GENEALOGY OF THE NOTION OF CONSTITUTION IN PORTUGAL: THE "FUNDAMENTAL LAWS" AND THE "CIVIL CONSTITUTION"[1]

Genealogía de la noción de constitución en Portugal: las «leyes fundamentales» y la «constitución civil»

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Abstract

Celebrating the bicentenary of Portuguese constitutionalism (1822), this article aims to contribute to the study of the genealogy of the notion and concept of "constitution" in this country, which has its origins in the pre-constitutionalism period, long before the Liberal Revolution of 1820. As a matter of fact, the modern concept of constitution established by the liberal revolutions of the 18th and 19th centuries had its own constitutional ancestors, which are not always notorious or of easy understanding. Generally, the most known and studied of them all is still the concept of "fundamental laws", which is commonly known today as a synonym of constitution. From 1772 onwards, a new concept came about in Portugal, one of "civil constitution". Therefore, without neglecting the comparison with what happened in other constitutional latitudes, in order to understand the formation process of the concept of "constitution" in Portugal, we've focused our research mainly around the notions of "fundamental laws" and "civil constitution", which are the closer etymological predecessors to the modern Portuguese concept of constitution, formed as of 1820/22.

Keywords

Notion of Constitution; "Fundamental Laws" of the Ancient Regime; Portuguese "Civil Constitution".

Resumen

Celebrando el bicentenario del constitucionalismo en Portugal (1822), este artículo pretende ser una contribución al estudio de la genealogía del término y del concepto de «constitución» en este país, que comenzó a formarse en la época del preconstitucionalismo, mucho antes de la Revolución Liberal de 1820. En realidad, el concepto moderno instituido desde las revoluciones liberales de los siglos XVIII-XIX tuvo sus antepasados constitucionales, que no siempre son notorios y de fácil comprensión. En general, el más conocido y estudiado de todos ellos sigue siendo el de las llamadas «leyes fundamentales», concepto que aún hoy es vulgarmente usado como sinónimo de constitución. A partir de 1772, en Portugal, surgió un nuevo concepto, el de «constitución civil». Por lo tanto, sin dejar de lado la comparación con lo ocurrido en otras latitudes constitucionales, para entender el proceso de formación del concepto de «constitución» en Portugal, centramos nuestra investigación especialmente en torno a las nociones de «leyes fundamentales» y de «constitución civil», que son el fondo etimológico más cercano del moderno concepto portugués de constitución, formado a partir de 1820-1822.

Palabras clave

Noción de constitución; «leyes fundamentales» del Antiguo Régimen; «Constitución Civil» portuguesa.

CONTENTS

I. INTRODUCTION

We shall start this article with the assumption that for at least two and a half centuries, from the American Revolution of 1776 and the French Revolution of 1789, the term "constitution" started to encompass an original legal-political meaning, different from what it had previously, which became universal and eventually extended to countries the world over. Although, as we will see below, from the 18th century in England the notion of constitution was already being used by authors to denominate a "founding pact" between the people and the sovereign about the form of government, only after the two abovementioned revolutions the notion of constitution was applied to the written instrument by which a political community organizes and institutes itself as a political entity. This is the *communis opinio* which is adopted by a great number of modern authors. As an example, to Eirik Holmoyvic "constitution has been a key concept since the late eighteenth century. Despite the term having been a part of the legal and political vernacular far longer, our modern understanding of it dates from this period […]. This change is, of course, largely due to the wave of written constitutions in the wake of the American and French revolutions in 1776 and 1789, respectively" (2015: 43).

As Dieter Grimm (2016: 3) wrote, it is important to separate the *i) empirical or descriptive concept of "constitution"*, as a concrete form of a country's political organization and functioning, and *ii) normative or prescriptive concept of constitution,* as legal provisions (written or not) which rule and discipline such organization and functioning. This author also states that in the first sense, every country has (and always had) a constitution; in the second sense, not every country has one, given the high diversity of scope and density of constitutional provisions. The modern normative sense of constitution which arises from the liberal revolutions of late 18th century is characterized by the existence of a written constitutional code, emanating from the will of

the nation or the people, being provided with normative pre-eminence which regulates and limits political power and defines the fundamental rights of the members of the political community.

In the aforementioned and famous year of 1776, in New York, reverend Charles Inglis formulated a concept of constitution that, although synthetic, still holds true today. In the reverends' learned understanding, a constitution was "that assemblage of laws, customs and institutions that form the general system according to which the several powers of the state are distributed, and their respective rights are secured to the different members of the community" (Inglis, 1776: 21)[4]. Although incomplete, this definition embraces two fundamental traits of the modern constitution, namely the organization and control of the State's political power and the guarantee of human rights for individuals who are citizens of that State.

The American Revolution implemented a new constitutional technique, completely overhauling the previous state's form of political organization, from which modern-sense formal constitutions derive. The US Constitution (Philadelphia, 1787) is often considered as the first modern-sense constitution, but this statement overlooks the fact that in the eleven-year period between the revolution and this federal Constitution (1776-1787), fifteen written constitutions were adopted in the various (afterwards) federal American States[5], as well as the Articles of the Confederacy and Perpetual Union instituted by them (1777).

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[4] The Declaration of the Rights of Man and of the Citizen (1789), drafted at the start of the French revolution, replaced the "distribution of powers" by "separation of powers", establishing in its article 16 that "any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution". It is still curious, however, that in the 20th century, mainly because of the subordination of the executive to the legislature in parliamentary forms of government, we returned to the «distribution of powers» to the detriment of the "separation of powers".

[5] Constitution of New Hampshire (January 5, 1776); Constitution of South Carolina (March 26, 1776); Constitution of Virginia (June 29, 1776); Constitution of New Jersey (July 2, 1776); Constitution of Delaware (September 20, 1776); Constitution of Pennsylvania (September 28, 1776); Constitution of Maryland (November 11, 1776); Constitution of North Carolina (December 18, 1776); Constitution of Georgia (February 5, 1777); Constitution of New York (April 20, 1777); Constitution of Vermont (July 8, 1777); Constitution of South Carolina (March 19, 1778); Constitution of Massachusetts (March 2, 1780); Constitution of New Hampshire (June 2, 1784); Constitution of Vermont (July 4, 1786) (Grau, 2009).

Both in the case of the thirteen states which resulted from the independence of the North American British colonies and the case of the federation itself created by them later on, the notion of "constitution" was especially appropriate to qualify the actual instruments that were, in a very literal sense, "constituting" the new political entities. Consequently, these first constitutions "constituted" new sovereign political communities and remained as their legal-political statute, very much like the statutes of any other legal collectivity[6].

However, for the purpose of this study it is indifferent that the Constitution of New Hampshire (1776) is considered the first written constitution of the world or that this primacy be given to the later federal Constitution, since in both cases we remain within the scope of constitutional texts generated at the heart of the American Revolution, as the first proper constitutionalist revolution.

In this context, we must reject the numerous assertions that draw much further back the use of the notion of constitution, by applying it to situations of "incipient constitutionalism", *v. g.*, considering: the *Regeringsform* (Form of government) of 1720, in Sweden, the "first written liberal constitution of continental Europe" (Lepetit, 2013: 1-161); the *Instrument of Government* of 1653 being "England's first and […] only written constitution» (Blick, 2015: 73); Connecticut's *Fundamental Orders* of 1639 being the "first effective North American written constitution" (Reipplinger, 2008: 1-22); the *Regimento* (Regiment) of the Portuguese Kingdom 1438 being the "first Portuguese written constitution" (Otero, 2012: 244), etc. In reality, these manifestations of early "formal constitutionalism" can only be qualified as "constitutions" if we retroactively apply such notion to normative sets that regulated a few odd organizational and functional aspects of political power whilst not adopting themselves the designation of "constitution" or any equivalent term.

Considering the next bicentennial of the first Portuguese constitution (the Constitution of 1822), this article looks for the conceptual precedents of the Portuguese notion of constitution. That's to say, assuming the North American and French origins of the liberal concept of constitution, it is

[6] In neo-Latin languages, the term "constitution" (from the Latin *constitutionem*), as well as the equivalent term in the English language (with the same Latin origin), designate both the act of constituting, creating, composing or forming and the result of such act, that is the structure, composition or complexion of the constituted entity. In the German language, the expression *Verfassung* also designates both the act of constituting and the structure of the constituted body or entity.

nevertheless important to find out its possible national roots. Therefore, the immediate object of research will be focused on this concept's stages of development in the pre-constitutional period, especially on the two centuries that preceded the *Constituição Política da Monarquia Portuguesa* (Political Constitution of the Portuguese Monarchy) of 1822.

Since the Portuguese constitutional process was also the result of external influences, both European and American, we will not neglect comparative methodology, by linking the Portuguese process with events in other constitutional latitudes. In this sense, this work might match the two challenges facing comparative constitutional history: "first of all, assessing the identity and the constitutional substance of a European living common core of constitutional traditions; second, considering constitutional history as a useful tool to address different levels of global constitutionalism and new trends of governance" (Lacchè, 2018: 127).

It should come as a warning that this work is limited to the field of semantics, the linguistic origins and evolution of the words "constitution" and "fundamental laws" —the proximity between these two concepts makes the expression "fundamental law" a common and current synonym for constitution[7]. Any other approach to the "historical" or "non-written" constitution falls outside the scope of this article. This means that any historical texts of a material constitutional nature (as to their object) that are not identified as "constitution" or "fundamental law", will be excluded from the scope of our endeavour.

Accordingly, we will not include in this research legal acts such as the above-mentioned *Regimento* of the Kingdom of Portugal 1438, since, notwithstanding its material constitutional nature, on its contemporary identification there no express reference to a "constitution" or a "fundamental law". Strictly speaking, in those days the expression "fundamental laws" was unheard of, and despite the substantial proximity with that concept, the *Regimento* does not share in the same fundamental characteristics that are present in modern written constitutions, but that does not mean it should not be considered as one of its remote ancestors. Basically, the *Regimento* of 1438 —like other "constitutionally historic" texts, such as the legal-political texts of 1383, 1499 and 1581, drafted in moments of political crisis and social instability

[7] In Portugal, the Constitution of 1822 made a reference to the "Constitution or Fundamental Law" (article 27) and to the "fundamental laws which regulate the exercise of the three political powers" (article 29). After the failing of this first constitutional written experience, a "Fundamental Legal Charter" was still worked on (1823-1824), but without success.

stemming from the union or possible Iberic union of the Portuguese and Castilian crowns (Domingues, 2018: 1-17)— should be considered as a materially constitutional part of the Portuguese middle ages' essentially non-written "constitution".

For different reasons, we will also steer clear from medieval legal texts that, despite being officially named as "constitutions", do not reveal any materially constitutional nature, since they do not deal with the organization and control of political power or the safeguarding of human rights. Indeed, the word *constitutio* emerged in Roman law with its definition stemming from several fragments of Justinian's *Corpus Iuris Civilis* as the legal will of the emperor (Inst. 1.1.5[8]; Dig. 1.4.1.1[9]; Inst. 1.2.6[10]), that is, a legislative act issued by the supreme representative of the political power, regardless of its object. The rebirth of Roman law in early 12th century spread that legal definition all over Europe, and European monarchs —who considered themselves equivalent to the emperor inside their respective kingdoms— adopted the term "constitution" to identify their own legislative acts.

The same occurred in Portugal. In the Portuguese middle ages, the monarch's "constitutions" emerged next to the "laws, postures, *encoutos*, advices, decrees or *degredos*, establishments, ordinances, chapters", etc. Its usage remained until the 15th century, as disclosed by the various royal *Ordenações* (codes of legislation), falling into disuse afterwards.

It is likely that the legal character of the modern constitution remotely derives from medieval "constitutions", since these are normative acts adopted by the political power. However, by not having political character regarding its object, as well as being deprived of fundamental character regarding its legal force, they should not be considered as predecessors to the modern notion of constitution, at least in a direct line. The emergence of a new meaning of constitution in the 18th century would replace and make obsolete its old medieval usage as the sovereign's legislative act.

Taking these clarifications into account, we have structured this work in three separate chapters: the first two will deal with the two distinct nominal lineages that in a way have contributed to the modern concept of constitution in Portugal (the traditional "fundamental laws" and the "Civil Constitution" of the Portuguese Monarchy introduced in academic education by the

8 "Constitutio principis est, quod imperator decreto uel edicto uel epistula constituit".

9 "Quodcumque igitur imperator […] statuit […] legem esse constat. Haec sunt quas vulgo constitutiones appellamus".

10 "Quodcumque igitur imperator per epistulam constituit vel cognoscens decrevit vel edicto praecepit, legem esse constat; hae sunt quae constitutiones appellantur".

Pombaline Statutes of the University of Coimbra 1772); the third chapter will analyse the impact of that heritage in the modern meaning of constitution at the time of the constitutional revolution of 1820-22.

II. "FUNDAMENTAL LAWS" OF THE KINGDOM

The liberal concept of constitution is directly related to the previous concept of "fundamental laws" in such a way that "il est difficile de faire une histoire du concept de constitution sans le mettre en relation avec le concept voisin de lois fondamentales" (Beaud, 2009: 5). In fact, the concept of fundamental laws of the Ancient Regime emerges as closer to the modern concept of constitution (Holmoyvic, 2015: 45) having as its object the regulation of political power and being provided with legal supremacy. Fundamental laws are a French constitutional phenomenon with origins in the 70's of the 16th century, spreading afterwards to all of Europe.

In its origins we find two major purposes, specifically to limit and to legitimise political power (Nifterik, 2016: 3): to limit, insofar as political power was bound by them; to legitimise, insofar as the authority of political power was referred to the original consent of the people. As a consequence, those laws could not be unilaterally repealed or amended by the sole will of the monarch. In the year of 1576, Innocent Gentillet endorsed such rigidity with the constitutional principle by which "le prince ne peut abolir les loix fondamentales de sa principauté" (1576: 48-51). The repeal or amendment of fundamental laws could not depend on the unilateral will of the monarch because they were supposedly based on a bilateral contract —between the people and the monarch[11]—, thus assuming the respect for the natural law principle of *pacta sunt servanda* (Mohnhaupt, 2014: 159). In case of breach of fundamental laws, the right of resistance against political power could be relied upon (Tomás y Valiente, 1995: 32), the so named "right of resistance for breach of pact" (Domingues, 2017: 214).

In Portugal the same reason was aptly followed: "the fundamental laws of the kingdom of Portugal could not, by reasons of origin, be modified or repealed in whole or in part by the absolute monarch. Since they had been confirmed in *Cortes* [the estates representative body], only in *Cortes* could they be altered or repealed" (Langhans, 1957: 352; Cardim, 1998: 117). Even the most forthright defenders of royal absolutism in the 17th and 18th centuries

[11] "In the pre-constitucional Ancien Régime, only a contract was capable of guaranteeing the unilateral immutability of the leges fundamentals" (Mohnhaupt, 2014: 162).

would agree with this subordination of the king to fundamental laws, provided that their scope would not put into question the sovereign's authority or freedom of action: "however august and independent the power of kings may be, it cannot however be extended in order to derogate the Fundamental Law of the Kingdom" (Silva, 1767: 412; Collaço, 1915: 27).

A rather curious fact is found on a royal memorandum of instructions for a Portuguese embassy in Italy, dated around 1538, aimed at finding out whether "there are non-derogable laws in such places, what laws are they and whether in some of them the prince, even if he is superior, is not obeyed by the people" (Pinto, 2015: 102). Notwithstanding the closeness of the concept, we should bear in mind that in that document there are no explicit references to the notion of "fundamental laws", which will appear later on, although the supremacy and rigidity of some laws are already present in the medieval period[12].

As we have stated earlier, the first references to "lois fondamentales" had their origins in France during the second half of the 16th century, in the works of Innocent Gentillet (1571 and 1576) and Théodore de Bèze (1574), being repeatedly quoted in the following years of that century (Thompson, 1986: 1103; Coronas, 2011: 14; Seelaender, 2006: 199). That notion and terminology did not take long to overflow beyond French borders. In a letter written in January 8th, 1596, by Francis Bacon, an explicit reference to the "fundamental laws" of England is made for the first time (Stourzh, 2007: 93). In Denmark-Norway the first "fundamental law" ("Grunnloven" ou "Grundlov") was the *Lex regia* of 1665 (Holmoyvic, 2015: 49). In Spain, the first fundamental law was likely the "Nuevo Reglamento sobre la Sucesión de la Monarquía Española" of May 10th, 1713 (Coronas, 2011: 14). Still, there were other european variants, *v. g.*, the "Reichs-und Landesgrundgesetze" in Germany, the "Fundamental lag" or "Grundlagar" in Sweden, the "fundamentele Wetten" or "Grondwet" in the Netherlands and the "Grundsatzungen" in Switzerland. This phenomenon would extend to the European colonies in the Americas[13].

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12 The supremacy and rigidity of certain laws is part of the British political thought in the middle ages: *v. g.*, Henry Bracton e John Fortescue; in Portugal on the second half of the 15th century "the people successively demanded that the monarch didn't alter the law, unless with collaboration of parliament, *v. g.*, in the Santarém *Cortes* of 1451, the Lisbon *Cortes* of 1455, the Guarda *Cortes* of 1465, the Évora *Cortes* of 1475 and the Évora *Cortes* of 1481/82" (Domingues, 2016: 26).

13 *V. g.*, "The Charter or Fundamental Laws of New Jersey", of March 3rd of 1676, which in its article 39 makes an explicit mention to the "fundamental laws of the nation of England".

The existence of unwritten fundamental laws of a constitutional nature gave rise repeatedly to serious difficulties regarding their exact determination. In this regard, Thomas Hobbes (1651) —seconded by Ulrik Huber (1672, 1686 and 1698)— stated: "but I could never see in any author what a fundamental law signifieth […]. For a fundamental law in every Commonwealth is that which, being taken away, the Commonwealth faileth and is utterly dissolved, as a building whose foundation is destroyed […]. Not fundamental is that, the abrogating whereof draweth not with it the dissolution of the Commonwealth; such as are the laws concerning controversies between subject and subject" (Tomás y Valiente, 1995: 19; Mohnhaupt, 2014: 156; 2016a: 3). In any case, for the European common doctrine "fundamental laws are laws of a special kind (in fact not laws at all and only called laws by way of analogy), which bind the ruler (who is otherwise not bound to the laws, *legibus solutus*), their binding force being based on the contract of pact between the ruler and the ruled. They bind because natural law teaches that *pacta sunt servanda*" (Nifterik, 2016: 18).

Despite this indeterminacy of the notion, authors have since the beginning shown a constant concern in outlining an identity core, as well as in pinpointing those written laws that should be qualified as fundamental. For the 16th century French author Innocent Gentillet, fundamental laws constituted the basis or foundation without which the State wouldn't either be able to last or subsist. Therefore, in France the king could not abolish "la loi salique, ni les trois états, ni la loi de non aliéner les pays e provinces unies à la couronne, car le royaume et la royauté sont fondez sur ces trois points, qui sont comme les trois colonnes qui soutiennent le royaume et le roi. Ne peut aussi le prince enfreindre ni abolir la loi naturelle approuvé par le sens commun de tous les hommes" (Gentillet, 1576: 47-48).

In the following century, Ulrik Huber added the guarantee of the right to life and the right to property as a fundamental principle: "another tacit fundamental law was the general rule that nobody may be deprived of life and private property without a legal procedure; the stronger right over our persons and goods that the state (ruler) acquires may only be used by form of law. […] About a century later the ideas would make a reappearance as fundamental rights" (Nifterik, 2016: 18)[14]. Needless to underscore this point, as it expressly includes in the scope of fundamental laws the respect for the rights of subjects

[14] It's quite remarkable the analogy with the thesis of John Locke, who supported that man should conserve in the "societal state" the fundamental rights that he had in the previous "natural state".

by their sovereign, something which would later become one of the pillars of modern constitutionalism.

In 1765, British lawyer William Blackstone identified as written fundamental laws three written legal instruments —the *Magna Carta* of 1215, the *Bill of Rights* of 1689 and lastly the *Act of Settlement* of 1701 (Holmoyvic, 2015: 44)— which are still today part of Britain's constitutional acquis. In France, according to the *Journal encyclopédique ou Universel*, in the year 1780 "the fundamental laws, or written laws, or laws certified by a continuous tradition, have as their object the succession to the throne, the king's rights, the state's constitution, the fundamental of the judiciary, the form of legislation, the liberty, safety and happiness of the people" (Michalsen, 2015: 64). It should be noted that in this text, which is dated after the first American constitutions, the notion of "State Constitution" is employed in the sense of organization of political power along with the description of "fundamental laws" already encompassing the two main dimensions of the modern concept of constitution —that is, the organization of public powers and the people's rights— using terminology which unmistakably evokes the 1776 United States' declaration of independence ("freedom, security and happiness").

In Portugal the first reference to the fundamental laws of the kingdom appears in the work of Luís Marinho de Azevedo, *Exclamaciones Políticas, Jurídicas e Morales*, published in 1645 (Xavier, 1998: 165; Homem, 2006: 138), being that in 1647 the expression was already well rooted in the political context of the kingdom (Cardim, 1998: 117). The first legal text which expressly defined itself as a "fundamental law" was the law on the regency and tutorship during infancy or inability of the king, which dates November 23rd, 1674 (Silva, 1856: 377-379). This specific qualification of fundamental law would occur two more times in the 17th century: the law of December 11th, 1679, repealing a chapter of provisions approved in the 1143 Lamego *Cortes* prohibiting crown heiresses from marrying outside the kingdom (Silva, 1857: 68-72); and the law of April 12th, 1698, which declared it necessary to repeal a provision from the Lamego Cortes on royal succession by exempting sons and heirs of the king who had legitimately succeeded a brother without any direct descendants, from the necessary approval or consent by the three estates of the kingdom (Silva, 1859: 407-408).

These two latter laws enshrined within the select core of written fundamental laws the provisions of the arguably mythical 1147 Lamego *Cortes*, which hitherto were considered the *lex fundamentalis* (singular), that is, were understood as the original foundational pact between the king and kingdom (Collaço, 1915: 23-24). In the language of the 18th century this instrument established "*the outline of succession and government of the kingdom by a State law or a fundamental law*, as it was in France the Salic law, in Germany the

Golden Bull, in England the Magna Carta, in Poland the Pacta Convencta, in Courland the Pacta Subjectionis, in Denmark the Royal Law and in the Netherlands the Union of Utrecht" (Silva, 1767: 411) [italics by the authors].

Although reduced to only four in the absolutist period, encompassing the themes of royal succession and regency, the "fundamental laws" of the kingdom of Portugal erased the scope and importance of the medieval (unwritten) "constitution", diminishing its normative scope and repealing the role of the *Cortes*, and would end up being instrumentalized by absolutist political literature of the 18th century, which transformed them into legitimization mechanisms for the absolute power of the king, as well as justifying the idea of "pure monarchy" or "full monarchy" as a form of Government (Homem, 2006: 135). As an example of this, Pascoal José de Melo Freire stated in his project for the *New Code of Public Law* (*Novo Código de Direito Público*) that "in Portugal, underneath the names of laws we understand to be first of all the fundamental laws of State —the most sacred among all— that regulate the *succession of the kingdom and confirm our absolute and independent power*" (Reis, 1844: 3) [italics by the authors][15].

The issue around the content of fundamental laws fed a controversy between Melo Freire and António Ribeiro dos Santos, which came about regarding the draft of the mentioned *New Code of Public Law* (*Novo Código de Direito Público*). This doctrinal squabble from 1789 is still one of the best contributions for understanding the theory and scope of the content of Portuguese fundamental laws at the doorstep of modern constitutionalism.

Ribeiro dos Santos adopted a concept which was much more inclusive and with a wider scope, encompassing written and non-written or traditional laws. In his learned understanding, it should be taken into account "primitive or primordial fundamental laws that were expressly established at the onset of the monarchy or that were supposed as such in its institution and development, having transmitted to it the same nature and onus that these had before in the gothic constitution and in the kingdoms of León and Asturias, from where our empire was cast off"; to these laws others should be added, namely "subsequent fundamental laws that *by mutual consent of our kings and peoples were established in Cortes or outside those on the essential things of government*" (Santos, 1844: 8-9) [italics by the authors].

Melo Freire opposes such proposals advanced by his critic and, given his own position as an absolutist, adopts a rather restrictive concept of fundamental laws of the kingdom, mentioning that "the only ones deserving of this

[15] This was the thesis present in Hobbes: fundamental laws were the basis and not the limits to the sovereign's powers (Tomás y Valiente, 1995: 20).

name *are the ones that regard the succession of the kingdom and the power and authority of the king in his government*" (Santos, 1844: 66-68) [italics by the authors]. In his *Institutiones Iuris* (1789) this author did consider that: *i)* the first and main fundamental laws of the kingdom are contained in the very Lamego *Cortes*; *ii)* the laws of those *Cortes* regarding judgements, nobility and sanctions should not be considered as fundamental, rather only those that concern the succession of the kingdom; *iii)* by fundamental laws it should be understood the laws of the Lisbon *Cortes* of 1674 as well as the laws of 1697 from those same *Cortes* (Freire, 1967 [1789]: 95-96). By being reduced, under absolutism, to the laws of succession to the throne, "fundamental laws" ended up fulfilling solely the function of legitimization of the absolute power of the monarch, otherwise not bound by any other laws.

III. THE "CIVIL CONSTITUTION" OF THE PORTUGUESE MONARCHY

Mostly forgotten by current legal-political literature in Portugal, the concept of "Civil Constitution of the Portuguese Monarchy"[16] came up shortly before the appearance of the concept of modern constitution in the US. The notion of Civil Constitution was introduced by the Statutes of the University of Coimbra in a decree from the Marquis of Pombal —the all-powerful prime-minister of King D. José—, in 1772.

From this date, the notions of "fundamental laws" and "civil constitution" came to coexist in the Portuguese legal-political order as different constitutional realities. As such, Pascoal de Melo Freire, regarding the inviolability of municipal rights, which he understood to "always having been taken in high consideration and not susceptible of limitation or abrogation, safe for a major public concern", asserted that "these and other similar privileges, however ancient, as they depart only from the will of the king, are to be distinguished entirely from the Fundamental Laws, which are to be authored by the people and the king, as well as from *the laws part of the Constitution of the Kingdom*" (Freire, 1967 [1789]: 34) [italics by the authors], although the former had been subsumed by and would become part of the latter.

[16] It should be noted that the "civil" adjective emerges in opposition to "ecclesiastic" and not in opposition to "political", and as such it cannot be interpreted as an etymological form of differentiation between "Civil Constitution" and its successor "Political Constitution". With the intention of opposing the civil state to the ecclesiastic state, the French Constituent Assembly would afterwards approve the "Civil Constitution of the Clergy" of July 12th, 1790.

It is possible that these paragraphs in the Pombaline Statutes of the University of Coimbra received some influence from neighbouring Spain, given that "the notion of constitution entered into de Spanish political vocabulary around 1750 by the action of legal professionals and historians influenced by the recent works of Montesquieu. And shortly afterwards the notion of political constitution would appear in the official legislation, usually with the meaning of set of historical or active principles and fundamental rules of the domestic legal order" (Coronas, 2011: 16-17).

It seems certain that in Portugal the notion of "constitution of the kingdom" or "civil constitution" emerged as a demand imposed on academic education. Under the Pombaline Statutes of the University, the professor in charge of *National Domestic Public Law* (*Direito Pátrio Público Interno*) would be required to teach in his lessons to his listeners, the "students", the "Civil Constitution of the Portuguese Monarchy". This topic would address —as explicitly provided for by the Statutes— "the form of domestic public government of the State"; therefore, the "civil constitution" to be taught in Portuguese academia would be a sort of "government constitution", that is to say the analysis of the institutions of public power.

Therefore, we are dealing with a *descriptive concept of constitution* that is applicable to the organization and functioning of any form of government (in the broad sense of the word), being much broader than the prescriptive notion of fundamental laws. In the Portuguese case, this was a "full monarchy" or absolute monarchy with direct references to the "obligations" and "services of vassals towards the sovereign" (*Estatutos*, 1772: 301, 303), disregarding completely individual rights and freedoms. The "Civil Constitution" of absolutism had nothing to do with citizens, but with subjects.

To understand how, departing from a strict normative concept of "fundamental laws", we got to this broad descriptive concept of "government constitution" is a hard task and somewhat open to speculation. The same doesn't hold true for how the notion of "government constitution" evolved into "constitution" by means of antonomasia. In the case of the latter, the term "government" fell when, with the passage of time and the repeated use of the expression, everyone was aware that "constitution" implied "government" (Stourzh, 2007: 91). We will try to understand how the former constitutional metamorphosis did occur, namely the transition from fundamental laws to the notion of "government constitution".

In the aftermath of the Glorious Revolution in England, a resolution of the British Parliament of 1668 connected "fundamental laws" to the term "constitution" by referring to the abdication of James II: "that King James the second, having endeavoured *to subvert the constitution of the Kingdom, by*

breaking the original contract between king and people; […] having *violated fundamental laws*; and having withdrawn himself out of the Kingdom; has abdicated the Government; and that the Throne is thereby vacant" (Holmoyvic, 2015: 45; Michalsen, 2015: 63-64). Still present in this text are the traditional notions of constitution (as a foundational pact between king and people) and of fundamental laws (as provisions limiting the sovereign's power). About four decades later, in the year of 1727, Roger Acherley published in London his work, which pointed towards the change to "governmental constitution" as present in its extensive title: *The Britannic constitution: or, the fundamental form of government in Britain. Demonstrating, the original contract entered into by King and people, according to the Primary Institutions thereof, in this nation: Wherein is proved, that the placing on the throne King William III was the natural fruit and effect of the original constitution* (Dippel, 2010: 32).

Besides the fundamental laws, the constitution would encompass all of the State's political organization, as found in the definition made by Henry Bolingbroke in his *Dissertation upon Parties* (1734): "By constitution we mean, whenever we speak with propriety and exactness, that *assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that composed the general system, according to which the community hath agreed to be governed*" (Dippel, 2010: 30; Holmoyvic, 2015: 45). The *incipit* of this definition —"that assemblage of laws, institutions and customs"— coincides with the definition adopted by reverend Inglis in 1776, but with the substantial difference that Bolingbroke willingly had not yet included in his definition the "idea of Constitution as an instrument to protect the liberties of individuals" (Dippel, 2010: 30).

For a better understanding of this synthesis and the evolution from "fundamental laws" to "governmental constitution" it becomes necessary to have a look at the constitutional documents written in the British north-American colonies before the Glorious Revolution (Grau, 2009). Some of these written relics come up self-identified as *Fundamental Orders* (Connecticut, 1639), *Fundamental Articles* (New Haven, 1639), *Fundamental Laws* (West New Jersey, 1676), *Fundamental Agreements* (West Jersey, 1681), and even *Fundamental Constitutions* (Carolina, 1669; East New Jersey, 1683)[17]. For the fundamental laws of the province of Pennsylvania, the designation of *The frame of the government of the province of Pennsylvania* of 1682 was adopted. Notwithstanding that designation, these were authentic "government

[17] This would mean that, by influence of the European metropolis, the North-American colonies started to produce their own legal-political acts of a higher hierarchy than ordinary laws and named as "fundamental".

constitutions" that determined the form of organization and the exercise of political power. In the West New Jersey *Fundamental Laws* of 1676 (chapter 14) a curious reference was made to the fundamental laws of "*Constitution of the government of this Province*"[18] (Grau, 2009: 242).

Given the close proximity to modern constitutions, some might consider the *Fundamental Orders of Connecticut* of 1639 as the first written constitution of North America, overshadowing the state constitutions adopted after independence (1776) and the federal constitution of 1787 (Reiplinger, 2008: 1-22). Despite the arguments put forward, we can't but challenge this opinion, given the fact that Connecticut was not already an autonomous political state, but a colony under British monarchy, implying that the *Fundamental Orders* had to be confirmed by Britain in 1662 (Reiplinger, 2008: 4). This would assume that the sole constitution in effect —which occupied the constitutional debate in North America in between the decades of 1760 and 1770 (Dippel, 2010: 36-38)— was the British constitution. Interestingly, chapter 39 of the fundamental laws of West New Jersey (1676) imposed a *prima facie* obligation, by which legislative acts —"laws, acts and constitutions as shall be necessary for the well government of the said Province"— had to comply with "the primitive, ancient and fundamental laws of the nation of England" (Grau, 2009: 256).

Europe also saw the emergence of some "government constitutions", a few of them with such a degree of "democratic" basis that they tend to be considered as modern written constitutions, *v. g.*, the *Agreement of the Free People of England* of 1649, the Swedish *Regeringsform* of 1720 and Corsica's "Constitution" of 1755[19].

Going back to the Portuguese "Civil Constitution", the analogy with Bolingbroke's definition is remarkable. Based on the University of Coimbra Statutes of 1772, the Portuguese concept *sub judice* can be found: *i)* in the subjects that would be part of such "Civil Constitution", that is: "the form of hereditary succession contained in it; the supreme and independent power as well as the temporal authority of the king; the character of ancient or modern legislation as well as the administration of justice and public estate; the nature

[18] Besides the express reference to the government constitution of the province, this passage connects fundamental laws to the constitution, around twelve years before the Glorious Revolution (1688).

[19] The "constitution" of Corsica (1755-1769) is likely the text closer to modern constitutionalism, as inaugurated shortly afterwards on the other side of the Atlantic, specifically when it comes to the consent of the political community, the political representation without estate distinction and the separation of powers (legislative, executive and judicial).

of the *Cortes* and the decisions taken in them by the kings, previous to the existence of courts of law and sitting magistrates; the different courts of law commissioned for public, civil and economic governance; the different jurisdictions committed to those courts of law; the nature of tributes and public impositions; how to establish those (tributes and impositions); the supreme jurisdiction to establish sanctions, create and promote offices. as well as direct the studies of vassals; and every other article part of inspection by the same National Domestic Public Law"; *ii)* by the object determined for academic study: "the complex of every one of those notions constituting an essential part and the most important of national jurisprudence, as it includes the doctrine of nexus, of the bond and the everlasting relationship between obligations and the services of vassals towards the sovereign: it would not be fair nor convenient that jurists could leave the University without first having been licenced and having rehearsed in schools for the faithful fulfilment of all said obligations and office, this with the necessary and mandatory instruction of all indispensable notions" (*Estatutos*, 1772: 302-303).

As we have said, this is a rather extensive way to interpret the "civil constitution", which reveals a meaningful analogy with the Aristotelian notion of "politeia" and which in modern times, and certainly not by chance, may be translated into "constitution". This new concept of constitution would be introduced in Europe by Montesquieu's hand and his work *L'Esprit des Lois* (1748). As a matter of fact, "Montesquieu contribu à rendre courante la traduction de la politeia par le mot de constitution. Assimilée à la politeia d'Aristote ou de Polybe, celle-ci acquiert un sens politique: elle désigne le mode d'agencement ou d'organisation des pouvoirs à l'intérieur de l'Etat" (Beaud, 2009: 13). We should point out however, that when referring to the British constitution Montesquieu didn't refer solely to fundamental laws, but also to the political and social organization of British government and its guiding principles (Holmoyvic, 2015: 45-46).

It would have been Bolingbroke's (1734) and Montesquieu's (1748) concept to which the Portuguese Civil Constitution of late 1700's did converge; although this was never formalized through an official written procedure, it did reach a considerable amount of fulfilment and densification in compendiums or in later university handbooks, in accordance with the Statutes of 1772.

In his *Preleções de Direito Pátrio Público e Particular [Lectures on national public and private law]*, Francisco Coelho de Sousa e Sampaio dedicates a section to the "form and constitution of the Portuguese empire", composed by the following chapters: *i)* on the "Fundamental Law of [the] Lamego [Cortes]", by defending its authenticity but considering solely as the State's

Fundamental Law the section on the succession of the crown and the final fragment which prevented the king from turning the kingdom feudatory to León and from participating in the Cortes of León; the laws of nobility and justice would be mere private ["*particular*"] laws established in the Cortes; *ii)* on the political regime, which would be a "full monarchy" and not a mixed or monarchic-democratic one, as he believed the Cortes to fulfil a merely advisory role; *iii)* on hereditary monarchy, by imposing a legitimate hereditary succession of the crown; *iv)* on the regency and tutorship of the kings of Portugal, established by the law of November 23rd, 1674 promulgated in the Lisbon Cortes; *v)* on the independence of Portugal (Sampaio, 1793: 25-70).

Ricardo Raimundo Nogueira, teaching National Law (*Direito Pátrio*) at the University of Coimbra during the school year 1795-1796, prepared that year for his students some *Lectures on Domestic Public Law of Portugal* (*Preleções de Direito Público Interno de Portugal*) (Freitas, 2005: 145-179). In the printed version, this work was divided in two parts. The first part dealt with the "form and Constitution of the Portuguese empire" and the second part with the "system of political and economic government of the kingdom". In the introduction, the author left a brief notion of "State Constitution", which would include "the form of the empire, the order of succession, the judiciary system, the distribution of taxes, the administration of public income, and in general everything relating to its particular nature encompassing the special offices between subjects and the emperor, as well as between subjects amongst themselves" (Nogueira, 1858: 235).

Ricardo Raimundo Nogueira develops his idea of Constitution in two parts. The first part is dedicated to the "Constitution of the Portuguese empire", including the following topics: *i)* the form of government, Portugal being a pure and independent monarchy, since all rights of sovereignty belonged to the king[20] from the moment (1096) when it was transmitted by D. Afonso VI of León and Castile to his daughter D. Teresa alongside Count D. Henrique (Nogueira, 1858: 248-250; 256-260; 277-279 e 295-298); *ii)* the fundamental laws of the Portuguese monarchy, which are "pacts and conditions forming the new empire and through which the vassals shall be subject to the supreme emperor who shall govern them" and address the succession of the crown established by the Fundamental Law of Lamego[21]

[20] This author refuses the thesis of the divine nature of the power of kings and states that the people does not transfer, fully and irrevocably, the power of sovereignty to the monarch

[21] In this work, there is a very well-founded defence of the authenticity of the Lamego Cortes, supposedly convened in the time of the first king, D. Afonso Henriques.

—considering that only the part regarding succession was Fundamental Law, belonging the other two parts to civil legislation— and the amendment made by the Fundamental Law of April 12, 1698 (Nogueira, 1859: 37-39 and 75-78); *iii)* the tutorship of kings and state regency in case of infancy or inability of the legitimate heir, from the beginning of the monarchy until the Fundamental Law of November 23rd, 1674 (*ibid*.: 88-90); *iv)* the "interregnum" or vacancy of the throne, during which there was no legitimate sovereign and the empire would become vacant and the established form of State would be dissolved; in this case the imperial power would be passed on to the Cortes —which represented the whole Nation— until the appointment of a new sovereign (*ibid*.: 90-91).

The second part of Nogueira's approach to the Constitution dealt with the "kingdom's system of political and economic governance", including the following topics: *i)* the Cortes, with regards to their origin, form and authority, considering they had only an advisory role and denying them any deciding authority —"given that, if the representatives of the people had the right to establish laws or impose taxes, it would be a form of mixed government and would partake in democracy, which is false"— (Nogueira, 1859: 99-102 and 114-116); *ii)* Portugal's civil Law (*ibid*.: 122-126); *iii)* the current judiciary system (*ibid*.: 136-138; 151-154; 157-160 and 172-176); *iv)* the crown's estate, highlighting tax distribution and the administration of public revenues (*ibid*.: 184-186 and 194-197).

In the beginning of the following century, whilst defending the "excellencies of the Portuguese constitution" against the pretensions of the French invaders (1807-1810), José António de Sá highlighted the connection and affinity between the Portuguese Civil Constitution and the Aristotelian forms of government —which he assiduously quotes— and Polybius, *v. g.*, when he states that the "abuses from the ones who govern may end up in degenerating the constitutions and converting aristocracy into oligarchy, democracy into ochlocracy and monarchy into tyranny" (Sá, 1816: 170). For this author, monarchy was the preferable form of government, although "the essence of the monarchic Constitution consists in non-arbitrary governance, but according to established laws" (*ibid*.: 179). That is, in an attempt to challenge the existing absolutist theses, José António de Sá started clamouring for the Rule of Law. Among other Portuguese mechanisms subordinating political power to the Law he brought to the fray —a century before Magalhães Collaço (the first law professor to study constitutional review in Portugal)— a "control of constitutionality", which was exercised by the kingdom's chancellor: "it is therefore, this magistrate a high supervisor who prevents the insertion of things going against the orders and privileges of the sovereign and

people, to established laws, the public security and peace, as well as the ancient mores of the kingdom" (*ibid*.: 182 and 184-185).

Despite its recognized political-constitutional nature, being a much broader concept than that of fundamental laws of the kingdom and given the recognized influence that the modern constitutions in America and in Europe may have had in Portugal, the Civil Constitution (1772-1820) is still a historical constitution reminiscent of old Portuguese constitutionalism with a connection to ancient Greco-Roman constitutionalism, and differing substantially from their modern Portuguese successors under the constitutional monarchy: the Political Constitution of 1822, the Constitutional Charter of 1826 and the Political Constitution of 1838. In short, the Portuguese Civil Constitution was a merely descriptive constitution of the form of government actually in force during a specific national historical period. The modern concept of constitution would acquire different legal-political contours giving way to the development of an absolutely new concept in the universe of law and politics. From the American Revolution of 1776 "constitution was no longer a description of the actual organization of the state and its institutions, but rather its very constitutive and normative foundation" (Holmoyvic, 2015: 47).

This vertiginous rotation regarding the concept of constitution towards a normative sense has been attributed to Emmerich Vattel when he stated in 1758 that "le règlement fondamental qui détermine la manière dont l'autorité publique doit être exercée, est ce qui forme la constitution de l'État. En elle se voit la forme sous laquelle la nation agit en qualité de corps politique, comment et par qui le peuple doit être gouverné, quels sont les droits et les devoirs de ceux qui gouvernent" (Tomás y Valiente, 1995: 35; Stourzh, 2007: 80). In the understanding of Holmoyvic, "At the core of this definition was the idea that the constitution was the normative foundations and not the result of a state's political organization […]. In other words, the constitution was to be an act of the people as a whole establishing the government […]. The second notion inherent in Vattel's definition was that the constitution was a legal norm superior to the government and its laws, resolutions, and acts […]. Thus, the function of a constitution was to define the public powers in the society and, importantly, their competences and limits" (2015: 46).

In fact, the modern constitution seeks not only to legally recreate the political community, thus expressing its power of self-constitution of the political body, but also to define the organization of political power as "constituted power", as Sieyès would teach. This was the reiterated meaning in 1792 by Thomas Paine, during enforcement of the American constitutions: "a constitution is not the act of a Government, but of a people constituting a

Government; and Government without a Constitution is power without a right" (Mohnhaupt, 2014: 161).

In comparison with modern constitutional texts, the Portuguese Civil Constitution lacked essential fetures, such as: *i)* formalization in a single public written document (constitutional code); *ii)* representative or constitutional system, since while the Cortes could be convened, they could no fulfil any functions of sovereignty, something which was an attribute exclusive to the king, instead being a mere advisory body to monarchic power; *iii)* principle of separation of powers: in a "pure monarchy" the powers of sovereignty were all concentrated in the crown; *iv)* principle of legality, according to which the government could only act while respecting the law: in the Ancient Regime the king was only subordinated to fundamental laws and the ideological principle was one in which "the prince's will is law", typical of an Absolute State (*legibus absolutus*), which literally meant independence before the law; *v)* the nation's sovereignty: the principle was of the divine power of the king (*jusdivinism*), *i. e.*, the power of the king derived directly from God and not the nation, and even those who admitted the sovereignty of the nation (Ricardo Raimundo Nogueira) conceded to pure monarchy as the sole form of government; *vi)* fundamental rights: complete absence of a written catalogue of individual rights and freedoms.

Pascoal de Melo Freire, although still in a very incipient way, reserves part of his lectures on National Public Law (*Direito Pátrio Público*), Book II, for "individual rights", by understanding that "individual rights or rights of men […] specially consist of liberty, citizenship and family" (Freire, 1967 [1789]: 10). In his project for the New Code, he introduced the guarantee of access for public offices (tit. 45, §6), the guarantee of the rights to property and freedom as its most sacred (tit. 45, §8) the owner being able to freely use his assets and rights, "the public laws of the State being always ensured" (tit. 45, §9); on title 46 the author defines the rules for granting citizenship, considering that a citizen was someone born in the kingdom of Portugal and her dominions (Reis, 1844). It should be mentioned that, a century earlier, Ulrik Huber had already defended something similar; "note, however, that Huber only thought of fundamental laws protecting freedom(s), not of fundamental (individual) rights" (Nifterik, 2016: 11).

In short, it would have been the North-American interpretation of the British Constitution —which was strongly based upon the guarantee of English freedoms, since the *Magna Carta* (1215) up until the *Bill of Rigths* (1689)—, in the revolutionary context of the 70s in the 18th century, which determined that the constitution should be the protection instrument of individual rights and freedoms (Dippel, 2010). This ideal of a list of individual rights as part of a fundamental law of the State was materialized with the

Virginia Declaration of Rights of June 12th, 1776, and would become an essential part of the concept of constitution later enshrined in Europe by the French Declaration of the Rights of Man and Citizen of 1789 (article 16).

Lastly it becomes important to highlight the fact that the movement towards constitution-codification was a way to give effectiveness to the principle of the Rule of Law: "the codification of constitutions led to the era of constitutionalism, *in which the powers became subject to the rule of law*" (Mohnhaupt, 2014: 164) [italics by the authors]. Therefore it is appropriate to bring into the fray the pertinent critique by Almeida Garrett of the ancient Portuguese constitution, which although grounded on solid and natural principles, "was formally wrong: as it scattered in various written laws the traditional mores and usages, it lacked regularity, coherence and harmony; as it was deprived of guarantees and legitimate remedies for the case of infringement of positive law or aberration of its spirit, it would forcibly run the risk of being poorly known and forgotten by the nation, despised and therefore infringed by the government" (Garrett, 1830: 297).

IV. THE MODERN NOTION OF CONSTITUTION

Although innovative, the modern meaning of constitution also results from the junction of the various concepts mentioned up until this point. From the "constitution" as the sovereign's legislative act, the modern constitution inherits the sense of positive legal provision as created by a sovereign power; from the medieval concept of constitution as founding pact of sovereignty between king and people, the modern constitution inherits its origin from the constituent power of the people; from the notion of fundamental laws, the modern constitution gathers the sense of legal provisions binding and limiting political power; from the concept of "government constitution" ("civil constitution"), the modern constitution receives its broad normative scope with regards to the organization and exercise of political power.

An analysis of the origin and developmental process of the first Portuguese constitution (1822) illustrates these various tributaries of modern constitutionalism.

a) The Constitution as a positive written provision;
b) The Constitution as a constituent pact by the nation or the people;
c) The Constitution as a fundamental law of the country, binding political power;
d) The Constitution as a "government constitution" or "political constitution".

Nevertheless, arising out of the liberal revolution against the "Ancien Régime" and the absolute State, modern constitutionalism assumes its radical discontinuity with "historical constitutionalism" and "fundamental laws" as an original and unconditioned expression of the "constituent power of the nation" (Sieyès). Having Rousseau's teachings on "social contract" (1762) as a basis, the sovereign people became able to freely adopt, maintain, amend, repeal or recreate its own fundamental laws up until the point, if they so wished, of self-harm (Tomás y Valiente, 1995: 36). These are the roots for the construction of the modern theory of constituent power, as an original and unlimited power.

In Portugal, the debate in the constituent Cortes of 1821-22 on the relevance of the old "constitution" and the old "Fundamental Law of the Kingdom" also illustrates the radical conceptual change brought about by the modern notion of constitution.

In the preamble of the first written Portuguese constitution (1822) there is still an explicit reference which hyperbolizes the "fundamental laws of the monarchy" by considering that all the ills of the Portuguese nation were derived from its forgetfulness and that only its reestablishment would allow reaching prosperity and avoid falling again into the abyss (*Constituição*, 1822: 1). Despite this "retroactive constitutionalisation" and the apparent reverence of the ancient regime's fundamental laws —although with a clear reference to the role of the old Cortes, which absolutism abolished—, the 1820 Portuguese constituents, under influence of the famous Cádiz Constitution of 1812, did not hesitate to adopt the modern concept of constitution which had, as we have said before, been inaugurated by the American Revolution of 1776 and the French Revolution of 1789.

An analysis of the debate in the midst of the Constituent Cortes, in the session of July 13 of 1821, clearly demonstrates the change in constitutional paradigm that occurred in Portugal, given that the "fundamental laws" were in practice reduced to the laws of the Lamego Cortes and the limited authority —advisory or deliberative?— that had been exercised by the historical Cortes, convened in between the 13th and 17th centuries. In the constituent assembly of 1821-22, there were still several voices in favour of invoking the pre-existing fundamental laws, but the end result was devastating, because they were limited to a mere honourable mention in the preamble of the Constitution and to two sparse references in articles 27 and 29, where they appear as synonymous with the modern sense of constitution.

Rising up against the reestablishment of Portuguese fundamental laws, Francisco António de Almeida Pessanha, representing the province of Trás-os-Montes, started by posing (without being aware of it) Hobbes and Huber's

magna quaestio to the constituent Cortes: "but what on earth are these fundamental laws? and how were they defined? […] If we put to the side the Lamego [Cortes] laws, which as it was said only regulate one constitutional article, which well-defined laws did we have that could be named as constitutional?". One of the main arguments used was that ancient fundamental laws did not guarantee separation of powers, one of the pillars of the modern constitution. In his words, "the king, besides being the chief of the executive power, as in good reason, was also the chief of the legislative power, that is, the true legislator, since the three estates of the kingdom only appeared before him to be consulted upon; I see that he was likewise the chief of the judicial power, or the first judge in the nation […]. Can you say that there is a true Constitution when the monarch gathers to himself such powers? I think not. With this concentration any government could degenerate into tyranny" (*Diario*, 1821: 1528). This member didn't leave unmentioned one of the capital principles of a representative system in ancient fundamental laws —*no taxation without representation*—, stating that the "the sole well defined prerogative of our ancient Cortes was to grant subsidies to the crown"[22]. However, because the Cortes had not been convened for more than a century, that right had been lost, further demonstrating the insufficiency and "imperfection of our ancient fundamental laws" (*Diario*, 1821: 1528).

Another resounding voice in the Great Congress (*Magno Congresso*) of 1821 against the reestablishment of the ancient fundamental laws belonged to Inácio da Costa Brandão. For this member of the assembly for the province of Alentejo, "the Constitution is the law which determines who and how should exercise the public power, which are the rights of the Nation and the obligation of those who govern" —therefore, a modern concept of constitution. From the old Constitution, only the Cortes had been recovered and even then, similarities were more nominal than real[23]. In his opinion, the ancient fundamental laws, notwithstanding the already-mentioned convening of the Cortes, were incapable of delivering the prosperity of the Nation. Therefore, it was a question of creating *a new Constitution*, which would bring back the natural dignity to the Portuguese nation. In this member's understanding,

[22] Which is considered a fundamental law in other European states: "the rule (as in England) that no taxes can be introduced and assessed on the people without the consent of parliament" (Nifterik, 2016: 12). This understanding was supported as early as 1610 by James Whitelocke (McIlwian, 1947: 14-15).

[23] Regarding the new paradigm of the Portuguese Cortes, convened in 1820, which implied a turnaround in the political representation of the nation, *cf.* Domingues and Moreira, 2018: 1-39.

the new constitution would have to be based upon constitutional principles such as sovereignty of the nation, liability of public office holders, equality before the law and the guarantee of fundamental rights —all fundamental aspects of the modern concept of constitution. In his words, "the new Constitution declares that sovereignty resides essentially in the nation, that the capacity of making her Constitution and her laws belongs to herself; that every public employee, no matter their hierarchy, receives from her the power that they exercise and that they are liable before her for abusing that power. The new Constitution ensures that every individual is equal before the law, individual property and civil liberty".

That very same member of the assembly concluded his participation in the following emphatic manner: "in what does the new Constitution seems similar with the ancient one? Why should we say that solely through our old Constitution shall we obtain prosperity and as such, let us re-establish that Constitution? Let us speak plainly and frankly, as it is proper of the representatives of a free nation that recognized their rights and swore to defend them: let us say that *we are going to make a new Constitution because our old Constitution, made at the time where the rights of man and nations were unknown and despised, is insufficient to provide to us the dignity and happiness to which we have a right*" (*Diário*, 1821: 1531-1532) [italics by the authors].

V. CONCLUSION

This is how Portugal, as it was in other countries, changed from a descriptive notion of constitution, as a set of different "fundamental laws", to a normative notion, as a set of legal provisions integrated in a single written constitutional charter. Granted, it was not a simple process, that of consolidating the content of all fundamental laws into a single constitution; as we have already explained, it was a process of evolution, in which the concept of constitution brought with it developments and innovations which were not part of the historical concept of constitution.

In present times, when we pronounce the word constitution, the first idea that comes to mind is of a single written document —a constitutional code— issued by a constituent power, establishing the organization of political power and the rights of citizens. We should bear in mind however, that this idea was the outcome of a long and complex process (16th-19th centuries) that transformed the multitextuality of fundamental laws in the monotextuality of the constitution. The high point of this constitutional metamorphosis started with the American (1776) and French (1789) Revolutions. These two fracturing

moments of constitutional history on both sides of the Atlantic imposed the articulation of the fundamental legality of the State through written legal provisions, as well as systematising those in a single document[24]. As such, this idea opposes documental dispersion and consuetudinary non-written conventions that are so characteristic of an historical constitution. This orderly collection of norms and principles with legal-constitutional dignity in a single legal text became characteristic of the liberal constitutionalist matrix.

The Portuguese liberal revolution which started in Porto on August 24th, 1820, determined an immediate convening of the Cortes —which had not met in 123 years— with constituent powers in order to approve the first Portuguese written constitution; this would be adopted on September 23rd, 1822, and sworn in by the king on October 1st and by the other authorities of the kingdom on November 3rd, that same year. It was about "rebuilding" Portugal in accordance with the sovereignty of the nation, representative government, rule of law and individual freedoms. However, Almeida Garrett convincedly stated that "*before the revolution of 1820, Portugal had effectively its constitution, nor is there a State which does not have one*" (1830: 296-298). As we've seen, the next of kin of the notion of constitution before 1820 were the "fundamental laws of the kingdom" and the monarchy's "civil constitution". The first notion came up in the context of the revolutionary movement to restore Portuguese independence from Castile, on December 1st, 1640, making the period up until 1820 a period of moderate absolutism in Portugal. The second notion was created in the context of the Pombaline reform of academic education, in the Statutes of the University of Coimbra of 1772.

According to the liberal-representative pattern, the constitution results from a unilateral manifestation of the nation's political will, based on the people's right of political self-determination, while fundamental laws supposed a foundational pact, a bilateral agreement between the will of the monarch and the will of the kingdom. Therefore, in terms of liberal constitutionalism the people became the sole holder of an unlimited constituent power, which allowed it to repeal or amend fundamental laws; even if it was understood that they should be maintained, their legitimacy would rest not on historical tradition (as Burke defended while opposing Paine), but because this was the will of the sovereign people.

Applying this same syllogism to the "Civil Constitution", the liberal constitution ceases to be merely descriptive of a prevailing political regime

[24] But not without any opposition or exception. It should be mentioned the case of the British Constitution which still maintains, up to this day, a strong connection to the historical concept.

that could have come from a distant past, but rather it is the result of a manifestation of constituent power by implying a construction or reconstruction of the State and the new legal-constitutional order. The Constitution ceases to be a precipitate of dispersed norms on the form of government to become the normative system by which it should abide.

Besides being a legitimising foundation of political power, the modern Constitution is also the instrument of its own limitation, be it through separation of powers, the subordination of the executive to the legislative power, as well as individual rights. In truth, the modern Constitution enshrines the rights of citizens against political power (*bill of rights*), that the latter has the obligation to respect (life, freedom, property, etc.) and to protect (right to security).

The best way to conclude this paper is to recall the thoughts of someone who, for many years, has been paying tribute to this theme:

> What distinguishes constitutions from the previous forms of submission of political power to law? Five elements have to be mentioned. 1) The modern constitution is neither an empirical description of a political entity nor a philosophical system, but a set of legal norms. 2) Their purpose is to regulate the establishment and exercise of political power. Different from the *leges fundamentales*, they constitute the right to rule instead of merely modifying it. 3) This regulation is comprehensive. It does not only regulate the exercise of political power in this or that aspect but in a systematic and coherent way. 4) Constitutional law can fulfil its function only if it enjoys primacy over all other law. The validity of government acts depends on their compatibility with the rules of the constitution. 5) As rule that establishes and regulates government, constitutional law cannot emanate from the government. It antedates government and has its source in the people. Every form of legitimation other than popular sovereignty would endanger the supremacy of the constitution. The constitution thus appears as a special and particularly ambitious form of legalization of political power (Grimm, 2018: 3).

BIBLIOGRAPHY

Beaud, O. (2009). L'histoire du concept de constitution en France: De la constitution politique à la constitution comme statut juridique de l'Etat. *Jus Politicum – Revue de Droit Politique*, 3, 1-29. Available at: https://bit.ly/3tFxR4f.

Blick, A. (2015). *Beyond Magna Carta: a Constitution for the United Kingdom*. Oxford: Bloomsbury Publishing.

Cardim, P. (1998). *Cortes e Cultura Política no Portugal do Antigo Regime*. Lisboa: Cosmos.

Collaço, J. M. T. M. (1915). *Ensaio Sobre a Insconstitucionalidade das Leis no Direito Português*. Coimbra: França e Arménio.

Constituição Politica da Monarchia Portugueza, decretada pelas Cortes Geraes Extraordinarias e Constituintes, reunidas em Lisboa no anno de 1821 (1822). Lisboa: Imprensa Nacional. Available at: http://purl.pt/6926.

Coronas, S. M. (2011). De las leyes fundamentales a la constitución de la monarquía española (1713-1812). *Anuario de Historia del derecho Español*, 81, 11-82.

Coronas González, S. M. (2011). Leyes fundamentales y constitución de la monarquía española de 1812. *Iura Vasconiae: Revista de Derecho Histórico y Autonómico de Vasconia*, 8, 41-62.

Diario das Cortes Geraes e Extraordinarias da Nação Portugueza (1821). Lisboa: Imprensa Nacional. Available at: https://bit.ly/2Oiqekc.

Dippel, H. (2010). El concepto de constitución en los orígenes del constitucionalismo norteamericano (1774-1776). *Fundamentos*, 6, 25-83. Available at: https://bit.ly/3tCH1i4.

Domingues, J. (2016). A Soberania num Manuscrito Português de 1837. *e-Legal History Review*, 22, 1-102. Available at: https://bit.ly/3aIfu6i.

—— (2017). Polimorfismo Constitucional do Direito de Resistência em Portugal. *Historia Constitucional*, 18, 195-221. Available at: https://doi.org/10.17811/hc.v0i18.476.

—— (2018). A União Dinástica com Castela e a Constituição Medieval Portuguesa. *e-Legal History Review*, 27, 1-17. Available at: https://bit.ly/3q0K3dM.

Domingues, J. and Moreira, V. (2018). Nas Origens do Constitucionalismo em Portugal: O Parecer de J. J. Ferreira Gordo sobre a Convocação das Cortes Constituintes em 1820. *e-Legal History Review*, 28, 1-39. Available at: https://bit.ly/3q0K3dM.

Estatutos da Universidade de Coimbra do Anno de MDCCLXXII: Livro II que contém os Cursos Juridicos das Faculdades de Canones e de Leis (1772). Lisboa: na Regia Officina Typographica.

Freire, P. J. M. (1967 [1789]). *Institutiones Iuris Civilis Lusitani cum Publici tum Privati*. Lisboa. *Instituições de Direito Civil Português, tanto Público como Particular*. Lisboa: Boletim do Ministério da Justiça.

Freitas, P. C. (2005). *Um Testemunho na Transição para o Século XIX: Ricardo Raimundo Nogueira (análise histórico-jurídica)*. Coimbra: Almedina.

Garrett, A. (1830). *Portugal na Balança da Europa: Do que tem sido e do que ora lhe convem ser na nova ordem de coisas do mundo civilizado*. Londres: S. W. Sustenance.

Gentillet, I. (1576). *Discours sur les Moyens de Bien Govverner et Maintenir en Bonne Paix un Royaume ou autre Principauté… Contre Nicolas Machiavel Florentin*. Available at: https://bit.ly/3q21dYm.

Grau, L. (2009) *Orígenes del constitucionalismo americano: Corpus Documental Bilingüe*. Universidad Carlos III de Madrid. Available at: http://hdl.handle.net/10016/5669.

Grimm, D. (2016). *Constitutionalism: Past, Present, and Future*. Oxford: Oxford University Press. Availablet at: https://doi.org/10.1093/acprof:oso/9780198766124.001.0001.

—— (2018). Constitutionalism: Past – Present – Future. *Nomos: La attualità nel diritto*, 2, 2-12. Available at: https://bit.ly/3ruPMsE.

Holmoyvic, E. (2015). The Changing Meaning of Constitution in Norwegian Constitutional History. In K. Gammelgaard and E. Holmoyvik (ed.). *Writing Democracy: The Norwegian Constitution 1814-2014* (pp. 43-59). New York; Oxford: Berghahn Books.

Homem, A. P. B. (2006). Lei Fundamental e Lei Constitucional: A Formação do Conceito de Constituição. Contributo para uma História do Direito Público. In J. Miranda (coord.). *Estudos em Honra de Ruy de Albuquerque* I (pp. 131-174). Coimbra: Coimbra Editora.

Inglis, C. (1776). *The Deceiver Unmasked; Or, Loyalty and Interest United; In Answer to a Pamphlet Entitled Common Sense, by a Loyal American*. New York: Samuel Loudon.

Lacchè, L. (2018). Crossing boundaries. Comparative constitutional history as a space of communication. *Glossae. European Journal of Legal History*, 15, 125-139. Available at: http://www.glossae.eu.

Langhans, P. A. (1957). Fundamentos Jurídicos da Monarquia Portuguesa. In *Estudos de Direito* (pp. 225-391). Coimbra: Universidade de Coimbra.

Lepetit, J.-P. (2013). La Constitution Suédoise de 1720: Première constitution écrite de la liberté en Europe continentale. *Jus Politicum: Revue de Droit Public*, 9, 1-161. Available at: https://bit.ly/3jutIvs.

McIlwian, C. H. (1947). *Constitutionalism: Ancient and Modern*. Cornell University Press. Available at: https://bit.ly/2YXggXC.

Michalsen, D. (2015). The Many Textual Identities of Constitutions. In K. Gammelgaard and E. Holmoyvik (ed.). *Writing Democracy: The Norwegian Constitution 1814-2014* (pp. 60-74). New York; Oxford: Berghahn Books.

Mohnhaupt, H. (2014). On the Development of the Term "Verfassung": from the Plurality of the Ancien Régime's "Leges Fundamentales". In J. O. Sunde (ed.). *Constitucionalism Before 1789: Constitutional arragements from the High middle Ages to the French Revolution* (147-164). Oslo: Pax Forlang.

Nifterik, G. (2016). Ulrik Huber on fundamental laws: a European perspective. *Comparative Legal History*, 4, 2-18. Available at: https://doi.org/10.1080/2049677X.2016.1176351.

Nogueira, R. R. (1858-1859). Prelecções de Direito Público Interno de Portugal (Anno Lectivo de 1795 a 1796). *O Instituto: Jornal Científico e Literário*, 6-7.

Otero, P. (2012). O significado constitucional das Cortes de Coimbra de 1385 e das Cortes de Torres Novas de 1438: a génese da primeira Constituição escrita portuguesa. In *Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, V – *História e Política: entre Memórias e Ideias* (pp. 231-244). Coimbra: Universidade de Coimbra.

Pinto, P. (2015). Minuta de Instruções Régias para uma Embaixada a Itália. *Fragmenta Historica*, 3, 99-114.

Reipplinger, C. (2008). Les Fundamental Orders du Connecticut, première constitution écrite effective en Amérique du Nord. *Jus Politicum: Revue de Droit Public*, 1, 1-22. Available at: https://bit.ly/39XMAj7.

Reis, P. J. M. F. (1844). *Novo Código do Direito Público de Portugal, com as Provas, Compilado pelo Desembargador Paschoal José de Mello Freire dos Reis (em que se contém a materia do livro II das actuaes Ordenações)*. Coimbra: Imprensa da Universidade. Available at: http://purl.pt/6429.

Sá, J. A. (1816). *Defeza dos Direitos Nacionaes e Reaes da Monarquia Portugueza*. Segunda edição corrigida e consideravelmente acrescentada. Lisboa: Impressão Régia.

Sampaio, F. C. de S. (1793). *Prelecções de Direito Patrio Publico e Particular, Offerecidas ao Serenissimo Senhor D. João Principe do Brasil*. Coimbra: Real Imprensa da Universidade.

Santos, A. R. (1844). *Notas ao Plano do Novo Código de Direito Público de Portugal do Dr. Pasqual José de Melo, feitas e apresentadas na Junta da Censura e Revisão pelo Dr. António Ribeiro em 1789*. Coimbra: Imprensa da Universidade.

Seelaender, A. L. C. L. (2006). Notas sobre a constituição do direito público na idade moderna: a doutrina das leis fundamenais. *Revista Seqüência*, 53, 197-232. Available at: https://bit.ly/3ju70U3.

Silva, J. J. A. (1854-1859). *Collecção Chronologica da Legislação Portugueza (1603-1700)*. Lisboa.

Silva, J. S. (1767). *Deducção Chronologica e Analytica* I. Lisboa: Oficina de Miguel Manescal da Costa.

Stourzh, G. (2007). Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century. In *From Vienna to Chicago and Back: Essays on Intellectual History and Political Thought in Europe and America* (pp. 80-89). Chicago: The University of Chicago Press.

Thompson, M. P. (1986). The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution. *American Historical Review*, 91, 1103-1128. Available at: https://doi.org/10.2307/1864378.

Tomás y Valiente, F. (1995). Génesis de la Constitución de 1812. I. De muchas leyes fundamentales a una sola constitución. *Anuario de Historia del Derecho Español*, 65, 13-126.

Xavier, Â. B. (1998). *El Rei aonde póde, & não aonde quér: Razões da Política no Portugal Seiscentista*. Lisboa: Edições Colibri.