

THE FIRST SPANISH CONSTITUTIONAL DRAFT: THE "CONSTITUTIONAL LAWS" OF MANUEL DE AGUIRRE (1786)

SUMMARY:

ABSTRACT:

In 1796, the Basque thinker and military man Manuel de Aguirre entered a competition for ideas on how to improve national legislation in order to achieve public happiness. His proposal consisted of drawing up the first constitutional draft drawn up in Spain. It was still a very basic project, but it reflected how part of the Spanish Enlightenment was interested in reforming the Enlightenment despotism of Charles III and replacing it with a representative government in which the king still had important powers, but was limited by bodies of a representative nature.

The Reception of Foreign Constitutionalism in the Spanish Enlightenment

Until the last third of the 18th century, the Spanish Enlightenment had largely accepted the benefits of Enlightened Despotism. Impregnated with the ideas of German cameralism and French physiocracy, the Enlightened had conceived of the Monarch as the engine of administrative, social and economic reforms that would lead to public prosperity, transforming decrepit Spain into a modern state¹. The destiny to which many enlightened people aspired was to turn Spain into the utopia that an anonymous author had described in the 17th century: *Sinapia*. A utopian kingdom of a Spain located in the southern lands².

Sometimes this enlightened despotism was mixed with very different ideas, which they instrumentalised. A good example is Cabarrús, who in his *Cartas sobre los obstáculos que la naturaleza, la opinión y las leyes oponen a la felicidad pública*, addressed to Manuel Godoy, showed a clear influence of Rousseau, with abundant references to the idea of the state of nature, the social pact and the general will³. However, his point of arrival was not the defence of a representative government, but that of "a system of paternal government, in which the authority of the Monarch, always absolute, but always enlightened, finds, by the mere separation of the powers which it is obligatory for him to subdelegate, the balance of the common good"⁴. The separation of powers, understood as a technical necessity and not as a political imperative, was reduced to

¹ Maravall, José Antonio: "La fórmula política del Despotismo Ilustrado", Maravall, José Antonio, *Estudios de la Historia del Pensamiento Español. Siglo XVIII*, Mondadori, Madrid, 1991, pp. 449-458.

² Anónimo: "Descripción de la Sinapia, península en la Tierra Austral (c. 1682)", Avilés, Miguel, *Sinapia. Una utopía española del siglo de las luces*, Editora Nacional, Madrid, 1976.... Although initially dated to the 18th century, it seems to be proven that this utopia was elaborated at the end of the 17th century. On the difficulties of dating this interesting work, see López, François: "Una utopía española en busca de autor: Sinapia. Historia de una equivocación. Indicios para un acierto", *Anales de la Universidad de Alicante. Historia moderna*, no. 2, 1982, pp. 211-221.

³ Cabarrús, Francisco: *Cartas sobre los obstáculos que la naturaleza, la opinión y las leyes oponen a la felicidad pública (1795)*, Fundación Banco Exterior, Madrid, 1990, pp. 36, 40, 44, 46, 74-75, 80 and 88. Only on one occasion did Cabarrús make express reference to the state of nature (*ibidem*, p. 82), but it can be understood that he considered this situation as prior to the social pact.

⁴ *Ibid*, p. 46.

differentiating the judicial function from the governmental⁵. This was common in the Spanish Enlightenment, which viewed with suspicion how the two functions were mixed in the Council of Castile.

Cabarrús distinguished between the judicial and governmental functions, and considered that the former should be the responsibility of the King, supported by enlightened "Councils"⁶. Among these Councils, what he called the *Consejo de Administración o Gobierno* (Council of Administration or Government), a body that had some representative elements, since it was made up of three deputies from each province, occupied a pre-eminent place. In this sense, some have seen in this proposal by Cabarrús an early attempt to establish modern Cortes in Spain⁷, although it does not seem that this was his aim. Suffice it to say that the Council to which he referred lacked legislative power and was limited to advising the King⁸, so that it was more of an institution based on the approaches of Enlightened Despotism.

If Cabarrús relied surprisingly on Rousseau to defend Enlightened Despotism, so did Ibáñez de la Rentería, in his case drawing on the authority of Montesquieu. The division of powers set out in *De l'esprit des Lois* was used by Ibáñez de la Rentería to defend a Monarch assisted by Councils⁹. In fact, the influence of Baron de la Brède was present even among absolutists, such as the apologists, a group that included Luis José Pereira¹⁰, Fernando de Ceballos y Mier¹¹, Andrés Piquer¹² and, above all, Juan Pablo Forner¹³. The latter came to use Montesquieu's theories to defend absolutism: he assumed the distinction of powers, but not their distribution among different bodies; for Forner, the Monarch was the sole depositary of all these powers¹⁴.

In contrast to these pro-monarchist positions, during the reign of Charles III - especially from 1780 onwards¹⁵ - the first critical voices were also raised, believing that

⁵ *Ibid*, p. 43.

⁶ *Ibid*, p. 41.

⁷ Maravall, José Antonio: "Cabarrús y las ideas de reforma política y social en el siglo XVIII", Maravall, José Antonio, *Estudios de la Historia del Pensamiento Español (Siglo XVIII)*, Mondadori, Madrid, 1991, pp. 82 ff.

⁸ Cabarrús, Francisco, *Cartas sobre los obstáculos que la naturaleza, la opinión y las leyes oponen a la felicidad pública* (1795), *op. cit.*, p. 45.

⁹ Ibáñez de la Rentería, José Agustín: "Reflexiones sobre las formas de gobierno (1783)", Fernández Sebastián, Javier, *La Ilustración Política*, Servicio Editorial de la Universidad del País Vasco, Bilbao, 1994.

¹⁰ Pereira, Luis José: *Theodicea, o la religion natural: defendida contra sus enemigos, los antiguos, y nuevos philosophos: con demonstraciones metaphysicas que ofrece el systema Mechanico, dispuestas con método geometrico*, Oficina de Pantaleón Aznar, Madrid, 1771.

¹¹ Ceballos y Mier, Fernando de: *La falsa filosofía ó El ateismo, deismo, materialismo y demás nuevas sectas convencidas de crimen de Estado*, Imprenta de Antonio Fernández, Madrid, 1775.

¹² Piquer, Andrés: *Lógica moderna o Arte de hallar la verdad y perfeccionar la razón*, Oficina de Joseph García, Valencia, 1747; Piquer, Andrés: *Philosophia Moral para la juventud española*, Oficina de Joachin Ibarra, Madrid, 1755; Piquer, Andrés: *Discurso sobre la aplicación de la filosofía a los asuntos de religión para la juventud española*, Joachin Ibarra, Madrid, 1757.

¹³ Forner, Juan Pablo: *Oración apologética por la España y su mérito literario*, Imprenta Real, Madrid, 1786.

¹⁴ *Ibid.*, pp. 129-130. On the influence of Montesquieu on Forner: Elorza, Antonio: *La ideología liberal en la Ilustración española*, Tecnos, Madrid, 1970, p. 89.

¹⁵ Corona, Carlos E.: "La doctrina del poder absoluto en España en la crisis del XVIII al XIX", *Cuadernos de la Cátedra Feijoo*, núm. 13, 1962, p. 13.

a purely reformist programme was doomed to failure¹⁶. These criticisms were evident in the complex relations between the monarch and the newspaper he himself had sponsored, *El Censor*, edited by Luis García Cañuelo and Luis Marcelino Pereira¹⁷. Thus, even before the echoes of the French Revolution reached Spain, a critical and rationalist current had already been established¹⁸.

Crossing the Pyrenees, iusrationalism made its presence felt among the Spanish Enlightenment, bursting in with overwhelming force. Its imprint is visible in the private libraries that made up some of the most prominent members of the Spanish Enlightenment. The most renowned French (Voltaire, Domat, Mably, Morelly and, of course, the Encyclopaedists), Dutch (Grotius), German (Puffendorf, Wolff, Heinneccio, Thomassius) and Swiss (Rousseau, Burlamaqui) authors are to be found on the shelves of the libraries of Meléndez Valdés, Álvaro Flórez Estrada, the Count of Toreno¹⁹ and Jovellanos. The reconstruction of the latter's early Sevillian library - substantially made up of funds from Jesuit institutions - shows to what extent the enlightened Asturian was familiar with the most important works of European iusrationalism. Works that he later acquired for the library of the Institute of Nautical and Mineralogical Studies that he built in his native Gijón²⁰.

In the field of education, the commitment to iusrationalism of the so-called "novadores" confronted them with the Peripatetics, who were in favour of perpetuating the Aristotelian-Thomistic system in Spanish universities. The educational programme of Gregorio Mayans y Siscar (1767) already proposed an openness to the new currents of thought which, however, is clearer in the case of Pablo de Olavide²¹. In 1774, Cátedras de Derecho Natural y de Gentes (suppressed by Charles IV in 1794) were created, in which the works of authors of little radicalism, such as Heinnetius, Juan Bautista Almici (the latter with previous inquisitorial censures)²² and Marín y Mendoza²³, were used as textbooks. But even in those educational institutions where there were no Natural Law subjects, Natural Law was also taught, as was the case at the University of Oviedo²⁴. The

¹⁶ Elorza, Antonio: "Ilustración y revolución en España a finales del siglo XVIII", *Anales de la Cátedra Francisco Suárez*, no. 29, 1989, pp. 142-143.

¹⁷ On *El Censor*'s criticism of the government of Charles III, see Caso González, José Miguel: *El Censor. Obra periódica comenzada a publicar en 1781 y terminada en 1787*, Instituto Feijoo de Estudios del Siglo XVIII, Oviedo, 1989, pp. 787-792.

¹⁸ Sánchez-Blanco Parody, Francisco: *Europa y el pensamiento español del siglo XVIII*, Alianza, Madrid, 1991, pp. 351-352.

¹⁹ Part of Flórez Estrada's library is kept in his palace in Somiedo. Toreno's library is currently part of the very rich bibliographic collections of the University of Oviedo. The reconstruction of Meléndez Valdés' library can be consulted in Palacios Fernández, Emilio: *Juan Meléndez Valdés. Prosa*, Biblioteca Virtual Miguel de Cervantes, Alicante, 2004.

²⁰ Aguilar Piñal, Francisco: *La biblioteca de Jovellanos (1788)*, Consejo Superior de Investigaciones Científicas, Madrid, 1984; Clément, Jean-Pierre: *Las lecturas de Jovellanos (Ensayo de reconstrucción de su biblioteca)*, Instituto de Estudios Asturianos, Oviedo, 1980; Somoza, Julio: *Catálogo de manuscritos e impresos notables el Instituto de Jovellanos en Gijón*, Imp. y Lit. de Vicente Brid, Oviedo, 1883.

²¹ Peset, Mariano / Peset, José Luis: *La Universidad Española (Siglos XVIII y XIX). Despotismo Ilustrado y Revolución Liberal*, Taurus, Madrid, 1974, pp. 219-226.

²² Álvarez de Morales, Antonio: *Estudios de historia de la Universidad española*, Pegaso, Madrid, 1993, pp. 141-148.

²³ An author opposed, for example, to the doctrines of Rousseau. Marín y Mendoza, Joaquín: *Historia del Derecho Natural y de Gentes (1776)*, Instituto de Estudios Políticos, Madrid, 1950, p. 54.

²⁴ Jara Andreu, Antonio: *Derecho Natural y conflictos ideológicos en la Unviersidad española (1750-1850)*, Instituto de Estudios Administrativos, Madrid, 1977, p. 64.

same happened at the University of Salamanca, in whose chair of Moral Philosophy, Natural Law and the Law of Nations was also explained informally as a result of a previous report on the renewal of studies drawn up in 1789 by Juan Meléndez Valdés²⁵. In the context of this same institution, a young professor - Ramón de Salas - would avidly read the most prominent iusrationalists and would undertake the writing “Apuntaciones al Genovesi y extracto de las Lecciones de Economía Civil” in which the theories of the state of nature and the social pact were transposed²⁶.

This arrival of iusrationalism coincided in Spain with the proliferation of historical studies that sought to recover the memory of the old Castilian, Aragonese and Navarrese institutions, framed in the myth of what began to be known as the "Gothic Constitution"²⁷. Thus, Cadalso defended the national past against those who despised it²⁸, affirming the existence of a political character of its own, embodied in the old Constitution and fundamental laws²⁹, and which had reached its peak with the Catholic Monarchs³⁰. From 1787 onwards, the *Diario curioso, erudito, económico y comercial* gave historical news of the main medieval Cortes, reflecting how they participated in the legislative power³¹ and sent complaints to the King in order to obtain redress for grievances³². Similarly, in 1780 Jovellanos also vindicated the national past, asserting that the Cortes meeting was

²⁵ Robledo, Ricardo: "La difusión del pensamiento moderno en la Universidad de Salamanca a fines del siglo XVIII", *Historia Constitucional*, no. 6, 2005, pp. 427-450.

²⁶ Astigarraga, Jesús: "Iusnaturalismo moderno de la mano de la economía política: las "Apuntaciones al Genovesi" de Ramón de Salas", *ibid.*, núm. 9, 2008, pp. 135-161; Astigarraga, Jesús: *Luces y republicanismo Economía y política en las "Apuntaciones al Genovesi"*, Centro de Estudios Políticos y Constitucionales, Madrid, 2011, especially pp. 59-76.

²⁷ Nieto Soria, José Manuel: *Medievo constitucional. Historia y mito político en los orígenes de la España contemporánea (ca. 1750-1814)*, Akal, Madrid, 2007, pp. 51 ff. On the later projection of the concept of historical Constitution see Varela Suanzes-Carpegna, Joaquín: "La doctrina de la Constitución histórica en España", *Fundamentos*, vol. 6: *Conceptos de Constitución en la historia*, Junta General del Principado de Asturias, Oviedo, 2010, pp. 307-362.

²⁸ Cadalso, José: *Cartas Marruecas (1789)*, Editora Nacional, Madrid, 1980, pp. 87-94.

²⁹ *Ibid.*, p. 84.

³⁰ *Ibid.*, pp. 65 and 70.

³¹ For example: *Diario curioso, erudito, económico y comercial*, volume III: n° 251 (8-March-1787), p. 277; n° 254 (11-March, 1787), p. 289; n° 255 (12-March-1787), p. 293 (here he refers to the resolution of Juan II in 1419 to assiduously convene Cortes); volume IV: n° 287 (13-April-1787), p. 421; n° 306 (2-May-1787); volume V: n° 407 (11-August-1787), p. 169; n° 408 (12-August-1787), p. 169; n° 408 (12-August-1787), p. 421; n° 306 (2-May-1787), p. 169. 421; n° 306 (2-May-1787); volume V: n° 407 (11-August-1787), p. 169; n° 408 (12-August-1787), p. 173; n° 428 (1-September-1787), p. 253; n° 437-440 (10 to 13 September 1787), pp. 289-301; n° 446 (19-September-1787), p. 325.

³² Thus: *Diario curioso, erudito, económico y comercial*, vol. III: no. 216 (1-February-1787), p. 138; no. 222 (7-February-1787), p. 161; no. 242 (27-February-1787), p. 241; no. 260 (17-March-1787), p. 313; No. 262 (19-March-1787), p. 321; Vol. IV: No. 292 (18-April-1787), p. 441; No. 314 (10-May-1787), p. 529; No. 327 (23-May-1787), p. 581; No. 345 (10-June-1787), p. 657; No. 353 (18-June-1787), p. 689; Vol. V: No. 353 (18-June-1787), p. 689. 689; vol. V: No. 386 (21-July-1787), p. 85; No. 387 (22-July-1787), p. 89; No. 416 (20-August-1787), p. 205; No. 447 (20-September-1787), p. 329; vol. 401; n° 484 (27-October-1787), p. 477; n° 485 (28-October-1787), p. 481, where the weakness of the royal power is highlighted; n° 486 (29-October-1787), p. 485; n° 503 (15-November-1787), p. 553.

the essence of the historical Visigothic Constitution³³. Nine years later he would recall the Cortes again, in a panegyric written in honour of Carlos III³⁴.

The mythologised idea of an ancient historical constitution thus grew. And in this way the past was mythologised, identifying in the late Middle Ages a kingdom of liberties. These ideas had already been supported in 1741 by Juan Amor de Soria - when he described the Kingdom of Castile after the Reconquest as a mixed government³⁵ - and were also disseminated from England by William Robertson³⁶, whose influence on Spanish historiography -in particular on Jovellanos- is remarkable³⁷.

This historical constitutionalism was also compatible with a foreign model that revered antiquity, the British model, which became a point of reference for much of the Spanish Enlightenment. The perspective of the "Constitution of England" as a model of political freedom compatible with respect for historical institutions was born of the knowledge that the Spanish Enlightenment had of the commentators on the British political government. They were well acquainted with the references to the English Constitution in the works of John Locke, William Blackstone, Henry St. John Bolinbroke and above all David Hume, whose fame as a historian facilitated his knowledge by Spanish readers. Nor can we ignore the importance that some writings on political economy had in disseminating the English Constitution, starting with Adam Smith³⁸, but also texts by Anglophile French authors, such as Jacques Necker, whose *Compte Rendu*³⁹ was well known to the Spanish Enlightenment⁴⁰. It was precisely the French speaking authors - even more than the British - who spread the English Constitution among the Spanish Enlightenment, in particular Voltaire, Montesquieu and Jean-Louis De Lolme. Nor should we forget the references to the English Constitution made by Italian authors who were widely read in Spain, such as Gaetano Filangieri and Genovesi⁴¹. All this

³³ Gaspar Melchor de Jovellanos, 'Discurso leído por el autor en su recepción a la Real Academia de la Historia, sobre la necesidad de unir al estudio de la legislación el de nuestra historia y antigüedades' (4 February 1780), in Jovellanos, Gaspar Melchor de: *Obras publicadas e inéditas de Jovellanos*, vol. XLVI (I), Biblioteca de Autores Españoles Madrid, 1858, pp. 288-298.

³⁴ Gaspar Melchor de Jovellanos, 'Elogio de Carlos III, leído en la Real Sociedad Económica de Madrid el día 8 de noviembre de 1788', in Jovellanos, Gaspar Melchor de: *Obras completas*, vol. X (*Escritos económicos*), Instituto Feijoo de Estudios del Siglo XVIII, Gijón, 2008, p. 674.

³⁵ Amor de Soria, *Enfermedad crónica y peligrosa de los reinos de España y de las Indias: sus causas naturales y sus remedios* (1741). Maravall, José Antonio: "Las tendencias de reforma política en el siglo XVIII español", *Revista de Occidente*, no. 52, 1967, pp. 68-69.

³⁶ Robertson, William: *History of the Reign of Charles the Fifth* (1769), George Routledge & Co, London, 1857, pp. 66-75.

³⁷ Fernández Sarasola, Ignacio: *El pensamiento político de Jovellanos. Seis estudios*, In Itinere, Oviedo, 2011, pp. 36-37.

³⁸ On Smith's idea of the English Constitution, see his reflections in Smith, Adam: *Lecciones de Jurisprudencia* (1762-1766), Centro de Estudios Políticos y Constitucionales, Madrid, 1996, pp. 40-48. The transition between the political economy that guided the Spanish Enlightenment and constitutionalism is still a little explored terrain, as Portillo Valdés, José María has pointed out: "Constitucionalismo antes de la Constitución: la Economía Política y los orígenes del constitucionalismo en España", *Nuevo mundo, mundos nuevos*, núm. 7, 2007.

³⁹ Necker, Jacques: *Compte Rendu au Roi*, Imprimerie Royale, Paris, 1781,

⁴⁰ Astigarraga, Jesús: "Necker en España, 1780-1800", *Revista de Economía Aplicada*, vol. VIII, no. 23, 2000, pp. 119-141.

⁴¹ Astigarraga, Jesús: "Political Economy and Legislation. The great success of Filangieri's *Scienza della legislazione* in Spain (1780-1839)", *Nuevo Mundo, nuevos mundos*, no. 6, 2006; Astigarraga, Jesús: "La Ilustración napolitana imputada: críticas y censuras a la *Scienza della legislazione* de G. Filangieri en España (1780-1839)", *Nuevo Mundo, nuevos mundos*, no. 6, 2006. Filangieri en la España de finales del siglo XVIII", *Nuevo Mundo, nuevos mundos*,

influence was reflected in the production in 1785 of a Spanish work dedicated monographically to describing the government of England, the work of the Duke of Almodóvar.⁴²

In the midst of the debate on historical constitutionalism, the Spanish Enlightenment was surprised by the birth of a new concept of Constitution, the rational-normative⁴³, closely linked to iusrationalist ideas. The Spanish Enlightenment was then immersed in a dichotomy between two different conceptions of the Constitution: a historical one and an iusrationalist one. They reacted to this dilemma in different ways: in some cases, considering that both constitutional ideas were incompatible; in others, trying to reconcile them, conceiving the constituent processes as reforms of the old Fundamental Laws.

In any case, the arrival of the new foreign constitutional experiences did not meet with a unanimous reception among the Spanish Enlightenment. The reception of French constitutionalism was not to the liking, for example, of Campomanes, who considered that the new political order of the neighbouring country destroyed the old historical French Constitution, changing everything at once, erasing the old system “and replacing an entirely new one founded on speculations and exposed to the contingencies of novelty”⁴⁴.

For his part, another of the protagonists of the Spanish Enlightenment, Jovellanos, would not take such a dim view of the new rational-normative Constitutions. Although his preferred model was above all England -something he would maintain until the 19th century- he found some virtues in the French Constitution of 1791, even though he considered that this constitutional model was impracticable in Spain until it reached, at least, a level of government similar to that enjoyed in Great Britain⁴⁵. However, he found the French text of 1795 (Constitution of the year III) “admirable”⁴⁶; and he did not fail to read, and even to excerpt, the Constitution of the State of Massachusetts⁴⁷. Moreover, in his eagerness to be well informed about political developments in the most advanced nations, he made an effort to locate the US Constitution⁴⁸. This American constitutionalism was also well known to Valentín de Foronda, consul in Philadelphia,

no. 7, 2007; Astigarraga, Jesús: "Victorián de Villava, traductor de Gaetano Filangieri", *Cuadernos Aragoneses de Economía*, vol. 7, no. 1, 1997, pp. 171-186.

⁴² Almodóbar, Duque de: *Constitución de Inglaterra (1785)*, Centro de Estudios Políticos y Constitucionales, Madrid, 2000,

⁴³ I use the concept in the sense defined by Manuel García Pelayo, as a formal Constitution, derived from a constituent process, as opposed to the historical and sociological concepts of Constitution. García Pelayo, Manuel: *Derecho Constitucional Comparado*, Revista de Occidente, Madrid, 1951, pp. 34-38. On these concepts of Constitution in the historical evolution, I refer to Fernández Sarasola, Ignacio / Varela Suanzes-Carpegna, Joaquín: *Conceptos de Constitución en la historia*, Junta General del Principado de Asturias, Oviedo, 2010, vol. vol. 6.

⁴⁴ Rodríguez de Campomanes, Pedro: "Reflexiones sobre la política exterior" (1792)", Coronas González, Santos Manuel, *Campomanes. Inéditos Políticos*, Junta General del Principado de Asturias, Oviedo, 1996, pp. 165-166.

⁴⁵ *Letter to Alexandre Jardine* (Gijón, 21 May 1794), in Jovellanos, Gaspar Melchor de: *Obras completas*, vol. III: *Correspondencia*, 2nd, Instituto Feijoo de Estudios del Siglo XVIII, Gijón, 1986, p. 636.

⁴⁶ Jovellanos, *Diario* (29 November 1795), in Jovellanos, Gaspar Melchor de: *Obras completas*, vol. VII: *Diario*, 2º, Instituto Feijoo de Estudios del Siglo XVIII, Gijón, 1999, p. 488.

⁴⁷ Clément, Jean-Pierre, *Las lecturas de Jovellanos (Ensayo de reconstrucción de su biblioteca)*, op. cit. Jovellanos would have read this text from a French translation published in *Le Ciourrier de l'Europe*, vol. VII, no. 31, April 1780. According to Somoza, he made an extract of eleven folios. Somoza, Julio, *Catálogo de manuscritos e impresos notables el Instituto de Jovellanos en Gijón*, op. cit. p. 55.

⁴⁸ Jovellanos, *Diario*, (9 April 1797), in Jovellanos, Gaspar Melchor de, *Obras completas*, vol. VII: *Diario*, 2º, op. cit., p. 708.

and very possibly influenced his idea that liberty, property and security were the wellsprings of the happiness of the State⁴⁹.

The Polish Constitution -in fact the first in Europe, preceding by a few months the French Constitution of 1791, whose constituent debates would be known in Poland⁵⁰- would also circulate in Spain, even through official channels. The documentation of Pedro Normande, Spain's Minister Plenipotentiary in Poland, includes the transfer to the Count of Floridablanca of a copy of the Constitution of that country⁵¹. Campomanes, who, as we have seen, did not like the French Constitution, did like the Polish one. A law which, according to him, would have enabled the Polish people to escape from slavery, reducing the hitherto unbridled power of the nobility⁵².

The Spanish Enlightenment scholars not only debated and analysed foreign Constitutions in Spain, but in some cases also did so in the very countries where they had been drafted. For example, the Asturian soldier Miguel Froilán Rubín de Celis reflected on the French Constitution in France itself. Emigrated to Bayonne, for reasons that are not well known, Rubín de Celis experienced the outbreak of the French Revolution at close quarters, of whose principles he declared himself an advocate to the point of writing various pamphlets aimed at extending its influence in Spain⁵³. Despite his admiration for the new political order established in France, Rubín de Celis criticised the Constitution of 1791, not for considering it excessively advanced (as other less radical Enlightenment writers, such as Campomanes and Jovellanos, saw it) but just the opposite: for understanding that many of its articles were not really revolutionary and distanced themselves from the teachings of Rousseau and Mably. Hence, the Asturian Enlightenment writer severely criticised the French Constitution, although his analysis was intended to be something more, setting out a plan adaptable "to all peoples who wish to be and remain free"⁵⁴.

Rubín de Celis' discourse fully assumed the modern meaning of Constitutions. However, he went further, considering that the character of "fundamental law" should only be attributed to the bill of rights, as well as to the basic regulation of the separation of powers. Everything else, in particular the organisational and functional aspects of the institutions, were to be merely "regulatory" provisions, which were not to be included in a constitution and were to be regulated by a law. He thus drew the line between constitutional and legal matters.

⁴⁹ Foronda, Valentín de: *Carta sobre los asuntos más exquisitos de la economía política, y sobre las leyes criminales*, Imprenta de Manuel González, Madrid, 1789, vol. I, p. 6. Foronda's link with American constitutionalism, in Maravall, José Antonio: "Las tendencias de reforma política en el siglo XVIII español", *op. cit.*, p. 79.

⁵⁰ Palka, Beata Maria: "La Costituzione Polacca del 3 maggio 1791: tra tradizione e modernità", *Historia Constitucional*, no. 6, 2005, pp. 285-329.

⁵¹ Despachos de Pedro Normande, Ministro Plenipotenciario de España en Polonia, sent to José Moñino, Conde de Floridablanca y Secretario de Estado y del Despacho de Estado. AHN, State, 4382. Later documents informed Floridablanca of the creation of the Targowice Confederation against the Constitution. Despachos de Miguel Cuber, Minister Plenipotentiary of Spain in Poland, sent to the Count of Floridablanca and the Count of Aranda, Secretaries of State, AHN, Estado, 4423. For his part, Godoy would receive several chapters of the constitutional text translated into French two years later: Despachos de Leonardo Gómez de Terán, Encargado de Negocios de España en Polonia, sent to Manuel Godoy, Duque de Alcudia y Secretario de Estado y del Despacho de Estado, AHN, Estado, 4376.2.

⁵² Llombart, Vicent: *Campomanes, economist and politician of Carlos III*, Alianza, Madrid, 1992, p. 319.

⁵³ A portrait of Rubín de Celis in Posac Mon, Carlos: "Proceso inquisitorial de Miguel Rubín de Celis, oficial de la guarnición de Melilla (1770)", *Aldaba*, no. 22, 1993, pp. 167-184.

⁵⁴ Rubín de Celis, Miguel: "Discurso sobre los principios de una Constitución libre (1792)", Elorza, Antonio, *Pan y Toros y otros papeles sediciosos de fines del siglo XVIII*, Ayuso, Madrid, 1971, p. 51.

It was precisely the way in which powers were distributed in the French Constitution of 1791 that Rubín de Celís criticised the most. A supporter of republicanism (the Monarchy seemed to him to contradict the principle of equality), the enlightened Asturian was horrified by the powers that the French Constitution conferred on the King. In particular, he was irritated by the suspensive veto with which the King could temporarily stop laws, since he believed that this power allowed the general will of the nation to depend on a single subject who for that very reason became the supreme organ⁵⁵. Above all, because the king was also protected by the exorbitant privilege of inviolability, which could lead to tyranny. It is worth noting that the rejection of the royal veto would be put forward, with almost identical arguments, by the Count of Toreno in the Cortes of Cadiz⁵⁶.

The organisation of the National Assembly envisaged in the French Constitution of 1791 did not satisfy Rubín de Celís either. The Asturian's proposal was to organise Parliament according to an assembly system, in which Parliament would concentrate powers. Thus, the National Assembly was to be divided into three bodies: one executive ("Poder de acción") and two legislative bodies ("Comisión de la voluntad nacional" and "Comisión de conformidad con la voluntad nacional"). The latter two legislative chambers were to be called the "Voluntad Nacional" instead of the National Assembly. These ideas, by the way, were very similar to those defended by Valentín de Foronda⁵⁷.

The bicameralism devised by Rubín de Celis was intended to replace the royal veto, which he detested. Under his system, both Houses were to participate in the formation of the law, and if the latter introduced the veto, a referendum was to be held, which would decide in the final instance. This referendum was to be added to other institutes of direct participation, such as the right of petition, with which he sought to avoid that evil that Rousseau had already referred to: that in large states the general will had to be, necessarily, represented.

Although the text of the enlightened Asturian radical was conceived as an alternative to the French Constitution of 1791, he himself considered it to be valid for all free peoples, and thus opted for a universal model that in the 19th century would be characteristic of some Spanish constitutional projects. But Rubín de Celis wanted these same ideas to be applied to Spain: he tried to indoctrinate members of the Spanish army who had deserted in the Convention War, whom he tried to instruct in French revolutionary thought⁵⁸. In any case, the Asturian's project shows that in revolutionary France it was not necessary to be a great philosopher or jurist to propose political reforms, at a time when everyone considered themselves participants in the *res publica*⁵⁹.

Alongside Rubín de Celis, another Spaniard who emigrated to France proposed a radical reform of the 1791 Constitution, in this case in a republican and federal sense. This was José Marchena. In Bayonne he was a member of various clubs (*Société des Frères et Amis réunis*, *Société des Amis de la Liberté et de l'Égalité*, *Club des Amis de la*

⁵⁵ *Ibid.*, pp. 57-62.

⁵⁶ *Diario de Sesiones*, n° 336, 3 September 1811, vol. III, p. 1751. On Toreno's rejection of the royal veto, see Varela Suanzes-Carpegna, Joaquín: *El Conde de Toreno. Biografía de un liberal (1786-1843)*, Marcial Pons, Madrid, 2005, p. 82.

⁵⁷ Fernández Sarasola, Ignacio: *Escritos políticos y constitucionales de Valentín de Foronda*, Servicio Editorial de la Universidad del País Vasco, País Vasco, 2002, pp. 74-75.

⁵⁸ Fuentes Aragonés, Juan Francisco: "Seis españoles en la Revolución francesa", Aymes, Jean-René, *España y la Revolución Francesa*, Alianza, Madrid, 1989, pp. 295-298.

⁵⁹ Scandellari, Simonetta: *Il "Discurso sobre una constitución libre" di Miguel Rubín de Celis, Bayona 1792*, Sassari, Università di Sassari, 1988, p.25.

Constitution and *Société Populaire de Bayonne*)⁶⁰. The first thing Marchena did, Marcelino Menéndez Pelayo claimed, “was to enlist in the Jacobin club of Bayonne, furiously adopting all the principles of the Mountain”⁶¹. An inaccurate characterisation of someone who repudiated Robespierre and who in reality was intellectually linked to Brissot de Warville and therefore to the Gironde.

It was to Jacques Pierre Brissot that Marchena sent a speech presented at the *Société des Amis de la Liberté et de l'Égalité* in Bayonne in which he set out “the basis of a legal Constitution”⁶²; a proposal to reform the French Constitution of 1791 in a republican and federal sense. Marchena proposed dividing the parliament into a House of Representatives and a Senate, renewable every two and six years respectively. Executive power would be exercised by the president of the legislature for six years, although he would not have the power to appoint ministers⁶³. Marchena's text also gave broad powers to the territorial departments, which would enjoy full autonomy in civil administration, tax collection and recruitment. A decentralising idea that was shared by the first constitutional projects drafted in Spain, but which did not please the Bayonne audience who, shouting “down, down!”, saw in Marchena's proposal an attempt to fragment the French nation⁶⁴.

The Girondin Brissot did not take the same view of the text, but he welcomed Marchena's text, commenting in glowing terms in his newspaper *Le Patriote Français*:

“It takes its foundations from the American Constitution and reforms them to adapt them to France. For example, it wants two chambers: one made up of representatives of the people and the other of senators appointed by the people, with one member for each department”⁶⁵.

Brissot added that it was worth reflecting on the Spaniard's proposal because it addressed a problem “on which the health of freedom depends”, which was none other than the way in which laws were passed. The French Constitution of 1791, in favour of unicameralism, guaranteed the rationality of its rules by subjecting them to three deliberations; however, after the first two, the Assembly could reject the law (Title III, Chapter III, Section II, Art. 5). Brissot feared that this power would leave legislative deliberations in the hands of one party, which would ultimately decide whether they should continue or not. Marchena's text at least, with the presence of a second chamber, seemed to solve this problem by subjecting laws always to double scrutiny.

⁶⁰ Richard, Antoine: “Un réfugié espagnol à Bayonne pendant la Révolution. Marchena et les Girondins”, *Bulletin de la Société des Sciences, Lettres et Arts de Pau*, vol. XLVI, 1923, pp. 14 and 17.

⁶¹ Menéndez Pelayo, Marcelino: *Estudios de crítica literaria*, Establecimiento Tipográfico Sucesores de Rivadeneyra, Madrid, 1900, p. 220.

⁶² Marchena, José: “Carta a Brissot” (Bayonne, 25-IX-1792), in Marchena, José: *Obra francesa*, Laetoli, Valencia, 2021, p. 10.

⁶³ It has not been possible to locate Marchena's project. Neither could Juan Francisco Fuentes, undoubtedly the best connoisseur of the figure of Marchena. I have obtained a summary of its contents from the reference made to it by Antoine Richard, who claims to have consulted the original, printed in Bayonne in 1792 by the Duhart-Fauvet printing house. Richard, Antoine: “Un réfugié espagnol à Bayonne pendant la Révolution. Marchena et les Girondins”, *Bulletin de la Société des Sciences, Lettres et Arts de Pau*, vol. XLVI, 1923, p. 14.

⁶⁴ Fuentes Aragonés, Juan Francisco: *José Marchena. Biografía política e intelectual*, Crítica, Barcelona, 1989, p. 93.

⁶⁵ *Le Patriote Français* No. 1131 (14-IX-1792), p. 304.

The attempt to improve the Constitution of 1791 -an imperfect work that contained in its bosom "the germ of a new revolution"⁶⁶ - was only the first step in the critique that Marchena made of the various phases of the "constitutional laboratory" that revolutionary France had become, consumed by constituent saturnism⁶⁷. His harshest criticisms were directed at the Convention, which he considered "the most unbearable tyranny"⁶⁸, personified in the deplorable figure of Robespierre⁶⁹. In this sense, he repudiated the concentration of powers that had taken place in the hands of the National Assembly during this period⁷⁰: "When we confuse the functions of the legislator with those of the executor of the laws, we ignore all the principles and can only contain anarchy with tyranny"⁷¹.

He was more sympathetic to the Directory, although its Constitution was also flawed, both formally ("the drafting is lamentable") and above all because of its enormous length, with superfluous articles that Marchena did not even consider to be truly constitutional articles. Even so, only this Constitution was on a par with the American one in terms of embodying the representative regime⁷².

In any case, Marchena personally suffered equally under both regimes: persecuted by the Convention, his criticism did not please the Directory either, which imprisoned him twice and condemned him to exile in the United States, although Marchena managed to be allowed to move to Switzerland, whose language at least was not unfamiliar to him⁷³.

In any case, exile allowed Marchena to defend radical proposals that would have been impossible in his native country. On the one hand, he defended freedom of the press as an instrument of political control⁷⁴, at a time when the Spanish Enlightenment only considered it as a mechanism for educating the people. Another aspect that was impossible to admit in 18th century Spain was republicanism, of which Marchena was a true champion, stating that "where there is any hereditary power there is no complete

⁶⁶ Marchena, José: "Algunas reflexiones sobre los fugitivos franceses desde el 2 de septiembre" (1795), in Marchena, José: *Obra francesa, op. cit.*, p. 50. The same approach in "Discurso sobre la nueva Constitución y sobre el decreto de los dos tercios" (1795), in *ibid.*, p. 63.

⁶⁷ Martucci, Roberto: "La Constitución inencontrable. Conflicto político y estabilización constitucional en Francia durante la transición de la Monarquía a la República (1789-1799)", in Varela Suanzes-Carpegna, Joaquín, *Modelos constitucionales en la historia comparada*, Fundamentos, núm. 2, Junta General del Principado de Asturias, Oviedo, 2000, p. 166.

⁶⁸ Marchena, José: "Cuidado con el Gobierno de Robespierre" (1795), in Marchena, José: *Obra francesa, op. cit.*, p. 31.

⁶⁹ Marchena, José: "Algunas reflexiones sobre los fugitivos franceses desde el 2 de septiembre" (1795), in *ibid.*, p. 49.

⁷⁰ Marchena, José: "No a un gobierno revolucionario" (1795), in *ibid.*, pp. 32-35; id., "Reflexiones sobre el proyecto de ley de Thibaudeau y sobre sus consecuencias, dirigidas a los pensadores, por un patriota" (n.d.), in *ibid.*, p. 42.

⁷¹ *Ibid.*, p. 40.

⁷² Marchena, José: "Sobre las próximas elecciones" (1797), in *ibid.*, p. 128.

⁷³ Marchena, José: "Carta de desde la cárcel" (1799), in *ibid.*, pp. 218-220.

⁷⁴ Marchena, José: Reflexiones sobre el proyecto de ley de Thibaudeau y sobre sus consecuencias, dirigidas a los pensadores, por un patriota" (n.d.), in *ibid.*, pp. 37-39; id., "Los escritores en los pueblos libres" (1797), in *ibid.*, p. 107. The aim of the press was, for Marchena, to shape public opinion politically, characterised by a reflective element which he felt was lacking in what he disparagingly referred to as "opinion of the vulgar". Marchena, José: "Discurso sobre la nueva Constitución y sobre el decreto de los dos tercios" (1795), in *ibid.*, p. 63; *idem*, "Sobre las próximas elecciones" (1797), in *ibid.*, p. 127; *idem*, "A la nación francesa" (1797), in *ibid.*, p. 176.

freedom"⁷⁵. The presence of a hereditary head of state was incompatible with the political equality born of the social pact⁷⁶, so that it could only be legitimised in religious terms⁷⁷, which made it the most abusive and pernicious of institutions, and one that philosophers could only despise⁷⁸. Precisely one of Marchena's harshest criticisms of the 91 Constitution derived from the fact that it maintained the Monarchy, incompatible with the regime of freedom it established.⁷⁹

Finally, Marchena's admiration for the American constitutional system, which he considered to be the paradigm of liberty⁸⁰ and "the most beautiful work of philosophy"⁸¹. In it he saw two principles that he considered nuclear: the aforementioned republicanism, and the separation of powers in a situation of balance⁸². But he did not take a dim view of federalism either, which, in fact, he considered ideal even for Spain, given the difference in customs and habits among its territories⁸³.

In short, as we have seen foreign constitutional experiences and doctrines - England, the United States, Poland and France- were known to the Spanish Enlightenment. It is not surprising that in this context of constitutional immersion some of their most advanced representatives began to formulate their own constitutional drafts. These were obviously texts produced by private individuals, very rudimentary both in their systematics and in their content, which had in common their normative appearance, adopting an articulated form. Despite their embryonic nature, these drafts are a faithful reflection of the impact that American and French constitutionalism (to a lesser extent Polish) was having in Spain⁸⁴.

The Constitution as a social pact: the constitutional project of Manuel de Aguirre

The first constitutional project designed in Spain was conceived at a very early date: no less than in 1786, that is, even before the US Constitution saw the light of day. Its author was Manuel de Aguirre (1786-¿1800?), a figure who has received little attention in Spanish historiography⁸⁵. A member of the military career (first in the Bourbon Cavalry Regiment, later as Colonel-in-Chief of the Queen's Regiment and finally as brigadier and

⁷⁵ Marchena, José: "Interrogatorio" (1794), in *ibid*, p. 21. See also *ibid*, "Sobre las próximas elecciones" (1797), in *ibid*, pp. 123-124.

⁷⁶ Marchena, José: "Los escritores en los pueblos libres" (1797), in *ibid.*, pp. 103-104.

⁷⁷ Marchena, José: "Ensayo de teología" (1797), in *ibid.*, p. 199.

⁷⁸ Marchena, José: "A la nación francesa" (1797), in *ibid*, p. 176.

⁷⁹ Marchena, José: "To the editor of *Les Nouvelles Politiques*" (1795), in *ibid*, p. 47; *ibid*, "On the forthcoming elections" (1797), in *ibid*, p. 127.

⁸⁰ Marchena, José: "Discurso sobre la nueva Constitución y sobre el decreto de los dos tercios" (1795), in *ibid*, p. 62.

⁸¹ Marchena, José: "Los escritores en los pueblos libres" (1797), in *ibid*, p. 104.

⁸² Marchena, José: "Marchena a las Asambleas Primarias" (1795), in *ibid.*, p. 69.

⁸³ Marchena, José: "Memoria al ministro Lebrun" (1792), in *ibid.*, p. 15.

⁸⁴ The constitutional projects analysed here can be consulted in Fernández Sarasola, Ignacio: *Proyectos constitucionales en España (1786-1824)*, Centro de Estudios Políticos y Constitucionales, Madrid, 2004, pp. 5-72.

⁸⁵ The figure of Aguirre has been substantially recovered from oblivion by Antonio Elorza. Elorza, Antonio, *La ideología liberal en la Ilustración española*, *op. cit.*, pp. 263-292. Antonio Elorza, 'Estudio Preliminar' in Aguirre, Manuel de: *Cartas y discursos del Militar Ingenuo al Correo de los Ciegos de Madrid*, Graficas Izarra, San Sebastián, 1974.

marshal), he joined the Sociedad Vascongada de Amigos del País in 1770, in which he took an active part from 1776. His most outstanding contribution took place in 1780, when he presented his book *Indagación y reflexiones sobre la geografía, con algunas noticias previas e indispensables*, which earned him the titles of Literary Member of the Sociedad Vascongada and Academician of the Real Academia de la Historia. From that time onwards, his intellectual activity was directed towards other societies, especially the Sociedad Económica Aragonesa and the Sociedad Matritense. It was precisely the latter that promoted Manuel de Aguirre's constitutional project.

In 1786, Charles III's consul in Lisbon, José del Río, announced a prize for the best essay answering the question “What should be the true spirit of legislation to promote Agriculture, Industry, Arts and Commerce in a great kingdom, by contracting the rules that are indicated to the extension of Spain's dominions in relation to the diversity of its climates, its natural productions and the national character of its inhabitants?”. A subject clearly inspired by the Enlightenment, in which the imprint of the theory of climates popularised by Montesquieu was evident, although it was also disseminated by other authors such as Voltaire and David Hume⁸⁶.

Manuel de Aguirre applied for the prize, participating with a “Discurso sobre legislación”, signed with the anagram “Leunam d'Erriuga”. Within the speech he introduced his project for a Constitution, in a rational-normative sense, distancing himself from the Aristotelian concept of Constitution that he had used in previous writings. Although Aguirre's work did not win the prize for which he had competed, it saw the light of day in 1787, in “El Correo de los ciegos de Madrid”. Manuel de Aguirre had begun to contribute to this newspaper at the end of 1786 under the pseudonym of “El Militar Ingenuo”.

The precocity of Manuel de Aguirre's constitutional project is surprising. At that time, the Constitutions of the newly independent American colonies⁸⁷, apart from the Articles of Confederation (1777) and, of course, the Virginia Declaration of Rights (1776), could hardly have been references. These documents were not widely available in Spain, but may have been known through their circulation in France, where they were translated on more than a dozen occasions⁸⁸. Particularly notable are the references to the Pennsylvania Constitution by Brissot de Warville in his *Bibliothèque Philosophique du législateur, du politique et du jurisconsulte* (Paris, 1782, 10 vols.), a well-known work among the Spanish Enlightenment (included, for example, in the Biblioteca de Meléndez Valdés)⁸⁹. Brissot considered the Pennsylvania text as a model of “excellent government”⁹⁰ and his reflections were instrumental in spreading American political

⁸⁶ Courtois, Jean-Patrice: “La teoría de los climas en Montesquieu, Hume y Voltaire (Un problema de gramática histórica del Siglo de las Luces)”, *Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidade* núm. 36, 2016, pp. 131-163.

⁸⁷ Namely the Constitutions of New Hampshire (5 January 1776), South Carolina (26 March 1776 and 19 March 1778), New Jersey (2 July 1776), Virginia (29 June 1776), Delaware (21 September 1776), Pennsylvania (28 September 1776), Maryland (11 November 1776), North Carolina (18 December 1776), Georgia (5 February 1777), New York (20 April 1777) and Vermont (8 July 1777).

⁸⁸ Bourne, Henry E.: “American Constitutional Precedents in the French National Assembly”, *American Historical Review*, no. 8, 1902-1903, pp. 466-486. See also the references by Jellinek and Boutmy in the same vein. Jellinek, George / Boutmy, Émile: *Orígenes de la Declaración de derechos del hombre y del ciudadano*, Editora Nacional, Madrid, 1984.

⁸⁹ Demerson, Georges: *Don Juan Meléndez Valdés et son temps (1754-1817)*, C. Klincksieck, Paris, 1961, p. 63.

⁹⁰ Brissot de Warville, Jacques-Pierre: *Bibliothèque philosophique, du législateur, du politique, du jurisconsulte*, Chez Desauges, Berlin-Paris, 1783, p. 234. Brissot's views in this work are to be found in the chapter entitled “Réflexions sur le Code de Pensylvanie”, pp. 233-238. The Constitution is translated into French on pp. 259-302.

ideas in France itself, marking the path of Gallic constitutionalism⁹¹. Before Brissot's text, the American Constitutions had been translated by Louis-Alexandre de La Rochefoucauld d'Enville⁹², who had received them from Benjamin Franklin⁹³, thus forming the first French translation of constitutional documents produced on the other side of the Atlantic⁹⁴. It is difficult to know whether this text might also have been known to the Spanish Enlightenment scholar, although it seems to have had little circulation in Spain.

Aguirre's draft uses a periphrasis as a title: the normative project is not simply called "Constitution", but "Constitutional Laws", although at the end of the text the author uses a different term: "Constitutional Code". The mixture of the noun "Laws" with the adjective "Constitutional" reflects the original nature of the text, in which the transition between two conceptions can be seen: that of the Fundamental Laws (in the plural) and that of the Constitution (as a univocal concept)⁹⁵. For its part, the use of the term "Constitutional Code" shows that the constitutional norm was still considered as a task of normative codification, something which in Spain would not begin to be overcome until 1809, with the constitutional project of Álvaro Flórez Estrada, in which the Constitution was no longer identified as a code, but as a norm from which all the normative codes of the country were to emanate.

The starting point of Manuel de Aguirre's project is unequivocally Hobbesian. The origin of the social pact was to be found in the intrinsic evil of man in the state of nature ("state of independence", in Aguirre's words), conceived as a hostile situation that had to be overcome. But, unlike Hobbes, the social pact through which the state of nature was abandoned would not entail the concentration of power in a single subject, but its attribution to the social body born of the same pact. Obviously, on this point Aguirre was following Rousseau. An author whose influence had been felt in Spain since the mid-18th century⁹⁶, although his *Contract Social* was not translated into Spanish until 1799 by José Marchena⁹⁷.

Unlike the American Constitutions, which began by establishing the Bill of Rights and then set out the form of government, Aguirre reversed the terms. It included first a very basic system of division of powers, in which the executive function would be vested in a single subject (the "Supreme Head of Society"), the legislative function would be shared by the latter and representative bodies (a "Council of State" and provincial

⁹¹ Dippel, Horst: *Constitucionalismo moderno*, Marcial Pons, Madrid, 2009, pp. 63-64.

⁹² De La Rochefoucauld d'Enville, Louis-Alexandre: *Constitutions des treize États-Unis de l'Amérique*, Ph.-D. Pierres, Paris, 1783. Pierres, Paris, 1783.

⁹³ Dippel, Horst: "Constitutional Documents of the United States of America, 1776-1860, Part I: National Constitutions / State Constitutions (Alabama-Frankland)", Dippel, Horst, *Constitutions of the World from the Late 18th Century to the Middle of the 19th Century*, K.G. Saur, München, 2006, vol. Part I: National Constitutions / State Constitutions (Alabama-Frankland), p. 42. Correspondence between Franklin and the Duke de La Rochefoucauld concerning the translation of the American Constitutions can be found in Cohn, Ellen R.: *The Papers of Benjamin Franklin*, Yale University Press, Connecticut, 2008, vol. 39, pp. 375-378.

⁹⁴ Kloppenberg, James T.: *Toward Democracy. The Struggle for Self-Rule in European and American Thought*, Oxford University Press, New York, 2016, p. 452.

⁹⁵ A transition that would later become evident in the Cadiz constitutional experience. Tomás y Valiente, Francisco: "Génesis de la Constitución de 1812. I. De muchas leyes fundamentales a una sola Constitución", *Anuario de Historia del Derecho Español*, no. 65, 1995, pp. 13-126.

⁹⁶ Spell, Jefferson Rea: *Rousseau in the Spanish world before 1833*, Gordian Press, Austin, 1938.

⁹⁷ Domerge, Lucienne: "Notes sur la première édition en langue espagnole du Contrat social (1799)", *Mélanges de la Casa de Velázquez*, no. 2, 1967, pp. 375-416. Fuentes Aragonés, Juan Francisco, José Marchena. *Biografía política e intelectual*, op. cit., pp. 182-186.

“Councils of State”), while the judicial function would be in the hands of magistrates proposed by the Council of State and appointed by the Supreme Head.

The political system was still far from radical, as evidenced by the procedure by which representative bodies were elected. Thus, the Provincial Councils of State would be made up of deputies proposed by “the respective classes” of counties and cities, but their election was the responsibility of the Supreme Leader. Similarly, the members of the national Council of State were to be proposed by the Provincial Councils but, once again, their appointment was to be approved by the Executive. In this way, Aguirre seemed to be designing a limited Monarchy, in which the Head of State restricted his functions through bodies -central and provincial- in whose composition he himself participated.

Even so, the Council of State would enjoy a certain degree of autonomy from the moment of its formation, since from then on it, and only it, could decide when to end its term of office. This provision was the consequence of its important functions: it was a body representing “the voice of the whole people and its general will”, a term obviously borrowed from Rousseau. As a representative of the general will, it is logical that the Council of State should participate in the drafting of laws. However, this participation was of a very different nature to that advocated by Rousseau. For Manuel de Aguirre, the legislature had to be shared between several bodies, so that the law was born of the confluence of three wills: that of the Council of State, that of the Provincial Councils and that of the Supreme Leader. A confluence that would also be required for the establishment of taxes, considered as the price that citizens had to pay so that their personal security would be guaranteed. The fact that Aguirre divided the legislative power into several bodies meant that he favoured the idea of constitutional balance, possibly as a result of the influence of British constitutionalism, which was present in Spain even before the arrival of Montesquieu⁹⁸.

The greatest radicalism of the constitutional project is to be found in the regulation of rights and freedoms. A regulation that is riddled with philosophical disquisitions, as befitted the origin of the document, a competition of ideas. His approach entailed subjecting individual liberty to the public interest, as is clear from his conception of the right to property. Far from giving property a sense of absolute right, or considering it a basic and almost unlimited right (as did John Locke and, in Spain, Valentín de Foronda), Aguirre subjected it to “the health of the people” which, as he himself added in the constitutional preamble, was “the supreme law” by which society was to be guided. As a result, the owner would be restricted in his “*ius abutendi*”, so that improper use of property allowed the state to intervene. Aguirre included another limit in the case of agricultural property: a distribution of it would be imposed, so that no one could have more land than he was able to cultivate. A redistributive stance, which would push the theories of agrarian reform to their limits and would seek to eliminate wasteland, guaranteeing the use of arable land.

The rules relating to religion in Aguirre's constitutional code were also radical. Donations from private individuals destined for worship were to form part of a single fund, administered by the state, which would be responsible for distributing the money among the clergy for their private support and that of the churches. This was a “regalista” proposal that Aguirre complemented with a clear spirit of religious tolerance: in his project he spoke of “the humane reception of all kinds of people”, affirming that only conduct that disturbed public tranquillity should be repressed in matters of religion. In

⁹⁸ Maravall, José Antonio: “Las tendencias de reforma política en el siglo XVIII español”, *Revista de Occidente*, no. 52, 1967, p. 71.

this sense, his position was similar to Locke's, when he stated that the state could only intervene in religious worship when it caused harm to the community or damage to the life or property of the subjects⁹⁹.

Nor did Aguirre forget to protect the inviolability of the home and personal freedom in his constitutional project. These freedoms could only be disturbed when there was criminal evidence or a complaint made under oath. All criminal investigations were subject to rules based on the new Criminal Law formulated by Gaetano Filangieri and Cesare Beccaria, and later assimilated in Spain by Valentín de Foronda and Manuel de Lardizábal y Uribe. In this sense, procedural rights were one of the main aspects of Aguirre's project: the accused would have the right to be informed of the accusation, to choose a lawyer to defend his cause, to a confrontation with the accuser and to the examination of witnesses. A whole range of guarantees that did not exist in 18th century Spanish criminal trials, which were still immersed in the obscurantism of anonymous accusations and inquisitorial trials¹⁰⁰.

The procedural rights mentioned by Aguirre affected judicial organisation. The defendant had the right to a prompt administration of justice, to an impartial judge and to have the proceedings heard by the judge with jurisdiction over the territory. Judicial impartiality was closely linked to the independence of the judges, which was expressly recognised in the draft and for whose guarantee Aguirre envisaged that the magistrates would be paid exclusively from the public purse, being strictly forbidden to receive any amount from the parties to the proceedings. A position, incidentally, that Jovellanos had once put into practice when he was *Alcalde del Crimen* (a criminal justice) in Seville¹⁰¹. For its part, judicial competence "by reason of territory" was complemented by the suppression of special jurisdictional privileges, which Aguirre's project also insisted on, in order to eradicate inequality among Spaniards. Something that not even the Cortes of Cadiz would manage to achieve in its entirety, by maintaining the military and ecclesiastical jurisdictions (arts. 249 and 250).

Conclusions

Manuel de Aguirre's constitutional project is surprising for having been conceived at a very early date, 1786. At that time, the only examples of Constitutions of which Aguirre was aware were those of the former British colonies in America, but which were not readily available in Spain. The date is also surprising because in the reign of Charles III the Spanish Enlightenment was more inclined towards positions close to enlightened despotism or, in his case, towards admiration of the British regime, whereas Aguirre's project was more radical. A radicalism that was not known in Spain until the French Revolution took place.

The draft, heavily influenced by the theories of Rousseau, was still very embryonic. On the one hand, its very title was confusing, as Aguirre sometimes referred to it as a "constitutional code" and at other times as "constitutional laws". But it also had a mixture of radical and more moderate components. Radicalism can be said to be found above all in the part devoted to rights and liberties, where in particular its approaches to private property are extremely modern, proposing a rational distribution of land

⁹⁹ Locke, John: *Letter on Toleration* (1689-1690), Tecnos, Madrid, 1994, p. 40.

¹⁰⁰ Ortego Gil, Pedro: *Entre jueces y reos: las postrimerías del derecho penal absolutista*, Dykinson, Madrid, 2015, pp. 115-150.

¹⁰¹ Ceán Bermúdez, Juan Agustín: *Memorias para la vida del Excmo. Señor D. Gaspar Melchor de Jovellanos, y noticias analíticas de sus obras*, Imprenta que fue de Fuentenebro, Madrid, 1814, p. 15.

ownership that would guarantee the exploitation of land. His religious tolerance and his extreme royalist approaches were also radical for the time.

Manuel de Aguirre's constitutional project is more balanced in the part devoted to constitutional bodies. Although he does not speak of a "king", but of a "supreme leader" (an idea which in itself is radical), the powers left in the hands of the executive were very important: it elected the members of the Provincial Councils and the Council of State, and drafted laws on an equal footing with these bodies. It is also moderate that the Provincial Councils and the Council of State were composed of citizens "of the different classes", i.e., it did not recognise representative equality, but rather a representation of the classes.

But, despite its somewhat rudimentary structure and content, Manuel de Aguirre's constitutional project is a document of enormous significance, because it reflects the fact that constitutional ideas in Spain predated the War of Independence by a long way. When the Cortes of Cadiz drafted the Constitution of 1812, they were heirs to a constitutional thinking that dated back to the end of the 18th century in Spain.