



NATIONAL RESEARCH UNIVERSITY
HIGHER SCHOOL OF ECONOMICS

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**THE CONCEPTS OF
FUNDAMENTAL LAWS AND
CONSTITUTION IN THE 18TH
CENTURY RUSSIA**

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: HUMANITIES
WP BRP 169/HUM/2018

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THE CONCEPTS OF *FUNDAMENTAL LAWS* AND *CONSTITUTION* IN THE 18TH CENTURY RUSSIA

In this article, we attempt to trace the semantic changes two key concepts of the Modern period - fundamental law and constitution underwent at the 18th century and investigates how these European concepts were adapted and used in the Russian political language. The concept of the constitution and fundamental laws in eighteenth-century political discourse had differing connotations: while the constitution was used mainly to describe the form of government, the concept of fundamental laws referred to historically developing legal traditions which have been adopted as norms of political law. The most radical vision of constitution in the 18th century went further than identify it with the fundamental law, demanding that the latter should enshrine the principles of civil rights and liberties of the Nation, and the legal guarantees thereof. However, this radical view, arising at the end of the century, was far from universal, and the discussion around various understandings of this concept was still to continue for many years.

JEL Classification: Z

Keywords: constitution, fundamental laws, XVIIIth century, Enlightenment, Russia

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In the late 18th and early 19th century marked the ridge of change in political vocabulary – a change arising from the general transformation of the social order at that time. Reinhart Koselleck saw the “turning point” arrive at mid-18th century when “the classical topoi radically changed their meanings” and “old words started to mean new things, so that as they get closer to our modern times, they become so easily understandable that no translation is needed”². The notion of constitution is no exception here. Between the 1750s and the 1810s, it undergoes crucial transformation and acquires meanings close to our contemporary ones. *Constitution*, as Olivier Beaud has noted, is directly linked to the notion of *fundamental laws*, “il est difficile de faire une histoire du concept de constitution sans le mettre en relation avec le concept voisin de *lois fondamentales*”³. The changes that occurred to the notions of ‘constitution’ and ‘fundamental law’ came along with the general shift in the social and political vocabulary. These two concepts can only be understood when seen in comparison with their peers, especially the notions of ‘state’, ‘society’, ‘citizen’ and ‘liberty’.

In Europe and America, the history of the ideas of *constitution* and *fundamental law* (*lex fundamentalis*, *loi fondamentale*, *Fundamentalgesetz*) has been studied within the scope of *Begriffsgeschichte* and the agenda of the Cambridge school.⁴ Russian historiography cannot boast of many studies in the genesis of these notions⁵. In our article, we will attempt to trace the semantic

2 Koselleck R. Vvedenie. In: Slovar' osnovnykh istoricheskikh poniatii. Izbrannye stat'i v 2-kh tt. Vol.1 / Per. s nem. K. Levinson; sost. Iu. Zaretskii, K. Levinson, I. Shirle; nauchn.red. perevoda Iu. Arnautova. Moscow, 2014. P. 25.

3 Beaud O. L'histoire du concept de constitution en France. De la constitution politique à la constitution comme statut juridique de l'Etat (2009) // Jus Politicum. Autour de la notion de Constitution. 2009. n° 3. - <http://www.juspoliticum.com/L-histoire-du-concept-de.html>

4 Stourzh G. Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century // Ball T, Pocock J.G.A. (Ed.) Conceptual Change and the Constitution. Lawrence, 1988. P. 35–54; Mohnhaupt H., Grimm D. Verfassung. Konstitution, Status, Lex fundamentalis // Koselleck R. (Hrsg.) Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland. Bd. 6. Stuttgart, 1990. S. 831–862; Schmale W. La France, l'Allemagne et la Constitution (1789–1815) // Annales historiques de la Révolution française. Vol. 286. 1991. P. 459–481; Idem. Constitution, Constitutionnel // Reichardt R., Lüsebrink H.J. (Hrsg.) Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680–1820. H. 12. München, 1992. S. 31–63; Beaud O. L'histoire du concept de constitution en France. De la constitution politique à la constitution comme statut juridique de l'Etat (2009) // Jus Politicum. Autour de la notion de Constitution. 2009. n° 3. - <http://www.juspoliticum.com/L-histoire-du-concept-de.html>

5 See Makarov A.N. Uchenie ob osnovnykh zakonakh v russkoi iuridicheskoi literature XVIII i pervoi polovine XIX vv. In: Sbornik statei po russkoi istorii, posviashchennyi S.F. Platonovu. Petrograd, 1922. Pp. 370–381; Omel'chenko O.A. K probleme pravovykh form rossiiskogo absoliutizma vtoroi poloviny XVIII v. In: Omel'chenko O.A. Vlast' i Zakon v Rossii XVIII veka. Issledovaniia i ocherki. M., 2004. Pp. 111–141; Timofeev D.V. Konstitutsiia v Rossii pervoi chetverti XIX veka: poisk orientirov politicheskogo razvitiia. Vestnik Cheliabinskogo gosudarstvennogo universiteta. 2011. № 1 (216). Istoriia. Iss. 43. Pp. 23–32; Polskoy S. V. Konstitutsiia i fundamental'nye zakony v russkom politicheskom diskurse XVIII veka. In: «Poniatiiia o

changes these two key concepts underwent at the 18th century and investigate how these European concept were adapted and used in the Russian political language.

I.

The contemporary political concept of *constitution*, with *fundamental law* as its legal synonym, is a fairly recent development⁶. Three hundred years ago, the term had a legal, financial, religious, medical, physical or astronomical meaning - but not the political one. 17th and 18th century dictionaries give evidence that the term was primarily understood as that of medicine or justice⁷. The Latin noun *constitutio*, stemming as it did from the verb *constituo* (place, put or establish), was used in the meaning of ‘establishment’ or ‘institution’. Following the example of Cicero, Quintilian and the authors of the *Codex Justinianus*, medieval Europe spoke of *constitution* as an established rule, legal resolution, or imperial or papal decree. A Frenchman in the first half of the 18th century, for instance, would associate it primarily with Clement XI’s *Unigenitus* bull, which split the French society into supporters and opponents of Jansenism, and gave rise to the names of “constitutionalists” (*constitutionnaires*) and “anti-constitutionalists” (*anti-constitutionnaires*), referring respectively to the opponents and proponents of the bull⁸.

According to Gerald Stourzh, «the term “constitution” was apparently rather a latecomer in early modern political discourse»⁹. It is due to its medical, rather than legal, connotations that it entered the political lexicon. In the 17th century,

Rossii»: K istoricheskoi semantike imperskogo perioda. V 2-kh tomakh / Nauch. red.: A. I. Miller, D. Sdvizhkov, I. Shirle. T. 1. Moscow, Novoe literaturnoe obozrenie, 2012. Pp. 94-150.

6 Most contemporary dictionaries explain constitution as «the basic law of a state, defining the foundations of its social and state structure, the administrative system, and the rights and duties of a citizen». See Tolkovyi slovar' russkogo iazyka S.I. Ozhegova i N.Iu. Shvedovoi. Moscow, 1993.

7 The first edition of the Dictionary of the French Academy talks of the constitution as a certain establishment (*établissement*), most likely financial, which is adopted by a certain piece of legislation (e.g. rent or pension). The dictionary provides the following as an example of usage: «Il a pour cent mille livres de constitutions». Then constitution is discussed as a law, ordinance or rule (again in the plural): «Cette République était gouvernée par de bonnes Constitutions». Next, the medical meaning (complexion) is given: «Bonne, forte constitution. Il est de bonne constitution, de mauvaise constitution», and the list is brought to an end by a reference to the philosophers who metaphorically apply the term to the structure of the world (*constitution du monde*). See: Dictionnaire de l'Académie Française. Paris, 1694. T. 1. P. 238.

8 Beaud O. L'histoire du concept de constitution en France. Pp. 8-9.

9 Stourzh G. Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century. P. 84.

authors of political treatises started using the term metaphorically: the “body politic” of the state could be likened to a certain *constitution*, just as the body natural could have a weak or strong one. *Constitution* appears here as a certain ‘set’ of the state’s ‘body’, which established the general features and principles of its existence, the governance of this *corpus*. In this meaning, ‘constitution’ was close to Aristotle’s *politeia*. But such terminological linkage did not arrive before the end of the 17th century. Earlier translators of Aristotle found other equivalents of *politeia*: in the English translations, *Res publica*, *Policy*, or *Commonwealth*, and in the French ones, *police* or *république*¹⁰. However, in the first half of the 18th century, Bolingbroke and Montesquieu commonly associate *politeia* with *constitution*. As Bolingbroke wrote in 1733,

By *constitution*, we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed¹¹.

Bolingbroke’s definition is quite remarkable in its focus on what the idea of *state* implied for an 18th-century man. Firstly, it was indivisible from that of *society*, which in turn was understood as a political association of *citizens* who had property and were endowed with a number of rights. In that sense, *civil society* (*societas*, *societas civilis*, *populus*) was the equivalent of *state* as a political entity (*civitas*, *res publica*). Secondly, the governance of this association of citizen was not seen as entrusted to a separate external institution, but rather as an internal organization of the society wherein the governed consented to obey the rulers out of the principle of common weal. Thus, until the end of the 18th century, both *politeia* and *constitutions* were seen as a public legal structure of *civil society* in its

10 E.g., Louis le Roy in his translation provides a commentary which thus explains the meaning of Aristotle’s *politeia*: «La police est l’ordre de la cité ès magistrats, mesmement au souverain de tous : consistant toute la république en son gouvernement». (Les Politiques d’Aristote. P., 1576, P. 164-165.). The same commentary has been preserved in the English translation of le Roy’s book: «Policy is the order & disposition of the city in regard of Magistrats & specially in regard of him that hath souveraine authority over all, in whose government the whole commonweale consisteth» (Aristotle’s Politiques, or discourse of government, translated out of the Greek into French... by Loys le Roy called Regius. Translated out of French into English. L., 1598). The first English translation of Politics made directly from Greek (1776) explained it as the «form of government».

11 Dissertation on Parties // Works of Bolingbroke. L., 1809. T. 3 P. 157.

old meaning. This old usage of the notions of *civil society* and *state* collapsed in the French revolution when the divide between the *state* and *society* (discernible since the 18th century) materialized. The *society* was now construed as a space where private property holders coexisted freely in liberty and equality, free from political domination. The *state*, in its turn, was beginning to be understood as a separate political institution¹². In this sense, people of the 18th century did not know the contemporary (bourgeois) opposition between *state* and *society*, which became the pivotal point of 19th century political thought.

Under the *Ancien régime*, the system of governance in Europe was inextricably linked to the system of estates within society. Manfred Riedel has noted that

the *societas civilis* is actually the name for the feudal society of the estates that we see here and there in the political theory of the 16th and 17th centuries. <...> This name could be applied to any potestate association of people enjoying individual rights or privileges and endowed with laws: cities, lands, kingdoms, principalities, counties, land estates big or small <...> The structure of the concept was defined by the close inextricable unity of the society and the authorities. The authority was always based on the power over the “house” – be it the grand “houses” (i.e. dynasties or families), or the households of the landowners who, in the political sense, formed the community of the land <...> The privilege (as a priority right) was the central category of this society and defined the political and legal status of an individual within it, as well as their belonging to any of the ‘estates’ or ‘possessions’ this society was composed of¹³.

However, the political order described above, implying as it did the *contract* as a foundation of both private and public relations within the society, in the works of European political theorists was often opposed to Oriental despotic regimes which knew no *civil society* or *contractual* relations. Thus constitution was possible only where the subjects had property and enjoyed some authority, and were not themselves property of a despot. European travellers of 17th and 18th

12 See Riedel M. *Obshchestvo, grazhdanskoe // Slovar' osnovnykh istoricheskikh poniatii. Izbrannye stat'i v 2-kh. tt. Vol.2.* Pp. 93-219.

13 Riedel M. *Obshchestvo, grazhdanskoe....* Pp.125-126, 127.

centuries found examples of such barbaric form of rule in Muscovy or the Ottoman Empire¹⁴.

In the 17th century, *constitution* was a rare word to be found in political treatises. A much more common occurrence was the notion of *leges fundamentalis*, which appeared as the most important concept of Early Modern political law. In France, the term *lois fondamentales* was first used in 1576 to replace the *anciennes lois du Royaume*; in England, the term *fundamental law* had been associated with the *Magna Carta* since early 17th century. In German lands, the *Fundamentalgesetz* first appeared in Pommerania's *Regierungsform* of 1634, but as early as in 1591 Friedrich Pruckmann, the chancellor of the Elector of Brandenburg, wrote in his book *Paragraphus solute potestas* that the Salic law is «*lex fundamentalis florentissimi Galliae regni*». Finally, it was a commonplace in describing the Holy Roman Empire to mention its *constitutions et leges fundamentalis*, which primarily referred to the *Golden bull* of 1356, the Augsburg Settlement and the Peace of Westphalia.¹⁵ Wolfgang Schmale has noted that throughout 17th and 18th centuries in Germany defining the *constitution* was less of a problem than in France, because prior to the French revolution the *constitutions* were construed here as an unchangeable body of the Empire's *fundamental laws*.¹⁶

Before mid-18th century, the political and legal thought knew no direct link between the *constitution* and *fundamental laws*. Whereas the former referred to a form of rule, than the latter was associated with the contract between the governed and the ruler or with the common law (*ancient Custom, Coutume établie*).

14 Adam Olearius thus mused on the form of government in "Muscovy": «The politick Government of Muscovy is Monarchical and despotical. The Great Duke is the hereditary Sovereign of it, and so absolute, that no Knez or Lord in all his Dominions, but thinks it an honour to assume the quality of his Majesties Golop, or slave. No Master hath more power over his slaves, than the Great Duke hath over his Subjects, what condition or quality soever they be of. So that Muscovy may be numbred among those States, where of Aristotle speaks, when he sayes there is a kind of Monarchy among the Barbarians which comes neer Tyranny. For since there is no other difference between a legitimate Government and Tyranny, than that, in the one, the welfare of the Subjects is of greatest consideration, in the other, the particular profit and advantage of the Prince, we must allow, that Muscovy inclines much to Tyranny». See Olearius A. *The Voyages & Travels of the Ambassadors from the Duke of Holstein, to the Great Duke of Muscovy, and the King of Persia. Rendred into English, by John Devies*. London: Thomas Dring, and John Starkey, 1662. P. 95.

15 Oestreich G. From Contractual Monarchy to Constitutionalism. In: Collins J.B., Taylor K.L. (Ed.) *Early modern Europe: issues and interpretations*. Oxford, 2006. P. 324.

16 Schmale W. *La France, l'Allemagne et la Constitution*. P. 468 («En Allemagne, la notion de constitution faisait moins de problème qu'en France [...] La raison en est simple, parce que le signifié ne faisait pas de doute: un corpus de lois fondamentales comme la Bulle d'Or de 1356, la paix de la religion d'Augsbourg, la paix de Westphalie de 1648 [...] formaient, sans nul doute, la constitution de l'Empire»).

However, throughout the 18th century the semantics of these concepts was beginning to change. Charles Louis de Montesquieu in *De l'esprit des lois* (1748) makes the term *constitution* a political concept, using it as a synonym for Aristotle's *politeia*, but applied to the state in general rather than the city state.¹⁷ At the same time, Montesquieu makes an important advance towards defining *fundamental laws*, especially for the monarchic rule. It is well known that in his theory, the main difference between monarchy and despotism lies in the presence of unalterable laws securing the rights of the estates. This definition of a "true monarchy" started to play the leading role in 18th century political texts. De facto, Montesquieu sees *constitution* as a system of statehood which defines both legislation and social life. In this respect, despite all his theoretical disagreements with Montesquieu, Jean Jacques Rousseau relies on the same understanding of *constitution* in his *Du Contrat social* (1762). In the same vein, Jean Louis de Lolme in his *Constitution de l'Angleterre* (1770) sees the English *constitution* as a historically developed system of governance (*systems des Gouvernemens*), keeping close to the sense that the British themselves attached to their constitution.¹⁸

A hugely important contribution to understanding the notion of the constitution was made in mid-18th century by Emer de Vattel (1714–1767), whose work *Le Droit des gens, ou Principes de la loi naturelle* (1758) had a significant impact on how *constitution* was perceived by the American and French revolutionaries later in the same century. Vattel was one of the first to provide a clear political definition of the term:

Le règlement fondamental qui détermine la manière dont l'Autorité Publique doit être exercée est ce qui forme la *Constitution de l'Etat*. En elle se voit la forme sous laquelle la Nation agit en qualité de Corps Politique ; comment & par qui le Peuple doit être gouverné, quels sont les droits & les devoirs de ceux qui gouvernent. Cette *Constitution*

¹⁷As noted by Olivier Beaud, constitution in its political meaning for an 18th century Frenchman was a new word and a borrowing from English, and it is due to Montesquieu that «a élevé le mot de constitution à la dignité du concept, et il l'a fait en lui faisant endosser un sens désormais proche de l'ancienne politeia [...] Assimilée à la politeia d'Aristote ou de Polybe, celle-ci acquiert un sens politique: elle désigne le mode d'agencement ou d'organisation des pouvoirs à l'intérieur de l'Etat. Montesquieu partage cette conception dans la mesure où, transposant la Cité à l'Etat, il use du mot de constitution pour qualifier la forme d'organisation de l'Etat» (See: Beaud O. L'histoire du concept de constitution en France).

¹⁸ [De Lolme J.L.] Constitution de l'Angleterre ou État du gouvernement anglais comparé avec la forme républicaine et avec les autres monarchies de l'Europe. Amsterdam, 1771. P. 246.

n'est dans le fonds autre chose, que l'établissement de l'ordre dans lequel une Nation se propose de travailler en commun a obtenir les avantages en vûë desquels la Société Politique s'est établie.¹⁹

For Vattel, it is the nation, which plays the crucial role in shaping its *constitution*. By merging the concepts of *constitution* and fundamental laws, Vattel *de facto* provided the first modern legal definition of *constitution* as the aggregate of fundamental laws:

Le *Loix* sont des règles établies par l'Autorité Publique pour être observées dans la Société. Toutes doivent se rapporter au bien de l'Etat & des Citoyens. Les *Loix* qui sont faites directement en vue du bien publique sont des *Loix Politique* ; & dans cette classe, celles qui concernent du Gouvernement, la maniere dont l'Autorité Publique doit être exercée ; celles en un mot, dont le concours forme la Constitution de l'Etat, sont les *Loix Fondamentales*.²⁰

What Vattel did may amount to a breakthrough in understanding the concept – a breakthrough which paved the way towards the first written *constitutions*. Scholars see his *Droit des gens* as a significant influence on the views of the USA's Founding Fathers, and especially on the constitutional ideas of Thomas Jefferson.

The revolutionary turmoil of the 1770s-1780s had a crucial impact on the transformations of political terminology. The constitutions individual states adopted during the War of Independence were par excellence constitutional instruments which outlined the state's form of governance. Adopted in 1787, the federal constitution implied the type of government already in existence.²¹ Following in the wake of Vattel in their vision of *constitution*, the Founding Fathers merged the notions of *constitution* and *fundamental laws* and gave even

19 Vattel E. *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*. Vol. 1. Londres, 1758. P. 31 (chapt. III, § 27).

20 Vattel E. *Droit des gens*. P. 32. (chapt. III, § 29).

21 Thus, the constitution of North Carolina (1776) was titled «Constitution, or Form of Government», and the full title of that of Massachusetts (1780) was «Constitution, or Form of Government for the Commonwealth of Massachusetts», in the text thereof constitution appears as a synonym of form of government - «Constitution of Government» (See: <http://www.modern-constitutions.de>).

more priority to the Nation in constitution-building, since it was the constitution that created the government, and not vice versa.²²

Written constitutions of the USA and its constituents had their impact on the semantic shift back in France, where two understandings of the concept clashed during the new round of debate in 1788-1789. One of them was the old view of *constitution* as form of governance, and it was championed by proponents of royalism and privileges of the estates; the other, a new revolutionary view of *constitution* as an act guaranteeing equal rights and liberties to all citizens and thus establishing a new form of rule. French revolutionaries insisted that the nation needed a *constitution* which would provide civil freedoms to all and give the “Nation” an opportunity to express its will. France had no such *constitution* and thus it had to be set up, they said – an idea which enraged the proponents of the old constitutionalism and the *Ancien Régime*. Responding to the revolutionary pamphlets, they pen their own, wherein they try to prove that the French *constitution* had been around for centuries. The court historiographer, Jacob-Nicolas Moreau, wrote a treatise titled *Exposition et défense de notre Constitution monarchique Française* (1789), where he can’t help exclaiming angrily, «Une foule de brochures <...> contiennent cette effrayant assertion, *la France n'a point encore de constitution*. On en conclut, & tout le monde répète qu'il faut saisir l'occasion de lui en donner une».²³ The opponents of the “monarchic constitution” responded in kind, vigorously attacking those championing the privileges of the estates:

On ne cesse de nous parler de *Constitution* : c'est le mot de ralliement de tous les Ordres privilégiés ; c'est avec ce mot qu'ils prétendent nous fermer la bouche. Menacer leurs Privilèges, c'est renverser la *Constitution*; comme s'il étoit de l'essence de la *Constitution Monarchique*, qu'il y eût des Ordres privilégiés²⁴.

22 Thomas Paine, arguing against Edmund Burke, provides the following definition of constitution: «A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government» (Rights of Man: Being an Answer to Mr. Burke’s Attack on the French Revolution. (2nd edition) by T. Paine. London, 1791. P. 56–57). We must note that Paine’s definition owes a lot to much-discussed 1789 treatise by abbé Sieyès and borrows some of its ideas.

23 Exposition et défense de notre Constitution monarchique Française / Par M. Moreau. Vol. 2. Paris, 1789. P. 190.

24 De l’organisation d’un état monarchique, ou Considérations sur les vices de la monarchie Française & sur la nécessité de lui donner une Constitution. Paris, 1789. P. 5–6.

One of the first to arrive at the contemporary understanding of *constitution* during this round of debates was Emmanuel-Joseph Sieyès in his famous political pamphlet *Qu'est-ce que le Tiers-État*, which was published in January 1789. In Chapter five, Sieyès provides his own definition of *constitution*²⁵. Building on the ideas of Vattel and American constitutionalists, he updated and clarified the definition of *fundamental law*, which he saw in *constitution*. Merging these notions once again, Sieyès thus confirmed that by the start of the revolution, the modern view of *constitution* as an act establishing the rights of the Nation and simultaneously consolidating the system of government based on popular representation. Thus *constitution* is a fundamental “unalterable” law for those who hearken to the will of the Nation in drafting and executing specific legislation – but it is not fully binding on the Nation itself, who is free to change its *constitution*.

The debates came to an end when the *Declaration of the Rights of the Man and of the Citizen* (*Déclaration des droits de l'homme et du citoyen*) was adopted by the Constituent Assembly on August 26, 1789. It marked the start of the first written *constitution* in France. The *Declaration* of 1789, among other things, stated that «Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution».²⁶ The understanding of *fundamental law* as an integral part of monarchic rule is losing importance, and the *loi fondamentale* arises as a synonym of *constitution* in revolutionary France. Moreover, as the revolutionary movement radicalizes and de-Christianization advances, *constitution* puts on the guise of the substitute of religion. Pointing out that some functions of religion were being transferred onto *constitution*, cites speeches and newspaper articles of 1793-1794, where the adoption of these new meanings is most conspicuous: «Une *constitution* doit être le catéchisme du genre humain...», «... presque partout la *Constitution* remplace le culte... la *Constitution* nous conserve tout ce que les religions avaient de bon : la

25 [Sieyès E.J.]. *Qu'est-ce que le Tiers-État*. Paris, 1789. P. 74.

26 *Constitutions des principaux états de l'Europe et des États-Unis*. T. 3. Paris, 1791. P. 350.

morale»²⁷. The constitutional acts of the French Revolution (*Declaration of the Rights of the Man and of the Citizen*, 1789; *Constitutions* of 1791, 1793 and 1795) were considered exemplary and accepted as models for the draft written constitutions of the first decades of the 19th century. At the same time, the Utopian trust in *constitution* as a magical instrument of transforming society, while subsiding in France, kindles across all Europe and spreads like fire.

Summing up, within the political and legal discourse of the 17th and 18th centuries, the notion of *constitution* and *fundamental laws* had differing connotations: while *constitution* was used mainly to describe the form of government, the concept of *fundamental laws* referred to historically developing legal traditions which have been adopted as norms of political law. The idea that *constitution* can be directly expressed in *fundamental laws* or that it in itself forms the *fundamental law* of a state, was explicitly expressed by E. de Vattel in mid-18th century, but it was not until the 1780s and 1790s that it took root, first of all in the works of the American and French authors prior to the Revolution. The most radical vision of *constitution* in the 18th century went further than identify it with *fundamental law*, demanding that the latter should enshrine the principles of civil rights and liberties of the Nation, and the legal guarantees thereof. However, this radical view, arising at the end of the century, was far from universal, and the “pamphlet war” around various understandings of this concept was still to continue for many years.

II.

Original works of 18th century Russian authors who used the terms *constitution* and *fundamental laws* lay mostly in the domain of political discourse of the elites. The most active use of the concepts falls onto the second half of the 18th century, which proves that it was the period of their most conscious and successful adaptation.

27 Schmale W. *La France, l'Allemagne et la Constitution (1789–1815)*. P. 467.

In the first half of the century, in contrast to the later period, both terms are a rare occurrence in Russian political literature. Largely, this neglect of the notion of *fundamental laws* was due to the official position of the autocratic monarchy and its ideologues, who could not withstand the idea of any limitation of the monarch's will. Theophan Prokopovich in his *Truth of the Monarch's Will (Pravda voli monarshei, 1722)* makes his case more than clear, stating that "every autocratic Prince" (samodershavnyi gosudar') possesses "majesty", i.e. sovereignty, and thus "should not follow people's law (chelovecheskii zakon), and moreover, should not be brought to trial for violating people's law. He should follow God's Commandments, but is answerable for violating them only before God, and in no way could be tried by his people".²⁸ The monarch is not subject to any law, and consequently, is not bound to comply with "foundational" (*osnovatelnye*) laws, which implied the preservation of traditional law. Peter the Great's reforms challenged the latter, and Peter might have been Theophan's co-author and surely the commissioner of his work. Theophan did know the concept of "*fundamental law*", but never used it explicitly. He wrote that fundamental laws, including those determining the order of succession, can only exist in "indirect", i.e. limited monarchy. Theophan brings up this issue when discussing the issue of that the people cannot cancel their "own will" which had been expressed in the original contract. The people cannot dissolve the contract whereby they delegated their power to their sovereign. Theophan believes this mandates them to withstand "their monarch's disorderliness, or evil manners", but with a notable exception, "unless at the first Monarch's election there existed *certain agreements*, whether by good will of the Monarch only or under oath, which would stipulate that in case of failure [of his duties] it was agreed to abandon the Monarch"²⁹. In this case, "certain agreements" are a euphemism. The *fundamental laws* that loom behind the phrase are almost a political obscenity for the author, as law for him cannot be fully fundamental, i.e. binding for the sovereign's will in any way. Hence the

28 *Pravda voli monarshei vo opredelenii naslednika derzhavy svoei*. St. Petersburg, 1722. P. 22.

29 *Pravda voli monarshei...* P. 32.

definition of such monarchy as “indirect”, although “it is quite different from its name”, it does not involve real sovereignty, or, as Prokopovich termed it, “Majestat”. In this text he actually describes what the *verkhovniki* attempted in 1730, when they forced Anna Ioannovna to sign the agreement (the crown for complying with the Conditions). Anna famously agreed that for failure to execute the Conditions she could be “deprived of the crown of Russia”³⁰. By doing so, Anna de facto relinquished her sovereignty, and the “direct” monarchy was replaced by an “indirect” one. Correspondingly, the Conditions and the Form of Government as compiled by the Supreme Privy Council equaled the fundamental laws of the state. Naturally, Prokopovich would not have approved of such act of alienation of sovereign power from the person of the monarch.

After the plot of the *verkhovniki* (1730), the issue of *fundamental law* was not brought up again until the latter half of the 18th century, when the governments of Elizabeth Petrovna and Catherine the Great made use of the “rhetoric of the monarchy” which implied that the “true monarchy” (*monarchie tempérée*) should rely on fundamental laws. Ivan Shuvalov’s project, launched in 1760-1761, provided that Elizabeth’s Legislative Commission (*Ulozhennaia Komissiia*) should crown its work with fundamental laws specifying the succession order and the rights of the subjects, especially of the nobility. At the same time, educated noblemen were discussing the issue of the highest estate’s position in the Russian monarchy. Undeniably, the idea of monarchy limited by the rights of the estates borrowed from Montesquieu, had a significant impact on the political views of the noble elites during the 1760s. A good example can be found in the work of Roman Vorontsov, who, while in charge of Elizabeth’s Legislative Commission since October 1760, attempted to do more than guarantee the nobility’s rights – his plan was to codify them as the empire’s unalterable law. In his opinion, the rights of other social groups (*sostoianie*) could only be outlined vis-a-vis those of the nobility, so the focus of Part 3 of the *Novoye Ulozhenie* is Chapter 22, wherein the

30 Kurukin I.V., Plotnikov A.B. 19 ianvaria - 25 fevralia 1730 goda: Sobytiia, liudi, dokumenty. Moscow, 2010. P. 36.

rights of the “noble” are shown to be the foundation of the state’s welfare. During the reign of Peter III, the father of his mistress initiated the abolition of the mandatory service for the nobility. Together with Aleksandr Glebov, he was the author of the manifesto *On Granting the Freedoms and Liberties to Russian Nobility* (1762). The manifesto contained an explicit solemn promise of the monarch in the following form: “We, in Our Imperial word, most solemnly declare and promise, forever in the most trustworthy and inviolate way to observe this in full force and privilege, and Our lawful Successors inheriting the throne from us should preserve it without any diminution, as this Our decree will for them be an *unassailable foundation* of the autocratic (*Samoderzhavny*) Throne of All Russia”.³¹ This solemn oath made the Manifesto of 18 February 1762 a *fundamental law*, limiting the power of the monarch vis-a-vis the rights of his subjects³². But alongside with the “freedom” of the nobility proper this limitation of the monarch’s political will did not suit Catherine’s plans. On February 11, 1763 she spoke to the Commission for the Liberties of the Nobility that the status of the nobility “is retained with the liberty received”. She even agreed to endorse whatever the “esteemed assembly would devise to improve the freedom of the nobility in Russia”, upon the condition that the “autocratic power in the Russian state, which the empire had been ruled by since days immemorial, is preserved in full force”.³³

In 1762, Catherine herself resorted to the rhetoric of denouncing autocracy and called for the full compliance with hard law by the monarch in her manifesto of July 6, 1762, which was to explain to her subjects the reasons for deposing her husband.³⁴ The author of the manifesto accuses Pyotr Fedorovich (Peter III) of

31 PSZ. Sobranie 1. Vol.15. St. Petersburg, 1830. P. 914, № 11.444 (18 February 1762: On Granting the Freedoms and Liberties to Russian Nobility). In the original draft of Section 3, Chapter 22 of the Ulozhenie there is a phrase appearing in a black box. It reads that the freedom of the nobility will be an inviolable law for the monarch and that «neither Our successors after Our reign will do anything to abolish this, since preserving it will be an unassailable foundation of the autocratic throne of All Russia» (RGADA F.342, Op.1, D. 63, Pt. II, L. 381).

32 This was well understood by contemporary thinkers: thus, M.M. Shcherbatov, in his critique of the 1785 Zhalovannaia Gramota, referred to the 1762 Manifesto as the «substantial law of the state, as clearly shown in Art. 9». See Shcherbatov M.M. *Primechaniia vernago syna otechestva na Dvorianskie prava*. ChOIDR. 1871. Bk. 4. Pt. 5. P.9

33 Quoted from: Omel'chenko O.A. «Zakonnaia monarkhiia» Ekateriny Vtoroi: Prosveshchennyi absolutizm v Rossii. Moscow, 1993. P. 201.

34 Manifest 6 iuliia 1762 goda. In: Osmnadsatyi vek. Istoricheskii sbornik, izdavaemyi P. Bartenevym. Bk. 4. Moscow, 1869.

having transgressed the country's traditions, assaulted Orthodox religion, and "defied laws both natural and civic". In this way, he was no longer an sovereign monarch (*monarque*), but an arbitrary one (*despote*): «he dreamt of his monarchic power, as if it had not been from God, and not for the benefit of his subjects, but accidentally fallen into his hands only for self-gratification, and therefore he let his despotism merge with arbitrary desire to provide all such *establishments of the state*, whichever his pusillanimity could devise to offend the people». ³⁵ On ascending the throne, the empress as a "true monarch" is giving the pledge and promises to establish *fundamental law* and rule in full accordance with them: "... here We must solemnly pledge in Our Imperial word to *legislate such constitutions of the state* which would guide the government of Our beloved motherland to run its course in full force and within its adequate borders". ³⁶

The statement that Peter III "overthrew" autocratic power was meant to emphasize that Catherine is restoring monarchy to replace despotism which had been established by her husband's arbitrary rule. Most likely, the 1762 manifesto as written by Grigory Teplov with the aid of Nikita Panin, who throughout his whole political career had been insisting on the introduction of *fundamental laws* in Russia. ³⁷ In 1762, N.I. Panin, writing in defense of his project of the Imperial Council, thus mused on the "inviolable" laws in his memorandum arguing against the empress' commentary on the draft manifesto on Senate reform and the establishment of the Council, "No great empire, and especially that of Russia, cannot have a more reliable rule than monarchy, that is sovereignty (*samoderzhavstvo*), but it does not follow from here that the heir to the throne can with full legal right transgress all boundaries and do whatever he desires, defying [...] the *inviolably established rules (ustavy)* of his autocratic predecessor, such as

35 Manifest 6 iulia 1762 goda... P. 218.

36 Manifest 6 iulia 1762 goda... P. 222. The official French translation of the Manifesto, distributed among the diplomatic corps and published in European newspapers, explicitly stated the Empress' intent to «raffermir les Constitutions fondamentales de cet Empire & de notre Souveraine Puissance ébranlées par les malheurs passés». Quoted from: Pièces imprimées à Petersbourg au Senat, concernant la Révolution en Russie // Nouvelles extraordinaires de divers endroits (Gazette de Leyde). Livraison n° 69 du 27 août 1762. Supplément.

37 The Danish ambassador Haxthausen, who was close to N.I. Panin, wrote on July 19, 1762 in his correspondence to the court that the Manifesto was written by G.N. Teplov, but «Monsieur de Panin l'a corrigé et y donné la dernière main» (Quoted from: Ransel D. The Politics of Catherinian Russia. The Panin Party. New Haven; London. 1975. P. 71).

faith spiritual, the security of their subject's property and their various statuses and conditions, and the sufficiently established form of government”³⁸.

Like translators of his period, Panin uses the word *samoderzhavstvo* (sovereignty) to refer to monarchic rule which requires *fundamental laws*, like all other forms of “good polities”, i.e. civilized societies and governments. The fragment cited above makes quite clear what he called *fundamental laws*: in addition to preserving monarchic rule and Orthodox faith, they included guaranteed rights of the estates and retaining the “form of government” unchanged, understood as “securing the Imperial throne against maleficent revolutions”. This is actually the same form of government that Panin argued for in his draft for the Imperial Council, believing that the presence of *fundamental laws* is what distinguishes monarchy from despotism to the utter benefit of the former.

Near the end of his life, working on the project of “unalterable laws” for his pupil, Grand Prince Pavel Petrovich, N.I. Panin, together with Denis Ivanovich Fonvizin, wrote *The Introduction to Unalterable Laws (Vvedenie k Nepremennym Zakonam)*, wherein he most fully set out the vision of what *fundamental laws* are.³⁹ The tutor of the future emperor and his supporters offer a reform program to Tsesarevich Pavel Petrovich: “an enlightened and virtuous monarch, having found his empire and his own rights in such bad order and disarray, must begin his great service by immediately safeguarding the general security by means of *unalterable law*”.⁴⁰ This idea was dear for the Tsesarevich, too – but of all such laws he cared most about the one establishing firm succession rights.⁴¹ Therefore, at his coronation on April 5, 1797 he only promulgated the acts regulating the imperial succession⁴².

38 Arkhiv SpbII RAN, F. 36. D. 400. L. 178 r.–179. Published in: Polskoy S.V. Neizvestnaia zapiska N.I. Panina i «Primechaniia» na proekt Imperatorskogo soveta (1762–1763 gg.) // Izvestiia Samarskogo nauchnogo tsentra RAN. T. 12 (38). 2010. № 6.

39 Rassuzhdenie o nepremennykh gosudarstvennykh zakonakh. In: Fonvizin D.I. Sobranie sochinenii. V 2 t. Vol. 2. Moscow, 1959. Pp. 254–266.

40 Rassuzhdenie o nepremennykh ... Pp. 265–266.

41 In 1788, Pavel Petrovich drafted a family agreement on the order of succession. It was promulgated as an Act on April 5, 1797. (PSZ. Vol. 24. № 17.910).

42 PSZ. Vol. 24. № 17.906 и № 17.910. The preamble of the Establishment of the Imperial Family (Uchrezhdenie ob imperatorskoi familii) directly states that this act must be listed “among the fundamental laws of Our Empire” (PSZ. Vol. 24. P. 525)

In the projects by ideologues of the 18th century Russian nobility, *fundamental laws* appear as an instrument of preserving the estate-based society and thus are not linked to the contemporary understanding of *constitution*. At the same time, these *unchangeable rules*, absent in despotic Russia as they were, become the primary “movers”, aiming at and motivating the future changes. Thus, Mikhail Mikhlailovich Shcherbatov postulated that Russia “is of monarchic rule”, “as Her Majesty herself stated it in her *Nakaz*”, hence the monarch is no “lord of an estate (votchinnik), but the ruler and patron of his state, therefore must possess *certain foundational rights*”.⁴³ These were nothing else but *fundamental laws*, which, as Shcherbatov puts it, must include, firstly, “firm foundation and rule of the succession order”, and secondly, “the preservation of the imperious faith and the Monarch’s confession thereof”. These leading rules are followed by a short list of other inviolable rights: “the right to legislate, impose taxes, mint coins”, “courts and the right to defend oneself”, and, last but not least, the “right for the name of nobility, in their various degrees, *under monarchic rule should be established inviolably*”. Shcherbatov goes still further, arguing that there must exist “a *treasury of laws*”, which he sees in the Senate. In addition, it should not only be provided with “sufficiently solid state rights in his power, but also manned with people [to match] its solid powers, so that it can safeguard the pledge entrusted to him”.⁴⁴ At the end of his pamphlet *On Corruption of Morals (O Povrezhdenii Nravov)*, Shcherbatov sees the way out of the corrupt present in the reign of a noble monarch who would grant “*solid rights to the state*”.⁴⁵ Here, he parts ways with the Western political theory which tended to see *fundamental laws* as more of a past heritage, rather than a goal of the future political development.

Following the fashion of her times, Catherine tried to demonstrate the “monarchic nature” of the Russian state where the “unalterable laws” reign supreme. Starting with her manifesto of July 6, 1762, wherein she promised to introduce such rules and establishments, she had been working on a number of

43 Sochineniia kn. M.M. Shcherbatova. T. 1. Col. 391.

44 Sochineniia kn. M.M. Shcherbatova... Col. 391–392.

45 O povrezhdenii npravov v Rossii kniazia M. Shcherbatova i Puteshestvie A. Radishcheva. Prilozhenie. P. 130.

potential fundamental laws. To be fair, she partly held her promise: the two *Gramotas* of 1785 fully matched the standard of *fundamental laws* as 18th century understood it, as they safeguarded the rights of the estates.⁴⁶ On the other hand, Catherine did not want or dare to grant any political rights or guarantees, first of all, to the nobility, which annoyed the ideologues of the noble elites. Whether the already granted rights would be safeguarded was the most painful question, which the empress herself understood well. She was trying to find a solution for a most complicated political equation where the guarantees of her subjects' rights were not to weaken the authority of the monarch.

Thus, as early as in the latter half of the 18th century the issue of *fundamental (korennye) laws* triggered a debate on Russia's development. The many ways different political actors understood and explained them is a key aid in outlining their general principles and aims. At the turn of the century, the situation got more complex, as the old political terminology entered the process of drastic transformation.

The French revolution brought about significant transformation in the understanding of *fundamental laws* and re-actualized the notion of *constitution* in the Russian political life.⁴⁷ As the *Ancien Régime* collapsed, leaving an indelible impression on the Russian observers⁴⁸, the once foundational notions of *state* and *society*, *citizen* and *subject*, *right* and *property*, changed as well. At the very start of the 1800s the high-profile spheres once again became the venue of debates on

46 See Griffiths D. Ekaterina II i eio mir. Moscow, 2013. P. 190-250.

47 During the years of the Revolution, the concept constitution enters the pages of Russian literature. In his Letters of a Russian Traveller (*Pis'ma Russkogo Puteshestvennika*, appeared in the periodical, 1791-1792 and as a single volume, 1801), Karamzin says nothing about the French debates on the constitution which he must have witnessed. But he writes a lot about the constitution of England, which he, like de Lolme, takes to mean 'system of government'. Karamzin wrote that on his visit to the British Museum in July 1790, "the most interesting exhibit was the original of the Magna Carta, that glorious agreement between the English and their king John, signed in the 13th century and [since then] serving as the foundation of their constitution. Ask an Englishman what its main benefits are – and he will say, "I live where I want; I am secure in what I have; I fear nothing save the law" [...] They are proud people, and most of all, proud of their constitution. I have been reading de Lolme here with utmost attention. The laws are good, but to make people happy, good laws must be obeyed well. [...] So, not their constitution, but enlightenment of the English is their true Palladium. Every civic institution should correspond to the character of the nation – what is good in England can turn evil elsewhere" (Karamzin N.M. *Pis'ma russkogo puteshestvennika*. In: Karamzin N.M. *Izbrannye sochinenia*. V 2 t. Vol. 1 / Sost., podgot. teksta i primech. P. Berkova. Moscow-Leningrad, 1964. Pp. 565–566, 592).

48 Among them was Prince Boris Golitsyn, who was one of the first to note the opposition between state and society in his «De l'influence des événements sur la formation d'une Constitution» (1790). Probably under the influence of revolutionary speeches and pamphlets, he talked of the «guerre continuelle entre le peuple et le souverain» in France – the country which, unlike England, did not develop the right sort of constitution («D'un semblable ordre de choses il étoit impossible de voir naitre une constitution quelconque»). See Golitsyn B.V. O vliianii sobytii na Konstitutsiiu (1790). In: Frantsuzskii ezhegodnik 2010: Istochniki po istorii Frantsuzskoi revoliutsii XVIII v. i epokhi Napoleona. Moscow, 2010. P. 200.

fundamental laws. In the clashes between old-time “Catherinian” dignitaries and Emperor Alexander’s “young associates”, both familiar and new meanings of the old concepts came to the surface. But already in the 1810s Alexander I and his critics equally understood *constitution* as a fundamental law of a state defining its structure and listing the citizens’ rights, rather than any form of government, or a contemporary counterpart of Aristotle’s *politeia*. The political meanings seen in the *constitution* by various social powers could differ substantially, but the terminological unity was there to remain.

These semantic transformations indicated an arrival of a new period, with its own problems, values and ideals. Moreover, *constitution* was becoming a “moving power”: just like in the latter half of the 18th century the elites of the nobility advanced the idea that *fundamental laws* were needed to guarantee their security and property rights in what they saw as *their* state, the nascent 19th century *society* sought in *constitution* protection from the state’s encroachment upon their rights.

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