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History of Constitutionalism in Spain (2000–2015): Controversies over a Bicentenary*

Abstract

History of Constitutionalism can show us how Constitutional law has "constituted" political realities all along history and Constitutional historians are among those who have the capacity to create more than one "constitutional history" that serves to build up very different traditions and narrations on the origins of constituent elements. The Spanish constitutional history of last years is an exceptional laboratory to study all these processes and their implications that reach their peak when dealing with the "Cadiz constitutional experiment". As a matter of fact, the readings that the different historiographical currents did on this constitutionalism apropos its Bicentennial clearly reveal the difficulties and challenges of the recent constituent history of a country undergoing continuous constitutional revision and renewal.

Key words: Spanish Constitutional History, Spanish History of Constitutionalism, Cadiz Constitutionalism, Bicentenary of the Constitution of 1812, Spanish Constitutional Historiography.

Słowa kluczowe: hiszpańska historia ustroju, hiszpańska historia konstytucjonalizmu, konstytucjonalizm Kadyksu, dwustulecie Konstytucji z 1812 r., hiszpańska historiografia konstytucyjna.

1. Constitutional history and Spain: How to address the issue?

The first question that struck me when I tried to set a balance of "Constitutional History" in Spain during the last fifteen years was precisely which should the most appropriate approach be. Should I focus on a constitutional history *of* Spain, on the constitutional history *in* Spain or perhaps should I deal with a constitutional history *from* Spain?

If we refer to a constitutional history *of* Spain, this means we should follow up on all national and international levels of all those works that have dealt with constitutional history of my country. If it is treated as a constitutional history *in* Spain, we would be re-

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ferring to the constitutional history produced in Spain, but also to the topics and perspectives of constitutional history that are of interest in Spain and do not have to be restricted to the country, but may also include various European or international constitutional experiences. If, however, we redirect it to a constitutional history *from* Spain, we are addressing our focus to the issues of interest for Spanish scholars or research projects, which are not necessarily confined to Spanish topics, but can cover any other context. In turn, we should also consider constitutional history studies carried out by "national scholars" and are published or developed in other countries.

It is difficult to choose any of the three approaches, since all of them offer elements that should integrate a complete balance on Spanish constitutional historiography; so let us adopt another strategy: focusing on the two key elements that back up all three cases.

First, the three perspectives are based on a certain understanding of the political space *in* which constitutional history is made. Against this background, either a constitutional history *of* Spain, or *in* Spain, as well as *from* Spain need a pre-comprehension of the political unity "Spain" to define those prepositions. If Spain is considered as a current State with delimited borders, all three perspectives would easily be defined. But in this case, should we just be interested in the studies produced in Spain or by Spanish scholars, independently of their topic, that could be very far from Spanish constitutional history? Should we ignore the non-Spaniards and not-made-in-Spain contributions to the Spanish constitutional history? If we intend to account for the *state-of-the-art*, should we be keen on the Spaniards constitutionalists, on the Spanish Constitutional History or on the Constitutional History of Spain, regardless of whoever produces it? Let us leave this matter open for now.[1]

Secondly, taking a further step, the view of the historian who makes a specific constitutional history on that space defines precisely the space on which constitutional history is made. Consequently, the different historical approach transforms the former understanding of the political space *in* which constitutional history is made into a certain understanding of the political space *on* which constitutional history is made. In this sense, the former aspect regarded the *who*, whereas this second common aspect focuses on the *how*, that simultaneously concerns the *what*, since the optics from which an object is contemplated defines it.

In fact, of these two very well-known elements, undoubtedly the most decisive one is the latter: who makes history builds his/her story from a point of view that has two unavoidable features, as Carlos Garriga clearly showed us:[2]

First of all, our perspective is always *external* to what we study (because we are not part of the past nor can ever be part of it) and secondly, it always happens *after* in relation to our object of study (because we contemplate it once it has happened and we know the further evolution of the historical episodes). These are the axes on which the work

[1] I will not pay attention to an ulterior subdivision that is not absolutely peaceful, because it depends on what is understood by the discipline "Constitutional History", and is the class of scholars who deal with these issues (historians, legal experts of various specialties, economists, political scientists, sociologists...). A consideration in this regard in M. Fioravanti, *Sulla storia costituzionale*, "Giornale di Storia Costituzionale" 2010, 1st sem., No. 19, p. 29–32; I. Fernández Sarasola, *Aproximación a la historiografía constitucional Española* [in:] *Historia e historiografía constitucionales*, ed. J. Varela, Madrid 2015, p. 109–152, esp. p. 132 ff.

[2] For all what follows, C. Garriga, *¿La cuestión es saber quién manda? Historia política, historia del derecho y 'punto de vista'*, "PolHis" 2012, 2nd sem., No. 10, p. 89–100.

of the historian is plotted. It cannot be otherwise: the facts are observed after they have occurred and from an external point of view.[3]

However, Garriga reminds us that one or the other may be given a boost by the historian: if the former is the priority, it will tend to consolidate the genealogy of the object of study; if, on the other hand, the latter is emphasized, the outcome would tend to build a field of meaning that can frame such a legal experience.[4] With this background in mind our author ends up concluding that different historiographical approaches depend primarily not on academic specialities or on different research fields, but rather on the point of view adopted by whoever writes history.[5]

If we assume the critical importance of the role of the historian in historiography building, then I reckon that the last two approaches proposed (constitutional history *in* Spain and *from* Spain) are the ones that best enhance this role. These two options, which I will refer to collectively as "constitutional history *in* Spain", can show more clearly the path Spanish constitutional historiography has taken in the last fifteen years.

2. Apparent order in apparent chaos: the bicentenaries

If we focus on the constitutional history *in* Spain, there are many clues that can be traced back in order to form an overview of constitutional history in recent years. Again, the possibilities are many. One option, for instance, would be to follow the courses related to Constitutional History taught in Spanish universities and their contents, the degrees in which they are taught and the disciplines to which they belong; another strategy could be to analyse awarded or ongoing research projects concerning constitutional history;[6] another possible element would be giving an overview on doctoral thesis dealing with this issue. Indeed, there are many data that can be tracked to obtain statistical results and extract from them balances and conclusions.

I opted instead for targeting those publications most directly related to monographs and relevant national or international journals that traditionally gather or can gather Spanish constitutional history. As an example, I refer to the monographies published by the "Centro de Estudios Políticos y Constitucionales",[7] or to periodical jour-

[3] "The historian – Garriga states – is the sum of both [viewpoints]: he can only look «from after the event» and he must look «from outside it»". *Ibidem*, p. 91.

[4] "The confluence of these two points of view, that only for argumentative effect's sake can be considered in an isolated way, defines the epistemological status of the historian […]: a «later» point of view (from the past to the present, that builds genealogies), and an «external» point of view (from outside in, that builds «worlds», frameworks of meaning". *Ibidem*.

[5] *Ibidem*.

[6] I. Fernández Sarasola reports some handbooks on constitutional history and some significant research projects in *Aproximación a la historiografía…*, p. 138–152.

[7] "Colecciones de libros del CEPC", Centro de Estudios Políticos y Constitucionales, Gobierno de España, http://www.cepc.gob.es/publicaciones/libros (access: 16.02.2018).

nals such as "Historia Constitucional,[8] "Anuario de Historia del Derecho Español",[9] "Fundamentos",[10] "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno",[11] the "Jstor" set of journals,[12] or the "Journal of Constitutional History/Giornale di Storia Costituzionale"[13]. Without ignoring other constitutional periodicals, such as the "Revista Española de Derecho Constitucional"[14] or the "Revista General de Derecho Constitucional".[15] The sample is not intended at all to be exhaustive, only representative.

If a similar approach is made, the production of constitutional history offers remarkably mixed results. First, those who have dealt with constitutional history are roughly three types of scholars: legal historians, constitutionalists and those who are called "general historians", devoted to domestic institutions or, in the case of foreign researchers, to Spanish history (in this latter case, we refer to both, "hispanistas" and, where appropriate, "americanistas" as well).

The topics of constitutional significance dealt with in recent years are quite varied if we apply a flexible approach; that is to say, if not only a historical analysis of constitutions is considered, but the relevant constitutional issues are included as well. The issues addressed have been, for instance, the "traditional"/"material" constitution, the political parties, freedom of the press, 1812 constitutionalism, parliament, amnesty and pardon, political thinking, American independencies, the normative system, slavery, the judiciary, liberalism, sovereignty, domestic government, the monarchy, democracy, citizenship, the nation, the liberal State, the right of association, the constitutional courts, colonialism, the police, the Magna Carta, the Spanish Second Republic, compared constitutional models, the executive power, the Franco regime, the conceptual history, the politics, the principle of legality, the representative system, women, the constitutional process of 1978, the elites, black people, republicanism, the provincial governments, the territory, or the forms of government, among others.

If we focus on the chronology, in general terms the studies fall between the fringes of the late 18th century and the last years of the Franco dictatorship (in the 1970s). Within this period, particular attention is paid to specific stages as the Enlightenment debate on constitution and the imperial crisis (late 18th century), Bayonne (1808), Cadiz (1812), the Liberal triennium (1821–1823) and the liberal constitutionalism from 1836 to 1837, the "liberal" route from Cadiz to the Six-year democratic period (1812–1869), the American independencies in the early decades of the nineteenth century (until 1826), the six-year

[8] "Historia constitucional: revista electrónica", http://www.historiaconstitucional.com/index.php/historiaconstitucional (access: 6.02.2018). This journal was founded in 2000, precisely coinciding with the study period of this paper. The periodical, which is directed by Joaquín Varela Suanzes-Carpegna and co-edited by the Constitutional History Seminar "Martínez Marina" of the University of Oviedo and the CEPC, boasts of being the first and only publication entirely devoted to Constitutional History in Spain.

[9] https://www.boe.es/publicaciones/anuarios_derecho/anuario.php?id=H_ANUARIO_DE_HISTORIA_DEL_DERECHO_ESPA%D1OL; and more updated: https://dialnet.unirioja.es/servlet/revista? codigo=115 (access: 16.02.2018).

[10] "Fundamentos. Cuadernos monográficos de Teoría del Estado, Derecho Público e Historia Constitucional", http://www.unioviedo.es/constitucional/fundamentos/Portada.html (access: 16.02.2018).

[11] http://www.centropgm.unifi.it/quaderni/ (access: 16.02.2018).

[12] https://www.jstor.org/ (access: 16.02.2018).

[13] http://www.storiacostituzionale.it/ (access: 16.02.2018).

[14] http://www.cepc.gob.es/publicaciones/revistas/revistaselectronicas?IDR=6 (access: 16.02.2018).

[15] http://www.iustel.com/v2/revistas/detalle_revista.asp?z=5&id=3 (access: 16.02.2018).

revolutionary or democratic phase from 1868 to 1874, the "Elizabethan Spain" as a unity (1834–1868), the period of the Restoration (1875–1931) or specifically, the Second Republic (1931–1939).

Regarding the spatial dimension Spanish constitutional history has focused in general terms on Spain as a politic unity in general and in particular on Cadiz, the Basque Country, Asturias, Navarra or Catalonia; and beyond Spain to England, Latin America, the former Spanish colonies, Portugal, Switzerland, United States, Italy or France.

Simply by browsing through these publications a reader realizes the disparity and variety of these approaches. Indeed, the first thing that becomes evident is that the wide dispersion of the studies consequently causes extreme difficulties to find possible conductive lines for framing such heterogeneous data that, in addition, would be artificially drawn. Even though it would have not been easy, a possible presentation of the Spanish constitutional historiography in the past fifteen years could have consisted in a selection of parameters for grouping these data in a descriptive way and the analysis of statistical results.

Nevertheless, I have opted for another strategy that consists in not trying to explain the heterogeneity (which is particularly meaningful, by the way), but rather focusing on the occasions in which studies converge. Indeed, in this itinerary from 2000 to 2015 there are two significant moments: around 2008 and around 2012. These two dates have one thing in common: both commemorate the bicentennial of two historic constitutions, although of different magnitude and meaning: the 1808 Constitution of Bayonne (a French Constitution imposed by Napoleon on the Hispanic Monarchy) and the Constitution of Cadiz of 1812 (a Hispanic Constitution that reacted against Bayonne). On these two occasions we could now say that almost the entire production of the constitutional historiography –with different levels of intensity, though – was shaped around two constitutional phenomena: Bayonne and Cadiz.[16]

[16] Without trying to be exhaustive at all, there are some significant Spanish (in reference to the edition or to the authorship) examples of this statement. I focus on Cadiz, since it is a specially significant case: The radical historiographical divergence apropos of the bicentennial can be appreciated in *La Constitución de Cádiz: historiografía y conmemoración*, eds. J. Álvarez Junco, J. Moreno Luzón, Madrid 2006. From the same date and with an Atlantic vision, *Doceañismos, constituciones e independencias. La constitución de 1812 y América*, coord. M. Chust Calero, Madrid 2006. The model of constitution that the *Gaditana* represents, is baptized, formulated, explained and characterized as such by C. Garriga, M. Lorente in *Cádiz, 1812: la Constitución jurisdiccional*, Madrid 2007. The keys to a constitutionalism as a phenomenon throughout the Hispanic universe in *Historia y Constitución: trayectos del constitucionalismo hispano*, coord. C. Garriga, México 2010. In 2011 the proliferation of commemorative publications soars. The journal "Teoría y Derecho. Revista de Pensamiento Jurídico" dedicated issue 10 (2011) to "La Constitución de 1812: Miradas y perspectivas". Also, the "Anuario de Historia del Derecho Español" (Madrid 2011) dedicated volume LXXXI to a monograph entitled "Cádiz, 200 años después".

Perhaps the most ambitious work in terms of magnitude regarding this commemoration was *Cortes y Constitución de Cádiz. 200 años*, ed. J.A. Escudero, Madrid 2011. The occasion has been also used to reissue works that opened new horizons for constitutional history, such as the reprint now as a book of a previously published essay in "Anuario de Historia del Derecho Español" 1995, Vol. LXV, by F. Tomás y Valiente, *Génesis de la Constitución de 1812: de muchas leyes fundamentales a una sola Constitución*, Pamplona 2011. Other commemorative homages can be found in *El legado de las Cortes de Cádiz*, coord. P. García Trobat and R. Sánchez Ferriz, Valencia 2011. In 2012 a unitary volume appeared that globally collects the results of decades of research on Hispanic constitutionalism of the HICOES group: *El momento gaditano. La Constitución en el orbe hispánico (1808–1826)*, dirs. M. Lorente, J.M. Portillo, Madrid 2011. This important work

The picture then from 2000 to 2015 could be depicted as an islet (Bayonne) and a large island (Cadiz) in a large sea of studies. If we contemplate this scenario from a bird's eye view, a first diagnosis can be extracted: there was something acutely relevant in those constitutional moments that had the power to concentrate all the attention of the observers. Therefore, it is worth landing on the islands to try to see up close what they reveal about the Spanish constitutional historiography of this period.

3. The *Momento gaditano* as the turning point of the constitutional historiography's divergences

Let's take a look at the "*Gaditano* – gaditano meaning «from Cadiz» – Moment"[17] and leave aside for now the Constitution of Bayonne, which has its own peculiar characteristics and is less illuminating than the 1812 case.[18] There are some reasons for this decision. The first is that 1808 attracts the attention of part of the doctrine, making its way as a unifying issue, but not however concentrating the entire interest of authors. 1812 instead does monopolize the attention of all sectors. Indeed, the large volume of works and activities in Spain, Europe and Latin America triggered by the fervour of the "*Gaditano* Moment" makes it especially significant.

But the particular importance of this "moment" is not simply a quantitative matter, rather, Cadiz interests us most because it concentrates the epitome of the historio-

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was awarded the National Prize of the Bicentenary of the *Cortes* of Cadiz, convened by the *Cortes Generales de España*.

It has also been an occasion to reedit sources. Such is the case of the *Constitución Política de la Monarquía Española*, Cádiz 2010 or the revised and complete edition of the constituent debates in a single volume: *Constitución en Cortes. El debate constituyente, 1811–1812*, ed. F. Martínez Pérez, Madrid 2011. Historiographical notes and references on anniversaries in particular and on the Spanish constitutional historiography in general can be found in I. Fernández Sarasola, *Aproximación a la historiografía constitucional española*, already mentioned. A specific historiographic balance on the constitutional phenomenon of Cadiz before the bicentenary is offered by B. Clavero in *Cádiz en España: signo constitucional, balance historiográfico, saldo ciudadano* [in:] C. Garriga, M. Lorente, *Cádiz, 1812…*, p. 447–526. A very complete overview of the historiography for the bicentenary by the same author can be found in *Cádiz 1812: antropología e historiografía del individuo como sujeto de constitución*, "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno" 2013, Vol. 42, p. 201–279. However, as announced by the same author it has to be done a comprehensive assessment of the bicentennial once the necessary time has passed, although it is an enormous undertaking considering the exponential multiplication of works on Cadiz in Spain, Europe and in the entire American continent.

[17] I borrow the expression from one of the most representative books already mentioned, culminating a trajectory of decades dedicated to the study of the first Hispanic constitutionalism: M. Lorente, J.M. Portillo (dirs.), *El Momento gaditano…*

[18] The interpretative differences on the commemoration of Bayonne are also revealing, though. In this respect, it can be seen, among others, I. Fernández Sarasola, *La Constitución de Bayona*, Vol. I of the collection "Constituciones españolas" by M. Artola Gallego, Madrid 2007; E. Álvarez Cora, J.M. Vera Santos (dirs.), *Estudios sobre la Constitución de Bayona*, Madrid 2008; C. Muñoz de Bustillo Romero, *Bayona frente a Cádiz: gobierno y administración en la prefectura de Jerez*, Cádiz 1989; J.-B. Busaall, *Le spectre du jacobinisme. L'expérience constitutionnelle de la Révolution française et le premier libéralisme espagnol (1808–1814)*, coll. "Bibliothèque de la Casa de Velázquez", Vol. 56, Madrid 2012.

graphical disparity in the constitutional field and exemplifies extremely well the origin of contemporary differences.[19] In addition, for one of the branches that has given more relevance to Cadiz in its lasting and innovative research on constitutional history, this constitutional experience would be intrinsically connected with the preceding episode of 1808. In this sense 1808 would not represent an anecdotal and isolated episode, but an essential element without which some fundamental characteristics of the first Hispanic constitutionalism could not be realistically understood.

But this is not the time to talk about *Gaditano* constitutionalism, but rather about its role in constitutional historiography, its "historiographical status", as José M. Portillo, one of the best connoisseurs of the Atlantic revolutionary constitutionalisms,[20] would say.[21] Indeed, it is not a question of defining features of that constitutionalism, but precisely how, in relation to it, the different historiographic lines conceive, design and understand its characteristic elements and its meaning. This approach, which is the one that interest us here, brings me to refer predominantly to the bibliography that relates to "methodological" reflection for the purpose of the bicentennial and not to the literature related to the "content" of the Constitution of Cadiz.

[19] Several authors have seen in the bicentenary an opportunity to promote, along with thematic initiatives, a methodological reflection on the constitutional history in Spain, which is what defines the historiographic lines and schools, alleging the lack of reflection on the matter in Spain and ignoring, therefore, the applied methodology of other schools of much greater length, such as the one initiated with regards to the proposals of the historian and constitutionalist Francisco Tomás and Valiente. I am referring to the HICOES ("Historia cultural e institucional del Constitucionalismo en España y América") group, whose research trajectory as a group dates back to 1997. It is the case of the claims of Joaquín Varela Suanzes-Carpegna in *Algunas reflexiones metodológicas sobre la Historia constitucional* (published in "Revue Française de Droit Constitutionnel" 2006, No. 68, p. 675–689, titled *L'Histoire constitutionnel: quelques réflexions de méthode*; in "Giornale di Storia Costituzionale" 2006 II, No. 12, p. 15–28, entitled *Alcune riflessioni metodologiche sulla Storia Costituzionale*; in "Historia constitucional: Revista electrónica de Historia constitucional" 2007, No. 8, p. 245–259, http://hc.rediris.es/08/index.html (access: 16.02.2018); in "UNED. Teoría y realidad constitucional" 2008, No. 21, p. 411–425; finally, this article was published as an introduction to the volume edited by the same author *Historia e historiografía constitucionales…* Unless otherwise indicated, I will refer to the 2008 edition). This position is backed in identical terms by Ignacio Fernández Sarasola (e.g. in *Sobre el objeto y el método de la Historia constitucional española*, "UNED. Teoría y realidad constitucional" 2008, No. 21, p. 435–446, reference in p. 436–437 (also published in "Revista General de Derecho Constitucional" 2008, No. 5, p. 1–12); *idem*, *Objeto y método de la historia constitucional* [in:] *Derecho, ciencias y humanidades*, dirs. A. Figueruelo Burrieza, G.J. Enríquez Fuentes, M. Núñez Torres, Granada 2010, p. 283–300; or *idem*, *La Historia constitucional: método e historiografía a la luz de un bicentenario hispánico*, "Forum Historiae Iuris" 2009, §§ 1 and 29 ss., http://www.forhistiur.de/zitat/0906sarasola.htm (access: 16.02.2018); most recently, *idem*, *Aproximación a la historiografía constitucional…*, p. 148–149.

[20] J.M. Portillo Valdés, *Revolución de nación: orígenes de la cultura constitucional en España, 1780–1812*, Madrid 2000; *idem*, *Crisis atlántica: autonomía e independencia en la crisis de la Monarquía Hispana*, Madrid 2006.

[21] *Idem*, *Proyección historiográfica de Cádiz. Entre España y México*, "Historia Crítica" 2014, sep.-dec., No. 54, p. 49–74, reference in p. 58.

3.1. Historiographical divergence's assumptions: Birth certificate of Spanish "modernity" under debate

The reading on 1812 done by the historians represents the beginning of two divergent and irreconcilable itineraries that can be stated simply from the beginning: those who believe that the Constitution of Cadiz was the starting point of contemporary constitutional Spain and those who on the contrary consider that this constitution represented a constitutional closure of an enlightened stage.[22]

For the former, the modern liberal nineteenth century State was inaugurated by the Constitution of 1812: The Spanish Nation exercised a collective right of self-determination translated into the constituent power and endowed with a constitution which supposedly already contained all the modern political elements (recognition of individual rights, separation of State powers). In 1812, thus, the *Ancien régime* finished and a new Western liberal nationalism banged its way in by building an egalitarian and unprivileged nation.[23] J. Varela could not state it in a better way: "The bicentennial must serve to reaffirm the beginning of the building of a Nation, Spain, overcoming old social and territorial privileges".[24]

With the Constitution of 1812 Spain was thus placed in the catalogue of unquestionably revolutionary constitutions, such as the United States' of 1787 and the French one of 1791. The problem was that throughout the 19th century, the political vicissitudes prevented the full implementation of this liberal world, which had to wait until 1869 to fully unfold, but returned to be buried with the Restoration and did not resurface until the

[22] In this sense of a historiographical watershed, vid. M. Lorente Sariñena, *De bicentenarios y otras cosas*, "Teoría & Derecho. Revista de pensamiento jurídico" 2011, december, No. 10, p. 9–19. This author suggests the radical change of perspective that "to contemplate the constitutional *Gaditana* experience like the last experiment of the Enlighted Monarchy" means. *Idem*, Ámbitos constitucionales e historiografía de la Constitución: la nación doceañista [in:] *La Constitución de Cádiz: historiografía…*, p. 146. Placing the constitution before or after 'modernity' determines the legal categories that we apply to study it. Likewise only if we date the constitution at the time that corresponds to it, we can also date the birth of the myth about the constitution and differentiate it from the constitution itself. Consequently, only if we analyse this first constitutional experiment from its own premises, without establishing contemporary equivalences or trying to explain them from later categories, it is possible to differentiate in historiographical terms "Cadiz from the idea of Cadiz" (*ibidem*). If this is so, "there appears before us a diffuse but recognizable boundary mark of one and the other time, that of the Catholic Monarchy/Nation and that of the Spanish State/Nation. This [...] very useful mark allows us to differentiate the nature and elements of the constitutive political discourse of the 19th century Nation: in Cadiz, through the Constitution, an attempt was made to maintain, or better, to recreate the bi-hemispheric unity; and in spite of the terrible failure of the rule of 1812, the deformation and idealization of what happened in Cadiz contributed to the peninsular [Nation] assumption. Thus, began the national myth of Cadiz, which, along with others on occasion contradictory, would serve to raise what could be defined as a peninsular area to the condition of a pre-constituted element to the detriment of other constituent possibilities". *Ibidem*, p. 147.

[23] J. Varela stated it clearly when reflecting on the 1812 Constitution's significance for the liberal Spanish State's sake due to its bicentennial: "The bicentennial of the Constitution of Cadiz should thus contribute to reinforce the Spanish national feeling, so harassed by anti-Spanish peripheral nationalisms, that tend to identify Spain with a mere oppressive State or, in other cases, as a nation only claimed as such by a bunch of reactionaries. The bicentennial of this Constitution should contribute effectively to refute such fallacies and to show the existence of a liberal Spanish nationalism […]" (*Reflexiones sobre un bicentenario (1812–2012)* [in:] *La Constitución de Cádiz: historiografía…*, p. 75–84, quotation in p. 82).

[24] *Ibidem*.

20th century. Accordingly, the current Spanish constitution of 1978 would be the heir of that ascending – albeit uneven – line of modernity inaugurated one hundred and sixty-six years before.[25]

This eagerness to locate Cadiz as the starting point of modernity seems to respond – as Portillo diagnoses – to the need of any Nation that wants to be described as "modern" to find a date in which the *Ancien Régime* would have left behind in order to enter officially this scenario of modernity. Without a supposedly revolutionary origin accurately dated, it would seem that there is no possible history-making of the "irresistible rise" of a new modern Nation.[26]

The others, however, address the modernity that the Cadiz Constitution assumed from another point of view, which does not respond to the revolutionary paradigm imposed by the French Revolution. Without ignoring the novelty that the mere existence of a written constitution represented in the framework of the traditional Hispanic world, they reckon that 1812 did not mean a starting point in terms of a radical rupture with its inheritance as far as the subjects of rights, organization of powers or the very concept of "law" are concerned.

For these scholars, the Constitution of 1812 culminated the reflection on the old constitution of the Hispanic Catholic Monarchy, concluding that indeed a new constitution was needed.[27] But the new Constitution was passed; now formal, unitary, written down, and not from the scratch. On the contrary, it gave "constitutional coverage" to an extant multiplicity of organic unities belonging to the Catholic Monarchy. In a few words, it "constitutionalised" many realities, practices, reasoning and understandings of the Hispanic *Ancien régime*. The continent – a new formal, written supreme text – was modern, but the traditional elements of its content were still too recognizable.

An example will be enough to raise suspicions: the Cadiz text, far from talking about the rights of "individuals" and separation of "powers", refers to "corporations" and powers. Powers and bodies constituted a real material constitution of the Monarchy, a framework of powers and political bodies on which the totality of the Catholic Monarchy was supported – and on which it rested. But that framework was much disorganized and prevented the empire from functioning efficiently. Thus, the first Hispanic constitutional experience sought to "give institutional and functional coherence" to that "material con-

[25] The newly quoted article (*ibidem*) is still an extremely good example of this comprehension.

[26] "This attitude must be interpreted inside a kind of Western *Weltanschauung* that needs to fix the moment of the beginning of modernity and of untying of a past that is its opposite. In a sense, it could be said that the nation that cannot present its own moment of takeoff with respect to the *Ancient régime* could hardly be considered modern. Hence the historiographical desire to see Cadiz, in this sense, as a moment of assumption of modernity, and not just of any modernity, but of the most advanced. It is in a way, a logical consequence of the liberal interpretation of Cadiz: modernity requires a 'date of birth', and if one has to have an origin, better this than any other of the 19th century. The thread of this Spanish modernity would go thus with one or another starting date, from 1812 to 1978". (J.M. Portillo Valdés, *Proyección historiográfica de Cádiz...*, p. 58–59).

[27] Vid., for instance, J.M. Portillo Valdés, *Crisis de la monarquía y necesidad de la constitución* [in:] *De justicia de jueces a justicia de leyes: hacia la España de 1870*, coord. M. Lorente, "Cuadernos de derecho judicial" 2006, No. 6, p. 107–134; or, *idem*, *Constitucionalismo antes de la Constitución. La Economía Política y los orígenes del constitucionalismo en España* [in:] *Nuevo Mundo Mundos Nuevos* [en ligne], Colloques, mis en ligne le 28 janvier 2007, consulté le 9 janvier 2017. URL: http://nuevomundo.revues.org/4160 (access: 16.02.2018).

stitution", which meant reordering the powers and articulating the functioning of its bodies.[28]

In order to give the dispersed interests of all those political bodies a constitutional balance, they were given cover within a new political vessel, the Constitution. Thus, in trying to combat the imperial and dynastic crisis by giving constitutional coverage to a new political entity, the Constitution created instruments of balance between bodies and reorganized preexisting powers; and did so in a jurisdictional way:[29] while establishing a new stage of reorganization of power, it recognized the existing bodies and powers and managed through jurisdictional channels the existing legal order to reorder the political body and resolve conflicts of power.

In this sense, 1812 became a kind of conduit with a constitutional filter through which these elements of the old Catholic Monarchy penetrated the 19th century and were finding where they fit in a renewed legal system that was undergoing a slow transformation.[30] The Hispanic world operated, therefore, by regenerating tradition, providing new meanings for traditional concepts and reformulating them in terms of "a new constitution". Going a step further, they tried to reformulate and reconceptualise the fundamental laws of the Monarchy and turn them into political laws of the Nation. The great novelty was that, in order to achieve this, it was understood that the practice of compiling should no longer be followed, but rather a constituent logic instead.[31]

But it was not, though, the fruit of an exercise of violent political will to break up, which is associated with the revolutionary constituent power, nor did it replace the Catholic anthropology of the traditional order.[32] In fact, Cadiz showed the intrinsic limitations to purge the traditional order and transform it into "constitutional", as well as to impose the normative supremacy of the constitutional text.[33]

Contemplating the polycentric Hispanic constitutionalism as a process of constitutionalisation of traditions rather than as a forced Spanish version of French revolutionary constitutionalism – as Alejandro Agüero reminds us – does not mean a denial of its transforming imprint, nor its capacity to become a milestone for the new political legitimation. Rather, "it helps to understand the density of different emerging discourses and, of course, the limits derived from the very conditions of the context in which they occur".[34]

In short, it is not that Cadiz does not introduce "constitutionalism, liberalism and modernity", but rather it introduces "its constitutionalism, liberalism and modernity",

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[28] In J.M. Portillo Valdés, *Proyección histriográfica…*, p. 64.

[29] The understanding of Cadiz constitutionalism as "jurisdictional" is fully posed by C. Garriga, M. Lorente in *Cádiz, 1812…*

[30] According to the suggestive perspective of B. Clavero (*Constitutionalismo colonial: oeconomía de Europa, Constitución de Cádiz y más acá*, Madrid 2016) one of the elements that Cadiz dragged was the constitutionalisation of a whole colonial world, not only making compatible colonialism with constitutionalism, but even making colonialism a constituent element of this constitutionalism.

[31] C. Garriga Acosta, *Cabeza moderna, cuerpo gótico. La Constitución y el orden jurídico*, "Anuario de Historia del Derecho Español" 2011, t. LXXXI, p. 99–162; *apud* J.M. Portillo, *Proyección historiográfica…*, p. 61.

[32] See B. Clavero, *Cádiz 1812: antropología…*

[33] Cfr. C. Garriga, M. Lorente, *Cádiz, 1812…*, esp. p. 43–72, 119–168.

[34] A. Agüero, *Historia política e Historia crítica del derecho: convergencias y divergencias*, "PolHis" 2012, 2nd sem., No. 10, p. 81–88. J.M. Portillo insists on the same idea (*Proyección historiográfica…*, p. 61).

different from what we understand today according to our contemporary parameters. Hence it is necessary to question the true meaning of this constitutionalism and its political and juridical categories in its context. It is necessary to be attentive to the contexts of meaning, since "normative statements are incomprehensible to the current reader if the contextual framework in which these statements acquired meaning is not previously recomposed".[35]

Is the modernity of Cadiz constitutionalism better understood by what it meant in relation to the world that preceded it or to the world which it supposedly inaugurated? Did the Constitution of Cadiz represent a constitutional bridge between tradition and modernity or was it a radical rupture between the past and the contemporary State and liberalism? These two views are clearly conflicting. In order to make this clearer, I shall call the first approach "Cultural History of Constitutionalism" and the second one "Legal History of Constitutional Law" and we will see immediately why.

3.2. Legal History of Constitutional Law

The Legal History of Constitutional Law considers that the object of study is the constitutional history of the Spanish State, which is a unitary entity that concentrates all public power in its hands since its foundation and, due to this, writes constitutions that organise public powers in a tripartition and recognise civil and political rights of individuals. Consequently, this history of constitutionalism revolves around a concept of constitution that historiography qualifies as "formal", that is, a written norm resulting from a constituent power that breaks apart from the past and with a supreme normative value that organises the powers and guarantees rights in the present, but with future prospects while being prescriptive.[36] The contradiction between the preconstitution of the constitutional State and the constitutive capacity of a formal constitution that all the writings on this line ooze is not theoretically resolved, though, because the constitution's capacity to constitute public powers and subjects of rights is obviated, since they both – powers and subjects – are taken for granted by default.

The "material constitutions" are expressly excluded as object of constitutional history.[37] Constitutional history, as such, is only conceived around formal constitutions. These are such a basilar factor that, in the studies of these scholars, all the elements and approaches revolve around them. For example, let us look at the decisive consequences

[35] A. Agüero, *Historia política*…, p. 83.

[36] On the definition of "Constitution" for the purposes of constitutional history, see I. Fernández Sarasola, *La historia constitucional: método*…, § 12–14.

[37] I. Fernández Sarasola apparently contemplates the study of a "material constitutionalism", but because it redefines the concept of "material constitution" that historiography has been managing. For him, as it does instead traditionally for constitutional historians, the "material constitution" is not the sum of descriptive (non-prescriptive) elements such as privileges, concessions, foundations, religion, fundamental laws of the realm... that is, the set of rules which reveal the framework of equilibria of powers and subjects of law in a specific political space; he considers instead that it is part of the "material constitution" which "materially" refers to aspects considered constitutional according to current constitutional understanding. According to his words, it is necessary to understand "constitution in a material sense not the political institutions and forces prevailing at any moment […] but the constitutional texts defined by their content, by the matter in question, and not by their position in the legal system". (I. Fernández Sarasola, *Sobre el objeto y el método*…, p. 437).

on two specific planes: the sources and their treatment and the chronology. Let us start with the latter.

Such a concept of constitution can only be located in very recent historical periods, basically post-revolutionary, according to Western parameters, associated with the liberal State of a long 19th century and the democratic State of a brief 20th century marked by the ghost of wars. This leads Varela to say that "Constitutional History deals with the genesis and development of the constitution of the liberal and liberal-democratic State, regardless of the form adopted by that constitution and its position in the legal system".[38]

This is the same as saying that constitutional understandings of pre-contemporary legal cultures such as the constitution of the ancient, medieval or modern world prior to the French Revolution are excluded as objects of constitutional history. The sharp chronology, resulting from the inflexible definition of constitution, causes classification problems that are only solved in appearance by new definitions that, in turn, generate other risks of inconsistencies. One of the clearest examples comes with English constitutionalism. Varela argues that the birth date of modern constitutionalism can be traced to seventeenth-century England.[39] To locate this kind of constitution linked to the liberal State in the 17th century allows, even with all the reservations that it raises to apply to that period and to that space such concepts of "Constitution" and "State", to encompass the English constitutional experience, in which it is impossible to locate a written and formal constitution in these terms, but instead a set of constitutional documents, traditions, jurisprudence… impossible to reduce to a single written text. Therefore, we would not be talking about, a kind of History of Constitutions, but a History of Constitutionalism. Although Varela refers to them both indiscriminately, Fernández Sarasola makes a difference: for him, whilst "the study of the historical constitutions involves a normative, institutional and political analysis […] the study of constitutionalism requires attention to the ideological perspective of the context [...] in which the idea of limiting the power of the State through a constitution arises […]". Thus, "constitutional history should not only deal with constitutional norms and their development (normative or practical), but also with legal-political doctrines that are at the base (doctrinal aspect). Hence, it also includes the analysis of constitutionalism, understood as a movement aimed at limiting the power of the State".[40]

The problem that comes forth is twofold, since it is particularly difficult to include the English example in this rigid scheme of normative constitution that restricts the powers of a unitary State: if the ability to cover the English constitutional experience is included as object of study of constitutional history, then nothing prevents this discipline from being interested in pre-contemporary constitutional experiences that deal with the limitation of power and guarantees of rights against the constituted powers, which would far exceed the Anglo-Saxon case leading us to pre-revolutionary constitutionalism.

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[38] J. Varela Suanzes-Carpegna, *Algunas reflexiones metodológicas*…, p. 411.

[39] "This substantive and axiological concept of constitution is, in my view, the one that must be taken into account in order to define the object of Constitutional History and to temporarily and spatially delimit constitutionalism, as a historical phenomenon designed to limit the State to the service of individual freedoms, whose date of birth can be established in seventeenth-century England". (*Algunas reflexiones metodológicas*…, p. 411–412).

[40] I. Fernández Sarasola, *Constitutional History*..., § 8.

In order to "save" this case, these scholars tend to redefine the concept of "constitutionalism" that historiography is using, pretending to make the concepts of "power" and "State" synonyms as we have just seen or considering "constitutionalism" as doctrine in different historical moments that revolves – again – around a constitution understood with contemporary features. This opens the new question of the extent to which it can be understood that in seventeenth-century England there was a unitary State and, if there was one, why it should not be located at that time in other political spaces following that definition that would be applicable to the English Monarchy. All this shows that if this rigid classification of contemporary Constitutional Law is strictly followed, both the English case and other chronologically contemporaneous ones, but without a written constitution like Israel's, should be excluded from Constitutional History.

In this sense Fernández Sarasola is quite blunt when he states that "only «modern constitutionalism» is the object of Constitutional history".[41] The argument, if we keep in mind the proclaimed "substantive and axiological" concept of the Constitution, seems very congruent: pre-State constitutionalisms are not a response to the limitation of a State power in purity nonexistent.[42] And with this statement we return precisely to the touchstone of this approach: what is the alleged political unity "unitary State" and how did it historically emerge?[43]

With regard to Spain, this period of a liberal centralized State begins with the Cadiz Constitution of 1812. This means that the Constitution is not in itself a supreme norm that conceives the Monarchy as transoceanic, but that it is given for a new defined and unitary State which is peninsular Spain. Indeed, the Legal History of Constitutionalism considers that contemporary constitutionalism is necessarily and exclusively linked to a unitary state entity that is Spain. The Cadiz Constitution would be the first modern constitution of a well-defined Spanish State, and not the constitution of a much wider distinct political unity: a multicontinental empire.

A clear consequence of this approach is the treatment that these scholars give to the Constitution of 1812 overseas: they refer to it as a "model", "influence", "projection" or "application in America", on the basis that since the early 19th century we could speak clearly of independent States with different constitutional histories and minimizing the constitutive, foundational value of the Cadiz constitutionalism with regard to the emer-

[41] *Ibidem*.

[42] "The […] doubt that can arise then is whether what has come to be called 'ancient constitutionalism' – i.e., movements aimed at limiting political power in the ancient and medieval world – could also be considered as part and parcel of Constitutional History. […] The answer should be negative. The so-called 'ancient constitutionalism' does not come from an idea of State limitation, because in the strict sense it does not even exist in legal-political consciousness. Hence, Constitutional History may be interested in it only as a precedent, but not as a central object of study" (*ibidem*, § 8, 9). In view of such a rigid pre-classification, since it attends to contemporary theoretical categorizations rather than to historical sources, constant classification difficulties arise, such as in the English case we have already highlighted, and emerges the tendency to solve them, or with new classifications or with ad hoc redefinitions of concepts conceived in general terms by historiography in another way.

[43] And even if this relationship between State and Constitution could be maintained to explain the historical present of "emancipation of the Constitution from the State" (see M. Fioravanti, *Sulla storia costituzionale*…, p. 32).

gence of the new American republics.[44] If the starting date is 1812, none of the constitutional and pre-State elements that preceded that date (which were scattered throughout the whole geography of the Monarchy) in the Hispanic world would be the object of constitutional history. From that date on, it could be made a constitutional history based on the texts of the constitutions that have followed until the current one of 1978.

Moreover, the link to the existence of the constitutional text is such that not only the constitutional historians can study it, from 1812 onwards, but strictly speaking they could only deal with periods in which a formal constitution (or a rule thus designated) exists, excluding the presence of constituent elements of the contemporary State during periods in which the Constitution has been suspended or the fundamental rules were not named as such, claiming that in those periods these rules did not constitute limitations of State power.[45]

Since the constitutional periods in which history can be made revolve around this definition of "formal constitution", this approach considers as the sole source of study the legal system of the state constitutional order: the texts of the constitutions, laws and legal doctrines that develop them, norms of constitutional transcendence and, at the most, State sources from which constitutional principles can be extracted such as parliamentary debates, the press, political essays, et cetera.[46]

Apparently the sources are rich, but in reality the selection is strict and revolves around a concept of constitutional legality: it is not a matter of letting the sources speak to define what is constituent and constitutional at every different moment, because "the constitutional" and its dogmatic are predefined according to contemporary parameters, and this "technifies" the selection of sources, in which the issues relevant to this dogmatic concept of constitution are addressed. That is to say, the sources for a scientific Constitutional History must be the same sources that would serve today to understand what it is, how it works and what effects a constitution produces.

The need to "frame normative sources" in its context is emphasized, but the "context" is pre-defined as such and it is not allowed to reveal its own sources of Constitutional Law.[47] For these authors, these constitutional sources on which history can be written constitute a system that is redefined according to our contemporary categories but which

[44] Cfr. M. Lorente Sariñena, *De bicentenarios*…, p. 10. The "influences" in America of the Cadiz text could be read, instead, as indications of a shared legal culture that produces, understands and reads in a certain way the constitutional texts (*idem*, Ámbitos constitucionales e historiográfia…, p. 48–49).

[45] I. Fernández Sarasola makes it very clear in *La historia constitucional: método*…, § 17.

[46] "[…] The sources of study and at the same time of knowledge of constitutional history are very varied. From a normative-institutional perspective, they include constitutional texts – including projects that did not come into force, sometimes of great interest – but also other texts other than the constitutional document, which according to the issue they regulate may be considered constitutional, such as parliamentary regulations or electoral laws, as well as the constitutional conventions or unwritten rules, which are essential to understand the functioning of the basic institutions of the State […]. From a doctrinal perspective, the sources of constitutional history are also very varied: the parliamentary proceedings, mainly when they have a constituent character (also useful as a source of interpretation of the rules), the opuscules destined to the most immediate political action and published articles in the press, the jurisprudence of the courts and, finally, the publications of scientific nature, collected in specialized journals, handbooks, treaties and monographs, which are essential to historicize the genesis and development of the science of Constitutional Law". (J. Varela Suanzes-Carpegna, *Algunas reflexiones metodológicas*…, p. 412–413).

[47] Vid. *ibidem*, p. 415–418.

is endowed with a quality of abstraction that makes it possible to impose itself on the liberal constitutional States' history. Later, this artificially imposed system "contextualizes itself", but without altering its own definition. In other words, it is not possible in this approach that elements displaced to the "context" domain have a constituent capacity or can contaminate the structure of the system of sources that is imposed from the present and that in no case is historicized.[48]

While the normative sources are framed within a "History of the Constitutions" and tend to be subjected to a normative-institutional study (dealing with the organization and functioning of the liberal State), all other sources that serve to contextualize and illuminate these constitutional norms would integrate the "History of Constitutionalism", a doctrinal phenomenon that reflects on the rights of citizens versus the State, and would be susceptible to a doctrinal history.[49]

From the study of these sources some ideas are extracted about the organisation of the State, as well as dogmatic and abstract constitutional concepts, which thicken the science of Constitutional History and, thanks to an alleged "neutral method", consolidate a scientific language and timeless categories that can be applied by scholars.[50]

Consequently, such a study may be only developed by jurists (for instance constitutionalists), "Theory of the Constitution" 's technicians, but in any case by historians without a "legal-constitutional" sensitivity and without the adequate disciplinal instruments to technify the constitutional history.[51] Conversely, this approach is not interested at all in non-legal knowledge, such as Anthropology, or in disciplines that build less national and more globalized stories, like International Law.

Certainly – as the promoters of this perspective maintain – there have been many scholars (constitutionalists, historians, political scientists, law historians, philosophers of law, etc.) who have been interested in issues of constitutional history, but have not addressed it as an autonomous discipline, understanding it as a historical part attached to their own discipline.[52] From this perspective, not necessarily shared by historians of constitutionalism,[53] it seems that only theorists of the constitution are in a position to elaborate and provide the other branches of knowledge with a neutral method (i.e., with-

[48] On the concept of contextualization extend themselves J. Varela Suanzes-Carpegna (*ibidem*) and I. Fernández Sarasola in *Sobre el objeto y el método*…, p. 443.

[49] These two perspectives linked to the sources for a constitutional history are raised by J. Varela Suanzes-Carpegna (*Algunas reflexiones metodológicas*…, p. 412–419) and I. Fernández Sarasola endorses them (*Sobre el objeto y el método*…, esp. p. 437–438; *idem*, *La Historia constitucional: método*…, *passim*).

[50] This way, J. Varela, *Algunas reflexiones metodológicas*…, p. 423–424. The qualification of the method as "neutral" is extracted from I. Fernández Sarasola, *La historia constitucional: método.*…, § 4. I will return to this question later.

[51] Vid. J. Varela, *Algunas reflexiones metodológicas*…, p. 424.

[52] I. Fernández Sarasola, *Aproximación a la historiografía*…, p. 132 ff.

[53] Maurizio Fioravanti, when dealing with the multidisciplinarity of approaches to constitutional history, emphasizes the artificiality of the academic compartments and the consequent difficulty in limiting them. From his perspective, the object of constitutional history cannot be strictly limited, because it has many dimensions, and therefore cannot be clearly attributed to certain scholars or a particular discipline. Rather, the constitutional historiography's history would have to be a history of all these multidisciplinary approaches combined (*idem*, *Sulla storia costituzionale*, esp. p. 30).

out "academic contamination" and without being at the service of a strategy) for constitutional history.[54]

The academic difference of disciplinary approaches seems to derive from the rigid and clear separation of disciplines which, in turn, allows these authors to distinguish with astonishing clarity among Constitutional History, History of Institutions, Political History, History of Ideas or History of Political Thought. This distinction leads to further fragmentations, such as the definition of the constitution itself, which would depend on each academic perspective.[55]

3.3. Cultural History of Constitutionalism

Let's now take a look at the other approach. The Cultural History of Constitutionalism's view goes beyond the "Spanish State" as a unitary nation, with a more global view. It intends to understand the meaning of "constitutional" in each legal culture, which only in very modern times is restricted to a constitutional legal system. Consequently, this perspective looks for constituent elements beyond the "official" constitutional texts, even if those elements fail to meet the current idea we have of a unitary national State. We could say that this approach intends to fathom the juridical rules governing a past Hispanic social group, just as an anthropologist tries to understand the rules governing an Amazonian tribe.[56]

Each historical moment, should tell us through its own sources what is constitutional and constituent (i.e., what elements maintain a balance of powers and limit their exercise to guarantee the freedoms and rights of subjects, however they are defined). Such an approximation would be impossible if a contemporary definition of constitution were imposed, since the constitutive value of all elements that did not respond to these contemporary categories would be discarded.

For the same reason, it is not methodologically feasible to impose on the sources of the past concepts, ideas or a "constitutional dogmatic" that should be in themselves objects of study and not instruments of historical analysis. The aim for these scholars is different: in order to know and understand the "constitution" of a specific society, each is allowed to reveal, through the sources they have produced and to which we have access, which rules maintain the political and social framework with a "constitutional" character. One example may suffice to illustrate this: the Constitution of 1812 is officially entitled "Constitución *política* de la Monarquía Española". The first adjective was not

[54] In this sense, I. Fernández Sarasola, *La Historia constitucional: método*…, § 1–5.

[55] *Ibidem*, § 12–14.

[56] Given this behavior, Carlos Garriga offers us the following reflection: "On the one hand, as observers we are not epistemologically legitimated to carry out the hermeneutic operation that transforms normative formulations into legal norms, so that everything the observer knows about the order depends [...] on the knowledge provided by the participants. On the other hand, the change of legal order is resolved in the change of rule of recognition, as determinant of its conditions of identity, and it can only be identified from an external point of view" (*idem*, *¿La cuestión es saber quién manda?*..., p. 94). The "rule of recognition" would describe "the social device – the set of social behaviors and practices – that converts the cultural categories of the participants into criteria of normativity, so that a legal order is the set of rules and operations recognized as legal by the participants". (*Ibidem*).

accidental: it was "just politic" because there were other constitutional orders existing outside it, such as the ecclesiastical, the civil or the domestic one.

For this purpose, if we refer back to the *Gaditano* case, a wide range of sources with a constitutional (not necessarily "legal") effect is analysed, such as legislative records, consultations with official bodies, rules of different levels, jurisprudence of diverse instances, etc., as well as heterogeneous sources from the most positivist points of view, such as institutional practices, journals, literature, the press, parochial records, municipal censuses, catechisms, manuals of domestic government or *oeconomica*, political economy treaties, etc.

Moreover, the mere analysis of these normative sources reveals a jurisdictional rather than a legal imprint of the concept of Constitution, which obliges us to turn to other sources that account for the functioning dynamics of that constitution, which is supreme insofar as it seeks to reformulate and re-found in constitutional terms the keystones that underpin the entire framework of the Catholic Monarchy, but not because it is the apex of a nonexistent normative pyramid and that it does not create either.

Certainly, if Cadiz's understanding of the world were from the point of view of legality, then the Cadiz Constitution would have articulated the normative instruments necessary to rise as the supreme legal instrument and it would have imposed itself on a world of norms becoming the supreme norm, as the French Revolutionary Constitution of 1791 did. But as its understanding of the world arose in a jurisdictional way, the Constitution was imposed by jurisdictional channels[57], it established its supremacy by not destroying the existing, instead rising above what existed (subjects, powers…)[58].

Thus, those dynamics with which the Constitution of Cadiz functioned were only explained by an understanding of order, society, power, religion, law... that were anchored to external elements to those of the normative texts themselves, because they allude to realities that already existed and that now either coexisted with the new constitution or were endowed with constitutional coverage. Therefore, it is not so much a question of focusing on the literalness of the constitutional text as an isolated normative monument, rather than on how that text works in that legal culture and how it transforms it.

Consequently, this historiographical perspective is also keen on topics with constitutional significance that are not merely related to a legal system and is interested in knowledge that reveal an apparently bizarre understanding of the constitution, such as Anthropology, History, Geography, Religion... Disciplines which, to sum up, reveal a "material constitution" that supports the various pre-contemporary legal cultures. I referred earlier to this when I talked about a "flexible" reading of the issues regarding constitutional history; that is to say, it is necessary to focus not only on the elements that are expressly contained in the constitutional text, but on everything that is also constituent and constitutional beyond the *Gaditano* text[59].

For historians of constitutional culture, only this sum of dimensions offers the possibility to understand what the Constitution is in each historical context. They do not

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[57] M. Lorente Sariñena, *Las infracciones a la Constitución de 1812: un mecenismo de defensa de la Constitución*, Madrid 1988; C. Garriga, M. Lorente, *Cadiz, 1812*…

[58] C. Garriga, *Constitutión y orden jurídico: el efecto derogatorio de la Constitutión* [in:] C. Garriga, M. Lorente, *Cádiz 1812*…, p. 119–168.

[59] A good example of this approach can be found in B. Clavero, *Cádiz 1812: Antropología*…

share, therefore, the perspective of legal historians of the Constitution, for whom there is a prior modern compartmentalization of disciplines which is projected on history to select objects of study that respond to a historical constitutionality and discard all those who are not restricted to the order of constitutional legality.

Many of these extant elements went through, thanks to their constitutionalisation in 1812, at the end of the 18th century to be fully inserted in the Spanish 19th century, raising an unconventional chronology that does not respond to centuries, but rather to constitutional cultures. Certainly, as we have already seen, the Cultural History of Constitutionalism considers that the construction of the contemporary Spanish State is the outcome of a reformulation and redefinition of tradition in constitutional terms. And this process occurred throughout the 19th century, but not in 1812. It is necessary, therefore, to study the inherited historical elements that crossed the boundary of 1812 and served as constituents of a new constitutional understanding.

Consequently, the first stage of a constitutional chronology covers the late 18th century (a period in which it was debated whether or not the Catholic Monarchy had a constitution) until the Constitution of 1812, which closed the cycle of Enlightened Debate.[60]

Thus, the first "Hispanic" – not "Spanish" – constitutionalism belonged to a traditional, non-contemporary legal experience: was not a constitution for a single modern unitary State, still unthinkable in this period, but instead a constitution for the entire Catholic Monarchy which was formed by a huge set of political bodies scattered throughout Europe, America and Asia. This was the political body in whom the Cadiz Constitution was thinking, a tricontinental Monarchy and not a peninsular State. As a matter of fact, the Constitution also had more practical success overseas than on the mainland.[61]

Again it would be sufficient to go first and exclusively to the text of the Constitution of 1812 as a priority normative instrument to realize that this understanding of the "Spanish Nation" covers all the space of the Hispanic Monarchy and there is no trace of its equivalence with a supposed "Spanish State" in the early 19th century. Therefore, the Cadiz nation is not equivalent to a political State unity but to a multi-continental political unity such as the Catholic Monarchy.

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[60] J.M. Portillo Valdés, *Revolución de nación...*

[61] Of course this approach is not exclusive to this historiographical line, but is extended among historians, jurists and all those who in an opportunistic way have joined with any external contribution the commemorative celebrations. That Cadiz can only be understood from outside Cadiz is already, more than proven, evident. As J. M. Portillo would say, the "natural" historiographic space of the Cadiz Constitution was not Spanish, but Hispanic; that is, rather of a bi-hemispheric Monarchy than of a European nation" (*Proyección historiográfica de Cádiz*, p. 53 ff.). Two good examples of this approach are C. Garriga Acosta (coord.), *Historia y constitución: trayectos*…; A. Annino and Marcela Ternavasio (coords.), *El laboratorio constitucional iberoamericano: 1807/1808–1830*, Madrid 2012. To erase that transoceanic and intercontinental dimension which is at the base of the constitution of 1812 implies, in turn, to weaken the "constitutive" or "foundational" value that the constitutionalism of Cadiz had in America (M. Lorente, *De bicentenarios y otras cosas*, p. 10 ff.). In general terms, Cadiz is incomprehensible without its intrinsic transnational dimension, because it can only be explained in the framework of a constituent hatching within the whole Catholic Monarchy that generated a family of constitutions revealing a collective understanding of the concept of constitution (cfr. M. Lorente, J. M. Portillo (dirs.), *El momento gaditano*… Contemplated from this perspective, the bicentennial of Hispanic constitutionalism would require encompassing that global constitutionalism (hence it is so extremely difficult to make a complete account of the commemoration).

The construction period of the modern constitutional statehood would not occur in Spain until the loss of the American territories, when the "European part of the Monarchy" began to be conceived as a new metropolitan State with colonies.[62] We are talking about an approximate timeline from 1837 to 1898.[63]

For the Cultural History of Constitutionalism, all juridical cultures have a constitution that sustains and defines them, constituting them, and all of them must be object of study for constitutional history, whether it be a material constitution where history, religion, nature or tradition are the constituents or a formal constitution, the result of a representative constituent power with more or less force and vigor. The interest of constitutional history does not begin with the liberal State (which is only one more historical structure of power, among many others) nor is it constrained to the physical existence of a unitary text called "constitution".

Therefore, just as the permanence of constituent realities makes it necessary for constitutional history to deal with pre-Cadiz in order to understand Cadiz, the entire period that opens after 1812 becomes an object of study for the Cultural History of Constitutionalism. This means that from 1812 onwards there are two periods of study: the periods with a constitution in force, and those periods when the constitution has either been suspended or is void, because both have constituent elements that explain the real constitutional dimensions of the culture of constitutionalism in Spain, and the true dimensions of the contemporary constitution as well.

Because the aim is not therefore to reveal the long epiphany of liberal constitutionalism shadowed by the ghosts of conservative constitutionalism, but to understand this 19th century constitutionalism, the political, social, territorial units that created and on which it rested; its relation to space; etc., in order to try to understand in its proper terms the constituent problems that reach the 1978 constitutionalism.

Up to this point, we have only dealt with two factors: chronologic and thematic, but of these two aspects it can be concluded that from all points of view, these approaches are totally opposed, and they operate in a parallel manner and without interference along contemporary Constitutional History. Indeed, it would be difficult to find another case in which this opposition is so clearly highlighted than the 1812 Constitution bicentennial, whilst the divergences reach their peak.

4. On incommunicado and irreconcilable constitutional historiographies: Some discouraging conclusions

Let us come back to the beginning. If the mixed list of the above mentioned constitutional issues (from 2000 to 2015) would be now taken into account and we consider its items within the stated dichotomy, it would be possible to classify data that before seemed so

[62] In fact, as M. Lorente puts it (*Ámbitos constitucionales e historiografía*… [in:] *La Constitución de Cádiz: historiografía*…, p. 146), so fundamentally was the Atlantic dimension of the Constitution of 1812, that the loss of the American territories was the greatest cause for the collapse of Cadiz.

[63] J.M. Fradera, *Gobernar colonias*, Barcelona 1999; *idem*, *Colonias para después de un imperio*, Barcelona 2005.

scattered into two groups. They cannot be ordered within a single group because they are not homogeneous: deliberately or unconsciously, they belong to diametrically opposed approaches.

Now we know why it was so difficult to answer the initial questions: because the object was not clear and so, depending on one or another perspective, the answers to the same questions would be very different. There is an absolute lack of communication between both constitutional approaches because they start off from contradictory assumptions: each of them projects into space its axis, X or Y, which means that they can never meet.

This lack of communication transcends the plane of historians and historiographical currents and affects all those dealing with constitutional history. As a rule, jurists tend to do genealogical history of current institutions or concepts; accordingly, they tend to turn to "Legal History of Constitutional Law", because it performs a more understandable, more identifiable history since it works particularly with legal sources (texts of constitutions, the doctrine that develops them...). Besides, contemporary Spanish jurists manage well with these sources as they use a language and a range of legal categories that seem (re)cognoscible for them.

The general historians in Spain are aiming to make history of periods and constitutional elements, but putting law aside, in order to narrow a field they are more confident with. It's usually forgotten, however, that in those past periods of history there was not such a clear disciplinary division as it exists now. Many of them, then, also find useful an approach that categorizes and isolates from the outset the field of constitutional law, constraining it to very precise limits that make it possible to be sectioned and extirpated very well as just a study dimension.

Perhaps among some schools of foreign scholars devoted to Spanish history (for instance "americanists" or "hispanists") where there is much more communication with a "Cultural History of Constitutionalism" done by legal historians and vice versa: legal historians are nourished by the progress of both, "americanistas" and "hispanistas" as well. Besides, this perspective is connected not only with other historians, but also with other types of history, such as social history or political history.[64] This is due to the fact that this cultural history of constitutionalism is capable of freeing itself from the rigid structures of State History, looking for spaces of politics and discipline outside the Law and the State itself. This flexible vision makes it much more open and receptive, as well as more explanatory and more capable of assembling other stories such as those already mentioned.[65]

If we go back to the Spanish national landscape, then, the scenario is a stage of isolation in which two plays that share the same title but have completely different plots are represented simultaneously. The first of these, which we have called "Legal History of Constitutional Law", is headed by constitutionalists who shall be baptized as the Oviedo School, with Joaquín Varela Suanzes-Carpegna and Ignacio Fernández Sarasola at the head. The second approach, the "Cultural History of Constitutionalism", is fundamentally represented by the research group HICOES, previously mentioned, directed by Bartolomé Clavero Salvador and Marta Lorente Sariñena.

[64] A very interesting reflection in this sense is done by the monographic dossier on *Politic History and Legal History*, "PolHis" 2012, 2nd sem., No. 10.

[65] *Ibidem*, *passim*.

In essence, the divergences are due to a political issue, which is reflected in the methodology. Faced with those who come to the sources without preconceived structures and ideas, letting the sources themselves reveal their own constitutional model of that concrete juridical culture, are those that impose on the past a rigid and univocal vision of order and constitutional elements elaborated in the present, and select only the sources that fit that understanding. They assume that their system is technical and aseptic and scientific, while that of culturalists is ideology, not science. But precisely this apparently "neutral" position is the one ideologically biased.

Anachronism, in effect, is a very powerful political instrument. To invent tradition by projecting the present into the past, no matter how much it will be later clothed with "context", is an ideological strategy, not historiographical, because of the consequences it has.[66] The anachronism ends up being political because it cultivates an exclusive national identity (and alien to the constituent moment of Cadiz) and is destined to strengthen a centralist and unitary nationalism against what are understood as threats to this primitive Spanish nation.[67]

In fact, this legalist historiography is part of a series of histories of the Western political-juridical tradition serving the legitimation of the different national laws and is a magnificent example that the methodological technique is not at odds with a political attitude with form in this case like of centralist nationalism.[68]

It is clear that, in addition, the consequences of this are not politically innocuous: to locate the liberal Spanish nation –and without contextualizing the term "liberal"– at this moment invites to think that there was a unitary nation that preceded all fragmentary nationalisms and that must be recovered to remove the evils that threaten it. Nevertheless, cultural, political and legally sustainable ways of understanding cannot be offered if the diagnosis of the problems that are trying to be solved is culturally, politically and legally unfocused.

For this reason, the results that the cultural historiographical approach throw up annoy the closed scheme of legalists, because it dismantles their understanding and it reveals the difficulties of framing between their theory and the constitutional sources, proposing the focus of attention in other elements and other chronologies to reconstruct the history of the formation of the contemporary Spanish state, much more complex. This juridical-cultural perspective that offers complex answers to complex problems is disavowed by legalists with the strategy of qualifying it beforehand as ideological, which seems to exempt those who so qualify it from facing a minimum analysis of it. With that attitude, however, far from rising as the only valid constitutional history, this school presents itself as a very deliberately misinformed historiography.

However, it does not seem that there are reasons for hope, because the bicentenary, far from forming in constitutional history and culture, has only brought discussion without understanding. There is an absolute lack of communication and the bicentennial has only boosted to unsuspected limits the legitimating historiography of the Cadiz origin

[66] B. Clavero, *Cádiz, 1812: Antropología*…, p. 255 *et seq.*

[67] From this unitary and nationalist-centralist understanding of constitution linked only to Spain (discarding the plurinationality that was found within it) an instrument is derived to exclude the rest of nationalisms, such as Catalan or Basque. (*Ibidem*).

[68] On the politicity, in addition, of the historiographical paradigms, M. Lorente Sariñena, *Límites, logros e intersecciones entre historia política e historia jurídica*, "PolHis" 2012, 2nd sem., No. 10, p. 25–29.

of the liberal, centralist and unitarian Spanish Nation. Marta Lorente had expressed the wish with the following words:

> We will surely celebrate or commemorate the year 2012; it only remains to hope that it will not become the anniversary of the constitutional founding or re-foundation of the indissoluble Spanish nation, of the rights of individuals or of universal suffrage and of democratic citizenship".[69]

Now we know that these wishes were never fulfilled, precisely because the political interpretations still interested in a historical legitimation prevented them from being fulfilled.[70]

In short, historiographic balance is of radical divergence between irreconcilable positions. From the very beginning these approaches are so diametrically opposed that no dialogue is possible, either in the present or the near future. Neither is academically required to reach a consensus with the other. I firmly believe that is not possible. Instead what I do believe is that it is legitimate to demand the following.

Firstly, an awareness of and responsibility to those involved in the creation of constitutional history whatever the perspective. We must be fully aware of what we are doing and above all why we are doing it; and secondly, also an awareness of and responsibility to the reader, who is compelled to distinguish which constitutional history is building an imaginary unitary Nation that hides the nature of its constitutional problems, and which one explains, instead, the nature of a State that needs to understand the lights and shadows of its real constitution.

It is not the role of the Constitutional History scholars to impose their perspective, but rather to continue to build constitutional history in which they believe with seriousness, commitment, and responsibility, knowing that political intentions when it comes to writing history are not innocuous. It will only be possible to face the present and future political challenges if we count on a citizenship prepared, responsible and committed to democratic constitutional values.

Streszczenie

Historia konstytucjonalizmu w Hiszpanii (2000–2015): Kontrowersje wokół ostatniego dwusetlecia

Historia konstytucjonalizmu może wskazać, w jaki sposób prawo konstytucyjne kreowało w przeszłości realia polityczne. Jednocześnie historycy zajmujący się dziejami konstytucjonalizmu są w stanie stworzyć więcej niż jedną „historię konstytucyjną", która służy budowaniu różnorakich tradycji i narracji, wyjaśniających pochodzenie instytucji składających się na ustrój konstytucyjny. Hiszpańska historia konstytucyjna ostatnich lat jest wyjątkowym laboratorium, w którym badaniu poddano procesy przemian ustrojowych i ich implikacje, osiągające swą kulminację w „eksperymencie konstytucyjnym Kadyksu". Lektura różniących się historiograficznych ujęć konstytucjonalizmu ostatniego dwusetlecia ukazuje trudności i wyzwania historii państwa, którego ustrój podlega ciągłym rewizjom.

[69] M. Lorente Sariñena, *Ámbitos constitucionales e historiográfia*…, p. 145.

[70] *Ibidem*, p. 153. Another more detailed balance in the same line on the historiography generated by the bicentennial in B. Clavero, *Cádiz 1812: Antropología*…

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