



[Unpublished articles]

The legal pluralism in the Brazilian experience : a critique of Raymundo Faoro's monist historiography

O pluralismo jurídico na experiência brasileira: uma crítica à historiografia monista de Raymundo Faoro

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Article submitted on 03/05/2024 and accepted on 06/20/2025.



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Abstract

This article investigates the reasonableness of historiographical interpretations that reduce the Brazilian legal experience, from the colonial period onward, to the law-making will of the sovereign State. To examine this perspective, which found its most well-defined expression in Raymundo Faoro's work *Os donos do poder* ("The Owners of Power"), this article conducts a long-term analysis of Brazilian colonial and imperial history in search of institutions and centers of power, whether public or private, that escape the monist framework. It is concluded that the Brazilian legal experience was highly complex, pluralistic, and replete with local laws, which requires legal historiography to adapt its research agenda and methodologies.

Keywords: Legal history; Legal pluralism; Brazilian Empire; Colonial Brazil, Raymundo Faoro.

Resumo

Este artigo investiga a razoabilidade de interpretações historiográficas que reduzem a experiência jurídica brasileira, desde o período colonial, à vontade legiferante do Estado soberano. Para examinar essa vertente, que teve na obra *Os donos do poder*, de Raymundo Faoro, a sua melhor e mais bem definida expressão, faz-se uma análise de longa duração da história colonial e imperial brasileira em busca de instituições e centros de poder, públicos ou privados, que escapam à chave de leitura monista. Conclui-se que a experiência jurídica brasileira foi complexa, pluralista e repleta de direitos próprios, o que exige da historiografia jurídica uma adequação de sua agenda de pesquisa e de suas metodologias.

Palavras-chave: História do direito; Pluralismo jurídico; Brasil Império; Brasil Colônia; Raymundo Faoro.



I Introduction¹

Raymundo Faoro's book *Os donos do poder* ("The Owners of Power"), first published in 1958, is a classic. The historical interpretation contained in the nearly one thousand pages of its second edition, in 1975, consolidated a specific way of understanding Brazil's formation and the legacies that colonization would have left to contemporary times. Inspired by Max Weber's theorization of the patrimonial type of State, Faoro envisioned the existence of a highly influential political power within the Portuguese Empire, which would have allowed the Lusitanian monarchs to legally control every step of maritime expansion. Many eloquent and emblematic passages capture this perspective well, such as the declaration that "since the very first century of Brazilian history, reality is made and built with decrees, charters, and royal orders" or the assertion that "the colonization and conquest of the territory advance through the will of the bureaucracy, expressed in legislative and regulatory activity" (FAORO, [1958] 2001, p. 173).² The State arrived before society, form molded content, ideas created reality.³ In treating the relationship between the Portuguese Empire and Brazilian colonial society in this way, Faoro ([1958] 2001, p. 152) challenged social, political, and legal historiographies,⁴ such as those of Nestor Duarte ([1939] 1966), Sérgio Buarque de Holanda ([1936] 2006), and Waldemar Martins Ferreira ([1958] 1962), that saw, throughout the hinterlands of colonial and imperial Brazil, the existence of autonomous powers and their own legal orders, which escaped the control of the central State authority.⁵

¹ I am grateful for the invaluable assistance, comments, and criticisms of Ricardo Sontag, Ariadi Sandrini Rezende, Anna Clara Lehmann Martins, Carlos Manuel Petit Calvo, Ivan de Andrade Vellasco, Karine Salgado, Luís Fernando Lopes Pereira, Mariana de Moraes Silveira, Samuel Rodrigues Barbosa, and Vitor Sartori. I also thank the reviewers and editors of *Revista Direito e Práxis* for their contributions. This article was developed from my doctoral research, which was funded by the *Coordenação de Aperfeiçoamento de Pessoal de Nível Superior* (Capes).

² All direct quotations from the original sources have been translated into English for the purposes of this article.

³ Bernardo Ricupero and Gabriela Nunes Ferreira (2005) wrote one of the most interesting works on the predominance of the State over society in Raymundo Faoro's historical interpretation.

⁴ The absence of a consolidated readership in legal history between the 1950s and 1970s meant that Raymundo Faoro, himself a jurist, was received primarily within political science and socio-political history. In these fields, he became a canonical figure, required reading in academic circles, as Gunter Axt (2001, p. 1) observes in *Revisitando "Os Donos do Poder" do Raymundo Faoro: uma abordagem historiográfica*. Consequently, the debates initiated by Faoro first resonated within the social and political domains.

⁵ Over the past three decades, European historiography has likewise debated the point at which it becomes possible to speak of a centralized State in the Old Continent. As António Manuel Hespanha (2012, pp. 117–119) observes, two main positions have emerged. One situates centralization at the close of the medieval period. The other, emphasizing legal particularisms and political decentralization well into the *Ancien Régime*, regards the State as a genuinely modern construct of the eighteenth century.



A formidable internal coherence, a compelling style, and a sophisticated theoretical orientation are some of the qualities of Raymundo Faoro's work that have allowed it to withstand the test of time, maintaining prestige today among some Brazilian scholars, such as Simon Schwartzman ([1982] 2015; 2003), Kátia Mendonça (1995) and Luís Roberto Barroso (2022). More than merely attracting occasional disciples, *Os donos do poder* captured a historical vision that has permeated Brazilian culture in diffuse ways and gave it its most refined and well-defined formulation. We can find early expressions of this way of understanding Brazil's formation in texts written before Faoro, even if with different tones, ideologies, and analytical categories. In his youthful writings, for example, Tristão de Athayde ([1924] 1990, p. 215) stated that "Brazil was founded backwards, starting from the end. It had a Crown before it had a people [...]. It was an inverted creation, the product [...] of officialdom." After Faoro, Graça Salgado (1985, p. 15), in a text prepared for the *Arquivo Nacional*, affirmed that "the strengthening of royal power and the consequent monarchical centralization expanded as the State succeeded in subordinating all sectors of Portuguese society. This process, unleashed in the late fourteenth century and concluded in the following century, was accompanied by the consolidation of various laws." Although the field of legal history was still scarcely developed between the 1950s and 1980s, it also produced interpretations close to Faoro's, as can be seen in *Introdução à história do direito político brasileiro*, by José Pedro Galvão de Souza ([1958] 1962, p. 26): "When Cabral's fleet arrived in Brazil and colonization soon began, the monarchy in Portugal, favored by the circumstances of the time, was concentrating power more and more, placing itself above the social orders."

For this reason, the observations made here about *Os donos do poder* can, with appropriate adjustments, also be applied to other works, whether or not by Faoro's followers, that reach similar conclusions. But my decision to return to Raymundo Faoro, this classic that might strike some as smelling of mothballs, stems from the fact that his interpretations synthesize a particular way of understanding Brazil's formation and encourage the adoption of a specific historiographical methodology that continues to be used in legal scholarship. Research inspired, even if only intuitively, by perspectives akin to Faoro's tends to emphasize the State's regulation of society. Let us recall that the State, in Faoro's view, strangled society or, as he preferred to say, enveloped it in a "shell" that amputated "all the limbs that resisted its domination" (FAORO, [1958] 2001, p. 192). Thus, seeking other legal experiences beyond that dictated by State power would be, in his logic,



an error and a waste of time. The Portuguese Empire and later the Brazilian Empire, in this reading, would bar any form of legal expression that did not originate from themselves.

To put this type of historiography that Raymundo Faoro represents to the test, this article conducts a long-term analysis of Brazilian colonial and imperial history in search of centers of power, whether public or private, that might challenge the legal and political monism supposedly present in the Brazilian experience. For experienced researchers accustomed to studies of legal and political pluralism, who, fortunately for us, *are becoming more common each day*, our proposal may seem unnecessary. Pluralism is a fact in their investigations. That is why it would be more interesting to focus on studies with a clearly defined spatial and chronological scope, examining specific manifestations of the plurality of law and power. But the obvious is not always widely recognized. There is still a large volume of research in academia on legal history that continues to be centered on the dogma of State monism. That is why young researchers may be the ones who benefit most from this work. Such a debate with a theoretical bias, interspersed with empirical analyses of *longue durée* (BRAUDEL, 2014), making it possible to observe historical continuities, can help consolidate new research agendas and methodologies in the field of legal history.

II Legal Pluralism in Brazilian Colonization

Among the missteps in the historiographical narrative proposed by Raymundo Faoro, the smallest one, already noticed by Rubens Goyatá Campante (2003, p. 160), concerns the mistaken characterization of the patrimonialism of the Lusitanian Empire. Although it did not reach a level of decentralization and casuistry comparable to the feudal one, Max Weber conceived central patrimonial power as having a certain inefficiency when compared to the type of State founded on legal-rational domination, the latter being rigidly enabled by a body of bureaucrats who unfailingly guaranteed compliance with its abstract and general legal order. Patrimonial bureaucracy combined traditional and legal-rational forms of domination,⁶ making the patrimonial State dependent on prebendary

⁶ “[...] nor that all empirical structures of domination must correspond to one of these ‘pure’ types. On the contrary, most empirical cases represent a combination of, or a transitional stage between, several pure types. This will compel us, time and again, to coin expressions such as ‘patrimonial bureaucracy’ in order to



officials who, while enabling domination, could hesitate in carrying out orders if the traditional element of authority was, in some way, questionable, for example, if the monarch ceased to distribute *honrarias*, *mercês*, and *dons* (honors, mercies, and gifts).⁷ What is observed is that Weber's characterization of patrimonialism was distorted by Faoro, who wrote of a "Portuguese public order immobilized in royal decrees, regiments, and ordinances, prestigious with battalions" that had crossed the Atlantic Ocean "incorrupt" to conquer the hinterlands "with iron and fire" (FAORO, [1958] 2001, p. 192). It seems that Faoro transported to patrimonial domination characteristics of legal-rational domination, or at the very least, exaggerated the legal-rational element of patrimonialism. Ultimately, and what seems to me to be the case, it could be said that Faoro saw legal-rational domination in sixteenth-century Brazil, with modern legal codes and an impersonal and formalistic bureaucracy that obeys the law not because of prebends granted by the monarch, but out of a professional duty for which it is salaried, yet he inappropriately labeled it as patrimonial.⁸

But I do not believe we should prolong a conceptual discussion, since the difficulty that must be overcome is essentially empirical. The problem is not in interpreting the Brazilian formation through the general characteristics of patrimonialism as conceptualized by Max Weber, a task satisfactorily undertaken by Fernando Uricoechea (1978), or through theorizing close to Weber's, such as Fernanda Olival's (2001) notion of *economia das mercês* (economy of mercies), Ângela Barreto Xavier and António Manuel Hespanha's (1993) *economia do dom* (economy of the gift), or João Fragoso's (2001) *economia do bem comum* (economy of the common good), all of which emphasize the bonds of reciprocity forged between the Crown and local officials and aristocrats through the granting of honors, titles, and mercies, which included appointments to offices and pensions, as well as donations of land and public assets. The logic underlying these prebendary relations, in fact, explains much of the cooperation the Crown secured from overseas society in carrying out the colonial enterprise, particularly in administrative

indicate that certain features of the phenomenon in question belong to the rational form of domination, while others pertain to the traditionalist form" (WEBER, [1946] 1971, p. 344). See Reinhard Bendix ([1964] 2019, p. 143) for a sharper distinction between the patrimonial administrative framework and legal-rational bureaucracy in Weber's theorization.

⁷ In the context of the Portuguese *Ancien Régime*, *honrarias* refers to titles or honorific distinctions; *mercês* to royal favors or grants, often involving offices, lands, or pensions; and *dons* to tangible gifts or goods bestowed by the Crown (*gifts or royal grants*).

⁸ This more rigorous interpretation of Raymundo Faoro's work was criticized by Fábio Konder Comparato (2003, p. 332), but I consider it a valid view.



centers. What seems implausible, however, is to find in sixteenth-century Brazil anything resembling legal-rational domination, which would only emerge as a clearly defined project in the eighteenth century and would take full shape even later.

Jean Bodin ([1576] 2011, p. 207) observed, in sixteenth-century Europe, that the phrase written at the end of the ordinances of the *Ancien Régime*, “for such is our will,” held a key to understanding how normative documents issued by the State were gaining importance in the creation of law. In this sense, law, in its modern meaning as a command arising from the will of the sovereign State, differed significantly from the preceding medieval legal experience, in which law originated from doctrinal construction based on Roman law, the *Ius Commune* (CAPPELLINI, 2008), and from own laws, namely written legislation or immemorial customs that expressed the freedom enjoyed by each locality and group (ethnic, social, professional, religious, etc.) to regulate itself according to the way life was lived (GROSSI, 2007, p. 27; 2014, p. 70). In the *Ancien Régime* experienced by Bodin, the State was becoming autonomous from society, taking with it the prerogative to define and order society legally and, ultimately, to constitute it as a political community by imposing its will. The path by which modern law would come to fully supplant the medieval system of legal sources would be a long one. Strictly speaking, the project of monopolizing the making of law by the State would only be fully conceptualized from the Enlightenment and the codification of law onward, a moment when the State, in its claim to completeness of law, sought to regulate through general and abstract laws all aspects of social life and to relegate other normative expressions to illegality. It was only at this time that the conceptions of legal monism and legalism emerged, meaning the exclusivity of State law as a source of law and, consequently, the identification of law and State order.⁹

To believe therefore that in sixteenth-century Brazil the State’s political power kept strict control over social life, not allowing the existence of local powers, and that “to the south and to the north, the centers of authority are branches of Lisbon: the State, imposed on the colony before it had people, remains intact” (FAORO, [1958] 2001, p. 193), is to assert that legalism emerged in Brazil three centuries ahead of Europe. Meanwhile,

⁹ European legal historiography has examined the process by which law came to be reduced to State legislation, as evidenced in the works of Paolo Cappellini (2010, pp. 111–121), Giovanni Tarello (2008), Thomas Simon (2008), Antonio Padoa-Schioppa (2014, p. 324 ff.), Michael Stolleis (1998), Maurizio Fioravanti (2004, p. 21), Bartolomé Clavero (2018, p. 111), Jean-Louis Halpérin (2012, p. 231; 2018), Dominique Bureau (2012, p. 226), and John Gilissen (1995, p. 417).



in France, a country regarded as a leader in the centralization of political power and the expropriation of autonomous powers (GROSSI, 2005, p. 49), Voltaire ([1764] 1901, v. 4, part 2, p. 42) lamented in the eighteenth century, in a pointed condemnation of local laws, that “there are, it is said, one hundred and forty-four customs in France which possess the force of law. These laws are almost all different in different places. A man that travels in this country changes his law almost as often as he changes his horses.” Portugal was not much different: António Manuel Hespanha (2006, p. 134) pointed to the existence of what he called informal mechanisms of social regulation, closely resembling the legal pluralism of ancient customs and local laws, showing that the State order of the Portuguese *Ancien Régime* still did not claim for the political sphere the exclusivity of lawmaking.

The anachronistic view of Raymundo Faoro, also identified by Ivan Vellasco (2009, p. 79), projected the legal mentality of his own era onto Brazil’s colonial past. One possible argument to preserve Faoro’s account would be that, driven by the need to exercise closer control over the colonial enterprise in pursuit of profit, the Portuguese Empire innovated in its legal governance of the colonies. The metropolis accelerated the arrival of a legalist legal order in Brazil, while in Portugal the legal pluralism of the *Ancien Régime*, as identified by António Manuel Hespanha, persisted. This would imply two legal models within the same Empire, one for the colony and another for the metropolis. Yet such an explanation does not withstand the empirical evidence of the sources. Few State regulations were specifically issued for Brazil, as Pedro Cardim and Miguel Baltazar (2017, p. 194) have shown through archival research. The legal framework remained virtually identical. Nor was there any extensive bureaucracy in the colony capable of rigorously implementing the commands of the Portuguese central authority. Beyond the empirical obstacles created by the scarcity of historical sources, this hypothetical reasoning would also contradict Faoro’s own claims, in which he remarked that “the Portuguese jurists and bureaucrats, poor in creative inspiration [...] transplant [to Brazil] more than they adapt, export more than they build” (FAORO, [1958] 2001, p. 204). What can be said of the thesis of two distinct legal experiences within the Portuguese Empire? If anything was transplanted to Brazil, it was Portugal’s legal pluralism!¹⁰

¹⁰ Transfer, transposition, circulation, reception, hybridization, adaptation, recontextualization, and translation are among the analytical categories used by legal historians to understand how European law was operationalized in the colonies. One of the most compelling discussions of these concepts is arguably that offered by Lena Foljanty (2015).



The legalist order, therefore, did not arrive in Brazil aboard Pedro Álvares Cabral's caravels, as was suggested by the simplistic and anachronistic account of Raymundo Faoro in yet another of his metaphors: "With the towns was established, on the beaches or in the hinterland, the rigid, inviolable, and hieratic word of the Ordinances" (FAORO, [1958] 2001, p. 173). The reduction of law to State legislation, a legal order aimed at regulating all aspects of social life in the abstract, the expansion of bureaucracy throughout the national territory to ensure the strict enforcement of legal norms, and the political power of the State monopolizing the legitimate use of force are features of a legal mentality that was far from being hegemonic at the time of Portuguese maritime expansion. The State's legal order did not exhaust all lawmaking in the *Ancien Régime*, which coexisted with a normative autonomy grounded in local power structures and customary ways of life.

Instead of the reductionist narrative advanced by Raymundo Faoro, which finds legalism in the baggage of *governadores-gerais* (governors-general), *donatários* (donatary captains), *senhores de engenho* (sugar plantation owners), and *degradados* (exiled convicts), examining Brazilian specificities reveals a much more complex, hesitant, and engaging history, marked by ebbs and flows, legal pluralism, and intricate relations among autonomous powers. During the colonial period, the central authority of the Crown (the monarch and his *Conselho Ultramarino* [Overseas Council], etc.), the Crown's authority in Brazilian territory (*governadores-gerais* [governors-general], *vice-reis* [viceroys], *ouvidores* [robed appellate judges], *tribunais das relações* [appellate courts], *juízes de fora* [robed trial judges], etc.), the local powers (*câmaras municipais* [municipal councils] with *vereadores* [aldermen], *juízes ordinários* [lay municipal judges], and *almotacés* [municipal market inspectors]), and the domestic authority of landowners¹¹ interacted in diverse and complex ways: sometimes in harmonious coexistence or relative indifference toward one another, at other times through pacts of mutual support, or in conflict.¹² The normative autonomy of Indigenous peoples, *quilombolas* (*quilombo* residents),¹³ and religious

¹¹ This fourfold distinction of colonial powers was developed by João Fragoso (2017, pp. 53–54). Arno Wehling and Maria José Wehling (1994, p. 303) also made a classification similar to Fragoso's.

¹² The second part of Santi Romano's *O ordenamento jurídico* ([1917] 2008) offers an interesting analysis, from the perspective of legal theory, of the relationships that legal orders can establish among themselves in a context of legal pluralism, such as ignoring one another or declaring legality or illegality.

¹³ *Quilombo* is a term historically used in Brazil to designate settlements founded by escaped enslaved Africans, often located in remote or hard-to-reach areas, which became spaces of resistance and autonomous self-governance. *Quilombola* refers to an inhabitant or descendant of such communities. In English-language scholarship, the terms are frequently kept in Portuguese, sometimes accompanied by explanatory translations such as "maroon community" (*quilombo*) and "maroon" (*quilombola*) for comparative purposes, though these analogies do not fully capture the specific historical and legal context of Brazil.



missions can also be included in this complex legal landscape. The legal historian Massimo Meccarelli (2023, p. 179) has recently proposed the study of local laws in settlements of Italian and German immigrants, an approach that can further enrich the complexity of the Brazilian legal experience. With the advent of the Brazilian Empire, the centers of power shifted, yet they were not subsumed under State monism.

The legal experience of the European *Ancien Régime*, inherently pluralist, found fertile ground in Brazil. The vastness of Brazilian territory posed serious difficulties for the Portuguese Crown, which lacked resources to send its officials deep into the hinterlands. With the Atlantic Ocean separating the metropolis from its dominions, the landowners, who already governed the domestic order of their households (BARBOSA, 2023; HERMANDO, 2024; MANSUR, 2024; SEELAENDER, 2017; SONTAG, 2023), became accustomed to projecting their autonomy over local institutions. The *câmaras municipais*, composed of them, often acted as agents of contestation against the will of the monarchy, as when, in 1666, sugar plantation owners organized in one such câmara expelled the *governador de Pernambuco* (governor of Pernambuco), Jerônimo de Mendonça Furtado, back to the kingdom (DIÉGUES JÚNIOR, 1952, p. 7). As Evaldo Cabral de Mello (2012, p. 22) warned, the gravity of this event should be noted. The *governador*, more than merely the highest royal authority in the locality, was seen as the almost physical embodiment of His Majesty King Afonso VI. This and other exploits of *câmaras municipais* decisively undermine the label of “Lisbon branch” that Raymundo Faoro attributed to them.¹⁴ However, as Arno Wehling (2018), John Russell-Wood (2014, pp. 305; 315–316) and Maria Fernanda Bicalho (1998; 2010, p. 199) have shown, *câmaras municipais* did not subsist only on conflicts with the central power. Their collaborations with the Lusitanian administration, defending the land and collecting taxes, among other tasks carried out in exchange for prebends granted by the Portuguese monarch, were essential for the Portuguese Empire to extend overseas. Neither Lisbon branches nor miniature sovereign kingdoms, *câmaras municipais* drove the colonization process at the local level balancing tensions with the Crown between centralization and decentralization.

¹⁴ The semantic weight of Charles Ralph Boxer's ([1969] 2011, p. 278) words captures the animosity between the *câmara municipal* and the Empire: “Contrary to what is often claimed, the *câmaras municipais* rarely became mere vassals and uncritical ‘yes-men’ to government officials, whether viceroys or judges of the Supreme Court [...]. Their power, influence, and prestige were considerable throughout the entire colonial period, although greater in certain times and places than in others.”



The *juízes ordinários*, members of the *câmaras municipais*, exhibited a particularly intriguing dual role: while in contact with the official law of the kingdom, they were also deeply embedded in local legal traditions and interests. The *Ordenações Filipinas* (Philippine Ordinances) (PORTUGAL, [1603] 1870, pp. 134-135) characterized them as bodies belonging to the organization of metropolitan justice (Phil. Ord., book I, title LXV). But since their appointment was carried out by election among the men of the locality, and they were not necessarily trained in law, they often presided over and decided cases applying the legal mentalities of the locality, with their own customs and judgments of equity, or yielding to the pressures of powerful landowners (SCHWARTZ, 2011, p. 209). Their judicial practices took little account of the official law of the kingdom. In other cases, instead of adjudicating disputes, *juízes ordinários* contented themselves with mediating them, especially when the issue involved conflicts between influential families.

When a *juiz de fora* was sent from the metropolis to the periphery, discontent arose among the local people because his presence encouraged the application of the official law (HESPANHA, 1994, p. 198). Observing this feature of the history of justice in the colony, in which the *juízes ordinários* were well regarded by local communities, while there was some hostility, or at least rivalry, toward the *juízes de fora*, António Manuel Hespanha informed us of an interesting event that reveals some characteristics of the legal autonomy of Brazilian towns afforded by the *juízes ordinários*. Having as a historical source a letter, belatedly published in 1821, from a resident near the São Francisco River to the son of a close friend living in Rio de Janeiro, Hespanha told us that, in a certain town, there were two judges, one Indigenous and one white man. The white judge was learned and knowledgeable in the Ordinances and the doctrines of the *Ius Commune*; the Indigenous judge adjudicated cases only orally. It was “remarkable that the Indigenous judge, without resolving Bartolus or Accursius, almost always judged with justice, rectitude, and equity, whereas the white judge, entangled in the intricate tricks of devious chicanery, rarely got it right” (HESPANHA, 2012b, p. 109). Tensions were also frequent when *ouvidores reais*, subordinate to the king, acted on appeals against decisions of the *juízes ordinários*, as observed by Luís Fernando Lopes Pereira (2020) in archival research on the *Ouvidoria do Paranaguá* (Paranaguá Royal Judicial District).

Decentralization, when excessive, created difficulties for the Portuguese Empire, but there was also a pragmatic logic behind this mode of governance. The freedom to manifest one’s own laws, as shown by the anecdote of the two judges, was probably



responsible for preventing certain types of deadlocks that would have arisen if the Portuguese Empire had vehemently imposed the law of the kingdom. The Crown's weakness was its strength; or its strength was its weakness. Portuguese pluralism flourished in its colonies also due to a pragmatic Lusitanian culture: each colony could solve its problems in its own way, as long as it paid its taxes. With the *juízes ordinários*, the Crown ruled without controlling. These individuals, even when they applied a law different from the official law, were also the jurisdictional vanguard: the first body to be established by the metropolis in remote localities in an attempt to resolve conflicts scattered throughout the hinterlands, as Joaquim Romero de Magalhães (2011, pp. 578, 583) demonstrates in an interesting collection of documents on the *juízes ordinários* published in the *Revista do Instituto Histórico e Geográfico Brasileiro*. But for Raymundo Faoro, who did not capture Portuguese pragmatism, the only way to rule was by rigidly transplanting the legal order to the overseas territories.

Historiography has long compared Lusitanian and Spanish cultures in an effort to differentiate two legal mentalities. This Iberian contrast gave rise to the well-known metaphor of the tiler and the sower, captured by Luiz Guilherme Piva (2000) and by Sérgio Buarque de Holanda ([1936] 2006), of a people more imposing and assertive, who almost intended to create a New Spain in the American lands, and another more plastic and pragmatic. But this interpretation has been questioned by the studies of *Derecho Indiano*, and “the more recent historiography has increasingly emphasized the pluralism and heterogeneity of the Spanish Empire” (HESPANHA, 2016a, p. 79). Research by Tamar Herzog (2021b, p. 709) on Spanish America also tells of a plurality of communities, rather than a unitary structure led by the king. The renewal of Spanish legal historiography reminds us to remember that we are within the framework of the *Ancien Régime* and that centralizations comparable to contemporary legalism are not plausible. This shift in perspective also influences our understanding of the Portuguese Empire: its decentralization, rather than a trait unique to Portuguese political culture, appears rather as a broader feature of *Ancien Régime* law and perhaps of the legacies of *the lus Commune*.¹⁵

¹⁵ The expansion of European law to the colonies took place according to the specificities found in each empire. Although the preservation of legal pluralism, even if translated in different ways to the new contexts, seems to be a constant in the various empires of Western Europe, as observed by the legal historiography of António Manuel Hespanha (2006b) for the Lusitanian Empire, Víctor Tau Anzoátegui (2015), Matthew Mirow (2018), and Tamar Herzog (2013) for the Spanish case, Serge Dauchy (2018) and Florence Renucci (2021) for the French colonies, and Mark Hickford (2018) and Ken MacMillan (2018) for the British Empire. Perhaps an



Once again, adopting a perspective that scrutinizes the strategies of the central authority in its interactions with other legal orders and power structures, strategies that were not always marked by an arrogant imposition of authority, especially when such authority was lacking, can uncover valuable historical interpretations. Was delegating to local individuals, such as the *juízes ordinários*, the *vereadores* of the *câmaras municipais*, the *corpos de ordenanças* (local militia),¹⁶ among others, the exercise of jurisdiction and certain military, fiscal, and administrative functions not, in a way, a means of making itself present in the hinterlands? Could it not have been the means devised to colonize and attempt to integrate the colonized into the society and political order of the empire at practically no cost? Did mediating the well-known family feuds of the hinterlands, in the absence of a police force to enforce jurisdiction, not bring more prestige to the Portuguese legal order than simply distancing itself from the problem? Were these actions not strategies of the Portuguese legal order, but in a way very different from the overbearing model imagined by Raymundo Faoro, in which “the law is the law of the kingdom and not that of the hinterlands”? (FAORO [1958] 2001, pp. 191–192).

Câmaras municipais composed of local inhabitants and elected *juízes ordinários* reveal that the imperial “shell” (FAORO, [1958] 2001, p. 192) did not suffocate other centers of power, in this case the local one. In the actions of the staff belonging to the Crown’s authority in Brazilian territory, methodical measures necessary for the execution of official duties were also not exactly what was found. Laura de Mello e Souza (2006) used a very curious comparison between the Lusitanian Empire and the solar system made by Father Antônio Vieira to write *O sol e a sombra*. Regarding the solar system, Vieira said in the mid-1600s that “when the sun is at its zenith, the shadow is very small and entirely below your feet; but when the sun is in the east or west, that same shadow stretches so far that it barely fits within the horizon.” The comparison with monarchical power suggested that the rays emanating from the prince’s head illuminated and dispelled any shadow near the source, that is, the king’s will. But as distances advanced,

important factor that brings these different national cases closer is the shared legal-cultural heritage of the *Ius Commune*, but only a comparative study that takes this context into account would make it possible to verify this hypothesis (PIHLAJAMÄKI, 2015). Part of this task, in fact, was undertaken by a recent article by Tamar Herzog (2021a), which seeks to consider how the adoption of local colonial customs reflected older practices of European law.

¹⁶ Ana Paula Pereira Costa (2006, pp. 110–113) and Arno Wehling and Maria José Wehling (2008) have examined the Portuguese military organization in the colony, which included not only regular troops but also civilians. Cristiane Figueiredo Pagano de Mello (2006) has noted that the *ordenanças* served, in addition to defense, a symbolic role in shaping Brazilian colonial society.



moving away from the zenith, areas of penumbra obscured the prince-sun's government. His officials did not obey him properly and local powers gained relevance. "Where the sun is at the zenith, these shadows lie not only at the feet of the prince but also at those of his ministers. But when they reach the Indies, where the sun rises, or these lands, where it sets, the same shadows grow so greatly that they far exceed the stature of the kings whose images they are" (VIEIRA, 1940, vol. 2, p. 275). It is intriguing to note that, even having access to Father Antônio Vieira's sermon, Raymundo Faoro did not renounce his premises, needing to twist the meaning of the historical source: "The official is the shadow of the king, and the king can do everything" (FAORO [1958] 2001, p. 204).¹⁷

Taking Max Weber's ([1946] 1971, p. 211) definition of power as the "possibility that a man, or a group of men, may carry out his own will in a community action even against the resistance of others who took part in the action," it follows that the Crown's bureaucracy in colonial territory could sometimes constitute a center of power with centrifugal wills distinct from that of the metropolis. Heaven and Tartarus, the divine Father Antônio Vieira and the *Boca do Inferno* ("Hell's Mouth"),¹⁸ would have to agree! Gregório de Matos ([between 1690 and 1694] 1943, vol. II, p. 242), a contemporary of the priest, had personal reasons for mocking Governor Antônio Luís Gonçalves da Câmara Coutinho, who had not granted him a requested mercy (PAPAVERO, 2008, p. 11). Nevertheless, the excerpt below from a satirical poem reveals a certain autonomy of the colonial government pointing out a contradiction in a prince supposedly sovereign, but flexible to the designs of a tyrannical governor.

The sovereign Prince,
a good Christian, God-fearing,
If Heaven does not come to his aid,
Pays tribute to a mere mortal:
He is subject to the Tyrant
Who, flattering the ambitious,
Is a venomous asp,

¹⁷ Antônio Manuel Hespanha (2012a, p. 168) has likewise pointed out the glaring inconsistencies in Raymundo Faoro's work: "An extreme case is that of Raymundo Faoro who, despite presenting an impressive array of anti-centralist arguments, remains entirely captive to an 'absolutist' and 'exploitative' interpretive model of Luso-Brazilian history."

¹⁸ *Boca do Inferno* ("Hell's Mouth") was the nickname given to the Bahian satirical poet Gregório de Matos (c. 1636–1696), renowned for the sharpness and acerbity of his criticisms against colonial authorities, the clergy, and the society of his time.



Who, clouding his senses,
Leaves him muddled of hearing,
And deceives his very sight.

If the King had been informed
Of who the Tyrant¹⁹ truly was,
He would never have come to Bahia
To govern an honorable people:
But the King was deceived,
And I, as one of the people, paid the price;
For it is already custom, already law
In kingdoms without exception,
That the wretched vassal must pay
For the King's inattention.

The mindset of Father Antônio Vieira and Gregório de Matos, as well as that of Voltaire, in advocating the reduction of law to that which emanates from central authority, gradually fostered a legal culture that called for the replacement of legal pluralism with monism. Yet it was with a vacillating, or rather patrimonial bureaucracy, in Max Weber's characterization and not in that of Raymundo Faoro, that colonization was carried out.

III Legal Pluralisms in the Brazilian Empire

José Murilo de Carvalho (2017, p. 249) offers a particularly apt description of the Empire of Brazil (1822–1889) as a moment of primitive accumulation of political power, that is, of intensification in the strengthening of the State apparatus, with an expansion of the bureaucracy and the political elite, which were recruited mainly from jurists trained in the newly founded Brazilian law schools. The intense codification of law and the granting of the first Brazilian Constitution played a decisive role in this phenomenon. It would therefore be legitimate to ask whether Raymundo Faoro's error was not partial, whether

¹⁹ In some editions (MATOS, [between 1690 and 1694] 2014, vol. 1, p. 235), perhaps due to paleographic divergences in interpreting the original manuscript, this second reference to the term "tyrant" is replaced by "toucan," a term used in other poems by Gregório de Matos to satirize Governor Coutinho's wide nostrils.



his interpretation might not hold true for the Brazilian Empire, about which he assured us, in the same lofty style, that after the more liberal early years of the Regency, “all authority becomes bureaucratized, from the quarter inspector to the minister, arranged hierarchically from top to bottom” (FAORO [1958] 2001, p. 384), or even that “all power emanates from the king and returns to the king” (FAORO [1958] 2001, p. 385). I continue to believe, despite this primitive accumulation of political power, that the legalist project was far from being consolidated in the Brazilian Empire. Newspapers of the time reveal the fragility of the State in the backlands, which faced resistance from domestic power, sometimes acting in conjunction with institutions of municipal, provincial, and even imperial authority. The newspaper *O Progresso*, for example, protested against the fact that the guarantees of the law did not reach the interior of rural properties, which were administered by the patriarchs (INTERIOR, 1846, pp. 208–209). In the *Diário de Pernambuco*, the article entitled *Nossos Valentões* (1843, p. 2) compared domestic power to European feudalism. Under the pseudonym *Matuto* (1829, p. 147), a contributor complained to the editors of the same newspaper that when a local potentate, powerful for private reasons, rose to public office, his arbitrariness toward the population became even greater. The State, during the Brazilian Empire, continued to coexist with autonomous powers.

The Empire of Brazil struggled to extend its reach to the periphery. Paulino José Soares de Sousa, Viscount of Uruguai (1862, p. 184), in his *Ensaio sobre o direito administrativo*, described a State with an oversized head but almost no arms or legs, implying that beyond the imperial and provincial capitals, central authority rarely penetrated the hinterlands: “administrative action fortified only at the center, entirely discretionary, without council, and without its own and natural auxiliaries. In various parts of the vast provinces, it can scarcely make its effective action felt. They are bodies whose circulation does not reach their extremities” (SOUSA, 1862, p. 205). Examining the interaction between central power and the autonomous powers, which remained strong in the Empire and were expressed, for instance, in the *Guarda Nacional* (National Guard)²⁰ and in the *juízes de paz* (justices of the peace), provides a privileged vantage point for

²⁰ Tha *Guarda Nacional* (National Guard) was a militia-like force created in 1831 in the Empire of Brazil, composed primarily of landowners and other *homens bons* (local notables), who served as officers and financed its activities. The Guard was intended to support public order and supplement the small standing army, often functioning as an instrument of local elites and a channel for the State’s indirect control over the province.



observing how the State sought to impose its order in the backlands, even without a constant presence. A cursory reading of this jurist might suggest a complete imperial failure to project authority into the hinterlands. In some features, it was. Yet a more discerning perspective reveals how certain private powers were co-opted by the State as a form of *longa manus*. Between the 1830s and the Paraguayan War, the Empire maintained only a small standing army, while the self-financed *Guarda Nacional* commanded an enormous force. Security and order were outsourced to landowners and other *homens bons* (local notables), who led the imperial *gendarmérie* named *Guarda Nacional* (MANSUR, 2025). As José Murilo de Carvalho (2017, p. 275) aptly notes, the “State could afford not to militarize itself because society was militarized.”

Independence demanded the creation of law schools, which until then did not exist in Brazil, to train professionals for the administration of justice and government, and to educate the political elite (APOSTOLOVA, 2017; VENANCIO FILHO, 1982, p. 19). It was imprudent for the emancipatory ideal to continue training graduates at Portuguese law schools (ADORNO, 1988, p. 77). In the 1823 Constituent Assembly, deputy Carneiro de Campos already warned that “we still do not have a university, and we have a great shortage of magistrates for many positions in the provinces, which are currently served, to the grave detriment of the public cause, by lay and ignorant judges” (BRASIL, [1823] 1874, vol. 5, p. 70). Antônio Carlos Andrada Machado, constituent and president of the committee that drafted the 1823 text, added that without legal courses there would be “no worthy magistrates [nor] legislator, [because they would not] know what [is] legislated, nor how to legislate” (BRASIL, [1823] 1874, vol. 6, p. 161). The Empire of Brazil inherited from the colony this lag in the State institutions, especially in the hinterland. Faced with the need to distribute justice, but lacking the capacity to do so with trained jurists, the Empire of Brazil employed the same cunning as the Portuguese colonizers: it created the position of *juiz de paz* (justice of the peace), elected from among lay citizens, and delegated to them certain judicial tasks, particularly conciliation and the preparation of formal accusations in criminal proceedings.²¹

²¹ Extensive research has examined the liberal influences behind the creation of the *juiz de paz* (FLORY [1981] 1986). Yet, as Carneiro de Campos and Viscount of Uruguai remind us, beyond liberal ideals, a decisive factor in the privatization of justice was the scarcity of trained jurists in the emerging Empire of Brazil. Ivan de Andrade Vellasco’s analysis (2004, pp. 106–108) underscores this point: there was a “perception that mechanisms had to be introduced to establish justice, capable of extending its benefits to all, or nearly all, of the Empire’s territory. This would form one of the basic pillars for sustaining and consolidating the constitutional system, and a primary task of the State in the making [...]. When examining the *rol dos culpados*, the registers in which the *juizes de fora* recorded all those against whom a complaint had been accepted and



The *juízes de paz* were established by the 1824 Constitution and initially regulated by the law of October 15, 1827, and later by the Criminal Procedure Code of 1832.²² Some simple manuals, among which are those by Diogo Feijó ([1829] 2017) and Bernardo Pereira de Vasconcellos ([1829] 2017), were written in an attempt to guide the *juízes de paz* toward decisions more in line with those prescribed by State law (CAMPOS, 2017; SLEMIAN, 2017; MOTTA, 2017, p. 84). But it was imaginable that the work of laymen would generate some autonomy, as well as controversies, contradictions, assimilation of the interests of local powers, and the adoption of customary standards of justice. Speeches of the time even accused them of incompetence and corruption (CAMPOS, VELLASCO, 2011, p. 400). Humorous criticisms of the *juízes de paz* were common. A probably fabricated judgment was published in the *Jornal do Comércio (RJ)* on January 14, 1844, with the intention of suggesting that the *juízes de paz* conducted proceedings in a dubious manner and did not even know the names of the official legal codes (SENTENÇA, 1844, p. 2). But it was the theatrical farce *Juiz de paz na roça* by Martins Pena ([1837] 1956, p. 36) that took the criticism to another level: “Judge: Do you reply? Watch out or I’ll send you to jail. Manuel André: Your honor cannot arrest me for nothing; the Constitution does not allow it. Judge: The Constitution!... Very well!... I, the *juiz de paz*, hereby repeal the Constitution! Mr. Clerk, record that the Constitution is repealed, and order this man arrested. Manuel André: This is an injustice!”

Strictly speaking, both the robed judiciary and the lay judiciary are subject to corrupt practices in the name of interests adverse to justice. Behind many of the criticisms that accused the *juízes de paz* of corruption, perhaps unconsciously, there may have been elitist mentalities that did not admit the adoption of customary or local laws by the population. The excerpt above, in fact, reveals that Martins Pena endorsed a legalist legal culture, not necessarily homogeneous or hegemonic, but present in Brazilian society in the early nineteenth century, which did not tolerate judicial decisions that deviated from the lines established by written State law. It was a Voltairian facet of the Brazilian playwright, who wanted to put an end to the casuistry of judicial decisions. Legalism captivated the hearts of many, but it did not fully conquer the remote backlands, which remained under the customary jurisdiction of the *juízes de paz*. Yet, however much lay

criminal proceedings initiated, one detail is striking: the marked increase in entries in the years following the election of the *juízes de paz* in the district, in 1829,” suggesting that the *juízes de paz* played a concrete role in expanding access to justice.

²² *Lei de 29 de novembro de 1832* (BRASIL, [1832] 1899a).



magistrates could give way to local legal interests and customs, paradoxically, they also served the State purpose of monopolizing power, since, in the context of the absence of a sufficient number of trained jurists, it was better for the State to have its Constitution occasionally “repealed” by some *juízes de paz* than to have a hinterland without judges. In 1841, the Criminal Procedure Code of 1832 would be reformed,²³ reducing the powers of the unlettered judges. The “revoked Constitution would be restored”!

In the preface to the second edition of *Os donos do poder*, Raymundo Faoro emphasized that the core theses of 1975 remained the same as in the first edition of 1958. However, when we situate his intellectual production historically, it becomes evident that, moved by the atrocities of Brazil’s business-military dictatorship (1964–1985), Faoro amplified his historical interpretation in the expanded version of the work (BRITO, 2019a, p. 57, 2019b, p. 287).²⁴ The second edition appeared during a period in which Faoro was a prominent advocate for democracy, particularly active as a lawyer and in the press. In a recent account, Justice Luís Roberto Barroso (2022, p. 21), of Brazil’s Supreme Federal Court, recalled personal encounters with the author of *Os donos do poder*. As a member of committees and later as president of the *Ordem dos Advogados do Brasil* (OAB) in the 1970s, Faoro, who openly criticized what he saw as patrimonialism, did not shy away from confronting it, leading to tensions with the military, as recalled in the testimony of Maria Victoria de Mesquita Benevides (2003) and in studies by Isadora Volpato Curi (2019) and José Eduardo Faria (2021). Faoro also regularly championed democratic ideals in the media, whether through interviews (FAORO, [1979] 2008) or his weekly columns (FAORO, 2018). His work is far from ahistorical; it bears the imprint of post-1964 events and even of the shadows of totalitarian regimes that had loomed over Brazil and the world since the 1930s. This context explains his historical interpretation, which was clearly defined as early as 1958. To historicize *Os donos do poder* is to move beyond debates over its flaws and merits, recognizing instead how the author’s historical context and personal experience decisively shaped his scholarship. Totalitarianism led to an anachronistic approach in Faoro’s historiographical work.

²³ The code was amended by the *Lei de 3 de dezembro de 1841* (BRASIL, [1832] 1899b).

²⁴ Bernardo Ricupero and Gabriela Nunes Ferreira (2021, p. 756) noted, on the other hand, how the reception of the two editions of *Os donos do poder* was quite different. The new context encouraged renewed interest in Raymundo Faoro’s work by explaining Brazilian authoritarianism. The first edition of the book took ten years to sell out, whereas the second did so in ten months. Marcelo Jasmin (2021, p. 784) also attributes part of the success of the second edition to the business-military coup.



IV Conclusions

Episodes from the colonial and imperial periods, recalled in a very general way in this brief essay, have shown that the expropriation of autonomous powers and own laws was a complex and long-term process, quite different from what is claimed by the historical interpretation of Raymundo Faoro, who envisions a well-structured State in the age of maritime exploration. Rather than a “State [that] superimposed itself, strange, alien, distant from society” (FAORO, [1958] 2001, p. 192), what can be seen, from the colony to the Empire of Brazil, are very intricate relations between the State and society, between central political power, political powers articulated at regional and local levels, community and domestic powers, each organized in its own legal order, written or customary, which constituted a complex legal pluralism. *Câmaras Municipais*, *juízes ordinários*, hesitant Portuguese officials administering the colony, *corpos de ordenanças*, *Guarda Nacional*, *juízes de paz* and domestic power: all these institutions, into which multiple interests and legal cultures flowed, were, if not established, at least recognized or reluctantly accepted by the central State power, in a pluralism that was part of the legal and political experience of the colony and the Empire. The State coexisted with the autonomy of other powers and legal orders in interactions between legal systems akin to those theorized by Santi Romano ([1917] 2008). Depending on the circumstances, it used them, was used by them, forged pacts with them, conferred legitimacy on them, repressed them, or criminalized them. There were tensions, but also substantial cooperation and tangible benefits for the Brazilian State.

Raymundo Faoro’s interpretation, which best reflects monist views held by a significant part of Brazilian historiography, nevertheless imposes a restriction on the research agenda and methodology in legal history. Law is sought only in the will of the sovereign State. Other forms of law are understood as ephemeral episodes of autonomy or as corrupt practices and, therefore, matter little for research. The essence of a pluralist law is confused with corrupted exceptions to a monist law. The use of historical sources is also restricted. Sources from State institutions, such as the *Ordenações Portuguesas*, opinions of the *Conselho Ultramarino*, reports from Portuguese officials stationed in Brazil, and judicial proceedings from the *Tribunal das Relações* gain special relevance in such studies. In fact, more than special relevance, this official type of source is, perhaps unconsciously, regarded as sufficient to construct histories of the Brazilian legal



experience since the colonial period, because, in Faoro's perspective, absolutist political power reduced law to the monism of the State order. Memoirs, oral accounts, newspapers, artistic expressions, and other sources from society appear as second-class sources. Fortunately, a new Brazilian legal historiography, which emerged in the late 1980s and is now probably in its third or fourth generation of researchers, has been gaining strength. This historiography is spread across research groups in Brazil and maintains important intellectual contact with Hispanic-American studies of *Derecho Indiano* and with the legal history produced in recent decades in Europe. This historiography, self-aware in its destructive stance toward State-centrism and monism, has turned to the legal plurality of the Brazilian experience, so much so that this essay may soon be rendered unnecessary.

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Authorship Credits

The author is solely responsible for the writing of this article.

Conflict of Interest statement

There are no potential conflicts of interest in the conduct and communication of this research.

Funding Information

This research was carried out with funding from the Coordination for the Improvement of Higher Education Personnel (CAPES).

Data Availability Statement

The data supporting the conclusions of this study are available in the article itself.

Editors Responsible for the Evaluation Process and Editing

Carolina Alves Vestena and Bruna Bataglia.

