

## 1. The corporatist conception of society and the historiography of early modern Europe.

From the 80s on, the political and constitutional historiography of early modern Southern Europe (namely, Italian and Iberian historiography) experienced a dramatic and quite generalized turn in describing the paradigm of polities before the mid 18<sup>th</sup> century. Categories like State, centralization, absolute power and, more recently, empire, lost their centrality in the description of the architecture of political units, even of the great European Monarchies of late Middle Ages and Early Modern times. In Italy, a new wave of early modern historians – paradoxically based both on Marxist and ultra-conservative theoretical frameworks<sup>1</sup> – highlighted the alternative contents of many of the still used political concepts and images, stressing the need for a proper understanding of their early modern occurrences.<sup>2</sup> In Spain, a similar methodological turn framed an important renewal of Ancien Regime's historiography. Scholars like Bartolomé Clavero and Pablo Fernández Albaladejo challenged the established vision of Spain as an early centralized monarchy by unveiling ethical, doctrinal, institutional, and logistic limitations to royal power. While Clavero – an elegant and self styled legal historian – emphasized the plurality and endurance of lower jurisdictions as a distinctive feature of early modern polities (Clavero, 1981); Albaladejo – a leading historian of the “Catholic Monarchy” – stressed the role played by ideological and institutional frameworks in the constraining of princely freewill (*arbitrium*) (Albaladejo, 1993). These mottos eventually repeated in the much broader revision of traditional historical *topoi* also carried out by other scholars<sup>3</sup>.

In Portugal, my book *As Vésperas do Leviathan*<sup>4</sup> questioned an array of pervasive ideas regarding the constitution of the Portuguese early modern monarchy, disclosing the unsuspected weight of lower powers (namely, those of city councils [*câmaras*], seigniorial and corporate jurisdictions), besides the overwhelming presence of Church courts, officials and institutions, which curtailed and weakened royal power. It also disclosed how, from the 12<sup>th</sup> century onwards, jurists – informed by legal pluralism, traditionalism, and casuism-- elaborated legal doctrines that, on the whole, favored peripheral powers to the powers of the monarch. Additional research – carried on

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<sup>\*</sup> Full Professor of Legal and Constitutional History; Faculdade de Direito of the Universidade Nova de Lisboa.; for an abridged CV, s. [www.hespanha.net](http://www.hespanha.net); e-mail: [amh@oniduo.pt](mailto:amh@oniduo.pt).

<sup>1</sup> I am referring, namely, to the influences – at theoretical or historiographical level – of a Marxist like Antonio Gramsci or a philonazi like Otto Brunner. The leading names are: Pierangelo Schiera, Cesare Mozzarelli, Paolo Grossi, Pietro Costa, Lucca Mannori; further information, Pierangelo Schiera (a cura di), *Ragion di Stato e ragione dello Stato (secoli XV- XVII)*, Napoli, Istituto Italiano di Studi Filosofici, 1996, 38-67.

<sup>2</sup> Bibliographical syntheses: Hespanha, 1984 (namely in the preface: “Para uma teoria da história político-institucional de Antigo Regime”); Benedictis, 1990; Hespanha, 1992b e 1996; Vallejo, 1995; Cardim, 1993 e 1998a; Schaub, 1995 e 1996; Clavero, 1996; Grossi, 1996.

<sup>3</sup> Witnessing the same historiographical turn, although through a narrower bibliographical sample, Grenn (1994), 3-11. The consideration of Southern European literature – which is lacking in this powerful text - is essential, because it was here (Italy, Spain, Portugal, later on, France) where the turn begun and eventually developed in an extensive array of perspectives and results. More detailed overviews: Benedictis, 1990; Schaub, 1993; Id. 1995; Id., 1996; Torre, 1995; Bizzochi, 1996.

<sup>4</sup> Recent reappraisal: A. M. Hespanha, “Depois do Leviathan”, in *O caleidoscópio político do Antigo Regime*, São Paulo, [redacted], 2007 (forthcoming).

by a younger generation of historians<sup>5</sup> –applied this model to specific monographic themes. The results were basically consistent with my initial points<sup>6</sup>.

The accumulated outcome was a new conceptualization of the monarchy, valid, at least, till the mid-18th century, when another political model – *Polizeistaat*, *État de Police* – began to develop. This monarchy was now characterized as a corporative monarchy (*monarquia corporativa*) whose distinctive features were:

- Royal power shared the political space with both inferior (families, counties, corporations [*corpora*] and universities [*universitates*]) and superior (Church) powers;
- Statute law was limited and was framed both by European common legal doctrine (*ius commune*) and by local usages and judicial practices (*consuetudines, usus, styli*), besides religion and ethics;
- Political and even legal duties ceded before moral duties (grace, piety, mercy, gratitude) or before affections (love [taken in a rather broader sense than today's] and friendship), embodied in visible relationships, like households, networks of friends, patrons and clients; creating duties that lawyers called *antidoral* (from the Greek *antidora*, or moral obligation).
- Royal officials enjoyed a wide and effective protection of their rights and attributions (*jurisdictio*), and were allowed to protect these even against royal orders.

Although this turn was noticed by some American scholars – amidst which, Julius Kirchner, Tamar Herzog, Stuart Schwarz, J. Russel-Wood, with explicit first hand references to the Southern European historiography<sup>7</sup> – the most extensive exposition of this new conception of the European Early Modern State was done by Jack P. Greene in his book *Negotiated authorities. Essays in colonial political and constitutional history*, 1994. Notwithstanding the fact that Green's major reference was apparently a book edited by Mark Greengrass (*Conquest and coalescence. The shaping of the State in Early Modern Europe*, 1991) – a book which was only very indirectly influenced by the new move of Latin European historians of Early Modern politics-- Greene adhered to the most important conclusions on European Modern States and applied them to a colonial context. The result was the adoption, in the North American colonial historiography, of a new interpretation of the colonial bond that was now presented as much less centralized and coercive and a new stress on the multi-level negotiations embedded in the colonial situation. This line of argumentation was already clearly visible in the work of historians like Stuart Schwartz or John Russel-Wood – or even John Elliott in his masterpieces on Spanish politics in the 17<sup>th</sup> century<sup>8</sup> –, but it gained with J. P. Greene's book a handy, compact exposition orientated to North American history readers.

## 2. The empire and the metropolis. A historiographical overview.

Although the new understanding of early modern polities did not immediately affect overseas history, the image of a politically decentralized and peripherized empire did fit, indeed even was a better fit, for the analysis of European early modern Empires, at least in the Portuguese *dominia*.

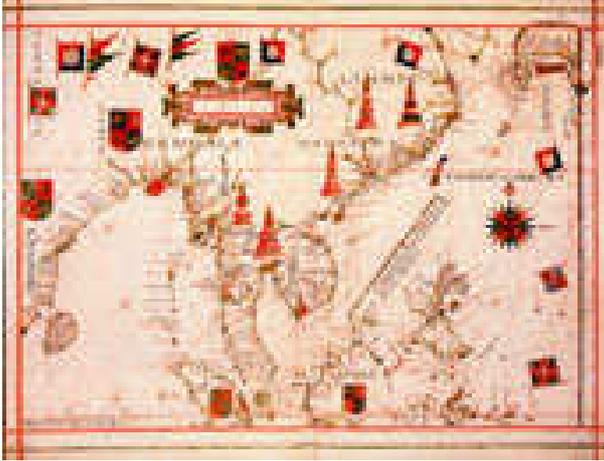
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<sup>5</sup> Nuno Monteiro, José Manuel Subtil, Mafalda Soares da Cunha, Maria Fernanda Olival, Pedro Cardim, Ângela Xavier, Ana Cristina Nogueira da Silva.

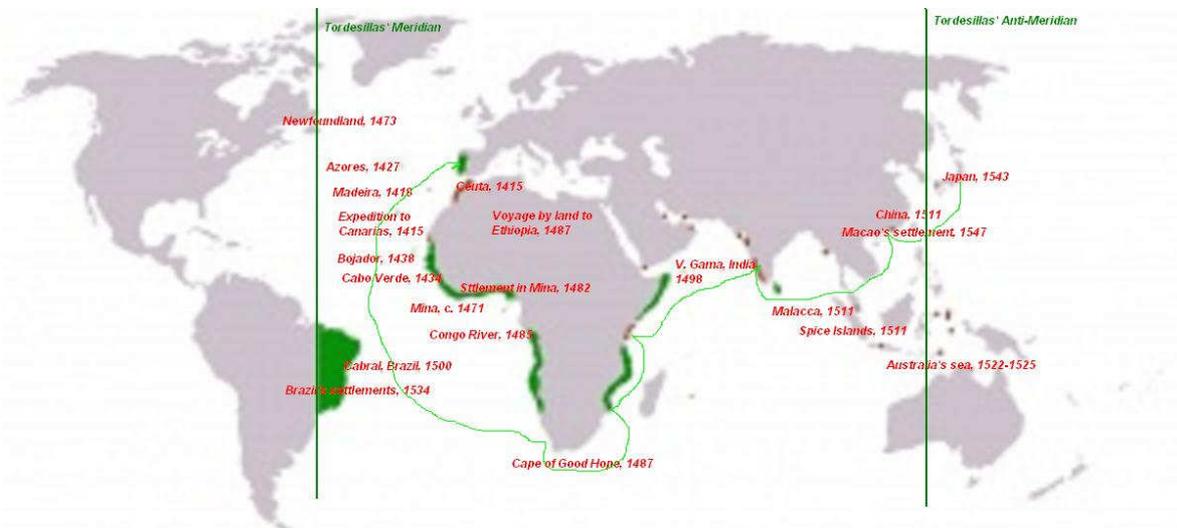
<sup>6</sup> A different question is the intensification of central/curial power, consisting in: centralizing the bureaucratic apparatus of royal court and officialdom, in the efforts to implement royal statutes, in the policy of subduing society to a royal disciplina (a key word after the mid 18th century). However, the permanence of traditional political dispositives corroded, for decades along, the success of such efforts. See, on this policy of promoting royal power, after the Portuguese early 18th century, Monteiro, 2006.

<sup>7</sup> S., eg., reviews of my book *Vísperas del Leviathan: Journal of modern history* (J. Kirchner), 1990; *American Journal of Modern History*, Feb. 1992, 221-222 (Carl A. Hanson); *Latin American Research Review*, 31(1996), pp. 113-134 (S. Schwartz).

<sup>8</sup> Namely in *The Count-Duke of Olivares. The Statesman in an Age of Decline*, Yale University, New Haven and London, 1986, where the centralistic project of the Count-Duke is contrasted with the pluralistic resistance of the realms and peripheral polities of the Habsburgian Monarchy.



Portuguese map (Southeastern Asia, 1576)



### Portuguese voyages, discoveries and settlements

As these maps may demonstrate, Portuguese *dominia* were made of many different modules (Timor, Macao, Eastern Coast of Africa), each living in a state of almost total autonomy until the 19th century. Even Portuguesia India (*Estado da Índia*, with Goa as capital) could not be effectively controlled given the nine months of seafaring in each direction (Hespanha e Santos, 1993). These simple facts call for a revision of several pervasive conceptions regarding the political history of the so called Portuguese “Empire” (a designation scarcely used in historical sources and, anyway, deprived of any concrete institutional meaning). This revision is further required given recent developments in Luso-Brazilian history that insist on the oppressive character of the empire.

The first point deserving reflection is the rationale for a survival of the image of a centralized Empire, at a time when the corresponding centralized image of the realm – Portugal itself— was falling apart. My explanation is rooted in the ideological role that the image of a centralized empire played in contemporary debates<sup>910</sup>.

From the Portuguese colonizer’s point of view, the image of a centralized empire was ideological rewarding. It gave credit to the genius of metropolitan people, allowing them to re-impersonate old empire builders such as the Romans. To claim the opposite, that is, to highlight

<sup>9</sup> Similar issues, for Italy, Musi, 1999.

<sup>10</sup> On the same topic, with a similar explanation – the weight of late colonial imagery of centralized and built on the basis of coercive bounds – Jack Green (1992). The critical problem of effective and direct governance over extended territories would be one of the most crucial issues of the doctrinal design and practical implementation of the 19<sup>th</sup> century centralized State; s., on the theme, Hespanha (1993).

the constitutive role of peripheral elements, would be counter productive as it would allow the fading of the gloss that made the imperial enterprise shine<sup>11</sup>. From the point of view of colonial elites, an absolute, centralized and oppressive empire lead more straightforwardly to an everlasting celebration of self-identity, self reliance and, also, self-indulgence. It permitted presenting independence as a heroic struggle against a “foreign bad rule”, it relegated the causes of contemporary misfortunes to outsiders, and it argued that sustained bulges of poverty and mis-administration were linked to old imported vices and past exploitation. Even the genocide of native peoples could thereafter be pulled off to the colonial period. Once all evils were “externalized,” the new post-colonial Nation would shine immaculate, unified and united it could be exempt from exploitation and ethnic segregation or biases.

These political underpinnings were quite clear in the pervasive anti-colonial discourse of some of the most traditional Brazilian historiography<sup>12</sup>. However, these same considerations seem to dominate even the more recent bibliography and are often viewed as topoi, which cannot be bluntly exposed. The works of a skilled and stimulating historian like Raymundo Faoro (Faoro, 2000) are a good example of this tendency. Although listing an impressive array of anti-centralist arguments, Faoro keeps untouched the “absolutist” and a “profiteering” conception of Luso-Brazilian history. Nonetheless, even classics like Caio Prado Jr.<sup>13</sup>, F. J. Oliveira Viana<sup>14</sup> and, in general, almost all of the most distinguished Brazilian historians stressed – under different tones – the large degree of self government in colonial Brazil. The newest Brazilian historiography also stresses the vitality of colonial society, the adjustability of its living law, the overwhelming power of county and city councils, as well as of the local gentry (*nobreza da terra*), the fast integration of crown officials in local communitarian networks, and the non enforcement of royal orders and royal law. Noteworthy in this sense are the works of Maria Odila Leite Dias who promotes a reading of Brazilian history freed from this obsessive opposition between metropolis and colony<sup>15</sup>. Lately, a new generation of Brazilian scholars has proposed a new reading and high-level analysis of often

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<sup>11</sup> It is not a hazard that romantic and nationalist historiography nourished several theories that emphasized the intentional, studied and programmatic character of the Portuguese expansion – the “Plan of Indies”, the “School of Sagres”, the “Policy of Secrecy”, the “Imperial Idea” and even the idea of a “Colonial Pact”, carefully thought and implemented, in order to rule favorably the commercial exchanges between the metropolis and the colonies. Actually, the expression “Pacto colonial” is a late innovation in Portuguese colonial discourse, imported from French and British literature (vg., *De l'esprit des lois*, liv. XXI, cap. 21), dealing primarily with a subject alien to Portuguese worries – how justify the colonial dominance. As it is generally known, amidst Iberian colonizers Papal donation was deemed to be an enough justification. Cf., on the justification of colonization through the idea of a pact, Paul Cheney, “Franco-American Trade During the American War of Independence: A False Dawn for Enlightenment Cosmopolitanism?”, in <http://www.librarycompany.org/Economics/2003Conference/papers/peaes%20-%20cheney%20conf%20paper.pdf>, p.8.

<sup>12</sup> This is a critic topic, which cannot be bluntly exposed. The example of a skilled and honest historian like Raymundo Faoro (Faoro, 2000) expressive. Although listing an impressive array of anti-centralist arguments, he keeps untouched the model of a “absolutist and”, que, embora anotando uma série impressionante de argumentos anti-centralistas, está completamente cego por um modelo de interpretação “absolutista” e “profiteering” conception of Luso-Brazilian history. Therefore, his text is plenty of contradiction between empiria and herneutics (v.g., on governors’ powers and their limitation, pp. 164/165; military structures and territorial non professional troops “ordenanças”, pp.180 ss.; crown servants, pp. 193-194; doctrinal and practical limitations to royal power, pp. 199-200; “brainless” of polisynody, 201. Classics like Caio Prado Jr (Prado Jr, 2000, pp. 313-346); F. J. Oliveira Viana (*Instituições políticas brasileiras*, 2 vols., 1949) and, in general, almost of the most distinguished classic Brazilian historians stressed – under different tones – the large practical self government of colonial Brazil, even if they consider this “confusion and arbitrary” a deficit of the Portuguese administration more than a witness for the creativity of the local community. The newest Brazilian is raising the old hypothec to a commemorative history, and stressing more and more the vitality of colonial society, the adjustability of their living law, the overwhelming power of county and city councils, as well as of the local gentry (*nobreza da terra*) the fast integration of crown officials in local communitarian networks, the helpless unenforcement of royal orders and royal law. Noteworthy are the works of Maria Odila Leite Dias, promoting a reading of Brazilian history freed from this obsessive opposition metropolis-colony (Dias, 1972, pp. 160-184); lately, in the same direction, multiplying perspectives and illustrations: Furtado, 1999; Souza, 1999; Bicalho, Fragoso & Gouveia, 2001). However, in a recent book, Laura de Mello e Souza strongly reacts against this “revisionism”, arguing that the Ancien Regime’s paradigm doesn’t fit at all with a colonial situation (Souza, 2006). Being my work one of her targets, I provide a counter-defense of my points in Hespanha (2007). In my opinion, what happened with not a few Brazilian historians is that – as it also happen in Portugal in relation to the Hispano-Portuguese crisis of the mid 17th century – is that they grant a nationalistic, revolutionary mood to every sign of dissatisfaction or revolt arising in the colony. Nothing more problematic. What was really at take was simply a vast array of feelings of anger: anti-fiscalism, greed for offices, animosity against newcomers, feeling of being forgotten by the king, several forms of localism, tensions between social networks, etc. (s. list of topics of the kind in Mota, 1996).

<sup>13</sup> Prado Jr., 2000, pp. 313-346.

<sup>14</sup> Viana, 1949.

<sup>15</sup> Dias, 1972, pp. 160-184.

already known material, one that indicates in the same direction.<sup>16</sup> Nonetheless, these developments are not uncontroversial. In a recent book, Laura de Mello e Souza strongly reacted against this “revisionism”, arguing that the paradigm of the European Ancien Regime’s corporative monarchies simply does not fit at all in a colonial situation<sup>17</sup>.

In my opinion, what happened with not a few Brazilian historians is that they assigned – as it also happened in Portugal in relation to the Hispano-Portuguese crisis of the mid-17th century – a nationalistic, revolutionary, interpretation to every sign of dissatisfaction or revolt arising in the colony. Although cheered by romantics and nationalists, nothing is more problematic than this kind of assumption. I would argue that many uprisings expressed a vast array of feelings of anger: anti-fiscalism, greed for offices, animosity against newcomers (*reinóis*), feeling of being forgotten by the king, localism of different grades and ranges, tensions between social networks, and so forth.<sup>18</sup> After all, the so called “colonos brasileiros” (Brazilian colonists) were not a native or an enslaved population, but the very Portuguese immigrants or their descendants. If most of them had consistent projects of a sustained colonial life, others’ ambitions were to shuttle between the colony and the realm, or even to eventually return to Europe. A hope for a rupture many have captured, perhaps, the feelings of most of the Muslim or Hindu Goan population; but it probably did not represent well the feelings of Brazilian colonists before the burst of American Revolution<sup>19</sup>.

## 2.1 A colonial project?

Traditional historiography insists, thus, in a neat separation between metropolis and colony and in the existence of a project of submission and exploitations of the later by the former. If we are to show the inadequacy of this hypothesis, we must first stress the lack of a general model or strategy for the Portuguese expansion<sup>20</sup>.

There were evidently several *topoi* incidentally used in colonial discourse to define the purpose of the enterprise<sup>21</sup>. One of them was the idea of Crusade, as a way of recovering land taken illegally by the (Muslim) enemies of the faith; idea that was closely linked to proselytism --the aim of spreading the faith. Commercial or plantation enterprises, as means of pursuing private and common good (*bem comum*), were also *topoi* of the same discourse. However, this ideological conglomerate was not harmonic, each one of the guidelines leading to different or even contradictory policies. Seemingly, the balance between the several *topoi* changed from time to time and from settlement to settlement. The *topos* of “conquest” (*Reconquista*), for example, was a strong asset in the legitimization of the “conquest” of North African Muslim city-fortresses or of the control over the (“Moorish” or “Turkish” occupied) Indian Ocean (including the Straits: Malacca and Muslim Insulindia). However, it was ill-functioning in the case of the Hindu people, although the Portuguese tried to take advantage of the legend of the previous Christianization of India by St

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<sup>16</sup> Furtado, 1999; Souza, 1999; now, in a nutshell, Bicalho, 2001; incorporating contrasting visions, Souza, Bicalho & Furtado, 2007. For an overview, s. also, Cardim, 2004.

<sup>17</sup> Laura de Mello e Souza, 2006, *maxime* 27-40. Being my work one of her targets, I provide a counter-defense of my points in Hespanha, 2007.

<sup>18</sup> S. list of topics of the kind in Mota, 1996.

<sup>19</sup> For the loose structure of the Portuguese Eastern Empire, s. the classical and pioneer article of Luis Filipe Thomaz (Thomaz, 1985).

<sup>20</sup> The same conclusion was already drawn by E. Burke (in 1775) for the British Empire: “The settlement of colonies was never pursued upon any regular plan; but they were formed, grew, and flourished, as accidents, the nature of climate, or the disposition of private men happened to operate (*An account of the European settlements in America*, 1757, quoted by Green, 1965, p. 43..

<sup>21</sup> The question of the aims of colonial activity (i.e., of the colonial project) is often embedded in the discussion on the legal titles for the expansion. Actually, each title entailed typical contents, frameworks and limitations for the colonial enterprise. S. Freitas, 1625. The Papal bulls - *Rex regnum* (Eugen IV, 8.9.1436), *Dum diveras* (Nicholas V, 14.6.1452), *Romanus Pontifex* (Nicholas V, 8.1.1455), *Inter coetera* (Calixt III, 15.3.1456) (on the Papal bulls concerning the Portuguese expansion, s. De Witte, 1958) - bestow the Portuguese king the right to make (just) war to enemies of Christendom, within a broad medieval tradition. However, this can hardly be seen as a specific feature of a Portuguese particular mission or project. On these Papal bulls, with bib., Santos, 1998, 38. On the use of European experienced *topoi* and models, on justifying and organizing overseas colonies, s. Elliott, 2006.

Thomas, which transformed the sub-continent in a *christiana pristina terra* and granted the Portuguese a title of “just war” as re-conquerors of a land under unfair occupation<sup>22</sup>. On the contrary, the establishment of plantations and religious proselytism were the usual justification given in the official literature regarding Brazil; as in Macao, the opening of commerce – a path to hominization, according to the prevailing Christian anthropology – and the spread of faith were the basic justifications for the Portuguese initiative. African settlements did not produce an explicit legitimating literature; but evangelization and peace keeping were often used as an ideological cover for the African colonial activity. Later on, the holding of Africa was presented as a condition allowing to sustain Brazil, as slavery became crucial to the local sugar economy. At any rate, a systematic and concrete colonial strategy, comprising the whole colonial enterprise, was seemingly lacking – and impossible to build out of these diverging aims - until the mid-18th century<sup>23</sup>.

Furthermore, although bulls and treaties of the late 15th century<sup>24</sup> guaranteed to the Portuguese the exclusivity of navigation and commerce within “their half of the world,” thus seemingly indicating a seminal idea of unity of overseas settlements, this idea did not include but a light political content. In fact, political paramountcy was conceived as a purely negative right of preventing others from entering this space, with the only positive content of assuring the monopoly of commerce and the defense of an orthodox evangelization. In other words, the sole underlying imperial concept was that of a trade and missionary monopoly, in opposition mainly to other European powers. It is also clear that, according to Papal bulls, the Portuguese king did not have any special rights on the native population. All the Pope did was to confirm what according to contemporary international law any other European power enjoyed in the international arena: occupation of vacant goods or lands (“navegação”), acquisition of rights by treaty or contract (“comércio”) and, eventually, conquest (“conquista”), but only by just war. The variety of “political situations” within the Portuguese colonial space derives from this emptiness of the original colonial constitution.

## 2.2 Institutional framework: no homogeneity, no centrality, no hierarchy.

### 2.2.1 A multiple personal status.

A constitutional approach, describing the institutional forms used during the Portuguese expansion, confirms this atomistic picture of the Portuguese overseas empire<sup>25</sup>. Although each and every Portuguese settlement was tied to the metropolis by some political link, a unified colonial constitution was lacking until the 19th century.<sup>26</sup>

The first factor was the absence of a unified status for the colonial populations<sup>27</sup>. Some colonial inhabitants, namely those born from Portuguese parents, were considered Portuguese “natives” (natural -- *Ord. fil.*, II, 55). Eligible to full Portuguese status, they used Portuguese common law, were subjected to Portuguese courts and enjoyed the privileges of “naturais”.<sup>28</sup> Nonetheless, very often royal privileges were granted to communities or customs had been slowly and quietly established, which deformed this general rule. An example of this process of

<sup>22</sup> Incidentally, the argument was re-used in Brazil, characterizing the wars against French or Dutch, who did not respect the papal adjudication of the land to Portugal (by the Tordesillas Treaty, 1492); moreover, French and Dutch were also under the suspicion of heresy.

<sup>23</sup> Russel-Wood, 1998, 240

<sup>24</sup> Treaty of Alcáçovas (1479), ratified by the Papal bull *Aeterni patris* (1481); Treaty of Tordesillas (1494) (accepting the Papal bull *Inter coetera*, 4.5.1493).

<sup>25</sup> Cf. Hespanha, 1995b, *maxime* 9-37. <sup>25</sup>

<sup>26</sup> Even then, the homogeneity of constitutional status of overseas settlements was problematic. The constitutional status of Macao was unclear either in constitutional text or in institutional level. The same could be said for the African coastal settlements and their hinterland till the end of the century. S. Cristina Nogueira da Silva, *Cristina Nogueira da Silva, A cidadania nos trópicos. As colónias no constitucionalismo monárquico português (1820-c. 1880)* (PhD diss., Faculdade de Direito, U.N.L., still unpublished). On the difficulty of building a concept of British colonial constitution before the 18<sup>th</sup> century, s. Green, 1987. p. 49.

<sup>27</sup> On the status of colonial populations, cf. Herzog 2002<sup>a</sup>; Id., 2002b; Id., 2003<sup>a</sup>.

<sup>28</sup> Amidst which, the right to settle the “conquistas”, to hold offices, to participate in local government (often only if other conditions, concerning social ranking were fulfilled).

differentiation were the concession of royal charters (*forais*), inspired or copied from those granted to metropolitan boroughs and cities, each stipulating different duties and rights for the respective inhabitants (*vizinhos*). Another centrifugal example was the deformation of the theoretically pristine constitutional situation by the elaboration of local norms often in the form of rooted practices. Already in the 13th century, Baldus de Ubaldis, the famous Italian jurist explained that Populi [nations, communities] existed by the law of nations [=natural law], so that government derives from natural law; but this government cannot exist without laws and statutes.<sup>29</sup> Therefore, by the very fact of their existence, nations [communities] have in themselves the capacity of govern, “like every animal is ruled by its spirit and soul”. Baldus was taking *populus* to be a synonymous of any human community, even inferior to the realm, and he granted it the legitimacy to govern itself autonomously (*iurisdictio*) also promulgating its particular legal norms (*iura propria; statuta, “posturas”, “fueros”*). This principle was general and was applied to every territorial or corporate body from the village (*aldeia*), to the city (*cidade*), county (*comarca*) or province (*província*). It was also applied to non territorial corporations such as *collegia* or *universitates* [e.g., corporate bodies, guilds, religious brotherhoods, universities]). Last, but not the least, Baldus portrayed the act of governing and creating norms as so natural, continuous and informal as was breathing. Living the law was enough to enact the law, so that rooted practices had the value of a formal act of enacting legal norms (consuetudinary law; *usus, styli, consuetudines*).

While this was the situation of those descending from Portuguese, foreigners, on the contrary, were unbounded by Portuguese order and law<sup>30</sup>. This was the case of Brazil’s “wild Indians” (“índios bravos”), whose sole obligation – that of accepting commerce and catholic predication<sup>31</sup> – arose from the law of nations (*ius gentium*) and not from a particular colonial submission. This was also the case of the African “sobas amigos mas não vassalos” (friend but not vassals), which the Governors’ charters (*regimentos*) often referred to<sup>32</sup>. The situation of neighboring free nations, however, was quite unstable. Colonizers used any failure on their part to accept missionaries or traders, or to abandon the bush and come to a closer contact with the white men, to declare a “just war” against them<sup>33</sup>. In Africa, the Portuguese authorities used to punish with war those nations that did not accept willingly a treaty of vassalage submitting them to the King of Portugal<sup>34</sup>. In Brazil, an decree dated 1655 ordered to perform a formal process, notifying neighboring nations that they were required to declare if they wanted to become vassals – at least, “friends” - of the Portuguese king or not. Those who did not want to receive not even the friendship of the Portuguese, were notified that they were required at least to allow the predication and a peaceful contact with the Portuguese<sup>35</sup>.

In the between, several other situations existed. First, there was the status of those who were defeated in a just war. It was up to the victorious part to decide their destiny and status. According to the laws of war, they could be killed, enslaved or kept under a more or less harsh

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<sup>29</sup> Quoted by Calasso, 1954, 501.

<sup>30</sup> Similar was the situation in the British Empire, where Englishness was the basis of the common constitutional status of colonizers (but not of colonized), as well as of the political rights of their communal assemblies towards the raising sovereignty of Parliament; s. Green, 1987.

<sup>31</sup> “...e os que não quiserem receber a dita amizade sem fazer mal a meus vassalos, nem impedirem a pregação do Santo Evangelho, se lhes não fará dano algum”, Regimento de André Vidal de Negreiros, 14.4.1655 (*apud* Mendonça, 1972, vol. II, p. 712).

<sup>32</sup> Cf. Regimento de 12.2.1676, given to Governor Aires de Saldanha e Menezes (*apud* Rego, 1959a, p. 63).

<sup>33</sup> For Angola, cf. Saldanha’s regiment above, 1967, 63 (the just war was declared by the governor, advised by a joint of ecclesiastics, high military officers, members of Luanda’s municipality, supreme fiscal officer [*Provedor da Fazendas*] and local higher judge [*Quvidor Geral*]). For Brazil, the question of just war would deserves a more detailed consideration; s., anyway, Puntoni, 1998.. The basic legal sources are Statute of 20.03.1570 (Mendonça, 1972, I, 335); statute of 26.07.1596; (Mendonça, 1972, I, 331); Statute of 11.11.1595; Prov. 5.7.1605; Statute of 30.7.1609; and, namely, the statute of 13.11.1611 (the just war should be declared by a joint formed by the governor, Loanda’s bishop, *Relação’s* chancellor and judges, priors of religious orders, only in case of rebellion or attack). Cf. also reg. André Vidal de Negreiros, 14.4.1655, Mendonça, 1972, II, 712.

<sup>34</sup> Rego, 1967, 63.

<sup>35</sup> S. note 31.

regime of (legal or fiscal) submission<sup>36</sup>. This was the case of the Hindu or Muslim population of India, of the Chinese inhabitants of Macao, of many Africans (e.g. the N'gola kingdom)<sup>37</sup> and many Amerindian (e.g. the Tupi population of Brazil)<sup>38</sup>. Second, those who recognized by treaty the superiority of the Portuguese King were considered as foreign vassals, keeping their original legal and institutional autonomy, according to the articles of the peace or treaty. Religious privileges were rare, especially for Muslims.<sup>39</sup> Chinese Confucianism and African gentile religions however were often tolerated, although always under the hope of conversion. Political institutions were often preserved in order to be used as mediators between the native population and the Portuguese power. Sometimes, Portuguese authorities “assisted” vassal or friend rulers by giving them European “counselors” (as in some Indian city states or in African chieftaincies). In Brazil, Portuguese “with good mores” (*bons costumes*) were sent as captains to rule Indian villages (“capitães das aldeias”), as Indian capacity for “correct” conviviality was usually deemed to be insufficient<sup>40</sup>.

Singular, from this perspective, was the situation of Macao's. This singularity was in part due to the obscurity of the formal act (if any) by which the Emperor of China allowed the Portuguese's to settle there. Although the local authorities made great efforts, until the late 18th century, to clarify this question by way of diplomacy or of research in royal or local archives, they were largely unsuccessful. Eventually, a rather void formula was cast – Macao was to be a Portuguese “settlement” (estabelecimento), formula which was still used in the Portuguese constitutions of the 19th century. At a substantial constitutional level – a sovereignty level, I mean – it was fairly unclear what this meant. However, the obsession with neat formulas was not a major concern in Ancien Regime's political theory, which was pretty well acquainted, even in Europe, with situations of mixed powers and entangled jurisdictions. In practice, the formula allowed Chinese magistrates, operating from Macao, to exert jurisdiction over the Chinese population and claim, moreover, the power to judge mixed cases, in which Portuguese were also involved<sup>41</sup>. Furthermore, Portuguese local officials, when writing to the Chinese authorities like the Sunto (or Viceroy of Canton) assumed the status of Chinese Imperial servants (!) This was also the only way Europeans had of coping with the traditional Chinese conception that classified foreign ambassadors and diplomatic legations always as vassals' “envoyees” (Hespanha, 1995).

This heterogeneity in the personal status of people living in the empire created a plurality of political links and of legal situations. As a result the crown and its local delegates could not subdue all the inhabitants to uniform rules or overpass the jurisdiction of native authorities, which were recognized by treaty, nor could they ignore the special roles applying to the Portuguese, which were fixed by local charters or rooted usages. Colonial authorities could not even freely dispose of the extreme measure of engaging in war to control neighboring nations. Legal and moral limitations framed the ability to wage war against foreigners. Such a war had to take into account the principles of just war, either concerning the titles to launch it or regarding the way of carrying it. Thus, even if the alleged motives were false or biased by interest or xenophobia, they still had to be formulated in plausible and acceptable ways.

Briefly, the uniformity and boundlessness of political power characteristic of centralized states did not exist in this type of empire. Institutional entanglement, plurality of legal models, diversity of constitutional limitations on royal power and consequent negotiated character of political bounds duplicate, in overseas, the composite and complex structure of European polities

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<sup>36</sup> Cf. Hespanha, 2000.

<sup>37</sup> Rego, 1967; Hespanha, 2000.

<sup>38</sup> Puntoni, 1998.

<sup>39</sup> However, some religious toleration for Muslims existed in the Moroccan fortresses (the so called “mouros de pazés”) or in some of the East African settlements. Hindus were mildly tolerated till the mid-16<sup>th</sup> century. Afterwards a fierce repression felt over them, even regarding civil ceremonials.

<sup>40</sup> Statute of 13.11.1611, n. 4, Mendonça, 1972, I, 325; s. also André Vidal de Negeriros (1655), ns. 43 ss., Mendonça, 1972, II, 710.

<sup>41</sup> On the origins of Portuguese settlement in Macao, s., Hespanha, 1995; Fok, 1991.. For the 19<sup>th</sup> and 20<sup>th</sup> century, Mansilha, 1909; Mariano, 1990a, 1990b; [Guimarães, 2000; Araújo, 2000](#).

of Early Modern Age. Returning to contemporary debate, the tropics were not a hindrance to the extension of Ancien Regime's political model. On the contrary, the complexity of this model and its plethora of political formulas fitted perfectly the variety and mobility<sup>42</sup> of colonial political bounds.

### 2.2.2 A pluralistic law.

A close examination of "colonial law"<sup>43</sup> would reveal that a unified and an all embracing body of law was also missing in the Portuguese overseas domains. What Spanish historiography uses to call the "derecho de Indias" was, in fact, a disparate collection of statutory legal providences, of very different range and subject, and even made more fuzzy by a pervasive and sustained practice of casuism, a typical feature of the decision making style of Ancien Regime's courts, also in colonies<sup>44</sup>. Far from a shining "imperial law", what we can extract from the sources is a humble and messy patchwork of legal situations and solutions, which the traditional historiography often described as abuses, legal ignorance and confusion, thus replicating the same criticism it levied against peasant law (*ius rusticorum*)<sup>45</sup>.

Several factors can be listed to explain the pluralism and inconsistency of colonial law during the early modern period. First, this pluralism and inconsistency was a reflection of the legal inconsistency of the very architecture of European common law, which was built upon the principle that particular rules (like, local customs, local "styles" of deciding in court, privileges; in a word, *iura propria*) is preferable to general rules (like statute law, *ius commune*)<sup>46</sup>. Second, the principle according to which a later law revoked a prior law (*lex posterior revogat priorem*) was not strictly binding because rights acquired under the prior law were to be respected even after its revocation. This explains the multitude of legal obstacles to the implementation of a new general policy, even when it was defined by royal statute. This meant that the king could not override "rooted" or "acquired" rights, unless he argues that such a measure was justified by the *suprema salus reipublicae*, a supreme common interest of the Republic<sup>47</sup>; otherwise, his decisions could be easily seized or canceled by a common court. Law was thus made of a structure of pluralistic and casuistic norms, multiplying particular status (or privileges), which efficiently limited and framed royal action. As suggested before, this feature of European medieval and early modern law was not truly related to the particular history of Iberia (the conviviality with other nations such as Moors or Jews).<sup>48</sup> Instead, it was a general characteristic of European *ius commune*, a characteristic which turned out to be a critical advantage when the colonizers had to deal with a complex and changing world, like that of Spanish and Portuguese expansion. Thirdly, legal inconsistency also had to do with something that has already been evoked – the constitutional pluralism of the empire, where

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<sup>42</sup> Although a trend could be identified to fix the colonial constitutional situation in the moment of the creation of the new dependent territory ("fragmentation moment", creating the so-called "immobilities of fragmentation", to echo L. Hartz [quoted by J. Elliott, 2006, XIV s.]), colonial constitutional situation evolved with the arrival of new waves of colonizers, with the changing of political imagery, with the concrete social and political conjuncture

<sup>43</sup> With further developments, Hespanha, 2006.

<sup>44</sup> S. Anzoategui, 1992.

<sup>45</sup> S. Hespanha, 1983.

<sup>46</sup> Hespanha, 1997, 92-98. The structure of colonial law in Brasil and their roots in the very nature of European common law is the subject of my articles "Porque é que existe e em que é que consiste um direito colonial brasileiro ?", "Porque é que existe e em que é que consiste um direito colonial brasileiro ?" (Hespanha, 2006).

<sup>47</sup> Hespanha, 1994, 472 ss.; Hespanha, 2006.

<sup>48</sup> This is the thesis of Lauren Benton, em "The Legal Regime of the South Atlantic World, 1400-1750: Jurisdictional Complexity as Institutional Order", *Journal of World History* 11.1 (2000) 27-56, strongly inspired in a classical interpretation of Spanish history (due to Américo Castro), transposed to Brasil by a famous Brazilian sociologist, Gilberto Freyre. Gilberto Freyre based on the idea of a Portuguese particular vocation to inter-racial conviviality built a whole (almost eschatological) theory on Portuguese Expansion, according to which the civilization built by the Portuguese in the Tropics (*O Luso e o Trópico*, Lisboa, 1961; Braz. Ed., Brasiliiana, 1971) announced a supreme way of human coexistence, as that of the last Empire of the biblical version of the history of mankind. Freyre's theories were strongly cheered by Portugal's dictator Oliveira Salazar when, in the 50s of the 20th century, the Decolonization Committee of UN began to attack the backward and stubborn Portuguese colonialist policy.

each submitted nation could enjoy the privilege of preserving its law, granted by treaty<sup>49</sup> or by the very doctrine of common law. This meant that Portuguese law was to be applied only to Portuguese nationals – i.e., Portuguese by blood (*Ord. fil.*, II, 55), while the natives were ruled by their specific law. Even when Portuguese judges had jurisdiction over native peoples, the standards of decision were native law, not Portuguese law, except for those cases where supreme (namely, religious) values were at stake<sup>50</sup>. The intervention of Portuguese judges or the subordination of their sentences to appeal to a higher royal court deformed, naturally, native standards of decision making<sup>51</sup>. Rather than a strict native version of law, what was enforced was “Creole justice”, in which native rules were severely, either implicitly or explicitly, subsumed to western values. One way or the other, whether native or Creole, an island of non official and autonomous law was created in the colonies<sup>52</sup>. Finally, legal inconsistency was also derived from the very nature of colonial higher officers – viceroys and governors.

## 2.1 A centrifugal administrative structure.

### 2.1.1 Viceroys and governors.

If centralization was not achieved through a general legal framework, it could nevertheless be achieved by instituting a clear hierarchy of commissioners through which royal orders would reach the periphery of the political system. Viceroys, governors, captains and royal judges could be channels for a centralization that, rather than systematic or based on general norms would be bureaucratic and “practical”. In order for this to happen, some pre-conditions should be met. On the one hand, it would require conditions which would enable the proper working of such a political machinery, and would ensure the efficiency of the hierarchical links between the several layers of the bureaucratic system; and, on the other hand, it would depend on the scope of political power royal servants would be entitled to use. Since the efficiency of the hierarchy depends (negatively) also upon the capacity of centrifugal powers for annulling, twisting or appropriating orders coming from above, an insight on the autonomy of the lower poles of the hierarchical chain will demonstrate why such a clear bureaucratic hierarchy was never established.

According to Ancien Regime’s legal doctrine, governors held an extra-ordinary power (*extraordinaria potestas*)<sup>53</sup>, similar to the one exercised by supreme military chiefs (*dux*). Like the king himself, they could derogate laws in order to better accomplish the strategic aims of their mission. In royal instructions<sup>54</sup> given to viceroys and governors, either in India or in Brazil, a clause

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<sup>49</sup> Exceptionally, treaties foresee the application of Portuguese law; it is the case of the treaty with the Congo’s Kingdom, according to which Portuguese law (except criminal law) was to be enforced: “Regimento da embaixada de Simão da Silva”, *Monumenta missionaria Africana*, I, 228-246; cf. Rego, 1959, 45-50.

<sup>50</sup> The institution of Portuguese judges to decide conflicts amidst natives was common. In Macao, the Procurator of Chinese Affairs decided conflicts amidst the Chinese population (Hespanha, 1995b, 42-45); in Goa, *Tanadores* or *Gãocares*, ruled traditional Hindu villages (*Gãocarias*, *tanadarias* or communities; Hespanha, 1995b, 39-41); in Brazil, the *Capitães das Aldeias* decided the legal affairs of Indian communities (“Regimento das aldeias e capitães das aldeias”, 30.10.1611: the captain was the judge for the causes of the gentiles, with express instructions to decide it by composition, although giving appeal to the “ouvidor da capitania” and from him to the “Provedor dos defuntos” at the *Relação*, Mendonça, 1972, I, 327 ). New rules, Reg. of André Vidal de Negreiros, 1655, ns. 42-56, Mendonça, 1972, II, 711-713); in Africa, Portuguese judges and officers participate in native courts, judging according to their standards (Silva, 2006); in Timor, Portuguese Dominican friars were counselors of traditional chieftains (*liurais*) in government and judicial matters (Castro, 1867; Rego, 1967, 125 ss.; Matos, 1974).

<sup>51</sup> Subrahmanyam, 1997, 34-35.

<sup>52</sup> There were several decisive practical limitations to a real enforcement of native law. First of all, Portuguese judges did not have a sufficient information about local law (in Goa, the *Foral of 1526* foresaw the assistance of native experts to interpret local usages, Hespanha, 1995b, 39). Secondly, judges tended to mitigate native law according to the imperatives of Christian mores, namely in matters such as family law or criminal law. Thirdly, the fact that there was a resort to Portuguese official courts (as it existed in the case of the *Juizes das Aldeias*, cf. Brazilian regiments quoted above), decisions obeying to local standards could hardly resist to the ethnocentric “translation” of the official learned superior court.

<sup>53</sup> Doctrinal approach on Portuguese viceroys and governors’ statute: Hespanha, 1995b, 25-27; decisive detailed analysis, Santos, 1998, 35 ss..

<sup>54</sup> On the regiments given to Indian viceroys, s. Santos, 1998, 37. The most important is the regiment of D. Francisco de Almeida, viceroy of Índia, 5.3.1505 (model to ulterior regiments), Pato, 1884, II, 269-334. Brazilian regiments: Royal chart of donation of the first Brazilian captaincy (Pernambuco) to Duarte Coelho, 25.9.1534, Mendonça, 1972, 1972, I, 131; Regiment of Tomé de Sousa, first Brazil’s general governor, 17.12.1548, Mendonça, 1972, I, 31; Reg. of Francisco

was usually inserted according to which they were authorized to disobey the instruction if “royal service” (“meu real serviço”) required it, or the specific conditions of those remote places which they were to rule did. The result was that, despite the highly detailed style of these instructions, which suggested a minimal degree of autonomy, in reality the instructions granted the governors a large space for an autonomous decision<sup>55</sup>.

This permission to create law – or, at least, to dispense with the established law – was a necessary consequence of the nature of the office of overseas governor. Overseas governors dealt mainly with ever changing matters, such as military or maritime enterprises<sup>56</sup>. Furthermore, they acted in a political environment that was not as stabilized as in Europe, where justice was rooted in fixed traditions, procedures and formulae. On the contrary, overseas governors acted in a strange and unmarked world, subverted by the very eruption of the European people. This was a world on the move, similar to the one described by Machiavelli, where justice was to be created by princely will, exploiting opportunity. Viceroy or governors were the personal delegates of the king, and thus were entrusted with princely powers, such as the power to dispense the law or to administrate royal grace<sup>57</sup>. The larger their isolation was from the source of power, the greater the range of their responsibility<sup>58</sup>.

The first viceroy of India (5.3.1505) Don Francisco de Almeida, for example, was allowed in his instructions to evaluate personally the situation and, after he listened to his council, decide according to his personal opinion (Pato, 1884, II, 332-333)<sup>59</sup>. In a letter to the king, Pero Borges, general justice of Brazil (*Ouvidor Geral do Brazil*)<sup>60</sup> in the mid 16<sup>th</sup> century (7.2.1550), wrote: “This land, Sir, to be maintained and to progress, needs that some norms of your *Ordinances* would not be enforced, because they have been enacted without consideration of its inhabitants [...] thousands of cases happen which are not ruled by the Ordinances and are to be decided at the discretion of the judge. If in such cases appeals [he means, to courts deciding according the formal law] are to be received, justice cannot be done [...]”<sup>61</sup>. Accordingly, Brazil’s governors received instructions stating that that cases unforeseen in the instructions should be decided by the governor, after conference with the Bishop, the chancellor of the Brazilian High Court (*Relação da Bahia*) and the commissioner for royal treasury (*Provedor da Fazenda Real*)<sup>62</sup>.

Besides justice, grace was also a specific royal attribute<sup>63</sup>. It allowed acting against the law (“dispensing the law”) in order to make a superior conception of Justice or

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Giraldes, 8.3.1588, Mendonça, 1972, I, 259; Reg. of Gaspar de Sousa, 6.10.1612, 6.10.1612, Mendonça, 1972, I, 413; Reg. of André Vidal de Negreiros de 1655; Reg. of Roque da Costa Barreto, 1677, with precious notes of Fernando José de Portugal e Castro, also him general governor by the end of the 18<sup>th</sup>, Mendonça, 1972, II, 753. Further information about governors’ regiments, Rego, 1967.

<sup>55</sup> However, on governors’ duties to consult and obey the overseas royal councils, cf. Reg. Conselho da Índia, de 25.7.1604, Mendonça, 1972, I, 349 ss; Reg. André Vidal de Negreiros, 1655, Mendonça, 1972, II, 709, n. 39; and D. Francisco José de Portugal’s notes on the subject, Mendonça, 1972, II, 839. On the *Conselho ultramarino*, overview and literature, Hespanha, 1994, 255 ss.; 1995, 242; Caetano, 1967.

<sup>56</sup> “E porque as cousas do mar são incertas e há casos que se não podem prevenir antecipadamente: hei por bem que Vós, com o Almirante da dita frota, auditor, e sargento-mor, e capitão de mar e guerra da capitania, disponhais, nos tais casos, o que se vencer por mais votos ...”, reg. of Salvador Corriea de Sá, 35.3.1644, Mendonça, 1972, II, 621.

<sup>57</sup> About this institutional model, Santos, 1998, 49 ss.

<sup>58</sup> “Quanto mais longe apartado esse Estado está de minha presença quanto mais carrego sobre vós a obrigação deste ponto [da justiça]”, Reg. of André Vidal de Negreiros, governador e captain general of the State of Grão Pará e Maranhão, 14.4.1655, Mendonça, 1972, II, 702 (d. 9).

<sup>59</sup> On viceroy’s juridical attributions, decisive, Santos, 1998, 53.

<sup>60</sup> Brazilian *Ouvidores*’ regiments, Mendonça, 1972, I, 83-87: Ouvidor Geral do Rio’s reg., de 11.3.1669.

<sup>61</sup> “Esta terra, Senhor, para se conservar e ir avante, há mister não se gauardarem em algumas coisas as Ordenações, que foram feitas não havendo respeito aos mmoradores delas [...] acontecem mil casos que não estão determinados pelas Ordenações, e ficam ao alvedrio do julgador”, e se nestes se houver de apelar, não se pode fazer jsutiça [...]”, Mendonça, 1972, I, 57.

<sup>62</sup> Cf. Reg. Francisco Giraldes de 1588, n. 48, Mendonça, 1972, I, 276; reg. Gaspar de Sousa, 6.10.1612, n. 57, Mendonça, 1972, I, p. 435 (id. Reg. André Vidal de Negreiros, 1655, Mendonça, 1972, II, 710, n. 40.).

<sup>63</sup> Hespanha, 1998; on viceroy’s use of grace, Santos, 1998, 55 ss..

Goodness prevail. Apparently, the creation of viceroalties aimed precisely to decorate overseas governors with a quasi-royal authority, allowing them to grant acts of royal grace, like favors (*mercês*), offices, rents, and pardons of crimes<sup>64</sup>. Thus, in Francisco Galdes' instructions (1588, n. 51, Mendonça, 1972, I, 277), the governor was entitled to grant loans up to the (global yearly ?) amount of one thousand *cruzados*, a very large sum, much higher than the annual salary of a *Desembargador*<sup>65</sup>; besides that, Gaspar de Sousa's instructions (6.10.1612) granted the governor the exercise of royal grace in a large array of situations<sup>66</sup>, renewed the authorization to give rents or economic privileges up to the amount mentioned above<sup>67</sup>; and gave him the right to grant offices, in ownership or in provisional exercise (*serventia*)<sup>68</sup>. While this was the situation in Brazil, in India, on the contrary, the crown issued restrictive legislation concerning the exercise of grace by the governors and viceroys, as a reaction against what it considered a pervasive wasteful policy<sup>69</sup>. In the aftermath of the Brazilian-Dutch war, governors received the right to promote soldiers to knights of the military orders; this prerogative remained seemingly unused till the end of the 18<sup>th</sup> century<sup>70</sup>.

Summing up, peripheral differentiation and autonomy was also promoted by the granting, even to viceroys or governors, of extensive powers of government.

### 2.1.2 Donatários, local governors and lower magistrates.

In Brazil, the above conclusions regarding a practical, but also a theoretical, autonomy, could also be applied to the lower levels of administration, namely to captains-feoffees (*capitães donatários*) and, later, captaincies' governors (*governadores das capitanias*). According to several royal determinations, from 1549 on, the general governor was the head of the State of Brazil and should have had supremacy over *donatários* and *governadores das capitanias*<sup>71</sup>. Those lower officials should obey his orders and give him account of their term in government<sup>72</sup>. This dependency, nonetheless, was rather obliterated by the fact that these lower officials were also required to obey the orders of Crown Ministers in Lisbon (namely, to the *Secretários de Estado* and to the *Conselho Ultramarino*). This double subjection created a space of hierarchical uncertainty – materialized in a frantic ping pong of appeals and jurisdictional conflicts -, upon which local governors could build an autonomous and effective power.

As a result, the hierarchy between the general governor (or viceroy) and local governors could be described, in the beginnings of the 19<sup>th</sup> century, as follows: "captaincies' governors were largely autonomous in what concerned the local ("economico") government of their provinces,

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<sup>64</sup> Santos, 1998, 50 ss..

<sup>65</sup> S., for comparisons with High Courts' salaries, 50 years later, Hespanha, 1994, 244, 253.

<sup>66</sup> Dispensation of legal procedures in civil and criminal cases, authorization of extraordinary contributions (*lintas*); cf. Mendonça, 1972, I, n. 42, p. 430; cf. also reg. given to the governor general of Grão Pará e Maranhão, André Vidal de Negreiros, Mendonça, 1972, II, 707 (n. 32).

<sup>67</sup> Cf., for the confirmation of this prerogative till the early 19<sup>th</sup> century, D. Fernando José de Portugal's notes to th1 reg. 1677, n. 52, Mendonça, 1972, II, 837: apparently, the then prevailing interpretation of this clause was that it allowed the governor to concede pecuniary grants till the yearly amount of 400 000n rs . By opposite, the prescription of sending to Lisbon a list of the *mercês* wasn't in practice.

<sup>68</sup> Although they could not create new offices or raising their fixed salaries (Gaspar de Sousa's regiment, 6.10.1612, ns. 43/44, p. 431).

<sup>69</sup> Patrimonial graces granted by India's governors cannot be executed without royal confirmation: A. 29.3.1618; A. 28.3.1619. In general, on Indian viceroys' patrimonial graces, Santos, 1998, 57.

<sup>70</sup> Cf. Reg. Roque da Costa Barreto, 1677, Mendonça, 1972, II, 772 (with D. Fernando José de Portugal's notes, early 19<sup>th</sup> century).

<sup>71</sup> With the progressive vacancy of captaincies by lack of descent, captains-feoffees were replaced by captaincies' governors. In the late 18<sup>th</sup> century, they were the only second rang royal magistrates in Brazil. Cf., Mendonça, 1972, II, 775-777.

<sup>72</sup> Cf. resolution 16.5.1716, *provisão (royal writ)*. 26.10.1722, CR. (*royal chart*) 14.11.1724.

being subjected to the general governor only in matters relating the general policy and defense of the whole State of Brazil”<sup>73</sup>.

Perhaps the most important attribution of *donatários*, later of local governors, was the ability to grant *sesmarias* - i.e., the concession of vacant land to be cultivated – surely the most traditional, continuous and decisive legal formula of land concession in Brazil (cf., v.g., *regimento* given to Tomé de Sousa, 1549, chaps. 8/10)<sup>74</sup>. Whatever the original title might have been, the Portuguese kings considered themselves as lords of all Brazilian lands that were not occupied by colons or by natives. And they entitled crown feoffees (*donatários*) with the power of granting those lands to (lay<sup>75</sup>) people who wanted to cultivate them<sup>76</sup>. According to the first instructions given to a general governor (Tomé de Sousa, 1549, chaps. 8/10), vacant land was to be given *arbitrarily*, exempt of taxes (with the exception of the dime to God); although, further legislation reduced the arbitrariness of these concessions, by<sup>77</sup> limiting the amount of land granted<sup>78</sup>, enforcing the protection of native lands<sup>79</sup> and establishing the payment of a rent<sup>80</sup>, liberty still reigned. Furthermore, notwithstanding the fact that, according both to legal doctrine and statute law<sup>81</sup>, *sesmarias* were not “crown’s rights (or property)” (*bens da coroa*), their concession had to be confirmed by the king, as an act of royal grace<sup>82</sup>; feoffees’ learned judges (*ouvidores*) were supposed to inspect both the legality of the concession and the proper use of the estate (*ibid.*). With the continued re-incorporation of captaincies under the crown’s direct administration, either by vacancy or purchase, the granting of *sesmarias* reverted to captaincies’ governors, while their inspection was entrusted to local jurist judges (*juizes demarcantes letrados*) who were proposed (in practice, appointed) by municipal councils<sup>83</sup>. As this narrative makes clear, the most decisive act in a plantation colony – the concession of agricultural land - depended upon local decisions made by the captaincies’ governors, while the legal follow up (the use of the land according to the legal aims and regime) fell under the jurisdiction of gradually more locally driven magistrates<sup>84</sup>. All in all, contemporary evidence allows us to imagine a great deal of local autonomy by the local authorities and a scarce possibility of central control on acts which theoretically depended on “royal” liberality. Concession of land, as well as licenses to delimit, reduce, exchange or even sell trusted property, became one of the multiple classes of favors local authorities and officials dispose of in order to acquire allies in the huge market of personal “services,” which characterized Ancien Regime’s societies.

No matter how important *sesmarias* granting may have been, the governors’ judicial prerogatives, exercised by their jurist- judges (*ouvidores*), were also crucial. In the first donations, captain feoffees enjoyed a full criminal jurisdiction on slaves, natives (gentiles) and ordinary people

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<sup>73</sup> Cf. Mendonça, 1972, II, 805-807. For a similar division of attributions between colonial assemblies and British central government in the British North American colonies, cf., Green, 1994, chapters II and III.

<sup>74</sup> Legal basis: *Ord. fil.*, IV,43,13; on doctrinal framework, Cabedo, 1601.

<sup>75</sup> Authorizing expressly *sesmarias*’ donation to ecclesiastical entities, CR (*royal chart*). 7.8.1727, quoted in Mendonça, 1972, II, p. 782.

<sup>76</sup> Juridical background: *Ord. fil.*, IV,43,13; doctrinal framework, Cabedo, 1601, II, dec. 112; further legislation (besides that quoted expressly): CRs. 16.3.1682; 20.1.1699, 27.11.1711, 28.3.1743. Alv. 3.5.1770, on *sesmarias*’ regime in Bahia. Global re-regulation in the end of the 18<sup>th</sup> century, alv. 5.10.1795, whose enforcement was suspended one year later (10.12.1796), Mendonça, 1972, II, p. 785; a new general system is instituted by the CL 22.6.1808 (concession by governors, chart by the [then Brazilian] *Desembargo do Paço*). Cf. also, for procedural details, Alv. 25.1.1809.

<sup>77</sup> Namely CR 27.12.1695 (quoted in Mendonça, 1972, II, 780 ss.).

<sup>78</sup> CR 27-12-1695: one only concession to each beneficiary with the maximal area of 4 x 1 leagues; CR 7.12.1697: 3 x 1 leagues (or 1,5 leagues in square); CRs 15.6.1729, 15.3.1531: smaller areas in the roads to Minas Gerais and in mining lands.

<sup>79</sup> Emphatically, against the abuses of conceding native lands in *sesmaria*, CR. 17.1.1691, Pr. 28.2.1716, quoted in Mendonça, 1972, II, 783.

<sup>80</sup> In the late 17th century the payment of a rent was aired; however, without a practical success, cf. more detailed information, in Mendonça, 1972, II, 783/4).

<sup>81</sup> Cf. Prov. 5.12.1653; on doctrinal qualification, Freire, 1789, I,7, §§ 3-4; Hespanha, 1994, p. 414..

<sup>82</sup> Cf. CR 23.11.1698.

<sup>83</sup> Cf. Res. 27.11.1761 (quoted in Mendonça, 1972, II, 780 ss.).

<sup>84</sup> For mining concession, s. Mendonça, 1972, I, 295.

(*peões*), as well as a very comprehensive civil jurisdiction (up to the amount of 100 000 rs.)<sup>85 86</sup>. In the lower levels of the judicial system, additional factors of inconsistency were added such as deformations introduced by ill-educated and biased personnel. According to a source dated in the mid-16<sup>th</sup> century, in Brazil captains used to nominate as *ouvidores* “simple and ignorant people, who cannot read or write”<sup>87</sup>, who were easily bribed or blackmailed by the powerful elites. Very often – it is said in the contemporary sources – captains appointed criminals deported to Brazil (“*degredados*”, “*desorelhados*”) as their judges (*ouvidores*), as a way to hold the justices under a strict control<sup>88</sup>. Sixty years later, the situation was seemingly the same<sup>89 90</sup>. This state of affairs was not uncommon, even in Europe, where local justices were often illiterate and unable to use the official written and educated legal system<sup>91</sup>. However, in the overseas domains, the effect this situation had on the peripherization of power was yet reinforced by the loose control on the colonial High Courts.

### 2.1.3 High courts and high judges.

High courts were also among the powers that expropriated central power. Designed to administer justice on the behalf of the king, colonial high courts (*Relações*) – namely, those of Goa, Bahia and Rio de Janeiro – had prerogatives similar to those enjoyed by metropolitan supreme courts (*Relações: Casa da Suplicação, Casa do Cível*). Legal theory conceived them as sovereign courts, collateral to the king, who was their natural president<sup>92</sup>. Their decisions had the same status as royal decisions and could not be seized, limited or cancelled even by a royal writ<sup>93</sup>. This meant that the administration of justice, either by the *ouvidores* or by the *Relações*, was a quite autonomous and self regulated arena, not only because the colonial governor – or even the king - could not control the contents of judicial decisions, but also because the crown’s disciplinary power on the judges was weak and provisional; actually, any definitive judgment against them was an exclusive attribution of metropolitan high courts<sup>94</sup>. Thus, this was a full self-referential model.

To stress the autonomy of colonial High Courts is much more than another detail. Since Stuart Schwartz’ research on the *Relação da Bahia*<sup>95</sup>, we are familiar with the strong solidarity ties linking high court judges to colonial elites. Higher judges were more than technicians devoted to the empire of law. Probably, they conveyed vested interests of the leading groups of colonial society. If we consider the range of their interventions – from the declaration of just war to the settlement of strategic legal issues like royal charts of donation, revocation of *sesmarias*,

<sup>85</sup> Cf. royal chart of donation to Duarte Coelho, 25.9.1534, Mendonça, 1972, I, 131 ss. (jurisdictions, 132); later on, reg. *ouvidores gerais*, 11.3.1669, Mendonça, 1972, I, 83.

<sup>86</sup> For an outline of the evolution, Mendonça, 1972, 776; namely, alv. 5.3.1557 (granting criminal appeal to royal courts in free men’s capital punishment cases). The creation of a general governor, in 1549, entailed some restrictions to judicial prerogatives of captains’ *ouvidores*, namely the loss of a full criminal jurisdiction over free men.

<sup>87</sup> Letter of Pero Borges, “ouvidor geral do Brasil”, to the king (7.2.1550), ns. 3-4, 7, 12, Mendonça, 1972, I, 53 ss..

<sup>88</sup> Carta de Pero Borges, “ouvidor geral do Brasil”, para o rei (7.2.1550), ns. 3-4, 7, 12, (Mendonça, 1972, v. I, pp. 53 ss, ns 3-4, 7, 12)

<sup>89</sup> “Sou informado que por a povoação do Rio Grande ir em crescimento e não haver nela modo de governo, nem quem administrasse a justiça, e haver disso algumas queixas, e os Capitães estarem absolutos”, Reg. Gaspar de Sousa, 1612, Mendonça, 1972, I, n. 10, p. 416.

<sup>90</sup> More examples, quoted from contemporary sources, in Hespanha, 2006.

<sup>91</sup> Picturesque examples of the kind of *khadi’s* justice common in the periphery: Altavila, 1925. For the European situation, Hespanha 1983, 2006b.

<sup>92</sup> In India and Brazil, the Governor, as king’s *later ego*, served as President of the *Relação* (Reg. *Relação da Baía*, 7.3.1609: Mendonça, 1972, I, 385 ss.).

<sup>93</sup> Cf. Hespanha,

<sup>94</sup> Cf. reg. Gaspar de Sousa, 6.10.1612, n. 46, Mendonça, 1972, I, p. 431 (governors could take notice of misdeeds of judges, lead an enquiry on it, sending the results to metropolitan courts in order to judged there). Governors’ powers concerning lower justice officers were larger (Gaspar de Sousa, 6.10.1612, Mendonça, 1972, I, p. 432). On governor’s powers to inspect *desembargadores* and other royal judges, s. Francisco José de Portugal’s notes to governor’s regiments, Mendonça, 1972, II, 816.

<sup>95</sup> Schwartz, 1973; Wehling, 2004; Subtil (2005). Subtil – nowadays the most informed expert on Luso-Brazilian judiciary prosopography - proves that, in the case of the *desembargadores*, the “career’s logic” prevailed over a strategy of settling in the colony, dominant among the lower crown magistrates (s. Subtil, 2003).

succession and disentanglement of *morgados* -, we can understand the central role high judges played in the colonial political arena, as well as their importance in the implementation of centrifugal strategies contradicting royal intentions.

The regime established for controlling governors' and viceroys' powers stressed yet again the importance of the colonial high judiciary. A royal writ of the early 17<sup>th</sup> century (A. 9.4.1623) entitled the colonial high judiciary, namely in India, to inspect (called *residência*) the activities of governors at the end of their term in office. Another point which became central to the autonomy of the courts was the power given to Rio's High Court (*Relação*) in the 18<sup>th</sup> century to evaluate the way viceroys fulfilled their duties after their term if office had ended. This meant that judges would have the last word on the exercise of the paramount colonial authority. Viceroys understood the risk implied in their subjection to the court, and fought against it without achieving a decisive victory<sup>96</sup>. At the lower levels, the Brazilian *Relações* exercised already power of control over civil (*ouvidores*) and military (*capitães*) officers nominated by *donatários*<sup>97</sup>, besides the general judicial control over every act of government, according to a general principle of European Continental common law (*ius commune*) subduing every "administrative act" (even royal) to a common judicial supervision. In 1711, a *provisão* (writ) on a lateral subject – control of foreign navigation along the Brazilian coast – openly upheld the submission of the colony's governors to the *Relação*'s inspection. The Viceroy Marquês de Angeja reacted briskly, arguing that such a measure would subordinate the governors to the *Relação*, putting under severe risk both his authority and the "superior interests" of the crown. Notwithstanding this opposition, a new provision was enacted (1.2.1717) which confirmed the submission of the governors and viceroys to the general rule of giving account of their term in office before the *Relação*. This provision enshrined the dependence of the executive branch of government on judiciary more tightly linked to local interests<sup>98</sup>.

The autonomy of justice had, however, a more formidable weight in the balance of power. Ancien Regime's judiciary apparatus was a Kafkian machinery, in face of which every wise citizen would reasonably shiver. From the lower *meirinho* (marshal) or *escrivão* (clerk) to the lofty *desembargador*, every justice officer was like an oracle, whose unforeseeable decision could affect one's honor, liberty or property. The helpless dependence of an ordinary citizen before this machinery is described by Manuel António de Almeida - on the very first page of his classical novel *Memórias de um sargento de milícias* (1852-1855) - in a so vivid light that any translation risks to obliterate: "Today's marshals aren't but the grimacing shadow of the marshals of the old time of the kings. Those were feared and fearful people, respectful and respected. They formed one extreme of the formidable judiciary chain which tied all the city of Rio de Janeiro, in those times where the lawsuit was one element of our life: the opposed extreme was the desembargadores. But the extreme ends were linked; and, when they touched one another, the circle was closed, inside which infuriated fights of sub poenae, challenges of evidence, principal and final allegations, and all those judicial gestures, would take place, under the ordinary name of judicial process [...]"<sup>99</sup>.

#### 2.1.4 Officers and servants.

Brazilian administration – Brazil being the most typical example, within the Portuguese Empire, of a plantation colony, with an important and structured resident population – experienced

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<sup>96</sup> An outline of the discussion, in Mendonça, 1972, II, 826; also, Macedo, 1976.

<sup>97</sup> Cf. Gaspar de Sousa's reg, 6.10.1612, Mendonça, 1972, I, n. 41, p. 429.

<sup>98</sup> Mendonça, 1972, vol. II, p. 826.

<sup>99</sup> "Os meirinhos de hoje não são mais do que a sombra caricata dos meirinhos do tempo do rei; esses eram gente temível e temida, respeitável e respeitada; formavam um dos extremos da formidável cadeia judiciária que envolvia todo o Rio de Janeiro no tempo em que a demanda era entre nós um elemento da vida: o extremo oposto eram os desembargadores. Ora os extremos se tocam, e estes, tocando-se, fechavam o círculo dentro do qual se passavam os terríveis combates das citações, provarás, razões principais e finais, e todos esses trejeitos judiciais a que se chama o processo... Era terrível quando, ao voltar de uma esquina ou ao sair de manhã de sua casa, o cidadão esbarrava com uma daquelas solenes figuras que, desdobrando junto dele uma folha de papel, começava a lê-la em tom confidencial! Por mais que se fizesse não havia remédio em tais circunstâncias senão deixar escapar dos lábios o terrível – Dou-me por citado. Ninguém sabe que significação fatalíssima e cruel tinham estas poucas palavras! Eram uma sentença de peregrinação eterna que se pronunciava contra si mesmo; queriam dizer que se começava uma longa e afadigosa viagem, cujo termo bem distante era a caixa da Relação, e durante a qual se tinha que pagar importe de passagem em um sem número de pontes: o advogado, o procurador, o inquiridor, o escrivão, o juiz, inexoráveis Carontes, estavam à porta de mão estendida, e ninguém passava sem que lhes tivesse deixado, não um óbolo, porém todo o conteúdo de suas albigueiras, e até à última parcela da sua paciência".

another singular form of combining local social interests and administrative power – the venality of offices.

The Portuguese monarchy never admitted the principle – common in other European monarchies, namely France and Spain - that public offices could be the object of sale. Private sale of offices was formally forbidden by law (*Ord. fil.*, I, 96 [sale by holders]; II, 46 [sale by those who had the power to appoint the officers]); although the frequent practice of renunciation of offices “in the hands of the king” probably covered private contracts of sale. The sale of offices by the crown was also excluded by singular statutes (cf. CL 6.9.1616) and considered uncommon by the doctrine<sup>100</sup>. Patrimonialization of charges existed, but under the form of rights of succession of the sons of office holders. The recognition of such rights was probably the strongest obstacle to the sale of offices, as the crown could not violate this chain of succession, and sell the offices to other people<sup>101</sup>.

During the 1720s and the 1730s, the selling of offices in India (captaincies, “captaincies of voyages [to China or Japan]”) became more common than it ever was in Portugal. The practice, however, was strongly criticized by the political literature, which [probably unfairly] charged the Habsburgs of having introduced this abuse in Portugal<sup>102</sup>. The situation in Brazil evolved differently. The first instructions<sup>103</sup> forbade the creation of new offices by governors, according to the rule that new offices could only be created by the king (cf. *Ord. fil.*, II, 26, 1; II, 45, 1,3,13, 15, 31). For the offices already in existence, yet vacant, governors could nominate provisional holders (*serventuários*), but not give them the office in property. At stake were not only the royal exclusive right to grant offices, but also the virtual rights of the heirs of the deceased officer<sup>104</sup>. In the early 18<sup>th</sup> century, a royal writ<sup>105</sup> established that new offices (already created or to be created)<sup>106</sup> should be given in property to those who promised a donation (“donativo”); while those offices given provisionally (*serventias*) should pay the royal treasury (*Real Fazenda*) one third of their annual income (*terça*)<sup>107</sup>. Later on (*Prov.* 23.12.1740) the *donativo*'s regime was extended to every office (except revenue collectors). From this moment onward, vacant offices were sold by auction to those who offered the largest sum<sup>108</sup>. Theoretically this didn't entail a real sale, because the amount paid was a mere donation, corresponding to a duty of gratitude, ruled by the so-called “direito antidoral and consuetudinario”<sup>109</sup>. Yet, from 1761 to 1767, a member of the *Conselho Ultramarino* sold by auction the either “property” or the triennial *serventias* of all the vacant Bahia's

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<sup>100</sup> Doctrine confirming the unusual character of the sale of offices by their holders, Portugal, 1673, l. 2, c. 14, n. 6; Cabedo, 1601, II, d. 24, n. 4; cf. Hespanha, 1994, 513; diverging, however without a sufficient empirical grounds, Olival, 2000, 245 ss..

<sup>101</sup> However, other ideological obstacles existed, such as the parallel with simony and the idea that offices, like benefices, should be bestowed to meritorious people (s. Hespanha, 1994, 498 ss..)

<sup>102</sup> “Faziam pratica neste reino coisa nunca vista entre portugueses: venderem-se a quem mais dava os officios que antigamente se davam de graça [it was practiced in this realm things that were never seen before among the Portuguese: to sell to those who pay more offices that previously were given for nothing]” *Arte de furta*, cap. XVII).

<sup>103</sup> Cf., v.g., reg. Francisco Geraldês, 30.5.1588, n.45, Mendonça, 1972, I, 275; reg. Gaspar de Sousa, 6.10.1612, n. 44, Mendonça, 1972, I, 431; reg. Roque da Costa Barreto, 23.1.1677, Mendonça, 1972, II, 753. By opposite, the first “capitães donatários” had the right to create and fill offices: Duarte Coelho's chart of donation, 25.9.1534, Mendonça, 1972, I, 133.

<sup>104</sup> Cf. *ibid.*, n. 43, p. 430.

<sup>105</sup> D. 18.5.1722, transmitted by *Provisão* 23.9.1723 (Mendonça, 1972, III, 754; source, Arq. Secret. do Governo da Bahia, L. 20, fls. 15)

<sup>106</sup> Excluding offices entitling the collection of revenues.

<sup>107</sup> The *terça* was the normal rent paid by substitute servants (*serventuários*) to the owners of the office, within the system of offices' rental established by the mid-17<sup>th</sup> century (cf. CL, July 1648; Hespanha, 1994, 515).

<sup>108</sup> The basis for calculate the proper *donativo* was the amount paid by the previous holder or the estimated value of the *serventia* (*Prov.* 2.4.1756). If the offices were insignificant that nobody would pay for them, the governor could fill them for nothing (av. 10.3.1740 (source: Arq. Secr. Gov. Est. Brasil., Ordens régias, mç. 1740)

<sup>109</sup> This qualification of the law supporting the sale of offices is meaningful. By “antidoral” is meant the duties which are based on the gratitude and not on a synalagmatic (or mercenary) relation (cf. Clavero, 1991). The label “consuetudinary” is used, in the mid-18<sup>th</sup> century, namely to qualify legal usages concerning the transmission of offices which did not fit in the modern concept of office as a public duty (thus, incompatible with patrimonialization). Therefore, “consuetudinary” were – according to Pombal's statutes concerning offices' regime (CL, 23.11.1770, Alv. 20.5.1774; on thee new conception of office, cf. Freire, 1789, I, 2, 20) – the son's rights to father's offices.

offices of justice. New office holders could rent them to *serventuários*<sup>110</sup>. After 1767, the sale was limited to the *serventias*, with the *serventuário* paying the general tax on offices (*meias anatas*<sup>111</sup>), the third of the estimated revenue (*terça*)<sup>112</sup> and a pre-fixed *donativo*. Thereafter, the sale by auction was replaced by a sale with a fixed price. Meanwhile *serventia* of offices of justice continued to be sold by auction. According to a commentary to the instructions to Brazil's governors, written by a viceroy of the early 19th century<sup>113</sup>, the Brazilian practice was similar to what was "used in almost all the overseas colonies". Although auctioning offices raised (only in what concerned the *donativo*, not the *terço*, which was fixed by estimation) the revenue obtained by the crown, the author of the commentary expressed a deeply negative opinion about such auctions: "Answering to this order, I exposed the inconvenient of such auctions. The experience manifests that the *serventias* are often sold to rival groups, which because of their mutual odium offer more advantageous donations, with the harm to public interest and the displacement of subjects with more merits, who cannot offer a higher sum"<sup>114</sup>. In Rio de Janeiro, the auction system was also enforced, with minor differences<sup>115</sup>, for the *serventias* of offices of justice (CR 24.10.1761). The only offices excluded (and, thus, appointed directly by the viceroy, as *Relação's* governor), were those of the *Relação*.

Summing up, one could say that from the early 18<sup>th</sup> century onward, the property or, more continuously, the *serventias*, of almost all the offices of justice (notaries, registrars and other justice's clerks) were at the disposal of local wealthy Brazilians. The importance of this fact cannot be underestimated. Not only because of the importance of offices revenues<sup>116</sup>, but mostly because of the centrality of these offices in the so-called *civiltà della carta bollata* (civilization of "sealed paper", *papel selado*). This was a world in which written documents were central to ascertain decisive matters, from personal status to patrimonial rights and duties. Royal charts of donation (v.g., of captaincies) or of *foral*, concessions of *sesmarias*, constitution of *morgados* (majorat, entailed property), *tombos* or sales of estates, applications for royal graces (like the authorization to disentail estates included in a *morgado*), are examples of documents written by a notary and kept under his care. Notaries' or judicial clerks' archives were central deposits of social and legal memory. Everything that mattered had to have a trace in them. Documents' preservation, occultation or manipulation were politically decisive. In such a context one can only imagine the social struggles to control notarial or judicial archives. This is why the appropriation of such offices by the Brazilian elites – or their direct clients – was rather more than a bureaucratic minor episode.

If the information that the auction system prevailed in the overseas empire is correct, the same considerations can be made regarding Africa, India or Macao. Nevertheless, in none of these colonies (even considering Goa and Macao, also with a European or Creole rooted society) the vested interests would have been as important as in Brazil, as a factor of "localization" or expropriation of colonial power.

### 2.1.5 Municipal councils.

Municipal councils also resisted to the center's will of power and their conflicts with governors were pervasive<sup>117</sup>. In a way, they played a role similar to that of the colonial assemblies

<sup>110</sup> Mendonça, 1972, II, 735; source CR. 20.4.1758, in Arq. Secret. Govern. Bahia, L. 61 – 7.

<sup>111</sup> On this tax., s. Hespanha, 1994, 48.

<sup>112</sup> According to a statute of 1666, *serventuários* had to pay to offices' holders one third of their revenue. The Brazilian regime is an extension of this rule: here, the third of the vacant offices given in *serventia* was to be paid to the crown, as there wasn't an owner of the office. Cf. , Hespanha, 1994, 515.

<sup>113</sup> D. Francisco José de Portugal, who annotated the regimento given to Roque da Costa Barreto (1677): Mendonça, 1972, II, 756.

<sup>114</sup> Furthermore – it is also said – this change triennial virtual change os civil servants created a chaos in the archives, due to the transfer of the papers and books from one house to the other (*ibid.*, p. 757).

<sup>115</sup> The *donativo* was no distinguished from the *terça*, the candidate offering a global sum (*ibid.*, p. 757).

<sup>116</sup> On the importance of notaries and registers' revenue, cf. Hespanha, 1994, 170 ss.

<sup>117</sup> Cf., with a bibliographical survey, Boxer, 1965; cf., also, Alden, 1968; Bellotto, 1979, 321 ss.; Bethencourt, 1998, II, 343-361; III, 270-280; Bicalho, [2000]; Souza, 2001.

of the British colonial plantations. The most impressive example of the way municipal government developed autonomous political strategies within the Portuguese Empire was probably that of the city of Santo Nome de Deus de Macao, in the Guangdong province, southern coastal China. The municipality of Macao was erected around 1554, as a Portuguese institution. However, the Chinese Emperor Wan Li (1583-1620) gave the title of mandarin to one of the municipal magistrates, the *Procurador da Cidade*, entitling him to judge the Chinese population, situation that lasted till 1736. Acting as an interface between the Portuguese and the Chinese imperial powers and dominated by local Creole elites, the Macanese municipality (*Leal Senado*, Loyal Senate, a imposing title) easily won a wide scope of independence. The decisive diplomatic relations with the regional Chinese authority (the *suntó*, or viceroy of Canton [Guangdong province]) passed through the mediation of the *Leal Senado*. In its relations with the Portuguese authorities – namely, the viceroy of India – Macao enjoyed an almost full autonomy, which allowed the city to maintain a flourishing trade with Spanish Manila even during the Luso-Spanish war (1640-1688)<sup>118</sup>. The main effort of Portuguese policy in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries was precisely to reduce Macao's *Senado* to the rang of a plain municipality<sup>119</sup>.

In Brazil, none of the councils had a similar diplomatic mission. However, the role played by municipal councils (*Câmaras*) was almost the same, either because they almost absolutely ruled local affairs or because they successfully counteracted against centralistic policies dictated by the crown or its local delegates<sup>120</sup>. The *Câmara* (as well as the *Misericórdia*<sup>121</sup>) became a very efficient device for organizing politically the elites. In a recent book<sup>122</sup>, the Brazilian historian João Fragoso describes the way local elites used the *Câmaras* to legitimize their political leadership, to defend their interests and to establish, widen and strength their social networks. The local gentry (*nobreza da terra, gente da governança*) was deemed to represent the pristine *conquistadores* of the land and, therefore, to act as the natural leaders of the republic. This leadership entitled the gentry to appropriate and share with their relatives, friends and clients the benefits tied to the exercise of municipal power – granting offices, renting taxes and common services, ruling local life through municipal statutes, deciding on internal and external commerce, arbitrating conflicts, and representing the republic *vis à vis* the central power. Internally, to govern a municipality meant a large array of extended possibilities for recruiting clients to form their *casas* (households) or *bandos* (factions) and, at the same time, of disturbing and eventually subduing, opponents' cohorts. Externally, the gentry of the *câmaras* ruled on very meaningful matters such as the access to the status of neighbor or natural (*vizinho*) – a kind of “local citizenship”, which enabled to exercise rights and to claim graces and advantages – or the definition of the terms of all political negotiations with royal power or royal servants.

Although these particularistic claims could produce irritation and even political impotence; they did not create a momentous risk of political dissolution. The corporatist model of authority could counter-balance this practical political paralysis by solemnly and indisputably asserting the symbolic supremacy of the royalty. Justice and grace went on as a royal prerogative, even if the practical results of their implementation by “localized” royal judges and royal officials turned out to be one more hindrance to the implementation of royal policies or the victory of royal interests. Paradoxically, this uncomfortable mediation of royal power by less than domestic servants reinforced the king, who took advantage of the old medieval maxim according to which “bad ministers make good a bad king”<sup>123</sup>.

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<sup>118</sup> Hespanha, 1995, 22, 76 s.. Emphatically, considering Macao, as a “merchant republic”, Lessa, 1976.

<sup>119</sup> Hespanha, 1995, 54-56. On overseas *câmaras*, in general, Boxer, 1965. On the *Câmara* of Goa and its privileges, reinforced in the late 18th century, Lopes, 1993, 50-51.

<sup>120</sup> Basic bibliography on Municipal Councils in the Portuguese Empire: Boxer, 1965; Id., 1969, pp. 273-295; Id, 1990; Russel-Wood, 1998; Id., 1999; Id. 2000; Bethencourt (1998-1999) (chapters on “*Câmaras e Misericórdias*”, vols. I, II, III); some examples of worthy recent Brazilian monographic on the role of *Câmaras* in colony's political life literature by Junia Furtado Ferreira, Maria Fernanda Bicalho, João Fragoso, Fátima Gouvêa.

<sup>121</sup> Charitable institutions spread, after the 15th century, in the most of the municipalities in Portuguese world. Basic literature: Russel-Wood (1981); Bethencourt (1998-1999) (chapters on “*Câmaras e Misericórdias*”, vols. I, II, III); Sá, 1997a; Id., 1997b..

<sup>122</sup> *Conquistadores e negociantes: histórias de elites no Antigo Regime nos trópicos. América Lusa, séculos XVI a XVIII*, 2007.

<sup>123</sup> Cf. Herzog, 2000.

### 3. Conclusions.

In the previous sections, I reviewed sources and secondary literature which confirm that the new historiographical vision of Ancien Regime's politics fits the historical data concerning the Portuguese Empire, mostly in its paramount "plantation colony" – Brazil. Nothing I found in the documentation or in other historical sources was new; neither did I substantially challenge the interpretation already presented by the most sound and solid Brazilian historiography. Why, then, such an estrangement in face of the almost mere systematization of scattered traces?

In my opinion, the problem consists of the logical derivations of the assumption that the corporatist model may fit the colonial context. Such derivations may shake older representations of the colonial relation and upset images that, at the same time, described and reassured, fulfilling both cognitive and politico-emotional functions. The next few paragraphs will deal with these logical consequences.

#### 3.1 Legacy and innovation in the tropics. Was there a structural divide between the metropolitan and the colonial society ?

In the opening chapter of his new book on the British and Spanish Empires, John H. Elliott argued that, arriving in the New World, most of the colonizers – with the possible exception of some groups of political or religious dissenters, as was the case in North America, but not in Brazil – had a well established idea of what society and rule were. Their project was not to build a Utopia, but merely to find an opportunity of growing happier, richer and more powerful in the way and according to the models they already knew of happiness, of wealthy-ness and of social distinction. Many others came to the New World simply hoping to survive, thus escaping from starvation or dreaming of an adventure. These people did not want to break their ties with the metropolis, where their families still lived, as well as their friends or commercial partners. Many of them hoped to return to Europe, from where both brides and commodities were incessantly imported, where the king sat, the High Courts assisted, and where political help was expected, claimed or found, in moments of distress.

For the colonizers (not, naturally, for the colonized), metropolis and colonies formed a *quasi continuum* of common traditions (also political traditions and representations), of language, of human relationships, and of mercantile links. It is, thus, very difficult to find a colonial (say, a Brazilian<sup>124</sup>) institution or social constellation whose matrix cannot be located in the European legal or institutional tradition. With slight unbalances: the *morgado* did not flourish in the colony; the *sesmarias* had in the colonies a second revival, long after their oblivion in the metropolis; the donation of crown lands, giving origin to lordships and nobility, did not take place in Brazil, in part because of the established concept of "terrae regiae coronae"<sup>125</sup>. In a word, (human) nurture clearly superseded (environmental) nature. This is why the history of colonists' societies – in their deepest cultural layers, like that of family, of politics, of social representations, of religion – would be, for a long time, a variant of European history. These societies, besides being the holders of a deep rooted culture – although also, a *traveling one* (James Clifford), open to change and to exchange –, were not holistic entities, kept apart from the metropolis. Social bonds had very different ranges: some of them developed inside a *casa*, a *bando*, a town; others, occasionally or in a sustained way, across the Atlantic, as expressed by demonstrating charity towards European relatives, visiting or saluting friends, expressing loyalty to childhood lovers, promising fidelity and "service" to benefactors, honoring the saints patrons of the pristine family borough, and sending

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<sup>124</sup> Insisting on the example of Brasil, I'm not suggesting that in other colonies where settlement and plantation were not a so visible pursuit old political and social formulae didn't work as well. The government and hierarchies of *Reconquista's* fortified boroughs were the matrix for North African, African and Asian fortresses. Flemish and Baltic factories framed the administration of African and Asian commercial settlements.

<sup>125</sup> "Lands of the royal crown" were lands formally inscribed in special books kept on the royal archive. In the sixteenth century it was generally considered that the incorporation was stabilized, new incorporations being impossible. So that the donation of other lands should obey to different models (for example, the model of *sesmaria*, concession whose aim was not the military defense [*ad defendendum ac populandum*], but the agriculture [*ad escolendum*]). Furthermore, the donation of inhabited boroughs (*concelhos, vilas*) would offend the expectancies of the dwellers, whose "liberty" consisted in a direct and sole dependence from the king.

gifts to embellish their tiny chapel. If private archives would have been conserved along with public archives, and were retrieved, these entangled relationships would materialize in thousands of letters, contracts, wills, and petitions<sup>126</sup>.

Colonial societies, of course, were not static<sup>127</sup>. New skills were acquired, new needs arose from the new environment, and new suggestions arrived, also from the Old World. I believe that many colonists would have liked to build Brazil as “another Portugal”; not a few put it clearly in their writings<sup>128</sup>. Most of these supporters of the Luso-Brazilian cloning were quite aware that the meso-conditions and the distance would differentiate and put apart the tropical societies. However, for them, this differentiation was not a project or a searched aim, but rather something that was inscribed in the very nature of things and, therefore, had to be taken as a burden or as a price. They did not consider these differences disruptive. Far from being hostile to such renewal and differentiation, Ancien Regime’s political matrix favored diversity and asymmetry<sup>129</sup>, within a pragmatic (not programmatic, as Enlightenment would be<sup>130</sup>) approach to societies and polities.

The ancient mode of relationship between unity and diversity is also a *Leitfaden* to historians. The fact that they find differences between historical situations and contexts is the outcome of one of their crucial *regulae artis*. This art forces them to contextualize over and over and be faithful to every fact and to every local reverberation of these facts. But, on evaluating all these infinitely plural evidences, historians must not forget that – in what concerns the political world of the Ancien Regime - plurality and difference were a systemic characteristic, generated by the openness of law to local norms, as the corporative legal doctrine fully explains. Therefore, the appeal to a genealogical category like Ancien Regime does not mean the adoption of a rigid model of social and political organization. On the opposite. It invokes a logic of representing and organizing society, which was loose and open by its very axioms. Nevertheless, it was a *logic*; meaning that it made available important interpretative keys allowing to evaluate and to give sense to the brute facts we find in archival documentation. Exceptions and plurality, thus, were not deviations from regularity. They were the expressions of a societal model, in many respects totally opposed of our current logic of organizing and ruling.

In order to avoid misunderstanding, I would like to clarify that when I propose the use of European categories of Ancien Regime to interpret early modern colonial societies, I am evidently referring to the colonists’ society. This statement is, of course, an oversimplification, as colonial societies also comprehend areas of ethnic and cultural Creolism with mixed and entangled conceptions about the body politic. However, with the probable exception of Zambeze, of Macao and (less definitely) of the *Estado da Índia* (Goa and its dependencies), the overwhelmingly dominant categories of social architecture came from the colonists, the other political cultures remaining subaltern elements, almost without expression except in the fringes of the establishment or in moments of severe crises of the dominant rule. Moreover, the dominant political culture, because of its hegemonic place, but also because of its spongiform character, could easily absorb heteronymous elements, converting them to models and figures familiar to the European political tradition. Thereafter, the representative of the Chinese Emperor in Canton became a “viceroy”; the communal land of the Goan villages became some kind of emphyteusis; the model of land succession in the Zambeze basin was legally rebuilt as something between a *majorat* and a *prazo*; the cohort of clients of African chieftains was assimilated to slaves; and the multiform figures of

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<sup>126</sup> Cf Herzog (2003b).

<sup>127</sup> S., on this interplay between tradition and innovation, unity and diversity, in the Atlantic Empires, J. H. Elliott, “Introduction” to the above quoted book (Elliott, 2006).

<sup>128</sup> Cf. witnesses in Evaldo Cabral de Melo, *Um imenso Portugal – história e historiografia*, São Paulo, Ed. 34, 2002. Actually, this ideal of a “huge Portugal” (*imenso Portugal*) – ironically glossed by the famous composer and singer Chico Buarque de Holanda – never came true, remaining as an ideological topic, used till the exhaustion by Salazar’s regime in order to claim before the UN (in the ‘60s of the 20<sup>th</sup> century) that Portugal had no colonies, and cheered by the at a time keen and poetic vision of a sociologist as Gilberto Freyre (“mundo que o português criou”: G. Freyre, *O mundo que o português criou*, Rio de Janeiro, 1940).

<sup>129</sup> S., for an example coming from American historical literature, Benton 2000; Id, 2002.

<sup>130</sup> I would suggest that this restriction – although brief – would be kept in mind. Because all that has been said about Ancien Regime – here taken as a synonymous of corporate or composite late medieval and early modern polities – will start to fade by the mid-18th century. S., for the change in Brazil, Seelander, 2003a; Id., 2003b; Neder, 2000. For Angola, pathbreaking, Santos, 2007.

domestic dependence within the European traditional big household (*ganze Haus*) were rich enough to absorb the social bounds weaved inside the Brazilian *engenho* or inside the *Casa Grande*. Out of sight were the *other* norms, fidelities and political images, fuelled by native or enslaved population; the locus for their expression was also out of the political spaces of the colonists' society: hidden in the bush, in the *quilombo*, in the *senzala* or in the *terreiro*; sung in hermetic lyrics; disguised in syncretic religious rites; revealed in invisible signs.

### 3.2 Ancien Régime in the tropics ?

The most disturbing effect of the application of a corporatist model to the colonial situation is the questioning of the paradigm of a unique and unilateral link of dependence between metropolis and colonies, a link that the traditional colonial history reads as "exploitation" and "coercion". Yet, in a pluralistic society as was late medieval and early modern Europe exploitation and coercion, even when they existed, were channeled by a very complex and diversified mechanism: transfers of revenues, symbolic hierarchization, legal inequalities, often playing divergent roles and mutually counter-acting. Trying to read the whole colonial history as the history of a monotonic bond that subdued colonized to colonizers<sup>131</sup> would, under these premises, be a rough oversimplification scarcely acceptable by today's historical *regulae artis*.

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<sup>131</sup> A very uncomfortable question would be to ask who the colonizers were and who the colonized. However, for a history focused in the colonial relation, this becomes the central question.

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