CHAPTER THIRTY ONE

PORTUGAL AND SPAIN
UNDER THE NEWLY ESTABLISHED
LIBERAL REGIMES

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INTRODUCTION: SINGULARITIES OF IBERIAN CRISIS
AMONG THE ATLANTIC REVOLUTIONS

Recent historiography has persisted in its inclusion of the revolutions that took place in the Spanish Atlantic from 1810 to 1825 in the larger cycle of Atlantic revolutions initiated in 1776, in British North America (Rodríguez 1998). However, in the case of the Spanish monarchy it is virtually impossible to identify a revolutionary moment comparable to 14 July 1789 or to 4 July 1776 (Breña 2012). In 1837, when the nation’s representatives for the second time in 30 years set about drafting a national constitution—Spain was in many ways a very different country than it had been in 1807: its territory had been drastically reduced, and after two long periods of absolutist governments, liberals were about to definitively establish a constitutional government. Yet, no Spaniard in 1837 could point to a specific date or event if asked to identify the “Spanish revolution”.

To explain this non-revolutionary transformation, the peculiarities of the Spanish crisis must be considered, and set in a comparative context with the Atlantic crisis of the European monarchies. In the British Atlantic, the crisis originated in the overseas colonies, and did not affect the metropolis. It is true that in 1783 Britain lost a considerable part of its territory, but it is also true that the monarchy’s political constitution and form of government remained the same after the American Revolutionary War (Armitage 2012). The constitutional changes occurred in America, not in Europe. On the other hand, in the case of France the situation was exactly the reverse: the crisis originated in the metropolis and only later reached the colonies, above all with the outbreak of the Haitian Revolution. Unlike in the British case, the French Revolution began with the constitutional transformation of the monarchy and ended with the abolition of the monarchy itself. In this case, constitutional changes initiated in Europe were extended to Haiti as a consequence of the neo-colonial program of the Consulate (Fradera 2015).

The Atlantic crisis of the Iberian monarchies clearly differed from these two experiences. As we explain in this chapter, the Portuguese monarchy avoided
most of the consequences of the crisis by doing something unique in the history of empires: the royal court—and with it, in a sense, the metropolis—were transferred to the colonies, where the royal government was recreated in Rio de Janeiro. The Spanish royal family had contemplated something similar, planning to take refuge in Mexico after the French army entered Spain, but in the event they abdicated their dynastic rights in favour of Emperor Napoleon Bonaparte.

This pivotal event took place in May 1808, and was remarkable because it brought about confluence of an imperial and a dynastic crisis, something that never happened before in any of the Atlantic empires. Since the peace of Basel (1795) that put an end to the war between the Spanish monarchy and the French Republic, the Spanish empire had been in a downward spiral of decline. In Basel, Spain ceded to France the remainder of the island of Hispaniola (the western part of Saint-Domingue had been French since the Treaty of Ryswick in 1697), a territorial loss that was also symbolically important because Hispaniola had been the first Spanish colony in the New World. In the years that followed, Spain signed a series of treaties with France that allowed the latter to mobilise Spanish resources for its own imperial projects. With the signing the Treaty of San Ildefonso (1797) and the Subsidy Treaty (1803), Spain put its navy and its monetary resources, the two cornerstones of empire, at the disposal of the French.

The battle of Trafalgar (1805) finally set the seal on Spain’s imperial crisis. The British destroyed a significant part of the Spanish navy—along with the French—but above all Trafalgar made it clear that the Spanish monarchy was no longer able to protect its empire. The British invasions of Buenos Aires and Montevideo in 1806 and 1807, and the expedition commanded by Francisco Miranda to Venezuela in 1806 reflected the gravity of Spain’s imperial crisis.

In Portugal, the pre-revolutionary context was quite different, although also singular (Hespanha 2012). Since the final decades of the eighteenth century, liberal literature was secretly imported from France and England, mainly via secret societies like the Freemasons. Invaded by Napoleonic armies under the command of Junot in 1807, and thenceforth deprived of its Royal Court, which had relocated to Brazil, the kingdom was left open to plunder, but also to the influx of French revolutionary ideas. A meaningful part of the Portuguese intelligentsia—some of whom were already involved in Freemasonry—saw the arrival of the French as an opportunity to modernise the country, and install a constitutional regime undergirded by the Napoleonic Code civil des Français. The Code was even translated into Portuguese, while a Portuguese delegation made its way to France to ask the emperor to grant them a constitution, similar to that of the Duchy of Warsaw, yet adapted to the Portuguese ancient usages. The retreat of the French troops thwarted the initiative, which in any case would have introduced some constitutional innovations—like the separation of Church and State—that would likely have produced some dissension, and would not be adopted in Portugal until the end of the monarchy in 1910 (Hespanha 2004).

Furthermore, Portuguese civil society would have been deeply convulsed if the imposition of a constitution was supplemented by the Napoleonic Codes. Traditional social orders would have been suppressed and civil equality introduced. A representative system—albeit a Napoleonic one—would have replaced royal absolutism, with the introduction of two representative chambers, a Council of State, a Cour de
Cassation, and a responsible ministry. Seigniorial rights (direitos de foral, direitos banaís), entailed property (morgadíos) and grants of crown land (donatárias) or comendas of the military orders would have been abolished, freeing up land for the open market. Corporative organisation would have given way to industrial and commercial freedom. All this explains why the ruling class, once the French were gone, hastily abandoned the constitutional project. Nevertheless, in academic and intellectual circles, especially among jurists, a great deal of this ideological legacy survived, and formed the basis of future political agendas. Meanwhile, the country had to endure an ambiguous political situation, theoretically governed from the distant royal court in Rio de Janeiro, through an Anglo-Portuguese Junta de Governo, appointed by the absent king. But the government in Portugal was ideologically divided between two factions, the traditionalist and anti-revolutionary (anti-French), and Enlightened reformists and protoliberal Masons and afrancesados (pro-French liberals).

TOWARDS THE CORTES

In the spring of 1808, the Spanish imperial crisis entered a more complex phase affecting the monarchy itself (Portillo 2006). As Charles IV and his son Ferdinand VII—both of whom claimed to be the legitimate king of Spain—transferred their dynastic rights to Napoleon, instead of a peaceful transition of sovereignty, a profound political crisis was unleashed. A significant portion of Spanish public servants—army officials, bureaucrats, clergy—chose to accept the new Bonaparte dynasty and the new king José I. It must be said that when compared to Ferdinand it was not the worst possible choice. In addition to being much better prepared for government (he was a lawyer and had previously served the dynastic interest of his family in Naples), José I came to Spain armed with a constitution. It was essentially a Napoleonic constitution adapted to Spanish circumstances in two important respects: it guaranteed the primacy of the Catholic faith and the integrity of the American empire. It was called the Constitución de Bayona (officially Constitución para la monarquía española), and it was and it was the first Spanish Constitution that considered the possibility of American representation in the Cortes (parliament) as well as in other relevant institutions, like the Council of State.

However, many other Spaniards led by local and provincial elites resisted the dynastic change, appealing to the fact that it implied that the Spanish monarchy ceased to be independent. They first formed emergency councils (juntas) in towns and provinces that proclaimed the Spanish king’s sovereignty, and the representatives of these local governments gathered in September 1808 in a general assembly called Junta Central Gubernativa del Reino. Among the representatives of the Junta Central the opinion gathered supports that the solution of the crisis required not only the expulsion of the French from Spain, but also redesigning the government of the monarchy. In other words, the members of the Junta Central arrived at the conclusion that the crisis was not only dynastic, but above all political and constitutional. The debate—both in the Junta Central and in the press—was centred on the issue of how the Spanish nation could be correctly represented.

In Portugal, mounting opposition to the English protectorate, but also the desire for broader political reform, lead to the civilian coup of 24 August 1820—headed
by a bourgeois group, mostly jurists, merchants, and military officers from Oporto, many of them members of Masonic lodges. It referred to itself evocatively as the Regeneration. Its central claims were a wholesale return to a previous state of political affairs: (i) the return of the Royal Court to the metropolis, Lisbon; (ii) the “restoration” of the old constitution of the realm, based on the regular gathering of a representative parliament (Cortes); and, on a more immediate level, (iii) the re-imposition of the commercial monopoly with the colonies, and (iv) the recovery of military autonomy from the British. However, the central claim—that of the installation of a constitutional monarchy—was anything but a “regeneration,” because the national representative body that was being demanded had nothing to do with the ancient parliament, which symbolically embodied the realm (Hespanha 2004; Pedreira and Costa 2008).

The success was dazzling. The Junta do Governo do Reino, headed by William Beresford, was dismissed and replaced by a Provisional Junta, charged with organising general elections to a national constitutional assembly, whose task would be to draw up a new constitution. However, the break with tradition was already apparent in the electoral procedures and the form of the new Cortes. After a heated though brief debate on the procedure for the election of representatives, the old system of electing, as well as the old structure of the Cortes, were replaced by a brand-new one—direct election to a unicameral parliament—modelled on the Spanish Cortes of Cadiz. The outcome was an assembly in which the opposing forces were quite evenly represented, although the democratic wing was more vociferous on the key issues. Due to the imminent arrival of the king and royal court, a draft of the constitution (Bases da Constituição, 1820) was prepared so that it could be solemnly sworn by the returnees before they had even disembarked.

CONSTITUTIONAL GUIDELINES

The new Spanish representatives had to resolve two constitutional issues of crucial importance. The first question was whether the American part of the monarchy should also be represented in a common assembly (the Cortes) along with the peninsular territories. In January 1809, the Junta Central called on the Americans to elect their own representatives to the junta. In its summons, the junta declared that the American territories would no more be considered “colonies or miserable factories” but provinces of the Spanish monarchy. As we will see, one of the main problems of early Spanish liberalism was rooted precisely in this moment. In their dealings with America, Spanish liberals used a language of equality but they practiced inequality. Indeed, they envisaged only nine representatives for all the American territories while the peninsular provinces had two representatives each at the Junta Central.

The second point of the debate was about the kind of parliament that would represent the Spanish nation. Moderates, like Melchor Gaspar de Jovellanos—the most influential Spanish intellectual of the time—thought that it should be some kind of corporate body gathered in two different chambers, one for commoners organised by cities and provinces, and an upper chamber for the nobility and the clergy. Like other moderate leaders—for instance, the Catalan Antonio de Capmany—Jovellanos thought, following Montesquieu, that the English constitutional system was the most suitable to be imitated by the Spaniards.
Notwithstanding the fact that the British model of constitutional organisation had been successfully implemented in other parts of Europe—specifically the Mediterranean islands where it was reproduced—in Spain it was not seen as fully congruent with a liberal perspective that conceived the nation as constituted exclusively by householders gathered in towns and provinces (Garriga and Lorente 2007). Promoters of this idea of national representation managed to impose a unicameral Cortes composed of four different types of representatives: ancient privileged cities, provincial juntas, and a majority of representatives of provinces designated by local and provincial electoral colleges. The fourth type of deputies were those representing the American and Asian territories who were elected by town councils following specific regulations.

Although Portugal’s constitutional experiments began ten years later, the public debate would be framed in very similar terms. The first issue concerned the representative nature of the Cortes. The wording of the constitution was a clear symptom of the misunderstanding between two competing political discourses—the one proposing constitutional continuity (regeneration) and another committed to the creation of a brand-new constitutional polity based on the supremacy of the national will. Both ideological groups tried to compromise in the process of writing a constitution. The “preamble”, for example, combines references to citizens’ rights with the veneration of the “fundamental laws of the Monarchy”; the constitution is deemed to be a decree of the Cortes, but dedicated to “the name of the Most Holy and Most Sacred Trinity”; the king is considered a representative of the nation, but also empowered “by Grace of God and by the Constitution of the Monarchy, etc.” cf. art, 121) (Hespanha 2004, 2012).

Was this the result of ideological misunderstanding or was it a genuine political compromise? Traditionally, the ambiguity of the Portuguese constitutional text has been seen as a reflection of a very difficult political moment, with opposed ideological groupings constantly forced to negotiate and compromise. However, it is likely that the political deadlock was made even more complicated by an epistemological confusion: the coalescence of seemingly incompatible ideas about concepts like the constitution, among others. The constitution, for example, as it was understood on both sides of the ideological divide, was viewed as representing both a natural institution, and being the product of the people’s will. In addition, certain old ideological categories endured in a new ideological context, and there were remnants of old rhetorical formulae and concepts (like potestas a Deo per populum), as well as the persistence of traditional social hierarchies.

In the study of constitutional and political practices in this period, other unanticipated contradictions emerge: transfers of traditionally royal prerogatives to the “sovereign Congress” (like the concession of graces, revision of judicial decisions, and acts of government); preservation by jurists and judges of a substantial power to interpret the law (even beyond the limits of the constitution); absence of any formal procedure to guarantee the primacy of the constitution, which depended solely upon the civil servants’ sense of duty to comply with the formal oath of allegiance to the constitution; submission of citizens’ rights as if the natural law which dictated individual rights was erased by positive law.

A second issue—at the time probably considered as secondary—was the extension of the constitutional regime to the overseas territories, a constitutional conundrum
that the influential Jeremy Bentham considered as unsolvable. In principle, the constitution was considered as a universal pact between all the Portuguese and, consequently, the colonies had just as much right to be represented in the Cortes as the metropolitan provinces. The constitution was envisaged as being valid in the colonies without limitations or exceptions, in matters concerning parliamentary representation, the organisation and balance of powers, and the civil and political status of the inhabitants. The Portuguese nation was defined by the Constitution of 1822 as “the union of all the Portuguese of both hemispheres”. Colonial territories were listed (art. 20), along with the metropolitan provinces, although under different denominations. The constitution granted citizenship to all Portuguese, born or permanently resident in the United Kingdom of Portugal and Brazil, provided that they were born of a Portuguese father (art. 21). However, recent studies have shown that this “universalism” was not reflected in political praxis or in the content of legal norms below the constitutional level, which both imposed restrictions on the political rights of the colonists (namely relating the electoral weight of colonies), and entailed the governmentalisation of colonial rule as well as racial discrimination against native populations or the overriding of their constitutional rights.

The ambiguity concerning the status civitatis was even greater, however, considering that (i) slavery still existed in the overseas territories, and that (ii) the political status of the native population inhabiting the colonies remained uncertain, so that as general rule it can be said that—excepting the assimilated urban elites—the native people were generally deprived of political rights and subject to their native authorities and law. Native chiefdoms occupying zones that were only tenuously under Portuguese influence were often bound by separate “treaties” more than by straightforward ties of sovereignty.

When the Spanish Cortes finally met on the 24 September 1810 near Cadiz there were about a hundred deputies representing different parts of the monarchy, but most of them were suplentes—that is, they had been locally elected in Cadiz among natives of the territories that were unable to send their own elected deputies. With the exception of Puerto Rico, that was the case for all the American territories (Silva 2009).

Towards the Constitution

The congress met in Cadiz from September 1810 to September 1813. It could be said that the constitution began to be implemented from the very first day. On 24 September 1810, Diego Muñoz Torrero, deputy from Extremadura, proposed a law to be passed by the parliament containing several constitutional principles: national sovereignty, a new proclamation of Ferdinand VII (as king) negating the dynastic change agreed with Napoleon by the Spanish royal family, and a provisional division of powers aimed at restricting and controlling the political capacity of the Regency (the acting government during the king’s stay in France). It also secured the deputies’ indemnity for their political activities.

The making of the first Spanish Constitution may be divided into two distinct phases. From March to August 1811 a commission drafted a project to be submitted to the Cortes. The second phase was the congressional debate of this project during the latter half of 1811. It is important to remember that the Cortes acted as
En el nombre de Dios Padre, Hijo, y Espíritu Santo, creador de la Sociedad.

Las Cortes generales y extraordinarias de la Nación Española, bien convocadas, después del más sereno, calmado, y madura deliberación, de que las antiguas leyes fundamentales de esta Monarquía, acompañadas de las oportunas providencias y precauciones que aseguren de un modo estable y permanente su entero cumplimiento, podrán Menar debidamente el gran objeto de promover la gloria, la prosperidad, y el bien de toda la Nación, decretan la siguiente Constitución política para el buen gobierno, y recta administración del Estado.

Título 1º

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De la Nación Española y de los Españoles.

Artículo 1.
La Nación Española es la reunión de todos los Españoles de ambos Hemisferios.

Artículo 2.
La Nación Española es libre, independiente, y no es, ni puede ser patrimonio de ninguna familia, ni persona.

Image 3.1.1 Political constitution of the Spanish Nation, 1812
Source: Public domain/Congreso de los Diputados, Madrid, Spain
a constituent parliament and at the same time as a sort of Council of the Regency. Assuming the role traditionally performed by the Council of Castile, the Cortes intervened in practically every relevant function of government, especially if related to taxes or war. In addition, from the beginning the congress also legislated to dismantle some of the traditional structures of the political and social order that were seen as the biggest obstacles to constitutional innovation.

From the beginning of the parliamentary sessions, partisans of liberal constitutional reforms dominated the debate. It can be said that the text produced in March 1812 was largely a reflection of Spanish liberal ideology as it had been configured since the final decades of the eighteenth century. Both moral philosophy and political economic ideas contributed to the definition of the peculiarly Spanish early liberalism and constitutionalism. Long before Cadiz, moral philosophers had grappled with the possibility of reconciling modernity with Catholicism. Key concepts of modern philosophy—such as interest, self-love, tolerance, or individualism—traditionally considered contradictory to the true essence of the Catholic faith were considered and to some extent accepted by Catholic intellectuals like Manuel de Aguirre or Jovellanos. On the other hand, political economy offered a vast field of arguments for the necessity of a constitution granting some essential civil rights like property, freedom, and security. Víctor de Villava, from a moderate point of view, and León de Arroyo or Valentín de Foronda, from a more progressive standpoint, were among those intellectuals who by the last two decades of the previous century had proposed to implement a constitutional text based on rights as a limit to monarchical power.

It was the following generation that imported all these debates into the constitutional design. The best-known liberals of the Cortes, like Agustín de Argüelles, the count of Toreno, or Evaristo Pérez de Castro were politicians more than intellectuals and they fought for implementing a political regime according to the ideas developed by Spanish Enlightenment. The Cadiz constitutional experiment reflected most of these ideas, making the resulting constitution a product of the Enlightenment more than a truly liberal document.

The structural elements of the Cadiz Constitution reflect that character (Clavero 2007). Following a theory of emancipation (based on the traditions of *ius commune* and *ius gentium*) the constitution declared Spain “free and independent” and, accordingly, assigned sovereignty to the nation. The first peculiarity of early Spanish constitutionalism resided in the definition of the Spanish nation as a collective body of all the Spaniards from both hemispheres. This (in 1812) was not the first time that a European parliament had admitted people from the former colonies (this had been the case in France during the Republican Convention) but it was certainly the first occasion on which a constitution declared the former colonial space to be part of the nation.

This is crucial because the constitution, rather than opening with a declaration of the rights of man and citizen (individual subjects) instead proclaimed the rights of a collective subject, that is, the Spanish nation. Other sections of the constitution—specifically section five on the tribunals and administration of justice—guaranteed due process, but the constitution did not include a specific declaration of rights. The only reference to individual rights as such is Article 4 that obliges the Nation “to preserve and protect by wise and just laws the civil liberty and the property, besides all other legitimate rights of all individuals belonging to it”.

663
Significantly, the wording of Article 4 is very similar to that of Article 12. This article has been one of the most controversial of the constitution since it was promulgated in 1812, and continues to be debated among historians. Astonishingly from a liberal point of view, Article 12 summarised a very characteristic attitude among early Spanish liberals towards religion: “The Religion of the Spanish Nation is and shall be perpetually Catholic, Apostolic and Roman, the only true religion. The nation protects it by wise and just laws, and prohibits the exercise of any other whatsoever.” Besides the evident contradiction with one of the most basic liberal principles—that of tolerance and freedom of religion—this article expressed the conviction of Spanish early liberalism that Catholicism was an essential part of the Spanish identity. As anti-liberal Catholic critics of the constitution—like the priest José de Vélez—pointed out, this article also advocated for a national and not monarchical religion. The immediate consequence of declaring religion to be under the protection of the sovereign nation in the same way it protected the rights of individuals (by wise and just laws) was the abolition of the Inquisition in 1813.

During the debates on the constitution liberals also sought to impose their points of view on two decisive questions. First, against the opinion of moderates, the constitution enshrined a unicameral system of representation. As many scholars have pointed out, the Spanish text of 1812 generously granted the right to vote to every male householder living regularly in any parish. There were no franchise restrictions based on income or taxes paid and elections were to be held at three levels of electoral colleges (local, district, and provincial). Technically it was a democracy of patri familiae, referred to as vecinos, that is, householders regularly living in a parish. Exclusions from the franchise were based on sex, race (those of African descent were excluded from citizenship), and, in some cases, occupation (domestic servants). According to liberal ideology such an electoral and representative system made it possible for the nation to be represented in a single assembly so that it could take a more active part in politics.

Such a representative system was in turn rooted in the notion of an ideal society managed by Spanish early liberals. Even if they never expressed a desire to abolish the nobility, they were convinced that a just social order should be also structured based on merit. Jovellanos had written 15 years before the constitutional debates the most influential text on civil order and political economy in Spain. Known as Informe sobre la ley agraria (1795), the first pages of this text described a social order based on an individual’s freedom to determine one’s personal interest. As a prerequisite for the proper functioning of this principle, the dominum over things (land) should be freed from legal restrictions and, as a consequence, a substantial class of medium-size proprietors would structure society. It is not an accident that the Cortes adopted Jovellanos’ text as a manual for schools.

However, Spanish societies on both sides of the Atlantic were much more complex and far from this ideal social type. Notwithstanding the fact that the Cortes vehemently opposed the use of terms like Indian or criollo that denoted a racial difference among Spaniards, they remained current in speech and in literature. Similarly, among European Spaniards language that depicted an individual as merely a vecino, or citizen, and nothing more was very rare. The status of nobility, clergy, notables, officers (both civil and military), but also territorial or corporate attributes, were still of the greatest relevance.
The newly established liberal regimes —

The political activity of the Cortes was one of the most debated points of the constitution. The liberal leader Argüelles argued that the constitution was conceived as a complete system in which every single element acquired meaning as part of the whole. From this perspective, the Cortes was conceived as the highest authority since it was a truly national representative assembly. Moderates (and of course the absolutist opponents of the constitution) rather preferred a functional assimilation of the Cortes to the former Council of Castile. They did not envisage the Cortes as a parliament or national assembly, but as an advisory body whose role was to help the monarch in the government of the kingdom. Liberals instead imposed their vision of a system in which the parliament strictly limited the political capacity of the king. To start with, the constitution specified what the king could and could not do and how any of the royal prerogatives should be exercised in agreement with a secretary of state, who remained responsible to the parliament. It is very important to note that there was nothing resembling a cabinet system of government since the king had to deal separately with each one of his secretaries. The only council envisaged by the constitution, the Council of State, was composed of 40 members (four members of the clergy, four nobles, and 32 of the “most distinguished by their intelligence and education”, at least 12 of them from America) appointed by the king from a list provided by the parliament. It is not surprising at all that conservative European thinkers labelled this constitution as “republican”. The Swiss thinker Ludwig von Haller pointed to this section as the most dangerous of the Spanish constitution because in his opinion it opened the door to a political neutering of the monarchy.

Constitutionalist culture in Portugal initially developed in the shadow of the Western European one, cast under the influence of Montesquieu, Bentham, Condorcet, and Rousseau, disseminated by a vibrant underground literature, the freemasonry and, later on, encouraged by the presence of the French and British armies, during the Napoleonic war and its aftermath. This was the context of the initial revolutionary upsurge, in 1820, followed by an intense period of indoctrination. Opposed to the new political ideas was traditional political thought, both corporatist and absolutist, fuelled both by political scholasticism (Iberian Second Scholasticism) and, on the other hand, by the political theories of enlightened absolutism (S. Puffendorf, J. G. Heinneccius, de Vattel), dominant in the last decades of the Ancien Régime at the University of Coimbra (Hespanha 2004).

The influence of the Cadiz Constitution on the Portuguese has yet to be studied in detail. From the parliamentary discussions, one can see that the Spanish example was continuously present, either as a radical turn to be shunned or as a paradigm to follow. The model was attractive given the imperative, in the Portuguese context, of accommodating within the revolutionary movement the democratic sensibility with those traditionalist elements that were open to a certain degree of modernisation of the political regime. Actually, in spite of its progressive democratic framework, the Cadiz Constitution claimed that it merely represented the fulfilment of a constitutional development whose beginnings could be traced back to the most ancient political traditions of the realm. These ideas, as well as that of the primacy of positive law over natural rights, were at the root of both constitutional texts, which bear resemblance to one another both in their organisation of the political powers and in the very wording.
In the Portuguese text, the organic features of the new constitutional system appear less important: patriarchal suffrage without franchise limitations but with certain occupational exclusions (servants, monks and nuns, civil servants; however, no explicit reference to gender, race, or serfdom), a single chamber, merely provisional royal veto, free nomination and dismissal of ministers by the king, royal irresponsibility but ministerial responsibility (although never formalised in a statute), three-rank judicial system resembling the *cassation* system.

The constitutional debate was also quite similar to that which took place in Cadiz, although almost a decade later. The constitutional solutions were therefore fundamentally similar. The Portuguese Constitution included a list of guaranteed citizens’ rights. The list was in line with contemporary constitutionalist norms. Even the freedom of religion was included, despite the existence of a state religion. However, in every clause a formula was repeated which characterised the whole conception of citizens’ rights as guaranteed by the State—“pela maneira que a lei declarar” (“according to the law”) or similar wording. That is: rights were only guaranteed in the terms configured by infra-constitutional positive law. The idea was that natural individual rights abated with political association, so that State law preceded and articulated individual rights—and not the other way around, with individual rights preceding the state and constituting it, as a radical liberal conception would have it. Oddly, this legalist conception of citizens’ rights contrasted with the prevailing doctrinal ideas about natural law, individual rights, the liberal State, the liberal constitution, and positive law. Actually, Christian doctrine cultivated a rather literary and philosophically eclectic discourse, according to which, in a liberal State and Constitution, liberty and individual rights—namely liberty, security, and property—were above all positive laws and State powers and institutions. By contrast, the free will even of parliamentary legislators was strictly curtailed by the paramount validity of such supra-positive values and rights. The contradiction can be explained in historical terms. The legalistic impulse followed the trend to formally articulate and to put limits to the vagueness of the juristic theoretical declarations; and, at the same time, followed the Lockean safeguard against the dangers of a direct enforcement of individual rights without any reference to positive law. Moreover, the dignifying of positive law was compatible with the political prestige of the new democratic and representative institutions, as well as with the Rousseauian definition of law as *volonté Générale* (Hespanha 2004).

On the contrary, the exaltation of supra-positive law, rights, and values corresponded to the fear of the “tyranny of the majority” (or “legal absolutism”) of the period of the French Convention and Terror, and the desire to set limits on the will of the majority, it also reflected the appeal to a higher law (grounded in reason, drawn from tradition, from the spirit of the people, or the genius of the nation, from learned opinion) in line with the jurists’ century-long doctrinal self-confidence, a belief in a law based not upon the *imperium* of the State, but on the *auctoritas* of the jurisconsults. This idea was tirelessly promoted by law professors in their symbolic struggle with the new legislators and politicians (Hespanha 2009, 2017).

To be sure, the list of citizens’ rights corresponded to liberal political ideas, although old-fashioned clauses are still present (e.g., the right to public graces, or *merçês*, Const. 1822, art. 15), as well as conjunctural ones (e.g., the payment of...
A CONSTITUIÇÃO DE 1822

COMENTADA E DESENVOLVIDA NA PRÁTICA.

TÍTULO 1.

Dos direitos e deveres individuais dos Portuguezes.

CAPÍTULO ÚNICO.

Artigo 1. A Constituição política da Nação Portugueza tem por objecto manter a liberdade, segurança, e propriedade de todos os Portuguezes. Veremos no decurso desta obra, se a Constituição corresponde ao seu objecto.

Art. 2. A liberdade consiste em não serem obrigados a fazer o que a lei não manda, nem a deixar de fazer o que ella não proíbe. A conservação desta liberdade depende da exacta observância das leis.

Apparecem neste Artigo três cousas notaveis: a primeira he dar da liberdade a mesma ideá que dá Fleury nos Costumes dos Israelitas, e pelas mesmas palavras! a segunda he, que para os autores da Constituição ha outra liberdade; porque dizem a conservação desta: e a terceira he fazer depender a conservação da liberdade dos Portu-
public debt and of state civil and military salaries, Const. 1822, art. 15). Conversely, State agency was more praised than feared. The trend of demanding more and more from the state government and administration is linked to several factors. The first was the need for swift and yet profound transformations at the political, social, and economic levels. However, this model of reforming society also corresponded to the statist reformism associated with Enlightened despotism, which had been a feature of Portuguese policy since the Marquis of Pombal. The example of the post-revolutionary and Napoleonic global reshaping of French society was a second and consistent source of inspiration. Some lessons were also drawn from England, where William Blackstone outlined the use of the king’s prerogative as a means to modernise society, an issue that was picked up and developed further by his American commentators. State interventionism was also embraced by public law experts during the Romantic period, both in France and in the German-speaking countries. In Portugal, this idea of a complex State responsible for providing social needs is well established in legal doctrine by the 1840s.

**CRISIS AND FALL**

Liberalism and constitutionalism were short-lived in Spain. From 1812 to the death of Ferdinand VII (1833) the Cádiz constitution was in force for only five years. Napoleon released Ferdinand from his golden (and voluntary) captivity in France in 1814. After the battle of Vitoria (23 June 1813) the French army left the Iberian peninsula while Napoleonic hegemony declined drastically in Europe. In December 1813, Napoleon and Ferdinand VII agreed the restoration of the Bourbon monarchy in Spain, and the Spanish monarch entered Catalonia in March 1814—ironically, only a few days before Napoleon’s own abdication. He had no sooner set foot in Spain when he declared the constitution abolished and proscribed its liberal authors and supporters. As will happen again in 1823, parliamentary deputies and other liberals were imprisoned and most of them fled into exile. A majority went to France and England, but some liberals reached America where they continued fighting for liberty, like the former guerrilla leader, Francisco Javier Mina, who fought against the French in 1808 and was executed in 1817 in Mexico for supporting insurrection.

During the two long periods of despotic government (1814–1820 and 1823–1833) the exiled liberals kept alive the ideas of civil liberties and representative government. But, above all, in exile Spanish liberalism was nourished by and integrated into the mainstream of political debates in Europe and thus evolved, something that was highly unlikely to happen in Spain, since not only the freedom of the press but the press itself was quashed by Ferdinand VII. In fact, the first critical approaches to the Cadiz constitution came from exiled liberals who considered it excessively attached to the idea of national sovereignty and consequently believed that the system of powers it envisaged was not very well balanced.

Liberals returned to government in 1820 after a military uprising led by Rafael del Riego. The pronunciamiento, or military intervention, would duly become one of the favoured mechanisms for political change in nineteenth-century Spain, as well as in Latin America. This three-year period of liberal governments was indelibly marked by two facts. On the one hand, it was the first time that the Cadiz constitution was implemented with the king present and exerting all his prerogatives.
Predictably, Ferdinand VII used his wide prerogative powers to permanently block the implementation of the constitution and slow down every legislative project aimed at overhauling the vestiges of the Old Regime. That was especially the case with regard to legislation concerning the entailment of Church property, the religious orders, or the definitive abolition of the seigniorial system.

On the other hand, during the so-called Trienio, Spanish liberalism split into two main groups that subsequently gave birth to the two main liberal factions of the nineteenth century, moderados and progresistas. During the Trienio these ideological groupings were known as doceanistas or moderados and exaltados. They essentially differed in their conception of the division and balance of powers, the exaltados proposing a revision of the constitution to more clearly articulate and bolster the supremacy of the parliament as a national assembly. They also insisted more vehemently on limiting the prerogatives of the Catholic Church and the nobility, and in going further with the new legal order (civil and penal codes). Moderates instead preferred a more circumspect implementation of new social and political institutions and wanted to keep the monarchy as a significant part of the system.

The radical government appointed in the summer of 1822 was unable to manage a very complicated situation resulting from the confluence of both internal and external opposition to the constitutional regime. Led by the king himself, several military units (including the royal guard) and armed provincial groups (voluntarios realistas) plotted against liberal governments practically from the very first moment of the Trienio. They found support among local clergy and some local elites, as in the Basque Country, where they formed groups that ten years later would support the candidacy to the throne of Carlos María Isidro, the brother of Ferdinand VII, and his neo-absolutist project. European powers, or more specifically, the Holy Alliance for its part considered the Spanish liberal government as a danger to the stability of the monarchical principle in Europe, especially after the furore civile (as labelled in 1825 by the ultra-moderate Italian composer Gioachino Rossini in the opera Il viaggio a Reims) spread to Portugal and Italy. Even if they never decided to intervene in Spain collectively, due to their own contradictory interests, Bourbon France intervened unilaterally in the spring of 1823 to restore despotism. The army commanded by de Duke of Angouleme encountered practically no opposition from the Spanish people on his way to Cadiz where, symbolically, liberalism was again defeated by despotism.

It is a historiographical commonplace to emphasise the lack of popular support for the constitutional system in 1823. The same may be said about support for absolutism in 1820, when liberals took over the government of the monarchy. Thus, rather than revealing the pro-absolutist tendencies supposedly characteristic of Spanish society, the events of 1823 should be seen as evidence of the popular indifference, and disengagement of the common people from high-level politics. One of the farsighted policies of the constitutional system of 1812 was precisely to foster the spread of literacy along with medium-size landholdings as a means to creating a new citizenry that was better informed, and had a greater vested interest in local, provincial, and national politics. By the end of the century, Joaquín Costa—one of the greatest intellectuals of the post-imperial generation—still complained about the lack of both popular literacy and a just distribution of landed property. As a matter of fact, the structure of Spanish society did not change significantly during the
first decades of the nineteenth century, and it was only after Ferdinand VII's death (1833) that liberalism definitively established itself in Spain. By then, following the European mainstream, Spanish constitutionalism renounced the vision of a politically active community of vecinos propietarios and substituted the idea of national sovereignty with the concept of Administración.

Something similar could be said about Portugal, where the consensus around politico-constitutional reform was only fictional. Dissension among members of the royal family (for instance the queen's refusal to swear to uphold the constitution) reflected the dramatic tensions existing within the ruling groups and the population in general. The political implications of the debates in the Cortes, as well as the social and institutional consequences of effective constitutional solutions—the refusal of the royal veto, the lack of a separate chamber for the formerly privileged social orders, or the granting of religious freedom—and legislative reforms—the extinction of feudal corvées, the suppression of seigneurial jurisdictions, the reversion of crown land and comendas of the military orders to the Public Treasury, the abolition of the Holy Office of the Inquisition, the close oversight over religious orders, monasteries, and convents, the hostility to seigneurial taxation (forais)—all these proposed and effected changes impinged on vested interests and on deeply rooted social imaginaries, both of which were further roiled by the often radical discourse of the reformers. To this may be added the independence of Brazil—which was also triggered by the intransigence of a radical wing of the Cortes—which hurt important commercial interests and wounded Portuguese national pride. The reactionary opposition made its move in 1823, through a military coup headed by the Infante Miguel, which forced king João VI to suspend the constitution, although promising that it would be adapted to the traditional political order of the realm. The king passed away shortly after, in 1826. His first-born son, Pedro, the self-proclaimed emperor of Brazil, took the crown as Pedro IV, granted the Carta Constitucional, arranged the marriage of his daughter to her uncle, the absolutist leader Miguel, thus reuniting the two political branches of the family, and abdicated his royal power in favour of his young daughter, who became Queen Maria II (b. 1819–1853; queen in 1826). The solution did not appease Miguel, who once again resorted to military force to seize the crown as absolute king (acclaimed by the Cortes on 23 June 1828), sparking a six-year civil war (Guerras liberales) against his brother. In reaction, Pedro reassumed the Portuguese Crown, formed an army of liberal émigrés, invaded the metropolis, lay siege to Oporto, and, after a surprise landing in southern Portugal, defeated the royalist army, forcing his brother’s capitulation (Convention of Évora Monte, 1834) and his definitive exile in Austria. Pedro died not long after, after restoring his young daughter Maria to the throne (Santos 2006; Hespanha 2004).

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