An Introduction to 19th century Portuguese Constitutional and State History

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Abstract

After several decades of official disinterest, contemporary history became a popular topic of Portuguese historiography in the late 1970s. However, attention was often directed towards socio-political aspects, with legal and constitutional aspects barely being examined at all. Although the situation has not changed dramatically, the area benefits indirectly from the interest that is being shown in the period. The following text brings together a group of works which deal, more or less directly, with the legal and institutional framework of 19th-century Portuguese history. The lack of any systematic treatment of the subject makes a synthesis or a critical bibliography far too hazardous a task, so that this contribution claims to be little more than an organized list of titles, with some brief comments.

Keywords

Contemporary history; Liberalism; Constitutionalism; Legal history; State history; Civil service; Administration; Law; Bureaucracy

1. In its traditional meaning, constitutional and state history has been a very understudied discipline.¹ Not even legal historians – or even jurists – have given it much attention.

1.1. 19th-century constitutional texts have been published several times from Lopes Praça (Praça, 1893, the most interesting and complete text) to Jorge Miranda, although this work does not

systematically include the constitutional proposals. Recently, I supervised the publication of a DVD with the sources for Portuguese constitutional history, which brings together not only the constitutional texts, but also the known constitutional proposals, the parliamentary discussion of the constitutions and the subsequent legislation to the Constitutional Charter, the integral versions of the texts of 19th-century Portuguese constitutional doctrine, including not only university lectures on the subject, and other relevant doctrinal works. Altogether, this amounts to roughly 30,000 pages of texts, with contextualizing introductions and search instruments. The indispensable daily parliamentary gazettes are also being published with their full texts on the website of the Portuguese parliament (http://debatas.parlamento.pt/monarquia.asp). Their history, however, with some references to the context of their appearance, is much poorer. In short, it was made by Marcelo Caetano (Caetano, 1965), based on older materials (Praca [J.L.], 1878, 1893; Laranjo [J. F.]. 1895). The best existing text is definitely that of Joaquim Gomes Canotilho, with some very interesting details of historico-constitutional interpretation (Canotilho [J. G.], 2002; summarized with some changes in Torgal [L. R.], 1998, 125-141). In the work Portugal contemporâneo (Reis [A.], 1988), I attempted (in collaboration with Johannes-Michael Scholz) to make a synthesis of what I understood to be the structure of the liberal state (Hespanha [A. M.], 1988a, 1988b). A much more exhaustive treatment of constitutional and State history was made by me in Guiando a mão invisivel. Direitos, Estado e Lei no Liberalismo monárquico Portuuguês, [Guiding the invisible hand. Regulations, State and the Law of Portuguese Liberal Monarchism], Coimbra, Almedina, 2004, a work in which, besides more current aspects in the bibliography of constitutional history, other aspects are also touched upon that are normally considered to be less current in this context, ranging from the dogmatic aspects of constitutional law – which historians tend to minimize, but which are enormously important for the image and exercise of power – to the “logical” aspects of power – to which jurists, on the other hand, unfortunately do not pay much attention. Mention should also be made of the respective chapter in História do direito português, by Nuno Espinosa Gomes da Silva (Silva [N. E. G.], 2000, 403-444), as well as the synthesis by Mário Reis Marques of 19th-century Portuguese law (Torgal [L. R.], 1998, 141-154).

2 There have been successive publications of Jorge Miranda (e.g. 1992, 2001), with minor differences; the best one is the last one (2001), as it includes lesser known texts such as some as yet unpublished constitutional proposals. The official proposals are now published on DVD [A. M. Hespanha and Cristina Nogueira da Silva] Fontes para a história constitucional portuguesa, FD-UNL, 2004; the same is true of some unofficial proposals, such as the one for the 1822 Constitution, Lisbon, Typ. Rollandiana, 1820 (“with the permission of the Constitutional Committee”, anonymous); the series of proposals related with the promise of a new Constitution, made by Dom João VI, in 1823 (Ricardo Raimundo Nogueira, José Maria Dantas Pereira, Francisco Manuel Trigosde de Aragão Morato) (cf. Dias [H.], 1987;); for the 1838 Constitution, the proposals of António José Lima Leitão and Santos Cruz (cf. Hespanha [A. M.], 2004b, Ch. 12.1.

3 A. M. Hespanha & Cristina Nigueira da Silva, Fontes para a história do direito constitucional portugues, Lisbon, Faculdade de Direito da Universidade Nova de Lisboa, 2004 (the same material is also available on the website of the Biblioteca Nacional de Lisboa).

4 The work by Paulo Ferreira da Cunha, História constitucional do direito português, Coimbra, Almedina, 1995, seeks to be precisely this – a Constitutional History of Portuguese Law – and not a history of Portuguese constitutional law, a subject to which, in any case, he dedicates roughly 200 pages (271-424), covering the vintista period and that of the First Chartism, without any great empirical innovation.
Detailed points regarding the history of constitutional texts have been (infrequently) touched upon by other historians. The constitutional proposals of the first liberal period have been dealt with by Paulo Merêa (1967), myself (1982) and Henrique Dias (1987). There is also a recent work by António Pedro Ribeiro dos Santos (Santos [A. P. R.], 1990) that gives a comprehensive view of power in the constitutionalism of this period.

1.2. Some aspects of constitutional dogma has been dealt with by legal historians and jurists; however, attention must be paid when reading them to possible contaminations by modern-day dogmatic viewpoints. When all is said and done, the best contributions towards a history of constitutional dogmatics continue to be the actual doctrinal texts of the period, complemented with the reading of parliamentary debates, in which questions of juridico-constitutional doctrine were frequently discussed: the theory of constituent power (its limits and contradistinction in relation to legislative power), contents of the constitution (“constitutional matters”), theory of civil and political rights, control of constitutionality (laws and acts of government), theory of dictatorship and of the bill of indemnity, division and limits of powers, ministerial responsibility, responsibility of the State and civil servants, discretionality of the acts of the executive and its limits, etc. At this level of constitutional dogmatics, it is frequently necessary to resort to the history of ideas, although it is not always clear that this approach produces reliable results at the level of juridico-constitutional history, since jurists do not always passively accept the ideas originating from political theory. Here too – as is suggested by the theory of reception – the received sense is more influential than the original sense. In any case, the following texts should be consulted: Araújo [F.], 2001 (on freedom); Ribeiro (M. M. T.), 1990b; Sobral (M. R. R.), 1985 (all of them about political, civil and economic rights); Santos (M. H. C.), 1982b (on happiness); Ribeiro (M.M.T), 1984; Tengarrinha (J.), 1992, 1993; Costa (J.R.), 1976; Machado [J. E.], 2002; Montes (J. B. C.), 1988; Castro (Z. M. O.), 1993; Rebelo (O.S.O.V.), 1987 (all of these texts are about freedom, in its various aspects); Pereira [J. E.], 1991; Vargues (I. N.), 1997 (on nationhood).

2. However, constitutional history is not only a history of texts or a history of concepts and doctrines. It is also a history of political practices, from which normative models for the constitutional organization of society are derived. So that it therefore has to be seen in the context of: (i) the general history of the period; (ii) its political history; (iii) its institutional history. In relation to this latter aspect, the distinction between institutions of public law or private law is not very relevant.  

2.1. For the general history of the 19th century in Portugal, the best contributions to date are the respective volumes (vols. V and VI) of História de Portugal, edited by José Mattoso (respectively,  

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5 Almeida ([C. A. N.], 1987); Almeida ([V. R.], 1990), Correia ([M. L. C. A. A. P.], 1988); Esteves ([M. A. A.], 1985); Estorninho ([M. J. R.], 1986); Homem ([A. P. B. C.], 1985); Novais ([A. J. P. R.], s/d); Pereira ([M. P. C. S.], 1987); Simão ([J. A. P.], 1990); Sousa ([A. F.], 1986); Rocha ([M. M.], 1984). See also the (law) thesis of Cristina Queirós, (Queirós (M. M. C.), 1990).