# THE IMPORTANCE

# OF

# POLITICAL TRADITIONS

by

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with an introduction by

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FMF Paper

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## INTRODUCTION:

# THE CONFLICT OF POLITICAL TRADITIONS IN SOUTH AFRICA

**by M C O'Dowd**

IN *"The Importance of Political Traditions"*, Leonard Liggio presents an explanation of the difference between the histories of North and South America. It is the difference between the ancient political traditions these two continents inherited from Britain and Spain, he says.

Liggio describes the wide range of institutions that co-existed with feudalism in mediaeval Europe, Spain and

England, and were often at odds with it. These institutions limited the power of the state and the great magnates and protected the rights of individuals: they included municipal corporations and guilds, a wide range of voluntary associations and some of the institutions of the church, which were independent of the state and generally a favourable influence. Most of these institutions were themselves rooted in the customs of the Germanic tribes. Where the Visigoths brought these customs to Spain, and the Saxons brought them to England, the powers of kings were limited (and did not include taxation) and the individual free tribesman was secured of extensive rights.

But at the end of the Middle Ages an alternative tradition asserted itself. It claimed to be "modern" and "rational", but, in fact, it was the reassertion of a very old tradition derived in Europe from the Roman Empire, with still more ancient roots in Persia, Babylonia and Egypt. This was the tradition of autocracy, bureaucracy, unlimited taxation and mercantilism -- institutions that have always gone together, whether in ancient Babylonia, the late Roman Empire, Ming China, or recent East Germany.

All through Europe there was a move toward such autocratic government. In Spain it flourished to an extreme degree, but hardly at all in England. The difference between the Spanish and English colonies was even greater. The Spanish monarchy imposed a system of centralized bureaucracy on its colonies centuries before it could do so in Spain, aided by the fact that the Inca and Aztec regimes it replaced in the colonies were themselves bureaucratic autocracies.

In the English colonies, on the other hand, many of the early colonists were refugees from James I's attempts to establish a centralized autocracy in England, moderate and unsuccessful though his attempts were. The traditions of freedom rooted in the Germanic tribes of the Middle Ages was transported to North America in its strongest form. It is true that some of the colonists, like the Puritan Pilgrim

Fathers, sought freedom for themselves, but had no desire to allow it to anybody else. But others, like the Quakers who founded Pennsylvania, were committed in principle to general liberty and tolerance, indeed to a greater extent than any state had ever been before. In important respects the Quakers' conception of liberty was broader than the traditional tribes'.

So the one European tradition, that of freedom and individual rights, was established in an advanced form in North America, and the other, the tradition of empire, autocracy and mercantilism, in an extreme form in South America. Liggio suggests that the whole divergent history of the two continents follows from this fact; that the economic success of North America is the direct consequence of its free institutions, as well as its unsatisfactory political history, and the economic failure of South America is a consequence of its inherited tradition of autocracy.

Liggio's thesis is eminently plausible and can be generalised for the world as a whole. Throughout history, we have known only two basic ways of organising human society. One is the essentially free society, where individuals are restrained by law or customs but not by arbitrary authority; and where the economy relies on markets. The other is autocracy, which regards the individual as "belonging" to the king, the state, or the collective society, and where, to a greater or lesser extent, the economy is controlled by the ruler.

Notice the connection between the political and economic freedom. It is not accidental. Free markets give ordinary people much more power than autocrats dare to tolerate. Furthermore, free markets require secure property rights, which are a great obstruction to the exercise of arbitrary political power. The extent to which autocrats try to dispense with markets has varied very much. Very few have gone to the disastrous length of trying to do so altogether, but they always try to control them to a significant extent.

## Turning tribes into autocracies

THE rights-protecting Germanic tribes that survived into the Middle Ages and the African tribes that have survived into the present time have a great deal in common. We know little about the tribal societies which must have existed in Southern Europe and the Middle East at a much earlier time, but what we do know suggests that all tribes had much in common. In particular, they recognised individual rights constrained by law but not by arbitrary authority, and their tribal rulers were subjected to law or custom in the same way as ordinary people were. The main difference between tribes lay in the *nature* of the property rights that were upheld. A nomadic or semi-nomadic pastoral tribe would have property in animals but not in land, whereas an agricultural tribe would have property in land.

In the Old Testament we have not only the description of an ancient tribal society but also the history of how it was transformed into an autocracy. The book of Samuel describes how the Israelites lived before they decided to appoint a king: it was not because they were dissatisfied with their internal administration. It was because they wanted a permanent war leader, in order to make them more effective against their external enemies. Samuel told them not to do it. He warned them of the things a king would do. He would conscript labour, Samuel said. "He will take your fields and your vineyards and your olive yards, even the best of them, and give them to his servants".

David and Solomon did everything that Samuel said they would do, as well as some things Samuel hadn't thought of. He did not say, "The king will murder you in order to steal your wife", but that is what King David did.

This story illustrates how most autocracies come about. The advantage of autocracy is that it is, in the short run, more efficient for the purposes of warfare. David was victorious; he ended the Israelites' problems with their

neighbours for the time being and created the Empire of Solomon. In the same way, the Persians, Romans, Turks and Russians prevailed over their neighbours, and spread their autocratic systems far and wide.

Unfortunately for the autocrats, but fortunately for mankind, autocracies are short-lived. At all times in history, from the most ancient to the most modern, autocracy has undermined its own economic base -- something on which its power depends. The crumbling of the Soviet Union today was a rerun of the decline of the Roman Empire. So was the downfall of seventeenth century Spain and the *ancien regime* of France. But there is an important difference: today it happens much faster.

## South Africa's clashing traditions

What are South Africa's prospects? Will South Africa fare better than South America? The answer is complicated, for South Africa has strong traditions of both freedom and autocracy. It has a stronger tradition of freedom than any part of South America, but there can be few places where the two traditions have met head on as thoroughly as they have done in South Africa.

On the positive side, we have both an indigenous tradition of freedom and an imported one. The rights-protecting African tribal tradition existed here in a very pure form uncomplicated by the slave trade as it was in northeast Africa and West Africa, and not influenced by Moslem autocrats as in parts of West Africa and the Sudan.

As for the imported tradition, the British and Dutch settlers both brought strong traditions of freedom from their countries of origin. Holland and England were two of the countries that most successfully resisted the autocratic tendencies of the sixteenth century and preserved the earlier tradition of freedom. Holland revolted successfully against the new Spanish autocracy and for a long time had the world's free-est economy. According to Adam Smith, writing

in 1776, Holland was the richest country in Europe. Although the Dutch East India Company was indeed autocratic, outside Cape Town its government was quite ineffectual. The Boers developed a strong tradition of individualism and suspicion of government. The constitutions of the Boer Republics are quite extreme examples of limited government.

The British settlers, too, were in a constant struggle with the British colonial governors over their rights. But feeling more tied to the government, they were more concerned with building a free society where they were living. In the Cape Colony, they secured such things as a free press and independent courts.

Today, the common law of South Africa, Roman-Dutch law, is a hybrid of the British and Dutch settlers' legal traditions. It is in fact a triple hybrid, first hybridising Roman law with the customary law of Holland, and then hybridising the result with English law, particularly the English principle that the government is subject to the law, which was not the case in Roman law and was very doubtful in the Roman-Dutch law of Holland. South Africa's common law is probably one of the best available systems of law embodying the basic principles of a free society, as they have come to us from tribal customs, in a system adequate for the complexities of the modern world.

It is true that the Boers did not regard their traditional principles of freedom as applying to black people, and the British were equivocal about it at best. At the time this mattered enormously, but in the longer historic perspective it matters less. The essence of Liggio's thesis about South America is that the many attempts to democratise autocracies in South America have failed because the basic institutions needed to underpin democracy simply did not exist there. It is far easier to adapt institutions that already exist, even if some people have been excluded from them, than to create such institutions out of nothing. The relatively free societies of Holland and

England were full of various forms of discrimination and exclusion, but reforming them has been easier than trying to create democracy from scratch, as in South America.

## The Autocratic Influences

Unfortunately, along with the favourable traditional influences, South Africa has been subjected to a number of influences from the autocratic side. These are the principles and practices of the British Empire (as distinct from the practices within Britain herself), Russian communism, and mid-twentieth century statism, especially as practised in Britain under both parties prior to Mrs Thatcher's accession to power.

### 1) *The British Empire*

The British Empire had two faces. On the one face, it included the countries that were used to settle emigrants from Britain: initially, the North American colonies, which became the founding members of the United States; later, Canada, Australia and New Zealand. In these, in contrast with the policies of the Spanish government, the indigenous institutions were transplanted. While these institutions were not fully democratic, they had strong democratic implications, which flourished in the colonies sooner than they did at home. Before the American War of Independence, the northern colonies were already far freer and more democratic than Britain herself. The revolt of the colonies was a response to a very mild attempt by the British government to curtail their freedom and impose some degree of central government. The American Revolution was not a revolution at all in the usual sense. It was a conservative movement in defence of the free (or relatively free) institutions that were already in place.

The other face of the British Empire was seen in India and

later in other parts of Asia and black Africa. But it was in India that it was formed. The British empire in India was an empire of conquest in the Roman tradition. Institutions inherited from the Mogul Empire and an autocratic empire in the Middle Eastern tradition were intentionally used and perpetuated, while the British rulers were extremely conscious of their Roman "inheritance". For example, it was quite fashionable to refer to colonial governors as "proconsuls".

As empires go, Britain's was "moderate", as indeed was the Roman Empire in its earlier years. Property rights were respected, and most civil rights appeared to be in place most of the time. But behind it all was the iron fist -- the power of arbitrary detention, banishment and confiscation, combined with the fundamental fact that the government was not accountable to the people in any shape or form.

During most of the nineteenth century the Cape Colony was regarded as a colony of settlement, and its British governors were not drawn from the autocratic Indian services. But towards the end of the century this started to change. With the South African War, it changed completely. Lord Milner had been trained in India and he and his followers introduced into South Africa the methods of the Indian Empire that became the established mode of government over the black population. This imperial style of government remained at odds with courts and the common law throughout the twentieth century. To this day, the courts and the common law resist the imperial style.

### 2) *Russian communism*

Another form of imperial tradition has invaded South Africa, not in the institutions of government but in the thinking of the opposition: Russian communism, also known as Marxist-Leninism. There is not much of Marx in Marxist-Leninism but there is a great deal of Lenin and of Russia -- the Russia of the Czars, which has been the second most complete

autocracy (after the Ottoman Empire) to exist in the modern world.

In spite of the claims of complete revolution, Russian political life after the revolution was strikingly similar to what it was before. The institutions of government under Stalin and those that existed a century earlier, under Czar Nicholas I, were much more similar than the contemporary institutions of Britain or Japan and those that existed there a hundred years before.

Indeed, during the Russian Revolution the clock turned back a great deal. In the second half of the nineteenth century Czar Alexander II attempted to westernise and liberalise Russian institutions. He introduced a trial by jury and a considerable range of civil rights; he relaxed censorship, thus making possible the famous flowering of Russian literature, including the writings of Tolstoy, Dostoevsky, Chekhov and the rest; and he abolished serfdom. Lenin and Stalin reversed all the reforms. Serfdom, censorship and arbitrary imprisonment were brought back. In the 1840s, Dostoevsky was sent to Siberia for "conspiring to set up a printing press". A hundred years later, Solzhenitsyn was sent to Siberia for criticising Stalin in his private diary. The main difference was that in Dostoevsky's time the prisoners had enough to eat while in Solzhenitsyn's time they did not.

The Russian autocracy had its traditional roots. On the one hand, it identified itself with the Roman empire. Moscow was called the "third Rome" and "czar" is simply a Russian version of "Caesar". But the identification was not with the Rome of Augustus, so beloved of the British imperialists. It was with the late Roman and Byzantine Empires, which had become fully assimilated to the Persian and Mesopotamian model.

There was, however, another tradition which was even more extreme. This was the tradition of the so-called Tartars, the Mongols of Genghis Khan. These people, like the Ottoman Turks who were related to them, took the

concept of autocracy to its logical conclusion. There were no property rights at all in their empires. Everything belonged to the ruler and could be "reclaimed" by him at any time. Everybody was the slave of the ruler and could be put to death at his mere say-so. In the Ottoman Empire this system reduced to desert most of what had been known once as the "fertile crescent". After the collapse of the Tartar Kingdom in Russia, the Russian Czars never fully established the Tartar system, but there is no doubt that they aspired to it. It was left to Stalin to do so successfully.

The military nature of the autocratic tradition was very evident among the Tartars and the Ottomans. Both regarded themselves as an army rather than as a nation, and part of the reason they denied people's rights was to prevent the warriors from settling down and losing their warlike character, as the Vikings did in Normandy. This military character is still very much alive. "Comrade" is a military term. Of course, the alleged existence of a war has always been used to justify autocratic rule and the suppression of civil rights.

Russian communism was exported as an ideology to the rest of the world. But it was the promise of Russian material aid rather than the appeal of Russian communist ideas that accounts for whatever popularity communism has had. The South African Communist Party was as tightly tied to Moscow as any and moreso than most; for many years the Communist Party had great influence on the ANC because of its ability to deliver Russian material support. Indeed, that was its function in the alliance.

Soviet material support was withdrawn from the ANC as part of the Soviet Union's retrenchment policy, while the main spokesmen of the Communist party were loyally propagating the Gorbachev line, which was by no means in accordance with traditional Marxist-Leninism. Traditional communist ideas are now rootless, but even with the collapse of the Soviet Union, they will not die quickly for all that. They have been built deeply into the thinking and

traditions of African national movements, and they remain there as a dangerous and destructive force.

3) *Twentieth century statism*

The last of the evil influences on South Africa has by no means been the least destructive. This was the great mid-twentieth century fashion for social engineering and the aggrandisement of the state that came with it. Before World War II it was pioneered by fascist regimes, but after the demise of fascism it was taken up with great enthusiasm by western democracies, underpinned by Keynesianism (the belief that economy can be "managed" by the manipulation of the money supply) and the doctrine of Gunnar Myrdal (the belief that development is a function of the state). It justified high taxation, all kinds of controls, a bloated bureaucracy and a great deal of pushing around of individuals. In Britain it gave us the tower blocks. In South Africa it gave us grand apartheid, funded by a tax system closely copied from socialist Britain.

## The tide of freedom

UNLIKE South America, South Africa partakes of both traditions -- of freedom and autocracy. For most of the twentieth century, the autocratic tradition has been dominant, but that has been so in most of the world. Yet the good traditions are still alive, not only as ideas, but embodied in many institutions, from the independent judiciary to the democratic organisation of the Methodist Church. Throughout the world the tide is running strongly in favour of the traditions of freedom. South Africa is better placed than many countries to ride this tide.

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**by Leonard P Liggio**

IN this year, the 500th anniversary of Christopher Columbus' voyage to the New World in 1492, the world has before it an important pair of models for liberty and wealth: Iberian South America and Anglo-America. The past five hundred years of South American history and four hundred years of North American history provide significant bases for comparison. Much attention can be focused on the differences in the native cultures encountered by the immigrating Europeans.

The native populations of South America were much more advanced in agriculture and craft skills, as well as political skills of taxation, than the native populations of North America. If England's crown and the English colonists had a similar opportunity, they would have embraced it fully; as would North America.

In North America, the Indian tribes' valuable

characteristics were well presented in the monumental reports of the *Jesuit Relations*. The Indian tribes were not engaged in settled agriculture. As European settlement displaced the animal resources, the tribes tended to move with them.

In South America, Castilian immigrants from Spain encountered two massive, centralised empires -- the Aztecs and the Incas -- which exploited the settled, agricultural populations. Much to the envy of the early English colonists, the Spanish crown substituted itself for Aztec and Inca rulers, while individual Spaniards took part of the agricultural production of the native peoples for themselves.

## Mediaeval foundations of freedom

TO understand the difference between South and North America, we must study Europe's legal and political institutions during the five hundred years before 1492 -- before Columbus received the support of Isabella and Ferdinand.

Iberia's legal and political institutions were the same as the rest of mediaeval Europe's. On the eve of colonisation, Spain shared all the institutions of Europe and England. But it rejected them and initiated new, absolutist institutions. After taking over the Aztec and Inca empires, Spain embarked on the creation of an absolutist state in Spain and the colonies. England, on the other hand, languished in its mediaeval heritage, and the English colonists carried that heritage to North America. The American Revolution was a successful struggle to retain the English mediaeval heritage, when London itself seemed to move in the direction of absolutism.

That was just after 1760. At the same time, a leading Bourbon reformer and utilitarian advocate of enlightened despotism, Gaspar Melchor de Jovellanos, declared Iberia's great tragedy to be its mediaeval, or Gothic inheritance. Jovellanos and the enlightened philosophers attacked

Montesquieu's assertion that Gothic constitutional traditions were the foundations of liberty and wealth in Europe. We need to recall that Montesquieu's defense of the Gothic constitution was the most influential authority among the American founding fathers.

Montesquieu's defence of constitutional rights -- protected by limits on the expansion of government through the balance and separation of powers -- helps one to understand the differences between South America and North America. Montesquieu's analysis -- paralleled by Tocqueville -- emphasises the importance of individual rights to the historic roots of legal and political institutions. Eric Jones, in the *European Miracle*[1], explains the crucial development of the individual rights founded in the mediaeval institutions which developed during the five hundred years before Columbus. Europe's outstanding success in bringing about liberty and wealth over the past five hundred years is due to exactly the gothic inheritance which Jovellanos disdained.

**The early liberals**

PERHAPS our understanding of the difference between South and North America will be assisted by the analyses of Montesquieu, Tocqueville, Acton, and Burckhardt. These mid-nineteenth century liberals' analyses were based on the work done by the earlier nineteenth century French liberals.

The great liberal historian, Augustin Thierry, documented the development during the Middle Ages of free institutions. Basing his analysis on the economic theory and political studies of Jean Baptiste Say, Destutt de Tracy, Benjamin Constant, Charles Comte and Charles Dunoyer, Thierry undertook voluminous researches and publications of the growth of commerce and industry, the emergence of the middle class, and the charters and oath-bound associations from the eleventh century, whereby the legal and constitutional rights of the middle class were protected.

Thierry's work shows how rights emerged in the great religious movements of the Peace of God and the Gregorian Reformation, and were consolidated in the oath-bound associations creating town-charters and representative institutions. In the debris of the Carolingian Empire and its tradeless feudal system, there arose commerce and industry -- with watermills, windmills and private property in land. The feudal institutions were challenged by the oath-bound associations, usually led by abbots or bishops. Contract and consent became the centre of the struggle against the feudal institutions of autarkic economy. In the conflict against feudalism, the emerging market forces of commerce and agriculture created the edifice of mediaeval legal and constitutional institutions.

Today, the memory of this magnificent classical liberal history is practically lost. But its importance has been emphasized again by recent valuable contributions to legal and constitutional scholarship. The most significant has been that of Harvard law professor Harold Berman[2].

The remnants of mediaeval legal and constitutional institutions in Cataluna and Castile in Spain, were attacked as early as the eighteenth century with the succession of the Bourbons. This process was intensified under Carlos III, who succeeded his half-brother, Ferdinando VI. In 1734, at the age of sixteen, Carlos had already ruled Parma for his mother, Queen Elizabeth Farnese, and in 1736 he became king of the Two Sicilies, where he reigned until he came to power in Spain in 1759. During Carlos' time in the Two Sicilies, he undertook legal and economic reforms inspired by the School of the Two Sicilies: the ideas of Antonio Genovesi, Giuseppe, Palmieri, Gaitano Filangieri, Domenico Cantalupo, Domenico Caraccioli and the Abbe Ferdinando Galianie[3].

During Carlos' reign in Spain, many works of French and Italian writers on jurisprudence, constitutional thought and economics were translated into Spanish. An important source of economic ideas for Spain and Ibero-America was

the Royal Economic Society of Madrid. Prominent Spanish economists included Pedro Rodriguez, Count Campomanes (1723-1802) and Gaspar Melchor de Jovellanos (1744-1811)[4].

A starting point for Spanish economists in the late eighteenth century was Turgot's *Reflections on the Formation and Distribution of Riches* (1770). According to Joseph Schumpeter,

> Turgot's theoretical skeleton is, even irrespective of its priority, distinctly superior to the theoretical skeleton of the *Wealth of Nations*. It is not too much to say that analytic economics took a century to get where it has in twenty years after the publication of Turgot, had its content been properly understood and absorbed by an alert profession. As it was, even JB Say -- the most important link between Turgot and Walras -- did not know how to exploit it fully.[5]

In the flowering of liberalism in the early nineteenth century, one of F.A. Hayek's favourite authors, Benjamin Constant, raised a serious question. He challenged what he perceived to be Charles Dunoyer's determinist view of progress. Constant asked: if we believe that economic and technological improvement is accompanied by improvement of moral sentiments, how do we explain the fact that while all of the more advanced peoples of Europe -- French, Lombards, Flemish, Dutch, Germans and Austrians -- accepted the tyranny of Napoleon Bonaparte, it was the Spanish peasants alone who rose up against the French occupation, and exhausted and then destroyed Napoleon's rule? Constant saw the Spanish peasants as the liberators of Europe.

It is exactly in the context of the Spanish struggle for liberation from Napoleon that arose the first use of the word, *liberales*, which was adopted by the English and French admirers of the Spanish vanguard. However, there was a strong conflict among the Spanish *liberales* and their French and English friends. The opponents of the monarchist absolutists in Spain were divided between the

supporters of King Joseph Bonaparte and French modern statism, and supporters of the Cortes of Cadiz and the Constitution of 1812.

## The utilitarian opposition

MANY supporters of Enlightenment French philosophy, economics and legal reform, such as Jovellanos, were associated with the French Napoleonic administration in Spain. Charles Dunoyer served in the French civil administration in Navarre and maintained long friendships with Spanish political and economic writers, who later were exiles in France. The works of the Spanish exiles were published in French. The Spanish exiles translated many of the French liberal writings into Spanish to challenge the anti-liberal direction of Spanish political life. Thus, Jean Baptiste Say, Destutt de Tracy, Charles Comte, Charles Dunoyer, Augustin Thierry and the French Doctrinaires, Francois Guizot, Royer Collard, de Barante, Laine and Maine de Biran, had an impact on Spain's political thought. But the greatest influence from this French direction was the English utilitarian, Jeremy Bentham. Bentham's writings often appeared in French translations by Dumont long before they appeared in English. Sometimes Bentham's ideas for law reform were codified in Latin America before Englishmen knew what he had written. The utilitarian influence was one of Latin America's major handicaps, in contrast with the lack of utilitarian influence on North American thinking.

In the era of independence in Spanish America in the early nineteenth century, Jeremy Bentham's writings flooded the Iberian world. Utilitarianism, rather than Whig liberalism, was seen correctly to be the heir of the Enlightenment, but seen wrongly to be the guide to liberty and wealth. English and American constitutionalism, as described by Montesquieu, was understood correctly to mean inefficient government institutions which cancelled

out each other, but was understood incorrectly to mean a block to an efficient society. According to Montesquieu, an efficient society required inefficient government.

Pierre Claude Francois Daunou, a co-author of the French Constitution of the Year III (1795), which featured a divided executive and bi-cameral legislature, was a constitutional theorist with a major impact on Latin America. Associated with the ideologues, Daunou lost influence during the rule of Napoleon. He was professor of history at the College de France (1819-30) and archivist of France (1830-40), and became a leading exponent of individual rights, alongside Benjamin Constant. Daunou's *Essai sur les garanties individuelles* was an impressive statement of constitutional protection of individual rights. Translated into Spanish, the book had as great an impact on Latin America as Thomas Jefferson's publication of Destutt de Tracy's *Commentary on Montesquieu* on North America. Daunou's principles in *Les garanties individuelles* did not find in Latin America any of the mediaeval institutions which had protected individual freedom in England and America. The rule of Spanish absolutism was swept away, but the new institutions did not harken back to the mediaeval Iberian traditions.

In the midst of the resistance of the Spanish townsmen and rural yeomen after May 2, 1808, their leaders sought inspiration from the historic rights-protecting institutions of Spain. The provincial councils looked to the mediaeval representative institutions. The national council in Cadiz called in 1810 for the formation of a successor to the Cortes, which issued a new constitution on March 19, 1812 based on English constitutional principles. The *liberales* sought a foundation in the Gothic traditions of liberty in constitutional documents and institutions such as the *communas* of Cataluna and Castile. In March 1814, Ferdinand VII was restored to power in Spain after swearing to maintain the constitution of 1812. But he suppressed the Cortes and undertook a ferocious

destruction of the liberales. In January 1820, a revolution re-established the Cortes. But a French invasion in 1823 restored Ferdinand VII, and proceeded to massacre the Cortes in Cadiz. During this period, Benjamin Constant was the French writer most in tune with the Spanish constitutionalists and their foundation in the mediaeval representative institutions of the *communas*.

## Ancient rights and freedom

SPAIN was liberated from Roman taxation and inflation when the Germanic tribes crossed the Rhine frontier in 406. The Visigothic settlers in Spain brought their German concepts of limited power of rulers and extensive independence and rights of freedom. They believed that the king must live on his own resources, and the concept of taxation was unacceptable to independent freedom. But, with the Moslem conquest after 711, and the Moslem defeat by the Franks at the Battle of Tours in 732 AD, the representative institutions of the Germans were limited to the Visigothic Christian kingdoms in the Pyrenees, Asturias, Navarre, and Galicia.

During the five hundred years of the Reconquista, the Germanic concepts of law and political institutions flourished in Spain. In the various kingdoms of Spain -- Asturias, Galicia, Navarre, Leon, Castile, Aragon, Cataluna and Valencia -- the rights of freemen were clearly recognised. Taxation was at odds with freedom. The king's ability to rule depended on whether he had enough funds of his own to pay for his costs as king. The nobles and freemen; townsmen in municipalities with charters and the secular and monastic clergy had complete independence and rights against the king.

The well-known oaths of the nobles, freemen, townsmen and clergy, as at the coronation of the kings of Aragon, and the reciprocal oaths of the kings, required kings to live up to their oaths. If they didn't, the freemen,

etc were absolved of their oaths. We find in the *Fueros* the traditional rights and independence from taxation of the mediaeval nobles, freemen, townsmen and clergy, with their roots in Germanic legal concepts -- the foundations of our modern individual rights. English legal and constitutional history, including the Magna Carta, was parallel to the constitutional history of Spain, such as the Great Charter of 1020 issued by the Cortes of Leon under Alphonso V.

Unfamiliarity with the history of the Hispanic Pyreneen kingdoms could lead one to think that Spanish Christians were isolated from the mainstream of European mediaeval civilisation. The oath-sworn associations, arising from the Peace of God and Truce of God movements in the tenth and eleventh centuries, were led and protected by the Clunic monasteries. The great Abbey of Cluny (north of Lyon) led a religious reform and then a political reform. Spain and Spanish monasteries were particularly linked to the Abbey of Cluny through the most important of its pilgrimage goals: the shrine in western Spain of Santiago de Compostela. Large numbers of pilgrims travelled to Compostela; often the people who had participated in the oath-sworn associations of the Peace of God movement or in the oath-sworn associations which brought self-governing charters and representative institutions to the towns and provinces of France. Massive numbers of the monks who had led these movements made this same pilgrimage. The Spanish Pyreneean kingdoms were inundated with news of the representative institutions of towns and provinces in mediaeval Europe, which were similar to legal concepts of the Spanish *Fueros*[6].

## The transformation of religion

THE conquest of the kingdom of Grenada in 1492 witnessed the establishment of absolutism, the core feature of which

was the end of the universal, supra-political position of religion and especially of the Church. The universal church was replaced under absolutism by a subservient, state religious bureau. For example, the French kings and rulers of the Spanish kingdoms used Concordats to gain from the Papacy total control over the church institutions in their territories.

The Protestant Reformation, the second phase of this movement, occurred where local rulers were not able to gain similar concessions from the Popes. Countries where rulers already had wrested control of the Church remained "faithful", and sought to consolidate their gains through the Catholic Reformation centred on the Council of Trent. In Spain, the rulers of Castile, Aragon and Cataluna after 1480 gained the power to establish political inquisition, and dominated not only the Peninsula but the Vice-royalties of Mexico and Peru as well.

Just as the Monarchist's Church of the Council of Trent (with the Royal Inquisition) contributed to absolutism, the history of Spain and Spanish colonies during the reign of Charles V indicates the great turning point whereby Spain lost its mediaeval constitutionalism and led much of Europe to substitute oriental despotism in its place. As William Graham Sumner's *The Conquest of the United States by Spain* (1900) showed, while the US conquered Spain's colonies, Spain's imperialist ideas conquered the intellect of American politicians. The distinguishing characteristics of European constitutionalism[7] were lost with Spanish conquests of Asia and South America. Spain adopted the imperial methods of India, Turkey, China, Mexico and Peru in place of the decentralised, limited constitutional institutions of mediaeval Europe.

The political control of religious institutions in the fifteenth century undermined the foundations of European constitutionalism's uniqueness. The Spanish crown's access to the gold and silver of the Aztec and Inca despotisms

made Spain the paymaster of European wars for a century and a half. Castilian infantry excelled throughout Europe, leaving Spain's monetary and human wealth in graves around the continent. To achieve imperial greatness, Spain had to abandon the mediaeval free market and constitutional institutions.

Along with the precious metals of the Indies. Spain sought to impose a "modern" system of taxation to pay for its imperial role. Navigation Acts were passed for state control of foreign trade for fiscal purposes. The *Mesta* was granted monopoly of sheep migration, preventing enclosures and agricultural development in Castile, for taxation purposes. But wool could not be exported. That guaranteed the Spanish manufacturers cheap raw materials to export to the monopolised South American markets. The Seville merchants had monopoly of trade to South America to collect customs, judge commercial cases and set trade policy. The Consejos de las Indias controlled political administration. In South America, the self-governing municipal institutions, modelled on mediaeval Spain's *communas*, were abolished. Instead, royal appointees ruled under the royal Audiencias and the Viceroys.

## The theory of rights

IF one considers the constitutional institutions of the domains of Charles V, it is possible to see the contrast with the period of his successors. The Austrian-Bohemian lands had provincial estates; the Burgundian lands had the seventeen estates of the Netherlands provinces, as well as the Free County of Burgundy. The Iberian-Italian lands had eight parliaments and constitutions: Naples, Sicily, Sardinia, Aragon, Valencia, Cataluna, Castile and Navarre. Philip II clashed with the Netherlands' estates and lost seven of them. Charles V crushed the *communas* of Castile and gradually drained the power of the Cortes. The other parliamentary institutions were allowed to become

ceremonial. The Spanish government imposed tasas (maximum price controls) on agricultural and manufactured products which disrupted the economy. An army of tax inspectors and tax collectors were employed to enforce the mercantilist regulations. The mediaeval traditions were completely reversed by the absolutist state. In Latin America, the early free institutions were strangled, and mercantilism became universal.

However, in this period of struggle over whether Latin America would receive mediaeval free institutions or new mercantilism, Latin America gave to Europe one of its most important inheritances: the development of the theory of rights. The expansion of rights theory, which reached its heights from Locke to the American Revolution, was founded on the rights debates which were introduced into Spain from the New World. The origin of this development was the disputation between the Bishop of Chiapa, Bartolome De Las Casas and Juan Gines de Sepúlveda in 1550 at Valladolid. The debate was on the humanity rights of the American Indians. The disputation led to the enrichment of the traditional rights theory of the Scholastics.

Iberia experienced the establishment of numerous new universities at the beginning of the sixteenth century -- the process continued in Ibero-America where six universities were established by the end of the century. Building on a tradition of historical writing in the fifteenth century, for example, the *Rerum Hispanorum* of Alphonsus A Sancta Maria (1396-1456), the new university faculties made significant achievements in moral philosophy. From Cardinal Cajetan's (1468-1534) commentaries on Thomas Aquinas, the late Spanish Scholastics by the dozens carved an historical sphere in the history of philosophy. Building on the De Las Casas disputation, rights theory was expanded by Francisco de Vitoria and Domingo de Soto through Martin de Azpilcueta to Francisco Suárez[8]. The glory of the intellectual contribution of the School of

Salamanca was more than off-set in Latin America by the rise of Absolutism and Mercantilism in place of the mediaeval institutions of liberty.

## Shakespeare

FOR two hundred years -- from Adam Smith and the Scottish Enlightenment through Macaulay, Acton and Dicey, to Harold Berman, Eric Jones, Nathan Rosenberg and Roland Vaubel -- classical liberals have explained why the Anglo-American world escaped the disasters which befell Latin America.

First, the disasters which befell Latin America were economic and political. Cultural life has flourished there. This permitted the famous contrast between Caliban (Anglo-America) and Ariel (Latin America): North America is the material, sub-human, non-intellectual culture; Latin America is the spiritual, supra-human, intellectual culture. It is interesting that the comparison is drawn from William Shakespeare's *The Tempest*, rather than classical continental writers, whether Racine, Corneille, Cervantes and Calderón. Shakespeare appeals to us because of his realism, his materialism, if you will, rather than for heroism, spiritualism and unrealism. Is Shakespeare the playwright of the James Buchanan School of Public Choice? Shakespeare places his emphasis on the reality of human nature rather than the hope that men will be inspired to transcend their human nature's self-interest. He does not propose that politicians or voters will abandon their own self-interest for the general good.

Shakespeare's work draws on mediaeval institutions and philosophical traditions, as did the School of Salamanca. The England which Shakespeare describes is an England which continued to flourish in the mediaeval political and legal structures which continental Europe was abandoning for Spanish absolutism.

In the later years of Shakespeare's career, England

was ruled by James Stuart, who had been king of Scotland. James I complained repeatedly to the Spanish ambassador and to the Spanish court, which he wished to copy, that he hated the limitations on his power from the English common law, the common law courts and judges, the absence of a centralised bureaucracy, and the freedom of the House of Commons to criticise and thwart him. His son, Charles I, sought to achieve the establishment of Spanish absolutism in England, but Charles I was executed and a Commonwealth established before the Restoration returned England to its mediaeval legal institutions and political traditions, including the Anglican church.

Like many monarchs, Henry VIII seized supremacy of the church in England and confiscated monastic lands, but he maintained the Catholic liturgy and defended the Sacraments against Martin Luther. In the era of Shakespeare, England inherited an English Catholic church, against which Protestant Reformers, the Puritans, complained. The Anglican church was a mediaeval church, minus monasteries and a papal legate. Similarly, the mediaeval common law and common law courts, the protection of private property and individual rights -- based on the Magna Carta (1215) and the Provisions of Oxford (1258) -- and the representative institutions in Parliament were maintained.

Most important of all, England retained de-centralised self-government. Local administration was controlled by major tax-payers as unpaid justices of the peace. All central orders went through them (or not, as they decided). This system was transferred to North America by the colonists. North America inherited the mediaeval institutions and political traditions of England, and fought the American Revolution to preserve that mediaeval inheritance[9].

It is the mediaeval tradition that Berman, Jones, Rosenberg, Vaubel, etc see as the cause of the liberty and prosperity of the West (and particularly of England and

North America). Yet, so much of Latin America's knowledge of North America's views of Latin America come from the New England writers. Too many intellectuals are influenced by literature, and many see North America through the eyes of the Puritans who wrote literature. The New England Puritans were not part of the English mediaeval tradition with which we associate the liberty and prosperity of England and English America. The Puritans sought exile in New England to escape the mediaeval Catholicism of the Anglican Church and the mediaeval (freedom) of English society and economy. The Puritan Yankee provides the literary model, but the reality of English America was mediaeval in economy and society.

The American South was not only Anglican and Cavalier, but had strong Creole/Latin influence at its two commercial and cultural centres - Huguenot and British and French West Indian in Charleston; French and Spanish in New Orleans. Charleston and New Orleans were more important ports than Boston, until the War between the States[10]. So were New York, Philadelphia and Baltimore. These Middle Colonies were truly characteristic of English America. They were centres of commerce, with broad cultural diversity of religions and dozens of languages (in New York). Diversity, toleration, and plurality were the foundations of their commercial wealth.

> Enter the London stock exchange, that place more respectable than many a court. You will see the deputies of all nations gathered there for the service of mankind. There the Jew, the Mohammedan, and the Christian deal with each other as if they were of the same religion, and give the name infidel only to those who go bankrupt; there the Presbyterian trusts the Anabaptist, and the Anglican accepts the Quaker's promise. On leaving these peaceful and free assemblies, some go to the synagogue, others go to drink; ... others go to their church to await the inspiration of God, their hats on their heads, and all are content.

Peter Gay, noting that Voltaire's *Lettres philosophiques* (1734) were dedicated to England's rule of law, calls

Voltaire's description "a positive vision of a civilisation that assimilates, protects, and profits from a variety of citizens". Voltaire tells his readers in one vivid image,

> "A sound civilisation is unity in multiplicity; since its virtues and vices constantly act upon each other, the strength of one institution is the strength of all. The rule of law, commercial prosperity, religious toleration, the flourishing of arts and sciences, civil liberties -- all are necessary, all sustain each other[11]."

## The task ahead

AFTER a decade in which North American and Western and Eastern European historians have identified the mediaeval roots of modern economic and political success, it is time for those engaged in Latin American studies to seek to identify parallel Latin American themes and traditions.

When the United States Constitution was written, it received violently critical reviews from the great philosophers of the French Enlightenment. They did not understand, as Edmund Burke did, that the Americans had revolted against England because the English bureaucrats were attempting to destroy the Americans' mediaeval institutions and to install a modern, bureaucratic state. The French philosophers emphasised repeatedly that the American constitution was retrogressive, looking back to the institutions and concepts of liberty of the middle ages. Thomas Jefferson and John Adams sought to explain to the philosophers that the American revolutionaries were traditional Whigs who wished to keep all the historic, mediaeval institutions of England, from common law to absence of central government agents.

John Adams prepared a three-volume *Defense of the Constitution of the United States* for the Enlightenment critics. He drew on a deep background of legal history, including history of the canon law. John Adams was the

highest example of the New England mind. He deserves the highest accolades for his ability, in the midst of the Age of Reason, to transcend the spirit of the age and to pursue the vast amount of reading he needed to understand the mediaeval traditions of American legal and representative institutions.

The mediaeval supremacy of the judiciary and judicial review were reflected in the US Constitution and *The Federalist Papers.*

> "The political and social philosophies that sprang from the Enlightenment were religious because they ascribed ultimate meaning and sanctity to the individual mind and also, it must be added immediately, to the nation. The age of individualism and rationalism was also the age of nationalism: the individual was a citizen, and public opinion turned out to be not the opinion of mankind but the opinion of Frenchmen, the opinion of Germans, the opinion of Americans, and so forth. Individualism, rationalism, nationalism -- the Triune Deity of Democracy -- found legal expression in the exaltation of the role of the legislature and the consequent reduction (except in the United States) of the law-creating role of the judiciary[12]."

Were there any Latin American John Adamses? It is necessary to identify them, then re-examine their analyses of constitutions and institutions, and show North and South America the value of their contributions. Classical liberals have an important Latin American research agenda before them.

We live in an exciting epoch. The concept of liberty -- of capitalist revolution -- is once more to the fore. The restoration of mercantilism, whether as socialism in the Eastern Bloc countries or as welfare state in Western Europe, North and South America, has once again failed.

The scholarly research in the last decade has more clearly identified what Lord Acton and Alexis de Tocqueville in the last century, and FA Hayek and Bruno Leoni in this century, have been explaining to us. We must understand

what it is about the West's legal and political institutions that provided unique dividends of liberty and wealth. We know from all these sources that the West's unique development is due to the inheritance of mediaeval legal and political institutions.

It is understandable that the East Bloc countries which shared that tradition -- Yugoslavia, Poland, Hungary, Czechoslovakia, East Germany, Lithuania, Latvia and Estonia -- have taken the lead in recent months in re-establishing the route to a free society. Their example gives hope to Latin American countries that their roots in Spain's mediaeval tradition can provide a road map to liberty and prosperity.

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