Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte
Journal of the Max Planck Institute for European Legal History

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.rg.mpg.de

http://www.rg-rechtsgeschichte.de/rg26
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 26 (2018)
http://dx.doi.org/10.12946/rg26/302-311

Rg 26 2018 302 – 311

Arno Wehling*

An Old Empire Gives Birth to a New One

Social Practices and Transformations of the Luso-Brazilian Legal Order

* Academia Brasileira de Letras / Instituto Histórico e Geográfico Brasileiro / Universidade Veiga de Almeida, wehling@globo.com

Abstract

This paper analyzes the institutional and legal organization of the Brazilian Empire during the transition from the Old Regime to a liberal world, in a country still deeply affected by its colonial status.

The paper tries to answer the following questions: With the country moving towards independence, how was the new liberal order put in place in a continental, agro-exporting, slave-owning and predominantly illiterate country like Brazil, whose source of power came mainly from large rural estates? And how was the new normativity established during this huge and long period of transition?

It is determined that the liberal framework involved new constitutional and infra-constitutional laws, while also accepting the survival of old legal and judicial rules and doctrines.

Keywords: constitutionalism, patrimonialism, liberalism, Brazilian Empire, codification

Arno Wehling

An Old Empire Gives Birth to a New One

Social Practices and Transformations of the Luso-Brazilian Legal Order

Although Fernand Braudel once referred to the Iberian Union of 1580–1640 as an alliance of two monumentally decadent nations,[1] their downfall occurred only in the early 19th century, when Spain lost most of its colonies in America and Portugal lost Brazil.

In Portugal's case, however, it can be said that the empire gave birth to a new one, since the Brazilian monarchic regime was imbued right from the outset with an imperial dignity based not on the existence of different political units within the country, but rather on its continental dimensions and its political and economic potential, which was then compared to the Russian Empire.

The crisis of the Portuguese Empire in the first decade of the 19th century was aggravated when Napoleon ordered Portugal to side politically with France, but there weakness and its dependence on England were already evident before that.[2]

When the Court was transferred to Rio de Janeiro in 1808, the public policies at the time had to be urgently adjusted. Two points stand out here: the *Brazilian inversion* and the state reorganization. The expression »Brazilian inversion«, coined by the critic and literary historian Silvio Romero, refers to the transfer of the political center from Lisbon to Brazil.[3] But more than a mere change of cities, there was also a change of policies.

Lisbon, the political center of the empire, dealt with Brazil until then in a decentralized way, controlling directly the most important captaincies, such as Pará, Maranhão, Pernambuco, Bahia, Rio de Janeiro, and Minas Gerais.[4] Although there had been a viceroy based in Rio de Janeiro since 1763, he did not have effective control over the entire colony.[5]

Out of sheer necessity, the presence of the Court in Brazil made the political and administrative centralization of Rio de Janeiro inevitable, causing all captaincies to report directly to the new headquarters. Similarly, for the new policies to take effect, it was necessary to reorganize the state by doubling the number of Portuguese administrative units in Brazil.

This was carried out so accurately that the journalist Hipólito da Costa, who was then the editor of the newspaper *Correio Brasiliense* in London, criticized the measure on the grounds that the public administration in Brazil had been built without any imagination whatsoever by simply reproducing the »Lisbon Almanac«, that is, the catalog of official institutions of the kingdom.[6]

Rather than a lack of creativity, the practice suggests a willingness not to reshape the establishment, but only to introduce topical reforms that were considered essential.

The de facto existence of this institutional duplicity, coupled with the conjunctural circumstances of the Congress of Vienna, led to the proclamation of the United Kingdom of Portugal, Brazil, and the Algarves in 1815, similar to what had taken place in Great Britain. The Portuguese Empire seemed thus to be reborn on the other side of the Atlantic.[7]

The perception held of Brazil as an alternative to be the seat of the Portuguese government had been considered several times since the 16th century, especially when the survival of the kingdom was at stake.

The conception, however, of a »Portuguese Empire« is less clear. In official rhetoric during the revolutionary and Napoleonic conjuncture, the concept appears clearly associated to Brazil in the form of a »new« or »powerful« empire that would restore the prestige of Portugal at the time of the great Portuguese voyages.[8]

The rhetorical exaggeration in the statements made by Portuguese authorities was clear. The

1 Braudel (1995) 556–557.
2 Borges de Macedo (1990) 119–120. Alexandre (1993) 420, 467. Jobson de Andrade Arruda (2008) 5–6.
3 Romero (1943).
4 Belloto (1986) 261. Wehling (1986) 30–32.
5 Wehling (2015a) 26.
6 Varnhagen (1975) 174.
7 Wehling (2000).
8 Lourdes Viana Lyra (1994).

»empire« in Africa and Asia consisted of a few geographically limited centers that functioned as commercial warehouses and, in the African case, as locations to which slaves were transported from the interior of the continent.

Brazil, which was then suffering the effects of the decline of mining and competition in the sugar market, still held the promise of growth. These effects, however, could not be compensated by the production of cotton and by the nascent coffee business.

It is quite evident how relevant Brazil was within an empire that consisted of only a few, small, dispersed units linked merely by commercial interests.[9] On the other hand, the threat of an independence movement similar to the one in Spanish America, or even a slave rebellion like the one in Haiti, was a constant concern of the government councilors.

The rise of Brazil to a kingdom, which could be seen as a mere formal concession from the perspective of the politicians who defended the status quo, was viewed by others, and even by conservatives of the likes of the future Viscount of Cairu, as a viable political alternative. Thus, a new political reality was taking shape amid a decaying empire.

The period from 1815, when the United Kingdom of Portugal, Brazil, and Algarves was established, until the declaration of independence in 1822, or even until 1824, when the constitution was approved, became a true crossroads of options marked by movements such as the Republican Revolution in Pernambuco in 1817 and the Constitutionalist Revolution of Porto in 1820.

Stifled in Brazil by military means, and leading to the convening of a Constituent Assembly in Portugal, both movements brought about two major issues that had to be addressed, namely the challenge of organizing a new political order – or even a new country – and the establishment of a legal order appropriate to its conditions.

As in Spanish America, there were ruptures and continuities on two levels. On the level of political-institutional organization, the status of Brazil, Portugal, and other domains had to be defined. Would the United Kingdom survive? Would Brazil become independent or return to colonial status? Each question led to further questions, and not the least important of them was the question whether Brazil, in any of the questions raised, would remain united or fragmented.[10]

At the level of society, the other side of the coin at the beginning of the 19th century involved an array of countries who were struggling to overcome absolutist practices as well as mainly social and corporate privileges – all in an effort to bring to social life and the legal system the right of liberty before state power and equality before the law.

These were two great issues related to the transition from the Old Regime to a liberal world, and both issues were embedded in a dismantled and conflict-ridden empire dependent on another empire (Britain) and in a country (i. e. Brazil) still deeply affected by its colonial status.

These two issues pose the following questions for historians: first, with the country moving towards independence, how was the new liberal legal order put in place in a continental, agro-exporting, slave-owning, and predominantly illiterate country like Brazil, whose source of power came mainly from large rural estates? And second, how was the new normativity established during this huge and long period of transition?

We know from later developments that the country did not fragment. It continued to be an agro-exporting, slave-owning, and illiterate country with rural power from top-down. With the exception of the first point, agro-export, can we really say that the new legal order did not bring about any kind of change, or that the force of tradition prevailed?

We know *a contrario sensu*, however, that transformations in the legal order indeed took place after independence. Were they merely a facade, a formal framework that did not affect the intrinsic reality? Or did they correspond to actual changes in social practices, even if these changes were only topical in nature?

Here, we have one problem leading to a number of hypotheses. We will seek to address them from the perspective of social practices regarding legitimacy, legal protection regimes, and the colonial or Luso-Brazilian survivals in the new legal order of the 1824 Constitution.

9 Costa e Silva (2007).

10 Alexandre (1993) 232. Pereira das Neves (1995) 75. Pimenta (2002).

The New Legal Order and its Procedures of Legitimation in Light of Social Practices

In 1821, when King D. João VI returned to Lisbon under pressure from the constitutionalist revolution, leaving behind his son D. Pedro as regent of the Brazilian portion of the United Kingdom, and in 1822, when the path towards independence was paved and completed one year later, Brazil grew from a kingdom to empire. From the political-institutional point of view, the status of the country and its form of government had been defined.

Firstly, there was then the question of the relationship with Portugal, with the known options of either remaining part of the United Kingdom, returning to the status of colony, or declaring independence. The first option implied a careful definition of the role of each of the main parts of the monarchy, namely Portugal and Brazil, and also that of other domains.

One of the possibilities raised then was to link Angola to Brazil, whether in line with the United Kingdom's formula or in terms of independence. A further possibility would be to keep Pará and Maranhão linked to Lisbon and not to Rio de Janeiro.[11]

While an eventual return to the status quo before 1808 was in the interest of the Portuguese merchants in the port cities, it was rejected by all other political groups. The option for independence, in turn, preliminarily involved the issue of the integrity of the country, which had been weakened by the Pernambuco Revolution of 1817 and by positions favoring relations between the northern provinces of the country and Portugal.

Secondly, there was the question of the form of government. Excluding the neo-colonial option, the only options left were either a republican or a monarchical government. The former was much more closely associated in Brazil with French Jacobinism than with the then aristocratic republic of the United States.

Considering the Restoration times and the close ties Brazil had with England and Austria of Metternich (the prince regent and future Emperor was married to the Archduchess Leopoldina, daughter of the Austrian Emperor), this position was restricted to some radical liberals. The decision-making process tended toward a temperate monarchy as defined in the Constitution of Cadiz, which sought a middle position between pre-revolutionary absolutism and parliamentary monarchy pure and simple.[12]

The combination of traditional and modern elements in the first period of Brazilian constitutionalism was clear: a deliberative and not merely a consultative assembly, like the courts (*cortes*), but never representative or holder of popular sovereignty, which would result in making the king a mere delegate.

The issue was debated soon after the Constituent and Legislative Assembly met in May 1823, and it was guided by a formula enunciated by the Emperor and Minister, Jose Bonifacio. According to it, sovereignty resided not in the people but in the King and the nation together. The conservative political-juridical formula had thus its legitimacy in the *national tradition*, which was something less changeable in this argument than the *popular sovereignty*.

Constitutional projects, including what became later the 1824 Constitution, also combined traditional and modern elements when it came to define the *empire* and the *temperate monarchy*, known as being constitutional.

The empire was a guarantee of the legitimacy of succession of the »new« or the dying »mighty Empire« that could eventually be restored, depending on the circumstances. It must be remembered that King D. João VI was granted the honorific title of »Emperor of Brazil« in the treaty that recognized the independence of the country. In addition, the continental dimension of the new country reinforced the imperial thesis.

The temperate monarchy, in turn, prevented a potential parliamentary radicalism, which was restrained by a senate for life and by the Emperor himself, who held both the executive and moderating power. In this case, Benjamin Constant's proposal was accepted.

In the case of the imperial concept, the ceremony of *coronation and consecration* of the first emperor of the new empire was a curious example of this eclecticism. The date is reminiscent of the restoration of the Portuguese independence in

11 Machado (2007) 322.
12 Wehling / Wehling (2011) 638.

1640. The ceremony was marked by a mixture of modern and ancient protocols reminiscent of the coronations of Napoleon at Notre Dame and the emperors of the Holy Empire in Frankfurt, not to mention the brandishing of the sword in the fashion of the kings of Hungary.[13]

An earlier example of eclecticism predating the coronation was the ceremony held by the Old Portuguese regime on October 12, in which D. Pedro was *acclaimed* the Constitutional Emperor and Perpetual Defender of Brazil in a public event held in the largest square in Rio de Janeiro. The event took place at the request – at least theoretically – of the provinces that constituted the empire, although it was made by only six of the nineteen provinces.

The issues that gave rise to the new empire, and its basic legitimating framework, had been envisaged but were definitively far from being settled. The legal order still had to be re-organized.

In dealing with ambivalences between old and new, tradition and innovation, one possible way of discussing the problem is to distinguish *designing what is new* from *redesigning what is old*.

Designing what is new came to fruition with the imperial unitarism provided for in the constitution, the administrative reorganization, the development of administrative law, and with the criminal code and the code of criminal procedure of 1830 and 1832.

The constitution envisaged a centralizing political-administrative regime as a way of preventing the provinces from breaking away and avoiding threats of secession. In this respect, it did not follow the colonial tradition but the innovation introduced in 1808 when the Supreme Court was transferred to Rio de Janeiro.

Presidents of provinces appointed by the central power, local councils with few characteristics of assemblies, and rigid financial control made clear the desired weakness of local power.

The political setbacks that followed and the subsequent economic demands resulted in the Additional Act of 1834, an amendment to the constitution that granted greater powers to the provinces, including the chambers, and created the »provincial assemblies«.

It was a federalist concession grafted onto a unitary model. While the conservative and centralizing reaction of 1841, through an exegesis exercise focused on the amendment, namely the »interpretative law« of the Additional Act, limited some of the federalist measures, the middle ground proved to be institutionally effective until the late 1870s, when renewed regional forces would change the picture.

A further »new« element was the newborn administrative law inspired by the French model. It met the structuring or restructuring needs (depending on the case) of the state's administrative machinery that was then being set up.[14]

The Viscount of Uruguay, a jurist with the practical experience of being the leader of the conservative party, defended in the 1862 book *Essay on Administrative Law* the distinction between the activities of the government of the executive power and those of the agents of the public administration. The former were in charge of guiding and supervising and the latter of implementing and fulfilling the measures. Yet another constitutionalist, namely Pimenta Bueno, the Marquis de Sao Vicente, published in 1857 a book that became established as the most important analysis of the imperial constitution. In the book he detailed the criteria and procedures of this »administrative power« within the executive power, noting that the »agents are the rings of the long administrative chain that encompasses all social conveniences«.[15]

One can see in this approach the conservative and centralizing mark of the specialist in administrative law Guizot, and other jurists, in the area who were aware of what was happening in Brazil, and who were always quoted by Brazilian authors.

In the organization of public law, a dominant institutional position became clear, namely the conscientious maintenance of the territorial integrity of the empire and the self-balance of powers. At the beginning of the second reign, the institutions were clearly improved in both aspects when a new Council of State was created and the purely personal character of the exercise of the moderating power by the monarch was abolished. In addition, the figure of the President of the Council of Ministers was created in 1847.

13 Oliveira Lima (1989) 56.
14 Guandalini Jr. (2016) 188–190.
15 Pimenta Bueno / São Vicente (1978) 266.

State policies and the supervision of public administration became an attribute of the State Council and in the political sphere, the presidency of the cabinet transformed the temperate monarchy of the first constitutional moment into a parliamentary monarchy.

There was much discussion at the time – also among historians – about the effectiveness of this political-constitutional model due to the limitations of the electoral representation and the vertical structure of the public administration, which went »from the Emperor to the block inspector«. This state of affairs led the conservative Viscount of Itaboraí to say »In Brazil, the king reigns, governs, and administers«.[16]

This tendency towards a centripetal policy and administration was rooted not only in the need to guarantee the integrity of the empire. It was also one of the legacies of the Old Regime, for there continued the policy to assign to the government, with an 18th-century semantic force, the role of the supreme coordinator of national life.

It was, therefore, no surprise for the legislature or the press that after the creation of the Supreme Court of the Empire in 1828, a legal act compelled its ministers to send activity reports to the »government« at the end of each financial year.[17]

In the criminal sphere, the innovation was more significant with the general hostility to the criminal book of Ordinances and the adoption by the author of the 1830 Code, Bernardo Pereira de Vasconcelos, of the principles of Bentham. For the first time in Brazil, empiricism and the religious nature of the Portuguese law were replaced by something that could represent the spirit of modern codification, such as a logical construction and the explicit exclusion of sin as a crime.

Of the three parts that made up the code, it is worth reminding that the second one referred to the »crimes against the political existence of the Empire«. The Criminal Procedure Code of 1832, enacted in the regency on behalf of the under-aged Emperor, had special importance for the political, judicial, and administrative organization of the empire, since it structured the different judicial spheres from municipal court to the Supreme Court along with the respective process. Its openly liberal inspiration brought enforcement to local life, like the locally elected justice of the peace and layman in law, and the municipal judge and public prosecutor entrusted police functions.

The code can be interpreted in two ways: first, as a strong liberal wedge stemming from foreign inspiration and, for this reason, inappropriate to the Brazilian circumstances; second, as the trigger of a centrifugal political mechanism that weakened or even hindered the actions of the central powers of the empire. The latter interpretation provided the justification for a conservative reaction in 1841 that resulted in depriving the justices of the peace of their functions, transferring the appointment of municipal judges and prosecutors to the government, and creating a chief of police for each province. Police functions were thus centralized and taken from the judges.

The last major innovation in the legal sphere was the Trade Code of 1850.

The new economic circumstances in the first half of the 19th century – with the spread of the Industrial Revolution, the continued growth of trade and insurance market, coupled with the complexity of financial operations – required new forms of legal protection. Silva Lisboa, the future Viscount of Cairu, a follower of English liberalism, translator of Adam Smith and Burke, and advisor to Prince D. João since 1808, had attempted to enact a commercial code in 1809. He failed in his attempt, but his book *Principles of Mercantile Law* was nevertheless an important reference work in forensic practice for half a century.

Although the liberal philosophy had been introduced in theory into economic matters, what really came to be practiced in commercial matters after the independence was a mixture of traditional legislation, doctrine (especially the work of Cairu), and the reception of foreign law such as the French and the Neapolitan commercial codes of 1807 and 1819, correspondingly.

Legislative innovations, which could be referred to as »modernizing«, were introduced in the fields of bills of exchange (1827), interest loans (1832),

16 Oliveira Torres (1963) 447. Murilo de Carvalho (1980) 50–51.

17 Brasil, Lei de 18 de setembro de 1828.

and mortgages (1833), although further research may prove that there were essentially fiscal interests behind these innovative aims.[18]

After a long gestation period of 17 years, starting with the initial project of codification, the Trade Code was finally promulgated in 1850. It proved to be the most lasting code in the history of Brazilian law, in particular because it brought to Brazil legal institutes and procedures that became increasingly universal.

As to the *redesigning of what is old*, it involved different receptions and transactions. Legislation on family law is a clear case of *longue durée*. While references to the Napoleonic Code had already been taken note of at the time of independence, bourgeois individualism and the nuclear family were still far from constituting the dominant reality in a country with little urban life and large rural properties.

Thus, we understand why the paternal power of the Old Regime, church weddings, and other conventions simply remained in force or were only slightly changed through specific laws.

Major changes occurred in the law of inheritance, property, and obligations, although they are seen as small improvements rather than conceptions that reflected the legal arrangement of a new world. After all, if the Trade Code came into being 30 years after independence, the civil became a reality only in 1917.

In all three fields, the impact of the Pombaline reforms remained strong. The positions on these issues did not differ radically from liberalism. »Modernization« had thus been influenced by absolutism, especially for its strategy of moving around capital represented by mortmain assets and forbidden inheritance.

What also remained were the relations with the Church, either because of the supremacy of canon law over family law, or because ecclesiastical law was maintained in matters relating to the secular and regular clergy.

Art. 5 of the Constitution of 1824 stated that Catholicism »would continue« to be the official religion of the empire. In addition, the *First Constitutions of the Archbishopric of Bahia*, a set of norms of canonical and ecclesiastical law that had been in force since 1707, remained in force to a great extent until the founding of the republic, when church and state were then separated, and to a minor extent until the enactment of the Civil Code in the 20th century.

Legal Protection Regimes and Social Practices

Following the matrix of liberalism, the constitution of the empire defined freedom, security, and property as basic rights on which all other rights and legal order were based.

Its legal, and later doctrinal, enunciation throughout the empire resulted in a long and extensive debate that was well received abroad by Guizot, Tocqueville, Bagehot, and Spencer, among others. The political circumstances were favorable to discussions around a wide range of topics arising mainly from a contradiction in terms related to the existence of slavery in a country based on a liberal socio-political order.

The right to freedom was established and guaranteed by the constitution of the empire with the provision that »no citizen can be compelled to do, or refrain from doing anything, except in virtue of the law«. As stated by the Marquis of São Vicente, this provision elevated freedom to an »absolute principle«, whose main legal consequence was to establish the presumption of freedom in cases of doubt.

Such a provision in a society that had emerged from the colonial condition and the »ministerial despotism« of the Old Regime, and in which slavery was still a reality, led – as it effectively did – to major legal developments that were central mainly to criminal law and, in view of servile work, to property law.[19]

The imperial legal doctrine admitted »legitimate restrictions« to freedom in certain circumstances, but always based on »public and social utilities« dictated by moral principles and the harmony between individual rights and social interest.[20] In addition, the constitution provided for the freedom of thought, communication, press,

18 Wehling (2015b).
19 Wehling (2001) 375.
20 Pimenta Bueno / São Vicente (1978) 385.

conscience, religion, coming and going, emigration, work, contract, association, and the freedom to engage in different agricultural, commercial, and industrial activities.

In brief, guarantees and restrictions were established in the prevailing liberal model on the basis of the existence of restrictive rules and provided that these rules were morally and constitutionally well founded.

Concerning the aspect of freedom, one can say that colonial practices did not survive. Not so much due to the liberal argument that the whole system was despotic, but rather due to the fact that the very conception of freedom and guarantees as perceived in the Old Regime was entirely distinct from the conception imposed from the enlightened and revolutionary point of view.

The same cannot be said of property rights.

The right to property in Brazil originated from a Portuguese tradition dating back to the 14th century called *sesmaria*, according to which the crown granted individuals plots of lands captured from the Moors in an effort to stimulate settlement. In the colony, *sesmarias* were introduced with the same aim under the system of hereditary captaincies in the 16th century.

Throughout the colonization process, the continuous conquests of the hinterland made ownership a dynamic element of occupation with the subsequent legalization (or not) of the granted lands. As to the rationalizing measures adopted by the Pombaline bureaucracy in the second half of the 18th century, efforts were made to regularize as much as possible the occupied lands in different captaincies.

Both the Brazilian National Archives and the Torre do Tombo Archives in Portugal house thousands of documents from this period, in which the occupiers seek to regularize their properties by means of documents, testimonies, and records of measurements.

At the time of independence, however, land ownership in the country was far from being settled, or even peaceful. From the liberal standpoint, the constitution fully guaranteed the right to own property and allowed expropriation only for reasons of public utility with prior indemnity in national currency.

The 1826 law regulating the expropriation provision defined the »only cases« in which expropriation was allowed, namely in the case of »public good«, carried out by executive act, or in the case of »public use«, by legislative act.

The suspension of the concession of *sesmarias* prior to independence, and the widespread existence of ownership, left the country, as far as property rights are concerned, in a true legal vacuum – vacation legis – until the Law of Lands of 1850 came into force.

1850 was an emblematic year for the history of Brazil and its rights, marking a definite turning point in the colonial status of the country. An effective law against slave trade was passed, releasing capital from the trade so that it could be invested in other economic activities. The European immigration flow and the creation of small properties were intensified and contractual and settlement rules improved.

With the enactment of the Commercial Code, the first step towards modernization of private law was taken. The Land Law was finally passed, incorporating criteria such as the prohibition of granting new lands for settlement, the recognition of ownership, and the regularization of occupied lands. The law also defined the principle of the so-called *terras devolutas*, that is, unoccupied public lands belonging to the empire that could only be acquired by private individuals through purchase from the government.

In addition to the government's fiscal objectives towards increasing revenue through land regularization and demarcation, the law also provided that the obtained revenues should be channeled to finance immigration as a definite alternative to slave labor.[21]

There is no doubt that land regularization under the Land Law benefited and strengthened the large rural properties, but it also clearly represented a shift from a traditional pre-capitalist, agrarian, and economic conception to the full insertion of land as a commodity into the market economy.

If, on the one hand, legal protection of liberty, security, and property had been explicitly guaranteed in the early decades of the empire, on the other hand, the question of equality still remained

21 Staut Jr. (2015) 129–131.

open. Equality before the law was established in the constitution, but it also established in a related way the census suffrage and the exclusion of the illiterate and the freed slaves from the right to vote.[22] With the exception of the latter, there was no big difference from the European institutional context back then.

The biggest difference was the issue of slavery in Brazil and in the United States. This genuine »malaise of the Christian civilization« had led England to pressure Brazil into enacting various laws against slave trade, but compliance came only with the 1850 law.

The permanent coexistence with slavery forced a series of artifices and casuistries. Both Indians and slaves were considered inhabitants and not citizens of the empire. The latter, however, were subject to a more severe treatment in the Criminal Code of 1830, a point that brings to mind the example of Haiti.

After the revolt of the slaves of Malê origin in Bahia in 1835, an ordinary law made the penalties for the crime of insurrection even worse. The case law itself was very wavering on the matter, but the theory of »presumption of freedom« would usually prevail in the courts.[23]

In addition to the Land Law, the immigration legislation and the Commercial Code, the anti-trafficking law also contributed to the effective legal modernization of the empire. In many respects, the Brazilian Empire was already institutionally and legally structured in 1850, although there was a clear understanding that issues related to the Civil Code still had to be solved. They started to be tackled at the end of that decade.

New Informal Legal Regimes as a Colonial Legacy – What Persists in the Legal Order of the 19th and 20th centuries?

From an official point of view, informal legal regimes corresponded to heterodox social practices. All regimes existing in the empire have been present since colonial times.

The existence of local legal forms as part of the Portuguese colonization was a constant in the colonial period, so much so that one may speak of a »Portuguese law adapted to Brazil«.[24] After independence, these local legal forms continued to be practiced, especially in the most remote places of the country, and more so because the validity of most of the Philippine Ordinances justified it.

But such legal forms cannot strictly be considered as »informal legal regimes«, but should be rather seen as mere deviations or adaptations allowed by the very spirit of casuistic legislation, except in specific cases or in the centralized tour de force of the Pombalibe politics, which, by the way, was not always successful.

The settlements of fugitive slaves and the tribes of non-acculturated natives were a different case. In the colony and in the empire, both had a social organization of their own as well as norms of a customary nature, whose frame of reference was the community. The little we know about them comes from descriptions by chroniclers, travelers, or from scientific expeditions in the 19th century.

However, there is no doubt that they lived on the fringes of the legal system of the Old Regime and constitutional liberalism. The reason for this was that the settlements were seen as harboring insurgent groups and, therefore, as object of the penal code. The non-acculturated natives, on the other hand, »secluded themselves from civilization«, as it was commonly asserted in the 19th century. As they were self-governing, they maintained their legal order *a latere* of the institutional and juridical life of the empire.

The question of »informal legal regimes« can be viewed from still another angle. It is a consensus in Brazilian historiography that the social-political life in the country revolved, both in the colony and in the empire (and even in the 20th century), around three vectors: patriarchalism, patrimonialism, and authoritarianism in rural areas. It is therefore reasonable to conclude that the legal order in the country was influenced – if not completely changed – by them.

The concept of rural patriarchalism was initially defined by Oliveira Viana and Gilberto Freire. The former saw in it the formation of a »rural clan« and the latter that of a »patriarchal family«. It corresponded in the colonial period to such a

22 Murilo de Carvalho (2011) 25.
23 Ribeiro (2005) 320–323.
24 Wehling / Wehling (2006) 77.

degree of autonomy that it weakened, diluted, or even dismantled the royal authority as it became entrenched in the hinterland.

Paternal power, the right of primogeniture, the sense of self-righteousness, and the formation of private militias were characteristic of this patriarchal world. It underwent some changes, but it was never fully eliminated during the 19th century, having been a constant during the imperial period.

Except for the right of primogeniture, the social and political force of patriarchalism, with the legal capacity it enjoyed, remained unchanged in most parts of the country until the 20th century, going beyond the imperial regime and leading to developments that were dealt with by the Civil Code of 1917.

Patrimonialism, a Weberian category introduced into the Brazilian political analysis by Sergio Buarque de Holanda and Raimundo Faoro, sought to reverse the logic of the previous explanation, admitting the existence of a state larger than society. Such a state, represented in its dynamics by a bureaucratic stratum, would promote the private use of public instruments and had been organized in Brazil in the colonial period, enhancing its characteristics after independence.

The bureaucratic stratum, beyond the legal discourse of the Old Regime or constitutionalism, whose rhetoric it embraced fully, served its own interests and objectives in institutional practice and used the legal machinery in its favor.

Such a phenomenon would be perceived throughout the history of imperial and republican Brazil as a gap between the reality of a poor, enslaved, dependent, and illiterate country and the formal country that had created its institutions based on European models or on the republican model of the United States. This would result in a kind of syndrome showing that »the ideas were out of place«.

Finally, the inventory of informal legal regimes also comprises the effects of rural authoritarianism, as studied by Vitor Nunes Leal and Maria Isaura Pereira de Queiroz. The power of the local lords, represented in the colony and in the empire almost always by a group of rural proprietors of a municipality or region, was not only exercised de facto within their lands, but also extended to administrative and judicial institutions.

Since the town councils were represented in both systems by local lords – in the colony the »good men« were ordained and in the empire the active citizens were the ones who voted and were elected – it comes as no surprise that the local justice was under their control.

The ordinary judge in the colony, the judge of the peace, and the municipal judge in the empire were examples of this power and authoritarianism. They applied rights that were theoretically uniform but which allowed for numerous interpretations and different decisions given the peculiarities of a continental country.

The centralizing reactions of the law enforcement authorities, including here judges appointed by the king in the colony and law and court judges in the empire, were not always efficient, especially since many of these same authorities ended up being new members of the social elite.

From the Portuguese Empire, which at the beginning of the 19th century was more rhetorical than real, emerged a new one: this time the Brazilian Empire. In the context in which it emerged, the world of constitutional liberalism needed to establish its legal order, an order that was necessarily distinct as far as material reality, ideology, and political and legal philosophy were concerned.

This involved new constitutional and infra-constitutional laws, while also accepting the survival of old legal and judicial rules and doctrines. All of this was going on at a time when everything was affected by the economic, social, political, and ideological circumstances of industrialization, not to mention the developments associated with the French Revolution and the fragmentation of a colonial life that had existed for three centuries.

It is no wonder that legal practices, as if repeating social practices, were so different from the model envisaged in the halls of Enlightenment or in future developments. They reflected local conditions, breathing color and life into an imported legal fabric that had to adapt to the difficult local circumstances in order to live on in Brazil.

To paraphrase Ortega, the law of the Brazilian Empire could be stated as follows: »I am me and my circumstances.«

■

Bibliography

- Alexandre, Valentim (1993), Os sentidos do Império, Porto
- Belloto, Heloisa (1986), O Estado português no Brasil: sistema administrativo e fiscal, in: Nizza da Silva, Maria Beatriz (coord.), O Império Luso-Brasileiro, 1750–1822, Lisboa, 261–300
- Borges de Macedo, Jorge (1990), O Bloqueio Continental, Lisboa
- Braudel, Fernand (1995), O Mediterrâneo e o mundo mediterrânico na época de Felipe II, vol. II, Lisboa
- Costa e Silva, Alberto da (2007), O Império de D. João, in: Revista do Instituto Histórico e Geográfico Brasileiro 436, 335–340
- Guandalini Jr., Walter (2016), História do direito administrativo brasileiro, formação (1821–1895), Curitiba
- Jobson de Andrade Arruda, José (2008), Uma colônia entre dois Impérios, São Paulo
- Lourdes Viana Lyra, Maria de (1994), A utopia do poderoso Império, Rio de Janeiro
- Machado, André Roberto A. (2007), Apontamentos para o estudoda reinvenção do estado no Grão Pará: 1823–1825, in: Peres Costa, Wilma, Cecília Salles de Oliveira (orgs.), De um Império a outro. Formação do Brasil, séculos XVIII e XIX, São Paulo, 322–342
- Murilo de Carvalho, José (1980), A construção da ordem, Brasilia
- Murilo de Carvalho, José (2011), Cidadania no Brasil – o longo caminho, Rio de Janeiro
- Oliveira Lima, Manuel de (1989), O movimento da independência (1821–1822), São Paulo
- Oliveira Torres, João Camilo de (1963), A democracia coroada, Petrópolis
- Pereira das Neves, Guilherme (1995), Do Império Luso-Brasileiro ao Império do Brasil (1789–1822), in: Ler História 27–28, 75–102
- Pimenta, João Paulo G. (2002), Estado e nação no fim dos impérios ibéricos no Prata (1808–1828), São Paulo
- Pimenta Bueno, José Antonio, Marquês de São Vicente (1978), Direito público brasileiro e análise da constituição do Império, Brasília
- Ribeiro, João Luiz (2005), No meio das galinhas as baratas não têm razão – a lei de 10 de junho de 1835, Rio de Janeiro
- Romero, Silvio (1943), História da literatura brasileira, vol. III (passim), Rio de Janeiro
- Staut Jr., Sergio Said (2015), Posse e dimensão jurídica no Brasil, Curitiba
- Varnhagen, Francisco Adolfo de (1975), História geral do Brasil, vol. V, São Paulo
- Wehling, Arno (1986), Administração portuguesa no Brasil, 1777–1808, Brasília
- Wehling, Arno (2000), A monarquia dual luso-brasileira. Crise colonial, inspiração hispânica e criação do Reino Unido, in: Bottrel Tostes, Vera Lúcia (ed.), Anais do Seminário Internacional Dom João VI, um rei aclamado na América, Rio de Janeiro, 338–348
- Wehling, Arno (2001), O escravo ante a lei civil e penal, in: Wolkmer, Antonio Carlos (coord.), Fundamentos de História do Direito, 373–396
- Wehling, Arno, Maria José Wehling (2006), A questão do direito no Brasil colonial, in: Neder, Gizlene (org.), História & Direito. Jogos de encontros e transdisciplinaridade, Rio de Janeiro, 77–94
- Wehling, Arno, Maria José Wehling (2011), Liberalismo ou democracia: a recepção brasileira da Constituição de Cádiz, in: Escudero, José Antonio (dir.), Cortes y Constitución de Cádiz – 200 años, vol. III, Madrid, 638–651
- Wehling, Arno (2015a), O ofício do vice-rei do Estado do Brasil, 1763–1808. Autoridade, hierarquia e conflito, Os vice-reis no Rio de Janeiro. 250 anos, Rio de Janeiro
- Wehling, Arno (2015b), O direito privado entre o Antigo Regime e o liberalismo constitucional: permanências, rupturas e diferentes dinâmicas, in: Silveira Siqueira, Gustavo, Ricardo Marcelo Fonseca (eds.), História do direito privado – olhares diacrônicos, Belo Horizonte, 136–148