1648).<sup>116</sup> Academically Etienne Feuillant equaled fundamental law to political law in his *Des Lois Fondamentales considérées dans leurs rapports politiques* (1818) as it is the law that regulates the activities of government<sup>117</sup>. In 1764, Voltaire published *The*

<sup>114</sup> See A. GUZMÁN BRITO, *El vocabulario*, cit., passim.

<sup>115</sup> See ARISTOTLE, *The Politics*, cit., 129-178.

<sup>116</sup> See C. SCHMITT, *Constitutional Theory*, tr. L. Feng, SPPH, 55, nt. 10.

<sup>117</sup> See E. FEUILLANT, *Des Lois Fondamentales considérées dans leurs rapports politiques*, Paris, 1818, 7.

ders may easily know that in the name of *regimen*, Bartolus discussed what Aristotle dealt with in the name of *πολιτεία*. If the discussion Aristotle did was constitutional, so did the Bartolus'. However, jurists in the thirteenth to fourteenth century have got used to express constitution with *regimen*. In this sense the so-called 'old institution' ('l'ancien régime') which was the aim of French revolution should be 'old constitution'<sup>109</sup>. It was a concept with Aquinas' style of class structure. In the words of Emmanuel Abbé Sieyès, what the constitution reflects is the rule of aristocracy and ecclesiastic class as well as being ruled of the third class<sup>110</sup>. That revolution was indeed the change of the constitution or ruling class. In the terms of Aristotle, the old constitution is in the form of monarchy or even tyranny and the new one is democratic. The third class became the ruling one, the monarchy died out and the regime of ecclesiastic class was deprived.

Then we may ask why writers after Thomas Aquinas preferred *regimen* to *status*. Perhaps *status* had been gradually used to express a country. In the fourteenth century, Giovanni Villani (1275-1348), a Florentine historian, began to used

</halsall/source/bartolus.html>.

<sup>109</sup> See A. DE TOCQUEVILLE, *The Old Regime and the Revolution*, tr. F. Tang, TCP, 1992.

<sup>110</sup> See E.J. SIEYÈS, *An Essay on Privileges & What is the Third Estate*, tr. F. Tang, TCP, 1991.

‘stato’, *status*’s modern form, to represent a certain kind of kingdom<sup>111</sup>. In the sixteenth century, Machiavelli, also from Florence, furthered the terms of ‘stato’ in the sense of subject. He wrote: «Throughout history, all ‘stati’ or regimes that rule humanity are republic and monarchy»<sup>112</sup>. Since then *status* was used to represent the country and constitution as one of a country’s factors has to be expressed in other terms. ‘Stato’ is different from *civitas* in that the citizen quantity of the former is not limited, so the maintenance of the citizen groups does not depend on the acquaintance between each other but on the fact that they belong to a same geopolitical community. Substituting *civitas* is a great event in the history of constitutional development. If the constitution in the sense of Aristotle was based on the relationship of acquaintances, the constitution after sixteenth century has to be established on the basis of the relationship of strangers.

### 1.3 *The nazionalized concept of πολιτεία.*

Until now what I have discussed is the Latinization of πολιτεία, which bases on the fact that Latin was regarded as the international

<sup>111</sup> See S. HAN, *History of Western Country Form*, GPS, 1993, 123.

<sup>112</sup> See N. MACHIAVELLI, *The Prince*, tr. P. Handia, TCP, 1985, 3.

academic language in Western countries. However Latin lost the privilege from the latter part of the seventeenth century<sup>113</sup>. People began to write academic works with national languages. In this period, *civitas* (a city-state with small population) died out and *status* (a territory-nation state) began, under the background of which, πολιτεία was no longer translated into various forms in Latin. Instead, it was directly transformed into corresponding terms of different national languages, including fundamental law (‘Loi Fondamental’) in French, political law (‘Loi poli-tique’ in French, ‘derecho politico’ in Spanish, ‘diritto politico’ in Italian respectively), Consti-tution in French, English and many other languages, ‘Verfassung’ in German etc., all of which will be analyzed in the following paragraphs.

#### 1.3.1 *Fundamental Law.*

In 1576 there emerged the expression of fundamental law in France, which was not used for referring to a written law but an integration of ancient customs, the king’s law with fundamental nature, the most central principles on monarchy government declared by ‘états généraux’ and the High Court of Paris. The contents of fundamental law are complex in levels, including both

<sup>113</sup>Descartes (1596-1650), Bacon (1561-1626, Spinoza (1632-1677) and Newton (1624-1727) still wrote with Latin, but few persons did so after them.