# Marta Lorente, *La Nación y las Españas. Representación y territorio en el constitucionalismo gaditano*, Madrid, Ediciones UAM, 2010.

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This new book by Marta Lorente provides both a rigorous and colorful synthesis of her outstanding research over the last decade. In particular, it summarizes and illustrates the groundbreaking book she coauthored with Carlos Garriga three years ago on the Cadiz Constitution,[2] in which they thoroughly revise the ordinary commemorative interpretation of the *Gaditana* as a pristine source of European constitutionalism (a Spanish *simile* for "programmatic" or "projectual" (M. Fioravanti) constitutionalism, like the earlier French one), which would install a new political paradigm of a State limited not only by the separation of powers and by the framing of a written text that shaped institutions and political practices, but also by the pre-eminence of individual rights over State prerogatives. The main point of the authors is not that the *Gaditana*—like all the contemporary constitutions of continental Europe—did not enshrine an order of rights that overrode the law of the state.[3] Their revision is far more radical: the Cadiz Constitution, rather than being the inaugural milestone of a political era, was instead the epigenous event of a vanishing paradigm—the jurisdictional paradigm—typical of the corporatist monarchy that was now beginning to relinquish power, but which was still pervasive in the public sphere.

In this new book, one can find several paragraphs that summarize a decade of historiographic work, undertaken by the author and by some of her colleagues, mostly in Madrid and Seville.[4] The arguments which sustain her thesis are based upon a methodology of research concerning the Spanish constitutional history, recognized not only as new, but also as leading to substantial interpretive innovations. As the *Gaditana* was not a mere piece of paper approved by a constituent assembly after the debates published in the Cortes' proceedings, but, on the contrary, led to a complex process for the reception of its text both by the community and by the officials it addressed, studies on the history of the Cadiz Constitution must necessarily include, along with the history of the creation of a text, also the history of its reception and enforcement through the traditional institutions that were still in place. Consequently, research into this question has to descend from the level of the text's political discussion and redaction in the Cortes to the more modest and also less spectacular level of everyday political praxis recorded at the level of the archives. This change in the field of research is the best way of highlighting the traditional legacy of the novel constitution.

The first symptom of this legacy is the historicist tone of the constitutional language, which, in the preamble, immediately declared its fidelity to the old laws of Spain (even the Visigothic ones…), whose falling into oblivion was the supposed cause of all the miseries of the realm. The result was not only the preservation of the traditional legal corpus, but also the sacrificial offering of the new constitution to the scrutiny of the epigones of the old legal heritage.

The second sign of this same legacy is related with corporatism and the restrained role that parliamentary law played in the concert of legal sources, mostly if we consider that the features of the new law—its generality

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2 Carlos Garriga and Marta Lorente, *Cádiz, 1812. La constitución jurisdiccional*, Madrid, Centro de Estudios Políticos y Constitucionales, 2007.

3 The redefinition of the constitutional paradigm in these terms (rights overriding the law), which was to result in the postponement of European continental constitutionalism until almost the mid-twentieth century (if a few ephemeral constitutional experiences are disregarded) belongs to an earlier work by Bartolomé Clavero (*Manual de História constitutional*, Alianza Editorial, Madrid, 1989).

4 Carlos Garriga, Fernando Martinez Pérez, Bartolome Clavero, Carmen de Bustillo, the late José María Portillo and others.

(also from a territorial point of view), its general availability and cognoscibility, its exclusivity and its codification—were not clearly defined in theory and almost disappeared in the legal praxis. Therefore, the fact that the law did not enjoy generality necessarily led to the survival of particular normative spheres, i.e., to the survival of privileges, which could be either personal or territorial, but which, in both cases, were corporatist.

The third revivalist feature was the lack of institutional mechanisms capable of defending the parliamentary law (or even the constitution) against (old or new) conflicting norms. Under the previous corporatist structure of the law, the entanglement or clash of several levels of regulation was a normal phenomenon, with the jurists availing themselves of intellectual techniques and institutional devices to solve normative bottlenecks. After the installment of a hierarchical system of law, such fuzziness began to sound disturbing, senseless and dysfunctional to the new dogma of the law as *volonté générale*; however, the mindset of jurists and politicians seemingly continued to follow the traditional model of legal order.

Consequently, the plan to establish the supremacy of the constitution and the law as the sole criterion for judging the practice of institutions and the behavior of civil servants became impracticable, even if these civil servants were magistrates, entrusted with the mission of applying the law to everyday life.

Along with these basic pledges to maintain the traditional corporatist order, there were others that were even more noticeable, but which are perhaps less important in relation to the central points of the book: loyalty to both the altar and the throne, the inexistence of an overriding order of individual rights, etc.

In the inventory of the traditionalist traits of what was deemed to be a revolutionary constitution, according to Lorente's analysis, we finally find a reference to the way it was perceived by those who had to implement it or, more broadly speaking, by those who were addressed by it. Actually, the Cortes could discuss and write a constitutional text, but it was not within their power to change mentalities and the traditional ways of understanding political life and the institutional apparatus. Therefore, the constitution was permanently subjected to a process of silent translation back to the patterns of the old rule.

The book uses this interpretive scheme to repaint the picture of the constitutional history of Spain, just as had already been done in an earlier book by Garriga and Lorente.

However, the second strong point of this book concerns the impact of the Cadiz Constitution on the political and constitutional history of Latin America. In a nutshell, the argument is that the traditionalist virtualities of the new fundamental law addressed the markedly corporatist traits of South American societies. This is not to say that Latin-American societies were closer to the doctrinal sources of medieval and early modern corporatism than they were to their European models; the explanation for their archaism was rather the fact that here—somewhat more than in Europe—corporatist mental models were combined with hierarchical societies, dominated by powerful elites, which, because of their distance from the center and the weaknesses of the outermost administrative apparatus of the crown, continued to grow even stronger until the end of the Ancien Régime (and beyond).[5]

Therefore, some of the new constitutional rules (or even the para-constitutional rules, such as those relating to the electoral process) actually served to reinforce certain corporatist features of the Spanish Overseas Empire in Latin America.[6] Marta Lorente is not particularly interested in the already quite well identified restrictions on citizenship contained in the Constitution, such as the electoral disenfranchisement of people working in the domestic world (women [by implicit exclusion] and domestic servants [article 25.3]),[7] along with

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5 This is the parallel process of a reinforcement of the local periphery, upon which I have been insisting, namely in exchanges of views with my Brazilian colleague Laura de Mello e Sousa (our discussion was about the period towards the end of the Ancien Régime; however, this situation of a strengthening of local power – mostly that of the municipalities – continued to be noted under the new constitutional regime, growing even stronger through *de facto* institutions, such as the *coronelias* (the notorious Brazilian "coronéis") and other forms of *caciquismo* and *amiguismo*, at least until the 1930s, with the establishment of the authoritarian regime of Getulio Vargas (cf. José Murilo de Carvalho, *Desenvolvimiento de la ciudadania en Brasil*. México, Fondo de Cultura Económica, 1995). A similar panorama can be noted in other South and Central American Counties (e.g. Argentina and Mexico).

6 Main documentation: http://www.cervantesvirtual.com/portal/1812/.

7 In the Portuguese Constitution of 1822, ecclesiastical domestic service was also considered to be an obstacle to the right of suffrage.

slaves and people of African origin (*mestizos*, *mulatos* and *castas*),[8] normally belonging to the local extension of domestic service—the *plantation* (*encomienda*, *hacienda*, *engenho*). Instead, she seeks to uncover other levels of survival of a less visible corporatism, either in the Constitution or in its application in America, a theme which has recently become of interest to the more innovative Latin American historiography.[9]

One of these less visible levels is the compatibility of the new constitution with the political reinforcement of the municipal elites from the mid-eighteenth century onwards. Theoretically, the rupture introduced by the new constitution should have led to a political decline of local elites. However, on the one hand, the possibility—opened up by the Cadiz Constitution—of establishing new municipalities in every borough with more than 1000 "souls" triggered a municipal revolution, which, while causing an upheaval in the traditional political spaces (such as the *Audiencias*, but also in the large and more important *municipios*, whose territory and political-spatial areas were now endangered), multiplied the creation of corporative nodules, naturally dominated by subordinate elites. On the other hand—a point that is convincingly highlighted by Marta Lorente—the whole electoral process promoted the supremacy of installed elites. Actually, as she again stresses, the similarities between the process of cooptation of the *cabildos*, as well as the nomination of the municipal *procuradores* to the old *Cortes* and the Church, and the processes adopted for choosing deputies to the new parliament (cf. the Cadiz Constitution, articles 34 ff.) were striking. Voters were previously selected by local notables, both lay and ecclesiastic, a procedure that, according to the given examples, led to an exclusion of all "unfit" people. Furthermore, scrutiny was organized in progressive phases, leading to a successive refinement of representation in an elitist sense.[10] The lack of any kind of scrutiny from higher entities gave immense leeway to local dignitaries in imposing a representation of their own. All of this reinforced the original exclusion of the various layers of the population that were subordinated either by their lack of citizenship or their status as neighbors (cf. article 9).

As Marta Lorente emphasizes, the rules imposed by the Cadiz Constitution generally favored a smooth transition from elite-ruled colonial regimes to conservative political independences, even if this was not the wish of the more progressive wing of the members of the *Cortes*, as was clearly shown in the case of José de Bustamante y Guerra, the President of Guatemala (185-213), a man inclined towards continuity and conservative outcomes in "representative" processes. Taking advantage of his local power and influence, he went so far as to remake the electoral rules on an even more elitist basis. According to the *Ayuntamiento* of the Ciudad de Guatemala, the attitude of Bustamente was nothing other than an attempt to restore the established political way of life of the Iberian-American Overseas Territories: "The chiefs of America are used to treating these subjects as they would have done in a colony of slaves, because their distance from the throne and the lack of resources [of the ordinary people] allow them impunity in their procedures. A succession of centuries has granted them an absolute and despotic power, and it is not easy to convert them to the new system" (194).

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8 Those who were deemed to have African origin could only become citizens through the performance of specially valuable actions, article 22.

9 Antonio Annino, *Historia de las Elecciones en Iberoamerica, Siglo XIX: De la Formación del Espacio Politico Nacional*, Buenos Aires, Fondo de Cultura Económica, 1995; A. Annino & F. Guerra (coord.), *Inventando la nación. Iberoamérica, siglo XIX*. México, Fondo de Cultura Economica, 2003; J. C. Chiaramonte, *Nación y Estado en Iberoamerica.El lenguaje politico en el tiempo de las independencias*, Sudamerica, Buenos Aires, 2004; Id., *Ciudades, províncias, estados: orígenes de la Nación Argentina (1800-1846)*, Ariel, Buenos Aires, 1997; Gabriella Chiaramonti, *Ciudadanía y representación en el Perú (1808-1860). Los itinerarios de la soberanía,* Lima, Universidad Nacional Mayor de San Marcos-Oficina Nacional de Procesos Electorales, 2005; François-Xavier Guerra y Annick Lempérière *et al., Los espacios públicos en Iberoamérica. Ambigüedades y problemas. Siglos XVIII-XIX,* Fondo de Cultura Economica, México, 1998; François-Xavier Guerra, "La ruptura originaria: mutaciones, debates y mitos de la independencia", Izaskun Álvarez Cuartero y Julio Sánchez Gómez (eds.), *Visiones y revisiones de la independência americana,* Salamanca, Universidad de Salamanca, 2003: 89-110; "El apogeo de los liberalismos hispánicos. Orígenes, lógicas y límites", *Bicentenario. Revista de Historia de Chile y América,* 3/2 (Santiago, 2004): 7-40; synthetic review and appraisal: Víctor Peralta Ruiz, "Impacto de las cortes de Cádiz en el Perú. Un balance historiográfico", *Revista de Indias,* 2008, vol. LXVIII, No. 242, pp. 67-96.

10 The same thing happened with the first Portuguese electoral laws (cf. my book, *Sentidos Improváveis e Incertos do Constitucionalismo Oitocentista Português*, Curitiba, Juruá, 2009).

As the author continually reminds us, when we replace merely textual research with an archival, case-oriented study, each situation investigated increases in its density, complexity and uniqueness. Nevertheless, some general guidelines can be drawn up for interpreting the full picture of the Latin American independence processes from the examples given or evoked by Marta Lorente.

Perhaps the most striking thing to be noted is that along with innovative and even revolutionary ideas (including that of independence) conservative trends were also at work, sometimes concealed in a seemingly revolutionary discourse. Certain freedoms were, for example, insistently demanded. However, such freedoms were frequently not intended to be applied on a universal basis, in accordance with the new liberal paradigm, but were instead demanded in favor of the traditionally installed communities and elites, i.e., as particular privileges to be enjoyed by political bodies and personal states, as granted to them by old charters and the old "Indian law" (*derecho de Índias*).[11] In less exceptional cases, "independence" amounted to little more than the preservation of the traditional political way of life, just as it had been lived even before the enlightened attempts to introduce innovation. It is no wonder that these conservative independence projects met with two kinds of resistance: that of the colonial authorities, for political reasons, namely the desire to preserve their colonial dominance; but mostly that of the more radical groups of the political spectrum, for whom independence also meant a guarantee of equal rights and liberties for all and the extinction of status-based privileges. A hopeless plan…

Another interpretive guideline leads us to the conclusion that what happened in the case of early Iberian-American constitutionalism was not so radically different from what would eventually happen in Spain. In the metropolis, many of the almost revolutionary narratives of the Cadiz Constitution were annihilated by the survival of the old laws, old bureaucratic practices and processes, old political imaginaries and old political elites. Therefore, Spain and Latin America shared a quite similar constitutional path of elite-based political systems, which survived several theoretically democratic changes at the electoral level, until such time as authoritarian regimes submitted the local *caciquismo* to centralistic State policies, already in the 20th century. This is an important *caveat* for those who attempt to disconnect the two constitutional histories, often inspired by an anachronistic and hopeless intention of legitimizing newborn Nations by stressing their constitutional and political ruptures with the old metropolis. Historical ruptures exist, but only when they really do happen, not when they would simply be convenient for non-historical purposes.

This triumph of conservative independences ruled by the elites of the old colonizers, which was to be noted all over Latin America, is naturally a phenomenon that has been, and must continue to be, addressed by studies of political history. The scope of Marta Lorente's book is another one: it does not deal directly with political processes, but with a universe of texts and a variety of textual updates, looking at the ways in which these have framed political issues and political bodies. Namely, the way in which Cadiz silently introduced constitutionalism and smoothly shored up the politically dominant groups through various institutional channels and devices.

In the last chapter, M. Lorente provides an overview of the way in which the constitutional promise of a single codified law, dealing with the political unity of the Nation-State, was (not) implemented in the remaining Spanish Overseas Territories of the late nineteenth century. It is also a story that is worthy of being told, as yet one more facet of the constitutional ambiguities facing the "colonies." In fact, just as there was never a unified territory, comprising European Spain and the other "Españas,"[12] so legislative unity was also never attained. While, it took some time for the metropolis to replace the plurality of the old traditional catalogue of historical sources of law[13] with unitary codifications, this unification of the law was never achieved in the Overseas

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11 Whose *Recopilación* of 1680 was still in force at the end of the Spanish colonial rule in the late nineteenth century, representing special laws for America, despite the recent promulgation of the general Civil Code (1868), for which there had been such a great demand.

12 Cf. Chapter 3 on the selling of small fortresses (*presídios*) in Morocco. Also in Portugal, the unity of the national territory proved to be a difficult matter in the early days of constitutionalism (and even beyond this), so that by the end of the nineteenth century, the sale or pledging of some colonies was a pervasive theme that did not benefit from a corresponding constitutional debate about their inalienability. A perspicacious and elaborate overview of this theme can be found in Cristina Nogueira da Silva, *Constitucionalismo e Império - A Cidadania no Ultramar Português*, Coimbra, Almedina, 2009.

13 Including such venerable legal monuments as the Visigothic laws and the *Siete Partidas*… In Portugal, the traditionalist array of the sources of law had been severely curtailed by Pombal's *Lei da Boa Razão* (1769).

Territories. Until the end of the nineteenth century, private editions of the 1680 *Recopilación* were in force in the remaining Overseas Territories, while the metropolis progressed (albeit with regional hindrances and claims) towards a unified civil and criminal legislation, as had been promised, almost a century earlier, in the Cadiz Constitution.[14]

To sum up, this book is an illuminating, wise and erudite basis for rethinking both Spanish and Latin American political and constitutional history, as well as that of the Portuguese-Brazilian constellation.



However, the *Ordenações* and the tradition of Roman Canonical Law remained in force, according to the same law, until the Civil Code was promulgated in 1867. Cf. António Manuel Hespanha, *Hércules confundido […]*.

[14] On the break away from the principle of legal unity with the opening up of specific legislation for the Portuguese Overseas Territories (1938), cf. Cristina Nogueira da Silva, *Constitucionalismo e Império […]*, op. cit. Her work also shows how the fuzzy separation of legislative and executive powers allowed for the development of a governmental and administrative normative corpus that was specific to the colonies, which actually made the myth of legal homogeneity sustainable, this being one of the pervasive topics used, from the late nineteenth century onwards, to criticize the policy of legally integrating the overseas territories as being unrealistic.