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Mancini in the Platine Basin: The Reception of the Principle of Nationalities in Argentina, Uruguay and Brazil

Introduction

The objective of this work is to understand the process of appropriation of the ideas of Pasquale Stanislao Mancini[1] by the legal cultures of Argentina, Uruguay and Brazil throughout the 20th century, particularly in respect to the principle of nationality[2], and how the political and cultural identity of these countries influenced in the reception of his ideas. Due to the scarce circulation of his work in Latin America, his original writings in Italian were not translated in this continent. On the other hand, the translation to Portuguese took place in Brazil only in the beginning of the 21st century[3]. The theory elaborated by Pasquale Stanislao Mancini about the nationality principle[4], therefore, reached South America in its original language, but mainly through the commentaries

1 Pasquale Stanislao Mancini (Castelbaronia, 1817 – Naples, 1888) was a jurist, professor and politician, and has also been Minister of Education (1862), Minister of Justice (1876) and Minister of the Foreign Affairs (1881) of the Kingdom of Italy.

2 The lecture in which Mancini proposed his theory is called '*Del principio della nazionalità come fondamento del diritto delle genti*', and it was given when he assumed the first Italian chair of International Law, at the University of Turin, on January 22nd, 1851. It was published later in the book '*Diritto internazionale. Prelezioni*' (Naples, 1873). The elements of the concept of 'Nation' formulated at the *Risorgimento*, as the one proposed by Mancini, were firstly drawn in a political context in which nationalist currents of thought tried to legitimate the independency of some European territories – as Italy and Hungary – that were submitted in a complete or fragmentary ways to the sovereignty of foreign states. This phenomenon can be easily seen throughout the first half of the 19th century, mainly in the juridical and political culture from Italy and French. Among Italians, we could underline important jurists in this period, as Pellegrino Rossi, Gian Domenico Romagnosi, Giuseppe Mazzini, Luigi Taparelli D'Azeglio, Giacomo Durando e Vincenzo Pagano. Involved in the romanticism that was dominant in the literature, the idea of an Italian nation came alive and received anthropomorphic contours, since this new 'Nation' should take itself the condition of protagonist of law in the international scenario. The elements that compose the concept of 'Nation' and 'Nationality' in Mancini can be found in GIAN DOMENICO ROMAGNOSI. *La scienza delle costituzioni.* (Firenze: a spese degli editori, 1850); GIUSEPPE MAZZINI. *Nazionalità. Qualche idea su una costituzione nazionale*. In: Edizione nazionale degli scritti di Giuseppe Mazzini. (Galeati, 1908), Vol. VI; LUIGI TAPARELLI D ' A ZEGLIO. *Della nazionalità.* (Ponthenier 1847); GIACOMO DURANDO. *Della nazionalità italiana. Saggio politico-militare*. (Bonamici 1846); VINCENZO PAGANO. Del diritto della nazionalità italiana. (Rondinella 1861).

3 PASQUALE STANISLAO MANCINI. *Direito Internacional.* (Unijuí 2003).

4 In the writings of Pasquale Stanislao Mancini emerges, mainly, the affirmation that the Nations, e not the States, were the true subjects of International Law. The affirmation tries to transfer the focus on the exclusive protagonism constructed by the political and juridical contractualists from the State to the Nation. In sharp contrast with the consecrated writings of Emmerich de Vattel, of Immanuel Kant and of Georg Wilhelm Hegel, the Italian jurist gives the statist paradigm up in the International Law, proposing a new model of international community based on the action and on the protagonism of national societies highly homogenized whose founder myth would not be found in contractualist fables, but in anthropological draws forged by the centuries. 'Nation', to the author, was a 'natural society of men with unity of territory, of origin, of customs and of language, configured in a common life and in a social consciousness'. Because of that reason 'the mother idea of science is not the State, but the nationality'. State and Nation have been in opposition during all the human history, whose testimony 'will answer to us that, lots of times, both nationality and State principles, instead of conciliating in a concrete, identic and common way, confront themselves'. In: PASQUALE STANISLAO MANCINI. *Diritto internazionale. Prelezioni.* (Naples 1873).

in French language textbooks about the subject, such as those by Robert Piédelièvre[5], Alphonse Rivier[6] and Paul Fauchille[7].

2 The reception of these ideas in the Argentinean, Uruguayan and Brazilian handbooks of public international law[8], such as those written by Daniel Antokoletz and Luis Podestà Costa in Argentina, Eduardo Jimenez de Arechaga in Uruguay, and Raul Pederneiras and Hildebrando Accioly Lima in Brazil, from the beginning of the 20th century, is, therefore, the object of analysis of the present work. This choice is due mainly to the wide circulation of these scholars in their respective countries, as well as to the impact that they had in the process of academic education of jurists. Also, a further selection among the manuals of the aforementioned countries was made, focusing only on those that were written by Argentinean, Uruguayan, Brazilian or foreigners residing and active in these countries. Hence, no regard was given to public international law textbooks translated from foreign languages and published in these countries.

3 Moreover, it will be an object of analysis of the present work the main differences between the Argentinean, Uruguayan and Brazilian legal cultures with respect to the subject. In Argentina, until the 1960s the Mancinian principle was still applicable to international law and fit for regulating the context of the international community. In Uruguay and Brazil, on the other hand, there was an early process of historicization of the principle, in the sense that it started to be regarded as a result of a very specific moment of the historic itinerary of international law and, therefore, was no longer applicable to the latter.

4 There were variations to the process of reception/adoption of Mancini's ideas about nationalities. In Argentina and in Brazil, the textbooks started to report news on the principle of nationalities only in the first decades of the 20th century; in Uruguay, this took place a few decades later. Among the three nations, the Argentinean doctrine appears to be the most generous in this process of appropriation of ideas. Even if having some reservations, it seems to accept the principle of nationalities as existing for a longer period of time. This acceptance would only end two decades after the institution of the United Nations. The Brazilian and Uruguayan doctrines, on the other hand, always showed skepticism to the real possibility of validity of the principle, preventing,

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5 ROBERT PIÉDELIÈVRE. *Précis de droit international public, ou, Droit des gens.* (Pichon 1894).

6 ALPHONSE RIVIER. *Principes du droit des gens.* (Rousseau 1896), Vol. I.

7 PAUL FAUCHILLE. *Traité de droit international.* (Rousseau 1922), T. I.

8 For a deeper historical review on the impact of the theory of Mancini on the science of Private Law in the Brazilian doctrine, see, particularly, CARLOS AUGUSTO DE CARVALHO. *Direito civil brasileiro recopilado ou nova consolidação das leis civis.* (L. Francisco Alves 1899); Rodrigo Octávio. *A Theoria de Mancini.* In: Revista Jurídica. (1916), II.; FRANCISCO CAVALCANTI PONTES DE MIRANDA. *La conception du Droit International Privé d'après la Doctrine et la Pratique au Brésil.* (*Récueil des Cours de l'Académie de Droit International*, 1932), Vol XXXIX.; PONTES DE MIRANDA. *Tratado de Direito Internacional Privado.* (L. José Olympio 1935), Tomo II; CLÓVIS BEVILAQUA. Princípios elementares de Direito Internacional Privado. (L. Freitas Bastos, 4ed, 1944); WILSON DE SOUZA WILSON DE SOUZA CAMPOS BATALHA, *Tratado elementar de direito internacional privado.* (Revista dos Tribunais 1961) Vol. I; AMILCAR DE CASTRO. *Direito Internacional Privado.* (Forense 1956); OSCAR TENÓRIO. *Direito Internacional Privado.* (F. Bastos, 8ed, 1965) Vol. I; HAROLDO VALLADÃO. *Direito Internacional Privado*: em base histórica e comparativa, positiva e doutrinaria, especialmente dos Estados americanos. (F. Bastos 1973); JACOB DOLINGER. *Direito Internacional Privado.* (Forense, 10ed, 2011); MARISTELA BASSO, *Curso de Direito Internacional Privado.* (Atlas, 3ed 2013); NÁDIA DE ARAÚJO. *Direito Internacional Privado: teoria e prática brasileira.* (Revolução 6ed, 2016).

therefore, the consolidation of an actual transplant of ideas. In Brazil, in particular, during the interwar period, Mancini's premises were despised by the scholars, or regarded by them as a product of a historically delimited moment, and consequently rejected in the framework of the institutes of international law in force.

As a part to a wider research, which involves the international legal studies of other south-American countries, the present investigation has a non-exhaustive character. The work related to it has not yet been entirely finished and the conclusions offered by this presentation are still partial. **5**

The harsh rejection in the Brazilian doctrine

In Brazil, only in 1902 Lafayette Rodrigues Pereira, in the first volume of his *Princípios de Direito Internacional*, refers to the Italian author: 'Mancini was the inventor of the principle of nationalities in Italy, having International Law as basis and foundation. He proclaimed this theory for the first time in an opening lecture in Turin, on January 22nd, 1851. His theory was then adopted and proclaimed by a great number of Italian publicists'[9]. It seems that the Brazilian author did not have access to the original text of the lecture of 1851, since, in order to introduce the principle, he makes use of the French commentaries by Terenzio Mamiani[10] and those by Heinrich Ahrens[11], Robert Piédelièvre[12] and Alphonse Rivier[13], authors that in different ways and degrees adhered to aspects of the Mancini theory. **6**

In this occasion, Lafayette approaches to the ideas of Mancini, and welcomes part of them in his manual. But it is indeed a timid approach, considering that, on one hand, he postulates the equality of nations and accepts as their founding elements the same ones used by the Italian author; however, on the other hand, he presents the State as 'the set of bodies through which a nation manifests its political life and action, or better, it is the public power organized in all of its ramifications'[14]. Thus, Lafayette departs from the main postulate by Mancini, which asserted that nations where the true subjects of international law. **7**

In 1931, quite early if compared to the other South American doctrines, Raul Pederneiras, in his work *Direito Internacional Compediado*, refuted the possibility of enforcement of the principle of nationality. Despite acknowledging the originality of Mancini's work, and attributing to the Italian scholar the formulation of this principle, the Brazilian jurist asserts that 'if such doctrine succeeded, many States would fail to have an actual existence, and would be fatally absorbed by the old **8**

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9 LAFAYETTE RODRIGUES PEREIRA. *Princípios de Direito Internacional.* (Jacintho Ribeiro dos Santos Editor 1902), p. 59.

10 TERENZIO MAMIANI. *Des traités de 1815 et d'un nouveau droit européen.* (Dentu, 1862).

11 HENRI AHRENS, *Cours de droit naturel ou de philosophie du droit: Compléte dans les principales matières, par des aperçus historiques et politiques* (Brockhaus 1838).

12 Op. cit.

13 Op. cit.

14 LAFAYETTE RODRIGUES PEREIRA. *Princípios de Direito Internacional.* (Jacintho Ribeiro dos Santos Editor 1902), p. 65.

metropolis or by the governments that formerly dominated them as their dependents or colonies'[15]. According to the criticism that Paul Fauchille had made to Mancini in his *Traité de droit international* (1922)[16], Pederneiras concludes that the consequence would be either '[…] a scanty number of enormous States with discontinuous territory or an uncountable number of tiny States, a myriad of States […]'[17]. The opposition between the Mancinian principle and the Brazilian history sets a strong background in the work of Pederneiras, due to the fact that this country was colonized by an European nation and had only recently achieved independence from Portugal – from which country it inherited its language, culture and religion – and was trying to establish itself as a regional power in the international scenario. In this context, accepting the effectiveness of the principle of nationalities could be interpreted as a relativization of the very idea of a Brazilian State, as independent to Portugal. As the author says, 'however, to make the nationality an essential ground to the constitution of the State it's to destroy the essence of the personality, which doesn't determinate the uniform individual pattern. If we give support to this opinion, we would have to yield to the old Lusitanian metropolis or to absorb it as a province or as dependent from our federation'[18]. Because of these reasons, 'the Mancini's theory deserves a historical reference'[19]. In the specific case of non-European States, they have distinguished themselves from the first ones due to the 'influence of new means and other activities, until the modification or adulteration of ethnical elements, as the languages, from a region to another, almost deleting, some times, the original form'[20].

Thus, according to Pederneiras, 'Mancini's theory cannot be admitted either'[21], nor could it be regarded as in force since it '(…) considered the nation as a natural person of International Law and the State as an artificial institution, which can be easily refuted'[22]. 9

Barely after the end of the Second World War, Jorge Americano, in 1945, published his *O novo fundamento do direito internacional e seu esteio na conciencia universal*, in an attempt to offer a different vision concerning the typical topics of other handbooks of the subject matter. There is no mention, in his book, to Mancini or to the principle of nationalities, but when the topic is brought in the chapter dedicated to the subjects of international law, the author affirms that 'it is extremely difficult to characterize what a nation is in a legal manner'[23]. Contesting the idea of homogeneity present in the core of Mancini's theory, he asserted: 'There are typical nations, i.e., characterized by a set of unmistakable elements – territory, people, a national conscience consolidated specially by a racial, 10

15 RAUL PEDERNEIRAS. *Direito internacional compendiado*. (Freitas Bastos 1931), p. 26.

16 PAUL FAUCHILLE. *Traité de droit international*. (Rousseau 1922), T. I, p. 11 ss.

17 RAUL PEDERNEIRAS. *Direito internacional compendiado*. (Freitas Bastos 1931), p. 26.

18 Idem, p. 70.

19 Idem, p. 70.

20 Idem, p. 70.

21 Idem, ibidem.

22 Idem, ibidem.

23 JORGE AMERICANO, O novo fundamento do direito internacional e seu esteio na conciencia universal (Renascença 1945), p. 21.

historic, linguistic and cultural identity, a sovereign government. However, not all nations in the present world gather all of these elements'[24].

11 This is an approach that, although with different elements, will be the one followed by the other Brazilian jurists of the 20th century. That is the case, for instance, of Hildebrando Accioly, who, when publishing his treatise in 1956, not only mentioned Mancini and the Italian school of thought[25], but also added: 'It is not possible, however, to take to extremes the application of mentioned principle'[26], especially because 'one can hardly define the limits of a nationality'[27]. Coherently to the idea that States of an heterogeneous ethnic composition – as Brazil – would constitute a nation, Accioly did not hesitate in affirming that 'the nation is, therefore, constituted by a set of factors that do not intermingle with those constituting the State itself, nor with those of the regroupment of individuals which is named as people. Its basic element is the subjective factor, represented by the national conscience'[28]. Thus, the author affirms his opposition to the Mancini's theory, counteracting those that say that 'a Nation is a set of people that have the same origin, the same traditions, the same customs and common aspirations. Ordinarily, the members of a nation speak the same language, have the same religion, and live in the same territory'[29]. For Accioly, there are 'examples in a contrary sense'[30] and the thing that connects the members of a nation is 'a tie purely moral, while in the State there is a political bond'[31].

12 In the basis of Accioly's criticism was the fact that, according to the author, 'we could hardly precise the limits of a nationality'[32], situation that could conduct to the absurd of creating small States, absolutely without autonomous conditions of life, ingrown inside others, or dissociated from some States, that live perfectly happy with their people belonging to more than one nationality (as the case, for example, of Switzerland and Belgium)[33].

13 Luiz Faro, in the same year, followed the line set by Pederneiras, affirming that 'despite all definitions, there is nothing vaguer than a nationality understood in this manner. There are many elements that constitute it, and none of those, by itself, is sufficient to justify it'[34]. Faro goes even further than Pederneiras and Accioly, and delegitimizes Mancini's principle also from its internal perspective, showing the fragility of its premises. To the Brazilian author, in this regard, the 'identity of the race does not mean much; all civilized peoples are the result of a fusion of many races'[35], and

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24 Idem, ibidem.

25 HILDEBRANDO ACCIOLY, *Tratado de Direito Internacional Público.* (Rio de Janeiro 1956) Vol. I., p. 111.

26 Idem, ibidem.

27 Idem, ibidem.

28 Idem, ibidem.

29 Idem, ibidem.

30 Idem, ibidem.

31 Idem, ibidem.

32 Idem, ibidem.

33 Idem, ibidem.

34 LUIZ P. F. FARO JUNIOR. *Direito Público Internacional.* (Haddad 1956), p. 56.

35 Idem, ibidem.

in particular the 'American countries are a mix of almost all the known races'[36]. The identity of the language, in turn, was 'a very important factor of a nationality, but it is far from being decisive'[37] and 'the identity of a culture also is not decisive. Its importance tends to decline considering that, in a modern world, there is a common background of civilization made easier by the frequency and the speed of communications'[38]. Finally, 'regarding religion, it is no longer a preponderant factor'[39]. As it can be noticed, in Faro's work strong aspects of the Brazilian sociological constitution and its history as an independent State influence the analysis on the possibility of validity of the nationalities principle, culminating in the author's denial of this postulate.

A year later, in 1958, Gerson de Britto Boson, in his *Curso de Direito Internacional Público* [40], **14**
consolidated his rejection to the Italian theory in a very objective manner, by affirming that 'One cannot, however, accede to the Mancini's idea when he intends to see in the concept of nationality the premises of international Law'[41]. In line with his Brazilian predecessors, the author considered as fulcral point of his denial the idea of homogeneity as decisive element in the constitution of the nation, as the Italian author defended: 'It is not only due to the fact that the expression 'nationality' nowadays has a precise meaning in constitutional legal technique, but also because the very controversial concept of *nation*, even in the sense taken by the Italian jurist, escapes the reality of facts, as the nation is not a subject of international Law, and that there are States in which its population is formed by different nations'[42]. Accepting Mancini's theory and transplanting it to the Brazilian legal culture could have the effect, to Boson and the others, of delegitimizing the Brazilian's State own history and constitution.

In 1968, Oliveiros Litrento would be the last Brazilian author to explore in a fairly detailed **15**
manner, within a textbook[43], Mancini's principle of nationalities. Also in his work there is strong criticism, and, for this author, 'the principle of nationalities is insufficient to serve as basis to the organization of the international society'[44]. Even if it allows 'a criterion to individualizing and structuring the elements of international society'[45], it cannot present 'any rule to organizing the relations between States, nor does it assure the stability and the peace in the international community'[46].

Unlike the manner in which Mancini's principle was viewed in the Argentinian doctrine,where it **16**
was an object of intense analysis by a significant number of authors – as it will be later described in

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36 Idem, ibidem.

37 Idem, ibidem.

38 Idem, ibidem.

39 Idem, ibidem.

40 GERSON DE BRITTO MELLO BOSON, Curso de Direito Internacional Público. (Bernardo Alvares editora 1958).

41 Idem, p. 247.

42 Idem, ibidem.

43 OLIVEIROS LITRENTO. Manual de Direito Internacional Público. (Forense 1968).

44 Idem, p. 57.

45 Idem, ibidem.

46 Idem, ibidem.

this work –, in Brazil, as one can find, few theoreticians dedicated a few pages to the Italian author and his theory. In the first half of the 20th century, Clóvis Beviláqua's silence in his *Direito Público Internacional*[47] is actually quite eloquent. By adopting a approach centered on the State that leaves no space to any reflection about the possibility of concession of legal personality to nations, Bevilaqua, in this work, in an act of near contempt, ignores the existence of the principle. A similar reaction is the one found in *Curso de Direito Internacional Público* [48], by Celso Albuquerque de Mello, which was published for the first time in 1967 and that reached fifteen editions. In this one, no mention to Mancini or his principle of nationalities is made whatsoever, as the author adopts a concept of nation filled with sociological content, rather than one with legal value.

In the steps of a rejection

The first manual of International Law published in Uruguay dates from 1864. The so-called 'Curso Elemental de Derechos das Gentes' was written by Gregorio Perez de Gomar and it was fated to serve as a theoretical framework for entire generations of jurists until the publication of the first edition of the Eduardo Jimenez de Arechaga's manual, almost a century later. Published just over a decade after the Mancini's lecture at Turin, the Perez Gomar's considerations were very close to those from the Italian jurist, but didn't mention him at any time. **17**

This aforementioned proximity becomes latent when Perez de Gomar says textually that the expression 'State' could not serve to indicate the subjects of the international relations. In this sense, the author initiates his presentation asseverating that the expressions 'society', 'nation' e 'State' would be used in a common way as synonyms, but in dealing with subjects of international relations there would be distinctions in a political level able to impute just to one of them that condition[49]. The State should only complete '[...] the society in its upper and general necessities and give to it an harmonic direction'[50], and it's not essential to it '[...] the existence or conservation of external relations, once several States could reunite or confederate themselves, making common the attention to these relations[...]'[51]. **18**

After moving away the possibility of the State to constitute a subject of international relations, the Uruguayan jurist starts to discourse about an idea of Nation, assigning to it the treats of an international juridical personality: **19**

> Since the moment in which there is in each nation a power rating that rises up enough characterized to guide its destines, despite the multiplicity of elements that compose it; **20**

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47 CLÓVIS BEVILÁQUA, *Direito Público Internacional.* (Freitas Bastos 1939).

48 CELSO ALBUQUERQUE DE MELLO. Curso de Direito Internacional Público. (Freitas Bastos 1967).

49 GREGORIO. PEREZ DE GOMAR. *Curso Elemental de Derecho de Gentes.* (Imprenta Tipografica 1864), Tomo I., p. 22.

50 *'[...] a la sociedad en sus necessidades superiores y generales y dándoles armónica dirección'.* In: GREGORIO. PEREZ DE GOMAR. *Curso Elemental de Derecho de Gentes.* (Imprenta Tipografica 1864), Tomo I, p. 22-23.

51 *'[...] esencial en él, la existência o conservación de las relaciones externas, puesto que varios estados pueden reunirse o confederarse, haciendo común la atención de esas relaciones [...]'.* In: GREGORIO. PEREZ DE GOMAR. *Curso Elemental de Derecho de Gentes.* (Imprenta Tipografica 1864), Tomo I, p. 23.

> the word personality expresses just the existence of an agent that acts by itself and that, even recognizing itself as subordinate to an upper precept, depends on its intelligence to discover it and on its volition to give it compliance[52].

Consecrated the juridical personality of the nations, it would be left to the jurist only to find out if they '[...] are of the same nature and if they are in the same situation, to advance our deductions'[53]. **21**

After the Perez de Gomar's course in 1961, when the Eduardo Jimenez de Arechaga's manual was published, the theme of nationalities began to be examined only in Bachelor's theses discussed in the Faculty of Law of the University of Uruguay. It's the situation, for instance, of the Juan Campisteguy's[54] and Alfredo Furriol's works[55], published in 1887 and 1896, respectively. The first one focuses more on technical and legal issues, while the second brings a typical perspective of the nascent French sociology of law, whose theoretical assumption was a conference given by Ernst Renan at Sorbonne, without mentioning Mancini neither the Italian school. **22**

The Uruguayan doctrine, on the other hand, mentioned expressly the Mancini's principle of nationalities only through the voice of Eduardo Jimenez de Arechaga, jurist that later assumed a chair as member of the International Court of Justice. In the second volume of his *Curso de Derecho Internacional Público* [56] *,* he presents an approach that is very similar to the one taken by Brazilian writers. In other words, it is understood that the Mancinian theory should be submitted to a well-defined time delimitation due to the political elements that stimulated its materialization. For the Uruguayan author, **23**

> also because of political reasons, the famous Italian public law lawyer Mancini, in 1851, before starting the Italian Nation process of reconstitution, enunciated a theory according to which the true subjects of international law were not the States, but the nationalities, as the name of the discipline itself indicates, meaning with that the communities of homogeneous population, by virtue of its origin, its race, its language and its historical tradition, whose homogeneity is a result of the consciousness of its own unity.[57]. **24**

In Jimenez de Arechaga's words, it was 'a typically irredentist manifestation that ultimately aimed at the culmination of the Italian unification process'[58]. In this sense, he asserted to be beyond any doubts that '[…] Public International Law does not subordinate the existence of a State to **25**

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52 *'Desde que en cada Nación existe una potencia que se levanta bastante caracterizada para dirigir sus destinos, cada una es una personalidade completa, a pesar de la multiplicidad de elementos que la compone; la palabra personalidad no expresa sino la existencia de un agente que obra por sí mismo y que, aunque se reconozca subordinado a un precepto superior, depende de su inteligencia descubrirlo y de su voluntad darle cumplimiento'*. In: GREGORIO. PEREZ DE GOMAR. *Curso Elemental de Derecho de Gentes.* (Imprenta Tipografica 1864), Tomo I, p. 24.

53 *'[...] son de la misma naturaleza y si se hallan en la misma situación, para poder avanzar nuestras deducciones'*. In: GREGORIO. PEREZ DE GOMAR. *Curso Elemental de Derecho de Gentes.* (Imprenta Tipografica 1864), Tomo I, p. 25.

54 JUAN CAMPISTEGUY. *Breves consideraciones sobre Nacionalidad y Ciudadania.* (Gadel 1887).

55 ALFREDO FURRIOL. *Ensayo sociológico*. Nuestra Nacionalidad. (El Siglo Ilustrado 1896).

56 EDUARDO JIMENEZ DE ARECHAGA. *Curso de Derecho Internacional Público.* (Centro Estudiantes de Derecho 1961), Tomo II: Los Estados y su Dominio.

57 Idem, p. 286.

58 Idem, p. 287.

the presence of this national unity'[59] and, utterly contradicting the possibility of the principle, he affirmed to be proven that '[…] the political form of the State contributes to creating a nationality, as a sort of melting pot in where linguistic and ethnic elements merge and, as time goes by, the birth of a new nationality takes place'[60]. For the Uruguayan jurist, the thesis elaborated by Mancini has found an echo just in another ambit, different from that for what it was initially thought and 'in a field for what it was not designated: in the Public International Law it was not received, but it was totally accepted in the Private International Law, in which, mainly in Europe, the principle that is followed to determine the applicable law in a case of conflict of laws, it's the nationality criterion'[61]. In other words, with this assertion Jimenez de Arechaga puts the State as an entity able to set the grounds to the birth of a nation, not on the contrary, as Mancini defended.

Argentine reservations

In the Argentinean doctrine of International Law of the 20th century, it is Estanislao Zeballos who **26**
first brings up Mancini's theory. The jurist initially does so in an indirect manner, in his article entitled *Concepto cientifico de la Revolucion italiana* [62], in 1911. It is an apology to the process of Italian unification, indicating the theory of nationalities as opposed to the theory of divine right, because it professes the triumph of the will of peoples or of national conscience in the formation of political ideas and in the determination of its forms of government. Three years later, in the first volume of his treatise *La Nationalité au point de vue de la législation comparée et du Droit Privé humain* [63], published in Paris in 1914, Zeballos identifies the Italian authors who sustain the ideas about nationality as influenced by the French doctrine, directly quoting Mancini and his 1851 lecture[64].

In 1938, Daniel Antokoletz, Lithuanian jurist who taught at the University of Buenos Aires, **27**
makes the first more detailed assessment of the principle. In *Tratado de Derecho Internacional Publico en tempo de paz y en tempo de guerra*, he departs from the assumption that the principle is an extension of the thoughts of Madame de Staël[65], and inserts it in a wider, evidently Iluminist prospect. It can be noticed, thus, an apparent relativization of the ineditism of the work of the Italian jurist. This interpretation, however, does not find reflecton in the Brazilian doctrine, and it also contrasts with the most recent Italian historiography[66], that defends that the origins of Mancini's thought were Italic doctrinaire tendencies present in the configuration of the *jus publicum europium.*

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59 Idem, ibidem.

60 Idem, ibidem.

61 Idem, p. 286.

62 ESTANISLAO ZEBALLOS. *Concepto cientifico de la Revolucion italiana*. Revista de Derecho, Historia y Letras, (1911), Vol 39, p. 144.

63 ESTANISLAO ZEBALLOS. *La Nationalité au point de vue de la législation comparée et du Droit Privé humain.* (Sirey 1914), Tome I.

64 Idem, p. 155-156.

65 DANIEL ANTOKOLETZ, Tratado de Derecho Internacional Publico en tempo de paz y en tempo de guerra. (Facultad 1938) Tomo I, p. 449.

66 See, in particular, ENRICO CATELLANI. *La dottrina italiana nel diritto internazionale nel secolo XIX*. (Romana Editoriale 1935), p. 14 ss.; and, after, ANGELO SERENI. *The italian Conception of International Law*. (Columbia

Considering it to be still valid, Antokoletz grants a positive evaluation of the principle, affirming it to be a '[…] benefic influence on the European diplomacy'[67], especially until the first world war, when the allies would have recognized '[…] a certain international personality to the Polish, Czech and Yugoslavian committees, as a nationality that was independent from that of his home States'[68]. Yet, some reservations to the Mancini theory emerge. They are overall related to the historic aspects of the constitution of Latin-American States. According to Antokoletz, the principle would not apply '[…] in the American continent, formed by States conceived through the free and spontaneous will of their people'[69]. Despite stressing his perplexities regarding the Mancinian principle, Antokoletz still presents it as related to the doctrine of self-determination of peoples, being such doctrine 'a right of the peoples, homogenous or heterogeneous, to dispose of their destinies and to elect the sovereignty to which they deserve to live'[70]. To the Lithuanian jurist, it would be, therefore, a 'new word that expresses an old idea'[71]. Without clarifying if he does so in a conscientious manner or not, Antokoletz gives the impression that the principle of self-determination of peoples would be the result of a transfiguration of the principle of nationalities, in a phenomenon that would have arisen with the deflagration of the First World War. **28**

Two years later, in 1940, with the release of the handbook *Derecho Internacional Publico*, Luís Freyre also mentions Mancini. Ignoring the previous works on the theme, Freyre presents him as '[…] the initiator of the theory of nationalities'[72], which would have had the ambition of '[…] modifying the basic principles of Public International Law, by showing new paths, according to which it should be nations, not States, the factors of international conviviality'[73]. Instead, it would be a '[…] doctrine developed in circumstances under which the sentiment of Italian nationality, that had been buried for centuries under the flood of foreign dominations, gained importance and dealt of becoming concrete in the facts by organising Italy as a State'[74]. Therefore, the recognition of the Mancinian postulate remains untouched, something that had been previously refuted by Antokoletz. **29**

1943), ANTONIO DROETTO. *Pasquale Stanislao Mancini e la Scuola Italiana di Diritto Internazionale del secolo XIX*. (Giuffrè 1954); and, more recently, GIOVANNI CAZZETTA. '*Prolusioni, prelezioni, discorsi. L'identità nazionale nella rettorica dei giuristi*'. In: Giovanni Cazzetta (a cura di). *Retoriche dei giuristi e costruzione dell'identità nazionale.* (Il Mulino 2013), p. 11 ss.; FLORIANA COLAO. *L'"idea di nazione" nei giuristi italiani tra ottocento e novecento.* (*Quaderni fiorentini per la storia del pensiero giuridico* 2001), vol XXX, p. 255 ss.; and, CLAUDIA STORTI. *Empirismo e scienza: Il crocevia del diritto internazionale nella prima mettà dell'Ottocento.* In: Luigi Nuzzo et VEC, Miloš (Ed.s). Constructing International Law. The Birth of a Discipline. (Klostermann 2012), p. 51 ss.; CLAUDIA STORTI. *L'indipendenza dell'Italia nel diritto internazionale della prima metà dell'Ottocento in Problemi giuridici dell'Unità italiana.* (Giuffrè 2013), pp. 33 ss.; CLAUDIA STORTI. Pasquale Stanislao Mancini. In: Italo Birochi, Ennio Cortese, Antonello Mattone et Marco Nicola Miletti (a cura di). *Dizionario Biografico dei Giuristi Italiani (XII - XX secolo).* (Il Mulino 2013), Vol. II, p. 1244 ss.; GIAN SAVINO PENE VIDARI. *La prolusione di Pasquale Stanislao Mancini sul principio di nazionalità* (1851). In: Giovanni Cazzetta (a cura di). Retoriche dei giuristi e costruzione dell'identità nazionale. (Il Mulino 2013), p. 117 ss.

67 DANIEL ANTOKOLETZ. Op. cit., p. 449.

68 Idem, ibidem.

69 Idem, ibidem.

70 Idem , p. 450.

71 Idem, ibidem.

72 LUÍS FREYRE. Derecho Internacional Publico. (Cita Estudantil 1940), p. 70.

73 Idem, ibidem.

74 Idem, ibidem.

This approach implies the legitimization of the validity of the principle, even if with reservations. **30**
Among these reservations are '[…] the inadmissible contrast that results from its domination (doctrine of nationality) with the name of the science to which it intends to serve as a basis (International Law)'[75]; the fact that it has an eminently political nature, that is, '[…] if the State is the politically organized version of the nation, if being a national to a country means having active and passive rights in such country, it is evident that the attribution of nationality is associated to considerations of political order'[76]. Finally, and of particular interest to this study, another reservation was the fact that the concept of nationality derives from the '[…] concept of nation, which is not identical from the European and American points of view'[77]. In the American point of view, which collides with Mancini's theory, '[…] nation is the association of a set of individuals, with different historic backgrounds, inserted in various religious contexts, with differences in their languages and costumes, and that only have in common their dominating ideal of living in a territory determined according to its own legislation'[78]. Sensitive to the history of constitution of the Latin-American States, Freyre places it as an obstacle to the applicability of Mancini's principle.

In 1943, Isidoro Ruiz Moreno, within the confines of his *Manual de Derecho Internacional Público* **31**
[79], presents a very thorough view of Mancini's theory. In this sense, the author affirmed that 'the nationalities, when tending to reach a political conscience, are converted into nations'[80]. After presenting a long list of arguments pro and con reported by the scholars of the time, the Argentinean jurist asserted that is was '[…] beyond any doubt that, at least for a period of time not possible to determine, the theory of nationalities, which may be useful to correct errors from the past in the same way as it once was to the appearance of new States in the roots of the 1914 conflict, will not be taken as a basis to the creation of States and, even less, to adjust the map accordingly'[81]. It is the first assessment made by an Argentinean to put at stake the validity of the principle. Antokoletz and Freyre, previously, even with their respective reservations, had not questioned it in such an incisive manner. Ruiz Moreno, therefore, intensifies and deepens the collection of reservations which will slowly lead to the de-legitimization of the institute in the Argentinean pages of international law.

In 1951, Ángel Modesto Paredes, in his *Manual de Derecho Internacional Público*, makes a different **32**
reading than that launched by Ruiz Moreno, with more intense criticism to the use of the principle made in some occasions by international praxis. However, he remains silent as to an eventual de-legitimization of its validity. He classifies it as a 'generic and abstract concept'[82], inserted in a context

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75 Idem, ibidem.

76 Idem, ibidem.

77 Idem, ibidem.

78 Idem, ibidem.

79 ISIDORO RUIZ MORENO. Manual de Derecho Internacional Público. (J. Castagnola 1943).

80 Idem, p. 64.

81 Idem, ibidem.

82 ÁNGEL MODESTO PAREDES. *Manual de Derecho Internacional Público. Sus principios fundamentales en tiempo de paz.* (Depalma 1951), p. 9.

characterized by '[…] complex practical and political applications'[83]. Consequently, ever since its elaboration, the principle would have been a victim of completely distorted uses, a victim of politics, that '[…] was charged with destroying and making it threatening, when it turned nationality into the banner of excessive demands and forced and arbitrary territorial incorporations'[84]. The reference to Mancini is made only in an indirect manner, when the author affirms that it was a '[…] work of Italian theoreticians to highlight for the first time the creational character of nationalities, compared to the artful and sometimes violent character of political formulas'[85].

In 1960, the fourth edition of the international law handbook[86] by Lucio Podestá Costa brings **33**
a dense reading on the theory of Mancini when he writes about the *'Formación del Estado'*. Some passages indicate it as inherent to the political moment that took place at the time in the Italian peninsula: 'The fight for the Italian unity found in Mancini's doctrine the philosophical justification of its anxieties'[87]. Through this reading it is possible to find a new tendency in the Argentinean doctrine on the subject. In other words, over 30 years after the Brazilian doctrine, Podestá Costa disrupts with the Argentinean tradition that saw the principle as still valid in the international legal order. In order to do so, he departs from the premise that the principle could only be understood through a process of historicization. His writing leads, therefore, to the presentation of the principle as a legal institute valid in a determined historical moment, which was functional to the interests intrinsic to that context. The consequence is a complete subtraction of any possibility of validity of such principle in the moment in which that manual was published[88]. The 'theory of nationalities' was the reflex of its time and environment in which it was inserted. Outside the background of the Italy of the *Rsorgimento,* it was absolutely unexplainable to the elements cited by Mancini[89], Podestá Costa affirmed in a very categorical manner. The assertion is developed in the subsequent paragraphs, together with a political, sociological and anthropological analysis. Such examination makes clear, nevertheless, the eminently historical framework in which the debate should be placed.

In 1963, the publication of *Tratado de Derecho Internacional* [90] by Lucio Moreno Quintana, right **34**
before he finished his term as a member to the International Court of Justice, brings out the close relation between the principle of nationalities and the principle of self-determination of peoples, as he presents the latter as a direct derivation, or better yet, a transfiguration of the former: 'A foundation to the principle of self-determination is the existence of nation that claims its independence. From this comes the formulation of a theory of nationalities according to which

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83 Idem, ibidem.

84 Idem, p. 11.

85 Idem, ibidem.

86 L. A. PODESTÁ COSTA. Derecho Internacional Público. (Tipografica Editora Argentina, 4ed, 1960).

87 Idem, p. 68.

88 Idem, p. 69.

89 Idem, ibidem.

90 LÚCIO M. MORENO QUINTANA. *Tratado de Derecho Internacional.* (Editorial Sudamericana 1963) Tomo Primero.

every psychological nation should be converted into a political nation, that is, into a State'[91]. On one hand, Moreno Quintana disregards the argument which puts nations as subjects of international law but, on the other hand, he adopts the elements that Mancini inserts in the core of this concept. It is not clear, however, if the author actually draws back from the possibility of validity, in that moment, of an institute historically delimited as typical from 19th-century Europe. The countless examples about the subject brought throughout the book provide little clarification to enlighten the context, and actually aggravate it as the author starts confusing the principle of self-determination of peoples, which is a theoretical elaboration typical from the 20th century, with the principle of nationalities.

35 In 1966, giving scholar force to the process of historicization started by Podestá Costa, the textbook by the Diaz Cisneros refers to the principle in an emphatic manner, by stating that it would be 'of historical interest, non applicable to contemporaneity'[92]. This extract – which amounts to a death sentence both harsh and objective – is located in the assessment of the classification of States according to their structure made by the author, and is inserted in a context where the concept of Mancini is mentioned. Diaz Cisneros reassesses this idea in the subsequent paragraphs, and reaffirms the condemnation of the principle to the annals of history: 'The theory of nationalities by Mancini is not applicable to the nations and the States in the present time, as we have argued when studying the foundation of International Law (§2)'[93]. The reasons for that are exposed in a systematic way, by making use of a long list of arguments already previously used by the critics of Mancini, including 'for the most part of the modern States the unity of the territory was not held, neither of languages, of religion, nor of other elements signed by Mancini, as can be proved looking at the States of our time'[94].

36 The textbooks of international law published by some authors in Argentina between 1966 and 1976 rarely mention Mancini and his principle of nationality, and the limited mentions to it are restricted to the reproduction of quotes from the books by Antokoletz and Ruiz Moreno. Examples of this are the textbooks by Julian Herrero[95], issued in 1968, and Eduardo Augusto Garzia[96], issued in 1975. Therefore, they do not present a significant relevance to this study.

37 Only in 1976 the study of the subject is resumed, with the publication of *Derecho Internacional Publico* [97], by the Ukrainian jurist Bohdam Halajczuk, and by the Argentinean jurist Maria Teresa Moya Dominguez. Mancini and his concept are indirectly mentioned, when the authors affirm that the 'Italian school of international law denied the international personality of the States and claimed

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91 Idem, p. 141.

92 CESAR DIAZ CISNEROS. Derecho Internacional Público. (Tipografica Editora Argentina, 2ed, 1966), p. 442.

93 Idem, p. 443.

94 Idem, ibidem.

95 JULIAN A. HERRERO. *Derecho Internacional Publico.* (Buenos Aires, s/e, 1968).

96 EDUARDO AUGUSTO GARCÍA, Manual de Derecho Internacional Público (Ediciones Depalma 1975).

97 BOHDAN T. HALAJCZUK, MARÍA TERESA DEL R. MOYA DOMINGUEZ. Derecho Internacional Publico. (Sociedad Anónima Editora 1976).

it in the name of nations'[98]. Halajczuk and Moya Dominguez, following the tendency that was inaugurated by Podestá Costa, depart from the historic contextualization of the principle, according to which it served a 'legal foundation to the aspirations of the Italian nation towards unification'[99]. The originality of the idea is also acknowledged by the authors when they affirm that 'observed by the eyes of that time, the perspective of that school seemed much more revolutionary and even extravagant that it does nowadays'[100]. Furthermore, the authors view the theory of Mancini as anticipating the proposals of other internationalists, such as Strissower and Verdross, regarding an aspect of international life that only much later would be proved, that is, 'that the founding element of the State is not its government but its people, the State is nothing but a form of organization of a nation, the government is nothing more than an organ to it'[101]. The conclusive criticism made by Halajczuk and Moya Dominguez somewhat concurs with points already made by Ruiz Moreno and Freyre, in the sense that 'this identification of the State with the nation is correct only in respect to the ethnically homogeneous states or those that have national minorities, but in no way to the dynastic states, which lack an ethnic substrate of a nation that could be regarded as authentic bearer of the rights and obligations that international law inflicts. The so-called African states also lack such a substrate'[102]. They take into account, thus, the form with which south-American States were historically constituted.

38 In a general way, the Argentinean doctrine was more attentive to the principle of nationalities taught by Mancini in 1851. Even the authors that did not admit in any way the validity of the principle dedicated few, yet noteworthy pages to its appraisal. It is significant to note, however, that, among the reservations to it, views that bring into perspective specific elements of Latin-American history in contraposition to the European one, and that did not permit the application of the principle in the international community constituted by the former, were repetitive and continuous, yet made in distinct approaches.

Concluding remarks

39 Far from constituting a solid and wide continent, the set of findings that were exposed in this work actually formed a great archipelago of unresolved questions instead. These must be assessed in a future development of this research, which, as previously said, is not complete.

40 These questions relate especially to the possible causes that led to the non-acceptance of Mancini's ideas to the doctrines of the three South American countries that were studied in this work. Brazilians, Argentineans and Uruguayans present differing approaches as to the Mancinian principle. Even submerged in an ocean of reservations, the Argentinean doctrine seemed to

98 Idem, p. 126.

99 Idem, ibidem.

100 Idem, ibidem.

101 Idem, ibidem.

102 Idem, p. 127.

recognize the validity of the institute for a few decades. The Uruguayan and Brazilian doctrines, ever since the first work that examined the topic, condemned it as ancient history. Among the reservations of the firsts and the open rejections of the others, it is possible to find a common ground, that is, the certainty that the ethnic, cultural, linguistic and religious homogeneity present in the theory of the Italian jurist would constitute an obstacle to its applicability in America. An eventual adhesion to these ideas by the doctrine would lead to a confrontation with the complex ethnic, linguistic and cultural constitution of the three countries – which involve indigenous communities and intense migratory flows from Europe and Asia – as well as the history of the independence of the three States from their colonial metropolises. One aspect to be considered at a later stage would be, therefore, an analysis of to what extent, in the viewpoint of the studied authors, such acceptance could represent a 'setback' or a 'march of progress' in the legal situation of the three countries.

It should also be subject of consideration the causes that made Mancini's ideas be more discussed **41**
in the Argentinean doctrine than in the other two. The most intense flow of ideas of the Italian legal culture in Argentina may have been a significant reason for this, unlike what happened with the Brazilian legal culture, which received stronger influences from French cultural traditions. The fact that Argentinean law schools have been installed long before and in much larger number than the Uruguayan and Brazilian ones may have also been a factor to this phenomenon. It must also be taken into account the consistent acceptance of the Brazilian internationalist culture to the voluntarist positivism, in stark contrast to the cultural assumptions of the Mancinian theory, an occurrence that, in turn, is unparalleled in the Argentinean legal culture.

Finally, the first conclusion that can be reached in this context is the lack of a true transplant **42**
of Mancini's ideas to the legal cultures that are subject of the present essay, as well as the fact that the 'principle of nationalities' has not been receptioned in the international order governing the relations between the States. These questions relate especially to the possible causes that led to the non-acceptance of Mancini's ideas to the doctrines of the three South American countries that were studied in this work. Brazilians, Argentineans and Uruguayans present differing approaches as to the Mancinian principle. Even submerged in an ocean of reservations, the Argentinean doctrine seemed to recognize the validity of the institute for a few decades. The Uruguayan and Brazilian doctrines, ever since the first work that examined the topic, condemned it as ancient history. Among the reservations of the firsts and the open rejections of the others, it is possible to find a common ground, that is, the certainty that the ethnic, cultural, linguistic and religious homogeneity present in the theory of the Italian jurist would constitute an obstacle to its applicability in America. An eventual adhesion to these ideas by the doctrine would lead to a confrontation with the complex ethnic, linguistic and cultural constitution of the three countries – which involve indigenous communities and intense migratory flows from Europe and Asia – as well as the history of the independence of the three States from their colonial metropolises. One aspect to be considered at a later stage would be, therefore, an analysis of to what extent, in the viewpoint of the

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