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Individual Ownership and Collective Ownership in the Nineteenth-Century Debate before the Sacred Economic Congregation

Simone Rosati*

Abstract

This work aims at retracing the origin and the characteristics of the debate on ownership in the Papal States during the 19th century. Such reconstruction will be possible thanks to the documents presented to the Sacred Economic Congregation. The latter, during the first two decades of the 19th century, received the papal mandate to discuss a draft law in order to eliminate all the obstacles opposed to the diffusion of the free and absolute private ownership. The notice related to a Law on ownership favoured the birth of an intense debate that created a division between the papal authorities, on the one hand, and the local communities, on the other hand. As we will see throughout the research, the two sides of the conflict protected two different models of ownership that, in turn, were expressions of two legal mentalities on the forms of appropriation: the individual one, typical of the modern world, and the collective one, an expression of the medieval civilisation.

Keywords: Sacred Economic Congregation; 19th century; private ownership; collective ownership; Papal States.

1. The debate on ownership in the Papal States: an issue related to an economic reform or to two opposing legal cultures?

Why, at the end of the 18th century, the pontifical territories were the forum of an intense debate on ownership?

We might dryly answer to this question by using the words of one of the unquestionable protagonists of this story, Monsignor Nicola Milella, Secretary of the Commission of cardinals constituted to discuss the project of a Law to abolish the servitudes of pasture, which would see the light shortly after¹:

“Nel mentre presso altre nazioni si poneva ogni cura di giovare l’agricoltura, la pastorizia e l’industria col liberare la proprietà dall’odioso vincolo delle pubbliche servitù, il governo pontificio non si ristette indifferente [...] fu allora che si concepì ragionevolmente la idea di una Legge generale per poter ad un tempo, ed in modo uniforme, provvedere a tutti i casi particolari, e così togliere il fastidio di lunghe e singolari discussioni [...] e liberare dallo squallore in cui vedesi l’agricoltura e l’industria nelle suburbane provincie”².

If we simply make a superficial reading of the work of the prelate, which is permeated by an enlightened and enthusiastic faith towards statistical and economic data, we would only deduce the conviction of a mere project of agrarian policy, aimed

at improving the productivity of the lands; this is the interpretation given by some historians³, which focuses on the detailed economic tables that are very present in the studies on agrarian issues of the nineteenth century.

Nevertheless, a more profound reading of the text allows to clarify some considerations that the Historians of Law can’t disregard.

A first consideration that emerges from the text of the Pontifical Secretary is the reference to other European nations, a peremptory signal of the fact that such reform was not a simple procedure of economic-agrarian policy, aimed at favouring some crops instead of others or at improving the techniques of land use; instead, it aimed at far more profound and relevant goals for society, which express a mentality that had been existing during decades in the European states.

The mentality and the goals of the Pontifical Curia can be deduced from Milella’s work: to free the individual ownership from the hateful bond of the servitudes of public use: “*liberare la proprietà dall’odioso vincolo delle pubbliche servitù*”⁴. These few words summarise the core of the ownership problem in the pontifical territories. Such words have more to do with legal science than with economic science. In this words, the historian of law, thanks to his awareness, is able to glimpse the trails that hide behind the apparently empty shell of the technical definitions.

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¹ We refer to the *Notificazione della Commissione governativa di Stato*, 15 November 1849.

² MILELLA, N., *I papi e l’agricoltura nei domini della S. Sede*. Roma, 1880, p. 311.

³ Among the historians who have analysed the vicissitudes of ownership in the territories of Saint Peter by omitting the social and legal data and by prioritising the economic field we mention Marina Caffiero’s work, *L’erba dei poveri*. In some parts of the research, it seems to reduce the suppression of the rights of common to a mere procedure of agrarian economy. CAFFIERO, M., *L’erba dei poveri. Comunità rurale e soppressione degli usi collettivi nel Lazio (secoli XVIII- XIX)*. Roma, 1983.

⁴ MILELLA, N., *I papi e l’agricoltura nei domini della S. Sede*. Roma, 1880, p. 311.

Behind the “ownership” and the “hateful bond of public servitudes” two opposed worlds, two opposed mentalities are hidden. They are the heirs of two irreconcilable civilisations⁵. Let us explain this better. All the great debate that ever since the end of the 18th century involved a lot of jurists, economists, towns, city associations, commissions of cardinals⁶ is not only the slow implementation of a plan of economic renewal in the pontifical domains. It is a lot more, it is the tragic juxtaposition between ancient (the Medieval world) and modern (the world of ownership individualism).

“The ownership” to which Milella refers is the only individual ownership that centuries of legal stratification had delivered to modernity. “The public servitudes”, on the other hand, derived from a more ancient civilisation, the one of the Middle Ages, an expression of *another modality*⁷, extremely multifaceted and divided, of structuring the modalities of appropriation of the soil. Two distant mentalities, one of which is simple and unitary, while the other one is complex, were heading to a fatal clash.

The objective of this study is to retrace, through the works of the Sacred Economic Congregation, the two concepts regarding the modalities of appropriation of the goods that have been at the root of the political and legal discussions on ownership during the nineteenth century: on the one hand, the medieval voice, which is the expression of a legal mentality that gives to the community a central role; on the other hand, the “modern mentality”, which mainly attributes to the individual the direct and absolute power to affect the *res*.

These two voices, the ancient one and the new one, are the extreme summary of two modalities of thought that reflect as

many modalities of living the anthropological relation between the self and the environment: the first one is based on the central role of the community and of custom⁸; the second one focuses on the individual seen as the only term of the absolute relation with things⁹.

Clearly, the term “modern”, here, does not mean the authorship of the individualistic logic in the theory on ownerships, but only the fact that precisely such historical period - the legal modernity¹⁰ - has witnessed the clear dominance of individual ownership as a characterising element of that era¹¹.

The main element to truly understand such debate is, first of all, man in his essence, as a being in relation to others and to the environment. This is the essential starting point of our research. In other words, behind the path that we will follow, we will not only find sentences, legislative works or law treatises, but also the thousand-year-old history of man in his natural instinct to possess the things that surround him. From this point of view, ownership no longer is the history of a specific legal order (of the Italian, the French or of any other legal order), but it rather is the history of man *tout court*¹².

2. The cause of the litigation: the *ius pascendi in re aliena*

The first important element consists in understanding the origin of the debate about ownership in the Papal States, which can be identified in the extremely peculiar ownership system that is typical of those places in which, ever since the beginning of the 20th century, a legal agrarian regime that caused hate and problems existed: the *iura in re aliena* and, in particular, the *ius pascendi in re aliena*, that is, the right to pasture cattle on private

⁵ This is the famous theory of Paolo Grossi, according to whom ownership, before being a legal concept, is a mentality, “*non si riduce mai a una pura forma e a un puro concetto ma è sempre un assetto sostanziale, un nodo di convinzioni, sentimenti, certezze speculative, interessi grezzi, tanto che sarebbe avventatissimo – e addirittura risibile – chi tentasse di inseguire, in questo terreno, una sorta di termini, parole*”. GROSSI, P., *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*, Milano, 1992, p. 630.

⁶ For an in depth analysis see ROSATI, S., *Comunità e territorio: la difesa civica dei diritti agrari collettivi nello stato pontificio (sec. XIX)*. In: *Archivio Scialoja-Bolla*, Nr. 1, 2018, p. 157-181.

⁷ The expression in italics is taken from the famous monograph of Paolo Grossi *Un altro modo di possedere*, that represents the essential source to understand the world of the rights of common both from the legal and from the anthropological point of view, as a relation between man and land alternative to the individualist one. The Title of Grossi's book is a quote and a tribute to another great jurist, Carlo Cattaneo who, in one of his essays entitled *Su la bonificazione del Piano di Magadino*, wrote: “questi non sono abusi, non sono privilegi, non sono usurpazioni: è un altro modo di possedere, un'altra legislazione, un altro ordine sociale, che, inosservato, discende da remotissimi secoli sino a noi”. CATTANEO, C., *Su la bonificazione del piano di Magadino. Primo rapporto a nome della Società promotrice*, Lugano, 1851, p. 5.

⁸ BARCELLONA, P., *L'individualismo proprietario*, Torino, 1987, p. 110-111; GROSSI, P., *L'Europa del diritto*, Bari, 2007, p. 24; QUAGLIONI, D., *La consuetudine come costituzione*. In: NERVI, P. (Hrsg.), *Dominii collettivi e autonomia. Atti della V Riunione scientifica* (Trento, 11-12 November 1999), Padova, 2000, p. 21-37.

⁹ Modernity is characterised, in relation to other legal experiences, by the all-embracing presence of the individual ownership as a “norma di funzionamento dell'intera società e dei rapporti umani”. BARCELLONA, P., *L'individualismo proprietario*, Torino, 1987, p. 13.

¹⁰ We assume the famous doctrinal stance of Paolo Grossi, who sees in the long path of human history three legal experiences, which are the expression of as many historical civilisations well differentiated from the legal, cultural and social point of view: Middle Ages (IV-XIV), Modernity (XIV-XX), Post-Modernity, which starts at the beginning of the 20th century and is still following a path of development, therefore it is waiting to be decoded by the academic. GROSSI, P., *L'Europa del diritto*, Bari, 2007, p. 8.

¹¹ It should be noted that the signs of change are defined by Paolo Grossi already in the XIV century, a transition era during which “le linee di un edificio future” are placed; the egological dimension of it finds in this era the first signs that will solidify from the following historical passages, such as legal humanism, the doctrine of natural law, the Enlightenment, the French Revolution, until the nineteenth century, when, at last, the Pandectists deliver to the bourgeois culture a legally perfect model of individual ownership, faithfully based on the principles built throughout the experience of the previous centuries. GROSSI, P., *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*, Milano, 1992, p. 624-626.

¹² We return to the enlightening words of Grossi: ownership, before being a legal concept, is a mentality, “*non si riduce mai a una pura forma e a un puro concetto ma è sempre un assetto sostanziale, un nodo di convinzioni, sentimenti, certezze speculative, interessi grezzi, tanto che sarebbe avventatissimo – e addirittura risibile – chi tentasse di inseguire, in questo terreno, una sorta di termini, parole*”. GROSSI, P., *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*, Milano, 1992, p. 630.

lands¹³. This was a promiscuous modality of enjoyment of the soil which was very present in the pontifical lands and that, due to its nature, put in relation two different and opposed centres of interest: on the one hand, the owner of the land (who was the holder of the *ius serendi*); on the other hand, the community, the holder of the collective right to pasture (those who were holders of the *ius pascendi*).

The *ius pascendi*, therefore, represents the concrete realisation of the theory of decomposition of the absolute dominion¹⁴. According to this theory, the absolute ownership is divided in as many forms of belonging as the *utilitates* that can be obtained from the land¹⁵. In our case, the *ius pascendi* and the *ius serendi*, which are identified precisely through the fruits from which the *utilitas* derives, that is, the natural fruits for grazing (the *ius pascendi*) and the industrial fruits that, on the other and, require the work of the owner of the land (the *ius serendi*)¹⁶.

So, which is the legal culture that hides behind this theory? It is the legal culture of the medieval world in which, as Paolo Grossi underlines, each situation of enjoyment can be dominion, and it can be so beyond the excessive formalisations of the legal system¹⁷. Therefore, a fragmentation of ownership in as

many forms of dominion as the *utilitates* obtainable from the soil took place; this situation reflected faithfully the extremely peculiar and fascinating culture that was able to preserve itself in the reality of the “pontifical” countryside throughout the entire 19th century.

Therefore, starting from the end of the 18th century, firstly in a marginal way and later with more strength, a serious ownership issue emerged regarding the modality to overcome such promiscuity; as we can imagine, this problem absorbed the values and the ideas underlying the two mentalities that we have identified at the beginning of this work.

Those who supported the individual property endorsed the complete liquidation of the collective agrarian rights, considered as the legacy of a murky past and of an unacceptable social and economic theory. Their ideal was the one of private property and the cult of the individual to the detriment of the values expressed by the community as a relational place for the intermediation between man and land. This ideal inspired the judgements of the Roman Rota towards the end of the 18th century¹⁸, the work of the Economic Congregation (that we will analyse in this study)¹⁹, the decisions of the Tribunal of

¹³ On the “*ius pascendi in re aliena*” see: FALZACAPPA, C., *Sui pascoli comunali. Memoria del Conte Casimiro Falzacappa di Corneto*, Perugia, 1842; FREZZINI, L., *Sull'abolizione delle servitù di pascolo, legnatico e simili nelle provincie ex-pontificie*, Castelpiano, 1889; SERCIA, G., CANCANI-MONTANI, F., *Il castello di Montalto di Castro, la tenuta della “Pescia Romana” e la Dogana dei pascoli del Patrimonio. Rapporti economico-giuridici fra la Camera Apostolica, i Farnese e gli abitanti di Montalto di Castro*, Roma, 1926; VILLANI, P., *Ricerche sulla proprietà e sul regime fondiario del Lazio*. In: *Annuario storico italiano per l'età moderna e contemporanea*, vol. XII, 1960; DANI, A., *Aspetti e problemi giuridici della sopravvivenza degli usi civici in Toscana in età moderna e contemporanea*. In: *Archivio storico italiano*, vol. CLVII, 1999, p. 285-326; ZENDRI, C., *Universitas, proprietà collettiva e servitù di pascolo nel tractatus de servitutibus di Bartolomeo Cipolla (CA. 1420-1475)*. In: NERVI, P. (Hrsg.), *Dominii collettivi e nuovi protagonismi per la promozione dello sviluppo rurale. Atti della VI Riunione Scientifica (Trento, 9-10 novembre 2000)*, Padova, 2002, p. 105-129; BARBACETTO, S., *Servitù di pascolo, civicus usus e beni comuni nell'opera di Giovanni Battista De Luca († 1683)*. In: NERVI, P. (Hrsg.), *Cosa apprendere dalla proprietà collettiva. La consuetudine fra tradizione e modernità. Atti della VIII Riunione Scientifica (Trento, 14-15 novembre 2002)*, Padova, 2003, p. 286-294; DANI, A., *Le risorse naturali come beni comuni*, Arcidosso, 2013; DANI, A., *Profili giuridici del sistema senese dei pascoli tra XV e XVIII secolo*. In: MATTONE, A., SIMBULA, P. F. (Hrsg.), *La pastorizia mediterranea. Storia e diritto*, Roma, 2011, p. 254-267; DANI, A., *Usi civici nello Stato di Siena di età medicea*, Bologna, 2003.

¹⁴ On the theory of the division of the absolute or divided dominion see PETRONIO, U., *Usi e demani civici. Fra tradizione storica e dogmatica giuridica*. In: CORTESE, E. (Hrsg.), *La proprietà e le proprietà*, Milano, 1998, p. 514; MEYNIAL, E., *Notes sur la formation de la théorie du domaine divisé (domaine direct et domaine utile) du XIIe au XIVe siècle dans les romanistes. Étude de dogmatique juridique*. In: *Mélanges Fitting*, vol. II, 1908, p. 409-461; THIBEAUT, A. F. J., *Über dominium directum und utile*. In: *Veruche über einzelne Theile der Theorie des Rechts*, vol. LXXVIII, 1970.

¹⁵ Regarding this, we share the valid warning of Ugo Petronio: “guardare agli usi e ai demani civici sotto il profilo del godimento delle utilitates e della loro appartenenza [...] significa assumere un punto di osservazione che sembra più aderente a quanto suggeriscono le fonti del cosiddetto diritto intermedio, le quali, quando si riferiscono agli usi civici [...] o agli stessi cosiddetti «demani civici» [...] hanno riguardo soprattutto al godimento dei servizi prestati dal suolo, e quindi all'appartenenza di essi, piuttosto che al suolo in sé e alla sua titolarità”. PETRONIO, U., *Usi e demani civici. Fra tradizione storica e dogmatica giuridica*. In: *La proprietà e le proprietà*, Milano, 1998, p. 514.

¹⁶ The reference to the natural and industrial fruits is related to a distinction stated before by Cardinal De Luca in his most famous work, *Theatrum Veritatis et iustitiae*, in which, in reference to common pastures, in Book IV, Pars I (*De servitutibus*), disc. 35, he says the following: “*seu quod res sit in dominio unius quoad certum genus fructum, puta industrialium, et in dominio alterius quoad aliud genus, puta naturalium, ex iis, quae super hac distinctione dominorum diversis respectibus habentur praesertim sub tit. de feudis disc. 6*”. Another jurist and judge of the Rota in Siena and Florence who exposed these principles is Neri Badia (1657-1726), in his work *Decisiones et responsa iuris*, dec. 51, as Alessandro Dani highlighted. DANI, A., *Usi civici nello Stato di Siena di età medicea*, Bologna, 2003, p. 179.

¹⁷ GROSSI, P., *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*, Milano, 1992, p. 28.

¹⁸ *Coram Gamberini*, decisio diei 19 aprilis 1822, Septempedana juris pascendi; *coram Resta*, decisio diei 22 martii 1803, Sutrina juris pascendi, Super bono iure; *coram De Cursiis*, decisio diei 9 junii 1840, Nepesina juris pascendi et registrendi; *coram Cesarei*, decisio diei 2 junii 1817, Praenestina juris pascendi; *coram Bussio*, decisio diei 9 junii 1755, Veliterna juris pascendi; *coram Bussio*, decisio diei 26 maii 1755, Nepesina juris pascendi super facultate faciendi restrictus; *coram Migazzi*, decisio diei 22 martii 1751, Sutrina juris pascendi; *coram Elephantiuto*, decisio diei 17 martii 1752, Sutrina juris pascendi quoad facultatem faciendi restrictus; *coram Spada*, decisio diei 4 junii 1832, Terracinen juris pascendi et restringendi. Super bono iure; *coram Bussio*, decisio diei 25 ianuarii 1751, Balneoregien juris pascendi; *coram Rusconi*, votum decisivum 26 aprilis 1780, Mathelicen juris lignandi et pascendi.

¹⁹ *Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualità di rappresentanti della popolazione di Corneto*, Roma, 1802; *Sacra Congregazione Economica. Prospetto generale delle servitù di pascolo dello Stato desunto dai stati particolari degli Em. Legati e Monsignori Delegati trasmessi alla segreteria di Stato, e da questi passati al Segretario della S. Congregazione Economica*, Roma 1822.

the Roman Republic²⁰, until the Pontifical Notification of 1849²¹.

Those who supported collective ownership, on the other hand, considered that those collective rights inherited from the past were a patrimony that had to be preserved and that those rights should not be considered as deplorable burdens imposed on someone else's property, but as an actual form of dominion given to a community. Ever since the first attempts of liquidation of the collective rights, the community itself protected the dignity of such forms of belonging that others wanted to erase without even giving a fair compensation to their holders²².

This is the primary cause of the debate on ownership in the pontifical territories and it is easy to understand the reasons. The fact that various subjects, an individual and a collective one, could access the same land based on different legal titles was the origin of uncertainties and conflicts, mostly in the period we are analysing, in which the individualistic mentality grew increasingly strong.

In particular, such mentality became increasingly strong in the Papal States starting from Pius VII pontificate. The Pope put a great effort in the attempt to restore the tragic economic conditions of the State that, after the fall of the Jacobin government, was scourged especially by the lack of primary goods and by the galloping inflation²³.

In the economic field, the *opus magnum* of Pius VII is the *motu proprio* entitled "*Il vivo impegno*" of 15 September 1802, completely centred on the prevailing legal and economic idea that saw the individual ownership as the solution to every problem²⁴. The strategy that had to be used to restore in the pontifical countryside the flourishing that the Roman citizens desired is well specified in the *motu proprio* itself, which shows the will to divide the large estates into various small private properties²⁵.

Therefore, the solution to the abandonment of the countryside was identified in the fragmentation of the big land properties into small parcels which were to be exploited at full capacity. The realization of this purpose faces various obstacles that were highlighted in this actual agrarian code. One of the most

serious and widespread obstacle to the better culture (this was the definition used in the *motu proprio*) was the presence of the collective right to pasture, seen as a collective use of the *ius pascendi* on a private land²⁶.

If we were to choose a date that symbolically represents the explosion of this debate on ownership, the best choice would consist in the day, month and year printed in the *motu proprio* of Pius VII "*Il vivo impegno*": September 15, 1802. The fate of the pontifical countryside and the way to interpret the same forms of appropriation started following a clear and unambiguous direction that would have continued, unaltered, until the beginning of the 20th century.

This is a very strong message that until now had not been underlined by historiography. The thing we want to bring out from the Agrarian Code is not the technical assessment on the implementation of its economic measures nor their success, but rather the strength to direct the way to conceive ownership and to approach to it. Precisely from this moment on, that process of *reductio ad unum* of the different forms of ownership exclusively in favour of that private property that represents the legal modernity commenced, with toughness and frequently with prevarication.

Pius VII himself places, at the beginning of the edict, the clear exposition of the guidelines of his government in the economic field, and he immediately specifies that precisely the economic policy will be a decisive factor in the future of the ownership structures²⁷.

These interventions were soon discussed and they immediately found a lot of difficulties which we will analyse during the rest of the dissertation. For the moment, it is sufficient to remember that, from the day of the promulgation of the pontifical edict, an insidious connection that was going to cause many legal and political controversy was created between the improvement of agriculture and the liquidation of the *iura pascendi in re aliena*. In fact, from that moment on, the topic of the rights to pasture started being entangled in the economic theory that was accepted as the unambiguous criterion to affect

²⁰ Tribunale civile del dipartimento del Tevere. Cornetana di manutenzione, o sia di Reintegrazione per i Consoli dell'Arte agraria di Corneto contro i Citt. Scipione Ex Marchese, Leonardo, ed altri Falzacappa, i fratelli Lucidi, ed altri consorti della Lite, Roma, 1799; Tribunale Civile del Dipartimento del Tevere. Cornetana per li Cittadini Leonardo Falzacappa, Gaetano e Fratelli Lucidi, e Scipione Sacchetti contro li sedicenti Consoli dell'Arte Agraria di Corneto. Risposta, Roma, 1799

²¹ Notificazione della Commissione governativa di Stato, 15 November 1849.

²² ROSATI, S., Comunità e territorio: la difesa civica dei diritti agrari collettivi nello stato pontificio (sec. XIX). In *Archivio Scialoja-Bolla*, vol. 1, Nr. 1, 2018, p. 157-181.

²³ MARCONCINI, F., *Le grandi linee della politica terriera e demografica di Roma da Gregorio I Magno a Pio IX. Fatti, leggi e dottrine*, Torino, 1930, p. 157-158; CECCHI, D., *L'amministrazione pontificia nella Prima Restaurazione, 1800-1809*, Macerata, 1975; CARAVALE, M., CARACCILOLO, A., *Lo Stato pontificio da Martino V a Pio IX*. In: GALASSO, G. (Hrsg.), *Storia d'Italia*, vol. XIV, Torino, 1971, p. 576-580.

²⁴ "Lo stato moderno è la decisione di costruire un ordine della convivenza a partire da un'antropologia individualistica che assume l'individuo come soggetto di bisogno e come desiderio di possesso illimitato". BARCELLONA, P., *L'individualismo proprietario*, Torino, 1987, p. 12.

²⁵ "La ridente prospettiva delle innumerevoli avventurose conseguenze, che sarebbero certamente per derivarne tanto rapporto alla privata, che alla pubblica utilità ci ha sostenuti nelle nostre considerazioni, e dopo di esserci lungamente occupati intorno a tale oggetto, abbiamo trovato, che sicuramente si arriverebbe ad ottenere l'intento, ove l'immensa quantità de' Latifondi deserti, ed incolti, che al presente si scorge nelle Campagne Romane, venisse divisa in un maggior numero di possessori". PIUS PP. VII, *Motu proprio: Il vivo impegno* (15 September 1802), p. 8

²⁶ PIUS PP. VII, *Motu proprio: Il vivo impegno*, p. 23-24.

²⁷ "Noi abbiamo cominciato ogni nostra Operazione Economica dal togliere tutti quei Vincoli, che da tanto tempo imposti all'interna contrattazione dei Grani, e delle altre Derrate rendevano onerosa la condizione dell'Agricoltore [...] E in tempo, che Noi levammo questi primari ostacoli, [...] non lasciamo di occuparsi a toglierne degli altri, che ugualmente pregiudicavano all'interesse dell'Agricoltura. La servitù dei Pascoli, per cui il Proprietario è costretto a lasciare le migliori terre bene spesso incolte, e spogliate [...] anch'essi hanno interessato la nostra attenzione, e si stanno maturando su di essi gli opportuni più utili regolamenti". PIUS PP. VII, *Motu proprio: Il vivo impegno*, p. 1.

the ownership structures. Precisely for this reason, as we will see in the following paragraph, the Pontifical Dicastery that was charged with discussing the issue on land ownership was the Sacred Economic Congregation.

The continuation of this work includes 4 testimonies that describe the debate concerning ownership inside the Economic Congregation and that we have linked to two legal mentalities: the modern mentality and the medieval one.

3. The Sacred Economic Congregation

A proof of the fact that the ownership issue was increasingly becoming a field of the activity of the government that had to be managed exclusively through the precepts of the economic science - which inevitably tended to solve and simplify the complex anthropological relationships deriving from the relation man-land in a mere circumstance of circulation of any good - is the decision to entrust the elaboration of a draft of law on collective rights of enjoyment to the Sacred Economic Congregation, restored by Pius VII with the *motu proprio Post diuturnas* of 1800²⁸.

The origin of this congregation dates back to Pope Benedict XIV. This Pope, with the constitution *Ne igitur ea* of April 18, 1746, created a congregation that he defined as peculiar (*peculiarem Congregationem*), composed by the Camerlengo Annibale Albani (1682-1751), by the Cardinals Antonio Saverio

Gentili (1681-1753), Domenico Riviera (1671-1752) and by the Secretary of State Silvio Valenti Gonzaga (1690-1756)²⁹.

In this way, the Congregation received the task of monitoring all the expenditures and revenues concerning the Apostolic Camera, to present to the pontiffs all those proposals that it considered more convenient for the better government of the Camera itself and of the public treasury³⁰. Apart from this, Benedict XIV established as well that the congregation gathered on the first Wednesday of each month in the Apostolic Palace, that is, in the rooms of the Cardinal Secretary of State, Silvio Valenti Gonzaga, with the auditor-general of the apostolic camera itself, Francesco Simonetti³¹.

In 1800, the new Pope, Pius VII, with an edict of the Secretariat of State of July 9 of the same year, instituted four congregations, among which we find, in the second place, the one related to the economic affairs that finally acquired the name of Sacred Economic Congregation.

Nevertheless, only with the bull *Post diuturnas, super restauratione regiminis Pontifici*, of the 3 October 1800, the Sacred Economic Congregation was regulated better and permanently confirmed.

In particular, in Article 2, *De publicae oeconomiae administratione, et administratoribus*, it was entrusted with the task of monitoring all the emoluments and fees received by those who carried out a specific mandate in the Papal States³². Articles 33³³, 34³⁴ of

²⁸ On this topic, see MORONI, G., *Dizionario di erudizione storico-ecclesiastica da S. Pietro sino ai nostri giorni*, vol. XVI, Venezia, 1842, p. 192-195; DEL RE, N., *La curia romana. Lineamenti storico-giuridici*, Città del Vaticano, 1998, p. 407-409; DAL PANE, L., *La Congregazione Economica istituita da Benedetto XIV e la libertà di commercio*. In: *Rivista di Storia dell'Agricoltura*, Nr. 5, 1965, p. 371-418; FRANCHINI, V., *Gli indirizzi e le realtà del Settecento economico romano*, Milano, 1950, p. 69-74; LODOLINI, E., *L'archivio della Sacra Congregazione del Buon Governo (1592-1847). Inventario*, Roma, 1956, p. CXLVI-CXLVII; SPAGNUOLO, A., *Fondi dell'Archivio di Stato di Roma relativi alle Congregazioni Economiche del secolo XVIII*. In: *Rassegna storica del Risorgimento*, Nr. 53, 1996, p. 75-98.

²⁹ "Cui quidem Congregationi Nos Ven. Fratrem Nostrum Hannibalem Episcopum Portuen. S. R. E. Camerarium S. Clementis, ac Dilectos Filios Nostros Antonium Xaverium Tit. S. Stephani in Monte Coelio Gentili, Dominicum Tit. SS. Duodecim Apostolorum Riviera, Sylvium Tit. S. Prisca Valenti Nostrum Secretarium Status, Presbyteros, et Hieronymum S. Angeli in Foro Piscium Diaconum Columna, respective nuncupatos, eiusdem S. R. E. Cardinales, nec non Dilectos etiam Filios Magistris Joannem Baptistam Mesmerum Thesaurarium Nostrum Generalem, Joannem Julianum Rubini praedictae Camerae Nostrae Commissarium Generalem, et Clementem Argenvilliers Auditorem Nostrum, tamquam ipsius Congregationis cum definitivi suffragii jure Secretarium, adscribimus". *Motu proprio ne igitur ea*. In: *Sanctissimi Domini Nostri Benedicti Papae XIV. Bullarium*, Tomus Primus, Romae, 1754, p. 491.

³⁰ "Huius autem Congregationis, et Personarum eam pro tempore constituentium munus sit, et assidua cura, non modo praemissorum omnium et singulorum plenam executionem, et exactissimum implementum urgere, et promovere, verum etiam ad omnia et singula genera et capita tam expensarum, atque onerum quam reddituum et proventuum Camerae Nostrae Apostolicae sollicitum dirigendo considerationis intuitum, opportuna pro tempore Consilia et remedia excogitare, Nobisque et Successoribus Nostris Romanis Pontificibus insinuare, quaecumque ad optimum ipsius Camerae regimen, et Publici Aerarii emolumentum, ad subditarum Civitatum et Communitatum levamen, ac Populorum incolunitatem utilitatemque, in Dominio existimarint salubriter expedire". *Motu proprio ne igitur ea*. In: *Sanctissimi Domini Nostri Benedicti Papae XIV. Bullarium*, Tomus Primus, Romae, 1754, p. 491.

³¹ "Quapropter volumus et mandamus, huiusmodi Congregationem semel singulis mensibus, nimirum prima Feria tertia cujuslibet mensis, quae de cetero impedita non fuerit, incipiendo a prima Feria tertia mensis Julii proxime futuri, (quo nimirum tempore rationes dati et accepti, quae pertinent ad elapsum annum millesimum septingentesimum quadragesimum quintum, confectas, atque inter se collatas fore praecipimus), et sic deinceps de mensem in mensem in Palatio Nostro, et in Aedibus solite habitationis praefati Nostri Secretarii Status, indesinenter congregari; eidemque praedictum Franciscum Simonetti in praeserta Scheda saepe memoratum, sive alium pro tempore Camerae Nostrae praedictae Ratiocinatorem Generalem, semper interesse". *Motu proprio ne igitur ea*. In: *Sanctissimi Domini Nostri Benedicti Papae XIV. Bullarium*, Tomus Primus, Romae, 1754, p. 491.

³² "Dalla congregazione economica deputata si fissi un annuo stabile assegnamento a monsignore tesoriere, ed anche a tutti quegli impiegati, e ministri che dalle propine, e regalie convenute nell'istromenti traevano o in tutto, o in parte la lor sussistenza". Bull *Post diuturnas, super restauratione regiminis Pontifici*. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 50.

³³ "Anche dalla congregazione del Buon Governo si renderà conto al pieno tribunale della camera della erogazione di quegli assegnamenti, che dalla medesima camera si passano ad essa congregazione all'effetto di supplire alle spese occorrenti pel mantenimento de' suoi ministri, e suoi officj, ed in tanto si farà la maggior possibile riforma del le sue spese ordinarie da sottoporsi all'approvazione della congregazione economica". Bull *Post diuturnas, super restauratione regiminis Pontifici*. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 53.

³⁴ "Si farà similmente dalla camera capitolina la maggior possibile riforma di spese, incaricandone la diligenza, e lo zelo dei signori conservatori, dai quali se ne dovrà presentare la nota da approvarsi dalla congregazione economica, e discutendo soprattutto, se convenga per principal riforma ridurre gli onorarij del senatore, dei conservatori medesimi, e del priore de' caporioni a livello del tempo della santa memoria di Benedetto XIV, e sopprimendo le paghe de' caporioni che non hanno alcun esercizio, e si rendono affatto inutili". Bolla *Post diuturnas, super restauratione regiminis Pontifici*. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 53.

the above mentioned bull, furthermore, entrusted to the congregation the reform of the expenditures of the Sacred Congregation of Good Government and of the apostolic camera.

The most relevant function of the economic congregation was the consultative nature that had to apply to all the economic-administrative affairs: for this reason, in the greatest part of the pontifical documents on free trade of wheat and cereals³⁵, on the tax system of industry³⁶, of agriculture³⁷, of the arts and manufactures³⁸ and, in general, in every law regarding public economy we find the indication of the prior consultation of the Economic Congregation.

During the Pontificate of Pius VII, the faculties of the economic congregation, that initially were exclusively consultative, were also extended to the litigation, so that the cases previously proposed by the Congregation could be discussed in a trial. A documentary proof of such judicial activity of the Sacred Economic Congregation can be deduced from the case analysed in this work. In fact, after its reconstruction, the Congregation was not only called to express a technical-economical assessment on the issue of ownership, but it also became, as we will see, a judicial instance that received the defensive memoirs of those who were favourable or opposed to the liquidation of the rights of pasture.

The sacred congregation, organised in this way, existed since 1809, year in which, due to the second French invasion and the consequent deportation of Pius VII, it stopped existing.

When the French domination ended in 1814, and Pius VII returned to Rome, the Sacred Economic Congregation was restored through a letter of the Secretariat of State on July 15, 1815, through which Monsignor Nicola Maria Nicolai was appointed secretary and Vincenzo Folcari was appointed Under-Secretary.

The last modification on the competences of the Economic Congregation was made, a few days later, with another letter of the Secretariat of State of July, 26. First of all, from that moment on, the college of the cardinal would be able only to discuss and make resolutions regarding the principles that must be established for a simpler and uniform public administration. Secondly, the Congregation was banned from dealing with particular issues related to the ordinary course of the administrations, since it could only provide general criteria from which the applicative regulations were going to derive. For this purpose, the Congregation only had the faculty and the right to request to the leaders of the administrations the clarifications and the documents necessary for the discussions of the general criteria. Thirdly, any faculty related to the litigation and any judicial faculty were removed from it, and it could only discuss and resolve issues submitted to it by the Secretariat of State. Lastly, every resolution of the Economic Congregation had to be submitted to the Roman Pontiff for the approval and the promulgation.

The continuation of this work includes 4 testimonies that describe the debate concerning ownership inside the Economic

³⁵ "Le materie economiche saranno discusse, e decise dal pieno tribunale radunato in congregazione, e le giudiziali; quelle che riguardano strettamente il vero, e puro favor del commercio, a somiglianza di quanto abbiamo prescritto relativamente alle materie annonarie con altra cedola di Nostro motu proprio, e susseguenti Nostre dichiarazioni, saranno delineate dal suddetto monsignor presidente con due de' sei deputati da eleggersi per turno della stessa deputazione per quel corso di tempo, che sarà da esso creduto opportuno, mentre le altre saranno privatamente giudicate da monsignor presidente della grascia. Incombera poi a tutti i deputati, e segnatamente a quelli, che verranno fra essi alternativamente dalla intera deputazione particolarmente destinati, l'invigilare sui venditori, ed a tenore delle leggi condannare i trasgressori alle pene pecuniarie, dovendo peraltro su gli oggetti interessanti. E su gl' inconvenienti di maggior rimarco interpellare la piena deputazione. L' assessore eserciterà le veci del fisco, e sarà obbligato d' invigilare, e di comunicare ai competenti superiori le denunce, che gli perverranno contro i trasgressori, non che di ricorrere alla congregazione economica composta dal reverendissimo cardinal camerlengo, e di altri reverendiss. cardinali (dei consigli della quale ci siamo principalmente serviti nel combinare le providenze contenute in questa Nostra cedola di motu proprio) ove da alcuno nell'atto dell'esecuzione o in qualunque altra circostanza si portasse la minima alterazione all' adempimento del sistema da Noi adottato". Motu proprio Le più colte nazioni d'Europa. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 99-100.

³⁶ "Vogliamo pertanto, che la Congregazione economica, la quale da Noi viene incaricata della direzione de' sistemi ordinati in questa cedola di Nostro motu proprio non solo seguiti ad occuparsi, come abbiain detto disopra, della rettificazione dei dazj, e de' proventi, che restano a prendersi in esame; ma ci proponga ancora, in seguito di nuove riflessioni, e di ragionevoli e giusti ricorsi, che potessero sopravvenire, quelle modificazioni, Variazioni, O riforme, che crederf opportune, e necessarie, onde Noi le possiamo prendere in considerazione per ottenere sempre più la felicità dei Nostri popoli, che è il voto più ardente del Nostro cuore paterno. Intanto perfi autorizziamo la congregazione suddetta a fornire ne' casi particolari quegli schiarimenti, che possono occorrere per la retta esecuzione di tutte le disposizioni contenute in questa Nostra cedola di motu proprio, non intendendo peraltro con questo provvedimento di togliere ai rispettivi tribunali alcuna facoltà di loro attribuzione, e che non si opponga ne direttamente nè indirettamente a quanto qui abbiamo disposto". Motu proprio Dacchè piacque alla provvidenza. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 129.

³⁷ "Ad ottenere un tale intento Noi scorgemmo essere assolutamente necessario, che cessino, e sieno a tutti note le ipoteche, ed ogni altra sorta di vincolo, a cui si trovano sottoposti li terreni, cosicchè chi somministra il denaro sulla sicurezza di alcuno di detti fondi non corra rischio di perderlo per l'esistenza d' impegni anteriori. E rilevammo con piacere che in vista appunto di assicurare la sorte, e la condizione dei prestatori contro gli enunciati pericoli, fra le altre ispezioni, che attualmente si stanno maturando dalla Nostra congregazione economica, lodevolmente essa si stava eziandui occupando di un regolamento, col mezzo di cui si rendesse a tutti noto, e potesse ognuno al momento rilevare con certezza le ipoteche, ed altri vincoli, ai quali restano sottoposti non solo i terreni, ma ogni altra sorta di fondo commerciabile, regolamento che per lo stesso importante oggetto d' in durre una tale sicurezza nei contratti d' investimento di denaro da molto tempo sotto nome d' ullèzzio d' involazione, o di altri consimili titoli si trova felicemente introdotto, ed attivato nella maggior parte degli altri stati". Motu proprio L'oggetto del maggio bene. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 207.

³⁸ "E l'esecuzione di tutte le anzidette determinazioni contenute nel presente Nostro moto proprio commettiamo all'enunciata congregazione economica, a qui per conseguenza conferiamo tutte le necessarie facoltà, anche di suddelegare, peraltro col Nostro preventivo oracolo, tutte quelle persone, delle quali giudicasse espediente di servirsi per il più sollecito ed esatto l'adempimento delle enunciate ingiuntegli incombenze: specialmente poi autorizziamo la stessa Nostra congregazione economica a dare nei casi particolari tutte quelle determinazioni, ordini, e decisioni, che per la migliore esecuzione delle disposizioni prescritte con questa stessa Nostra cedola di moto proprio, giudicherf occorrere. E vogliamo, ed espressamente dichiariamo che da queste risoluzioni, e decisioni della predetta congregazione come si conviene ad un tribunale, che non è giudiciale, ma bensì unicamente incaricato della riforma della legislazione, non si dia mai alcuna appellazione, ma che soltanto sia luogo alla revisione da commettersi da Noi alla congregazione medesima, poichè tale è mente, e volontà Nostra espressa". EDITTO December 16, 1801: Providentiae, et favores concessi artibus, et commercio. In: *Bullarii Romani Continuatio*, Tomus septimus, Pars I, PII VII, Prati, 1850, p. 235.

Congregation and that we have linked to two legal mentalities: the modern mentality and the medieval one.

4. The promoters of the modern ownership

Let us start with the sources that show a modern mentality regarding ownership, based on the cult of the individual; this idea was adopted by the Economic Congregation, in particular by two of the secretaries who guided the congregation: Paolo Vergani and Maria Nicola Nicolai.

4.1 The report of the Secretary of the Economic Congregation Paolo Vergani

The first official work of the Economic Congregation on *ius pascendi* was commissioned in 1801 to its Secretary, Paolo Vergani³⁹, in compliance with the already mentioned *motu proprio* that, in article 6 chapter II, exhorted to issue a Law to liquidate the collective rights as soon as possible. The technical economic report of the Prelate⁴⁰ is extremely interesting, especially in the conclusive part, in which the ancient collective rights of the rural communities are qualified with a definition that will remain unaltered in the literature regarding this topic: «hateful servitudes». The reason of such a harsh judgement is due to the consideration that the pontifical reforms on free commerce of wheat and of the other fruits of the land could not be fully effective until the removal of the obstacles that impeded to the owners to freely exploit their lands, above all the common grazing⁴¹.

According to Vergani, the reference model had to be the Legislation adopted by Leopold II in the State of Siena⁴², which

had reached the longed-for goal of uniting the *ius pascendi* and the *ius serendi* in one person⁴³. Nevertheless, the Tuscan regulation should have received two relevant corrections: first of all, the opportunity to compensate the holders of the *ius pascendi* with a congruous annual fee corresponding to the value of the pasture; secondly, the Secretary of the Commission of the cardinals considered preferable a Law that, instead of generally declaring as abolished all the collective rights to pasture in the pontifical domains, let to the owners themselves the faculty to liberate the land⁴⁴.

This was the action line shared by the political and economic action of Pius VII and by his *entourage*, favourable to the results produced by the indirect Laws that create all the necessary conditions to realise a specific goal, by removing all the material obstacles and, at the same time, by giving incentives to those who supported the initiative promoted by the government. It was the principle, described in the *motu proprio* «*il vivo impegno*», of the award and of the punishment⁴⁵.

The social and legal culture that emerges from reading the document is a deeply individualist culture, intolerant towards everything that is an expression of the customary patrimony of the local communities and of their rights. A sign of this hostility can be deduced from the *vexata quaestio* of the compensations, which is discussed by Vergani with harsh tones. In fact, he considered that the union of the *ius pascendi* and of the *ius serendi* in the hands of only one owner should have been done in favour of the exclusive holder of the *ius serendi*, while the community of the holders of the *ius pascendi* would have received a small

³⁹ Monsignor Paolo Vergani had a primary role in the economic policy of Pius VII. He participated, especially as General Assessor of Finance and of Commerce, before, and as Secretary of the Economic Congregation, later, in the writing and discussion of the provisions regarding the free trade of wheat, in the project on the Code of Commerce, in the plan of “land registration” and, as we will see soon, in the *vexata quaestio* of the rights to pasture. He wrote various texts with political and economic content: *Le idee liberali. Ultimo rifugio dei nemici della religione e del trono*, Genova, 1816; *Della importanza e dei pregi del nuovo sistema di finanza dello Stato pontificio. Discorso di Monsignor Paolo Vergani*, Roma, 1794; *Discorso storico-politico sull'autorità del Romano pontefice*, Roma, 1815; *Analisi ragionata del Congresso di Vienna*, 2 books, Genova, 1818. On the life and political commitment of Paolo Vergani see DAL PANE, L., *Lo Stato pontificio e il movimento riformatore del Settecento*, Milano, 1959, p. 295; LA MARCA, N., *Tentativi di riforme economiche nel Settecento romano*, Roma, 1969, p. 131-134. On the legal stances of Vergani regarding the topic of pastures see PETRONIO, U., Qualche spunto sulla ‘questione demaniale’ in Italia prima della Legge Zucconi. In: FALASCHI, P. L. (Hrsg.), *Usi civici e proprietà collettive nel centenario della Legge 24 giugno 1888. Atti del Convegno in onore di Giovanni Zucconi (1845-1894)*, Camerino, 1991, p. 68-72.

⁴⁰ VERGANI, P., *Voto economico sopra le servitù de' pascoli alla quale soggiace una gran parte de' Terreni de' Particolari nelle Provincie Suburbane*, Roma, 1801. The report is reported in full in Summary (n.3) of the above mentioned Memoir of Monsignor Nicolai on pastures.

⁴¹ “La felice necessaria influenza della nostra nuova Legislazione Economica sull'Agricoltura resta necessariamente limitata a una porzione soltanto dei Terreni, che compongono le indicate Provincie, cioè a quelli, i quali sono liberi. La linea, che divide questi Terreni liberi da quelli che proseguono ad essere sottoposti all'odioso vincolo del Pascolo, è un termine, il quale circoscrive gl'indicati vantaggi del libero Commercio, e oltre al quale, per conseguenza non possono penetrare le beneficenze dell'ottimo sovrano”. VERGANI, P., *Voto economico sopra le servitù de' pascoli alla quale soggiace una gran parte de' Terreni de' Particolari nelle Provincie Suburbane*, Roma, 1801, p. 52.

⁴² See DANI, A., *Usi civici nello Stato di Siena di età medicea*, Bologna, 2003.

⁴³ “L'imperatore Leopoldo II, dopo di aver incoraggiata generalmente l'Agricoltura in tutta l'estensione del Gran Ducato di Toscana mediante la celebre Legge delli 18 Settembre 1767, sulla estensione del libero commercio anco ai generi li più necessarij all'umana sussistenza, rivolse le sue paterne cure a rimuovere, ed allontanare le cagioni particolari, che avevano procurato la depressione dell'Agricoltura stessa nel vastissimo Stato di Siena; Ed avendo iscoperto che la principale di queste cagioni consisteva nei perniciosi effetti, che ovunque in detto Stato produceva la separazione del Diritto del Pascolo dal Dominio del Suolo, venne nella determinazione, che effettuò coll'altra Legge delli 11 Aprile 1778 di riunire generalmente nel detto Stato di Siena, e di consolidare nel Padrone del Suolo il Dominio pieno, ed assoluto del Terreno colla percezione di tutti i suoi frutti”. VERGANI, P., *Voto economico sopra le servitù de' pascoli alla quale soggiace una gran parte de' Terreni de' Particolari nelle Provincie Suburbane*, Roma, 1801, p. 26.

⁴⁴ VERGANI, P., *Voto economico sopra le servitù de' pascoli alla quale soggiace una gran parte de' Terreni de' Particolari nelle Provincie Suburbane*, Roma, 1801, p. 26-29.

⁴⁵ In the *motu proprio il vivo impegno*, the Legislator does not hide his faith in such system of indirect Laws that would have finally fulfilled the longed-for desire of a prosperous cultivation “*interessando le due molle, che muovono il cuore umano, cioè il premio e la pena*”. PIUS PP. VII, *Motu proprio: Il vivo impegno* (September 15, 1802), p. 34.

and inadequate monetary fee⁴⁶. The distinction is evident also in the same legal terminology used by the Author of the document, when he qualifies the holder of the *ius serendi* as owner of the land and the community who holds the *ius pascendi* as the receiver of a mere servitude of use.

Such text will have a strong influence on the process of abolishment of the rights to pasture and it will even reach the Italian Parliament that, at first, will adopt a political stance in line with the Pontifical one⁴⁷.

The economic report of the Monsignor was discussed by the Economic Congregation in January 1802 and all the members, persuaded by his strong arguments, voted in favour of the abolishment of the rights to pasture, and they gave to Baldassarre Odescalchi, Duke of Ceri, the task of writing a draft of law, the first one created for the Papal territories⁴⁸. It fully answered to the guidelines defined in the *motu proprio* of Pius VII on the agricultural increase; in fact, it foresaw the liquidation of the rights to pasture in every occasion in which a cultivation was made in the lands burdened with the “hateful” legal bond.

Therefore, the project, written in a very short time, was read and debated in the session of January 15, 1802, during which some doubts regarding the opportunity of some articles were posed. The criticisms were mainly connected to two issues: firstly, it was considered unfair to extend the abolishment Law also to lands belonging to the community, and not only to private citizens, since such patrimony was considered as a good to be preserved for the subsistence of the communities themselves; secondly, another element that was criticised was the termination clause which established, in case the freed lands were not used in any way during two years, the reintegration of the original condition and, therefore, the rebirth of the ancient collective right.

After modifying the text, the agrarian Law was submitted to Pope Pius VII for the supreme approval. Nevertheless, in spite of the general enthusiasm of the cardinals of the Congre-

gation, it was not pronounced because, when the news of the abolition of the servitude of pasture spread, the ownership issue exploded. Some communities of the Papal States sent to the Congregation the Defensive Memoirs, which we will analyse in the following chapter, that claimed the dignity and the value of the agricultural Customs, liquidated by the economists that frequented the commission of cardinals as if they were mere flaws of the economic system.

It was probably at this time that it appeared clear how the Law on collective agrarian rights was not an economic operation like the other one that had just ended (for example the one on free circulation of wheat, but it rather was something that could not be understood exclusively by making assessments, from a cold technical office, on some cadastral mark, or by interpreting in a detached way the trends of the agricultural production of the previous year.

In sum, the Cardinals, and especially the Pope, understood that the Law that abolished the servitudes of pasture, which was so simple and triumphal in its abstract expressions, was much more than a modification of the ownership structure of a land; in fact, it was the dramatic attempt to dismantle from the deep roots of the land a mentality that had crystallised in the awareness of the rural communities.

4.2 The Memoir of Mons. Nicola Maria Nicolai

Another important moment in the debate on land ownership in the Papal States was the one that begun in 1815, when Mons. Maria Nicola Nicolai was appointed Secretary of the Sacred Economic Commission. His competences in the agrarian and economic field were unquestionable thanks to his great work on the countryside and the Roman Annona⁴⁹ and he wrote an extremely erudite Memoir with a summary on the servitudes of pasture⁵⁰. This work deserves our attention since it allows us to have a complete overview of the works of the pontifical commission on our topic, from the beginning of the papal as-

⁴⁶ “E perciò la Nuova Legge Agraria, che io giudicherei più opportuna in proposito di questa materia delle Servitù dei Pascoli sarebbe che a tutti li Proprietarij si accordasse la libertà di liberarsi di tali Servitù, e di consolidare intieramente il godimento del Pascolo col dominio del Suolo, ogni qualunque volta ciascuno di essi si obbligasse di corrispondere alla Comunità, o a chiunque altro si trovasse essere in possesso del Diritto del Pascolo un annuo Canone corrispondente all'importo del Pascolo stesso; Canone che per un maggior comodo de' Proprietarij medesimi dovrebbe esser loro permesso di affrancare mediante lo sborso del Capitale ad esso corrispondente”. VERGANI, P., *Voto economico sopra le servitù de' pascoli alla quale soggiace una gran parte de' Terreni de' Particolari nelle Provincie Suburbane*, Roma, 1801, pp. 26-27.

⁴⁷ In the first Draft Law on the abolishment of the rights of common in the ex-pontifical provinces, presented to the Camera by the Minister of Agriculture, Industry and Commerce Bernardino Grimaldi on November 29, 1884, we find, between the annexes, the “Voto economico sopra le servitù di pascolo” of Paolo Vergani; this demonstrates the ideological continuity that permeated a part of the political class and, in particular, the Minister who proposed the abolishing law. *Atti parlamentari. Camera dei deputati. Legislatura XV, Ia sessione 1882-83-84. Documenti. Disegni di Legge e relazioni*, n. 270.

⁴⁸ We quote the most significant articles of the Law proposal of the Duke of Ceri, which included 12 articles:

“Art. 1 Chiunque pianterà nel suo terreno vigne, o alberi di olivi, e moricelsi, o di frutti, rimarrà per diritto, e in forza della Legge libero dalla servitù del pascolo.

Art. 3 Chiunque per altro vorrà coltivare il suo terreno [...] e per conseguenza rimanere libero dalla servitù, dovrà interpellare giudizialmente l'attuale possessore del *jus pascendi*, e dichiarargli, che egli vuol ridurre il suo terreno a miglior coltivazione, e per conseguenza liberarsi dalla servitù, e tre mesi dopo seguita una tale intimazione avrà egli il diritto di espellere i bestiami dell'attuale possessore del *jus pascendi*.

Art. 4 Chiunque rimarrà in forza della sopraccennata coltivazione libero dalla servitù del pascolo dovrà pertanto pagare o al Barone, o alla Comunità, o a quegli, che godeva prima il *jus pascendi* il prezzo, che questi ritraeva dall'erbe, e questo prezzo dovrà giustificarsi innanzi al giudice del luogo, desumendolo dall'ultimo decennio.

Art. 6 Chiunque sei mesi dopo l'intimazione da Noi accennata all'articolo 3., o non avrà fatta la piantaggione, o non avrà seminato, o rotto almeno il suo terreno, come è necessario, per coltivarlo, o seminarlo, o chi dopo averlo coltivato ancora per molti anni tralascierà poi la coltura accennata di sopra, decaderà ipso facto dall'accennata libertà, e quegli che godeva prima il *jus pascendi*, facendo solamente costare al giudice locale, che non si è coltivato il terreno secondo vien prescritto dalla legge, ritornerà nell'antico diritto, e farà pascere dai suoi bestiami il terreno rimasto incolto”. The text of the Law Proposal is included in Summary n.4 of the above mentioned Memoir of Monsignor Nicolai.

⁴⁹ NICOLAI, M. N., *Memorie, Leggi, ed Osservazioni sulle campagne e sull'Annona di Roma*, Parte Seconda, Roma, 1803.

⁵⁰ M. N. NICOLAI, *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario*, Roma, 1823.

signment (right after the promulgation of the *motu proprio Il vivo impegno*) until the date of publication of the memoir (1823).

In particular, in order to clarify the situation better, the Congregation, through its Secretary, asked to all the Legates and Delegates of the Pontifical Provinces to provide the necessary information on the *ius pascendi*, by answering precisely to some fundamental questions that would have composed the entries of a «*Prospetto Generale delle servitù di pascolo*»⁵¹; in the document, it was necessary to specify if the lands burdened by the rights to pasture were a property of the community or of a private citizen, and also the legal title of the pretensions of the servitudes of pasture (*de jure domini*, *de jure cessionis* and *de iure civico*)⁵². This three-fold division was so hard to reproduce that many Towns omitted it for lack of documents or other kinds of proofs.

Now, beyond the statistics, which are never exact and can be misleading, the most genuine and concrete part of the economic prospect is the one with the observations communicated by the representatives of the communities to the Economic Congregation on some points that are considered particularly important. In this way, next to a list of numbers and abstract statistics, we find a valuable testimony of the voice of the different communities and of the way in which they intended the *ius pascendi*.

The general impression that we have when we read the observations of the provincial Legates is that the pastures were protected as a patrimony of the city from which the economic subsistence of the population, and in particular of the poorest rural classes (who obtained from the common goods the necessary means for their subsistence) depended.

The population lives on such servitudes. If they are removed, it is better to emigrate⁵³. This is the reflection of the Delegate of Frosinone, similar to the one of many other pontifical delegates. We do not only perceive the economic importance of the agrarian rights, but also, somehow, the pride of the communities in the defence of their own history, such as in the case of the city of Viterbo, which appealed to the ancient origin of the collective rights⁵⁴. In sum, the plan of the economic reform clashed with the general sentiments of the inhabitants of the

Papal States who were still tied to that past that the new ownership mentality defined as a remainder of the feudal barbarities.

Let us go back now to the Secretary Nicolai who, based on the above mentioned observations, prepared a sort of questionnaire divided into doubts to submit to the Fathers of the Economic Congregations, to finally decide which action line to follow. Let us see the more interesting ones.

The first doubt had been solved a long time before and it had to do with establishing whether the servitudes of pasture had to be preserved or abolished. Obviously, the answer of the sacred congress was “affirmative”, considering the economic damage produced by the system of pastures⁵⁵.

The second point asked whether the abolishment of the collective rights of enjoyment should have been general for the entire Papal States or it should have concerned only some provinces, and whether such abolishment should have affected the lands owned by the community⁵⁶. The Secretary had the idea, confirmed by the economic congregation, that the abolishment had to be general on all the lands, both of the private citizens and of the communities, in order to definitively eliminate every residue of the past and to respond both to the well-being of the State - that would have seen agriculture flourish again thanks to the creation of a small agricultural property aimed at the maximum profit - and to the local administrations, that would have filled the civic coffers with the taxes of the owners.

Let us move on to the third doubt that concerned the opportunity or lack of opportunity of a compensation in favour of the holder of the *ius pascendi*⁵⁷. By voting «affirmative», the Congregation expressed a decision favourable to Nicolai's proposal. Nicolai, when dealing with the topic of the compensation due to the holder of the *ius pascendi*, reflected on the difficulty of determining the amount of the compensation in case of deciding to follow the classifications of the rights of pasture in the three famous categories (Civil Law, Divestment Law and Dominion Law) and on the possible distinction based on the physical or legal person that holds the right. Therefore, in order to accelerate the process, the Secretary proposed to determine a compensation (approved by the Congregation) that shall be applied in general to all the cases of liquidation, leaving aside the nature of

⁵¹ *Prospetto generale delle servitù di pascolo dello Stato desunto dai stati particolari dagli E.mi Legati e Monsignori Delegati trasmessi alla Segreteria di Stato, e da questa passati al Segretario della S. Congregazione Economica*, Roma, 1822. The text is annexed to the Summary (n.1) of the Memoir on pastures of Mons. Nicolai. The data on pastures are related to the Towns of the Legations and Delegations of Frosinone, Civitavecchia, Ravenna, Macerata, Fermo, Ascoli, Perugia, Pesaro and Urbino and Viterbo.

⁵² The communal pastures are divided into three classes: *de jure domini*, *de jure cessionis* and *de iure civico* (or customary). The *de jure domini* pastures are the ones in which the owner of the land (that is, the one who originally held the full ownership of the land) has given to others the right to seed, by reserving for himself the right to pasture. On the contrary, the *de jure cessionis* pastures are the ones in which the original owner of the land has given to others, free or upon consideration, the right to pasture by reserving the right to seed or any other *utilitas* deriving from the use of the land. Finally, the customary one is “quel diritto di pascere, che non ha altro titolo, se non la costante osservanza, ed a questa specie appartiene il pascolo civico, poiché per questo titolo ne godono i cittadini di più e più municipi senza conoscere donde provenga il loro diritto”. FALZACAPPA, C., *Sui pascoli comunali. Memoria del Conte Casimiro Falzacappa di Corneto*, Perugia, 1842, p. 6.

⁵³ *Prospetto generale delle servitù di pascolo dello Stato desunto dai stati particolari dagli E.mi Legati e Monsignori Delegati trasmessi alla Segreteria di Stato, e da questa passati al Segretario della S. Congregazione Economica*, p. 3.

⁵⁴ In reference to the community of Viterbo “da lunghissimi tempi indietro possessitrice di detto pascolo per titoli antichi confermati da molti Pontefici, ne ha sempre difesa l'integrità contro qualunque particolare o Corporazione che abbia tentato liberarsene”. *Prospetto generale delle servitù di pascolo dello Stato desunto dai stati particolari dagli E.mi Legati e Monsignori Delegati trasmessi alla Segreteria di Stato, e da questa passati al Segretario della S. Congregazione Economica*, p. 29

⁵⁵ NICOLAI, M. N., *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario*, Roma, 1823, p. 31.

⁵⁶ NICOLAI, M. N., *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario*, Roma, 1823, p. 32-35.

⁵⁷ NICOLAI, M. N., *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario*, Roma, 1823, p. 35-39.

the servitude or the holders. To those who objected with the authority of De Luca or of the Judges of the Roman Rota, who had sanctioned such classification, Nicolai said that the Supreme legislator was the one who destroyed custom, by judging what was convenient for the well-being of the State⁵⁸.

Maybe this part of the discussion reached one of the highest moments of agrarian individualism, as a stubborn will to annihilate the vitality and the dignity of the community dimension of the agricultural villages, hit especially in their ability to organise and to express themselves through Custom, a place of normative production. In fact, after “destroying the Custom” and “the hateful servitudes of pasture”, the communities would have been completely voided of their economic and legal identity.

Lastly, the last doubt concerned the possibility of substituting the monetary payment with the transfer of a part of the land⁵⁹. According to Nicolai and the Cardinals themselves, this was an excellent method to favour the division of the land in small farms and it was even better that the other solution of the compensations, that would have caused fights and issues. It is important to highlight that the compensation through lands was not going to constitute what we define today as collective ownership (which refers to the goods whose holders are the individual citizens as an entity that is autonomous from the Town), but only a big quantity of goods to divide according to the only model accepted in this historical era, the individual ownership.

In this way, the Economic Congregation, in the session of 1823, voted in favour of all the points diligently discussed by its Secretary, thus paving the way to the longed-for Agrarian Law that would have transformed into verdant gardens the Roman countryside.

Nevertheless, once again, the opposition of the community and of some of its intermediate bodies, such as the Agrarian Guilds, interrupted the works. The Dicastery received, precisely in this moment, the greatest part of the memoirs - which we will analyse soon - that aimed at defending the collective rights, while other communities sent some letters directly to the Pope, asking him to put an end to the attempt to erase their primary

source of subsistence. This determined the definitive closure of the works of the Sacred Economic Congregation.

5. The promoters of the medieval ownerships

Let us analyse now the documents presented to the Sacred Economic Congregation that, according to our interpretation, can be linked to the other legal mentality on ownership that is the one typical of the medieval world.

5.1 The memoirs presented by the local communities to the Sacred Economic Congregation

The main issue dealt with in the memoirs written to defend the servitude of pasture and submitted to the Economic Congregation is that they constituted an actual right of ownership with a very ancient origin, and they were not a mere servitude seen as a burden imposed on someone else's land⁶⁰. In the lands subject to the civic pasture there is, as we have seen, a division of the absolute ownership in two forms of dominion: the *ius pascendi*, whose holders are the citizens as a whole, and the *ius serendi*, which belongs to an individual subject⁶¹.

The proof of a similar functioning of ownership could also be presumed, according to the authors of the defensive memoirs, from the Papal Cadastre, where the *ius pascendi* and the *ius serendi* were registered separately and from each derived the obligation to pay the land tax (*Dativa reale*), in compliance with the *motu proprio* of March 3, 1819 on the estimates of the rustic lands⁶². If, on the one hand, the estimates were evoked to demonstrate the existence of a divided dominion, on the other hand, they also caused misunderstandings, since the natural fruits were generally registered in favour of the Community; this notion caused a deep uncertainty because it could be seen as a private property of the Town or as a patrimony of the individual members of the Community *uti cives*⁶³.

At this point, a question that is not at all obvious arises: who are the actual holders of the communal pastures? The Town seen as a moral body or the totality of the citizens? In fact, the adjective linked to the words pastures can lead to serious misunderstandings and can induce us to think that the rights to pasture belong to the Town, seen as a body that, as such,

⁵⁸ NICOLAI, M. N., *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario*, Roma, 1823, p. 36.

⁵⁹ NICOLAI, M. N., *Proposta di liberazione dei terreni dalla servitù de' pascoli. Memoria con Sommario*, Roma, 1823, p. 42.

⁶⁰ *Memoria sul pascolo comune nel territorio di Viterbo per l'Università dell'Arte agraria di detta città*, Roma, 1823, nn. 12-15; *Cornetana di Pascoli Civici per Gli Agricoltori, e Partecipanti de' Pascoli Comunali del Territorio di Corneto. Memoriale di fatto, e di ragione*, Roma, 1806, nn. 105-107; *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della città di Toscanella*, Roma, 1822, nn. 27-37. The above mentioned memoirs, as we have already said, have been obtained from the Archive of the Family Falzacappa of Tarquinia, which is currently preserved by the Society of Art and History of Tarquinia (*Società tarquiniense d'Arte e Storia*).

⁶¹ Regarding this, one of the memoirs analysed contains a precise description of such *de facto* situation: “la divisione dei domini come può farsi nella estensione, cose può anche eseguirsi nelle utilità dei Fondi, che perciò può nel medesimo fondo separarsi il dominio dei frutti naturali, cioè del pascolo, e dei frutti industriali, cioè della seminazione, che in fine questa distinzione dei domini si deve presumere fin da principio accaduta, allorché ignorandosi l'origine, si trova il possesso fondiario diviso tra due, uno dei quali ha il solo diritto di seminare, e di percepirne il frutto industriale, l'altro quello di pascere, e di goderne il frutto naturale. In questa combinazione di cose non potendosi discernere, se il Possessore si sia spogliato del diritto di pascolo trasferendolo in altri o se si sia spogliato di quello della sementa, facendone una cessione, non può più all'uno, che all'altro diritto attribuirsi il titolo di Servitù, onde vuolsi egualmente all'uno, ed altro attribuire quello di proprietà, e di dominio”. *Cornetana di Pascoli Civici per Gli Agricoltori, e Partecipanti de' Pascoli Comunali del Territorio di Corneto, Memoriale di fatto, e di ragione*, Roma, 1806, n. 20.

⁶² *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della città di Toscanella*, Roma, 1822, nn. 75-76.

⁶³ Paolo Grossi follows this line as well and he reveals the “inadeguatezza per lo storico del diritto” of the cadastres, since they “hanno volto economico ma non giuridico, nel senso che si tratta di figure pensate e risolte al di là di ogni grammatica giuridica sia pure elementare”. GROSSI, P., *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*, Milano, 1992, p. 623.

can use them as it wishes; the system of pastures also knew this form of possession in the hands of the Town-body, but the defenders specified with extreme precision that the civic rights protected by them were completely different and belonged to the entirety of the citizens, as such⁶⁴.

The notions given by the defenders of the civic rights allow to avoid another kind of mistake and to understand that they cannot be confused, in any way, with those that were defined as “fiscal pastures”, which were not enjoyed by the citizens but that actually belonged to the State, who allowed to use them only through the payment of a tax⁶⁵. The example proposed to clarify the distance between the two legal figures is the one of the State of Siena, which managed, through the *Officio dei Paschi*, the lands that were rented to anyone who wanted to pasture his herd there; the proceeds did not give benefice to the community but rather to the Royal Treasury; this type of *ius pascendi*, called Customs Pasture, did not deserve any kind of protection and, in fact, the edict of the Grand Duke Leopold of 11 April 1778 that suppressed such institution⁶⁶ was considered, by the authors of the memoirs, as an example of a fair and wise Law, which was surely inapplicable by analogy to the situation of the territories of Saint Peter⁶⁷.

It remains to be seen who the citizens that held the right of ownership of the lands were: They were those who had established their own domicile in the Town in which the ancient Agrarian Customs still existed, regardless of the fact that they were native or foreigners; in the second case, however, the requirement of the continuous domicile was necessary in order to enjoy the privileges and the citizens' rights⁶⁸. The possibility, for the foreigners, to enjoy the communal pastures, under the condi-

tion that they established their domicile in the Town that had the Agrarian Customs, was described by the authors of the memoirs, as a beneficial stimulus to the demographic increase, since the faculty to become the holder of the *ius pascendi* favoured the arrival of numerous families from various Italian villages; they were attracted by the subsidies given for agricultural development. An example of this was the possibility, for those who built a farmhouse and planted a vineyard or an olive grove, to appropriate a portion of communal pasture to enjoy it privately. This price was justified by the need to grant, in the countryside, the stable presence of families of small independent farmers⁶⁹.

The rights to pasture, apart from being an expression of actual dominion of the citizens on the land, were to be seen with great respect also for another reason; they were the crystallisation of a very ancient customary patrimony that, as such, was worthy of being preserved and recognised. This second element was one of the strengths of the promoters of the civic rights of pasture who, in order to demonstrate their *ab immemorabili* origin, used the most diverse and ancient quotes from ancient texts, which frequently led to flights of fancy. This is the case of a memoir in which they even tried to find the origin of such rights in the Etruscan civilisation⁷⁰.

All the Communities that presented their own pamphlets to protect the civil pastures adduced, as a documentary proof of their antiquity, the statutes of the communes, a large part of which concerned the regulation of the agricultural activity and was based on a system that, next to the individual ownership, accepted, especially in the case of pastures, the collective rights recognised to all the citizens, which could be exercised also on private lands⁷¹. Regarding this, Corneto's Statute of 1453,

⁶⁴ “il dire finalmente, come si è detto, che i pascoli comunali, a cui hanno diritto i singoli cittadini, sono un patrimonio privato della Comunità, e non il patrimonio pubblico dell'università dei cittadini, è un attentare alle leggi fondamentali costitutive dell'umana società, in cui tutte le nazioni in tutti i tempi sono state d'accordo; ea etenim in pecunia, et patrimonio civitatis sunt, quorum usus singulorum non est. Ma quelle cose, delle quali l'uso è di ciascuno, sono state dette dal Gius delle Genti – res universitatis – vale a dire di tutti – ut basilicae, porticus, balnea, fora, prata, et pascua publica, in quae scilicet pecudes immittere singulis civibus est». Therefore, the clear separation between the Town-body (alienable) and the ownership of the citizens (inalienable) was identified in the use, meaning that «se quest'uso non est singulorum, res est Civitatis, ma se la cosa è in publico civium usu, come sono i comunali, res est universitatis, vale a dire di tutti». *Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualità di rappresentanti della popolazione di Corneto*, Roma, 1802, n. 111. This is one of the current theories on the legal nature of the collective rights, which are in fact qualified as rights whose holders would be the members of a specific community *uti cives*. This is the concept expressed by S. Pugliatti, *La proprietà e le proprietà*, p. 192; DANI, A., *Usi civici nello Stato di Siena*, Bologna, 2003, p. 28-29.

⁶⁵ *Memoria economica sui pascoli comunali cornetani. Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualità di rappresentanti della popolazione di Corneto*, Roma, 1802, n. 70.

⁶⁶ The edict of September 11, 1778 entitled “Soppressione dell'Ufficio dei Paschi di Siena” confirms what has been declared by the promoters of the communal pastures. Nevertheless, it must be noted that the General Regulation for the Towns of the Lower Province of Siena of the same day and year of the above mentioned edict established the suppression of the communal pastures at the request of the owners of the land who wanted to free their lands from the *ius pascendi*. For an in-depth analysis see DANI, A., *Aspetti e problemi giuridici della sopravvivenza degli usi civici in Toscana in età moderna e contemporanea*. In: *Archivio storico italiano*, vol. CLVII, 1999, pp. 298-307.

⁶⁷ *Memoria economica sui pascoli comunali cornetani. Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualità di rappresentanti della popolazione di Corneto*, Roma, 1802, nn. 141-142.

⁶⁸ *Memoria economica sui pascoli comunali cornetani. Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualità di rappresentanti della popolazione di Corneto*, Roma, 1802, n. 63.

⁶⁹ *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della città di Toscanella*, Roma, 1822, nn. 28; 49.

⁷⁰ *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della città di Toscanella*, Roma, 1822, n.31. In fact, in the memoir, we read that «non dobbiamo arrestarci ai Romani, e cercare in essi le fonti della nostra agricoltura. La storia, e l'osservazione de' monumenti ogni giorno più ci fa toccare con mani quella verità, che ogni istituto di pace, e di guerra, di religione, e di politica, e di ogni arte domestica i romani presero dagli etruschi, da quel popolo cioè che aveva civilizzata, e retta, e nobilitata l'Italia ben prima che essi poveri, e rozzi comparissero nella scena del mondo».

⁷¹ *Memoria economica sui pascoli comunali cornetani. Memoria economica sui pascoli comunali cornetani presentata alla S. Congregazione economica da Consiglio municipale, Gonfaloniere ed Anziani in qualità di rappresentanti della popolazione di Corneto*, Roma, 1802, nn. 24-26.

whose formulation is identical to the one of the nearby cities⁷², describes very well the situation at that time:

*“Quoniam pascuorum jura pariter, et aquarum in tenimento Corneti comunia sunt, ordinamus quod nemo praesumat prohibere quemquam sua animalia pascuare, et aquare in quibuscumque locis reservatis vineis, pratis, cannetis, et aliis locis bladatis et seminatibus”*⁷³.

These few lines include the entire delicate balance between the *ius pascendi* and the *ius serendi* existing on the same land, because obviously, while the cultivated lands did not admit the pasture, since it would have destroyed the fruits, on the other hand, the empty fields, on which the holder of the *ius serendi* had not done any work, were freely accessible to the citizens to pasture their herds. Therefore, the balance stood between the cultivated and the uncultivated land. This rule seems easy in theory, but it actually requires more attention by the Local legislators, in order to establish the timing for the cultivation and, consequently, for the exclusion of the *ius pascendi*⁷⁴. It was a particularly complex system, very distant from our way of seeing the productive activity on the lands, but it reflected very well the daily life of that time (which remained the same at least until the end of the nineteenth century), in which the population who lived in a Town was far less than the one that could materially work in an intensive way the entire agricultural surface of the city.

Once identified an important proof of the existence of these civil rights in the statutes of the Middle Ages, our tireless promoters put their effort on even more ancient sources, whose formulations were certainly vaguer. One of these monuments of the past was found in the Edict of Rothari (643), where article 363 established the same principle of the communal pastures as

it was regulated in the statutes of the Middle Ages, that is, with the norm that as soon as the harvest is over, the population was free to introduce the herds in the lands⁷⁵. Not satisfied with this, they even analysed the glorious texts of Roman Law, and also in this case the research gave its results. In fact, the great Latin Authors such as Scaevola, Cicero or Frontinus described the existence of the *ius pascendi* and of the *ager compascuus*⁷⁶. Of course we have not reported this historical *excursus* because we believe in its scientific grounds; apart from the unequivocal demonstration of the medieval statutes, the rest of the digressions of our defendants of the civic rights are not examples of methodological rigour, but they help us understand the aim they pursued: to declare that the communal pastures were a Custom recognised since ever to every population. They were an extended system, which does not simply have the respectable seal of time, of experience, of many existing laws and customs, but that is also based on the inviolable Property Rights, and on the immutable basis of local necessities⁷⁷.

We could not avoid adding to the historical reconstruction the *auctoritas* of the Doctrine of that time or the more ancient one, an inevitable testimony to prove the social usefulness and the legitimacy of the agrarian rights. In spite of what the detractors of the communal pastures thought, that is, that only the vestiges of a very distant past could support a system of division of the land, the Lawyers of our memoirs put a lot of effort into searching for a doctrinal foundation for the rights to pasture; and their commitment led to a rich list of “celebrities” who, in their works (sometimes fleetingly and sometimes with more abundance), dealt with the topic concerned⁷⁸.

The list of the authorities favourable to the civic pastures is very rich and it includes the famous Otero, author of the Trea-

⁷² For example, the statutes of Tuscania (1423), Book I, Section LXXXI, say the following: “*Pascua, et silvae antiquae quae sunt in jurisdictione Communis Tuscanae, ad omnes usum, et utilitatem civium et singulorum Thuscanorum sint deputata, et quod exipsis percipietur sit Communis Thuscani*». The same thing applies to the Statute of Viterbo (1469), in which the subject of pastures was regulated in Section IV: “*Pro bono pacis, et pacifici Status Civitatis, et Populi nostri Viterbiensis statuimus, et ordinamus, quod pascuis herbarum, et spicarum planorum comuniatatis, et tenimenti Civitatis Viterbii communiter fruunt et ab omnibus Civibus, et continue habitantibus in dictu Civitate, et eius districtu, et comitatu, non autem a forensibus, ut supra dictum est, ut hactenus existit consuetum*”.

⁷³ *Statuta Civitatis Corneti*, 1545, Liber V, Cap. XCIV.

⁷⁴ Monsignor Buttaoni, in the consultative report on the rights to pasture, states that the *ius pascendi* was not «eguale in tutti i luoghi: in alcuni campi è limitato al tempo estivo, cioè dal Giugno a tutto Settembre di ciascun'anno. In altri comprende anche il mese di Maggio. In altri si estende a tutte le stagioni. Ed in altri, cioè nei prati destinati alla falciatura de' fieni, il pascolo cessa nei mesi di Marzo, Aprile, e Maggio, perché appunto i rispettivi possessori possano avere il mezzo di fare il fieno». BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n.3. On this topic see DONDARINI, R., *Comunità rurali: beni comuni e beni collettivi*. In: *Rivista storica del Lazio*, vol. XIII-XIV, Nr. 1, 2005-2006, pp. 115-124; ROSATI, S., *Lo statuto degli ortolani di Corneto del 1379*. Studio storico-giuridico. In: *Bollettino della Società tarquiniese d'arte e storia*, vol. XL, Nr. 1, 2013-2014, p. 137-171.

⁷⁵ *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della città di Toscanella*, Roma, 1822, nn. 28-49. In fact, today, we consider that the Germanic legal culture has somehow favoured the presence of such community Customs in medieval Italy. In this sense see DANI, A., *Usi civici nello Stato di Siena*, Bologna, 2003, p. 19-23.

⁷⁶ *Memoria economica sui pascoli comunali toscanesi per il consiglio municipale, e gonfaloniere come rappresentanti la popolazione della città di Toscanella*, Roma, 1822, nn. 27-37.

⁷⁷ BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 163.

⁷⁸ *Cornetana di pascoli civici*, cit., nn. 35-36. On the literature related to rights to pasture see ZENDRI, C., *Universitas, proprietà collettiva e servitù di pascolo nel 'Tractatus de servitutibus' di Bartolomeo Cipolla (ca. 1420-1475)*. In: NERVI, P., *Dominii collettivi e nuovi protagonisti per la promozione dello sviluppo rurale*, Padova, 2002, p. 105-129; BARBACETTO, S., *Servitù di pascolo, civico usus e beni comuni nell'opera di Giovanni Battista De Luca (†1683)*, cit., pp. 267-297; ZENDRI, C., *Monti, colli e contadini alla fine del medio evo: Bartolomeo Cipolla e l'eredità della grande dottrina trecentesca*. In: *Archivio Scialoja-Bolla*, Nr. 1, 2004, p. 75-87; PIERGIOVANNI, V., *De iure ovium: alle origini della trattatistica giuridica sulla pastorizia*. In: MATTONE, A., SIMBULA, P. F. (Hrsg.), *La pastorizia mediterranea. Storia e diritto (secoli XI-XX)*, Roma, 2011, p. 33-40.

tise *De pascuis*⁷⁹, Perezio⁸⁰ and Capobianco⁸¹, both convinced of the need to preserve the rights to pasture for the benefit of a Community, especially of the more disadvantaged part; furthermore, great importance is given to the authors that, in a specific way, recognised the legitimacy of the Customs of the city exercised on the lands of private owners of the *ius serendi*, true core of the entire “ownership issue”. Among them we have Covarrubias, who analysed the situation in Spain⁸² and, clearly, one of the greatest theorists of the *ius pascendi*, Cardinal De Luca, who in his most famous work, the *Theatrum Veritatis et Iustitiae*, deals with the praedial servitudes⁸³ specifically in Book IV.

5.2 The report of the Consistorial Lawyer Alessandro Buttaoni

We can now deal with another document, always written to defend the civic rights to pasture, not by the local communities, but by order of the Sacred Economic Congregation itself, which entrusted to Monsignor Alessandro Buttaoni the task of organising a consultative report on the right to pasture in force in the territories of the Papal States⁸⁴.

We consider that we should analyse this document individually, not because its author was selected directly by the cardinals to express his motives, but rather because of the types of arguments developed by Monsignor Buttaoni. Such reasons enrich the memoirs analysed with further specifications that are particularly important, especially from the legal point of view.

Buttaoni, at the beginning of his consultative report, based on a strong doctrine⁸⁵, divides the rights to pasture into three titles: firstly, they can derive from an actual dominion on the land; secondly, from a servitude that has been legally acquired or that can be established by contract or by prescription; lastly, they can derive from the so-called civil or customary right, by virtue of which it is licit for every member of the people to pasture his own livestock in the non-cultivated and opened lands⁸⁶.

Regardless of the threefold nature of the titles that justify its possession, the *ius pascendi* can belong to the barons, to the communities or to the “peoples”, meaning the group of citizens *uti singulis*⁸⁷.

Since the three titles that support the rights to pasture are legitimate, the consistorial Lawyer affirms that the Sovereign could not decide to issue a Law that destroys or limits the different rights to pasture of the community and of the populations without using that Right of Majesty, called Eminent Domain⁸⁸, by virtue of which, in case of grave necessity, or of a public, great and evident usefulness he can limit, or remove the rights and the properties of the Subjects⁸⁹.

This is the fundamental point that must be solved to verify the opportunity or lack of opportunity of an abolishing Law: can the Prince exercise his Eminent Domain in relation to pastures?

⁷⁹ In fact, this is what OTERO says in the *Tractatus de pascuis et iure pascendi*, in Chapter 6, num. 11: “ratio propter quam usus publici Pascui conceditur habitantibus in Oppido, utique est, ut oppida populentur, et augeantur, et habitatoribus abhaderent”.

⁸⁰ PEREZIO, in his Commentary on Justinian’s Code, in title *De pascuis publicis*, number 12, states: “principes supremi reliquerunt huiusmodi cultos agros suis subjectis ad pecora sua alenda, sine quibus nec ipsi vivere, nec agros suos colere possent”.

⁸¹ CAPOBIANCO, G. F., in the *Tractatus de iure et officio Baronum erga Vassallos burgenses*, in Chapter 73 n. 8, declares that the pastures are a good recognised to each of the citizens so that they enjoy it *uti singulis*: “ista bona fuerunt concessa pro vivere, et comoditate singulorum presentium, et futurorum civium, et ideo jus pascendi dicitur competere singulis, uti singulis”.

⁸² The Spanish jurist DIEGO COVARRUBIAS, in chapter 37 of his *Questionum praticarum earumque resolutionum amplissimarum liber unus*, says the following: “In his publici Edictis Regia Auctoritate promulgatis expressim asseveratur, esse contra huius regni Leges, quod quis proprios fundos, et agros alisque legis permissione prata, et pascua civibus, et incolis interdicta efficiat, quamvis possit libere quilibet proprios fundos, et agros colere qua ei liberuit cultura, ita tamen, ut fructibus collectis, et agris vacantibus a semine pascua sint omnibus habitatoribus communia. Quam equidem legem multis experimentis compertum est satis Rei Publicae convenire, iustissimamque, atque aequissimam esse”.

⁸³ Among the various discourses of Cardinal of Venosa, we believe it is particularly interesting to quote discourse 37 number 4 of Book IV (De Servitutibus): “agitur de quodam iure, seu verius quadam facultate, quae iure cuiusdam consuetudinis universalis magis quam praescriptionis competit Civibus, et incolis ex iure Civico, et naturali deponendi cum eorum animalibus in agris, et fundis apertis, et campestribus destinatis ad culturam segetum post has recollectas, quae consuetudo videtur fere universalis per Europam ipsi juri naturae, seu naturali rationi innixa, et quodammodo necessaria, nec cives, et incolae inermem vitam ducant”.

⁸⁴ BUTTAONI, A., *Voto consultivo dell’Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 2.

⁸⁵ Such three-folded division of the rights to pasture is traced back to cardinal Giovanni Battista De Luca, who in his *magnum opus*, the *Theatrum veritatis et iustitiae* (Book IV Firts part), describes in the discourses 36, 37 and 38 the three-fold distinction. On this topic, see PESCOLIDIO, G., *Comunità di villaggio e proprietà collettive in Italia e in Europa*, Pieve di Cadore, 1986, pp. 77-80; VILLANI, P., *Ricerche sulla proprietà e sul regime fondiario del Lazio*, cit., pp. 82-83; DANI, A., *Usi civici nello Stato di Siena*, Bologna, 2003, p. 172; RAFFAGLIO, G., *Diritti promiscui, demani comunali ed usi civici*, Milano, 1915, p. 140.

⁸⁶ BUTTAONI, A., *Voto consultivo dell’Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 4.

⁸⁷ BUTTAONI, A., *Voto consultivo dell’Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 2.

⁸⁸ A definition of the theory of the Eminent Domain, which is chronologically coeval to the author of the consultative report, can be deduced from the lessons of the *novissimum civil law* “il Dominio eminente del Sovrano su’ beni de’ cittadini, versando sul potere di disporre de’ medesimi per oggetto di utile pubblico e nella facoltà di imporre su’ beni medesimi, fa sì ch’egli abbia il diritto di domandare il sacrificio della proprietà privata per causa di utilità pubblica, previa una giusta indennizzazione”. MARINI, C., *Lezioni di diritto civile novissimo*. Book II, First part, Napoli, 1830, p. 30-31.

⁸⁹ BUTTAONI, A., *Voto consultivo dell’Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 5.

By quoting Pufendorf⁹⁰ and Grotius's⁹¹ doctrine, Buttaoni highlights how a similar Eminent Domain can be used in exceptional cases, only when there is an urgent need or utility of the State at stake. The latter is considered by Grotius as sufficient, by itself, to use the rights of the citizens. Now, neither of the two situations would occur in the case of pastures (except for the baronial pastures, which are considered negatively), since their constant presence in the territories of the sub-urban provinces, instead of representing a damage, represents a public utility.

In other words, the public pastures, that is, the ones that are in favour of the communities, must be seen as goods of public utility and also necessary for the preservation and the increase of the population, with the obvious consequence that a possible abolishing law would cause a damage rather than aiming at the common good. The proofs of the usefulness of the *ius pascendi* coincide with those that we have described in the previous memoirs, therefore we will not repeat their content. We simply wanted to see how Monsignor Buttaoni collected all the observations of the local communities to demonstrate the impossibility, for the Papal government, to exercise the Eminent Domain, a necessary requirement to affect the rights of the subjects.

The consistorial Lawyer did not stop with these considerations. He adds one more. Even in the hypothetical case in which the Prince decides to abolish the rights to pasture, and to abuse of his Eminent Domain, he would not be exempted from the obligation to compensate the community for the loss of the rights, a fundamental principle that is indissolubly related to the exercise of the right of Majesty⁹², as confirmed again by the authority of Grotius⁹³ and Pufendorf⁹⁴. The private citizens of the *ius pascendi*, in fact, would have the right to a double compensation: the one given by the Treasury of the Prince, with regard to the damages caused to the subjects for the public good, and the one due by the owners of the *ius serendi*, advantaged by the consolidation of the two forms of dominion in their hands⁹⁵.

Nevertheless, as we have already said, Buttaoni was sure of the illegitimacy of an abolishing Law, even in case it foresaw the compensation for the damages caused to the community, since the proof of an extremely evident, big and public utility lacked, and this element is always necessary to affect other's rights with a provision of the sovereign⁹⁶.

6. Conclusions

The memoirs examined allow us to understand the main core of the debate on ownership in the Papal States, and we have identified it in those that were defined as servitudes of pasture. They were very spread, as we have seen, in a period in which the economy was mainly based on agricultural and pastoral activities.

The problem was not caused by the actual servitudes, in which the owner of a dominant land took the herds to pasture in a servient land, but rather by those that we can call collective rights of enjoyment and use belonging to a population on lands in private dominion. In fact, they define all the cases in which a situation of promiscuity is created in the enjoyment of the *utilitates* that derive from the same land between the owner of the land and the community that holds the collective right. Therefore, two different subjects could access the same territory based on different legal titles: the owner of the land (the holder of the *ius serendi*) and the recipients of the civil rights (the holders of the *ius pascendi*).

On this fact, whose characteristics are clear, we have the intersection of the two voices that we have analysed, which gave rise to two very different legal qualifications of the collective rights to pasture. These opposed notions derive from the different modalities to understand the relation between man and land that have a different cultural background. The collective voice was the seal of the medieval legal culture in which the characteristics of that historical landscape led to accepting without difficulties the collective uses of pasture, while the individual voice represents modernity, which could no longer accept, nor understand, any slightest interference in the sacred and unlimited absolute ownership.

As we have seen in this work, the great resistance of the local communities interrupted the works of the Sacred Economic Congregation that, after the death of its Secretary Nicola Maria Nicolai, never discussed again about the Law for the abolishment of the pastures. Nevertheless, this was only a pause, because modernity and the new ownership culture based on individualism left their mark slowly and with some difficulties: a few years after, in fact, a Congregation specifically in charge of writing a Law to abolish the rights to pasture, which was created with the Pontifical Notification of 1849, was instituted.

⁹⁰ This is what Pufendorf says in the *De iure naturae et gentium* (Book 8, Chapter V, § 7): "*Dominii eminentis non tam rem, quam vocabulum aliqui damnant. Ipsam enim vim imperii propter salutem publicam instituti, sufficientem principi titulum praebere, urgente necessitate utendi bonis suorum subditorum; eo quod omnia simul concessa intelligantur, sine quibus obtineri bonum commune non potest*". PUFENDORFII, S. V., *De iurae naturae et gentium. Libri octo, cum annotatis Joannis Nicolai Hertii*, apud David Mortier, 1715, p. 875.

⁹¹ Grotius follows the same line as Pufendorf in the "*De iure belli ac pacis*" (Book 2 Chapter 14 § 7): "*Hoc quoque sciendum est, posse subditis jus etiam quaesitum auferri per Regem duplici modo aut in poenam, aut ex vi supereminentis dominii. Sed ut id fiat ex vi supereminentis dominii, primum requiritur utilitas publica*". GROTIUS, H., *De iure belli ac pacis. Libri tres, in quibus jus naturae & gentium, item juris publici praecipua explicantur. Editio novissima*, apud Janssonio – Waesbergios, 1680, p. 284.

⁹² BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 7.

⁹³ GROTIUS in the "*De iure belli ac pacis*" (Book 3 Chapter 19 § 7) says the following: "*Sed notandum contra est, jus illud supereminens non promiscue competere, sed quatenus communiter expedit in regimine non dominico sed civili, etiam regio. Adde, quo dubi huius domini usum res exigit, compensatio tamen facienda est*". GROTIUS, H., *De iure belli ac pacis. Libri tres, in quibus jus naturae & gentium, item juris publici praecipua explicantur. Editio novissima*, apud Janssonio – Waesbergios, 1680, p. 632.

⁹⁴ Pufendorf, in the "*De iure naturae et gentium*" (Lib. 8 Chapter, V § 7) writes: "*Caeterum iis, qui hoc modo [nimirum vi dominii eminentis] sua publico impendunt, aut perdidit, a tota Civitate quantum fieri potest ea restitui, aut pensari, manifestissima aequitate nititur*". PUFENDORFII, S. V., *De iurae naturae et gentium. Libri octo, cum annotatis Joannis Nicolai Hertii*, apud David Mortier, 1715, p. 876.

⁹⁵ BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 8.

⁹⁶ BUTTAONI, A., *Voto consultivo dell'Ill.mo e R.mo Monsignor Alessandro Buttaoni alla Sacra Congregazione Economica sopra il diritto di pascolo vigente nei territori delle Provincie Suburbane*, Roma, 1823, n. 62.