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Contracting freedom: the making of the law of labor in nineteenth-century Brazil

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CONTRACTING FREEDOM: THE MAKING OF THE LAW OF LABOR IN NINETEENTH-CENTURY BRAZIL

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De las generaciones de los textos que hay en la tierra
sólo habré leído unos pocos,
los que sigo leyendo en la memoria,
leyendo y transformando.
Del Sur, del Este, del Oeste, del Norte,
convergen los caminos que me han traído
a mi secreto centro.
Esos caminos fueron ecos y pasos,
mujeres, hombres, agonías, resurrecciones,
días y noches,
entresueños y sueños,
cada ínfimo instante del ayer
y de los ayeres del mundo,
la firme espada del danés y la luna del persa,
los actos de los muertos,
el compartido amor, las palabras,
Emerson y la nieve y tantas cosas.
Ahora puedo olvidarlas (…).
Pronto sabré quién soy[*].

[*] José Luis Borges, *Elogio de la sombra* (s.l.: Ediciones Nepeus, 1969): 28-29.

ACKNOWLEDGMENTS

Señoras y señores
Sepan ustedes
Que es la flor de la noche
Pa quien la merece
Volá volando voy
Volando vengo
Por el camino yo me entretengo[*]

The winding paths taken during the last four years comprised countless departures and landings, gatherings and leavings, splits, and reconciliations. I thank each and every one who crossed my way during this journey. I wouldn't rewrite a single line of the map traveled so far nor erase a single name who helped me to draw its route. Librarians, archivists, university workers, professors, colleagues, friends, affections, and family: high flights comprise stable platforms and fleeting (dis)encounters. On either side of the ocean, I lost and found them both. I treasure and heartily *agradeço* you all.

[*] José María López Sanfeliu, "Volando voy," in *La leyenda del tiempo,* recorded by José Monje Cruz (Madrid: Philips--Polygram, 1979).

ABSTRACT

The research examines the shifting legal landscape of labor in Brazil from the period immediately following Independence (1822) until the formal abolition of slavery (1888). While the rise of contract and liberal reforms changed the legal lexicon of labor already in the first decade of Independent Brazil, they did not erase the legal grammar of the old regime nor altered the plural dynamics of the sources of law and personal statuses, but even contributed to further expand and complexify it. This study then inquires the complexity and plurality of Brazilian labor landscape across four key dimensions: firstly, the diverse array of legal subjectivities, embracing workers with distinct legal statuses, including those who were free, freed, enslaved, nationals, foreigners; secondly, the varying temporal origins of legal sources, encompassing labor norms from the colonial period, national laws, law of slavery; thirdly, the intersection of different legal sectors, drawing labor norms from civil, commercial, and criminal law; and finally, the diverse moments of normative production, spanning from contractual practices to state regulations and judicial conflicts. The resulting picture is a singular mosaic that offers the possibility of reading from a local and empirical perspective some shared legal problems within the Atlantic space in the era of emancipation, such as the long coexistence between slavery and liberalism; the proliferation of special contractual legal regimes alongside the unification of the subject of law; and the remaking of punishment and work control under the spread of free labor ideologies.

RIASSUNTO

La ricerca esamina i problemi giuridici emergenti dal mondo del lavoro in trasformazione in Brasile dal periodo immediatamente successivo all'Indipendenza (1822) fino all'abolizione legale della schiavitù (1888). Sebbene l'ascesa del contratto e le riforme liberali abbiano cambiato il lessico giuridico del lavoro già nel primo decennio del Brasile indipendente, esse non hanno cancellato la grammatica giuridica dell'antico regime né hanno alterato le dinamiche pluralistiche delle fonti del diritto e degli status personali, contribuendo anzi a espanderle e a renderle più complesse. Questo studio indaga quindi la complessità e la pluralità del paesaggio del lavoro in Brasile attraverso quattro dimensioni: in primo luogo, l'eterogenea gamma di soggettività giuridiche, che comprende lavoratori con status giuridici diversi, tra cui quelli liberi, liberati, schiavizzati, nazionali e stranieri; in secondo luogo, le diverse origini temporali delle fonti giuridiche, che comprendono le norme sul lavoro del periodo coloniale, le leggi nazionali, il diritto della schiavitù; terzo, i settori giuridici coinvolti (diritto civile, commerciale e penale); infine, i diversi momenti di produzione normativa, che vanno dalle pratiche contrattuali ai regolamenti statali e ai conflitti giudiziari. Il quadro che ne risulta è un mosaico singolare che offre la possibilità di leggere da una prospettiva locale e empirica alcuni importanti problemi giuridici condivisi nello spazio atlantico nell'era dell'emancipazione, come la lunga coesistenza tra schiavitù e liberalismo; la proliferazione di regimi giuridici contrattuali particolari in parallelo all'unificazione del soggetto di diritto; e la riformulazione della punizione e del controllo sul lavoro a fronte della diffusione delle ideologie sul lavoro libero.

RESUMEN

La investigación examina los problemas jurídicos emergentes del mundo del trabajo en transformación en Brasil desde el período inmediatamente posterior a la Independencia (1822) hasta la abolición legal de la esclavitud (1888). Aunque el ascenso del contrato y las reformas liberales modificaron el léxico jurídico del trabajo ya en la primera década del Brasil independiente, no borraron la gramática jurídica del antiguo régimen ni alteraron la dinámica plural de las fuentes del derecho y de los estatutos personales, sino que contribuyeron a ampliarlos y complejizarlos. Este estudio indaga, por tanto, la complejidad y pluralidad del panorama laboral en Brasil a través de cuatro dimensiones: en primer lugar, el heterogéneo abanico de subjetividades jurídicas, compuesto por trabajadores con diferentes estatutos jurídicos, incluyendo libres, libertos, esclavizados, nacionales y extranjeros; en segundo lugar, los diferentes orígenes temporales de las fuentes jurídicas, que incluyen normativas laborales del período colonial, leyes nacionales, derecho de la esclavitud; los diferentes sectores jurídicos implicados (derecho civil, mercantil y penal); y, por último, los diferentes momentos de producción normativa, que van desde las prácticas contractuales hasta las normativas estatales y los conflictos judiciales. El cuadro resultante es un mosaico singular que ofrece la posibilidad de leer desde una perspectiva local y empírica a problemas jurídicos compartidos en el espacio atlántico en la era de la emancipación, como la larga coexistencia de la esclavitud y del liberalismo; la proliferación de regímenes jurídicos contractuales especiales en paralelo a la unificación del sujeto de derecho; y la reformulación de la punición y del control sobre el trabajo bajo la difusión de las ideologías del trabajo libre.

LIST OF ABBREVIATIONS

AHDE – Anuario de Historia del Derecho Español

ANRJ – Arquivo Nacional do Rio de Janeiro

BNRJ – Biblioteca Nacional do Rio de Janeiro

CDIB – Collecção das Decisões do Governo do Imperio do Brazil

CLIB – Collecção das Leis do Imperio do Brazil

CMU – Centro de Memória da Universidade Estadual de Campinas

HAHR – Hispanic American Historical Review

IHGB – Instituto Histórico e Geográfico Brasileiro

IRSH – International Review of Social History

LHR – Law and History Review

OF – Ordenações Filipinas

QF – Quaderni fiorentini per la storia del pensiero giuridico moderno

RBH – Revista Brasileira de História

RIOAB – Revista do Instituto da Ordem dos Advogados Brasileiros

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CHAPTER 3

THE LAW OF LABOR BEYOND LABOR LAWS: MERCHANTS, SLAVES AND SERVANTS

INTRODUCTION: WITHIN THE LANDSCAPE OF THE RIVER

Entre a paisagem
o rio fluía
como uma espada de líquido espesso. (...)
Entre a paisagem
(fluía)
de homens plantados na lama;
de casas de lama
plantadas em ilhas
coaguladas na lama;
paisagem de anfíbios
de lama e lama. (...)
O rio sabia daqueles homens sem plumas.
Sabia
de suas barbas expostas,
de seu doloroso cabelo
de camarão e estopa. (...)
Porque é na água do rio
que eles se perdem
(lentamente e sem dente).
Ali se perdem
(como uma agulha não se perde).
Ali se perdem (como um relógio não se quebra). (...)
Na paisagem do rio difícil é saber
onde começa o rio;
onde a lama
começa do rio;
onde a terra
começa da lama;
onde o homem,
onde a pele
começa da lama;
onde começa o homem naquele homem (...)
O homem, porque vive, choca com o que vive.
Viver é ir entre o que vive.
O que vive
incomoda de vida
o silêncio, o sono, o corpo
que sonhou cortar-se
roupas de nuvens.
O que vive choca, tem dentes, arestas, é espesso.
O que vive é espesso
como um cão, um homem,
como aquele rio.
Como todo o real é espesso
Aquele rio é espesso e real[1].

[1] "Within the landscape / the river flowed / like a sword of heavy liquid. (...) Within the landscape / (flowed) / of men planted in the mud; / of houses of mud; planted in islands / coagulated in the mud;

Fluid, heavy and real, "the way everything real is heavy", in the acute depiction of the Pernambucan poet João Cabral de Melo Neto. The legal landscape we are about to penetrate will not lead us to a static and transparent channel. Despite the early efforts of Independent Brazil to construct a liberal legal order with all its attributes of simplicity and predictability, its nineteenth-century legal history was anything but a reassuring, flat, and translucent State-based law, driven by the paradigm of contract. The legal order under transformation and construction after Independence, even if heavily committed to liberal ideals from the very first hour, was rather a deep flowing river, in whose waters and mud men navigated and collided.

The expression "in the making" that appears in the title of this thesis tries to convey the gradualness of this process, but its sequence hints that the focus of this research is on a particular legal sector: the legal regulation of labor[2]. The tributary of the river, which, more than any other, was made of man and mud,[3] was precisely the field where the changes introduced by the principles of liberal law had a vaster impact.

/ landscape of amphibians / of mud and mud. (…) / The river knew / about those men without feather. / Knew / about their beards exposed, / about their sorrowful hair / of shrimp and hemp. (…) / Because it is in those waters / that they are lost / (slowly / and without sharpeness). / There they are lost / (the way a needle is not lost). / There they are lost / the way a clock is not broken. (…) / In the landscape of the river / it is hard to know / where the river begins; / where the mud / begins from the river; / where the land / begins from the mud; / where the man / where the skin / begins from the mud; / where begins the man / in that man. (…) Man, / because he lives, / collides with what is living. / To live / is to go into what is living. / What is living / discommodes life's / silence, the sleep, the body / that dreamed for itself / clothing cut from cloud. / What is living collides / has teeth, edges, is heavy. / What is living is heavy / like a dog, a man / like that river. / The way everything real is heavy. / That river / is heavy and real." See João Cabral de Melo Neto, "O Cão sem Plumas," in *Poesia Completa* (Rio de Janeiro: Alfaguara, 2020): 99-114. For the English translation, see Thomas Colchie (trad.), "The Dog without Feather", *The Hudson Review* 24, no. 1 (1971): 23-35.

[2] The same expression appeared in the title of an important book on the history of labor law published in 1986, followed by a second volume two decades later. The construction – and successive transformation – that these books deal with, however, are about the emergence of an autonomous discipline called "labor law", chronologically and scientifically later to the object of this research. See Bob Hepple (ed.), *The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945* (London: Mansell Publishing Limited, 1986); Bob Hepple and Bruno Veneziani (eds.), *The Transformation of Labour Law in Europe. A comparative Study of 15 Countries. 1945-2004* (Oxford and Portland: Hart, 2009).

[3] The choice of the term "making" is also a conscious reference to the most influential book in twentieth-century labor history and the origin of the current widespread use of the concept "agency". The masterpiece of the English historian Edward Thompson has made it indispensable to consider the participation of the working class in its own making, an argument that inevitably also applies to the

The aim of extinguishing the multiplicity of legal statuses and sources – the very epitome of the transition from the old to the new regime – would affect like nowhere the dynamics of a legal sector based precisely on the plurality of professional rules, and corporations[4]. Likewise, the impetus to create a landscape of free and equal subjects clashed head-on with the bonds of dependence and coercion which until then had guided labor relations under the logic of domestic loyalties[5]. Affirming that the paradigm of contract penetrated, with concrete consequences, the worlds of labor in the nineteenth century, in Brazil and beyond, does not mean to suppose an immediate abolition of status divisions, nor that the first synonym for contract labor was free labor[6]. However, to acknowledge the visible changes in how work relationships were expressed, negotiated, and disputed once the contract paradigm invaded the worlds of labor is the first step to examine its contradictory outcomes.

This research is therefore devoted to the "legal problems emerging from labor relations"[7] at this crucial moment of (attempted) implementation of the liberal "legal

"making" of the law of labor. See Edward Palmer Thompson, *The Making of the English Working Class* (New York: Pantheon Books, 1964).

[4] On the necessity to examine the special laws of each professional group when studying the legal regulation of labor over the long term, see Werner Ogris, "Geschichte des Arbeitsrechts vom Mittelalter bis in das 19. Jahrhundert. Ein Überblick," in *Elemente europäischer Rechtskultur. Rechtshistorische Aufsätze aus den Jahren 1961-2003,* edited by Thomas Olechowski (Böhlau: Wien, 2003): 575-611 (576).

[5] For an efficient synthesis, see Giovanni Cazzetta, "Il lavoro," in *Enciclopedia italiana di scienze, lettere ed arti. Il contributo italiano alla storia del pensiero.* Diritto (Roma: Istituto della Enciclopedia Italiana, 2012): 422-429.

[6] Among the extensive historiography, it suffices to recall: Stanley L. Engerman, "Servant to Slaves to Servants: Contract Labour and European Expansion" in P. C. Emmer, *Colonialism and Migration; Indentured Labour Before and After Slavery.* Comparative Studies in Overseas History (Dordrecht: Martines Nijhoff Publishers, 1986): 263-294; Robert J. Steinfeld, *The invention of free labor.* The employment relation in English & American Law and Culture, 1350-1870. Chapel Hill: The University of North Carolina Press, 1991); Robert J. Steinfeld, "Changing legal conceptions of free labor," in *Terms of free labor. Slavery, serfdom, and free labor,* edited by Stanley L. Engerman (Stanford: Stanford University Press, 1999): 137-167; and, more recently, Giovanni Cazzetta, "Contratto di Lavoro (Storia)" in *Enciclopedia del Diritto. I Tematici,* edited by Riccardo del Punta, Roberto Romei and Franco Scarpelli (Milano: Giuffrè, 2023): 137-163.

[7] As proposed by Cristina Vano under the expression *"storia dei problemi giuridici del lavoro"* in "Il diritto del lavoro nella storiografia giuridica germanica: prospettive a confronto," *Materiali per una storia della cultura giuridica* 17, no. 1 (1987): 129-144 (143).

project"[8], which in Brazil coincided, for at least sixty years, with the legality of slavery. For some years now, the social history of labor in Brazil has argued the necessity to read free and unfree labor experiences in combination[9], abolishing historiographical walls[10] and rejecting teleological and linear-based categories, such as "transition", as valid analytical tools.

By contrast, there is still no comparable concern in legal studies and historiography. Beyond keeping strong and rigid historiographical walls based on legal statuses – setting apart the legal history of free labor from the legal history of slavery –, there is still a profound lack of interest among labor jurists and legal historians to the period that precedes the birth of a specialized scientific discipline called "labor law."[11]

As an autonomous discipline within legal science – which includes the formulation of rules, principles, doctrines, and legal sources of its own – and not as a mere development of the civil law tradition, it is quite clear that Labor Law has a very

[8] A reading of the liberal "model" or "project" that places some of its main theoretical bases in sixteenth and seventeenth-century England, with particular emphasis on the centrality of the contract category in its formulation, is delineated by Pietro Costa, *Il progetto giuridico. Ricerche sulla giurisprudenza del liberalismo classico. Da Hobbes a Bentham*, v. 1 (Milano: Giuffrè, 1974).

[9] For readings that function both as a manifesto and a historiographical balance, see Silvia Hunold Lara, "Escravidão, cidadania e história do trabalho no Brasil," *Projeto História,* 16 (1998): 26-38; John French, "A história latino-americana do trabalho hoje: uma reflexão autocrítica", *Revista História Unisinos* 6, no. 6 (2002): 11-28; Antonio Luigi Negro and Flávio Gomes, "Além de senzalas e fábricas: uma história social do trabalho," *Tempo Social* 18, no. 1 (2006): 217-240; Christian De Vito, Juliane Schiel and Matthias Van Rassum, "From bondage to Precariousness? New Perspectives on Labor and Social History," *Journal of Social History* 54, no. 2 (2020): 1-19.

[10] The strict opposition between free and unfree labor, which also endurably marked social historiography, was called – and criticized – as a "historiographical Berlin Wall" by Sidney Chalhoub and Fernando Teixeira da Silva, "Sujeitos no imaginário acadêmico: escravos e trabalhadores na historiografia brasileira desde os anos 1980", *Cadernos AEL* 14, no. 26 (2009): 14-47 (XX).

[11] An honorable exception is the recent work by Spanish labor lawyer Antonio Ojeda Avilés, *Las cien almas del contrato de trabajo*. La formación secular de sus rasgos esenciales (Pamplona: Aranzadi, 2017). Combining conceptual profiles and legal thinking with empirical data from contractual practice, the work traces a long-term history of the employment contract, drawing on a courageous multi-century itinerary in a "*foresta impenetrata e impenetrabile di cui si conosceva soltanto l'inizio e la fine, l'ingresso romanistico e l'uscita napoleonica*" (as described by Lorenzo Gaeta and Paolo Passaniti, "Recensione a Antonio Ojeda Avilés, Las cien almas del contrato de trabajo. La formación secular de sus rasgos esenciales (Aranzadi, 2017)," *Giornale di Diritto del Lavoro e di Relazioni Industriali,* 161 (2019): 199-201 (200).

recent temporal placement. The current discipline, "emancipated"[12] from civil law, with "normative (regular production of labor-related rules), jurisdictional and pedagogical/scientific autonomy (inclusion in the curricula of law schools and academic publications)"[13], is an "undesired son" [14] of the mass production processes of industrial society and the resulting social question[15]. It is from then on, undeniably, that a body of legislation organized around concepts specific to employment relations (such as legal subordination and hetero direction[16], the principle of worker protection, and collective legal instruments[17]) effectively takes place. One of the youngest – and, for many, still immature[18] – branches of law, especially when compared to the millennia-

[12] A term that recurs in much of the legal literature on the subject, it is nevertheless target of doctrinal criticism. As Maria Palma do Rosário observes: "*Ainda que compreensível, já que a afirmação autônoma do direito do trabalho significou, na sua gênese, a separação do direito civil, não podemos deixar de observar como esta ideia de emancipação é, do ponto de vista linguístico, reveladora de uma postura de menor confiança da doutrina na abordagem deste problema. De forma implícita, a recondução do processo de afirmação do direito do trabalho a um movimento de emancipação remete a área jurídica para um estatuto de incapacidade ou de menoridade, e não apenas para um estatuto diferente do direito civil. A verdade é que, ao longo do seu desenvolvimento, o direito do trabalho sempre mostrou dificuldades em se libertar do estigma de menoridade que lhe é imputado pela doutrina civilista*". See Maria do Rosário Palma Ramalho, *Da Autonomia Dogmática do Direito do Trabalho* (Lisboa: Almedina, 2000): 6. According to Umberto Romagnoli, this is the "great anomaly in the history of labor law": "*questo diritto si è allontanato abbastanza in fretta dal diritto privato, ma non si è mai svezzato del tutto dalla sua patria potestà*". See Umberto Romagnoli, "Prefazione," in *Diritto del lavoro e diritto civile. I temi di un dialogo* (Torino: Giappicchelli, 1994): 2.

[13] Ramalho, *Da Autonomia Dogmática do Direito do Trabalho*, 199.

[14] "*Il fatto è che la società industriale un figlio così, nevrotico e protestatario, non lo desiderava*", pointed out Umberto Romagnoli, "Alle origini del diritto del lavoro: l'età pre-industriale," *Rivista italiana di diritto del lavoro* 1 (1985): 514-527 (515).

[15] On "The 'Social Question' and the Emergence of Labour Law," see Bob Hepple, "Introduction," in *The Making of Labour Law in Europe,* edited by *The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945,* edited by Bob Hepple (London: Mansell Publishing Limited, 1986): 5-30.

[16] For the inevitable Italian brand heritage, see Bruno Veneziani, "Contratto di lavoro, potere di controllo e subordinazione nell'opera di L. Barassi," in *La nascita del diritto del lavoro. "Il contratto di lavoro" di Ludovico Barassi cent'anni dopo. Novità, influssi, distanze* (Milano: Vita e Pensiero, 2003): 381-450.

[17] Cristina Vano, "Riflessione giuridica e relazioni industriali: alle origini del contratto collettivo di lavoro," in *I giuristi e la crisi dello Stato liberale in Italia fra Otto e Novecento,* edited by Aldo Mazzacane (Napoli: Liguori, 1986): 125-156.

[18] Giovanni Cazzetta, "Il diritto del lavoro e l'insostenibile leggerezza delle origini," *QF,* 25 (1996): 543-572.

old tradition of the classic areas of private law, in Brazil and elsewhere[19], is a phenomenon of the twentieth century[20].

The acknowledgment of this temporal placement does not entail, however, a disregard of the pre-industrial age's legal problems of labor as undeserving of historiographical attention[21] or as a mere "pre-history" of labor law[22]. Labor lawyers used to the avalanche of social laws of the twentieth century usually limit themselves to a textual reading of previous legislation[23], superficially noting that these were short

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[19] *"La formazione del diritto del lavoro come area normativa o disciplina speciale è un fenomeno tipico di questo secolo"* has written the Italian jurist Gino Giugni in 1979. Now it is published in Gino Giugni, *Lavoro legge contratti* (Bologna: Mulino, 1989): 245.

[20] In Brazil, federal universities began to cover a discipline called "*Direito Industrial e Legislação Operária*" in 1926, which was transformed into "*Direito Industrial e Legislação do Trabalho*" in 1936. It was only by a Decree of 1956 that the discipline was renamed as "*Direito do Trabalho*". See Evaristo de Moraes Filho and Antonio Carlos Flores de Moraes, *Introdução ao Direito do Trabalho,* 10. ed. (São Paulo: Editora LTr, 2010): 101.

[21] This is expressly stated by the well-known Brazilian scholar Maurício Delgado Godinho, for whom it would not only be "*cientificamente desnecessária a busca de manifestações justrabalhistas em sociedades anteriores à sociedade industrial contemporânea*", but "*apenas a contar da extinção da escravutra (1888) é que se pode iniciar uma pesquisa consistente sobre a formação e consolidação histórica do Direito do Trabalho*". See Maurício Delgado Godinho, *Curso de Direito do Trabalho,* 16. ed. (São Paulo: LTr, 2017): 93; 114.

[22] Evaristo de Moraes Filho and Antonio Carlos Flores de Moraes call "*período pré-historico*" the whole legal history of labor before the year 1888, when the slavery was legally abolished, once "*essa data é, para o nosso assunto, a mais significativa possível, porque marca o fim do regime escravocrata entre nós e a virada brusca para a urbanização, o trabalho livre, o incremento da industrialização, com as consequências que daí se originam de formação do proletariado, constituição de movimento social e das agitações das ideias sociais*". Instead, "*todas as possíveis manifestações legislativas sobre o trabalho, anteriores a 1888,*" according to the authors, constitute the "*período pré-histórico no Brasil*". See Ibid, 104. The "prehistory," narrative, however, is not a formulation exclusive to Brazilian jurists. The Spanish jurist Manoel Alonso Olea also dedicates a chapter of his *Introducción al Derecho del Trabajo* to what he calls "*La pré-historia del derecho del trabajo*", which includes "*el régimen de esclavitud*" (pp. 42-45), "*la transición hacia la servidumbre*" (pp. 46-48), "*los arrendamientos romanos*" (pp. 48-50), "*el régimen feudal de servidumbre*" (p. 50-57), until it finally spreads in the industrial era "*el trabajo libre libre por conta ajena*". See Manuel Alonso Olea, *Introducción al Derecho del Trabajo* (Madrid: Editorial Revista de Derecho Privado, 1962). Not to mention when Brazilian jurists scann the history of labor law according to an eminently European chronology, wholly inadequate for the particular vicissitudes of Brazilian history. For instance, Evaristo de Moraes Filho, in his *Tratado Elementar de Direito do Trabalho,* devotes a chapter to the "*Fundamentos e Formação História do Direito do Trabalho – Século XIX*", dividing it in the following sections: "*De 1802 a 1848*" (pp. 81-84); "*De 1848 a 1919*" (pp. 85-87) and "*De 1919 aos nossos dias*," all initial and final time frames completely alien to Brazilian legal history. See Evaristo de Moraes Filho, *Tratado Elementar de Direito do Trabalho,* v. 1 (Rio de Janeiro: Freitas Bastos, 1960).

[23] In an incredibly brief one-page summary, Alice Monteiro de Barros's treaty, updated by Jessé Claudio Franco de Alencar, splits up the "*Evolução Histórica do Direito do Trabalho no Brasil*" looking exclusively

laws, lacking in social safeguards, "which provided the employer with significative more guarantees, giving him the powers almost of a slave master, punishing service providers with imprisonment."[24]. To this, they add the presumption that work for hire lacked social significance in a slave society, as much as slavery was a mere property relationship, "inconsistent with the spirit of genuine and authentic labor law," condemning without trial the nineteenth century to the stool of oblivion and insignificance. By focusing on what was presumably absent (labor laws, free labor, norms of social protection), one misses what was actually there.

There are numerous reasons why this line of thinking imposes epistemological constraints and lacks support from historical sources.[25] Firstly, because it limits itself to examining the legislation in force, at a time when legislation was not the only, nor the most important, source for the production of law, much less in labor matters. If reducing the legal phenomenon to the norms issued by the State is of little value for codified legal systems, it is even more misleading to evaluate the complexity of a legal order still strongly marked by legal pluralism. This approach, already repeatedly challenged by legal historians[26], is even more dangerous in the context of labor relations[27] since it ignores the material dimension of this sector and the different

at "the legislative framework relating to labor," and thus divides Brazilian legal history into two periods: "*De 1500 a 1888*," in which she cites only the first two nineteenth-century rental of services laws (1830, 1837) and the commercial code, but forgets the third law of 1879; and "*De 1888 à Revolução de 1930*," when the Vargas era began. The four centuries comprising the colonial and imperial periods are summarized in a single paragraph of three lines. See Alice Monteiro de Barros, *Curso de Direito do Trabalho*, 10. ed. (São Paulo: LTr, 2016): 53.

[24] Evaristo de Moraes Filho, *Direito do Trabalho. Páginas de história e outros ensaios* (São Paulo: LTr, 1982): 185.

[25] I discussed some of them, and the differences in relation to the motivations that also for decades led to a neglect of the history of slavery in social labor history, as well as sources for overcoming this historiographical gap in legal history, at Marjorie Carvalho de Souza, "Esclavos y libertos en la historia jurídica del trabajo: fuentes y perspectivas para uma renovación historiográfica," in *Avances y nuevas perspectivas iushistoriográficas. 10 años de las Jornadas de Jóvenes Investigadoras-es en Historia del Derecho – 2009-2019,* edited by Nicolás Beraldi; Sol Calandria; Luis González Alvo (Tucumán: Facultad de Filosofía y Letras – UNT, 2023): 39-55.

[26] It is sufficient to recall Paolo Grossi, *Mitologie giuridiche della modernità* (Milano: Giuffrè, 2007).

[27] Ojeda Avilés dennounces it as the "*sinécdoque mendaz de identificar Derecho del Trabajo con Derecho Estatal del Trabajo*": Ojeda Avilés, *Las cien almas del contrato de trabajo,* 44.

channels of normativity production that are consolidated in the daily experience of workers and employers long before and beyond legal statutes.

Secondly, because it projects a twentieth-century concept of social rights as the only labor legislation of interest. Legislative interventions in the nineteenth century had a different nature and scope, but their relevance in that specific context should not be measured with a later metric. Brazil enacted three laws on service rental contracts between 1830 and 1879, contradicting the typical image that those were "*les années du silence*"[28] or of a complete "*abstención normativa*"[29]. As Robert Castel points out, the social question only changes, but it did not emerge in the twentieth century.[30] The nineteenth century had its own labor question – by the way, with a great prominence on the social and legal scene – , which changed considerably between the 1830s (in the wake of the abolition of the slave trade) and the 1870s (in the context of the gradual and definitive abolition of slavery). At both times, the Brazilian Parliament was forced to resort to new legal mechanisms that addressed specific legal problems and created unprecedented solutions.

Furthermore, legal statutes that held significance for labor issues didn't solely stem from the independent State's legislative action, nor did they exclusively concern workers who were legally considered free. On the one hand, the Philippine Ordinances continued to be considered a parallel source in labor matters, frequently invoked in doctrinal discourses and judicial practice[31]. On the other hand, other legal sectors and sets of rules were relevant to the worlds of labor, such as the work rules of commercial law, and the law of slavery. And here we come to the forth narrative problem of traditional legal literature.

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[28] Jacques Le Goff, *Du silence a la parole: une histoire du droit du travail (des années 1830 à nos jours)* (Rennes: Presses Universitaires de Rennes, 2004).

[29] Manuel Alonso Olea, "La abstención normativa en los orígenes del Derecho del Trabajo," in *Estudios en homenaje al profesor Gaspar Bayón Chacón* (Madrid: Tecnos, 1980): 13-38.

[30] Robert Castel, *From Manual Workers to Wage Labourers: Transformation of the Social Question* (New Brunswick, NJ, 2003).

[31] For a study that examines labor lawsuits, disputed as late as the 1870s, where the Philippine Ordinances continued to be the main normative reference, see Henrique Espada Lima and Fabiane Popinigis, "Maids, Clerks, and the Shifting Landscape of Labor Relations in Rio de Janeiro, 1830s- 1880s," *IRSH* 62, Special Issue (2017): 49-50.

Limiting the history of labor law in Brazil to the post-emancipation era shuts the door to exploring slavery as a legal labor regime, not merely as a bond of dominion. While it operated as a compulsory labor system, Brazilian historiography has thoroughly demonstrated that this did not prevent deals on compensation or negotiations regarding working conditions, at times even formalized in recognized agreements. Assuming the legal condition of enslaved individuals as workers and not as mere objects of property is the first step towards analyzing the legal problems that crossed their relations with their masters and third parties as issues of interest for a legal history of labor.

Instead, the historiographic paradigm of the "transition" from slave labor to free wage labor, dichotomizing the before and after abolition as monolithic and separate blocks, remains in force in the legal literature, although social historians had strongly criticized it over the last thirty years. While the distinctions between personal statuses cannot be neglected in legal research, it becomes a limiting framework when associated with teleological assumptions about the historical progression. It tends to overlook the conflicting nature of historical processes, the fluidity inherent in these statuses[32], and the shared labor experiences among individuals subjected to diverse legal conditions[33]. More than reiterating well-known distinctions, here I am more

[32] Slavery was not an unchangeable and irrevocable legal status, given the possibility, quite concrete on the legal horizon of the Brazilian experience, that enslaved subjects could obtain manumission. Rafael Marquese points to the large and constant number of manumissions in Brazil as one of the fundamental axes of the dynamics of Brazilian slavery from the end of the eighteenth century. Rafael de Bivar Marquese, "A dinâmica da escravidão no Brasil. Resistência, tráfico negreiro e alforrias, séculos XVII a XIX," *Novos estudos,* no. 74 (2006): 107-123; Sidney Chalhoub points to the possibility of access to freedom at higher rates than in other modern slave societies as one of the most striking characteristics of slavery in Brazil: Sidney Chalhoub, "Precariedade estrutural: o problema da liberdade no Brasil escravista (século XIX)," *História Social*, no. 19 (2010): 33-62 (34); Hebert Klein and Francisco Vidal draw on an extensive bibliographical survey of recent studies on manumission in Brazil to outline its trends and illustrate its frequency since the colonial period. See chapter 9, "Freedmen in a Slave Society" in Hebert Klein and Francisco Vidal Luna, *Slavery in Brazil* (Cambridge: Cambridge University Press, 2010): 250-292.

[33] In recent years, a growing scholarship that combines visual and written sources, has been devoted precisely to demonstrating that, until the eve of abolition, this combination of legal statuses was the most characteristic picture both in the rural enterprises of the plantations as well as in the manufactures and emerging factories in the urban centers of Brazil. See Henrique Espada Lima, "Enslaved and Free

interested in outlining where their labor experiences entangled and how it impacted their respective legal labor regimes under a common scenario of "labor precariousness"[34].

Last but not least, this approach also serves to value the role of enslaved and freed workers in the process of shaping a modern legal language for labor relations. Another reason why the nineteenth century is overlooked in legal studies concerning the worlds of labor is the overly simplistic identification of Brazil's first working class, capable of articulating, as an organized collective movement, demands concerning the labor relationship with the one that emerged in the early twentieth century. Invisible, then, are the mobilizations and collective organizations of enslaved and freed workers in the pre-abolition period, and invisible are the black workers among the laborers of the First Republic themselves, identified almost exclusively with the immigrants, white and European, who were called to "replace" the slave labor force. [35]

By omitting the pivotal role of Afro-descendant workers in shaping historical labor rights claims, this assumption yields detrimental historiographical consequences. Not only does it perpetuate the narrative that portrays these workers as incompetent and unprepared for the transition to free labor, which also contributed to delaying the

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Workers and the Growth of the Working Class in Brazil," *Oxford Research Encyclopedia of Latin American History*, 1–28; Marcelo Badaró Mattos, *Laborers and Enslaved Workers. Experiences in Common in the Making of Rio de Janeiro's Working Class, 1850-1920* (New York: Berghahn Books, 2017); Artur José Renda Vitorino, "Operários livres e cativos nas manufaturas: Rio de Janeiro, segunda metade do século XIX," Paper presented at *Jornadas de História do Trabalho,* Pelotas (2002): 1-14; Souza, Marjorie Carvalho de, "Negotiating the terms of wage(less) labour: free and freed workers as contractual parties in nineteenth-century Rio de Janeiro," in *Coercion and Wage Labour. Exploring work relations through history and art,* edited by Anamarija Batista, Viola Franziska Müller and Corinna Peres (London: UCL Press, 2023): 245-263.

[34] Interpretative paradigm developed by Henrique Espada Lima, "Sob o domínio da precariedade: escravidão e os significados da liberdade de trabalho no século XIX," *Topoi* 6, no. 11 (2005): 289-326.

[35] The jurist Evaristo de Moraes Filho expressly vocalizes this type of narrative: "*Com a extinção da escravidão e com a República, como que despertaram alguns milhares de trabalhadores livres existentes nos centros urbanos brasileiros. (...) Trabalhadores de origem externa, trabalhadores estrangeiros, mormente italianos, portugueses e espanhóis, que imigravam para o Brasil. Se os negros constituíam um verdadeiro peso morto, como mão-de-obra não qualificada, analfabeta e submissa; os segundos, pelo contrário, ou eram qualificados ou semi-qualificados, e traziam de suas terras de origem o espírito de luta e de reivindicação. Agitaram, agitaram muito, principalmente em São Paulo e no Rio de Janeiro*". See Moraes Filho, *Direito do Trabalho,* 169.

abolition of slavery for numerous decades, but it also nullifies enslaved people's legacy to the post-abolition process of normative construction[36].

While I am not trying to suggest a misplaced alteration in the "birth date" of labor law discipline, acknowledging the recent emergence of industrial subordinate labor and of the scientific autonomy of the field doesn't imply that the pre-industrial experiences and its social actors are irrelevant to comprehending this recent legal phenomenon. Historical-legal research on labor relations is severely constrained if this periodization becomes an absolute time frame that makes any historical-legal study of pre-industrial societies inviable. It seems inopportune, as suggested by Cristina Vano, "to demarcate a useful area of study in the history of labor law, thus establishing a single 'permissible' direction of research. Rather, it is desirable, quite simply, that the terrain of inquiry be broadened as much as possible, without thereby denying the importance of the *Datierung* of a science in the reconstruction of its history, and thus without renouncing the purpose of identifying crucial stages and moments of transformation, from which labor law became part of the processes of formation of specialized legal disciplines"[37]. Not least because, as pointed out by Ojeda Áviles, "the emergence of the employment contract and modern labor law at the end of the nineteenth-century cannot be explained *ex nihil*. It must be considered as a legal phenomenon of arrival and not of departure."[38].

But more than seeking for antecedents and new social actors for what ensued later, the focus here lies in reclaiming the nineteenth-century as a significant subject of study by its own. By ceasing to seek what it lacked, we gain a clearer and less anachronistic comprehension of the distinct legal problems that defined this era. At the crucial moment of shift from the legal regulation of the *Ancien Régime* to the liberal

[36] For a more general survey in Brazilian labor law textbooks of the predominant narrative about the period prior to abolition and a critique of this paradigm for the invisibilizing effect on enslaved subjects' experience, see Vanessa R. Silva, *"Escravizados livres"*: *crítica ao discurso jurídico sobre a história do direito do trabalho a partir da representação historiográfica do trabalho escravo* (Undergratuate thesis, Universidade de Brasília, 2015).

[37] Vano, "Il diritto del lavoro nella storiografia giuridica germanica," 142.

[38] Ojeda Avilés, *Las cien almas del contrato de trabajo*, 27.

architecture of the individual contract, it is in itself a complex laboratory full of relevant legal experiences, which we refer to as "law of labor" [39], to clearly demarcate it from the successive and quite distinct labor law.

It constitutes an interesting and complex laboratory, firstly, because it coincides with a pivotal shift in the legal vocabulary of labor. It implied the gradual – but not immediate nor linear – abandonment of the traditional categories of master and servants ("*amos*" and "*criados*") in favor of the prevailing lexicon of rental of services characteristic of the liberal nineteenth-century. As such, the thesis narrative unfolds at the moment when this "new"[40] terminology becomes hegemonic in the Brazilian legal order, amidst numerous other liberal reform initiatives that identified what historiography acknowledges as the "liberal decade" of the Empire of Brazil (1827-1837). Given the simultaneity of this movement with the early international commitments of the Independent State to abolish the slave trade, the thesis commences by defining the Brazilian "labor question" of the 1830s as a product of the intersection between the pressures aimed at suppressing the slave trade and the implementation of a liberal legal order[41].

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[39] I follow the terminological distinction suggested by the German legal historian Thorsten Keiser, for whom: "We can distinguish between two major normative areas defined by different premises which are incisive for investigating the freedom potentials of working people. The law as it existed before 1919 differed in design depending on the specific status and professional environment but tended to be grounded in paternalistic and police concepts and oriented towards suppressing labour market dynamism. The term 'law of labour' appears historically appropriate to this law. It must be demarcated from the now current 'labour law' which affirms the free labour market, while seeking to mitigate its risks to the individual employee by social protection norms." See Thorsten Keiser, "Between Status and Contract? Coercion in Contractual Labour Relationships in Germany from the 16th to the 20th century," *Rechtsgeschichte – Legal History,* no. 21 (2013): 32-47 (33).

[40] The nuanced novelty of an old category of Romanistic origin, never disappeared in the medieval tradition, being reimagined to express the new axiological dimension of the labor phenomenon in the nineteenth century will be discussed *infra* chapter 1, § 2.

[41] This also leads me to disagree with labor lawyers Amauri Mascaro do Nascimento, Irany Ferrari and Ives Gandra da Silva Martins Filho's statement, according to which only after "*abolida a escravidão e proclamada a República teria início no Brasil o período liberal do direito do trabalho*". See *História do Trabalho, do Direito do Trabalho, Da Justiça do Trabalho,* 3. ed. (São Paulo: LTr, 2011): 147 ff. The liberal legal lexicon on labor penetrated the Brazilian legal order as early as the beginning of the nineteenth century, and the concomitant legality of slavery did not change, but only gave new meaning to, this circumstance.

Still, in the first chapter, I discuss the repercussions – although not disruptive – stemming from the hegemonization of liberal principles in Western legal culture and their impact in the legal lexicon of labor. As the contract became the universal expression of relations between individuals and the privileged instrument for promoting freedom and equality before the law, the lexicon hitherto used to designate the poles of labor relations – "masters and servants" – was perceived more and more as an uncomfortable symbol of the *Ancien Régime*. To dissociate with the old order's values of dependence, authority and coercion, nineteenth-century jurists in Brazil and abroad resorted to the Romanist category of *locatio conductio*, never forgotten in the medieval tradition[42]. Having the concern, though, of ensuring conceptual maneuvers to reinvent the legal bond of labor under a modern framework, in particular the depersonalization and patrimonialization of the legal labor relationship. Ironically, the very attributes that would lead, a few decades later, to the almost unanimous rejection of this category in the worlds of labor in the twentieth century.

Because the new laws of Independent Brazil didn't have the scope, nor the effect, of eliminating – they actually expanded it – the pluralistic nature of the colonial legal order, I also explore the legal framework concerning labor from the old Portuguese regime. This framework, rooted in the dynamics of family relations and domesticity, operated as a parallel yet equally significant source that persisted in Brazil throughout the century, even after Portugal itself repelled it with the civil code of 1867. Here, I emphasize how these distinct vocabularies, originating from different temporalities, openly coexisted within legal literature, although lacking coherence. Both vocabularies constituted the available repertoire for workers and employers to express and dispute their relationships during the whole century.

[42] See Paolo Passaniti, "Tra libertà e sottomissione. Il lavoro contrattualizzato negli schemi giuridici e istituzionali della dottrina medievale", *Historia et ius,* no. 24, paper 14 (2023): 1-15; Emanuele Conte, "Dai servi ai sudditi. La realitas dei contratti di status nel diritto commune," in *Summe - Glosse - Kommentar: Juristisches und Rhetorisches in Kanonistik und Legistik*, edited by Frank Theisen and Wulf Eckart Voss (Osnabrück: Univ.-Verl. Rasch, 2000): 37-54.

Plural was not only the landscape of the sources of law, but also the social landscape of the workers, in which enslaved, free, freed workers of African origin or born in Brazil, nationals, foreign immigrants of various nationalities often worked shoulder to shoulder in the same trades. The contract paradigm in Brazil was consolidated without an essential connection to the unification of the subject of law, maintaining and even expanding the distinction between legal statutes. The three laws that Brazil knew during the nineteenth century targeted different subjects and created different contractual regimes for nationals, foreigners, "barbarian Africans" and freedmen (the first was for nationals and foreigners, the second only for foreigners, the third for all of them, but with different rules).

So in the second chapter, I examine the targets and contexts in which these three Brazilian rental of services laws were enacted (1830, 1837 and 1879), highlighting the changes in the "labor question" between the 1830s (when the debate was very much about the abolition of the slave trade) and the 1870s (when, on the contrary, Brazil was preparing for the gradual and definitive extinction of slavery). I emphasize how the shared work experiences of subjects with different legal statuses overlapped and influenced each other, shaping meanings and limits for changing legal categories both in contractual practices and in courts of justice.

Finally, to emphasize the dynamic of coexistence of plural subjects and sources of law, the third chapter explores what I consider to be three other normative sets that, alongside civil laws on service rental, also made up the mosaic of the "law of labor" in nineteenth-century Brazil: a) commercial law of labor; b) the law of slave labor; and c) the regulation of domestic work that proliferated at the end of the century. As a selection, it does not cover all the many other possible topics of a broader mosaic that could include, for example, the regulation of indigenous labor, maritime labor, and factory regulations that were spreading in those years. It is certainly a fraction of themes and sources that does not fill all the gaps that still exist in the legal historiography of pre-twentieth century labor law, but which seeks to express, at least,

the main trends of the period under exam: the fluidity, density and plurality of norms and subjects in the construction of the modern legal lexicon of labor.

The vast and disparate set of documents and sources that supported this study included service rental contracts registered at notary offices; judicial records of labor disputes in different jurisdictions; legislative texts; parliamentary acts; books of legal doctrine; memoirs and private papers of jurists; newspapers; and legal journals. The combination of these types of documents was the result of the determination to combine solemn and non-solemn places in the production of law.[43] When writing the history of legal reforms and of crucial moments of institutional changes, legal scholars usually privilege preeminent jurists or political leaders as the main protagonists of their narratives. Even if a study of the implementation of a new legal regime of labor could not prescind of those prestigious artificers, a vivid account of such a socially rooted field of law requires a closer attention also to its main actors: workers and employers[44]. In the following pages, Brazilian jurists and imperial politicians share the stage with agricultural laborers and urban servants in driving the narrative of this dissertation.

This methodological predilection certainly contributes to bringing the analysis to the micro-scale, but it is not confined there. Under focus are the ambiguous boundaries that distinguish forced and free labor in the Atlantic world and the broader process of modernization of the Western legal lexicon on labor in the century of liberalism. Without falling into the historiographical abysses of receptionism or exceptionalism, the analysis of these sources seeks to hold together the particular

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[43] A methodological path suggested by Mariana Armond Dias Paes, "Direito e escravidão no Brasil Império: quais caminhos podemos seguir?", in *Constituição de poderes, constituição de sujeitos:* caminhos da história do direito no Brasil (1750-1930), edited by Monica Duarte Dantas and Samuel Barbosa (São Paulo: Cadernos do IEB, 2021): 194 ff.

[44] Speaking precisely of the "multivocality" of labor law, Italian jurist Gino Giugni calls it a "border law" (*diritto di fronteira*), while a field necessarily permeable to the inputs of a broader range of social actors beyond jurists and legislators. See Gino Giugni, "Intervento," in *La "Cultura" delle Riviste Giuridiche Italiane. Atti del Primo Incontro di Studio. Firenze, 15-16 Aprile 1983,* edited by Paolo Grossi (Milano: Giuffrè, 1984): 123-127 (125). On the perils of a history of labor law that neglects social subjects in favor of authoritative voices in legislative sphere or disciplinary construction, see Virginia Amorosi, "Raccontare la storia giuridica del lavoro in Italia: appunti tra passato e presente," *Diritti, Lavori, mercati,* 3 (2021): 695 ff.

needs experienced in the national sphere and local solutions developed by daily practices, with social, political, and legal phenomena of global scope that penetrated and shaped the Brazilian legal system in the nineteenth century.

Indeed, the legal problems of labor in nineteenth-century Brazil are a privileged vantage point for empirically studying the repercussions of global and wide-ranging phenomena such as the long history of slave labor and African slave trade, the spread of the ideologies of free labor, freedom of contract and abolitionism in the Atlantic world, the mass migration of European workers and the invention of new forms of labor control in post-colonial America. As Brazilian Historian Henrique Espada Lima suggests, "that process was far from being exclusive to the Brazilian context. On the contrary, the Brazilian case – with all its diversity and heterogeneity – can be thought of as a modulation in a more general process that touched not just those societies that experienced slavery and the post-emancipation era but embraced – with all its ambiguities – the restructuring of labour and social relations in places as different as Europe's metropolitan societies and the ''colonial'' societies of Africa and Asia. Because of that, a discussion of the Brazilian case has strong analogical value for our thinking about this process elsewhere."[45]

If the awareness of the expanded spatiality of these processes broadens – or at the very least, does not suffocate – the narrative to the nation-state borders, it is also useful to operate with a more complex notion of temporality. Without necessarily adhering to the decomposition of historical time proposed by Fernand Braudel in his *Histoire et Sciences sociales: La longue durée,* with the schematical division into event (short time), conjuncture (less short time) and long duration (long time) – with a clear predilection for the latter – I try to keep in mind the virtue of his warning about "the

[45] Henrique Espada Lima, "Freedom, precariousness, and the Law: Freed Persons Contracting out their Labour in 19th-Century Brazil", *IRSH* 54*,* no. 3 (2009): 391- 416 (415). See also Henrique Espada Lima, "História Global do Trabalho: um olhar desde o Brasil," *Revista Mundos do Trabalho* 10, no. 19 (2018): 59-70; Paulo Fontes, Alexandre Fortes and David Mayer, "Brazilian Labour History in Global Context: Some Introductory Notes," *IRSH* 62, special issue 25 (2018): 1-22.

intertwining of these movements, their inter-action and their points of disjunction"[46]. The perception of the complexity of the temporal dimension engendered by the notion of the multiplicity of time strata[47] is an important ally in constructing a narrative that wants to be attentive to legal sources from different temporalities and to the combination of ruptures and continuities without the artificiality of contrasting binomials. It's certainly a difficult *"jeux d'échelles"*[48] to handle, especially in a fluid landscape where "it is hard to know / where the river begins; / where the mud / begins from the river; / where the land / begins from the mud; / where the man / where the skin / begins from the mud; / where begins the man / in that man". But if "man, / because he lives, / collides with what is living", to write a legal history of labor is to delve into what is living: looking at moments of negotiation, dispute, and collision to bring together the pieces and plural components of a complex mosaic of laws and laborers.

[46] The original text, published in 1958 in the *Revista dos Annales*, was translated into Portuguese in 1965 by Ana Maria de Almeida Camargo and can be found at Fernand Braudel, "História e Ciências Sociais: A Longa Duração," *Revista de História* 16, no. 62 (1965): 262-294zze (290).

[47] Also discussed by Rafael de Bivar Marquese and Waldomiro Lourenço da Silva Júnior, "Tempos históricos plurais: Braudel, Koselleck e o problema da escravidão negra nas Américas," História da Historiografia 11, no. 28 (2018): 44-81.

[48] Which may even imply abandoning the very idea of scale as suggested by Christian De Vito, "History Without Scale: The Micro-Spatial Perspective," *Past & Present* 242, Issue Supplement 14 (2019): 348-372.

CHAPTER 1

Workforces and legal sources in Independent Brazil: changing categories in the law of labor

SUMMARY: §1. **The "infamous trade" under threat: the labor question in the liberal decade. –** §2. **From servants to contractors: the liberal legal lexicon in the world of labor**. – §3. **Old grammar in the new regime: colonial law of labor in Independent Brazil**.

Emerging from the continental Independence wave of the first decades of the 1800s with a prince of royal Portuguese blood as the new emperor[49], in the same years that fifteen other neighboring former colonies proclaimed themselves independent Republics, would already explain the historiographical tendency to emphasize a Brazilian *Sonderweg* when dealing with the period of state formation and nation building[50]. Added to this was the ever more isolated option in the first half of the

[49] For the adventurous reader who is interested in the themes discussed here, but not acquainted with the characters who marked crucial episodes of this chronology, it may not be useless to remember that the Independence proclaimed on September 7, 1822, was led by Dom Pedro de Alcântara (then Prince Royal of the Portuguese Royal House of Bragança and regent of the Brazilian territory). Declaring the separation from his father's kingdom, he was acclaimed as Brazil's first emperor on 12 October, with the name of Pedro I. His reign would not last long, finishing less than a decade later with his abdication of the throne and return to Portugal in September 1831, in the context of a struggle for the succession of Portugal's crown. By then, his son was six years old, which would leave the government of the Empire under the responsibility of different regents until 1840, when the young Pedro II was declared fit to become the new emperor at the age of fifteen, ruling Brazil until the proclamation of the republic in 1889. The proximity to the Portuguese royal family that would connote the particular process of Brazilian Independence was already experienced materially since 1808 with the transfer of the Court to Rio de Janeiro, then raised to the status of capital of the overseas Empire, and the elevation of Brazil to the status of a kingdom united to the Kingdom of Portugal and the Algarve. For an overall picture of the 67 years of monarchical life in Independent Brazil, which also includes a broad overview of the emancipation process since the arrival of the royal family, see the 3 volumes of the collective work edited by Keila Grinberg and Ricardo Salles (eds.), *O Brasil Imperial – Volume I: 1801-1831; Volume 2: 1831-1870; Volume 3: 1870-1889* (Rio de Janeiro: Civilização Brasileira, 2009).

[50] The interpretation is crystallized in classic works of historiography on the decolonization of the Americas, such as the well-known Tulio Halperin Donghi, *Reforma y disolución de los impérios ibéricos 1750-1850*, v.3, collection *Historia de América Latina*, directed by Nicolás Sánchez-Albornoz (Madrid: Alianza Editorial, 1985), as well as in milestones of Brazilian historiography, like the inevitable Emília Viotti da Costa, *Da Monarquia à República*: *Momentos Decisivos*, 3. ed. (São Paulo: Ed. Brasiliense, 1985), but it also shines through more recent works, such as José Murilo Carvalho*, A construção da ordem: a*

nineteenth century of maintaining the legality of the use and importation of slave labor, in a strong reluctance to abandon the position of top gross importer of enslaved Africans in the Americas. In fact, nor even in comparison with its closest peers – the two other American societies who experienced an unprecedented increase in the importation and employment of African enslaved people in those decades, the United States and Cuba[51] – the case of the former Portuguese colony fails to stand out. On the one hand, while the Caribbean Island took advantage of the maintenance of the colonial status to preserve slavery and the slave trade, in Brazil its preservation was a decisive factor in the negotiation of independence with the local elites; on the other hand, while the American government also exercised jurisdiction over territories where slavery was illegal, the Brazilian Empire was built upon a genuine and fully slaveholding society[52].

Another shared trend at the Atlantic level but singularly declined in Brazil is the early adhesion to the widespread legal tendency in the nineteenth-century Western world of constructing the infrastructure of a new Nation-State on the basis of a set of institutions, principles and legislative texts with a clear liberal imprint. The Constitution

elite política imperial (2003), 4. ed (Rio de Janeiro: Civilização Brasileira, 2008) or the remarkable collection organized by István Jancsó (ed.), *Independência: história e historiografia* (São Paulo: Hucitec, 2005). More recently, on the occasion of the bicentennial, similar remarks go through the special issue by Isabel Lustosa and Kirsten Schultz (eds.), "Dossiê: Qual Brasil? Projetos de nação em debate no contexto da Independência brasileira," *Topoi* 23, no. 51 (2022).

[51] The phenomenon was baptized by the American historian Dale Tomich with the now classic definition of "Second Slavery", thought to describe the temporal and spatial discontinuities of nineteenth-century slavery in comparison to the enslaving practices of the early modern period. This successful interpretation would influence a whole generation of historians and case studies by the shared conviction that it was a process closely connected to the advance of the Industrial Revolution and world capitalism. For its original formulation, see specially chapter 3 "The 'Second Slavery'": Bonded Labor and the Transformation of the Nineteenth-Century World Economy" in Dale W. Tomich, *Through the Prism of Slavery*: *Labor, Capital and the World Economy* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2004); for its specific declination in the Brazilian context, see the collective volume organized by Mariana Muaze, and Ricardo H. Salles (eds.), *A segunda escravidão e o império do Brasil em perspectiva histórica* (São Leopoldo: Casa Leiria, 2020).

[52] Tâmis Peixoto Parron, "Política do tráfico negreiro: o Parlamento imperial e a reabertura do comércio de escravos na década de 1830", *Estudos Afro-Asiáticos* 29, 1-3 (2007): 93-94. Comparative works between these three societies abound in historiography, but particular mention is deserved by the collective volume of Rafael de Bivar Marquese and Ricardo Salles (eds.), *Escravidão e capitalismo histórico no século XIX. Cuba, Brasil e Estados Unidos* (Rio de Janeiro: Civilização Brasileira, 2016).

granted in 1824, even under the authoritarian hand of the emperor[53], would already lay these foundations, but it is the decade of 1827-1837 that is remembered by historiography as the "liberal decade" in the Empire of Brazil. It goes without saying, either in that Charter, or in the broader set of laws which piecemeal replaced the sources inherited by the former metropole, talked beliefs of legal individualism were combined with a large constellation of old legal structures[54]. A well-known, and once again not exclusive to Brazil, dynamics of thwarting "new institutions by old commitments, new commitments by old institutions, in a pattern that is as discontinuous with the future as with the past"[55].

Both to get acquainted with the broader scenario of Atlantic anxieties that crossed Brazil in a decisive way but also to underly the more local incidents and characters of this peculiar process of national-building, these two phenomena – the apogee and decline of the Atlantic slave trade, and the non-linear path of modernization of the legal system in a liberal sense with which Brazil engaged from the first hour of its independent life – will be the main focus of this first chapter. Whether they are related in a contradictory or functional way as a vast historiography has been devoted to debate[56], they both compose the crucial background of the

[53] Eight months after Independence, the Constituent and Legislative General Assembly of the Empire of Brazil began its legislature (on May 18, 1823) with the task of drafting the country's first Constitution. Six months after, without the debates and deliberation had been concluded, the Assembly was dissolved by the emperor, with the arrestment and deportation of his main opponents. Pedro I then charged a few chosen advisors from his Council of State to draft a new text, which he granted without discussing with the Parliament on March 25, 1824, and which would remain in force until the end of the monarchy in Brazil. For the tumultuous Brazilian constituent process, see Andréa Slemian, *Sob o império das leis: constituição e unidade nacional na formação do Brasil (1822-1834)* (São Paulo: Hucitec, 2009).

[54] On the ambiguities and challenges of creating a national order that coexisted with Portuguese norms and of implementing a liberal order that coexisted with pre-liberal institutions, see José Reinaldo Lima Lopes, "Iluminismo e jusnaturalismo no ideário dos juristas da primeira metade do século XIX". In *Brasil: formação do Estado e da Nação,* edited by István Jancsó (São Paulo: Hucitec, Editora UNIJUÍ, FAPESP, 2003): 195-196.

[55] Karen Orren, *Belated Feudalism: Labor, the Law and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991), 2.

[56] The political and historiographical triumph of the abolitionist reading that the pair "slavery-liberalism" was an inevitable paradox has long obscured the fact that, in Brazil and elsewhere, for much of the nineteenth century the defense of slavery was based on predominantly liberal arguments. Already from

approval of the first legislative choices regarding labor in the 1830s. As much as those measures coincided with the first international agreements for the abolition of the slave trade and the rhetorical attempt to "replace" slave labor with immigrant workforce, they also represented the rise of the paradigm of contract in the nineteenth-century reassessment of the law of labor. A legislative movement launched in Brazil with decades of primacy even in relation to the former metropole, but which would not have the effect nor the aim of repealing the legislative, literary, and jurisprudential material – to let alone the social layers – of the Portuguese old regime.

With such a picture in mind, the first section dives into the context of the early nineteenth-century Atlantic pressures for the abolition of the slave trade and its synchronicity with the coming to Parliament's attention of legislative proposals on labor issues. The second section will put in evidence the adjustments – albeit not disruptive – that the hegemonization of liberal principles in the Western legal culture would bring to the legal lexicon of labor; and finally, a third section will discuss the legal grammar of the Portuguese old regime as a parallel but not least important source of law in the world of labor and its extended long life in the Brazilian legal order. With this itinerary I will try to suggest that as much as labor legislation carried with it a certain primacy in the process of legal modernization of the Brazilian independent State, it was also one of the most symbolic examples of the dauting challenges, and the innumerable discomforts, of building new paradigms upon old structures.

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the 1970s, however, several historians started to shed light on how much of the pro-slavery rhetoric, either in the Old South or in the Brazilian Parliament, associated bondage with the hard core of liberal ideas – government by consent, guarantee of individual liberty, security of private property. Among the many publications that made this functional relationship explicit, it is sufficient to recall Alfredo Bosi, "A *escravidão entre dois liberalismos*", *Estudos Avançados* 2, no. 3 (1988): 4-39; David Ericson, *The Debate over Slavery: Antislavery and Proslavery Liberalism in America* (Nova York; Londres: NY University Press, 2000) and, for a comparison between both societies, Rafael de Bivar Marquese, "Governo dos escravos e ordem nacional: Brasil e Estados Unidos," in *Brasil: Formação do Estado e da Nação,* edited by István Jancsó (São Paulo: Hucitec, Editora UNIJUÍ, FAPESP, 2003): 251-265. In the realm of legal historiography, more recently Mariana Armond Dias Paes has also demonstrated how the hegemonization of liberal principles in nineteenth-century Brazilian civil law contributed more to legitimize than to extinguish slave property. See *Escravidão e Direito: O Estatuto Jurídico dos Escravos no Brasil Oitocentista* (São Paulo: Alameda, 2019.

§1. **The "infamous trade" under threat: the labor question in the liberal decade**

If in the Iberian American race towards codification to Brazil is assigned the back seat as the last country among the former colonies to enact a civil code[57], despite the early constitutional mandate of 1824[58], the enactment of two labor contract laws in the 1830s may be considered a pole position not only within the continent, but also compared to the former colonizer. Until the Portuguese civil code was enacted in 1867, in the labor field Portugal would sanction only a few punctual measures between 1842 and 1866[59], all aimed at restricting the emigration of workers to Brazil, in addition to the first emancipatory laws, from the 1850s onwards, in overseas territories (which invariably foresaw the obligation for freedmen to serve their former masters)[60]. One and the other, however, were no more than small-scale interventions, which did not have the labor contract as their primary object, nor slavery or slave trade as a domestic

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[57] For a chronology of this process, it is useful to resort to Alejandro Gusmán Brito, *História de la codificación civil en Iberoamérica* (Pamplona: Aranzadi, 2006).

[58] In the very same article which provided for "the inviolability of civil and political rights of Brazilian citizens, which is based on freedom, individual security, and property" (art. 179), the Constitution also predicted a mandate to "III. *Organize as soon as possible a Civil and Criminal Code, based on solid foundations of Justice and Equity*". The determination, that for criminal law was met as early as 1830, for civil law would not be accomplished before 1916. This topic was widely discussed – with different interpretations – by a large historiography, among which it is sufficient to remember Keila Grinberg, *Código Civil e Cidadania* (Rio de Janeiro: Zahar, 2001); Ricardo Marcelo Fonseca, "A cultura jurídica brasileira e a questão da codificação civil no século XIX", *Revista da Faculdade de Direito da UFPR* 44 (2006): 61-76, and, more recently, Gabriela Back Lombardi, *Codificação Civil na Revista do Instituto dos Advogados Brasileiros (1862-1907): uma história do pensamento jurídico* (Master's dissertation, Universidade Federal do Paraná, 2023). On the nexus between codification and constitution, and how they have been forged as two faces of the same phenomenon in modern legal culture, return inevitably to Bartolomé Clavero, "Codificación y constitución," *QF* 18 (1989): 79-145 (= Id., *Razón de estado, razón de individuo, razón de historia.* Madrid: Centro de Constitucionales, 1991: 61-128).

[59] A detailed description can be found in Margarida Seixas, *História do Direito do Trabalho em Portugal: Um Direito em Construção* (Lisboa: AAFDL, 2021): 193-200; Margarida Seixas, "Intervenção do Estado em meados do século XIX: uma tutela para os trabalhadores por conta de outrem", *Revista da Faculdade de Direito da Universidade de Lisboa/Lisbon Law Review* 52, no. 1 (2021): 681-703.

[60] The itinerary of punctual emancipation measures that preceded the definitive abolition of slavery in Portuguese overseas territories with the decree of February 25, 1869 is followed by Cristina Nogueira da Silva, *Constitucionalismo e Império, A Cidadania no Ultramar Português* (Coimbra: Almedina, 2009): 277-286 and Margarida Seixas, "Regular o trabalho, evitar a opressão: o direito português entre a metrópole e as províncias ultramarinas na segunda metade do século XIX", *Revista Jurídica da Universidad Autónoma de Madrid* 33, no. 1 (2016): 251-266; also in Seixas, *História do Direito do Trabalho em Portugal,* 171-181.

issue within the national territory. Problems, in turn, that its most important former colony faced as issues of the primary order from the first hours following the political emancipation.

Not only because of the statistical and geographical position it occupied in the Atlantic slave trade, but also because of the very condition of a newly emancipated nation eager to obtain international recognition, Brazil would become a crucial target of the abolitionist campaign which cornered the continent from north to south in those years. Where hitherto Great-Britain, the great leader of the Atlantic crusade for the end of the slave trade[61], had used the protection of the Portuguese royal family and their transfer to Brazil in 1808, after the Napoleonic invasions, as a bargaining chip for the approval of gradual measures[62], now a new sovereign nation had asserted itself, on whose ships the commitments signed by the former metropole[63] were no longer

[61] From the second largest trafficking flag in the Atlantic, in a few years, the British Empire became the leader of an intense international campaign for the extinction of all trade in Africans after all British subjects were prohibited on March 25, 1807, from engaging in the slave trade. This change in posture was read in different ways by historiography (Leslie Bethell speaks of moral considerations and the need to put commercial rivals to the British West Indian sugar planters on an equal footing after the loss of their regular supply of cheap labor; David Eltis alludes to a system of British liberal beliefs), but however it is, from the 1810s onwards, abolitionism became a true and priority foreign policy, with the mobilization of a network of bilateral agreements, a system of naval repression and judgments in naval or bilateral courts, as well as an extensive network of collaborators and informants that converge in the Slave Trade Department of the Foreign Office. See Beatriz Galotti Mamigonian, "A proibição do tráfico atlântico e a manutenção da escravidão", in *O Brasil Imperial – Vol. 1 – 1808-1831,* edited by Keila Grinberg and Ricardo Salles. Rio de Janeiro: Civilização Brasileira, 2009: 216; Leslie Bethell, *The Abolition of the Brazilian Slave Trade* (Cambridge: Cambridge University Press, 1970): IX-X; David Eltis, *Economic Growth and the Ending of the Transatlantic Slave Trade* (Oxford: Oxford University Press, 1987): 25-28.

[62] Brazil becomes the first and only colony to host an overseas empire after King Dom João VI rejects the ultimatum from Napoleon in 1807 to close his ports to English ships under the threat of a French invasion. When in November General Junot marched on Lisbon, the Portuguese royal Family sought refuge escorted by four British warships in Rio de Janeiro, from then on capital of the Portuguese Empire. With the transfer of the court to Brazil, the metropolitan territory becomes entirely dependent upon British navy against the French and for the protection of the rest of Portugal's overseas empire. See Leslie, *Abolition of the Brazilian Slave Trade*, 7-8; and for the impact on Rio de Janeiro's urban life, Ynaê L. dos Santos "Tornar-se corte. Trabalho escravo e espaço urbano no Rio de Janeiro (1808, 1815)," *Revista de História Comparada* 7, no. 1 (2013): 262-292.

[63] The first commitment made by Portugal in this regard, as one of the methods of repaying the protection to the royal family and its transfer to Brazil, was the Treaty of Alliance and Friendship of 1810, in which Portugal undertook to limit the slave trade to Portuguese domains. The next milestone came on the trail of the Congress of Vienna, where Great Britain had obtained from the nations

binding. The strategy then became, as for all the other new states on the American continent[64], to make the recognition of Independence conditional on the commitment to abolish the slave trade. Indeed, while most of the new Spanish American states, whose interest in the importation of enslaved Africans had been quite smaller, easily demonstrated even their willingness to abolish slavery itself[65], Brazil, more deeply involved in the trade than any other, would not stop trafficking, let alone abolishes slavery, so immediately.

One must bear in mind that from the sixteenth and the beginning of the nineteenth century, the Portuguese America had already received more than three million captives – up to then the world's most voluminous trafficking in enslaved human beings –[66], and by the time the colonial system was about to collapse it was

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gathered there the declaration that the slave trade was "repugnant to the principles of humanity and universal morality", resulting for Portugal in the signing of the Treaty of January 22, 1815, declaring the slave trade north of the equator illegal and committing to repel it, but keeping open, however, the trade south of the equator between Portuguese possessions. The regulation of the repression procedures would be made only two years later, with the signing of an additional convention to the 1815 treaty, establishing the mutual right (innovation for peacetime) of visit and search, and mixed commissions on both sides of the Atlantic to judge the seizures and release the Africans found on board the condemned ships. Finally, on January 26, 1818, a charter was issued establishing penalties for those who engaged in the prohibited slave trade. Only the latter would remain in force in independent Brazil, with the incorporation of Portuguese legislation by the law of October 20, 1823, which will be discussed below. See Mamigonian, "A proibição do tráfico atlântico e a manutenção da escravidão," 214-219; and Beatriz Galotti Mamigonian, "Os direitos dos africanos livres", in *Constituição de Poderes, Constituição de Sujeitos: Caminhos da História do Direito no Brasil (1750-1930),* edited by Samuel Barbosa and Monica Dantas (São Paulo: Instituto de Estudos Brasileiros, 2021): 211.

[64] Duke of Wellington, the Britain's representative at the Congress of Verona, would have been directly instructed by Foreign Secretary George Canning that "Of one thing the Allied Powers may be perfectly assured: no State in the New World will be recognized by Great Britain which has not frankly and completely abolished the trade in slaves" (Canning to Washington, no. 4, 27 September 1822, printed in Webster, *The Foreign Policy of Canning, 1822-1827* [London, 1925]: 159 and quoted by James Ferguson King, "The Latin-American Republics and the Suppression of the Slave Trade", *HAHR* 24, no. 3 (1944): 391.

[65] Gradual abolition laws had already been passed in Argentina (1813) and the region that today comprises Ecuador, Colombia and Venezuela (1821), while total abolition was decreed in Chile in 1823, Federal Republic of Central America (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua in 1824, Mexico in 1829 and Bolivia in 1831. For a chronology of the history of Slavery, Antislavery and Emancipation in the Americas, see Keila Grinberg and Sue Peabody, *Slavery, Freedom and the Law in the Atlantic: A Brief History with Documents* (Boston: Bedford/St. Martin's, 2007): 178-183.

[66] Between 1526 and 1808, it is estimated more than 3.050.000 enslaved Africans had disembarked in Brazil, while the British Caribbean had received circa 2.300.239 in the same period; the French Caribbean circa 1.050.000; and the Spanish America few more than 600.000 captives. For complete

enjoying a period of unprecedented economic prosperity and renewed demand for African[67] enslaved labor, in the wake of a particularly favorable conjuncture of the international market[68]. Add to that a process of independence in which abolition had barely touched the political agenda[69] if not to seal the converging interest of local elites and the heir to the Portuguese crown to keep the status quo[70], and one can understand much of Brazil's resistance to yielding immediately to British pressure. Nevertheless,

estimates, see David Eltis et al, *The Transatlantic Slave Trade: An Online Dataset* (2008), at slavevoyages.org.

[67] It was widely believed that Amerindian labor was unsuitable for large-scale plantation agriculture, being employed particularly in the more backward areas of the north of the country. Without much ideological consistency, both the Catholic Church and the Colonial Government had been more concerned for the welfare of the Amerindian than of African, and by 1755-1758 their enslavement was legally prohibited. Even if a huge historiography has demonstrated the continuity of their illegal enslavement or legal coerced employment, is it is fairly acknowledged that "in almost every part of Brazil Negro slavery was the most characteristic aspect of both the rural and the urban scene": Bethell, *The Abolition of the Brazilian Slave Trade,* 1. For a recent text that maps important studies of indigenous forced labor and presents an interest empirical investigation, see Camila Loureiro Dias, "Os índios, a Amazônia e os conceitos de escravidão e liberdade", *Estudos Avançados* 33, 97 (2019): 235-252.

[68] The end of the colonial rule coincided with a notable commercial expansion, on the rail of renewed consumer demands by the advance of industrialization on the European continent and the market opportunities that Brazil's main rivals engagement with the American Revolutionary Wars, the French Revolutionary and Napoleonic Wars and, not least, the bloody uprising in the Caribbean sugar island of Santo Domingo opened to Brazilian exports of foodstuffs (including sugar) and raw materials (especially cotton). See Jorge Miguel Pedreira, "Economia e política na explicação da Independência do Brasil", in *A independência brasileira: novas dimensões*, edited by Jurandir Malerba (Rio de Janeiro: Editora FGV, 2006): 55-97. It is also worth recalling that during the first quarter of the nineteenth century, also the coffee bush gradually spread across the valley of the river Paraíba (southeastern of Brazil), and during the late twenties established itself as Brazil's third most important cash crop. During the next decade it would also outstrip sugar and cotton to become the country's principal export, accounting for 40% of Brazil's total exports by the end of the decade. From its beginning, the coffee plantations were worked by African enslaved labor and given its rate of slave mortality, it increasingly demanded new importations. See Bethell, *The Abolition of the Brazilian Slave Trade*, 73-74.

[69] Proof of this is the elusive mention (art. 254) to a "slow emancipation of blacks" ("*emancipação lenta dos negros*") in the draft constitution prepared by the Constituent Assembly, which would completely disappear from the Constitution granted in 1824. The "*Representação* à Assemblea *Geral Constituinte e Legislativa do Imperio do Brasil* Sobre a Escravatura" written by Jose Bonifácio, later considered the "patriarch of Independence", would not even be read by the Assembly before its dissolution. On how the constant silence about slavery was precisely the key to its assumption as one of the implicit foundations of the constitutional order, delaying the birth of an abolitionist movement in Brazil by many decades, see Tâmis Peixoto Parron, "Escravidão e as fundações da ordem constitucional moderna: representação, cidadania, soberania, c. 1780-c.1830", *Topoi* 23, no. 51 (2022): 699-740.

[70] On the functionality of "opting for D. Pedro" for the maintenance of social hierarchies and the productive system in the interest of local agricultural elites, see Iara Lis Carvalho Souza, "As várias representações do Brasil: a opção por D. Pedro", in *Pátria Coroada. O Brasil como Corpo Político Autônomo 1780-1831*. São Paulo: Editora UNESP, 1998: 91-106.

the Brazilian authorities were aware of the convenience to obtain external recognition, both to avoid any Portuguese attempt to reassert authority with British assistance or any direct hostility from the most powerful navy of the Atlantic.

It was in fact with British mediation, in the person of Charles Stuart, a British diplomat whom King John VI would appoint as his plenipotentiary, granting him powers to negotiate and sign a treaty with Brazil recognizing *de jure* its independence, that the Treaty of Peace and Alliance was signed in Rio de Janeiro on August 29th, 1825[71]. Britain's efforts would not be granted gratuitously and soon the British representative returns to Brazil to recall the commitment implied in all negotiations since 1822: "abolition for recognition"[72]. After a few more months of intense negotiations and diplomatic disputes, the final commitment of the then formally independent nation was signed on November 23, 1826, with the stipulation of a treaty that prohibited all importation of slaves to Brazil within a period of three years after the formal ratification (occurred on March 13, 1827). At a time when the English pressure seemed to become irresistible[73], the convention ended up being signed by the foreign ministers of the two countries, being merely ratified by the emperor during the recess of Parliament, without consulting Brazilian representatives.

When the agreement, already in force, is submitted to the formal appreciation of the Chamber of Deputies, installed six months before its stipulation and where

[71] As illustrated in detail by Alan K. Manchester, "The Recognition of Brazilian Independence," *HAHR* 31, 1 (1951): 93-94.

[72] Bethell, *The Abolition of the Brazilian Slave Trade,* 51.

[73] Mediation for independence completed (and thus the pact fulfilled by the English side), historiography also connects the intensification of British pressure with the political project of direct conquest of territories in Africa. It does not go unnoticed the interest of the English in removing any Brazilian influence on African kingdoms and the coincidence of the dates between the beginning of English and French penetration in Africa and the abolition of the African trade to Brazil. See Jaime Rodrigues, "O fim do tráfico transatlântico de escravos para o Brasil: paradigmas em questão", in *O Brasil Imperial – Vol. II – 1831-1870,* edited by Keila Grinberg and Ricardo Salles (Rio de Janeiro: Civilização Brasileira, 2009): 325. Indeed, in the *Tratado de Paz, Amizade e Aliança* between Brazil and Portugal of 1825, a clause had been inserted to make Brazil renounce to any possession in Africa: "*Sua Majestade Imperial promete não aceitar as proposições de quaisquer colônias portuguesas para se reunirem ao Império do Brasil*" (art. 3º).

projects on the same subject with longer deadlines were already being discussed[74], many deputies protested both to the approval procedure and to what they considered a surrender to British interest to the detriment of the national sovereignty. Mobilizing the rhetoric of separation of powers in an institutional monarchy[75], and the defense of the interests of the "Brazilian nation, free, sovereign and independent"[76], pro-slavery parliamentarians painted the restriction of the trade as an act *of* the Old Regime (and not *against* it), so that resisting its abolition could be legitimized as a flag of justice for the future of the Nation-state[77].

This new affront to the Legislative branch, added to almost a decade of reign marked by autocratic methods of government (of which the dissolution of the constituent assembly in 1823 had been just one example) and a strong reliance from the emperor on Portuguese ministers and advisors, only contributed to endorse the already widely held view that D. Pedro did not prioritize Brazilian national interests[78].

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[74] On May 19, 1826, José Clemente Pereira, elected by Rio de Janeiro, proposed the end of the introduction of captives for January 1, 1841. In appreciation of the proposal, the Commission of Legislation and Justice drafted an amendment reducing the deadline to 6 years. The parliament, however, went into recess without resolving the matter. See Tâmis Peixoto Parron*, A política da escravidão no Império do Brasil, 1826-1865* (Rio de Janeiro: Civilização Brasileira, 2011): 64.

[75] The deputy for the province of São Paulo, Francisco de Paula Souza e Melo, went so far as to suggest, on July 4, 1827, that if a minister were allowed to make treaties and laws, it was no longer useful to keep the doors of Parliament open: "*pode-se fazer leis por tratados em um governo representativo onde há divisão de poderes? Não será um tal tratado nulo por direito das gentes? E se assim é, para que aqui estamos? Para que passou o Brasil pelo mar tempestuoso de uma revolução que lhe desse o nome de governo representativo?... Se assim é, se um ministro pode por um tratado fazer leis e desfazê-las, fechem-se as portas das salas dos senadores e deputados, é escusada esta forma de governo e abracemos outra vez o proscrito absolutismo*": *Annaes do Parlamento Brazileiro. Camara dos Srs. Deputados. Segundo Anno da Primeira Legislatura. Sessão de 1827*, t. III (Rio de Janeiro: Typographia de Hyppolito José Pinto & C., 1875): 50.

[76] In textual words by Deputy Raimundo José da Cunha Mattos (Goiás), on July 2, 1827: "*Sr. Presidente! O commercio de escravos deve acabar, mas deve acabar quando assim o quiser a nação brazileira, livre, soberana e independente dos caprichos ou da vontade do governo de Inglaterra. A convenção que os nossos ministros fizeram com o Hon. Roberto Gordon, é o ultimo annel da grande cadêa com que fica manietada a nação brasileira*". *Annaes do Parlamento Brazileiro,* Sessão de 1827, t. III, 13.

[77] With this discursive strategy, in Tâmis Parron's effective synthesis, "*o transplante de africanos não era uma estratégia de domínio colonial exercida de fora pela metrópole nem um ramo do comércio injustamente praticado pela velha aristocracia, mas antes uma ação exercida de dentro pelos brasileiros e projetada com justiça para o futuro, para o desenvolvimento do Estado nacional. O que vinha do exterior era a convenção anglo-brasileira. Um despropósito do Executivo, um resíduo do absolutismo*": Parron, *A política da escravidão no Império do Brasil,* 76.

[78] Bethell, *The Abolition of the Brazilian Slave Trade,* 68.

In front of this institutional distress and the broader scenario of political instability accumulated in a decade of domestic and external military conflicts – Wars of Independence (1822-1824); Confederation of Ecuador (1824) and Cisplatin War (1825-1828) – D. Pedro chooses to change the battlefield and save his mother crown by returning to Portugal and abdicating on behalf of the six-year-old son, the future Dom Pedro II, on April 7, 1831.

If the emperor's departure could be considered in some way a victory for the antagonists of the treaty, it in no way altered its validity, leaving the Parliament in any case in front of a "*fait accompli*" [79]. At that point, it was convenient both to the opposition to Pedro I that at least the repression scheme was made by Brazilian officials, under Brazilian law, rather than the mixed commissions co-jointed by British authorities; as well as to the supporters of the ban that Brazilian's government image was dissociated from the suspicion of convenience with smuggling[80]. It was how, over a month after the departure of Pedro I, on May 31, 1831, a bill was introduced in the Senate with the aim of prohibiting all the slave trade to the national territory and became law only six months later, on November 7, 1831, not only diverging but extending many of the stipulations of the 1826 treaty[81]. If on the one hand this fast legislative path can be effectively attributed to the liberal and reformist wave that followed the abdication of the emperor[82], on the other many pro-trade

[79] Bethell, *The Abolition of the Brazilian Slave Trade,* 70.

[80] Mamigonian, "A proibição do tráfico atlântico e a manutenção da escravidão," 224; Beatriz Galotti Mamigonian, *Africanos livres: a abolição do tráfico de escravos no Brasil* (São Paulo: Companhia das Letras, 2017): 64-65.

[81] "*Lei de 7 de Novembro de 1831. – Declara livres todos os escravos vindos de fóra do Imperio, e impõe penas aos importadores dos mesmos escravos*", printed in *CLIB* (*1831*), pt. I (Rio de Janeiro: Typographia Nacional, 1875): 185-212. The Anglo-Brazilian agreement was limited to providing for the trial of guilty crews by mixed commissions and for the liberty of Africans from seized ships involved with the prohibited trade. By its own initiative, the Brazilian Parliament approved more severe provisions: Article 1 declared free *all* Africans illegally introduced in Brazil (not only those apprehended on slave ships); provided that all the transgressors - both sailors and slave owners - would be prosecuted (creating new punishable conducts); and that anyone was authorized to report to the police not only illegal disembarks, but also the existence of smuggled slaves in any part of the territory (extending so the clandestinity both on the high seas and in the interior of the country). See Parron, *A política da escravidão no Império do Brasil*, 87.

[82] Robert Conrad, *Tumbeiros: o tráfico de escravos* (São Paulo: Brasiliense, 1985): 92-97.

parliamentarians did not believe that this law could be more than an initiative "for the English to see" ("*para inglês ver*").

It was, in fact, with this label that many historians for a long time remembered the law[83], relying on abundant statistics that the importation of enslaved Africans even reached an all-time peak after its enactment, doubling in volume each year between 1834 and 1837[84]. More recent readings, however, warn against the mistake of confusing its repeated violation with political and social ineffectiveness[85]. The same law that would become an important weapon for abolitionists at the end of the monarchical period to ground freedom suits has served, in the 1830s, as a crucial factor of agglutination of pro-slavery forces mobilized for its repeal[86]. In those crucial post-abdication years, far from being a "dead letter", it was a drive-force for conservative

[83] It is the classic interpretation of the most traditional historiography – and already much revisited, but by no means disappeared from the mainstream narrative – such as Caio Prado Jr., *História econômica do Brasil* [atualização 1970, post-scriptum 1976] (São Paulo: Brasiliense, 2008): 157; Costa, *Da Monarquia à República*, 282; or Carvalho, *A construção da ordem*, 294. In a popular dictionary on slavery in Brazil, "*Lei para inglês ver*" even appears as an entry: Clóvis Moura, *Dicionário da escravidão negra no Brasil* (São Paulo: Edusp, 2004): 240-241.

[84] In the estimates updated by the most recent data available, it is recorded the arrival of 18.100 enslaved Africans to Brazil in the year of 1834; 37.134 in 1835; 52.387 in 1836 and 56.769 in 1837. See Eltis et al, *The Transatlantic Slave Trade: An Online Dataset* (slavevoyages.org).

[85] More recent research has argued that if the law did not imply the immediate extinction of the slave trade, it did not mean its total ineffectiveness, as the debates around it and its application varied according to the party in power; it served as a rationale for slave resistance and militant abolitionism; and it also legitimized England's diplomatic pressure on Brazil in crucial episodes. See Mamigonian, *Africanos livres,* 75-80*;* Beatriz Galotti Mamigonian and Keila Grinberg (eds.), "Dossiê: 'Para inglês ver'? Revisitando a Lei de 1831", *Estudos Afro-Asiáticos* 29, no. 1-3 (2007): 87-340*;* Beatriz Galotti Mamigonian and Keila Grinberg, "Lei de 1831," in *Dicionário da Escravidão e Liberdade,* edited by Lilia M. Schwarcz and Flávio Gomes (São Paulo: Cia das Letras, 2018), 285-291; Beatriz Galotti Mamigonian, "O direito de ser africano livre: os escravos e as interpretações da lei de 1831," in *Direitos e justiças no Brasil: Ensaios de história social*, edited by Silvia H. Lara e Joseli M. N. Mendonça (Campinas: Ed. da Unicamp, 2006): 129-60.

[86] Several petitions from municipal councils and provincial assemblies were forwarded to the House of Deputies and Senate asking for the re-discussion or complete repeal of the 1831 Law, coming not by chance from provinces located in coffee-growing areas (such as São Paulo, Rio de Janeiro, and Minas Gerais), as well as it was a recurring topic in the speeches of the conservative party's representatives. For a mapping of these pronouncements, see Tâmis Peixoto Parron, "A política do tráfico negreiro: o Parlamento imperial e a reabertura do comércio de escravos na década de 1830," *Estudos Afro-Asiáticos* 29, no. 1-3 (2007): 97-104; Parron, *A política da escravidão no Império do Brasil*, 134-146.

groups to build party identity and impose their political agenda at the top-level of the imperial government[87].

It is the group committed to this cause, which has accepted and invoked the monikers of "Party of Return" (*Partido do Regresso)*, "Conservative Party", "Party of Order" or "*Saquarema*"[88] to rise to power on September 19, 1837, under the leadership of the then President of the Chamber of Deputies, Pedro de Araujo Lima, future Marquis of Olinda, initiating an important conservative turn in the imperial administration on slavery and a clear institutional policy of connivance with illegal imports[89], enabling them to grow in an unprecedented way in the following years. This exponential increase motivated historiography to divide the period of illegality of the slave trade into two phases: that of "residual smuggling" (1831-1835), when trade activities did not have explicit or massive support from parliamentarians; and that of "systemic smuggling" (1836-1850), when the illegal trade reached levels of unparalleled intensity and glimpsed explicit support of parliamentarians engaged in the defense of slavery[90].

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[87] An important and extensive historiography has already advocated the need to read as interconnected events the law of November 7, 1831, the rise of the Conservative party, the judicial reforms at the end of the Regency and the reopening of the illegal slave trade. I limit to recall Parron, "A política do tráfico negreiro," 113; Jeffrey D. Needell, *The Party of Order: The Conservatives, the State, and Slavery in the Brazilian Monarchy, 1831–1871* (Stanford: Stanford University Press, 2006): 138–155.

[88] An unrivaled historiographical synthesis remains Ilmar Rohloff de Mattos, *O tempo saquarema: a formação do Estado imperial* (São Paulo: Editora Hucitec, 1987).

[89] One of the Conservative Minister of Justice Bernardo Pereira de Vasconcelos' first acts was to revoke a Decree of 6 June 1837 for the more scrupulous examination of ships arriving from Africa and to release three ships already detained. See Bethell, *The Abolition of the Brazilian Slave Trade,* 84; Parron, *A política da escravidão no Império do Brasil,* 149.

[90] This effective synthesis and chronology is proposed in a short essay by Parron, "A política do tráfico negreiro," 111; but it is in his wider work, *A política da escravidão no Império do Brasil,* more than once recalled here, where the research of extensive documentation (from parliamentary annals to books, diplomatic correspondence, acts and reports of the Council of State, collective petitions and representations from slave owners, municipalities and legislative assemblies) puts in evidence how "the Brazilian State in general and the *Saquarema* in particular had an active, direct and decisive participation in the most voluminous illegal smuggling of human beings that has been documented in Western history". (p. 252). Equal emphasis on the connivance of the Brazilian authorities with illegal slavery, from the point of view of the experience of Africans rescued from seized vessels, is provided by Mamigonian, *Africanos livres*.

It was not until the middle of the century that the "infamous trade" [91] to Brazil could be considered definitively extinct, when from September 1850 the imports reduce drastically, until the last disembarkation is recorded in the official lists in 1856[92]. Whether this result was due, as different historiographical interpretations suggest, to the ever more aggressive initiatives of repression from Great Britain [93], or to the efforts carried out by the Brazilian government itself[94], further motivated by the growing slave

[91] A recurring motif in parliamentary debates during the crucial decades of discussion on the abolition of the slave trade, the expression was consecrated in historiography with the unavoidable book by Jaime Rodrigues, *O infame comércio: propostas e experiências no final do tráfico de africanos no Brasil* (Campinas: Ed. da Unicamp/Cecult, 2000). His contribution is particularly interesting where discusses the non-linear transformation of the social image of traffickers from rich and influential traders to voracious pirates underserving of staying in the country (chapter 4: "*Tensões entre 'grandes' e 'pequenos' no final do tráfico*").

[92] While the three years prior to the law's enactment saw the highest annual imports since 1829 (in 1847, 61,731 enslaved Africans disembarked in Brazil; 1848: 61,757; 1849: 57,504), from 1850 onwards estimates point to a drastic drop (1850: 31,161; 1851: 5,595; 1852: 984; 1853-1855: 0) until the record in 1856 of the last ship to land on Brazilian shores, bringing the last 320 enslaved Africans. See Eltis et al, *The Transatlantic Slave Trade: An Online Dataset* (slavevoyages.org). Even though it is highly likely that other landings occurred in the following years at clandestine locations that did not enter official estimates, it is a historiographical consensus that the years 1850 represent the definitive end of the slave trade to Brazil, after the entry of more than 5.800.000 million enslaved Africans in more than three centuries. See specially chapter 12 "Crisis and final abolition, 1850-1851" in Bethell, *The Abolition of the Slave Trade,* 327-363; Rodrigues, "O fim do tráfico transatlântico de escravos para o Brasil," 319-321; Mamigonian, "A proibição do tráfico transatlântico," 229-230.

[93] Many Brazilian merchant vessels were illegally searched and captured by British cruisers during the 1840s under the justification that the Brazilian authorities were omissive in the implementation of repressive measures against illegal trade and even connived with its maintenance, provoking many protests by the Brazilian government and a climate of growing diplomatic tension. The climax of this discord, however, came with the enactment in 1845 by the English Parliament of the Aberdeen Bill, which gave the Royal Navy authorization to seize Brazilian ships involved in the illegal trade (equated with piracy) and the British Admiralty Courts permission to trial them. For a detailed account of the episode, see Bethell, *The Abolition of the Brazilian Trade,* especially chapter 9 "Lord Aberdeen's Act of 1845", 242-266.

[94] The official narrative of the Conservative Government in charge when the law was passed sought to minimize the merit of the British action, as can be clearly read from a statement by Brazil's next Minister of Justice, Jose Ildefonso de Sousa Ramos in 1852, "as the government of Brazil has enough force to carry out its searches and to execute its laws effectively", so that to the national effort should be given the credit "to bring about the complete extinction of the traffic as a measure of social convenience, of civilization, of national honor and even of public security". Leaving aside the self-celebrative tone of this discourse, it is recognized by historiography that the state structure was also able to activate a repressive machine as it was never before: the National Guard and the provincial police forces were more numerous and better organized than ever; the financial position of the Brazilian government had improved and that benefited also the development of the Brazilian navy; and even some of the leading foreign traders were imprisoned and ordered to leave the country. See Bethell, *The Abolition of the Brazilian Slave Trade,* 341-343.

agitations on the ground[95], fact is that it was only after the enactment of a second law in 1850 Brazil launched a last full-scale and ultimately successful effort to suppress the illegal trade[96]. The "Eusébio de Queirós Law" (law n. 581 of September 4, 1850[97]) is named after the Minister of Justice who was credited with finding the political solution to ensure that illegal ownership of Africans imported since the first abolition would not be questioned - "forgetting the past", as was so often said - and at the same time establishing more effective domestic measures to definitely suppress the slave trade[98]. Almost 30 years, therefore, would elapse from the signing of the first treaty with Great Britain until the definitive cessation of the slave trade, just as 30 more would follow between the cessation of the importation of enslaved Africans and the legal abolition of slavery.

For the argument of this chapter, what is irrelevant to acknowledge is that the first commitment made soon after independence in the Anglo-Brazilian treaty indeed

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[95] The years between 1847-1848 were particularly turbulent in Salvador and Rio de Janeiro with the outbreak of many slave insurrections. Based on the repercussions of these episodes, some historians argue that the fear of slave violence had contributed on equal foot as the concern with the international prestige and British pressure to reinforce the national efforts to suppress the slave trade. See Robert Slenes, "'*Malungu*, *nogma* vem!': África coberta e descoberta do Brasil," *Revista USP,* 12 (1992): 48-67; and Dale T. Graden, "An Act 'Even of Public Security': Slave Resistance, Social Tensions, and the End of the International Slave Trade to Brazil, 1835-1856," *HAHR* 76, no. 2 (1996): 267-8.

[96] In an effective synthesis of the complex and multifactorial scenario that explains the achievement of this result in 1850 instead of 1831, Rodrigues suggests: "*a maior coesão de parcelas da elite política, o esgotamento do projeto de construção do mercado de mão de obra baseado exclusivamente nos escravos africanos, a estreita vinculação entre a suposta 'corrupção dos costumes' e a escravidão, a manutenção do direito sobre as propriedades escravas já existentes e a brandura policial e judicial para com os senhores que comprovam escravos contrabandeados. A tudo isso aliava-se a separação entre os interesses senhoriais e os do traficante, do ponto de vista moral e legal, propiciando o apoio relativo dos senhores de escravos das províncias à nova lei, já que eles não estavam mais ameaçados pela justiça. Se entendermos essas motivações simultâneas numa conjuntura em que o medo das ações coletivas dos escravos aumentava (e, evidentemente, a pressão inglesa se acentuava), então é razoável afirmar que em 1850 a proibição legal do tráfico pôde ter, efetivamente, maior sucesso*". See Rodrigues, "O fim do tráfico transatlântico de escravos para o Brasil," 331.

[97] "*Lei n. 581 – de 4 de Setembro de 1850. Estabelece medidas para a repressão do trafico de africanos neste Imperio*", in *CLIB (1850)*, pt. I (Rio de Janeiro: Typographia Nacional, 1851): 267-270.

[98] The law equated trafficking with piracy; traders were placed under the jurisdiction of a special court - the *Auditoria da Marinha* - and subjected to prison sentences and payment of the costs of re-exporting the Africans shipped back to Africa. From a criminal point of view, however, it was less comprehensive than the 1831 law, as anyone who bought illegally imported Africans would no longer be considered a criminal accused of smuggling, nor would anyone who aided the slave trade. See Rodrigues, "O fim do tráfico transatlântico de escravos para o Brasil," 330; Mamigonian, *Africanos livres,* 240-244.

would not prevent the entry of almost another 800,000 enslaved Africans into Brazilian ports[99]. Nonetheless, it goes without saying that this is a datum available to us *a posteriori,* looking at history in retrospect, but it was not a circumstance of which slave owners and traders could be absolutely sure of in the 1830s.

Instead, after the ratification of the 1826 treaty, the expectation that the slave trade was about to be suppressed was a widespread concern. From both parliamentarian discourses and "*Fallas do Throno"* (the inaugural speeches the emperor delivered at the start of the legislative calendar) a common alarm is apparent – even rather prematurely – over the "end of the slave trade"[100]; also, the "unrelenting search for Africans, high slave prices and personal letters from owners indicate that economic agents believed in the effective coercion of the trade."[101] Whether or not it was a premature concern in the light of the statistics of the following years, it was a widespread anxiety and the enactment of two labor contract laws in just seven years (1830 and 1837) can be fairly considered[102] a byproduct of the broader movement of

[99] Current estimates suggest that at least 796,000 enslaved Africans entered Brazil between 1830 and 1856. See Eltis et al, *The Transatlantic Slave Trade: An Online Dataset* (slavevoyages.org). It is not too much to remember that, according to the law of 1831, all of them were to be free (although subject to a compulsory work period of 14 years), but in Brazil only 11,000 of them were rescued, being granted to private individuals or working in public works, in conditions not very different from slavery, and without necessarily accessing freedom after the compulsory labor period. For its detailed experience in Brazil, see the accurate study of Mamigonian, *Africanos livres*; first presented in the chapter "Revisitando a 'transição para o trabalho livre': a experiência dos africanos livres.", in *Tráfico, cativeiro e liberdade (Rio de Janeiro, séculos XVII-XIX,* edited by Manolo Florentino (Rio de Janeiro: Civilização Brasileira, 2005): 389-416.

[100] On July 2, 1829, the Marquis of Caravelas, deputy for the province of Bahia, exhorted his colleagues: "In view of the fact that the slavery trade is at an end, which is where we get the arms for our plantations, we must try to replace this shortage with some kind of measure", in *Annaes do Senado no Imperio do Brazil. Segunda Sessão da Primeira Legislatura de 1 de Julho a 3 de Setembro de 1829*, t. II (Rio de Janeiro, 1914): 13. Just under a year later, on May 3, 1830, the Emperor repeated the chant, as transcripted in *Falas do trono: desde o ano de 1823 até o ano de 1889: acompanhadas dos respectivos votos de graça da Câmara Temporária: é [sic] de diferentes informações e esclarecimentos sobre todas as sessões extraordinárias, adiamentos, dissoluções, sessões secretas e fusões, com um quadro das épocas e motivos que deram lugar a reunião das duas Câmaras e competente histórico* (Brasília: Senado Federal, 2019): 153.

[101] Parron, *A política da escravidão no Império do Brasil*, 89.

[102] As had already been done by Henrique Espada Lima, "Trabalho e lei para os libertos na ilha de Santa Catarina no século XIX: arranjos e contratos entre autonomia e a domesticidade," *Cadernos AEL* 14, no. 26 (2009): 137-175 (146)*;* Joseli Maria Nunes Mendonça, "Leis para 'os que se irão buscar' – imigrantes e relações de trabalho no século XIX brasileiro," *História: Questões & Debates,* 56 (2012): 63-85 (67).

seeking alternatives to the then main supply of labor force: the "infamous trade" under threat.

What seems to have been hitherto insufficiently emphasized by historiography, however, is that in addition to the labor question above discussed, these initiatives should also be read as the product of another broader movement that also connoted the years 1827-1837: this was the "liberal decade" of the Brazilian Empire, the most intense period of liberal reforms and restructuring of the legal institutions and paradigms that shaped the administration of justice[103]. After the kick-start given by the Constitution from March 1824 – creating the legal framework of a monarchical government with clear aspirations to liberal models of Western modernity[104] – the first two ordinary legislatures gathered in Rio de Janeiro from 1826 would engage in a series of reforms connoted by similar principles, envisaged to provide the new Nation-State with an independent and modern institutional infrastructure.

[103] It coincides with the first two legislatures of the Empire, including the period in which, after the abdication of the emperor in 1831, Brazil was governed by the Permanent Triumviral Regency (1831-1834) and the sole Regency of Feijó (1834-1837), always under the leadership of the liberal party. In a more or less coincident chronology, numerous historians recognize the liberal imprint of the reforms undertaken in these ten years. See Thomas Flory, *Judge and Jury in Imperial Brazil, 1808-1871. Social Control and Political Stability in the New State* (Austin: University of Texas Press, 1981), especially chapter 1 "Liberalism in a Time of Transition", 5-16, and chapter 2 "Reformist Thought", 17-20; Roderick J. Barman, *Brazil: The Forging of a Nation, 1798-1852* (Stanford: Stanford University Press, 1988), especially chapter 6 "The Liberal Experiment, 1831-1837", 160-188; José Reinaldo de Lima Lopes, *História da Justiça e do Processo no Brasil do Século XIX* (Curitiba: Juruá, 2017), especially section 3.1 "Reformas Liberais", 125-128; Andréa Slemian, *Sob o império das leis: constituição e unidade nacional na formação do Brasil (1822-1834)* (São Paulo: Hucitec, 2009), especially section 2.2 "Um panorama das 'reformas liberais'": 182-196.

[104] The Constitution of 1824 is considered "liberal" to the extent that it guaranteed the rules of the exercise of sovereign power, incorporated the idea of distribution of powers (or limited exercise of sovereignty), representation and guarantee of individual rights (civil rights): Lima Lopes, "Iluminismo e justnaturalismo no ideário dos juristas da primeira metade do século XIX," 197. Pointless to say, it was a moderate liberalism, within the limits of a text granted after the dissolution of the Constituent Assembly, with an emphasis on the action of the Executive; a Legislative divided between a representative General-Assembly (elected by indirect and census vote) and a Senate for life chosen by the emperor; and a Moderator Power, in tune with the counter-revolutionary wave of restored monarchies that swept Europe after 1814. See Andréa Slemian, "À nação independente, um novo ordenamento jurídico: a criação dos Códigos Criminal e do Processo Penal na primeira década do Império do Brasil," in *Brasileiros e cidadãos: modernidade política, 1822-1930*, edited by Gladys Sabina Ribeiro (São Paulo: Alameda, 2008): 179-180.

Not by chance, the first reforms had a prevalent public law nature (constitutional, administrative, judicial, criminal), beginning with the creation of the justice of the peace (1827), the foundation of the Supreme Court of Justice (1828)[105], new regulations for the Municipal Councils (1828), the establishment of the Provincial Treasuries (1831), but including the creation of the first law schools in Brazil (1827)[106] and not least two codes (of criminal law in 1830 and of criminal procedure in 1832) and an Additional Act to the Constitution (1834)[107]. Combining the liberal belief on the "empire of laws" [108] and a strong and age-old grievance against the Portuguese judicial system and the jurisdictional structure of the old regime[109], Brazilian first liberalism

[105] Just 4 days apart, the Supreme Court of Justice was established (on September 18, 1828) and the old Portuguese superior courts (*Desembargo do Paço*, *Casa da Suplicação*, *Mesa da Consciência* and *Ordens*) were extinguished (on September 22) in a double movement of simplification of the judicial system and abolition of the jurisdictional plurality typical of the old Portuguese kingdom. The old courts historically accumulated contentious jurisdiction but also administrative and governmental functions, in addition to the power to dispense laws and grant privileges, a design that no longer found shelter in the new constitutional order of separation of powers. See Lima Lopes, *História da Justiça e do Processo no Brasil do Século XIX*, 31-45.

[106] By a deliberate policy of reinforcing cultural dependence as a fundamental dimension of colonial rule, the Portuguese crown (unlike Spanish America) did not allow for the establishment of colleges and universities in any of its overseas territories, ensuring for centuries that the bachelors who would act on all sides of the Kingdom were trained in a single "factory": the University of Coimbra. Soon after independence, the need to create a university was recognized as the first investment to be made in public education, and the faculty of law as the first degree, which resulted in the foundation of two law schools in 1827, one in São Paulo and one in Recife. Considered state organs, their programs, curricula and even the syllabus of the different disciplines were set by governmental provisions. Among the vast historiography, it remains worth mentioning Sergio Adorno, *Os aprendizes do poder: o bacharelismo liberal na política brasileira* (Rio de Janeiro: Paz e Terra, 1988) and more recently José Reinaldo de Lima Lopes, "Brazilian law and legal culture in the XIXth Century", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung,* 135 (2018): 320-321.

[107] The Additional Act to the Constitution of 1824, an amendment approved on August 12, 1834, determines the creation of provincial Legislative Assemblies, definitively institutionalizing the provincial sphere as a space to serve regional interests as the culmination of the liberal project of decentralization of power.

[108] The constitutional ideology consolidated in post-independence Brazil was, in line with the post-revolutionary Western legal culture, predominantly legalistic, attributing, even in a non-linear and immediate way, an ever more central role to the legislation in the hierarchy of the sources of law, as discussed by Andréa Slemian, *Sob o império das leis,* 17-24; Slemian, "À nação independente, um novo ordenamento jurídico", 184-186. The well-known philosophical itinerary that led to this unmistakable trait of Western legal modernity was followed within the Brazilian legal historiography by José Reinaldo de Lima Lopes, *As palavras e a lei. Direito, Ordem e Justiça na História do Pensamento Jurídico Moderno,* 2ª ed. rev. e amp. (São Paulo: Madamu, 2021).

[109] For the liberals who, since the dissolution of the Constituent Assembly in 1823, constituted the staunchest opposition to the monarch, the judiciary was the branch that most urgently needed new

relied on an active role of the legislative branch[110] to reform – decentralizing – the administration of the justice system[111].

With such a scope, the first great reform of the liberal decade was precisely the creation of an elective, parish-level justice of the peace in 1827, the jurisdiction to which later would be attributed the competence for all disputes involving service rental contracts both under the 1830 and 1837 laws. Already promised by the Constitution of 1824, as had also been the jury system, this untrained magistrate was a bet on popular local and lay justice, to replace the royal appointive corporate colonial magistracy. Conceived as a nonprofessional locally elected magistrate who would serve for a year without pay (thus placed as far as possible from the executive branch), the liberal reformers made *the juiz de paz* "the standard-bearer of their own philosophic and practical concerns: democratic forms, localism, self-government and decentralization"[112]. It was born with an original competence of promoting conciliations between the parties involved in potential lawsuits, a civil jurisdiction in small claims, some vague but important police powers[113] and other miscellaneous

legislation. The structure inherited from the colony and from the brief period of the United Kingdom gave ample power to the professional magistracy, composed largely of Portuguese and/or figures linked to Pedro I. See Lima Lopes, *História da Justiça e do Processo no Brasil do Século XIX*, 17-21.

[110] On how any liberal revolution in the Western world, both to destroy the old order and to establish a functioning new one, needed from the very first hour a state, and a very visible hand guiding these reforms through legislation and administration, it is always insightful to come back to António Manuel Hespanha, *Guiando a mão invisível. Direitos, Estado e Lei no Liberalismo monárquico Português* (Coimbra: Almedina, 2004): 6-12. On how this idea was clearly reflected in the speeches of the first legislature, and of the first generation of post-independence Brazilian jurists, again Lima Lopes, "Iluminismo e justnaturalismo no ideário dos juristas da primeira metade do século XIX," 208.

[111] Connecting liberalism with national sentiment and proposing liberal institutions as a general antidote to colonial abuses, Brazilian liberal reformers found in decentralization and localism a way to attack the colonial regime and the quasi-colonial rule of Pedro I, depicted as equal manifestations of excessively concentrated public power. Flory, *Judge and Jury in Imperial Brazil, 1808-1871,* 18-19. On the justice system in the Portuguese old regime, see Arno Wehling and Maria José Wehling, *Direito e justiça no Brasil colonial: o Tribunal da Relação do Rio de Janeiro, 1751-1808* (Rio de Janeiro: Renovar, 2004).

[112] Flory, *Judge and Jury in Imperial Brazil,* 49.

[113] It expressly included (art. 5° of the Law of October 15, 1827) dispersing public gatherings with danger of disorder; incarceration of the inebriated for the duration of their state; prevention and destruction of runaway slave communities (quilombos); imposition to vagrants and beggars of the obligation to engage in "honest work"; but also assembling the evidence (corpus delicti) and interrogation of suspects when a crime was committed. See *Lei de 15 de Outubro de 1827. – Crêa em cada uma das*

duties[114]. In the subsequent years, other measures would only increase its powers and competence, with the incorporation of electoral responsibilities from 1828[115], the jurisdiction over service rental contracts from 1830, and a relevant expansion of its criminal jurisdiction with the enactment of the first Criminal Code (1830) and Code of Criminal Procedure (1832).

As was also the case in post-revolutionary France (1791), criminal codes were the first to be issued in Brazil, both because of the urgency of the penal question in a decade of numerous post-Independence political insurgencies[116], but also by the cohesion of the political elite around the liberal project of expanding individual rights and extinguishing criminal and procedural arbitrariness in the new constitutional order. The first Brazilian code, in line with a broader international tendency in the Western legal culture to reform criminal laws[117], expressly privileged the principle of legality (invoking Feuerbach's formula in the very first article) and the construction of a modern penitentiary system; limited the death penalty in favor of humanitarian values and particularly relevant to our argumentation, bet on the efficiency of the local and lay magistracy. The Criminal Procedure Code would later expand their powers even further, entrusting to the justice of the peace the most basic steps of criminal procedure and

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freguezias e das capellas curadas um Juiz de Paz e supplente, printed in *CLIB (1827),* pt. I (Rio de Janeiro: Typographia Nacional, 1878): 67-70.

[114] They included, for instance, protection of public forests and the prevention of illegal timbering in private ones, and notification of the provincial president when discoveries were made of useful animal, vegetable, or mineral resources. In the eloquent definition of Thomas Flory: "It was a digressive piece of legislation that mixed the general with the specific, and the important with the insignificant." See *Judge and Jury in Imperial Brazil*, 60.

[115] The justices of peace were also designated the officials charged with preparing lists of citizens qualified to vote in municipal elections by the regulatory law of municipal councils of 1828. From then on, they became the presiding officer and head of the electoral board in all local elections, what greatly expanded its political endowment, in addition to its ever-greater jurisdictional relevance. See Flory, *Judge and Jury in Imperial Brazil*, 63.

[116] Mônica Duarte Dantas, "Revoltas, Motins, Revoluções: das Ordenações ao Código Criminal", in *Revoltas, motins, revoluções: homens livres, pobres e libertos no Brasil do século XIX*, edited by Mônica Duarte Dantas, 2ed. (São Paulo: Alameda Editorial, 2018): 7-68.

[117] Mônica Duarte Dantas, "Da Luisiana para o Brasil: Edward Livingston e o primeiro movimento codificador no Império (o Código Criminal de 1830 e o Código de Processo Criminal de 1832)," *Jahrbuch für Geschichte Lateinamerikas,* 52 (2015): 173-206*;* Vivian Chieregati Costa, *Codificação e formação do Estado-nacional brasileiro: o Código Criminal de 1830 e a positivação das leis no pós-Independência* (Master's dissertation, Universidade de São Paulo, 2013).

extensively regulating the jury, the culmination of the popular participation as applied to the judiciary.

The privileged position of hindsight observers inevitably leads us to know that the trend towards decentralization and localism would not be an irreversible movement, nor a lasting one, in the legal reforms implemented in the following decades in Brazil. The rise of the Conservative Cabinet in 1837 and its political hegemony over the next two decades would indeed give Brazilian liberalism other connotations[118]. But whether liberal sentiments have been more "*exaltados*" (exalted) or "*moderados*" (moderate)[119] in the years that followed, it does not change the fact that the first efforts at legal emancipation from the colonial past in Brazil were implemented in the clear and determined direction of creating "a national law that was a liberal law"[120]: where legislation was the first legal source committed to the defense of freedom and property. If in the field of public law this movement translated into the creation of new institutions and the reformulation of entire sectors of the legal system, in the field of private law the first timid – but not irrelevant – manifestations may be considered – and we will argue why – the first laws on service rental contracts (1830 and 1837). It is clear that, in a national system that coexisted with Portuguese norms, in which a legislated system concurred with customs and a liberal system cohabited

[118] See "Part III. Reaction and the Counterreform, 1837-1871" (pp. 129-180) in Flory, *Judge and Jury in Imperial Brazil*. Among the first reforms adopted by the Conservatives was precisely the approval in 1840 of a Law of Interpretation of the Additional Act of 1834, which revoked the legislative capacity of the provinces and established that the Central Executive Power would control the Judicial Police. Many prerogatives were also taken away from the Justices of the Peace, but their competence over written service rental contracts was maintained until the end of the Empire, including in the third law on the rental of services of 1879.

[119] Once united against the perceived absolutist tendencies of Pedro I, after his abdication the self-proclaimed "liberals" formed two distinct political groups in Brazil, which from 1837 would become the two formal parties in Parliament during the whole Empire: the "exalted" – more radical advocates of the liberal flags and administrative decentralization, which then formed the "Liberal Party"; and the moderate – supportive of a monarchical centralism tempered by liberal values, later the "Conservative Party". An extensive historiography has showed how these distinctions were quite tenuous and the positions very interchangeable, but especially regarding the governance of slavery and slave trade abolition, their different approaches would have not insignificant consequences. In this regard it is useful to refer again to Parron, *A política da escravidão no Império do Brasil, 1826-1865,* 121-198.

[120] Lima Lopes, "Iluminismo e justnaturalismo no ideário dos juristas da primeira metade do século XIX," 198.

with pre-liberal institutions, this initiative certainly did not repeal the previous framework nor prevent "*la persistencia del antiguo régimen*"[121]. Instead, it would end up only increasing the complexity[122] of an already plural landscape of labor norms, by just adding ulterior references to the existing set of sources. Nevertheless, it would be responsible for introducing an important lexical change in the law of labor, with inevitable consequences on legal literature and education, but above all on the way labor agreements would now be negotiated and disputed.

[121] As was also the case on the old continent, where it remains helpful to return to Arno J. Mayer, *La persistencia del Antigo Régimen. Europa hasta la Gran Guerra* (Barcelona: Altaya, 1997).

[122] Samuel Barbosa, "Complexidade e meios textuais de difusão e seleção do direito civil brasileiro pré-codificação", in *História do direito em perspectiva: do Antigo Regime à Modernidade,* edited by Airton Cerqueira Leite Seelaender and Ricardo Marcelo Fonseca (Curitiba: Juruá, 2008): 361-373.

§2. **From servants to contractors: the liberal legal lexicon in the world of labor**

Once omnipresent in the glossary of contemporary social historiography[123], the analytical category of "transition" has been increasingly rejected in recent years as a valid tool of interpretation to describe the complex transformations in social, economic, and legal structures that traversed the Western world in the nineteenth century with the political triumph of liberal ideas and the renewed emphasis on consent as the legal basis of social relations[124]. The images of progressive linearity, or the replacement of one structure by another, implied in this analytical tool, would be responsible for crystallizing historiographic binaries such as free and unfree labor, slavery and capitalism, rural and urban societies, old order and modernity, as successive stages of history or completely disjointed worlds. However, the concern not to schematize this itinerary of changes, or to consider it uncritically as a product of progress and an inevitable point of arrival, should not lead the interpreter of nineteenth-century sources to underestimate the clamorous transformations produced, particularly in the worlds of labor, by the hegemonization of the liberal cosmovision. The combined demand for liberty and equality among fellow citizens that guided the renewal of legal systems in that century hit hard the relations of personal

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[123] It is an expression that explicitly appears in the old-classic readings of Brazilian historiography on the decades preceding abolition, such as the already cited Costa, *Da Monarquia à República,* 252; Prado Jr., *História econômica do Brasil,* 186 ff.; but also authors less branded by the Marxist-oriented schematism of the so-called "São Paulo School" of the 1960s to which belonged the two mentioned above, such as Maria Lúcia Lamounier, *Da escravidão ao trabalho livre: a lei de locação de serviços de 1879* (Campinas, SP: Papirus, 1988): 16 ff. and Ademir Gebara, *O mercado de trabalho livre no Brasil (1871-1888)* (São Paulo: Brasiliense, 1986): 14 ff. The legal literature, old or recent, more oriented to classificatory schematism, is still largely branded by this type of paradigm, rendered classic by Alonso Olea, *Introducción al Derecho del,* 46 ff.; Id., *De la servidumbre al contrato,* 2. ed. (Madrid: Tecnos, 1979): 127 ff., but still strong in Jorge Luiz Souto Maior, *História do Direito do Trabalho no Brasil,* v. 1 (São Paulo: LTr, 2017): 73 ff.

[124] John French's provocative text accurately notes how at the basis of the long persistence of "false dichotomies" in historiography were, among other beliefs, the overly rigid and by now naïve conviction that (1) slavery was a legal status of civil "non-freedom" completely opposed to being "free" in legal terms, even if dependent; and that (2) "non-free" labor always coincided with unpaid labor, as distinguished from free and paid labor. See John French, "As dicotomias entre escravidão e liberdade: continuidades e rupturas na formação política e social do Brasil moderno," in *Trabalho Escravo: Brasil e Europa, Séculos XVII e XIX,* edited by Dou Libby and Junia Ferreira Furtado (São Paulo: Anablume, 2009): 75-96.

suzerainty and dominion peacefully accepted in the *Ancien Régime* of master and servants, giving a virtually revolutionary significance in the worlds of labor to the words of Sieyès: "*Il n'y a point d'engagement, s'il n'est fondé sur la volonté libre des contractants. Donc, point d'association légitime, si elle ne s'établit sur un contrat réciproque, volontaire et libre de la part des co-associés*"[125].

As "contract" became the universal expression of relations between individuals – "*l'acte juridique par excellence*"[126] –, and the privileged instrument of social mediation and promotion of freedom and equality before the law[127], stipulations between workers and employers could no longer be defined from a legal point of view in terms of dependency, authority, protection, and coercion, but as a mere exchange between two free and equal contracting parties. Relationships once regulated under the logic of domestic loyalties and their complex reciprocal and unequal exchanges, whose obligations went far beyond the mere agreement to provide services, were now described as an impersonal and freely stipulated provision of work upon payment.

Not by chance, in no other branch of law the famous epithet of Sir Henry Maine[128] – that "the movement of the progressive societies has hitherto been a

[125] Emmanuel-Joseph Sieyès, "Mémoire préliminaire à la Constitution, lu le 21 juillet 1789: exposition des droits de l'homme et du citoyen par Sieyès", in *Archives Parlementaires de 1787 à 1860 - Première série (1787-1799)*, Tome VIII - Du 5 mai 1789 au 15 septembre 1789 (Paris: Librairie Administrative P. Dupont, 1875): 256-261. 257.

[126] As defined a century later by Duguit, Léon, "Deuxième Conférence. La conception nouvelle de la liberté", in *Les transformations générales du droit privé depuis le code Napoleon* (Paris: Librairie Félix Alcan, 1912): 32.

[127] Once again, the importance of the category of the contract in the construction of the social-legal theory behind the ideals of the Revolution is read in Costa, *Il progetto giuridico,* 225 ff.

[128] Sir Henry James Sumner Maine (1822-1888) was professor of civil law and Roman law at Cambridge University from 1847 to 1854, and professor at Oxford University from its foundation in 1869 until 1878, having been the first professor to hold the chair of comparative law. In 1877 he was elected Master of Trinity Hall College of Cambridge University, and in 1887 became holder of the chair of international law at the same college. He also served as a legal member of the Council of India from 1856 to 1869. See Sidney Lee, "Sir Henry James Sumner Maine," in *Dictionary of National Biography*, edited by Sidney Lee, v. 35 (New York: Macmillan & Co; London: Smith, Elder & Co, 1893): 343-346.

movement from Status to Contract"[129] – found so much repercussion and success[130]. The scheme drawn by the Scottish jurist in 1861 to describe "law in ancient societies" seemed to fit in the world of labor like a glove: the contraposition between pre-modern societies as patriarchal and hierarchical organizations, where the social positions and prerogatives (status) attributed to each individual were defined by kinship ties and family dependence, and, on the other hand, modern societies as social arrangements ideally free of coercion, whose inter-subjective relations would derive from the free agreement between individuals (contract), would be repeated as a chant for decades to come. Vice versa, the labor realm was also described by historians as the "deep meaning of the principle of freedom of contract"[131], "the prototypical voluntary behavior, the mustard seed, so to speak, of freedom in liberal ideology (…) and the heart of liberalism's project of a noncoercive – and nonfeudal – society"[132].

The economical functionality of this "great transformation[133] -, and its social consequences for the working classes[134], are too well noted to be remembered. Its non-linear – and perhaps never completed – pace of implementation, even from a formal point of view, and its prolonged coexistence with old structures, will occupy a great part of the next few pages. Still, as a starting point of this study, one cannot help but notice that "as contract becomes the sole source of obligations and the only legal mediation tool capable of achieving social justice ('*qui dit contractuel dit juste*'), and as the freedom of economic initiative (freedom of trade) and freedom of contract became

[129] Henry Sumner Maine, *Ancient law: Its connections with the early history of society and its relation to modern ideas* (Boston: Beacon Press, 1883): 165.

[130] Giovanni Cazzetta, "Contratto e *status.* Uguaglianza e differenze tra Otto e Novecento," in *Diritto e controllo sociale. Persone e* status *nelle prassi giuridiche,* edited by Laura Solidoro (Torino: Giappichelli, 2019): 85-112.

[131] Enzo Roppo, *Il contratto* (Bologna: Il Mulino, 1977): 37.

[132] Orren, *Belated Feudalism*, 24-25.

[133] Within the endless pile of published works devoted to the topic, it remains fundamental Karl Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (1944), 2. ed. (Boston: Beacon Press, 2001)*;* Castel, *From Manual Workers to Wage Labourers*.

[134] Among legal historians, the dark legacy of this ideology is efficiently synthetized under the title "*La violenza dell'astrazione*" by Pio Caroni, *Saggi sulla storia della codificazione* (Milano: Giuffrè Editore, 1998): 28 ff.

'articles of faith'"[135], many of the centuries-old structures of the ancient regime's legal regulation of labor were frontally attacked.

Beyond the clamorous witch hunt against corporations and trade guilds, also the lexicon up to then employed to designate the poles of labor relations would become a target: in a time when "*la loi ne reconnaît point de domesticité*"[136], the labels of "*maîtres et compagnons*", "*amos e criados*", "*master and servants*" also represented awkward symbols of the old order. However, neither where the king's head was cut off[137], nor where the first chimneys of the industrial revolution were lit up[138], the liberal revision of the labor relationship would be experienced as a complete refusal of all the existing legal vocabulary. Starting with the homeland of the civil codification, perhaps the greatest material symbol of legal modernity, neither a new category nor an autonomous model of labor contract would be created in a first moment for this purpose. Instead, the change of principles seemed like it could be easily framed in a category with deep roots in civil law and in the well-known title two of the XIX book of the Digestum[139]: *the locatio conductio* (letting and hiring of goods or services). The legal

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[135] Bruno Veneziani, "L'evoluzione del contratto di lavoro in Europa dalla Rivoluzione Industriale al 1945", *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 69 (1996): 23-67; 55.

[136] As dictated by the renowned art. 18 of the French Constitution of 1793: "*Tout homme peut engager ses services, son temps; mais il ne peut se vendre, ni être vendu; as personne n'est pas une propriété aliénable. La loi ne reconnaît point de domesticité il ne peut exister qu'um engagement de soins et de reconnaissance, entre l'homme qui travaille et celui qui l'emploie*". See *Constitution du Peuple Français du 24 Juin 1793, l'an deuxième de la République* (Paris: L'Imprimerie Nationale, 1793).

[137] In the civil code of 1804, more than 15 years after the Revolution, terms such as "*gens de travail*" and "*maître*" still appeared to designate the poles of the employment relationship, denoting that the idea of work as being part of a domestic community had not been completely overcome. As remarkably noted by one of its main commentators: "*Il [code] n'emploie pas les termes de locateur ou bailleur et de preneur ou locataire (...) il désigne les parties par les noms qu'on leur donne dans la vie réelle; il appelle les gens de travail domestiques et ouvriers, et il donne le nom de maître à celui qui les emploie (art. 1779-1781).*" François Laurent, *Principes de Droit Civil Français,* tome vingt-cinquième (Paris: A. Durand & Pedone Lauriel, 1877): 537.

[138] Suffice it to recall that in 1823, at the height of the process of industrialization and market liberalization in England, a statute called the "Master and Servant Act" was enacted, a terminology that would not disappear from legislation until the passage in 1875 of the Employers and Workmen Act. See Robert Steinfeld, *Coercion, Contract and Free Labor in the Nineteenth Century* (Cambridge: Cambridge University Press, 2001): 39-43.

[139] *Digesta Iustiniani Augusti*, with Latin text as it appears in *Editio minor dei Digesta* edited by Th. Mommsen-P. Krüger, editio stereotypa duodecima (1911), made accessible online by the Project DIGESTO, a co-operation among the *Dipartimento Scienze Giuridiche* (Università La Sapienza di Roma)

definition referred by Julius Paulus as the only possible framework for the convention of giving something to do – D.19.2.22(1), Paulo: "*quoties autem faciendum aliquid datur, locatio est*" – even if it has not enjoyed the unanimity that his strong affirmation would lead one to believe – *quoties… locatio est*! – for many national legal orders who followed the Napoleonic Code would end up being the solution adopted even though the European continent had already inaugurated its contemporary age following two revolutions. An insistence, after twenty centuries of elastic regulation[140], which responded to renewed interests and impulses, not immediately reconductible to the legal tradition and, if we do not want to sin of ingenuity, as Antonio Ojeda advises[141], nor did they come exclusively from the world of law.

Fact is that eager to demolish once and for all the pyramid of social strata and privileges on which the old society was based, the nineteenth-century jurists saw in a category of Roman origin, "archaic and futuristic"[142], "the perfect aseptic and pure instrument"[143] to implement the revolutionary break with the *Ancien Régime*. With a "scribbled adaptation of pre-existing law"[144], which included last-minute changes in its

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and the *Istituto di Linguistica Computazionale "Antonio Zampolli"* (CNR-Pisa), at http://dbtvm1.ilc.cnr.it/digesto/Digesto_Home.html.

[140] Present in Roman sources since the pre-classical era (4th-1st century BC) as one of the four consensual contracts (alongside the sale, called *emptio venditio*; the *societas* and the *mandatum*), the *locatio conductio* has known an adventurous life of reelaboration in the Romanistic tradition, starting with a remarkable production by the schools of the medieval tradition, but also the particular attention it received from the humanists, the natural law theorists or the later French doctrine of the XVII-XVIII century (especially the works of Domat and Pothier) and not least the *Pandectists*. It is an itinerary closely followed by Roberto Fiori, *La definizione della "locatio conductio"*. *Giurisprudenza romana e tradizione romanística* (Napoli: Jovene, 1999). The category has been developed to such an extent that the question arose whether the trichotomy (*locatio-conductio rei*, *operum*, *operis*) was already employed by Roman jurists, or was the result of the later doctrinal elaboration. It was Arangio-Ruiz who piously argued, in the first edition of his *Istituzioni di diritto romano*, Napoli, 1921, and reproduced in the following ones (I consulted the 14. ed, Napoli: Jovene, 1993: 345 ff.), that Roman jurists did not employ the trichotomy. On the subject, see also Luigi Amirante, "Ricerche in tema di locazione," *Bulletino del'Istituto di Diritto Romano "Vittorio Scialoja" (BIDR)*, terza serie – vol. I (1959): 111-119 (note conclusive); Armando José Torrent Ruiz, "La polémica sobre la tricotomia 'res', 'operae', 'opus' y los orígenes de la 'locatio-conductio," *Teoria e storia del diritto privato* 4 (2011): 1-50.

[141] Ojeda Avilés, *Las cien almas del contrato de trabajo,* 133.

[142] "*Una formula arcaica e avveniristica*" as defined by Paolo Passaniti, *Storia del diritto del lavoro I. La questione del contratto di lavoro nell'Italia liberale (1865-1920)* (Milano: Giuffrè, 2006): 52.

[143] Ojeda Avilés, *Las cien almas del contrato de trabajo,* 710.

[144] "*Un adattamento scarabocchiato del diritto preesistente*", according to the Italian jurist Romagnoli, "Alle origini del diritto del lavoro: l'età pre-industriale," 521.

legal definition[145], the liberal revision of the employment relationship and the adjustment of legal categories to the demands of the new production system was carried out without causing, on the surface, severe lacerations to the old discipline[146]. Not least because, as António Manuel Hespanha observes, many principles of the roman legal system – to name but a few, the unlimited extension of the power to dispose of goods and capital in the market and a conception of property that did not recognize any social or moral limitations to the use of things – converged conveniently with the capitalist vision of mercantile relations[147].

However, under a modern State organized "politically as a society of citizens and economically as a society of owners"[148], the legal act itself of hiring out one's own labor power to the service of others assumed quite different connotations [149]. The very same action that in Roman imperial society was a reducing factor of a worker's status

[145] The original wording of art. 1710 of the Code Napoleon, as drafted by the *projet primitif du conseil d'Estat*, provided that "*Le louage d'ouvrage est un contrat par le quel l'une des deux parties donne quelque chose à faire à l'autre*". In the final discussion, the *Tribunat* proposed a slight modification, so that instead of "*donner quelque chose à faire*", it was adopted "*s'engage à faire quelque chose pour l'autre*", redaction which indeed prevailed in the approved version. The Code thus prefers the position defended by Cujas rather the one defended by Pothier, considering the lessor "*celui qui s'engage à faire*" (the worker), and not "*la personne qui paye, qui donnait la chose à faire*" (the employer). An itinerary of this discussion, and of the centuries-old doctrinal controversies it contained, can be read in Pierre-Antoine Fenet, *Recueil complet des travaux préparatoires du Code Civil,* t. 14 (Paris : Videcoq Libraire, 1836) : 278-279 and Raymond-Théodore Troplong, *Le Droit Civil expliqué suivant l'ordre des articles du Code. De l'Échange et du Louage. Commentaire des titres VII et VIII du livre III du Code Napoleón,* troisième édition, tome second (Paris: Charles Hingray, 1859): 195-199.

[146] Behind the preservation of the nominal label, there were intense efforts of interpretation and conceptual elaboration, even on the part of jurists identified as mere "exegetes". See Paolo Passaniti, "Il lavoro come proprietà nell'Italia postunitaria. Gli anni dell'esegesi," in Tra Diritto e Storia. Studi in onore di Luigi Berlinguer promossi dalle Università di Siena e di Sassari, t. II (Soveria Mannelli: Rubbettino: 2008): 487-526; and Passaniti, *Storia del diritto del lavoro I,* 27 ff.

[147] Hespanha, António Manuel, *A Cultura Jurídica Europeia. Síntese de um Milénio* (Lisboa: Almedina, 2012): 135.

[148] Luigi Mengoni, "Contratto e rapporto di lavoro nella recente dottrina italiana,", *Rivista delle società* (1965): 674-688 (674).

[149] Laura Castelvetri, "Le origini dottrinali del diritto del lavoro," *Rivista trimestrale di diritto e procedura civile* (1987): 246-286 (249).

as a free man[150] – for its inevitable connection with the *locatio servi*[151] – became, in the liberal era, the very means of exalting and safeguarding the freedom of contract: the worker "was thus considered on a par with any owner who owns something susceptible to a market price"[152]. "*L'homme*", now "*libre*" and "*n'est pas susceptible du contrat de vente, peut louer ses services*"[153], and it is precisely what equalizes, rather than diminishes, his legal position in relation to his other fellow citizens. Vice versa, for the employer it meant a subtraction of his position as a holder of public rights over the worker, as he became a mere private subject in front his contractor, whose obligation to work is no longer due to a property or a sovereignty right, but to a pure agreement of work performance[154]. Stripped of the robes of master and servants, employer and worker assume the ordinary mantle of lessor and lessee, or, even simpler, of private contracting subjects.

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[150] The Roman jurists' well-known disregard for manual labor was based on the belief that mercenary labor diminished the condition of the free man, degrading it to that of the slave rented by the master; the free man, who obligated himself for money to the service of others, *locat se* as much as the *dominus* of the slave *locat servum*, which led Cicero (Off. 1, 42, 150) to consider the *merces* "*an auctoramentum servitutis*". See Mengoni, "Contratto e rapporto di lavoro nella recente dottrina italiana," 675; Joachim Rückert, "Employment and Labor Law. Medieval and Post Medieval Roman Law," in *The Oxford International Encyclopedia of Legal History*, edited by Stanley N. Katz, v. 2 (Oxford: Oxford University Press, 2009): 428-431 (428). It should be noted, however, that this dichotomy between manual and intellectual labor was not immediately overcome by the Revolution, appearing with conviction in the notes of the main commentator of the *Code Napoleon*, already at the end of the 1850s: "*Ces distinctions ne sont pas des préjugés; ce sont choses très-réelles et très-raisonnables, qui doivent être défendues contre de trop fâcheuses tentatives d'innovations" (...) ; "théorie éminemment morale et philosophique, et dont on ne pourrait s'écarter sans blesser l'honneur des professions libérales, sans exciter en elles l'esprit de spéculation et de trafic quit doit en être banni pour le bien de la société; sans se jeter enfin dans les dangereuses erreurs d'un matérialisme désolant*". Troplong, *De l'Échange et du Louage*, t. II, 247 ; 252.

[151] Luigi Amirante questions the commonplace in the doctrine that the *locatio operarum* of free laborers is nothing more than the expansion and deformation of the *locatio servi*. In his opinion, this hypothetical historical evolution finds no support in the sources, which offer no basis for the idea that the lease of the slave is older than the lease of free men. According to Amirante, what is safe to say is that from Plautus to Cicero the hiring out of the free man is attested alongside that of the slave; and that in almost all cases the object of the *locare* is always the person of the worker and not his work. See Amirante, "Ricerche in tema di locazione," 58 ff.

[152] Mengoni, "Contratto e rapporto di lavoro nella recente dottrina italiana," 676.

[153] Robert Joseph Pothier, *Oeuvres complètes de Pothier: Tome Sixième: Traité du Contrat de Louage* (1771) (Paris: Thomine et Fortic, 1821): 8.

[154] Hugo Sinzheimer, "La *democratizzazione* del rapporto di lavoro," in *Laboratorio Weimar. Conflitti e diritto del lavoro nella Germania prenazista* (Roma: Edizioni Lavoro, 1982): 53-78 (55).

A reframing of the position of the parties in the labor agreement would naturally be followed by a change in the comprehension of the legal bond between them. Contractors in equal position cannot exchange other than two perfectly co-respective obligations, stablishing a relationship that is no more than a purely "*consensuel, synallagmatique et commutatif*" bond[155]. No duty subsisting other than that stipulated and accepted by free will, the employment relationship becomes then an integral part of the law of obligations[156], leading the interpreter, when any difficulties emerged, "*s'en tenir aux principes qui régissent les obligations conventionnelles*"[157].

The other consequence of this reframing was the deliberate affirmation of the individualistic nature of the employment relationship, in frankly polemical contrast to the corporations and guilds of the medieval tradition. Especially outstanding in Western Europe, in Italy, Belgium, Germany and France[158], they functioned for centuries as the main centers of labor normative production during the Old Regime. Created to prevent that anyone could practice a trade without an apprenticeship or a proof of competency, the guild statutes laid down rigid rules, which also concerned the behavior of members and the contents of contracts, not freely drawn up by the parties. In turn, as the framework of an obligatory relationship becomes the only expression of an agreement between an employer and an individual employee, no other liaison was

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[155] Pothier, *Traité du Contrat de Louage,* 3.

[156] If this dogmatic framework in the continental legal tradition is already clearly outlined in the 18th century with the work of Pothier, in the Anglo-Saxon world, as Otto Kahn-Freund observed, despite the political success of liberalism and the economic consolidation of the ongoing Industrial Revolution, the traditional frame would still have a long life. In Blackstone's famous *Commentaries on the Laws of England* (1765-69), the employment relationship was included in the Law of Persons, as one of the family and domestic relationships, described alongside the well-known duties of obedience and protection within the household, and would remain so in the jurisprudence and legal literature for another full century and beyond. See Otto Kahn-Freund, "Blackstone Neglected Child: the Contract of Employment", *Law Quarterly Review* 93, 4 (1977): 508-528.

[157] Laurent, *Principes de Droit Civil Français,* 562-563.

[158] Veneziani, "L'evoluzione del contratto di lavoro in Europa dalla Rivoluzione Industriale al 1945", 28. For an accurate description of trade corporations in the French world, see the chapters "Mechanical arts and the corporate idiom" (pp. 16-39) and "Journeymen and Brotherhoods" (pp. 40-61) of William H. Sewell Jr., *Work & Revolution in France: The Langague of Labor from the Old Regime to 1848* (Cambridge: Cambridge University Press, 1980).

allowed to exist than the merely bilateral one[159]. Private law rigid schemes would obstruct any conditions of associational life.

Centenary institutions that up to then enjoyed institutional primacy would not become suddenly dispensable, however, without being painted first and foremost as potentially dangerous: "*celui-ci permet de se concerter, de se liguer; par lui se combinent les projets dangereux pour la communauté; par lui se forment les ennemis publics les plus redoutables*"[160]. The emergence of supra-individual interests was transformed into a threat against the new constitutional order and a dangerous return to the past, legitimizing the repression of any organized union of interests in the name of the exalted freedom of the individual. The most classic and well-known examples of this revolutionary conviction was the formal prohibition of any grouping or association of persons of the same trade, art or profession by the Law Le Chapelier (France, June 14-17, 1791), but also Brazil, as soon as its first national legal text was enacted, determined that "the Corporations of Trades, their Judges, Clerks, and Masters were extinct"[161]. The "radical individualism" of the new regime left no room between employer and employee neither for intermediate associations, collective interests, or mutual aid, becoming their relationship an impenetrable bilateral bond[162].

If at first glance the recourse to the category of *locatio* seemed that intuitive for the revolutionary and liberal targets, it implied, however, very concrete conceptual

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[159] Sinzheimer, "La democratizzazione del rapporto di lavoro," 62.

[160] Emmanuel-Joseph Sieyès, *Qu'est-ce que le Tiers état?,* troisième édition (Paris: [s.n.], 1789): 159-160.

[161] In the article that provided for the Civil and Political Rights of Brazilian Citizens, item XXV stated: "*Ficam abolidas as Corporações de Officios, seus Juizes, Escrivães, e Mestres*". See *Constituição Politica do Imperio do Brazil,* in *CLIB (1824),* pt. I (Rio de Janeiro: Imprensa Nacional, 1886): 34.

[162] Alonso Olea, "La abstención normativa en los orígenes del Derecho del Trabajo," 17-18. It may not be pointless to remember that the Penal Code of 1810, confirming the prohibition posed by the Le Chapelier Law, did not provide for the same penalties for workers' and employers' coalitions. While the "*coalition entre ceux qui font travailler des ouvriers, tendant à forcer injustement et abusivement l'abaissement des salaires (...) sera punie d'un emprisonnement de six jours á un mois, et d'une amende de deux cents francs à trois mille francs*" (art. 414), the "*coalition de la part des ouvriers"* for disturbances at work *"sera punie d'un emprisonnement d'un mois au moins et de trois mois au plus. Les chefs ou moteurs seront punis d'un emprisonnement de deux à cinq ans*". See *Code Pénal de l'Empire Français, édition conforme a celle de l'Imprimer Impériale* (Paris: Prieuer, 1810): 64. The Law Le Chapelier would be annulled in France on 25 May 1864, through the *Loi Ollivier,* which reinstated the right to associate and the right to strike.

maneuvers from a legal point of view. In order to reimagine the relation between worker and employer as a free agreement between subjects in identical legal positions, it was necessary to accomplish, at least, two semantic re-elaborations: a (i) the depersonalization (the idea of separability of work from the person providing it); and a (ii) the patrimonialization (labor energy as a good of the worker's patrimony of which he can freely dispose) of the legal bond.

Yet the very notions of "subject" and "object" of the contract did not belong to the Roman legal thinking[163], there are numerous references in ancient textual sources to the idea that what was rented in the *locatio operarum*, both of slaves and free people, was the person of the worker himself and not his work[164]. In turn, the liberal legal ideology – well rooted in centuries of modern political thought for which the logical-grammatical scheme 'subject-verb-object' is recognized as the model of legal transactions – seeks to displace the object of the *locatio*, by transferring it to the *operae*, abstraction made from the person of the worker[165]. This movement is referred to as the "depersonalization" of the employment relationship, since the content of the contract lay not in the person (a situation irreconcilable with his necessary freedom) but in the man's working power, offered in the labor market just like an owner would make with a commodity[166]. And here is where the link lies between the first and the second operations: it's the concept of "abstract" labor – the working power detached from the person who performs it – what allows the service to be seen as a commodity

[163] The notions of "subject" and "object", which today are considered the two poles of legal reasoning in private law, were not part of the structure of Roman legal thinking on the law of contracts. Roberto Fiori explains how for the *prudentes* there was no autonomous concept of *contractus*, but rather of *obligatio contracta*, and the typicity of a contract was given not by its essential elements, instead by the nature of the obligations. If one considers the *contrahere* not as an "essence", but only as a way to give birth to the *obligatio*, the use of the modern category "*object of the contract*" becomes totally improper in Roman law. See Roberto Fiori, "El problema del objeto del contrato en la tradición civil," *Revista de derecho privado,* 12-13 (2007): 205-260 (211-214).

[164] See excerpts reported by Amirante, "Ricerche in tema di locazione," 59-60.

[165] Luigi Mengoni, "Contratto di lavoro e impresa," in *Il contratto di lavoro,* edited by Mario Napoli (Milano: V&P, 2008): 3-38 (7).

[166] Veneziani, "L'evoluzione del contratto di lavoro in Europa dalla Rivoluzione Industriale al 1945", 54.

which a laborer can freely dispose of in an equal position with all the other agents in the market: the so-called patrimonialization of the legal bond[167].

To complete the process of objectification of the notion of labor, it was necessary to consider the work activity, on a par with any other material good, as an integral asset of the subject's patrimony[168]. The worker becomes the absolute owner of his workforce, "just as he is the owner of any other commodity, which can be exchanged just like money and land, while the wages given in exchange were regulated by the law of supply and demand which governed the prices of all commercial transactions"[169]. No longer subject, as in the past, to the corporate and feudal constraints that made human labor a service of a personal nature, rendered by virtue of status, and in this sense eminently nonnegotiable, labor power becomes – and it goes without saying "in the capitalist system, for the needs of the capitalist system" [170] – a freely saleable and purchasable thing upon a "price" (not necessarily a "wage")[171]. In the literal definition by the most famous commentator on the *Code Napoléon:* "*le législateur considérer le travail de l'homme comme um capital commercial*"[172], "*un capital susceptible de négoce et product d'um revenu*"[173].

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[167] Ramalho, *Da Autonomia Dogmática do Direito do Trabalho,* 187.

[168] For a study of the origin of the idea of free labor as a commodity that shifts its origin from political economy and locates it an abundant century earlier, in seventeenth-century Protestant natural jurisprudence, see Maria Pesante, *Come servi. Figure del lavoro salariato dal diritto naturale all'economia politica* (Milano: Franco Angelli, 2013). The author argues that "*l'idea del lavoro come merce non è un costrutto mentale intrinseco alla formazione dell'economia politica classica, e necessario alla costruzione dell'astrazione economica* (…) *L'identificazione delle aporie consente di mostrare, al contrario, come il concetto di merce lavoro fosse uno strumento ereditato, un residuo irrisolto, inglobato e tramandato*" (p. 26 ff.).

[169] Veneziani, "L'evoluzione del contratto di lavoro in Europa dalla Rivoluzione Industriale al 1945", 57.

[170] See Roppo, *Il contratto*, 37.

[171] Simon Deakin, "The Duty to Work: a Comparison of the Common Law and Civil Law Systems from the Eighteenth to the Twentieth Centuries", in *Labour, Coercion and Economic Growth in Eurasia, 17th-20th Centuries,* edited by Alessandro Stanziani (Leiden: Brill, 2013): 29-62 (58).

[172] Troplong, *De l'Échange et du Louage*, t. II, 222.

[173] Declared as a comment to art. 1710 ("*Le louage d'ouvrage est un contrat par lequel l'une des parties s'engage à faire quelque chose pour l'autre, moyenant un prix convenu entre elles*"), in Raymond-Théodore Troplong, *Le Droit Civil expliqué suivant l'ordre des articles du Code. De l'Échange et du Louage. Commentaire des titres VII et VIII du livre III du Code Napoleón,* tome premier (Paris: Charles Hingray, 1852): 195.

Symbolic in this regard was the position that the subject occupied in the overall structure of the French Civil Code and its relationship to other institutes. The articles regulating the contract were inserted in a book (the third) devoted generally to "*des différentes manières dont on acquiert la propriété*". A topographical placement that shows how the institute had not an autonomous position, but instead an instrumental role for transferring rights over things, subordinate and accessory to property, which stands instead as the hinge-institute, around which and in function of which all other are placed[174]. That was also what made it unproblematic to import by analogy the rules of the rental of things[175], deducing from it the applicable norms to the rental of services: "*Enfin dans la plupart des point difficultueux, le louage d'ouvrage emprunte au contrat du louage proprement dit [de choses] ses principes et ses théories"*[176]. If decades of Marxist criticism and mobilization of the labor movement rendered repugnant this idea – to the point of being the principle "the labor is not a commodity" the opening statement of the 1944 Declaration of Philadelphia[177] –, at the beginning of the nineteenth century it was nevertheless a revolutionary operation towards a "new regime", presented as an indispensable feature of the "deepest sense" of freedom of contract.

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[174] Among the large bibliography which discussed the relationship between this binomial within the liberal political thought, I limit to recall Paolo Grossi, "Proprietà e contratto," in *Lo Stato Moderno in Europa: Istituzioni e diritto*, edited by Maurizio Fioravanti, 9. ed (Roma: Laterza, 2008): 128-138; Roppo, *Il contratto*, 39 ff.; Costa, *Il progetto giuridico,* 212-234.

[175] The inclusion of the "*contrat du louage*" in Book III was based, according to the project's drafter, precisely on the purpose that "*la plupart des règles relatives au contrat de vente s'appliquent au contrat de louage; et cela devait être, puisque celui-ci ne diffère de celui-là qu'en ce qu'il ne transmet qu'une jouissance ou um usage à temps, au lieu d'une propriété ou d'u usufruit. Elles deux contrats se ressemblent en tout le rest*". See Thomas Laurent Mouricault, "Rapport fait par Mouricault, au nom de la section de législation sur le projet de loi concernant le Contrat de louage, et formant le titre XIII du livre III du Code civil", in *Recueil des lois composant le code civil, avec les discours des orateurs du Gouvernement, les Rapports de la Commission du Tribunat, et les Opinions émises pendant le cours de la discussion, tant au Tribunat qu'au Corps législatif, et dont on a ordonné l'impression*, t. 7 (Paris, 1804): 174-175.

[176] Troplong, *De l'Échange et du Louage*, t. II, 224.

[177] Adopted in the twenty-sixth session of the general conference of the International Labour Organization on May 10th, 1944, the Declaration of Philadelphia declared this statement in its very first article as the first "fundamental principle" of the organization. See International Labour Conference, *Declaration concerning the aims and purposes of the International Labour Organisation*, Philadelphia, 1944.

Even so, the legal translation of the act of disposing of one's own labor power upon a remuneration would continue to be carried out preferentially by the category of *locatio* rather than a contract of sale[178]. It not only better expressed the idea of continuity of time[179], but above all allowed for the affixation of a clear time limit – in fact, the only limitation that, to protect the personal freedom of the employee[180], the Napoleonic Code imparted to individual private autonomy. The prohibition of creating legal relations in perpetuity, phrased in the French Constitution of 1793 as the determination that *"Tout homme peut engager ses services, son temps; mais il ne peut se vendre, ni être vendu; sa personne n'est pas une propriété aliénable"*[181], in the *Civil Code* would be translated under the renowned formula of the first article regulating *Du Louage des Domestiques et Ouvrier* : "*on ne peut engager ses services qu'à terme ou pour une entreprise déterminé"*[182], a mantra later reproduced in almost every European Code which followed the Napoleonic codification[183].

The importance of this idea and, consequently, the suitability of the contractual figure of *locatio*, was persuasively articulated by the German legal philosopher Georg Wilhelm Friedrich Hegel in its *Grundlinien der Philosophie des Rechts,* first published in

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[178] Not a consensus in legal science. It is well known the Italian jurist Francesco Carnelutti's defense of the analogy between the sale and the labor contract, based on the idea that the object of the contract is labor energy. See Bruno Veneziani and Gaetano Vardaro, "La *Rivista di Diritto Commerciale* e la dottrina giuslavorista delle origini," *QF*, 16 (1987): 441-483 (478 ff.).

[179] Although analogous, imprinting the labor contract in the rental of services rather than on the sale contract was due to the conviction that it better reflected the ongoing nature of the relationship in which duration over time is the measure, the quantitative dimension of labor performance. See Mengoni, "Contratto di lavoro e impresa," 8.

[180] Most often presented as a mere deterrent against the ancient servile conditions of the worker, it was evidently a very functional measure for new economic demands of a mobile work force which did not keep the work for an excessively long time under a predetermined wage. See Veneeziani, "L'evoluzione del contratto di lavoro in Europa dalla Rivoluzione Industriale al 1945," 53.

[181] The already quoted (footnote 133) art. 18 of the *Constitution du Peuple Français du 24 Juin 1793, l'an deuxième de la République*.

[182] Article 1780, in *Code Civil des Français, édition originale et seule officielle* (Paris: l'Imprimerie de la République, 1804): 433.

[183] To name but a few: Article 1637 of the Dutch Civil Code (*Burgerlijk Wetboek*) of 1838: "*Men kan zijne diensten slechts voor eenen tijd, of voor eene bepaalde onderneming, verbinden*"*;* Article 1628 of the Italian Civil Code of 1865: "*Nessuno può obbligare la propria opera all'altrui servizio che a tempo, o per una determinata impresa*"*;* Art. 1371 of the Portuguese Civil Code of 1867 : "*O contracto de prestação de serviço domestico, estipulado por toda a vida dos contrahentes, ou de algum delles, é nullo, e póde a todo o tempo ser rescindido por qualquer deles*".

1821, by contrasting two categories which, despite the difficulties of translation, clearly express the difference between the liberal ideas of complete and limited alienation: the notions of *Entäußerung* and *Veräußerung*[184]. Even if both can be translated in English simply as alienation, the first is used by the author to designate the allowed alienation of property by an owner – *Entäußerung des Eigentums*[185] – "only in so far as the thing is external in nature"[186]; while *Veräußerung*[187] designates the alienation of "those goods, or rather substantial determinations, which constitute my own distinct personality and the universal essence of my self-consciousness[188]", which instead could only be alienated for a *temporary use* ("*auf eine beschrankte Zeit oder nach sonst einer Beschränkung*")[189]. According to the author, the goods which "exist essentially only as mine, and not as something external" – which includes the workforce, namely, the "individual products of my particular physical and mental skills and active capabilities" [190] – were in principle inalienable. The only way "they acquire an external relationship to my totality and universality"[191], and become therefore alienable, is adding a limitation: the "use is distinct from substance only in so far as it is limited, so too does the use of my powers differ from the powers themselves – and hence also from me – only in so far as it is quantitatively limited"[192]. This meant that the bond was valid if it did not turn into a perpetual subordination, otherwise, "by alienating the whole of my time, as made concrete through work, and the totality of my production, I would be

[184] An accurate discussion of these concepts and remarks on Hegel's contribution to the shaping of the liberal language in the law of labor can be read in Alonso Olea, *De la servidumbre al contrato de trabajo,* 131-149*;* Manuel Alonso Olea, *Alienación: História de una palabra,* 4. ed. (Madrid: Centro de Estudios Políticos y Constitucionales, 2019): 93-110.

[185] Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (1821), mit den von Gans redigierten Zusätzen aus Hegels Vorlesungen, neu herausgegeben von Georg Lasson (Leipzig: Felix Meiner, 1911): 67 ff.

[186] Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, translated by H. B. Nisbet (Cambridge: Cambridge University Press, 1991): 95.

[187] Hegel, *Grundlinien der Philosophie des Rechts*, 80.

[188] Hegel, *Elements of the Philosophy of Right*, 95.

[189] Hegel, *Grundlinien der Philosophie des Rechts*, 80.

[190] Hegel, *Elements of the Philosophy of Right*, 95.

[191] Ibid., 97.

[192] Idem.

making the substantial quality of the latter, i.e. my universal activity and actuality or my personality itself, into someone else's property" [193].

The wage contract – "*Lohnvertrag (locatio operae), Veräußerung meines Produzierens* (my output) *oder Dienstleistens* (services)"[194] – is only possible "for a limited time or with some other limiting condition"[195]. Nor the "the whole of my time" nor "my universal activity": the hiring should be limited temporally and at the same time does not comprise the entire activity of the worker. As one become a slave "when power and authority were granted to other to determine and prescribe what actions I should perform"[196], *a contrario sensu*, the limitation of the activity performed is also essential for the validity of the labor contract. For this purpose, once again, the obligational framework provided by the *locatio* category was extremely functional, as from free laborers "*nous n'avons pas droit de leur commander, ni d'exiger d'eux autre chose que l'ouvrage qu'ils sont obligés de faire*"[197]. The obligation to work, no longer a duty derived from a status, was circumscribed and limited by the contents, and duration, of a contract[198].

While the principle of freedom was revered with this mild limitation, the principle of equality did not receive the same formal honors in more than a nineteenth-century liberal codification: art. 1781 of the French, art. 1638 of the Dutch or art. 1387 of the Portuguese Civil Codes established that in absence of other evidence, the master's

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[193] Idem.

[194] Hegel, *Grundlinien der Philosophie des Rechts*, 80.

[195] Hegel, *Elements of the Philosophy of Right*, 112.

[196] Ibid., 96.

[197] Robert Joseph Pothier, *Traité des Obligations* (1761), nouvelle édition, tome premier (Bruxelles: Langlet et Cie., 1835): 291.

[198] It goes without saying, the same rule which considers labor as an obligational relationship is the one that excludes any duty of care. Whereas in the old patriarchal and perpetual bonds between the master and his servants the duty of the worker's sustenance was customarily secured, when the previous bonds were traumatically dissolved and the worker was thrown into the labor market through the 'free contract,' the basis that guaranteed him a certain sustenance was gone. The employer, now merely entering a business deal with the worker, was no longer responsible for the worker's fate outside the employment relationship. On the extensively discussed vulnerability that accompanies freedom: Sinzheimer, "La democratizzazione del rapporto di lavoro," 59; Espada Lima, "Sob o domínio da precariedade," 289-326; Castel, *From Manual Workers to Wage Labourers,* 140-149.

word was proof of wages due[199]. Despite the framing of the employment relationship under the *locatio* model had been justified for so rigorously subjecting it to the principles of civil law, particularly the perfect formal equality between the parties, a clear derogation of this principle was allowed to give the most powerful of the contracting parties the last word on the contract. The aporia did not go unnoticed by contemporary jurists: "*Voilà une première dérogation au droit commun; quelle e n'est la raison?*", asked the Belgian jurist François Laurent. The answer, of course, was not a private law motif: "*L'ignorance des classes inférieures dans lesquelles se recrutent les domestiques est la réponse à notre question. (…) Le droit commun ne peut pas recevoir d'application parce que les domestiques et les ouvriers manquent tout ensemble d'instruction et de moralité. (…) C'est une mauvaise passion que celle de l'égalité quand on y sacrifie la liberté et même la morale. On avoue que le maître est instruit, et que la moralité accompagne d'ordinaire l'instruction; tandis que ceux qui servent croupissent toujours dans l'ignorance, dont on peut dire qu'elle est la source de tous les vices*"[200]. Instead, it was based on a sincere disbelief on that revolutionary flag: "*Et parce qu'on proclamé l'égalité politique du maître et du domestique, on veut aussi les proclamer égaux sous le rapport intellectuel et moral, malgré l'ignorance qui persiste et malgré l'immoralité qui régulièrement e n'est la suite! Est-ce que par hasard il suffit de proclamer égaux ceux qui sont inégaux par leur culture intellectuelle et morale, pour faire cesser cette profonde inégalité?*"[201].

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[199] Art 1781 of the French Civil Code *:* "*Le maître est cru sur non affirmation, Pour la quotité des gages; Pour le paiement du salaire de l'année échue; Et pour les à-comptes donnés pour l'année courante*" ; Article 1638 of the Dutch Civil Code (*Burgerlijk Wetboek*) of 1838: "*De meester wordt op zijn woord, des gevorderd met eede gesterkt, geloofd: Ten aanzien van de hoegrootheid van het bedongen loon; Ten aanzien van de betaling van het loon over het verschenen jaar; Ten opzigte van hetgeen op rekening gegeven is van het loon over het loopende jaar; en Ten opzigte der tijdsbepaling, voor welke de huur is aangegaan*"; Art. 1387 of the Portuguese Civil Code of 1867: "*Na acção por soldadas devidas e não pagas, na falta de outras provas, será a questão resolvida por juramento do amo*". The Italian Civil Code, approved some decades later, if elsewhere virtually reproduced the French Code to the letter, had in this regard no analogous provision, perhaps following the criticism the rule received in the mid-century, and which would lead to its abrogation in France in 1868; in Belgium in 1883, but only in 1907 in the Netherlands. See Veneziani, "L'evoluzione del contratto di lavoro in Europa dalla Rivoluzione Industriale al 1945", 58.

[200] Laurent, *Principes de Droit Civil Français,* 552-553.

[201] Laurent, *Principes de Droit Civil Français,* 554.

Apart from this biased intervention in the balance between the parties, the legal regulation of labor in the liberal era has generally stuck to the premise that "*on gouverne mal quand on gouverne trop*"[202], by favoring "both the abstraction and the scarcity of rules as a tribute to self-regulation"[203]. "*Quelles en sont les règles?*" – asked the same French jurist quoted above, providing another resolute reply – "*Le code n'en trace aucune (...). Quand il existe entre le patron et l'employé (...) aucun doute, on applique l'article 1134: 'les contrats tiennent lieu de loi à ceux qui les ont faits*"[204]. A legislative policy option that mirrored the broader conception of law as *loi*, from whose realm contract could not be missed[205], but neither over-regulated. The sacredness of freedom – all consumed in the moment of consent[206], but not a real concern in the ongoing life of the relationship – and formal equality before the law deprived labor of the minute rules of guild statutes and offered it in return a concise regulation which reconvened the solution of any doubt to the fundamental legal structures of the new

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[202] The phrase has become notorious in the Preliminary Address delivered on the occasion of the presentation of the draft of the French Civil Code by the government commission, delivered by Jean-Étienne-Marie Portalis, the chief draftsmen of the Napoleonic Code, on January 21, 1801. See Jean-Étienne-Marie Portalis et al., "Discours Préliminaire prononcé lors de la Présentation du Projet de la Commission du Gouvernement," in *Recueil complet des travaux préparatoires du Code Civil*, edited by Pierre-Antoine Fenet, t. 1 (Paris: Videcoq Libraire, 1836): 463-523 (514). Regarding the legal framework of the labor contract, this goal was followed to the letter, completing its succinct regulatory triad (alongside the two brief articles of the section *Du Louage des Domestiques et Ouvriers*) the one with the general conceptual definition: "*Le louage d'ouvrage est un contrat par lequel l'une des parties s'engage à faire quelque chose pour l'autre, moyennant un prix convenu entre elles*". See *Code Civil des Français,* 417. It is worth mentioning, however, the warning of Antonio Ojeda, for whom it was not an oblivion from the Civil Code, but "simply an enclosure of territory reserved to another specific legal body", once the original Napoleonic planification was to create, alongside the Civil Code, also a Commercial Code (effectively enacted), but also a Marine Code and an Industrial Code, this one providing for industrial tribunals, consultation procedures and also labor contracts. See Ojeda Avilés, *Las cien almas del contrato de trabajo,* 36.

[203] Spiros Simitis, "The Case of the Employment Relationship," in *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany, and the United States*, edited by Willibald Steinmetz (London: German Historical Institute, 2000): 181-202 (188).

[204] Laurent, *Principes de Droit Civil Français*, 562. It is not a French exclusivity that the legal science, dominated by choices of legal positivism, far from opposing this legal framework, even supports it, refusing to "contaminate" the law with social and economic evaluations. Focusing on the Italian landscape but offering reflections of greater scope: Giovanni Cazzetta, *Scienza giuridica e trasformazioni sociali. Diritto e lavoro in Italia tra Otto e Novecento* (Milano: Giuffrè, 2007).

[205] Bartolomé Clavero, "Código como fuente de derecho y achique de Constitución en Europa," *Revista Española de Derecho Constitucional* 20, 60 (2000): 11-43 (17).

[206] Costa, *Il progetto giuridico,* 231.

regime: contract and, ultimately, property[207]. At the bottom was naturally the unconditional trust in the harmonic coexistence of labor with property, in an idyllic rhetoric that from Locke onward united them in a virtuous nexus [208].

Be it for the imperialistic spread of the French Civil Code or for the weight of the Romanistic tradition itself, the history of the readaptation of *locatio conductio* in nineteenth-century legislations is an undisputable worldwide success, being the denomination elected by the Italian (1865) and Spanish (1889) Civil Codes, but also, even before, by the Mexican state of *Oaxaca* (1827), by the Santa Cruz Civil Code of Bolivia (1830) – then adopted by the States of South and North-Peru (1836) – Costa Rica (1841), Republic of Peru (1852), Republic of Chile (1855), Uruguay (1868) and Argentina (1869)[209], and as we shall see, the Brazilian nineteenth-century laws on service rental contracts passed as early as the 1830s. It was not, however, an uncontested nor long-lasting triumph, as the civilist conception of the employment relationship, both for its axiological and technical-legal assumptions, became the target of an ever-larger criticism, not confined to Marxist circles.

If in the post-revolutionary period the category of the *locatio* had become the symbol and instrument for the consecration of equality between the contracting parties, before the end of the century it would already be seen as "the chrysalis out of which no butterfly of equality was to appear"[210]. The very same semantic re-elaborations that had made it possible for this figure to become the preferred means

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[207] Cazzetta, "Lavoro e impresa," in *Lo Stato Moderno in Europa. Istituzioni e Diritto*, edited by Maurizio Fioravanti, 9. ed. (Roma: Laterza, 2008): 138-62 (139).

[208] Cazzetta, "Lavoro e impresa," 142.

[209] Whether under the denomination "*Locación de obras"* (Civil Code of the Mexican State of Oaxaca in 1827); "*Alquiler de las obras y de la Industria*" (Santa Cruz Civil Code of Bolivia of 1830); "*Arrendamiento de obras*" (Civil Code of the Oriental Republic of Uruguay of 1868) or "*Arrendamiento de obras y servicios*" (Civil Code of Spain of 1889), all of the mentioned countries shared the preference for the category of *locatio* as the sole expression of the labor relationships. A comparative study of the labor legal regulation in the nineteenth-century Ibero-American world is still an unexhausted historiographical proposal, which is why I limit to refer, on the codificatory process, once again, to Gusmán Brito, *História de la codificación civil en Iberoamérica*.

[210] Bruno Veneziani, "The Evolution of the Contract of Employment," in *The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945,* edited by Bob Hepple (London: Mansell Publishing Limited, 1986): 31-72 (71).

of expression of free labor relationships would turn into the key motifs for it to be avoided as a degrading category. Underlining the impossibility of separating a person's labor power from the person herself, legal scholars begin to repel in the moral sense, no less than in the juridical one, the idea of looking for norms to regulate relationships in which people are directly involved among the provisions established for things. "There is not a use of property on the part of the employee, but a use of the person" – would state categorically Philip Lotmar[211] to explain why the *Arbeitsvertrag* was not to be confused with the figure of "*Miete*", being no more than a "*notion tout imaginaire*", for his French peer George Scelle, to define "*le contrat de travail (…) une variété de louage*" [212].

Common to the legal doctrine throughout the continent was the direct effort to reevaluate the personal element in the labor relationship[213]. The objectification of the workforce, once an operation with an emancipatory scope, would be rejected in favor of a progressive reintegration of the worker into the productive activity. Just as the liberal reconstruction of the employment relationship from the law of persons was carried out in civil law countries through the *locatio* model, the crisis of the "liberal forms of legality"[214] in the law of labor was expressed, in a first moment, from a discomfort with this same idea. Affirming the inseparability of the work activity from

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[211] "*Im essentiellen Thatbestand, den man Arbeitsvertrag nennt, liegt auf Seiten des Arbeitnehmers nicht ein Einsatz von Vermögen, sondern ein Einsatz der Person*" would state the German jurist already in the first chapter of the first book of his two-volume monography on the *Arbeitsvertrag nach dem Privatrecht des Deutschen Reiches,* erster Band (Leipzig: Duncker & Humblot, 1902): 7.

[212] "*Le contrat de travail (…) c'est, pour le Code, une variété de louage, notion tout imaginaire, car elle suppose que la faculté de travail est détachée du travailleur qui en serait le bailleur, et mise, en soi, isolée, à la disposition de l'employeur, lequel en tant que preneur ou locataire aurait le droit d'en jouir contre loyer. Il suffit d'énoncer ces données pour en saisir toute l'irréalité. On loue une chose ou un animal, ou pourrait louer un travailleur si la notion de la dignité humaine et la suppression de l'esclavage ne s'y opposaient; mais on ne peut louer une faculté humaine, séparément de la personne qui lui sert de soutien physique. C'est pourquoi les commentateurs affirment qu'il y a là contrat sui generis, et lui donnent un nom spécial: 'contrat de travail'*". Georges Scelle, *Le droit ouvrier. Tableau de la législation française actuelle* (1922), 2. ed (Paris : Librairie Armand Colin, 1929): 110-111.

[213] Mengoni, "Contratto e rapporto di lavoro nella recente dottrina italiana," 676. O percurso teórico que conduziu a esse itinerário também foi detalhadamente discutido por Ricardo Marcelo Fonseca, *Modernidade e Contrato de Trabalho. Do Sujeito de Direito à Sujeição Jurídica* (São Paulo: LTr, 2002).

[214] Aldo Mazzacane, "Introduzione", in *I giuristi e la crisi dello Stato liberale in Italia fra Otto e Novecento,* edited by Aldo Mazzacane (Napoli: Liguori, 1986): 18-22 (19).

the person of the worker, legal scholars were responsible to subjectify once again the object of the labor relationship, adding a personal element where before rivers of ink had been written to describe an exclusively patrimonial bond with a purely obligational nature. At the same time, to admit that the service provider integrates, with his person, the object of the contract was, after all, to admit that in a private law relationship the legal position of the parties was not identical[215]. A dissonance with the liberal individual framing that, combined with the emergence of collective dimensions of normative production[216], would convert the progressive detachment of the employment relationship from other obligational relationships into a broader movement towards the autonomization of labor law discipline itself[217].

But before the legal regulation of labor ceased to be a subject confined within the narrow boundaries of private law, other nineteenth-century European codifications, such as the *Código Civil Portuguez* and the German "*spätgeborenes Kind des klassischen Liberalismus*" [218] (the *Bürgerliches Gesetzbuch*), had already avoided the Romanist denomination, at least the first of them by an express disapproval of his drafter towards the premises that category presupposed. In the same year that he was commissioned by decree (of August 4, 1850) to draft the Code that would become known by his name, the Portuguese jurist Antonio Luiz de Seabra already invoked the notion of "dignity of man" to criticize a strictly patrimonial conception of employment relations: "*But not*

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[215] Ramalho, *Da Autonomia Dogmática do Direito do Trabalho,* 251.

[216] On the problems of "*conciliabilità"* (reconcilability) with the fundamental principles of contract law generated by the then apparent irreversible collective dimension assumed by the legal problems of labor at the turn of the century, see Vano, "Riflessione giuridica e relazioni industriali: alle origini del contratto collettivo di lavoro," 130.

[217] Ramalho, *Da Autonomia Dogmática do Direito do Trabalho*, 252 ff.; but also the studies gathered in the collective volume edited by Alan Bogg, Cathryn Costello, ACLD Davies and Jeremis Prassl, *The Autonomy of Labour Law* (Oxford: Hart, 2017).

[218] In the famous formula of Franz Wieacker, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft* (Karlsruhe: C. F. Müller, 1953): 9. Moving away from the unitary construction of *locatio,* the German BGB distinguished the *Dienstvertrag* (the 'contract for service' §611 ff.) from the *Werkvertrag* (the 'contract for work', § 631 ff.), placing the first one within the law of persons. Under the influence of von Gierke's idea of social protection, the *Dienstvertrag* included also an employer's duty of care (*Fürsorgepflicht*) and a worker's duty of loyalty (*Truepflicht*), a construction differentiated the employment contract from a regular exchange relationship. See Veneziani, "The Evolution of the Contract of Employment," 59; Deakin, "The Duty to Work," 59.

only can we acquire products in exchange for other products; we also acquire certain personal services in exchange for certain products or other personal services. We must not confuse this kind of trade with the preceding, because it does not marry with the dignity of man to confuse him with beasts of burden and hire, or with any other brute object, or irrational individual"[219]. His Code draft approved 17 years later, with a rather original result compared to the Napoleonic tradition [220], did not use the *locatio* model, but rather regulated the employment contract as a "*prestação de serviços*"[221]. If in the twentieth century this option of "assigning different nature, and different denomination" to the contract of employment would become an almost unanimous and widely applauded choice "because the term *locatio*, although based on the Roman tradition - *locatio operarum* -, corresponds poorly to the various categories of persons

[219] "*Mas não somente podemos adquirir produtos em troca de outros produtos; também adquirimos certos serviços pessoaes em troco de certos produtos ou de outros serviços pessoaes. Não devemos confundir esta espécie de permutação com os precedentes, porque não se casa com a dignidade do homem confundil-o com as bestas de carga e de aluguer, ou com qualquer outro objecto bruto, ou individuo irracional*": Antonio Luiz de Seabra, *A propriedade, philosophia do direito. Para servir de introdução ao commentario sobre a Lei dos Foraes* (Coimbra: Imprensa da Universidade, 1850): 199.

[220] "*Un texto con tanta originalidad de técnica y contenido*", as observed by Carlos Petit, despite of its apparent neglect in the comparative history of codifications: Carlos Petit, *Otros códigos: Por una historia de la codificación civil desde España* (Madrid: Dykinson, 2023): 232. As the same author also illustrates, apart from its peculiar treatment of labor relations, the originality of this code lies also in the distinction (then target of an intense criticism) of individual rights between "original" and "acquired" ones, on the basis of which the entire code was then structured. Adopting an unprecedented four-partition (part I: of civil capacity; part II: of the acquisition of rights; part III: of property; part IV: of the offense of rights and their reparation), this legal document followed a sort of "biography of the legal subject" (in the accurate expression of a Portuguese jurist) which was in no way to be confused with the classical tripartition among *persona, res, actiones*. Petit, *Otros códigos,* 234-341.

[221] Inserted in Title II "Contracts in general", but quite distant from the lease contract (chapter X: *contrato de locação*), the code provided for an entire chapter (IV) on the "provision of services", divided into I - domestic service; II - wage service; III - contract work; IV - services provided in the exercise of liberal arts and professions; V - maritime transport; VI - hostel or inn contract; and VI - deposit. Particular mention deserves the second of those, regarding "o *serviço salariado*", which provided, some decades before the concept of legal subordination had emerged in the doctrine, for the rule that the work had to be carried out "under the orders and direction of the person served" (art. 1392). See Margarida Seixas, "A *locatio conductio operarum* na gênese do contrato de serviço salariado no Código de Seabra (1867): notas para a (pré-) história do direito do trabalho," in *Fundamentos Romanísticos del Derecho Contemporáneo,* edited by Adolfo Díaz-Bautista Cremades; Justo García Sánchez (Madrid: Asociación Iberoamericana de Derecho Romano, 2021): 691-719 (709-710); Seixas, *História do Direito do Trabalho em Portugal,* 119-136.

who provide services and is even depressing for the modern man, who works but does not rent himself out"[222], it was not an obvious nor widespread choice in 1867.

Only two years earlier, *Il Codice Civile del Regno d'Italia*, the first civil code of united Italy, had expressly chosen to discipline employment relationships under a chapter entitled *Della Locazione delle Opere*[223]. Within the same peninsula, 45 years later, the jurist who would come to be internationally considered the father of modern labor law for the paternity of the successful concept of "legal subordination" (*lavoro subordinato*), would still defend an elastic use of the category *locatio* to tenaciously preserve the employment relationship within a rigorously private framework[224]. For

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[222] "*Ao contrário da quase totalidade dos códigos estrangeiros, inclusive o brasileiro (v. arts. 1.216 e seguintes), que incluem o contrato de prestação de serviços, no conceito da locação, o Cód. Civil português, no cap. IV, manifestamente lhe quis dar diversa natureza, como lhe deu diversa denominação. E foi louvável este critério; porque o termo locação, se tem por si a tradição romana – locatio operarum – corresponde mal às diversas categorias de pessoas que prestam os serviços e chega a ser deprimente do homem moderno, que trabalha, mas não se aluga e cuja actividade, que não é só física e braçal, mas também intelectual e profissional, constitui o variadíssimo objecto deste contrato*" See Luis da Cunha Gonçalves, *Dos contratos em especial* (Lisboa: Ática, 1953): 97. Twenty years earlier, the same author also denounced the "backwardness" of the still young Brazilian Code, albeit with a different argument: "*Esta seção é uma daquelas em que o nosso Código civil mais depressa envelheceu.* (...) *Em todo o caso, foi o nosso legislador mais exacto do que os estrangeiros que, desde o Código civil francês, no início do século XIX, até ao Código civil brasileiro, em princípios do século XX, incluem êste contrato na designação geral de locação de serviços, designação manifestamente errónea, porque o característico da locação è o regresso da cousa locada ao seu dono, ao passo que o serviço prestado fica pertencendo a quem o pagou e não è susceptível de restituição*". See Luis da Cunha Gonçalves, *Tratado de direito civil em comentário ao código civil português,* tomo VII (Coimbra: Coimbra Editora, 1933): 572-573. Already at the beginning of the century, Ruy Ennes Ulrich had pointed out that the identification of the work provided by the worker with a commodity "*é aviltante para a dignidade humana e se a acceitassemos teriamos que reconhecer a conservação da escravatura na actualidade*": *Legislação Operaria Portugueza* (Coimbra: França Amado, 1906): 111.

[223] See Paolo Passaniti, "Le origini del diritto del lavoro," in *Storia del lavoro in Italia. Il Novecento. Uomini e imprese nella società industriale (1896-1945),* edited by Fabio Fabbri (Roma: Castelvecchi, 2015): 389 ff.; but also Passaniti, *Storia del diritto del lavoro I,* 35 ff.

[224] Defining "*l'essenza vera della locazione: concessione a titolo oneroso della pretesa al godimento di date energie*", the Italian jurist stated categorically in 1917: "*io sfido a dimostrare che questa non è appunto l'elemento caratteristico anche dell'odierno contratto di lavoro. È questo un caso in cui quell'utilizzazione si attua soprattutto mediante l'intervento di chi ha promesso di incanalare le proprie energie nella direzione di una data persona: e non potrebbe essere diversamente".* See Ludovico Barassi, "Il concetto di 'locazione'", in Studi *giuridici in onore di Vincenzo Simoncelli nel XXV anno del suo insegnamento*, edited by Gaspare Ambrosini (Napoli: Jovene, 1917): 77-82 (81). For a collection of studies on the legacy of Barassi's work for the formation of modern labor law: Mario Napoli (ed.), *La nascita del diritto del lavoro. "Il contratto di lavoro" di Lodovico Barassi cent'anni dopo. Novità, influssi, distanze* (Milano: Vita e Pensiero, 2003). For a critical reading that suggests how the same jurist can appear both the father and the burier of labor law ("*il padre e l'affossatore del diritto del lavoro*"): Cazzetta, "Il diritto del lavoro e l'insostenibile leggerezza delle origini," 551.

these and other forms of resistance, the creation of an autonomous category of labor contract "would be slow to appear and slow to consolidate"[225] with respect to major economic and political processes which traversed the worlds of labor at the turn of the century, having a particular history in each national legal system and a chronology that only appears to coincide in the countries of the Romano-Germanic tradition[226]. In Brazil, where private law was codified for the first time in 1916, the category of *locação de serviços* was still the one that encompassed all employment relationships, and an autonomous labor contract would not appear in the legislative texts before 1930. The story that will occupy us most closely here, however, begins a century earlier, in the immediate post-Independence period, where the Brazilian chronology boasts some primacy, yet without implying a total break with the previous legal order- and lexicon.

[225] Veneziani, "L'evoluzione del contratto di lavoro in Europa dalla Rivoluzione Industriale al 1945," 23. Even when and where this new category emerges and becomes hegemonic, there is an insistence on the part of a significant portion of the doctrine and jurisprudence to consider the employment contract as a species of the rental of services genre. For a critique of this approach, see Antonio Ojeda Avilés, "Los Códigos Civiles y la exclusión del contrato de trabajo," *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo* 2, no. 1 (2014): 1-29.

[226] Within the European continental tradition, one might recall the first attempts of creating specific regulations in this regard from the Italian parliamentary bill of 1902, the law regulating rice-workers of 1907 and the law on the contract of private employment of 1924; the Belgian law of March 10, 1900 and the law of August 7, 1922 on the contract of private employment; the Luxembourg laws of October 31, 1919 and June 7, 1937 on the contract of private employment; the Dutch law of July 13 , 1907, which was integrated into the Civil Code (amended by the law of December 17, 1953); the French Code du Travail of 1910 (Book 1, Heading 2); or the report of the Danish commission of 1910 and the Danish laws of 6 May 1921 and 13 April 1938, as referred by Veneziani, "L'evoluzione del contratto di lavoro in Europa dalla Rivoluzione Industriale al 1945," 63-64.

§3. **Old grammar in the new regime: colonial law of labor in Independent Brazil**

"The Brazilian nation, comprehended in this rich continent and whose natural limits are the majestic Amazon and the superb Plata Rivers is today fortunately represented in this sovereign assembly to organize a constitution in which, bestowed the most luminous principles of universal and patriotic public law, it will be stipulated the appropriate rules to govern our actions in order to achieve the desired end of our independence. The extraordinary events which gave impetus to the foundation of this nascent empire could not fail to influence essentially all the branches which constitute the civil political and economic administration of a state. Separated from the monarchy to which we belonged, we were left with the same customs, language, and legislation"[227].

It was acknowledging the incompleteness of Brazil's (legal) emancipation – "the desired end of our Independence" was still to be achieved – that the Deputy by the Province of Pernambuco, Antonio Luis Pereira da Cunha, introduces with those words on May 5, 1823, the first bill presented to the Constituent and Legislative Assembly of the Empire of Brazil, as soon as its first ordinary session begins. The Assembly, the first national one to be held in independent Brazil, had been installed just two days before, by convocation of the Emperor himself five months after his Declaration of Independence, "for Brazilians to better know my constitutionality, how much I would flatter myself by governing to the satisfaction of the people, and how

[227] "*A nação brazilica compreendida neste rico continente e que tem por naturaes limites o magestoso Amazonas e o soberbo Prata se acha hoje felizmente representada nesta soberana assembléa para organizar uma constituição em que, expendidos os mais luminosos princípios de direito publico universal e patrio, estabeleça as regras adequadas para reger nossas acções de maneira tal que se obtenha o desejado fim da nossa independencia. Os acontecimentos extraordinarios que derão impulso á fundação deste nascente império não podião deixar de influir essencialmente em todos os ramos que constituem a administração civil politica civil e economica de um estado. Separados nós da monarchia a que pertenciamos, nos ficou, com os costumes e com a linguagem, a mesma legislação*". See *Annaes do Parlamento Brazileiro. Assembleia Constituinte – 1823,* tomo primeiro. (Rio de Janeiro: Typographia do Imperial Instituto Artistico, 1874): 20.

much I wished in my paternal heart (...) that this loyal and grateful nation would be represented in a general constituent and legislative assembly"[228].

Under that "paternal heart" and Portugal's weighty inheritance – after all, "we were left with the same customs, language, and legislation" – the Deputy admitted that "we still had to become" – "*devendo constituir-nos*" – "an independent people", for what "it was absolutely necessary that we organize not only a constitution in which the form of government is established, and the general bases that regulate the fundamental laws of this empire, but that we form a code in which the civil laws prescribing the rights and interests of citizens among themselves are included"[229]. Having no illusions it would be an immediate job, but rather "an enterprise which can only be well accomplished with vagueness and circumspection" [230], he then argues that the incorporation of the laws of Portugal should not be left to the "tacit consent of the nation, but explicitly declared by this august assembly, to whom is committed the high exercise of legislating[231]". With this belief, he proposes that the very first act of the General Assembly as a sovereign body of an independent country was precisely to declare in force all "Laws, Regiments, Charters, Decrees and Resolutions issued by the throne of D. João VI, king of Portugal and Algarve until April 25, 1821, when he got absent from this Court".

Sent to the Legislation Committee, the idea got soon a favorable opinion, acknowledged "the necessity and urgency of the proposed measure"[232], becoming on October 20th the first law approved by that Legislative Body, which officialy declared "*em inteiro vigor todas Ordenações, Leis, Regimentos, Alvarás, Decretos, e Resoluções*

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[228] Excerpt of the speech delivered by the Emperor at the opening of the Assembly on May 3, 1823 "*(...) Para que os brasileiros melhor conhecessem a minha constitucionalidade, o quanto Eu me lisonjearia governando a contento dos povos, e quanto desejava em meu paternal coração (...) que esta leal, grata, briosa e heroica nação fosse representada n'uma assemblea geral constituinte e legislativa*". See *Annaes do Parlamento Brazileiro. Assembleia Constituinte,* 15.

[229] *Annaes do Parlamento Brazileiro. Assembleia Constituinte,* 34.

[230] Id.

[231] Id.

[232] Ibid., 134.

promulgadas pelos Reis de Portugal" [233] by which the colony had been governed until then. Few legislative products of that Assembly would have such a long and fruitful life after its dissolution, to the point of keeping some statutes in force even when already abrogated in the former metropole or the Monarchy has ended in Brazil – the *Ordenações Filipinas*[234] in Portugal were repealed as soon as 1867 but in Brazil not before 1916. To this same example resorted the Deputy as a precedent of that kind of measure, recalling that "King John IV of Portugal, returning to the throne that belonged to him of justice [after the Restoration War with Spain], ordered in the same year of his acclamation, then ratified by law of January 29, 1643, that the *Ordenações Filipinas*, and subsequent laws, were good, and firm, as if they were promulgated and established by himself" [235]. A text which, for the second time after a cry of Independence, would be handed on for epochs, but in Brazil even with a longer life – "*una vitalità che non ha riscontro nella storia di nessun corpo legislativo moderno*"[236].

More than a legislative continuity, the incomplete legal emancipation of the post-Independence period had to do also, or above all, with a legal dependence that far from being merely formal was substantially cultural. Not only the deputy who had proposed the measure we just read[237] but all the graduate jurists acting in Brazil at

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[233] See "*Lei de 20 de Outubro de 1823. – Declara em vigor a legislação pela qual se regia o Brazil até 25 de Abril de 1821 e bem assim as leis promulgadas pelo Senhor D. Pedro, como Regente e Imperador daquella data em diante, e os decretos das Cortes Portuguezas que são especificados*", printed in *CLIB (1823),* pt. I (Rio de Janeiro: Typographia Nacional, 1887): 1-2.

[234] Legal compilation ordered by King Philip I of Portugal during the Iberian Union (1580-1640), the dynastic union that united the crowns of Portugal, Castile and Aragon under the Spanish Habsburgs after the Portuguese succession crisis of 1580.

[235] *Annaes do Parlamento Brazileiro. Assembleia Constituinte,* 34.

[236] Tullio Ascarelli, "Osservazioni di diritto comparato privato italo-brasiliano," *Il Foro Italiano*, 70 (1947): 97-109 (97).

[237] Antônio Luíz Pereira da Cunha (1760-1837), then Marquez de Inhambupe, born in Salvador (BA), studied Law at the University of Coimbra, and while still in Portugal began his professional career, holding various positions of prominence, including magistrate at the House of Supplication in Lisbon. Returning to Brazil, he also acted as magistrate of the Court of Appeals in Bahia before starting an outstanding political career as deputy, senator and minister of State. After the dissolution of the Constituent Assembly, as Councilor of State he participated in the drafting of the constitution sworn in by the Emperor in 1824. See Augusto Victorino Alves Sacramento Blake, *Diccionario Bibliographico Brazileiro,* v. 1 (Rio de Janeiro: Typographia Nacional, 1883): 241-243.

that time had obtained their law degrees from the University of Coimbra[238]. Likewise, old and new lawyers – who would only begin to graduate from law schools in Brazil after 1830 – would continue to carry out their legal training for decades to come with books from Portuguese jurists[239], until the first manuals of Brazilian law were printed

[238] Unlike the colonies of Spanish America, Brazil would not have any higher education institution until five years after its independence. It was the result of a deliberate and systematic policy by the Portuguese crown not to allow the establishment of higher education institutions in its colonies. It was not for lack of trying: as early as 1768, officials of the captaincy of Minas Gerais asked permission to set up a School of Medicine on their own, to which they received a fulminating response from the Overseas Council: "(...) *que um dos mais fortes vinculos, que sustentava a dependencia das nossas colonias, era a necessidade de vir estudar a Portugal. Que este vinculo não se devia relaxar, e era principio da relaxação a faculdade publica de uma Aula de Cyrurgia, que parecia pouco: mas era um pouco, que dentro em poucos annos, havia de monopolizar esta faculdade para os Brazileiros; e era um pouco que serviria de um exemplo ao depois para a Aula de Medicina, e poderia talvez com alguma conjuctura para o futuro facilitar o estabelecimento de alguma Aula de Jurisprudencia sustentada pelas Camaras até chegar ao ponto de cortar este vinculo de dependencia*". "Consulta da Capitania de Minas - Das 'copias extrahidas do archivo do Conselho Ultramarino,'" *Revista do Arquivo Público Mineiro* XVI, 1 (1910): 468-69. Forcing Brazilians who wanted to obtain a university degree to cross the ocean to the seat of the Kingdom was a way of maintaining the cultural homogeneity of the elites. On the western side of the continent, already in 1538 is created the University of Santo Domingo. The University of San Marcos, in Lima, was founded by royal charter in 1551, only twenty years after the conquest of Peru by Francisco Pizarro had begun. Mexico City University was also founded in 1551, and in 1553 its courses were inaugurated. Other institutes of higher education were founded in the 16th century and the following two centuries, so that by the end of the colonial period, no less than 23 universities had been established in the various possessions of Castile. By the end of the colonial period some 150,000 people had completed higher education at these universities. In sharp contrast, only 1,242 Brazilian students enrolled in Coimbra between 1772 and 1872. See Carvalho, *A construção da ordem,* 69; Sérgio Buarque de Holanda, *Raízes do Brasil,* 26. ed. (São Paulo: Companhia da Letras: 1995): 98.

[239] The first law schools in Brazil were created by the law of August 11, 1827, which provided for the opening of the first two higher education courses in the country in the cities of São Paulo and Olinda This same law, with the precaution that this act did not pulverize the ideological harmony that the common belonging to the Coimbra academy had guaranteed until then, also defined the subjects to be taught in each of the nine courses of the five years of the law degree, and allowed the professors to choose the compendiums to be adopted by the students, admitting that "if not already published", foreign works could be adopted, "as long as the doctrines are in accordance with the system sworn by the nation" (art. 7). In practice, the professors maintained the suggestions contained in the Draft Regulation or Statute organized by the State Councillor Visconde de Cachoeira (and incorporated by the same law), very much inspired by the Statutes of the University of Coimbra, and adopted to the study of National Law (*Direito Pátrio*) the *Institutionum juris civilis Lusitani, cum publici tum private* by the Portuguese Paschoal José de Mello Freire, as his doctrines "*se podem e devem aproveitar*". This would be the core bibliography of the course in Brazilian law schools until at least the 1850s. See "*Lei de 27 de Agosto de 1827. - Crêa dous Cursos de sciencias Juridicas e Sociaes, um na cidade de S. Paulo e outro na de Olinda"*, printed in *CLIB (1827),* 3-39 (24); but also Giordano Bruno Soares Roberto, *História do Direito Civil Brasileiro. Ensino e Produção Bibliográfica nas Academias Jurídicas do Império* (Belo Horizonte: Arraes, 2016): 38-41; Pedro Dutra, *Literatura jurídica no Império,* 3. ed. (São Paulo: Singular, 2021): 30-51; Hespanha, *A Cultura Jurídica Europeia,* 427.

in the national territory, without, however, the reference to the Portuguese professors disappearing not even from the frontispiece. To name just an illustrative example, the first manual of Brazilian civil law, published only in 1851 by Lourenço Trigo de Loureiro, professor at the Faculty of Olinda, denounced already in its title the main source of its contents: the *Instituições de Direito Civil Brasileiro* were "*extrahidas das Instituições de Direito Civil Lusitano do Eximio Jurisconsulto Portuguez Paschoal José de Mello Freire, na parte compativel com as Instituições da nossa cidade, e augmentadas nos lugares competentes com a substancia das leis brasileiras*"[240]. As Lima Lopes accurately observes, "Brazilian national law suffers from an initial twofold tension: a) it cannot be exclusively national, since the system cannot be made *ab ovo*, rejecting previous practice, colonial and of Portuguese origin; and b) it cannot be totally liberal-constitutional and voluntarist, since it must coexist with the traditional order and support some privileges"[241].

The emphasis on legislative contiguity and cultural dependence, however, is not to be confused with a picture of complete legal transplants or full verticality of legal solutions: it was of the very nature of the *Direito Luso-Brasileiro de Antigo*

[240] The author did not hesitate to admit that he had followed the work of the Portuguese jurist including the order of its contents, justifying the choice as "*Sendo geralmente reconhecida a necessidade de um systema de ensino do Direito Civil Brasileiro para uso das aulas da nossa Academia de Sciencias Sociaes e Juridicas na parte relativa a esse ramo do Direito Positivo Brasileiro, e determinando-nos a suprir essa necessidade, parecêo-nos que náda melhor podiamos fazer, do que seguir o sistema do Jurisconsulto Portuguez Paschoal José de Mello Freire, extrahindo do seu excellente Compendio de Instituições de Direito Civil Lusitano, pela mesma ordem delle, tudo quanto continua a ter applicação entre nós, e addicionando-lhe nos lugares competentes a substancia das Leis propriamente Brasileiras, publicadas desde 1822 até 1850*". See Lourenço Trigo de Loureiro, *Instituições...,* t. I (Pernambuco: Typographia da Viuva Roma & Filhos, 1851): 1. The book was adopted in the early 1850s as the basic bibliography in the law schools and remained so until the end of the imperial period. It had a second edition in 1857 and a third in 1861. From the second edition onwards, Mello Freire's name was removed from the title of the work, but its contents were little altered, which reveals less an autonomization of the work and more an appropriation, as Giordano Bruno suggests, of other author's work, which is verified textually not only with Mello Freire, but also with other Portuguese jurists, such as Coelho da Rocha. See Roberto, *História do Direito Civil Brasileiro,* 101-102.

[241] Lima Lopes, "Iluminismo e justnaturalismo no ideário dos juristas da primeira metade do século XIX," 200.

Regime[242], largely informed by the tradition of European *ius commune*[243], the vocation to accommodate a plurality of legal sources and multiple centers of normative production, with ample space for the emergence of local solutions[244]. This legal architecture, deeply rooted in the abundant medieval legal literature and in the textual traditions of Roman and canonical law, precisely because of its capacity for generous accommodation of multiple normativities, would continue to provide a substrate for argumentative and judicial practice[245] in a Brazil of increasingly diversity of means of "textual diffusion"[246], coexisting without major ruptures with the occasional legislative interventions that accumulated in the following decades.

With legal statutes enacted after or before, and legal books printed here or there, the Luso-Brazilian legal culture of the first half of the nineteenth century was also still a legal order fundamentally structured under the Old Regime's legal reasoning and its jurists' particular way of "*ver o mundo*"[247]. Independence without revolution and

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[242] An explicit reference to António Manuel Hespanha, *Direito luso-brasileiro no Antigo Regime*. Florianópolis: Fundação Boiteux, 2005.

[243] A label that describes the common legal experience of Western Europe between the twelfth and eighteenth centuries in reference to the tendency towards unity among the various normative orders then in force in the European legal space (Roman tradition, canon law, the laws of kingdoms and inferior bodies), forged by a university teaching of law that was homogeneous throughout Europe and vulgarized in a then universal language, Latin. Further discussion of the normative components that made up this plural landscape and the factors that explain its tendency towards unification can be found in Hespanha, *A Cultura Jurídica Europeia*, 114-150; Paolo Grossi, *L'ordine giuridico medievale,* 3. ed., 6. rist. (Roma: Laterza, 2023): 223-237; Paolo Cappellini, "Direito comum," *Espaço Jurídico* 9, no. 1 (2008): 79-82 and, more recently within Brazilian historiography, Gustavo César Machado Cabral, *Ius commune. Uma introdução à história do direito comum do Medievo à Idade Moderna* (Rio de Janeiro: Lumen Iuris, 2019).

[244] On the autonomy of colonial law as a reflection of the pluralism of the European legal system of the *Ancien Régime*, see António Manuel Hespanha, "Porque é que existe e em que é que consiste um direito colonial brasileiro," *QF,* 35 (2006): 59-81; and for a concrete example within Brazilian experience, see Arno Wehling, "As variações do direito português no Brasil: a experiência de um jurista na justiça colonial," in *Actas del XIX Congreso del Instituto Internacional de Historia del Derecho Indiano,* v. 1, edited by Thomas Duve (Madrid: Dykinson, 2017): 313-326.

[245] It is demonstrated from a doctrinal point of view by António Manuel Hespanha, "Razões de decidir na doutrina portuguesa e brasileira do século XIX. Um ensaio de análise de conteúdo," *QF,* 39 (2010): 109-151; and from a judicial perspective Pedro Jimenez Cantisano and Mariana Armond Dias Paes, "Legal Reasoning in a Slave Society (Brazil, 1860-88)," *LHR* 36, no. 3 (2018): 471-510.

[246] Barbosa, "Complexidade e meios textuais de difusão e seleção do direito civil brasileiro pré-codificação", 361-364.

[247] António Manuel Hespanha, *Como os juristas viam o mundo. 1550-1750. Direitos, estados, pessoas, coisas, contratos, ações e crimes* (Lisboa: Editora: CreateSpace Independent Publishing Platform, 2015).

a liberal constitution without the unification of the subject of law helped to preserve in Brazil the pre-modern architecture of a legal order based on a hierarchy of "statuses", which in the public and private spheres conditioned the rights that men and women would be able to enjoy.

Illustrative in this respect was the first Brazilian Constitution, which, alongside express principles of liberal individualism[248], also excluded the so-called "*criados de servir*" (servants of service) from the right to suffrage, in the most typical logic of an old-regime estate-based society[249]. Freedmen, although they could vote in parish elections, were excluded from the election of deputies, senators, and members of provincial councils[250]. The "cataract of natural inequalities, admitted as preconditions or determinant filters in the legislative sphere"[251], as Carlos Petit called it apropos of the Cadiz Constitution of 1812, ended up penetrating the Brazilian constitutional text as well, preventing it from becoming the founding piece of a "new" legal order based on the principle of equality before the law. As is also the case of the French Constitution

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[248] Beyond assuring the already mentioned "inviolability of civil and political rights of Brazilian citizens, which is based on freedom, individual security, and property (art. 179)", the same article provided for an attempt at least formally of contrasting the old structure of privileges ("XVI. All privileges that are not essentially and entirely linked to positions of public utility are abolished") and paid its tributes to the freedom of trade and industry ("XXIV. No type of work, culture, industry or commerce can be prohibited, as long as it does not conflict with public customs, safety or the health of citizens)". See *CLIB (1824),* 33-34.

[249] The following categories of workers were excluded from voting in parish elections: "*III. Os criados de servir, em cuja classe não entram os Guardalivros, e primeiros caixeiros das casas de commercio, os Criados da Casa Imperial, que não forem de galão branco, e os administradores das fazendas ruraes, e fabricas*" (art. 92). Ibid, 19.

[250] Their express exclusion was found in Article 94, II of the constitution, along with those "*que não tiverem de renda liquida annual duzentos mil réis por bens de raiz, industria, commercio, ou emprego.*" and "*os criminosos pronunciados em queréla, ou devassa*".

[251] Among the cases of suspension of political rights, the 1812 Constitution of Cadiz, which also included "*el estado de sirviente doméstico*" (art. 25, *tercero*). See Carlos Petit, *Un Código civil perfecto y bien calculado. El proyecto de 1821 en la historia de la codificación* (Madrid: Dykinson, 2020): 156. The motivation for this restriction is expressly voiced in the preliminary speech to the draft civil code drawn up a few years later, in which the *Ancien Régime* social hierarchies are resolutely advocated as inscribed in the "natural" order of things: "*El pobre bracero, el sirviente doméstico, que recibe su sustento de otro, aunque sea en cambio de su trabajo, de hecho están desnivelados y en una posición inferior a la de aquel que los emplea. La Constitución ha conocido y consagrado esta verdad amarga, si se quiere, pero que no es por eso menos cierta, ni menos inevitable, pues que está en la naturaleza de las cosas*". See Carlos Petit, "Amos, servientes y comerciantes. Algo más sobre el primer modelo constitucional," in *Derecho privado y revolución burguesa. II Seminario de Historia del Derecho privado. Gerona 25-27 de mayo, 1988*, edited by Carlos Petit (Madrid: Marcial Pons, 1990): 120.

of 1791, which deprived servants in a "*état de domesticité*" of their status as active citizens (tit. III, cap. I, sec. II, art. 2o), as well as the Constitution of 1795 (tit. II, art. 13) and 1799 (tit. I, art. 5º) and, in Portugal, all the nineteenth-century constitutional texts: "*criados de servir*" were ineligible (art. 34o, I, of the constitution of 1822; art. 68o of the constitution of 1826; art. 74o of the constitution of 1838) and could not vote in the election of deputies or municipal councils (arts. 33o, III, and 220o of the constitution of 1822; art. 65o, §. 3, 66o e 67o of the constitution of 1826; art. 73o, II, of the constitution of 1838, in this case also in the election of senators)[252].

If in the constitutional law the pervasiveness of the pre-modern legal order did not disappear even from the texts most committed to the liberal reforms, it would emerge still more loudly in books on private law, among which the recourse to the legal tradition required even less justification and embarrassment. So it came as no surprise that in the first systematic exposition of Brazilian civil law, the aforementioned *Instituições de Direito Civil Brasileiro* de Lourenço Trigo Loureiro, following the summary of the Portuguese compendium on which he was inspired, the law of persons had as its "main division" that relating to "status", which was presented by the author, already on the second page of the book, as derived essentially from the three traditional categories of liberty, city and family[253]. Even though the mention to Mello Freire disappeared from the frontispiece in the second (1857)[254] and third (1861) editions, they all kept the paragraph on the division of persons by "*estados*". In the last edition it became even more explicit, with the author explaining that every individual should be considered, "*on the legal scene, in relation to the various statuses, conditions, qualities or positions in which one may find himself placed in civil society, and on account*

[252] See Margarida Seixas, "Cuidando das famílias: o serviço doméstico e a história do seu regime jurídico", in *I Pós-Graduação de História do Direito da Família - A herança histórico-jurídica e a perspetiva interdisciplinar*, edited by Miriam Afonso Brigas (Lisboa: AAFDL, 2020): 93-108 (97); and also J. Joaquim Gomes Canotilho, "As Constituições," in *História de Portugal, v. 5: O Liberalismo (1807-1890),* edited by José Mattoso (Lisboa: Estampa, 1998): 125-140.

[253] Loureiro, *Instituições de Direito Civil Brasileiro,* 1851, 2.

[254] Lourenço Trigo de Loureiro, *Instituições de Direito Civil Brasileiro. Segunda edição mais correcta e augmentada, e Oferecida, Dedicada e Consagrada a Sua Magestade Imperial Senhor Dom Pedro II, por seu muito amante reverente e fiel subdito Lourenço Trigo de Loureiro, Lente da 1ª Cadeira do 4º Anno da Faculdade de Direito da Cidade do Recife,* t. I (Recife: Typographia Universal, 1857).

of which the law confers on him certain and determined rights, and certain and determined obligations, distinct from those which occur in men placed in different statuses, or conditions"[255].

If this stratified reading of the legal order – it goes without saying, deeply rooted in a Catholic conception of order as an instrument of divine will "necessary for the proper order of things"[256] – conditioned all spheres of social life, it was particularly relevant in the worlds of labor. Personal status and belonging to a social class – pre-existing conditions to the norm and therefore not freely modifiable by contracting parties of equal legal position – defined duties and obligations far out legitimate reciprocal bargaining. Even before the parties could shape by free determination the conditions of a reciprocal agreement, employer and employee were already linked by ancillary duties of loyalty, assistance, and obedience that overflowed a simple obligatory relationship of exchange to be part of a broader dynamic of family relationships.

It was in the extended notion of family and the domestic world – "as a human group and as a universe of affectivity", as defined by António Manuel Hespanha[257] – that the legal regulation of labor in the Old Regime found its most fundamental interpretation key. The concept of family – "a word with very broad contours" [258] – carried with it a legal connotation that went far beyond the biological kinship but corresponded to a broader bond of dominion and subjection over the entire domestic

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[255] "*Na scena jurídica, em relação aos diversos estados, condições, qualidades, ou posições, em que se póde achar colocado na sociedade civil, e em razão dos quaes a lei lhe confere certos e determinados direitos, e certas e determinadas obrigações, distinctos dos que se dão em homens colocados em estado, ou condições diferentes*". Lourenço Trigo de Loureiro, *Instituições de Direito Civil Brasileiro. Terceira edição mais correcta e augmentada, e Offerecida, Dedicada e Consagrada a Sua Magestade Imperial o Senhor Dom Pedro II por seu Muito Amante Reverente e Fiel Subdito Lourenço Trigo de Loureiro, Lente da 1ª. Cadeira do 4º Anno da Faculdade de Direito da Cidade do Recife*, t. I (Recife: Typographia Universal, 1861): 31.

[256] Zamora, *Casa poblada y buen gobierno*, 56.

[257] António Manuel Hespanha, "Carne de uma só carne: para uma compreensão dos fundamentos histórico-antropológicos da família na época moderna," *Análise Social* 28, 123-124 (1993): 951-973 (951); but also António Manuel Hespanha, "Fundamentos antropológicos da família de Antigo Regime: os sentimentos familiares", in *História de Portugal: o Antigo Regime (1620-1807),* v. 4, directed by José Mattoso and coordinated by António Manuel Espanha (Lisboa: Estampa, 1993): 273-278.

[258] Hespanha, *Direito luso-brasileiro no Antigo Regime,* 175.

group that lived around the "household" – the basic unit of this natural model of organization[259] – and circulated under the authority of the patriarch[260]. The group included blood relatives, servants, slaves and even material assets, constituting an articulated web of dependency ties that was organized under the "paternal heart" – to recall D. Pedro I's eloquent expression – of the *pater familias*[261].

The most symbolic representation of this imaginary was the representation of workers and employers in legal texts: from the *Ordenações Afonsinas* (1446), through the *Ordenações Manuelinas* until the *Ordenações Filipinas* (1603), they were mentioned exclusively under the labels of "*amos*" (easily translated as masters) and "*criados*". More than an immediate translation as "servants", as one can read in a widely circulated legal dictionary from the early nineteenth-century in Portugal, the *Esboço de hum dicionário jurídico, theoretico e practico* by the Portuguese jurist Joaquim Jose Caetano Pereira e Sousa, "*criado*" is the person who serves by a salary, but the word originally referred to those raised (literally "*criados*") within the household or in the company of someone without pay, with an obligation to serve. Its grammatical root, the next entry of the same dictionary, was the verb "*criar*", literally "to *create*" or "to give being to something", but also, as referred by the jurist, "to educate and nurture"[262]. Ten years

[259] For a discussion of the "household" in the Brazilian *Ancien Régime* as an economic and family unit, a sphere of natural loyalties and insuppressible powers, see Airton Cerqueira-Leite Seelaender, "A longa sombra da casa. Poder doméstico, conceitos tradicionais e imaginário jurídico na transição brasileiro do Antigo Regime à Modernidade," *Revista do IHGB* 178, 473 (2017): 327-424.

[260] Romina Zamora, *Casa poblada y buen gobierno: oeconomia católica y servicio personal en San Miguel de Tucuman, siglo XVIII* (Ciudad Autónoma de Buenos Aires: Prometeo Libros, 2017): 114; but also Grossi, *L'ordine giuridico medievale*, 13-16.

[261] On the reach of the extensive pre-modern notion of family into labor relations, see Victor Hugo Criscuolo Boson, *Pluralismo normativo e relações laborais na época moderna: para uma compreensão a partir da noção extensa de família* (Master's dissertation, Universidade Federal de Minas Gerais, 2016).

[262] "*Criado é a pessoa que serve por soldada. Antigamente esta palavra denotava aquelle que fora criado na casa, ou companhia de alguem sem salario, ou obrigação de servir*" (...); "*Criar quer dizer tirar do nada, dar o ser. Tambem significa educar, alimentar*". Joaquim José Caetano Pereira Sousa, *Esboço de um dicionário jurídico, theoretico, e practico, remissivo às leis compiladas, e extravagantes,* t. I (Lisboa: Tipographia Rollandiana, 1825): 304; 305.

after the publication of Pereira Sousa's dictionary, José Homem Correia Telles[263], in a work conceived as a subsidy for a future Portuguese Civil Code but openly indebted to the *ius commune* textual tradition – it was, after all, a "*Digesto*" – offers an even more eloquent definition in the volume dedicated to the *"Pessoas de Uma Familia Portugueza*": "*São como accessorios de uma familia os criados, e os escravos nas provincias, em que são tolerados*"[264].

It is the "expansive force of the domestic model"[265] – to use another expression by António Manuel Hespanha – to explain a series of presumptions of the legal labor regime of "*criados*", starting with the lack of legal protection for remuneration. Since the duty to provide food and clothing was also presumed for the adult servant within a widespread logic of cohabitation and dependence on the master, the exigibility of a salary was initially not even presupposed: "*domestici sunt illi, qui cum aliquo continue vivunt, data aliqua inferioritate, ad unum panem & ad unum vinum* (domestics are those who live with someone, implying some inferiority, for a bread and a glass of wine)"[266]. That's why it's not surprising to find in the *Ordenações Afonsinas* (1446) – and in its almost complete reproduction in the respective title of the *Ordenações*

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[263] José Homem Correia Telles (1780-1849), graduated from the University of Coimbra in 1800, served as a Judge of the Porto Court of Appeals and as a Deputy for four terms. Having taken part in the drafting of a Civil Code between 1827 and 1828, in those years he began to draft the *Digesto do Direito Civil Portuguez contendo os Desiderata para hum Novo Codigo Civil* (whose manuscript is in the Library of the Faculty of Law of Coimbra, dated by assumption with the year 1825 and cataloged under quota: Res. 114). The volume would be printed only in 1835 in three volumes at the University Press under a slightly different name: no longer presented as *Desiderata,* but rather to "*servir de subsidio ao novo Codigo Civil".* See José Homem Correia Telles, *Digesto Portuguez ou Tratado dos Direitos e Obrigações Civis, accomodado ás Leis e Costumes da Nação Portugueza para servir de subsidio ao Novo Codigo Civil,* t. 1 (Coimbra: Imprensa da Universidade, 1835).

[264] The second volume of his *Digesto Portuguez* was dedicated to the "*Direitos e Obrigações Civis relativos às Pessoas de Uma Familia Portugueza*" and devoted an entire title to servants – "*Titulo VIII. Dos criados*". Already in the first paragraph, he presented the definition: "*São como accessorios de uma familia os criados, e os escravos nas provincias, em que são tolerados*". See José Homem Correa Telles, *Digesto Portuguez ou Tratado dos Direitos e Obrigações Civis relativos às Pessoas de Uma Familia Portugueza para Servir de Subsidio ao Novo Codigo Civil,* t. II (Coimbra: Imprensa da Universidade, 1835): 205.

[265] Hespanha, "Carne de uma só carne," 969.

[266] The quotation is recalled by António Manuel Hespanha from the first volume of the extensive twelve-volume collection of the seventeenth-century manual *Commentaria ad Ordinationes Regni Portugalliae* (1669-1703), written in the language of the *ius commune* by the Portuguese praxist Manuel Álvares Pegas in 1669. See Hespanha, *Carne de uma só carne,* 968.

Manuelinas (1521) –, that "Young servants who live with a master and then demand compensation for the work they've done" would have no right to demand any wages for the services rendered when a fixed price had not been stipulated[267]. It was only in the seventeenth century (1603) that the *Ordenações Filipinas* changed this rule[268], recognizing a general right to remuneration even when it was not initially stipulated, reflecting, as Hespanha[269] suggests, the emergence of a more expanded world of labor relations, but still tied to the same social imaginary and using the same legal language. Not by chance, all the seven titles concerning labor relationships of this compilation referred to workers as "*criados*", and the only jobs expressly mentioned on the chapter defining wages – housekeepers, maids, secretaries, equerries, treasurers, pageboys, wet nurses – invariably revolved around the household[270].

However, just as "the imagery and mindset of the patriarchal family largely transgressed the domain of domestic relations"[271] to dictate the scope of the *res publica*, certainly also went beyond the narrower limits of blood children and domestic servants, covering other types of laborers, even if they didn't live or work within the

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[267] Title XXVIII of book 4 of the *Ordenações Afonsinas* – "*Dos Mancebos serviçaes que vivem a bem fazer, e depois demandaõ satisfaçom do serviço que fizerom*" – stated: "*Que se algum homem ou molher viver com algum Senhor ou amo, de qualquer condiçom e estado que seja, a bem fazer, sem fazendo avença alguã por certo preço, ou quantidade, ou alguã outra cousa, que aja d'aver pelo serviço que ally fizer, contentando-se daquello, que ao dito seu amo, ou Senhor, com que ali viver, prouver de lhe dar pelo serviço, que lhe ally fizer; e posto que o demandar queira, mandamos que nom seja a ello recebido"*. Once the spelling was updated, the title and content remained practically identical to those of the previous compilation: "*Titulo XIX. Dos mancebos, e serviçais que vivem a bem fazer, e despois demandam satisfaçam dos serviços que fezeram*". See *Ordenaçoens do Senhor Rey D. Affonso V*, t. 4 (Coimbra: Real Imprensa da Universidade, 1792): 125-126; *Ordenaçoens do Senhor Rey D. Manuel*, t. 4 (Coimbra: Real Imprensa da Universidade, 1797): 54-55.

[268] Candido Mendes de Almeida, *Codigo Philippino, ou, Ordenações e leis do Reino de Portugal: recopiladas por mandado d'El-Rey D. Philippe I*, t. 4 (Rio de Janeiro: Typ. do Instituto Philomathico, 1870): 807.

[269] Hespanha, "Carne de uma só carne," 968.

[270] Title XXXI of book 4 of the *Ordenações Manuelinas* – "*Como se pagarão os serviços e soldadas dos criados, que não entraram a partido certo*" – provided "*que daqui em diante na paga dos serviços dos criados, assi de homens, como de mulheres, se guarde a maneira seguinte. Aos Vedores, Camareiros, Secretarios, Estribeiros, e Thesoureiros dos Bispos, Condes e Fidalgos* (...). Aos Scudeiros dos mesmos e Capellães (...); Ás donzellas, que servirem as Condeças e mulheres dos sobreditos Fidalgos (...) Ás mulheres que servirem de donas (....) E ás amas; Aos Pagens de Fidalgos, Desembargadores, e de outras pessoas nobres" (...). See Almeida, *Codigo Philippino,* t. 4, 808-809.

[271] Hespanha, *Direito luso-brasileiro no Antigo Regime*, 177.

household, constituting the general model for the legal regulation of labor in the Luso-Brazilian Old Regime. Free labor relations – whatever they were – were "another category of patriarchal-based relations"[272] and derived, in the absence of any other stipulation, their rules from the general framework of "*amos*" and "*criados*". After all, even autonomous normative bodies with their own statutes and corporate rules, such as guilds and corporations, were nothing else than "large-scale reproduction of the family, which reincarnate and safeguard its essential values: group solidarity, respect for hierarchy, discipline"[273].

The comprehensiveness of this regulatory model also implied an extension of the master's authority far beyond the most obvious limits of the object of the services rendered: the duty of obedience was a necessary counterpart of grateful loyalty, and it is in the section of punishments for those who fail to meet these commitments that the Ordinances were most imposing. "A man who lives with another free of charge and receives a pelt and cloak from him may not leave him without his license (...) and if he does otherwise, he shall be imprisoned wherever he is found, until he pays double what he took"[274]. If the servant's license was denied and he still wanted to leave, "he shall pay in double all he has received, or he shall serve three years in the conditions he was before, and he may ask the courts to draw up a writ for his safety. The servant will always be obliged to serve his master when he is needed and called, and without his license he cannot serve anyone else"[275].

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[272] Sinzheimer, "La democratizzazione del rapporto di lavoro," 54.

[273] Romagnoli, "Alle origini del diritto del lavoro," 519.

[274] "*Todo homem, que com outro viver a bemfazer, ora seja homem de pé, ora de cavallo, e delle receber pelote e capa, ou cousa, que tanto valha, nãos e possa delle partir sem sua licença, até que o sirva hum anno cumprido; e se lhe der pelote sómente, ouc apa, ou outro qualquer vestido, não se possa delle partir, até que o sirva meio anno. E o que o contrario fizer, seja preso, onde quer que for achado, e não seja solto, até que pague em dobro o que levar, e as custas, que sobre isso se fizerem*" in "*Titulo XXX. Do criado, que vivendo a bemfazer, se põe com outrem, e do que o recolhe*". See Almeida, *Codigo Philippino,* t. 4, 808.

[275] "*E se algum pedir licença á pessoa, a que he acostado, e lha não dér, e elle todavia se quizer despedir, tornar-lhe-ha em dobro tudo o que tiver recebido, ou servirá trez annos da maneira, em que dantes com elle stava, e póde requerer ás Justiças, que do sobredito façam hum auto para sua segurança. E o criado, de que acima fallámos, será sempre obrigado servir seu senhor, quando lhe fôr necessario e o chamar, e sem sua licença não poderá servir á outrem*". See Almeida, *Codigo Philippino,* t. 4, 808.

This legal regime, however, did not remain forgotten in the lower Middle Ages as an outdated and unsuitable doctrinal archetype. For much of the nineteenth century, on both sides of the Atlantic, and in Portugal even after the greatest wave of Enlightenment Reforms (1769-1789)[276] and a "Liberal Revolution" (1820)[277], labor relations still appeared in the legal literature as part of the legal regime of family relationships, even if combined with a progressive modernization of the legal lexicon and of the legislative and doctrinal references. Illustrative in this respect is the just quoted *Digesto Portuguez* by José Homem Correa Telles (1835), which under the title VIII ("*Dos criados*") of a book entirely devoted to the "Rights and Obligations of the persons of a Family", defines as "a kind of lease (*locação*) the contract between the master and the servant, by which the latter undertakes to serve the master for a certain period of time, in some task, for a certain salary; therefore, in the absence of a law, this relationship is governed by the laws of lease"[278].

Glimpses of legal voluntarism were already to be found from the end of the eighteenth century in the legal literature produced following the *enlightened* reform

[276] The greatest expansion of the Enlightenment reform drive in Portugal coincided with the aftermath of the famous earthquake of 1755, which practically destroyed the city of Lisbon, and gave renewed impetus to the intellectual circles of humanists and jusrationalists' claims for reforms of State and society. This movement, which reached its peak under the leadership of the Minister Marquis of Pombal (prime minister between 1750 and 1777), affected all areas of social life, including commerce, agriculture, industry, administration, education, relations with the Church and, more broadly, the law. Among its most important fruits there is notoriously the Law of August 18, 1769, the so-called "Law of Good Reason", which reaffirms the primacy of royal law, introduces restrictions on the validity of customs, reduces the relevance of Roman law as merely a subsidiary source and only received when in accordance with "*Boa Razão*" (hence its nickname), banishes the authority of medieval jurists such as Bartolo and Accursio, limits the normative competence of the courts of justice and the validity of canon law in the temporal tribunals. See Hespanha, *A Cultura Jurídica Europeia,* 358 ff.; "A Lei de 18 de Agosto de 1769" in Nuno J. Espinosa Gomes da Silva, *História do Direito Português: Fontes de Direito,* 7. ed. rev. atual. (Lisboa: Calouste Gulbenkian, 2019): 468-474; and also Alexandre de Castro, "Enlightened Absolutism and legal culture in Portugal: Rise and decline of legal Pombalism in the 18th century (1769-1789)", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung,* 133 (2016): 296-364.

[277] As historiography called the military uprising in Porto, which began on August 24, 1820, demanding the return of King João VI of Brazil to Portugal and that he submit to a liberal constitution. On the nature of the "Portuguese liberalism" manifested in this movement, its limits and successes: Isabel Nobre Vargues, "O processo de formação do primeiro movimento liberal: a Revolução de 1820," in *História de Portugal, v. 5: O Liberalismo (1807-1890),* edited by José Mattoso (Lisboa: Estampa, 1998): 41-56.

[278] Telles, *Digesto Portuguez,* t. II, 1835: 206.

of the legal education (1772)[279], even when still written in Latin and under the traditional triad of "*Jura personarum, Jura rerum,* e *Obligationes*"[280]. One of the jurists who contributed to this reform and who would hold the chair of National Law at the Faculty of Law in Coimbra until his retirement in 1790, the renowned José Paschoal de Mello Freire (1738-1798), would hasten to clarify in his *Institutionum Juris Civilis Lusitani, cum Publici tum Privati*[281] – adopted as textbooks in Brazilian law schools until

[279] The corollary of the reform in the sources of law introduced by the Law of Good Reason was necessarily the reform in legal education, up to then substantially based on the *utrumque ius* (Roman textual tradition and canon law). By virtue of Law of August, 28, 1772, then reinforced by the new Statutes of the University of Coimbra of the same year, the curriculum of the Faculties of Law and Canon Law were profoundly altered to restrict the study of Roman law to a merely propaedeutic function, and to implement a new pedagogical orientation towards the primacy of the laws of the Kingdom. To this end, it was created a chair of National Law (*Direito Pátrio*) and guidelines were established for new compendiums to replace the legal literature of the medieval tradition. See Hespanha, *A Cultura Juridica Europeia,* 349 ff; "Reforma dos estudos de Direito. O Compêndio Histórico e os novos Estatutos" in Silva, *História do Direito Português,* 475-486; Castro, "Enlightened Absolutism and legal culture in 18th-century Portugal", 345 ff.

[280] This order of contents was in express contradiction with the textual provision of the 1772 Statutes, which stipulated that the compendium for the Study of National Law should follow the Ordinances of the Kingdom, and not the traditional division of Gaius and later Justinian among persons, things and actions. See *Estatutos da Universidade de Coimbra do Anno de MDCCLXXII, Livro II que contém os Cursos Juridicos das Faculdades de Canones e de Leis* (Lisboa: Regia Officina Typografica, 1773): 456: "*Ordenará [o Professor] as suas Lições pela mesma ordem, e serie dos Livros, e Titulos da sobredita Compilação Filippina; por ser esta a Fonte Authentica das Leis, que se devem substanciar, e explicar methodicamente aos Ouvintes; para mais obrigar a que recorram a ella; para auxiliar-lhes a memoria; e para facilitar-lhes o indispensavel, e contínuo uso, que della deveráõ sempre fazer*" . As justification for choosing this method, Mello Freire stated already in the exordium of the work: "*Iis tradendis eam methodum elegimus, quam Caius, et Justinianus in suis Institutionibus probarunt, non quod eam meliorem aliis, et concinniorem existimemus, sed quia veluti Authentica est, et ab Academia in Jure Civili Romano tradendo recepta*". See Paschalis Josephi Mellii Freirii*, Institutionum Juris Civilis Lusitani cum Publici, tum Privati*, *Liber II, De Jure Privato,* editio secunda (Olisipone: Typographia Regalis Academia, 1794): 4.

[281] Published in four volumes between 1789 and 1794 in the *Typographia da Academia Real das Sciencias de Lisboa*, the work was the first – even not the most compliant – materialization of Pombal's mandate in the statutes of 1772 that law be taught through compendiums, "brief, clear and well ordered", in the best scientific-rationalist style of the time. Despite maintaining the language and order of the contents of the *ius commune* tradition, in a survey of all the bibliographical and legislative references in the text, Hespanha shows that 80% of the legal doctrine cited belonged to the universe of the most emblematic authors of the various modernizing currents of Central or Northern European jurisprudence of the 17th and 18th centuries: from the "elegant school" and "critical history" of the Netherlands, through the Dutch and German "renovators" of Roman law according to its "modern use" in the forum, and of course the best-known names of jusnaturalism. See Hespanha, *A Cultura Jurídica Europeia,* 360 ff.; Id., "Razões de decidir na doutrina portuguesa e brasileira do século XIX", 135-136. It is also considered a modern legal doctrine for its notion of dominion, where the individualist model of ownership is already well-defined, as opposed to the multifaceted model of

the 1850s[282] –, from the first line of the chapter "*Dos criados alheios ou serviçais*" – right in the beginning of the *Liber II – De Jure Personarum* and soon after defining the status of free and enslaved men – that "those who are in the service of others are not really slaves, because they serve of their own free will"[283].

The same concern is easily traced also in the glossators of Mello Freire's work – role performed by many jurists of that generation and professors who followed him at the chair of National Law in the University of Coimbra[284]. Antonio Ribeiro de Liz Teixeira (1790-1847), who held the same cathedra from the beginning of the nineteenth-century[285], writing a *Curso de Direito Civil Portuguez para o anno lectivo de 1843-1844 ou Commentario ás Instituições do Sr. Paschoal José de Mello Freire sobre o*

medieval doctrine, precisely because it was written at a time when new ideas about law and new political projects were already circulating to exalt the crown and its legislation (Hespanha, *Direito luso-brasileiro no Antigo Regime*, 90). However, as far as labor relations were concerned, it still preserved the legal categories of the Ancien Régime, as did the jurists who would build on it in the following decades. It was authorized for use in teaching by the Royal Notice of May 7, 1805, and would remain for decades as the official text at the University of Coimbra and the two faculties created in Brazil in 1827.

[282] It also served as the official compendium for the teaching of National Law in Brazil from the creation of the Legal Courses in 1827, with an express mention in the Statutes that established them, and remained so for more than two decades, until the reform promoted in 1854. Only then was it replaced by Lourenço Trigo de Loureiro's manual, which, however, expressly stated, as we have seen, that the Portuguese compendium had inspired it. See Roberto, *História do Direito Civil Brasileiro*, 36-38.

[283] "*§. XIV Qui alicujus in famulatu fuerint*, *servi proprie non sunt*; *sua enim voluntate serviunt*". See Freirii*, Institutionum Juris Civilis Lusitani cum Publici, tum Privati*, *Liber II,* 10.

[284] While this tendency was clear among the jurists who followed him in the chair and who produced adaptations of his compendium for academic purposes (as discussed in the following notes), it should not be forgotten that the same impact was revealed among practicing jurists, and it is enough to remember the highly-popular treaty by Manuel de Almeida e Sousa de Lobão (the last surname a reference to the city where he practiced as a lawyer), notoriously based on Melo Freire's writings, albeit with a critical approach: *Notas de uso pratico, e criticas: addições, illustrações, e remissões (á imitação das de Müler a Struvio) Sobre todos os Títulos, e todos os §§. do Liv. primeiro das Instituições do Direito Civil Lusitano do Doutor Paschoal José de Mello Freire,* parte I (Lisboa: Impressão Regia, 1816).

[285] Professor of Civil Law at the Faculty of Coimbra from 1840, he initially limited his classes to commenting on Mello Freire's compendium, but then decided to publish the lectures to correct the errors of the versions that circulated in the hands of his students. The tribute to Mello Freire, as with other jurists, appeared right from the frontispiece: Antonio Ribeiro de Liz Teixeira, *Introducção ao Direito Civil Portuguez, Jus Privatum, do Sr. Mello Freire* (Coimbra: Imprensa da Universidade, 1845); soon followed by a second volume under the mentioned title *Curso de Direito Civil Portuguez para o anno lectivo de 1843-1844 ou Commentario ás Instituições do Sr. Paschoal José de Mello Freire sobre o mesmo direito,* t. 2 (Coimbra: Imprensa da Universidade, 1845). See also Paulo Merêa, "Esboço de uma historia da faculdade de direito. 1° periodo: 1836-1865," *Boletim da Faculdade de Direito de Coimbra,* 28 (1952): 1-81 (46).

mesmo direito, stressed as a first warning that even though servants and slaves both served someone else, "to serve a master is not the same as serving a slaveowner" ("*servir a um amo não é servir a um senhor*")[286]. The servants were submitted only to a certain extent to the subjection of those who took their services, sacrificing their freedom only "in the part or portion indispensable to the conservation of the social order"[287]. He described it as a relationship that legally did not constitute personal servitude, but merely an obligation, which could even be revoked if the damage caused by failure to comply was compensated, or at the term of contract, when the servant, "as a free person, can entirely abandon this condition for another very different one"[288]. For him, the consequence of this doctrine was that "the servant is as much a person and as free as the master, although their rights and obligations are different"[289]. A splash of legal voluntarism that did not alter the broader premise of the legal order that masters and servants were situated in different positions in the social hierarchy, making it superfluous to imagine, even at an abstract level, equivalence between the rights and obligations stipulated within the employment relationship.

Indeed, neither for Liz Teixeira nor her contemporaries, the voluntaristic note that legal doctrine sought to imprint on the moment of recruitment would prevent that the other conditions of the employment relationship continue to be established unilaterally, or in a very unbalanced way, by the master. After all, the rules relating to servants were still included in "Title I - Of Free Men and Slaves", the very first in the book on "The Law of Persons" – still far from the third book on "Obligations", following

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[286] Teixeira, *Introducção ao Direito Civil Portuguez*, 111.

[287] Ibid., 107.

[288] "*Findo o tempo pactuado, o criado, como livre, póde abandonar inteiramente esta sua condição por outra* muito *differente, do mesmo modo que o operario póde variar a seu arbítrio a espécie da sua industria; até mesmo um outro destes homens póde não cumprir a obrigação antes que o tempo expire, uma vez que indemnize o locatário de seus serviços, ou obras, do damno, que lhe resulta da falta de cumprimento da locação ajustada, pois segundo um principio absoluto, estabelecido pela natureza, - nemo praecise ad factum cogi potest, isto é, quem não pode fazer aquillo, a que se obrigou, póde deixar de fazel-o, compensando o damno causado pela falta de cumprimento*": Teixeira, *Introducção ao Direito Civil Portuguez*, 110.

[289] "*Em resultado da doutrina estabelecida, o criado é tão pessoa e livre, como o amo, ainda que seus direitos e obrigações sejam differentes segundo a natureza especial da locação e conducção de serviços*": Teixeira, *Introducção ao Direito Civil Portuguez*, 110.

the preferences of Mello Freire in his *Institutionum Iuris Civilis Lusitani*. So, it's not surprising that the right of salary, for instance, if uncertain or not fixed, was kept up to "the master's discretion to give whatever he wanted in return for the service"[290], ceasing to be due for the time corresponding to the servant's illness, unless it was attributable to the master himself[291].

Even the handbook that would replace Mello Freire as the official text at the Faculty of Law of the University of Coimbra from the 1840s – kept so, in its successive editions[292], until the Civil Code was enacted in 1867[293] – by another professor of National Law (*Direito Pátrio*) at the same Faculty, the *Instituições de Direito Civil Portuguez* by Manuel Antonio Coelho da Rocha, although more committed to the liberal doctrines[294], was equally paradigmatic of this imbalance. On the one hand, his book stood out for abandoning Justinian's traditional order – maintained by Mello Freire and Liz Teixeira – and preferring a division into a general part (with definitions

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[290] "*Sem avença de certo preço ou quantidade, ficando ao arbítrio do amo o dar em retribuição do serviço o que entender*": Teixeira, *Introducção ao Direito Civil Portuguez*, 113.

[291] "*Não deve o amo a parte da soldada correspondente ao tempo da moléstia do criado*": Teixeira, *Introducção ao Direito Civil Portuguez*, 112.

[292] Always printed in two volumes under the name *Instituições de Direito Civil Portuguez* "para uso de seus discipulos", by the *Imprensa da Universidade de Coimbra*, the books came out in a first edition in 1844, with 589 pages; a second edition with a slight different preface in 1848, with 749 pages; and a third, fourth and fifth edition with the same size and preface as the second in 1852, 1857 and 1867, respectively.

[293] Contemporary historiography does not hesitate to affirm to be his "*a obra de maior divulgação na praxe do foro e no ensino universitário nas vésperas do Código Civil*" (Guilherme Braga da Cruz, "O direito subsidiário na história do direito português," *Revista Portuguesa de História,* XIV (1975): 177-316 (313)), but it's worth mentioning the handwritten note in the first blank page of the second volume of the first edition (1844), kept in the Library of the Faculty of Law of the University of Porto: "*Incontestavelmente è o livro que ha mais bem escripto em Portuguez, sobre direito. È d'aquelles que em menos diz mais e mais philosophicamente. Coimbra, 13 de Janeiro de 1872. Eduardo Augusto Chaves, estudante do 2° Curso Juridico*".

[294] Initially admitted as a professor in 1822 at the Faculty of Law in Coimbra, where he had graduated four years earlier and obtained his doctorate in 1818, he was expelled along with 14 other professors (included Antonio Ribeiro Liz Teixeira) and around 30 students in 1823 for their involvement with the liberal movement. With the victory of this political group in 1834, he resumed his position as professor at Coimbra and took over the chairs formerly held by Mello Freire, of History of Law and Portuguese Civil Law. See Hespanha, "Razões de decidir na doutrina portuguesa e brasileira do século XIX", 122. His successful and many times reissued manual, first published in 1844, was much more committed to the doctrines of rationalist and legalist tendencies of the Pombaline brand than the others mentioned so far, as he declared already in the epigraph of the book, quoting the famous passage from the Law of Good Reason that "truth and simplicity form the character of Jurisprudence". See Rocha, *Instituições de Direito Civil Portuguez*, t. 1 (1844), 1.

and general principles) and a special part (on people, things and legal acts)[295]. Unlike those two and also Correa Telles, which all included the rules on the contract for servants in the law of persons, he dedicates an entire chapter to the contract for the rental of services among the species of contracts, included alongside the other onerous contracts in book III of the special part, on legal acts. On the other hand, however, the relationship between servant and master – in any case still mentioned in the general definition of family at the beginning of the book[296] – continued to occupy most of the chapter on rental of services.

Already in the general definition of the contract of "*locação de obras*", which he expressly admitted having taken from the Code of Napoleon, art. 1710 – "the contract by which one person undertakes to provide another with his services for a certain payment", distinguished between "specific works" (*obras determinadas*) and "service for a fixed period of time" (*por certo tempo*) – servants (*criados*) were mentioned as the only example of fixed-term workers[297]. What's more, in the general

[295] Right from the preface, the author explained the divergent option as a need to adapt to the didactic scope of the work, for which the classic doctrinal divisions and even the order adopted by modern codes did not suit: "*A divisão geral da Instituta de Justiniano em Jura personarum, Jura rerum e Obligationes, que tem sido commumente seguida pelos escriptores dogmaticos de Direito, e que o foi ainda pelo Snr. Paschoal no Jus privatum, não se póde perfeitamente ajustar, segundo a moderna distribuição, dentro dos limites do objecto, que nos incumbe. O Codigo Geral da Prussia na parte do Direito Civil seguio um plano novo, e especial, talvez appropriado para um Codigo, mas que nos não pareceo adoptavel em um compendio elementar de instrucção. O mesmo juizo formamos da excellente obra nacional, o Digesto Portuguez. O Codigo Civil Francez, apezar de compilado segundo a actual distribuição, como è um composto de differentes Leis, não offerece o modelo de um plano regular; o qual tambem se não encontra nas obras dos Professores Francezes, porque lhes é prohibido no ensino alterar a ordem estabelecida no Codigo*". Rocha, *Instituições de Direito Civil Portuguez*, t. 1 (1844), V. In the second edition he adds an even more explicit opinion: "*É por isso que entre os variados planos dos Codigos modernos nenhum achamos, que nos parecesse apropriado para o fim que nos propomos*". See Rocha, *Instituições de Direito Civil Portuguez*, t. 1 (1848), V.

[296] "*Diz-se familia, ou sociedade familiar, a reunião de muitas pessoas, que habitão conjunctamente, e em economia commum. Ordinariamente compõe-se da reunião dos conjuges, dos pais e filhos, e dos criados"*: Rocha, *Instituições de Direito Civil Portuguez*, t. 1 (1844): 34; (1848): 60.

[297] "*A locação de de obras, segunda especie da locação-conducção, é o contracto, pelo qual uma pessoa se obriga a prestar a outra os seus serviços por certa paga, quer os serviços sejão obras determinadas, como os dos recoveiros, e empreiteiros; quer por certo tempo, como os dos criados. Cod. Civ. Fr. art. 1710*": Manuel António Coelho da Rocha, *Instituições de Direito Civil Portuguez*, t. 2 (Coimbra: Imprensa da Universidade, 1844): 563; (1848): 662-663; 1852: 662-663; 1857: 662-663; 1867: 662-663. Considering that the subject was treated identically in all editions and with the same page numbering from the second edition onwards, I limit to refer to the first and second editions in the following notes.

composition of the chapter, including the two types of hire, 6 of the 10 sections were dedicated to servants, with only 1 section dedicated to day laborers, and the other 3 to contracts for specific works[298]. It is therefore not surprising to see the same author, on the one hand, again leaning on the French code, affirming that "no one can be engaged for life" [299], at a time when this was by no means a unanimous rule among his fellow civilists[300]. On the other hand, however, he drew from the *Ordenações Filipinas* (1603) and the more conservative Prussian Code (*Allgemeines Landrecht für die Preußischen Staaten* of 1794) – a reference to which he was not the only Portuguese

[298] The first three sections of the chapter on "*locação de obras*" were the only ones for the hiring of "specific works" ("*obras determinadas*"): I. *Dos recoveiros* (drivers: 1844, t. II: 563-564; 1848, t. II: 671); II. *Direitos e obrigações dos empreiteiros* (rights and obligations of independent contractors: 1844, t. II: 564-565; 1848, t. II: 671)*;* III. *Direitos e obrigações do dono da encomenda, ou obra* (rights and obligations of the employer: 1844, t. II: 565-566; 1848, t. II: 671). The other 7 sections were devoted to the hiring for a fixed time, all but one devoted to servants: IV. *Dos officiaes e jornaleiros* (day workers: 1844, t. II: 566-567; 1848, t. II: 671)*;* V. *Dos criados* (servants: 1844, t. II: 567-568; 1848, t. II: 671)*;* VI. *Direitos e obrigações dos amos* (rights and obligations of masters: 1844, t. II: 568; 1848, t. II: 671)*;* VII. *Quando podem despedir os criados?* (when masters can fire servants: 1844, t. II: 568-569; 1848, t. II: 671); VIII. *Direitos e obrigações dos criados* (rights and obbligations of servants: 1844, t. II: 569-570; 1848, t. II: 671)*;* IX. *Quando podem os criados despedir-se?* (when can servants resign: 1844, t. II: 570-571; 1848, t. II: 671); X. *Acção de soldadas* (1844, t. II: 571; 1848, t. II: 671).

[299] Rocha, *Instituições de Direito Civil Portuguez*, t. 2 (1844), 567; (1848), 667.

[300] The admissibility of lifelong pacts is less surprising from an author like the admittedly conservative Manuel de Almeida e Sousa Lobão, for whom "*por pacto e convenção se póde captivar a liberdade de habitar em certa caza, ainda perpetua e vitaliciamente; e em que, rebus sic stantibus, he valida e efficaz a obrigação: 1°, quando algum se obriga servir outra pessoa em quanto elle viver, com tanto, que o amo o não tracte com severidade deshumana; ou lhe falte com os precisos alimentos*": *Tractado Historico, Encyclopedico, Critico, Practico, sobre todos os direitos relativos a cazas, quanto a's materias civis, e criminaes* (Lisboa: Impressão Regia, 1817): 351-352; but it was also present in Vicente Ferrer Neto Paiva, writing in 1850 in a work of declared jusnaturalist orientation. Even after disagreeing with the authors who inserted the relations between masters and servants within the family realm, claiming, on the contrary, that they should be determined by the services rental contract – "*Alguns Escriptores também por esta occasião tractaram das relções entre os amos e os criados; porém estas devem ser determiandas pelo contracto de locação e conducção d'obras*" –, Ferrer admitted the perpetuity of the contract: "*esse contrato pode ser por um tempo indefinido (em quanto quiserem amo e criado), ou por certo tempo, ou por toda a vida; porque o criado ou mandatario sempre fica pessoa jurídica, o que não acontece na escravidão, que faz perder a liberdade e todos os direitos*". See Vicente Ferrer Neto Paiva, *Elementos de Direito Natural, ou de Philosophia do Direito,* segunda edição correcta e augmentada (Coimbra: Imprensa da Universidade, 1850): 166; 142.

jurist to invoke[301], but the one who gave the most explanations[302] –, a series of work rules in the most traditional family logic. It was from the authority of the Prussian Code,

[301] The recourse to foreign legislation was expressly authorized by the Law of Good Reason (1769), which determined the interpreter, in case of need, with preference regarding doctrinal texts, to resort "to the laws of the monarchs of other Christian nations": "*Leis Políticas, Económicas, Mercantis e Marítimas, que as mesmas Nações Cristãs têm promulgado com manifestas utilidades, do sossego público, do estabelecimento da reputação, e do aumento dos cabedais dos Povos, que com as disciplinas destas sábias, e proveitosas Leis vivem felizes à sombra dos Tronos, e debaixo dos auspícios dos seus respectivos Monarcas, e Príncipes Soberanos*". See Antonio Delgado da Silva (ed.), *Collecção da legislação portugueza: desde a ultima compilação das ordenações,* v. 2 (Lisboa: Typografia Maigrense, 1829): 411. Conducting a total survey of all the references present in José Homem Corrêa Telles' *Digesto Portuguez*, a similar effort to the one we already mentioned in footnote 275 regarding Mello Freire, António Manuel Hespanha notes that among the quotations from foreign codifications, the Prussian Code accounted for 70% of Telles' mentions, compared to only 30% for the Code of Napoleon. For authors like him, refractory to the revolutionary break with tradition, the Prussian code, still very much tied to an Ancien Régime social order, was preferable to the French code. See Hespanha, "Razões de decidir na doutrina portuguesa e brasileira do século XIX," 131.

[302] In a note added to the second edition, the author expressly declares to have resorted to foreign codes where the Portuguese legislation was lacking, using as the elective criterion of a legislation rather than another the disposition which showed "most analogous to our laws or customs". It is not surprising, therefore, that when it came to the law of obligations, particularly those of servants towards their masters, his declared preference was the Prussian Code: "*Um tratado de jurisprudencia entre nós é um composto de muitos e variados elementos, para o qual as leis patrias hoje por desgraça ministram o menor contingente; todos os mais são subsidios. […] Alguns artigos têm já por fontes subsidiarias os codigos modernos. Assim o artigo das tutelas na Reforma, e o dos principios geraes sobre contractos no Codigo Commercial são tirados diretamente do Civil Francez: e nós fomos extractar do da Prussia as doutrinas sobre obrigações, que resultam dos actos illicitos, sobre esponsaes, sobre testamentos de mão commum, e sobre as obrigações dos criados, e outras muitas, cujos elementos achamos introduzidos entre nós pelas leis, ou pelos praxistas, talvez pela frequente leitura dos JCtos Allemães* (…) *Todos sabem quanto è dificil e arriscado decidir entre os differentes sentidos, que os interpretes dão a alguns textos. Ora nós não temos o desvanecimento de nos julgar hoje capazes de ser juizes entre Accursio e Cujacio, ou entre Vinnio e Heineccio: nestas difficuldades decidimo-nos pela opinião, ou antes pela fórmula enunciada em um codigo, o qual, além da auctoridade dos seus redactores, tem em seu abono o assenso de uma nação civilizada. Não queremos encobrir, que muitas vezes vamos encontrar entre um codigo e outro codigo estas mesmas diversidades de opiniões; e então (é necessário confessal-o), como não temos regra, decidimo-nos por aquella disposição, que nos parece mais analoga ao nosso systema de legislação, aos nossos costumes e estylos, e talvez a alguma auctoridade, que nos dava melhor conceito":* Rocha, *Instituições de Direito Civil Portuguez,* t. I (1848), 284-285. It was, after all, the Code that more than any other came close to the Portuguese Ordinance's regulation of labor, containing in the first title of the first part – *Von Personen um deren Rechten überhaupt* – a definition of "family" – *häusliche Gesellschaft* – which expressly included servants: "*Doch wird auch das Gesinde mit zum häuslichen Gesellschaft gerechnet*". See *Allgemeines Landrecht für die Preussischen Staaten, Neue Ausgabe. Ester Theil erster Band (Berlin: Gottfried Carl Vauck, 1804).* However, the author admits that he consulted it in the French translation, like all other foreign codes: "*Não temos podido obter, além do Civil Francez, senão o da Prussia, o da Austria, e o da Sardenha vertidos em Francez; em quanto aos outros, que algumas vezes citamos, servimo-nos da Concordance entre les Codes Civis par Mr. Anthoine de Saint-Joseph*": Rocha, *Instituições de Direito Civil Portuguez,* t. I (1848), 285. Margarida Seixas suggests that the translation used of the Prussian Code was: *Code Général pour les États Prussiens, traduit par les*

for example, that he borrows the norm according to which the servant was obliged to "to do any service his master orders him to do, unless it is unlawful or beyond his strength", and to serve him "with all zeal and fidelity"[303]. As a Code that was drawn up and came into force, as Pio Caroni observes, before the bourgeois revolution in a still estate-based society (*Ständestaat*)[304], it was the preferred source among the "modern laws of civilized Christian nations" for the law of labor, not only because it was much less laconic than the Code of Napoleon, but precisely because of its greater alignment with the old regime framework of a relationship between master and servants.

Indeed, Correa Telles, in his already quoted *Digesto Portuguez* published ten years before the *Instituições* of Coelho da Rocha – and from which Rocha confessed to having greatly benefited[305] – also admits to be the Prussian Code the source to the rule that the servant was not only forbidden to resist, but his resistance was a criminal act: "any active resistance that the servant makes to the master, unless it is to remove the imminent danger to his life, health or honor, is criminal"[306]. The three of them – Liz Teixeira, Correa Telles e Coelho da Rocha – recognized to the master the right not only to reprimand, but also to punish the young servants to correct their vices or bad

Membres du bureau de Législation Étrangère, et publié par ordre du Ministre de la justice (Paris: De L'Imprimerie de la République, 1801). See Seixas*, História do Direito do Trabalho em Portugal,* 164.

[303] "*O criado é obrigado (...) a servi-lo [o amo] com todo o zelo e fidelidade*": Rocha, *Instituições de Direito Civil Portuguez*, t. 2 (1844), 570; (1848), 669.

[304] Caroni, *Saggi sulla storia della codificazione,* 54-59; and also Mário Reis Marques, "O Liberalismo e a Codificação do Direito Civil em Portugal," *Boletim da Faculdade de Direito de Coimbra,* 29 (1986): 1-256 (126-30).

[305] Right from the preface, he admitted: "*Imitando o exemplo do illustre Auctor do Digesto Portuguez, cujo trabalho confessamos ter-nos servido de grande subsidio, indicámos em cada disposição a fonte, donde era extrahida*": Rocha, *Instituições de Direito Civil Portuguez*, t. 1 (1844), VIII; (1848), ibidem.

[306] "*Toda a resistência activa, que o criado faça ao amo, a não ser para remover o perigo eminente da sua vida, saúde, ou honra, é criminosa*": Telles, *Digesto Portuguez*, 208.

habits[307], but Liz Teixeira, specifying that it was valid "mainly"[308] to young men, opened up this prerogative even further.

Also, the just causes for early dismissal listed by Coelho da Rocha and Correia Telles, invoked from articles 117 to 120 of the Prussian Code were not limited to protecting the liberal parameter of the object of the contract, but clearly envisaged a broader personal relationship of trust. It is enough to remember that servants could be dismissed for just cause if they were "accustomed to spending the night outside the house without the master's knowledge or permission; (…) if they had contracted a contagious or disgusting disease due to bad conduct; (…) if the servant became pregnant; (…) if they went out for their own amusements without the master's permission; or (…) if they were given to wine and gambling"[309].

In the space of a century that separated the approval of the Law of Good Reason (1769) – the most incisive product of the Enlightenment reform in the field of the sources of law – and the Portuguese Civil Code (1867), therefore, Portuguese doctrine would allow itself to be penetrated by some of the lexical and contenutistic tendencies of the liberal legal regulation of labor in that century, but without abandoning, or even restricting so noticeably, the vocabulary and rules of the old relationship between master and servants. Neither would do the Portuguese Civil Code, which even avoiding the category of *locatio*, and using the more neutral

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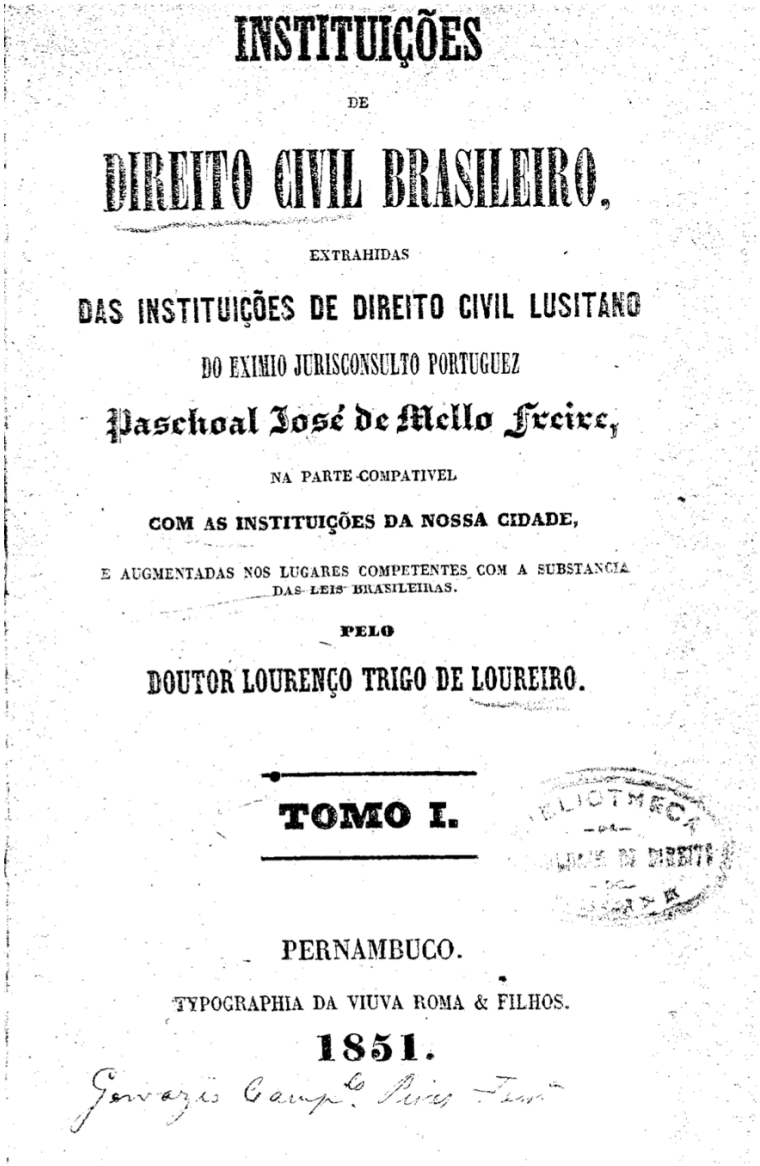
[307] Correia Telles, referring to the *Ordenações Filipinas,* L. 5, T. 36, par. 1 and the art. 77 of the Prussian Code, sustained: "*É permitido ao amo não só reprehender, mas ainda castigar os criados mancebos moderadamente a fim de os corrigir de vicios ou máos costumes*": Telles, *Digesto Portuguez*, 208; while Coelho da Rocha, referring only to the *Ordenações,* included it as a right of the master: "*Póde castigar moderadamente os criados moços*": Rocha, *Instituições de Direito Civil Portuguez*, t. 2 (1844), 568; (1848), 668.

[308] "*O amo deve não só reprehender, mas ainda moderadamente castigar o criado, principalmente mancebo, a fim de o corrigir de vicios, ou máos* costumes": Teixeira, *Curso de Direito Civil Portuguez*, 118.

[309] "*São causas justas para o amo despedir o criado antes de findo o tempo:* (…) *se ele se tem habituado a passar as noutes fora de casa sem o amo saber, nem este lhe dar licença; (...) se por sua má conduta contrahiu moléstia contagiosa ou nojenta; (...) se a criada vem a conhecer-se pejada; (...) se elle sem licença do amo sáe para os seus divertimentos (...); se o criado é dado ao vinho, ou ao jogo"*: Telles, *Digesto Portuguez,* 212-213. Almost identical hypotheses were described by Rocha, *Instituições de Direito Civil Portuguez*, t. 2 (1844), 568-569; (1848), 668-669.

contractual type "provision of services", continued to designate "servants" both domestic and wage workers, and "masters" or "served" his employers[310].

In Brazil, where laws on service rental contracts had already been passed as early as the 1830s, but which would coexist for decades with the *Ordenações Filipinas,* kept in force even after those statutes were repealed, the same kind of discrepant reconciliation between the "old" and the "new" appeared in legal literature and judicial practice.



INSTITUIÇÕES

DE

DIREITO CIVIL BRASILEIRO,

EXTRAHIDAS

DAS INSTITUIÇÕES DE DIREITO CIVIL LUSITANO

DO EXIMIO JURISCONSULTO PORTUGUEZ

Paschoal José de Mello Freire,

NA PARTE COMPATIVEL

COM AS INSTITUIÇÕES DA NOSSA CIDADE,

E AUGMENTADAS NOS LUGARES COMPETENTES COM A SUBSTANCIA DAS LEIS BRASILEIRAS.

PELO

DOUTOR LOURENÇO TRIGO DE LOUREIRO.

TOMO I.

PERNAMBUCO.

TYPOGRAPHIA DA VIUVA ROMA & FILHOS.

1851.

Source: Loureiro, *Instituições de Direito Civil Brasileiro,* t. 1 (1851): 7.

[310] While in the first section, on "domestic workers", the use of the terms servant (*serviçal*) and master (*amo*) was more ordinary, in the following section, on "wage workers", also the "individual who renders service to another, day by day, or hour by hour" is called a "*serviçal*" and his contractor "*servido*". See *Codigo Civil Portuguez aprovado por carta de lei de 1 de julho de 1867,* 2. ed. official (Lisboa: Imprensa Nacional, 1868): 236-240.

The aforementioned first Brazilian manual of civil law, from the pen of Lourenço Trigo de Loureiro (1793-1870)[311], although maintained – as stated in the frontispiece – Mello's Freire structure and devoted a chapter to the "*servants*" already in the first title – "Of Free Men and Slaves and the Laws by which Brazil governs itself" – of the first book, on the Law of Persons, also had to adapt it to the national legislative novelties. Thus, without embarrassment that those provisions were the manifestation of different phases in the legal regulation of labor, and also brought with them different legal categories, he simply added to Melo Freire's well-known definitions new legislative references and labor norms.

§. 14.

Dos servos alheios ou criados.

Os servos alheios, assim chamados por contraposição a servos proprios, ou escravos, não são propriamente servos; porquanto servem por sua propria vontade, e são geralmente conhecidos entre nós pelo nome de *criados*; Ord. liv. 4. tit. 28. in princ. ibi—*Todo a homem livre poderá viver com quem quizer*—, e lei de 13 de setembro de 1830. São todavia constrangidos a servir por soldada, ou por obrigação de casamento aquem os quizer tomar, sendo idoneo para isso, os orfãos de pai, que não tiverem bens, de que possão alimentar-se; cit. Ord. liv. 4. tit. 28. e liv. 1. tit. 88. §§. 13. até 18. Aquelle, que se obrigou por contracto escripto a prestar serviços a outro por tempo determinado, recebendo logo toda, ou parte da soldada contractada, tambem é obrigado a prestar os serviços a qualquer terceiro, aquem aquelle, que contracton com elle, transferir o contracto, se essa transferencia não foi expressamente negada no mesmo contracto, e com tanto todavia que não peore a condição do que se obrigou a prestar os serviços; cit. Lei art. 2.

Source: Loureiro, *Instituições de Direito Civil Brasileiro,* t. 1 (1851): 7.

[311] Born in Viseu, Portugal, he began his law studies at the University of Coimbra but interrupted them during the Napoleonic invasions. Coming to Brazil, he graduated from the newly established legal course at the Faculty of Olinda, joining the first class and graduating in 1832. He obtained his doctorate the following year and began his teaching career at the same faculty, first as an interim substitute, effective from 1840 and full professor in 1852 (a year after publishing the first edition of his *Instituições de Direito Civil Brasileiro*). See Paulo Távora, "Prefácio" in Lourenço Trigo de Loureiro, *Instituições de Direito Civil Brasileiro,* v. 1 (Brasília: Senado Federal, 2004): XIII.

That is how he includes, after reproducing the here already mentioned statement by Mello Freire that "those who are in the service of others are not really slaves, because they serve of their own free will", a reference to the Law of September 13, 1830, right after quoting the *Ordenações Filipinas*[312]. In the same paragraph, without interruption, he goes on to affirm that in any case fatherless children were obliged to *serve* by a wage (quoting again the *Ordenações*) and in the next sentence, with a slightly different terminology, that equally "obliged to provide services" were those "who oblige themselves through a written labor contract" in the case their contractors transfer it to a third party[313]. Norms of different temporalities and which mobilized quite different languages and categories were accommodated under the same rubric without major difficulties. The same happened in the section "on the punishment of the servant who leaves his master", where the author begins by recalling the rule in the Ordinances that a servant could be constrained by the courts to serve his master if he leaves before the end of the time (Ord. liv. 4. tit. 34), and then adds that "the same constraint and correctional imprisonment is subject those who evade the execution of a written labor contract; cit. Law of September 13, 1830"[314].

Lourenço Trigo de Loureiro wasn't the only one to include Brazilian references in alien structures. Another contemporary jurist of his – not an academic, but a lawyer

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312 "*§ 14. Dos servos alheios ou criados. Os servos alheios, assim chamados por contraposição a servos proprios, ou escravos, não são propriamente servos; porquanto servem por sua propria vontade, e são geralmente conhecidos entre nós pelo nome de criados; Ord. liv. 4. tit. 28. in princ. ibi – Todo a homem livre poderá viver com quem quizer – e, lei de 13 de setembro de 1830*": Loureiro, *Instituições de Direito Civil Brasileiro,* t. 1 (1851): 7.

313 "*São todavia constrangidos a servir por soldada, ou por obrigação de casamento a quem os quizer tomar, sendo idoneo para isso, os orfãos de pai, que não tiverem bens de que possão alimentar-se; cit. Ord. liv. 4. tit. 28; e liv. 1. tit. 88 §§ 13. até 18. Aquelle, que se obrigou por contracto escripto a prestar serviços a outro por tempo determinado, recebendo logo toda, ou parte da soldada contractada, também é obrigado a prestar os serviços a qualquer terceiro, a quem aquelle, que contractou com elle, trasferir o contracto, se essa transferencia não foi expressamente negada no mesmo contracto, e com tanto todavia que não peore a condição do que se obrigou a prestar os serviços; cit. Lei art. 2*": Loureiro, *Instituições de Direito Civil Brasileiro,* t. 1 (1851): 7.

314 "*Se o criado deixa o amo sem culpa deste antes de acabar o tempo, por que elle o tomou, (...) é constrangido pela Justiça onde quer que estiver a ir acabar de servir; Ord. Liv. 4 tit. 34. vers. – Ao mesmo constrangimento, e a prisão correcional è sujeito o que se evadir ao cumprimento do contrato de serviços firmado por escripto; cit. Lei de 13 de Setembro de 1830, artt. 4 e 5.*": Loureiro, *Instituições de Direito Civil Brasileiro,* t. 1 (1851): 8.

and politician on the capital of Rio de Janeiro, Candido Mendes de Almeida (1818-1881) –[315], dedicated himself to publishing, between 1870-1878, an annotated edition of the five books of the Philippine Ordinances (when they had already been revoked in Portugal), the first of its kind in Brazil, abundantly glossed over "*with various philological, historical and exegetical notes (...) and in addition to each book the respective Brazilian legislation concerning the matters*"[316]. Before him, Luiz da Silva Suzano's *Digesto Brazile*iro of 1855 hadn't done more than copy the full text of the Ordinances and add one law or another in a footnote[317], but, as Almeida himself observed a year earlier in his *Auxiliar jurídico* of 1869, no Brazilian jurist, "fearing the expense of the enterprise and the total reform of the Legislation enshrined therein"[318] had commented on or annotated the Ordinances until then. Already in the first note inserted in the first title on the servants' legal regime (29, book 4), Candido Mendes de Almeida hastened to refer, as parallel sources on the matter, to the Brazilian

[315] Graduated in law from the faculty of Olinda in 1839, he served as a public attorney and lawyer in the Court of Rio de Janeiro, as a provincial deputy since 1843 and as a senator since 1871. While his teaching work restricted to history and geography in high schools, his bibliographical production is quite extensive in law, including, a monograph on *Direito civil ecclesiastico brazileiro,* 2 vols. (1866-1873) and a commentary on the *Principios de dirieto mercantil e leis de marinha* de Silva Lisboa, 2 vols. (1874). See Augusto Victorino Alves Sacramento Blake, *Diccionario Bibliographico Brazileiro,* v. 2 (Rio de Janeiro: Typographia Nacional, 1893): 35-37.

[316] Candido Mendes de, *Codigo Philippino, ou, Ordenações e leis do Reino de Portugal: recopiladas por mandado d'El-Rey D. Philippe I. Decima-quarta edição segundo a primeira de 1603, e a nona de Coimbra de 1824. Addicionada com diversas notas philologicas, historicas e exegeticas, em que se indicam as diferenças entre aquellas edições e a vicentina de 1747, a origem, desenvolvimento e extinção de cada instituição, sobretudo as disposições hoje em desuso e revogadas; acompanhando cada paragrapho sua fonte, conforme os trabalhos de Monsenhor Joaquim José Ferreira Gordo e dos Dezembargadores Gabriel Pereira de Castro e João Pedro Ribeiro; e em aditamento a cada livro a respectiva legislação brasileira concernente as matérias codificadas em cada um, sendo de quotidiana consulta, além da bibliografia dos jurisconsultos que tem escripto sobre as mesmas ordenações desde 1603 até o presente,* t. 1 (Rio de Janeiro: Typ. do Instituto Philomathico, 1870).

[317] Luiz da Silva Alves D.'Azambuja, *Digesto brasileiro, ou, extracto e commentario das ordenações e leis posteriores ate ao presente* (Rio de Janeiro: Typ. Universal de Laemmert, 1855). In fact, when reproducing Titles 29 to 35 of the Ordinances, which governed the relationship between servants and masters, the author merely adds in a footnote, without including any commentary, the full text of the laws of September 13, 1830 and October 11, 1837 in sequence, leaving it up to the interpreter to make some use of it (pp. 37-42).

[318] Candido Mendes de Almeida, *Auxiliar juridico servindo de appendice a decima quarta edição do Codigo Philippino ou Ordenações do Reino de Portugal recopiladas por mandado de el-Rey D. Philippe I a primeira publicada no Brazil. Obra util aos que se dedicão ao estudo do direito e da jurisprudencia patria* (Rio de Janeiro: Typographia do Instituto Philomathico, 1869): V.

Commercial Code (1850) and the two laws on service rental contracts of 1830 and 1837. From his simple advice to the reader to "consult on this matter" the referred laws, no distinction could be deduced of temporality, legal categories or subjects referred to in those statutes and the seventeenth-century framework of the ordinances.

The jurist who most distanced himself from the Portuguese schemes – both didactic and legislative –, by imperial charge and conviction of method, would be the Bahian Augusto Teixeira de Freitas (1816-1883)[319], the most important Brazilian jurisconsult of the nineteenth century and the responsible for producing a *Consolidação das Leis Civis* in 1857[320]. Preceded by a 237-page "*Introdução*", in which he paid great tribute to German legal science – to have "achieved the most brilliant triumphs"[321] – and to the jurist Friedrich Carl von Savigny[322], the work has the merit of systematizing the laws in force in Brazil – "*o ultimo estado da Legislação*" – with a very original order of contents. Moving away from the Gaian triad, he organizes his work based on a bipartite division between personal and real rights, a distinction on which, for the author, "the entire system of Civil Law rests"[323]. The innovative nature of this

[319] Graduated in law in 1837 from the Faculty of Olinda, he was a magistrate in Bahia and a lawyer at the Court of Rio de Janeiro, where he participated in the creation of the Institute of Brazilian Lawyers in 1843 and became its third president in 1857 (a position he held for a few months). His extensive oeuvre, which includes the works commissioned by the imperial government and various publications in law reviews and newspapers, has led him to be remembered, alongside Vélez Sarsfield and Andrés Bello, as the triumvirate of the most important South American jurists of the nineteenth century. See Manuel Alvario de Souza Sá Vianna, *Augusto Teixeira de Freitas. Traços biographicos* (Rio de Janeiro, Typ. Hildebrandt, 1905); Arnoldo Wald, "A obra de Teixeira de Freitas e o direito latino-americano," *Revista de informação legislativa* 41, 163 (2004): 9-26.

[320] Under contract with the Ministry of Justice, Teixeira de Freitas was commissioned on February 15, 1855, to write a Consolidation of Civil Laws, a preparatory work for the drafting of the civil code, which would show the latest state of the country's civifl legislation. The final work, containing 1333 articles, with explanatory notes, was approved by the emperor just over three years later, on December 24, 1858. Ruy Rosado de Aguiar, "Prefácio," in Augusto Teixeira de Freitas, *Consolidação das Leis Civis*, v. 1 (Brasília: Senado Federal, 2003): XIII-XXIV. The work would go through two more editions (1865 and 1876) during the Empire and would remain a reference with almost para-legal value for jurists and scholars until the approval of a civil code in 1916.

[321] "*Fallamos da Allemanha, o paiz da meditação, onde a Sciencia do Direito, associando-se á historia, e á philologia, tem que alcançado os mais brilhantes triumphos*". Augusto Teixeira de Freitas, *Consolidação das Leis Civis*, 1. ed. (Rio de Janeiro: Typographia Universal de Laemmert, 1857): LII.

[322] This declared affinity is investigated in detail by Thiago Reis, "Teixeira de Freitas leitor de Savigny," *FGV Direito SP Research Paper Series,* 121 (2015): 1-48.

[323] Freitas, *Consolidação das Leis Civis*, XL.

methodological choice lay in the inclusion among personal rights of both rights in family relations (comprehensive of marriage, filiation, relatives and guardianships, but not including servants[324]), and obligations (where the rental of services was included alongside other contracts). Although the distribution of the contents does stand out for its originality and methodological coherence, the content of the chapter, on the other hand, reveals the merely consolidating nature of the work, as the rules on "*locação de serviços*" were a mere reproduction of the Philippine Ordinances, maintaining the usual categories of "masters" and "servants". It then adds a separate chapter on the rental of services by foreigners, in which were replicated, instead, once more *pari passu*, the rules laid down in the law of October 11, 1837, giving the impression that the only norms – and the lexicon corresponding to them – for the rental of services by Brazilians were still those of the seventeenth-century Portuguese compilation.

Just over a year later, the same author was commissioned to prepare a Project of Civil Code, the first to be drafted in Brazil. He devoted his efforts to this project from 1860 to 1865 but eventually stepped down in 1866 in the face of opposition to his idea of unifying private law[325]. While the code remained incomplete, it left a noteworthy contribution on the labor regulation. Within the chapter on rental of services, a first but single section was devoted to servants – "*criados de servir*" –, instead of treating

[324] He admitted that this option was different from the one adopted by the Prussian Code and from the opinion of the jurist Savigny, to whom he referred in note 240 of his *Introdução:* Freitas, *Consolidação das Leis Civis*, XL. Indeed, the German jurist considered it insufficient for the matter to be dealt within the narrow limits of any other contract of lease, but preferred the Prussian Civil Code's option of placing domestic servants not among contracts, but in the law of persons: "*Nun reichen wir mit der beschränkten Behandlung gleich jedem anderen Arbeitsvertrag nicht aus, und so ist im Preussischen Landrecht auf ganz richtige Weise das Dienstbotenrecht nicht unter die Contracte, sondern in das Personenrecht aufgenommen worden*": Friedrich Carl von Savigny, *System des heutigen Römischen Rechts,* erster Band (Berlin: Veit und Comp., 1840): 367.

[325] A month after the imperial approval of the *Consolidação*, the same author was hired, on January 10, 1859, to draw up a draft Civil Code. The project on which he worked between 1860 and 1865 had already more than 4,908 articles (almost four times the number of those contained in the Consolidation), when Freitas proposed a complete change of plans, with the unification of private law (inclusion in the same code of civil and commercial law, then separated into a separate code). See Orlando de Carvalho, "Teixeira de Freitas e a Unificação do Direito Privado", *Boletim da Faculdade de Direito da Universidade de Coimbra,* 60 (1984): 1-86.

them as the primary model for subordinate workers. Another section was dedicated to non-domestic laborers, simply referred to as "workers," whether they had a specific trade or not and were employed by entrepreneurs, masters, or other individuals on a wage basis. This distinction marked the initial step in moving away from the old regime, although it also initiated a long-lasting trend of legal segregation concerning domestic workers[326].

Between abandoned and rejected projects [327], Brazil, as has been noted here several times, would not see approved a civil code in the nineteenth century, which made the coexistence of labor norms and categories of different temporalities not only a literary topic and a matter for doctrinal discussion, but above all a structural feature of the universe of negotiation and dispute over labor agreements in Brazil. In notary offices or courtrooms, they were all part of an arsenal of possible solutions that could be resorted to in cases of convenience, even if, in principle, they had narrower scopes of application. In order to effectively penetrate this plural universe of negotiations and disputes, subjects and norms, lexicons and jurisdictions, we will dive deeper, in the following pages, on the specific targets of the first Brazilian laws on service rental contracts and the expansive and unforeseen uses that were made of them (chapter 2); and, in continuation (chapter 3), in the other equally creative and tendentiously expansive portions of the law of labor that existed alongside and beyond civil statutes.

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[326] On the marginality and invisibility of domestic work in twentieth-century legal systems – "*separato da ogni discorso di cittadinanza, separato dalla concezione giuridica della famiglia, ma non compiutamente contrattualizzato*" –, see Paolo Passaniti, "La Cittadinanza Sommersa. Il Lavoro Domestico tra Otto e Novecento," *QF,* 37 (2008): 233-258 (236), which I had the opportunity to translate into Portuguese as "A Cidadania Submersa. O trabalho doméstico na Itália entre os séculos XIX e XX," *Revista Mundos do Trabalho* 10, 20 (2018): 15-30 (18).

[327] After Teixeira de Freitas, the second jurist to be invited to carry out this task - few books record it - was the Viscount of Seabra, author of the Portuguese Civil Code Project, following a trip by Dom Pedro to Europe in 1871. The idea of commissioning a Portuguese jurist was not well accepted by his Brazilian peers and the project was not even published in the press. The third jurist commissioned was Senator Nabuco de Araújo, by contract in 1872. The author died in 1878 without having made sufficient progress. Finally, in 1881, Felício dos Santos offered the Imperial Government his *Apontamentos para o Projeto do Código Civil Brasileiro* (Notes for the Draft Brazilian Civil Code), which the review commission considered mere preparatory work. The subsequent movements recorded until 1889 were interrupted by the proclamation of the Republic. For a more detailed discussion of this itinerary see Rubens Limongi França, "Reforma do Código ou Consolidação das Leis Civis," *Revista Brasileira de Direito Comparado,* 16 (1999): 16-43.

CHAPTER 2

For those here and the ones to come: targets, subjects, and sanctions of three laws on service rental contracts

SUMMARY: §1. **Laws for "the ones who will be sought after": colonization projects in the 1830s**. **–** §2. **"Barbarian Africans" and "those who currently exist in Brazil": emancipation under contract**. – §3. **Migrants, nationals, and freed workers: rethinking labor in the 1870s**.

The legislative year that marked the implementation of the Anglo-Brazilian treaty abolishing the African slave trade began with a statement from the emperor as powerful as unrealistic: "the slave trade has ceased," proclaimed D. Pedro I before the General Assembly on May 3, 1830[328]. While this proclamation alone didn't prevent the illegal entry of at least 800,000 Africans into Brazil over the next two decades, the subsequent portions of the imperial speech captured attention and resonated in both houses of parliament. "It is convenient to facilitate the entry of useful arms," continued the emperor, and "Laws authorizing the distribution of uncultivated lands and ensuring the execution of agreements with colonists would be of manifest utility and great advantage to our industry in general.".

Five months before the royal speech, the first labor bill in the Independent Nation had been presented in the Senate, aimed at regulating "the contract for hiring the services of a Brazilian or foreigner [worker], inside or outside the Empire." As soon as the new legislature began in 1830, the bill returned to the agenda and was approved exactly six months after the treaty abolishing the slave trade came into force - the treaty on March 13, the law on September 13. A very early legislative interest in contract labor, which would be repeated just seven years later in the same decade and, for the third time in independent Brazil, again in 1879. A Brazil primacy, or at least

[328] *Annaes do Senado do Imperio do Brazil. Segunda sessão da Primeira Legislatura de 27 de Abril a 20 de Julho de 1830,* t. I (Rio de Janeiro, 1914): 6.

frequency record, in labor matters in a century in which labor was not the object of much legislative attention worldwide. In Brazil, where slave property and foreign immigration would be constant topics of the political and legal agenda, labor and contract consistently resurfaced "as a matter of public order" over the fifty years spanning the approval of the first and last law on the rental of services, although with different targets, subjects and sanctions.

In all of them, slave trade, slavery and immigration were indeed part of the "space of experience" and the "horizon of expectations"[329] of legislators and private companies involved in the parliamentary debates. This is how the first law of 1830 was intended to apply to Brazilians and foreigners (the latter being the targets most desired by the senates) but excluded "barbarian Africans". The second law, of 1837, in turn applied only to foreigners, the colonists to be brought to the Empire. The third law, of 1879, passed when the Imperial Government had already adopted gradual emancipation policies, covered Brazilians, foreigners and also freedmen but laid down different rules for each of them.

Shifting the legal lexicon of labor, giving space to the paradigm of contract, whilst accounting for a plural social landscape where the subject of law was yet to be unified meant inevitably composing plural contract regimes. But if narrow targets of legislative texts suggest parallel and divergent paths, this chapter seeks to demonstrate those were plural yet not incommunicable frameworks. A source-led study focusing on parliamentary debate and glimpses of law enforcement from notarial archives and courts of justice shows how status boundaries had been often negotiated and disputed on the ground. Legislators, lawyers, laborers, and employers had all been artificers and recipients of a new legal regime that combined contentious notions of freedom and authority and defied archetypal ideas of living a life under contract.

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[329] Reinhart Koselleck, "'Espaço de experiência' e 'horizonte de expectativa': duas categorias históricas in *Futuro pasado. Contribuição à semântica dos tempos históricos* (Rio de Janeiro: Contraponto, 2006): 305-328.

§1. **Laws for "the ones who will be sought after": colonization projects in the 1830s**

One of the personalities who most emblematically embodies in his own biography the only apparent contradiction, but instead functional confluence, in politics and law, between tradition and modernization, liberalism and slavery, immigration of free laborers and illegal slave trade which summarizes the first decades of Independent Brazil, is the draftsman of the country's first law on service rental contracts. Nicolau Pereira de Campos Vergueiro, born in the Northern parish of Vale da Porca, district of Bragança (Portugal) in 1778, soon after the height of Marquês de Pombal's Enlightenment reforms, graduated in law from the recently reformed University of Coimbra in 1801[330]. Four years later, shortly before the transfer of the royal family, he moved to the then colonial Captaincy, and later Province of São Paulo, in Brazil, of which he would soon become one of the most remembered political representatives and richest landowners.

His first investments as a farmer began as soon as he arrived in Brazil, after a quick marriage to the daughter of Captain José de Andrade e Vasconcellos, which allowed him, in partnership with his father-in-law, to acquire the first leagues of land for the establishment of a sugar mill in 1807. With the capital from this first agricultural enterprise, just under ten years later, he would acquire other plots in the same captaincy, founding first as a mill, but then as a coffee plantation, the *Ibicaba* farm, land that would make him the best-known importer of European immigrant labor to Brazil by the mid of the century. By the time the first 6,000 coffee trees were planted

[330] Notes on Vergueiro's biography appeared in Augusto Victorino Alves Sacramento Blake, *Diccionario Bibliographico Brazileiro,* v. 6. Rio de Janeiro: Imprensa Nacional, 1900: 313, but are provided more exhaustively by the documented research of Djalma Forjaz, *O Senador Vergueiro, sua vida e sua época (1778-1859*) (São Paulo: Officina do Diario Official, 1924).

there in 1828, however, as in the whole province and in the rest of the Paraiba Valley[331], the plantation was still almost entirely dependent on slave labor[332].

His political activity, in turn, after some minor positions in those early years, would include his participation as a Deputy in the General and Extraordinary Courts of the Portuguese Nation (1822), where he refused to sign and swear the Portuguese Constitution, and then as a Member of Parliament in the Brazilian General Constituent Assembly in 1823. He sat in Parliament from the first legislature after Independence, first as a Deputy, from 1826 to 1828, and from that year on as a Senator, a position he would hold for 10 terms, and in whose Chamber he proposed, a year later, the bill that interests us most. In those first years as a member of Parliament, he assumed very critical positions against the excesses of the Emperor in the First Reign, joined the Liberal party from its foundation, became one of the members of the Provisional Regency after the abdication of Pedro I in 1831, and part of the political group that would support the "Majority Coup"[333], being even arrested in 1842 on charges of

[331] A region comprising lands of São Paulo, Rio de Janeiro and Minas Gerais, it emerged as a coffee producer in the first decades of the nineteenth century, in close connection with the transatlantic slave trade, until making Brazil, by the 1850s, the largest producer of the commodity on the world market. Among the extensive bibliography documenting the use of enslaved labor for the coffee production, and the region's role in maintaining the illegal trade, an accurate overview is at Rafael de Bivar Marquese, "Diáspora africana, escravidão e a paisagem da cafeicultura no Vale do Paraíba oitocentista," *Almanack Braziliense,* no. 7 (2008): 138-152; and Rafael de Bivar Marquese and Dale Tomich, "O Vale do Paraíba escravista e a formação do mercado mundial," in *O Brasil Imperial – Vol. II – 1831-1889,* edited by Keila Grinberg and Ricardo Salles (Rio de Janeiro: Civilização Brasileira, 2009): 339-383.

[332] On the foundation of the Ibicaba farm, see Felipe Landim Ribeiro Mendes, "Ibicaba revisitada outra vez: espaço, escravidão e trabalho livre no oeste paulista," *Anais do Museu Paulista* 25, no. 1 (2017): 301-357.

[333] As historiography recalls the early assumption of the throne by Dom Pedro II, by then only 14 years old, advocated by exalted liberals eager to oust the conservatives from power. Vergueiro was part of the "Majority Club" or "Majority Promotion Society", created on April 15, 1840, responsible for leading the maneuver in Parliament and making the young monarch Emperor just over three months later, on July 23rd. See Marcello Basile, "O laboratório da nação: a era regencial (1831-1840)," in *O Brasil Imperial – Vol. II – 1831-1889,* edited by Keila Grinberg and Ricardo Salles (Rio de Janeiro: Civilização Brasileira, 2009): 94-97.

leading a Liberal Revolution in the Province of São Paulo after the Conservatives' rise to power[334].

Source: Sebastien Auguste Sisson, *Nicolau Pereira de Campos Vergueiro* (Rio de Janeiro: Lithographia de S. A. Sisson, 1861). Public domain, reproduced courtesy of Biblioteca Brasiliana Guita e José Mindlin.

[334] Eight months after the Majority Coup, the conservatives then in cabinet dissolved the Legislative Assembly after a Liberal victory in the Legislative elections. Even it was a prerogative of the Moderating Power in times of political instability, several liberals considered it an outrage, which added to a growing unsatisfaction with the government's centralizing reforms led to armed protests in the provinces of Minas Gerais and São Paulo in 1842. The poorly coordinated uprisings were soon suppressed and would only contribute to further isolating the Liberals in the following elections. These unsuccessful moves are discussed by Mattos, *O tempo saquarema,* 104-109; Needell, *The Party of Order,* 104-118.

Like many of his coreligionists, even though defending an anti-slave trade rhetoric in Parliament (going so far as to propose an abolition bill in 1826)[335], the Senator continued to extensively employ enslaved labor and engage in illegal slave trade. Between 1842 and 1844, in flagrant violation of the law that had made the infamous commerce illegal in 1831, Nicolau Vergueiro would still appear as the owner of the cargoes contained in four slave ships, which disembarked in the province of Rio de Janeiro and Santos some 2,291 illegally enslaved Africans from the Bay of Benin, the Congo-Angolan area and Mozambique[336]. Two years later, together with his sons José e Luiz, he created the Society Vergueiro & Cia, intended to finance the import of foreign migrants to Ibicaba, where the *Colônia Senador Vergueiro* would be officially founded in 1847 with the arrival of the first German settlers engaged for the coffee crop. By then cultivated by 215 enslaved people, the farm would receive many Swiss and Prussian immigrants in the following years and would be the stage of the most notorious accusations in the foreign press about "white slavery" in Brazil [337].

Long before the first immigrants arrived at the plantation, but only a year after the first coffee trees were planted at the then *Engenho Ibicaba*, Vergueiro presented to the Senate a bill to regulate service rental contracts of Brazilians or foreigners, both

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[335] Bethell, *The Abolition of the Slave Trade,* 57.

[336] According to the *The Transatlantic Slave Trade Database*, in 1842 Nicolau Vergueiro owned the cargo of the following vessels: Maria Segunda, from the Bight of Benin, with 788 slaves, 714 of whom landed in the port of Rio de Janeiro; Paquete, also from the Bight of Benin, containing 444 slaves, 400 of whom arrived alive in the port of Santos; and the ship Tejo, from Quelimane (Mozambique) with 684 slaves, 620 of whom arrived in Brazil also through the port of Santos. In 1843, Vergueiro also owned the cargo of the ship Aventureiro, from Whydah, Ouidah (Benin Coast), disembarking in Campos with 107 blacks, after 13 had died en route. Finally, the Senador appears as the owner of the ship Virginia, which left Benguela in 1844 with 500 captives and arrived in Macaé in 1844 with 450 slaves. See Eltis et al, *The Transatlantic Slave Trade: An Online Dataset* (https://www.slavevoyages.org/voyage/database).

[337] Accounts of the mistreatment of German and Swiss sharecroppers gained widespread attention in Europe in the 1850s, and the image of European workers reduced to white slavery became commonplace. Many diplomatic inspections and official Swiss consular missions – Heusser (1857) and Tschudi (1861) – were sent to São Paulo to evaluate the living conditions in Ibicaba and other farms employing European immigrants. All these negative descriptions led to a Prussian ban in 1859 on Brazilian emigration agents and on advertising Brazil as a destination for settlers. See Verena Stolcke and Michael M. Hall, "The introduction of free labour on São Paulo coffee plantations," *The Journal of Peasant Studies* 10, 2-3 (1983): 173.

inside and outside the Empire. It would be the first law regulating labor after Independence, formulated within the liberal paradigm of the contract, and in line with the Western legal trend of reimagining the employment relationship as a purely obligatory bond between formally equal subjects before the law. Under this framework, it did not establish in principle any differences between foreigners and Brazilians, nor any substantial distinctions in the prerogatives of employers and employees. However, the intentions manifested during the legislative process which preceded its enactment, and the legal disputes surrounding its application in the following years, reveal a less egalitarian vision than the text of the statute might suggest. Even though Vergueiro admitted that the "Law also includes those who are here" [338], he expressly stated from the beginning of the discussions that the bill's main goal, faced with the need "to make up for the shortage of slaves" was to "bring colonists from abroad"[339].

Put in these terms, the measure reminded his colleague Felisberto Caldeira Brant, Marquis of Barbacena[340], that it was pending in that Chamber "another colonization law, proposed here two years ago, and which has very good articles related to the subject of this law (...)", so that from the joint discussion "a more perfect law would emerge"[341]. The bill that the senator was referring to, proposed three years earlier, unlike Vergueiro's proposal, was directed exclusively to foreigners and aimed at distributing land and privileges to immigrants who came to colonize uninhabited areas of the country. In the discussion of this project, Vergueiro declared himself

[338] "*Esta Lei tambem comprehende os que cá estão*", affirmed Vergueiro in the plenary session of June 17th, 1830. See *Annaes do Senado do Imperio do Brazil* (1830), t. I, 278.

[339] Ibid., 276.

[340] Felisberto Caldeira Brant Pontes de Oliveira Horta, the Marquis of Barbacena (19 September 1772 – 13 June 1842), was a key figure in many of the episodes that run through this thesis. In 1822, he was sent to London to negotiate the Treaty of Recognition of Independence, for which the British made the abolition of the slave trade a condition. He also negotiated loans between Brazil and England and the trade treaty between these countries. As a senator, he was also the author of the first national law to abolish the slave trade, enacted in 1831. He was also councilor of state and minister of the empire. For a biographical overview, see Augusto Victorino Alves Sacramento Blake, *Diccionario Bibliographico Brazileiro,* v. 2 (Rio de Janeiro: Imprensa Nacional, 1893): 327-329.

[341] See *Annaes do Senado do Imperio do Brazil* (1830), t. I, 278.

completely opposed to what he considered to be a "prodigality system", since the foreigners the country needed were not those who arrived as small landowners, but "more arms for our landowners to work with, and this is not the way to acquire them"[342].

The bill that Vergueiro proposed in 1829, in turn, was aimed at attracting immigrants as proletarians, workforce for Brazilian plantations, of which the Senator himself was a major investor. In order to attract these workers, both he and his colleagues were aware that it was necessary, on the one hand, albeit rhetorically, to "secure the foreigner who wants to come to the Empire as a simple worker the help he will find in the government"[343], but, above all, to guarantee that the transporters of free men were sure of the payment of the expenses and money they advanced, just as until then "the traders of slave men were sure of the profit from their work"[344].

The bill was then aimed to regulate the contract in which a Brazilian or foreigner undertakes to provide services (i) for a fixed period or for a specific work (*empreitada*) and with (ii) advance payment of wages (art. 1). The combination of these factors was the known recipe for engaging immigrants who couldn't afford the expensive and often overpriced intercontinental travel costs. By promising their future services as a reward for the advance on the costs of transportation, their original debt was turned into wage advance on arrival. The Senator didn't hide the fact that this was exactly the type of situation he was targeting, explaining that the possibility of transferring the contract was a necessary condition for the operation of companies specializing in immigration, allowing them to transfer the right of credit over the colonists' work to the farmers interested in the imported workforce. If there was an obstacle to transferring the contract, "it would be necessary for the farmer himself to go after them"[345], Vergueiro observed, making it impossible for intermediary businessmen to carry out the transportation of workers.

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[342] Ibid., 298.
[343] Ibid., 125.
[344] Ibid., 276.
[345] Ibid., 275.

In the Chamber of Deputies, where the bill was latter sent and became law on September 13, 1830, more than one voice observed that the lack of a fixed term for the duration of these contracts, coupled with the possibility that they could be transferred, created the risk that the contractor would be passed from one borrower to another, in an endless chain of engagements. A member of the Parliament defended the idea that contracts could only be transferred between heirs, otherwise the importation of colonists would end up being another genre of slave trade: "anyone who contracts for 10 and passes it on to another for 20 or 30 is a trader"[346]. In a similar vein, there were proposals that the term of the contract should not exceed a maximum of 6, 8 or 10 years, under eloquent protests that "the term must be fixed. The will of the rich man is never to meet the will of the man who serves"[347], but none of them was incorporated. The final wording remained with the mere general indication in art. 1 that the services should be fixed for a "definite period of time", but without a quantum, and in art. 2 that "the person who has stipulated the services for himself may transfer this contract to another, provided that the condition of the person who was obliged to provide it is not worsened, nor is this transfer denied in the same contract"[348].

The second measure to make these contracts functional to protect investments in labor imports was to reinforce the faithfulness to the word given. The bill then prohibited in article 2 the employer to "withdraw from the contract, as long as the other party obliged to the services fulfills his obligation, without paying him for the services rendered, plus half of the contracted price". Article 3 went further to foresee "that the one who was obliged to render services can only refuse to render them, as long as the other party fulfills his obligation", under penalty of having to return "the receipts advanced, deducting the services rendered, and paying half of

[346] *Annaes do Parlamento Brazileiro. Camara dos Srs. Deputados. Primeiro Anno da Segunda Legislatura. Sessão de 1830, coligidos por Antonio Pereira Pinto em virtude de resolução da mesma Camara*, t. II (Rio de Janeiro: Typographia de H. J. Pinto, 1878): 373.

[347] Ibid., 374.

[348] See "Lei de 13 de setembro de 1830. Regula o contracto por escripto sobre prestação de serviços feitos por Brazileiro ou estrangeiro dentro ou fora do Imperio", printed in *CLIB (1830),* pt. I (Rio de Janeiro: Typographia Nacional, 1878): 32-33.

what he would earn if he fulfilled the contract in full"[349]. Although Vergueiro sustained it was a measure "coherent with our legislation"[350], while the Ordinances already provided fines in case of early abandonment of services for the servant who left the master, this is precisely where lie some of the most important points of comparison between the new and the previous law.

In the first place, the provision for identical fines for both the worker and the employee who failed to comply with the contract showed that the new law, at least formally, waved towards the ideal of equality between the contracting parties within the principles of the law of obligations. In seventeenth-century Portuguese legislation, instead, the hypothesis was foreseen in the chapter on "who throws the servant he has for wages out of the house"[351], under the old regime logic of coexistence within the household, and with unequal consequences for masters and servants. The master who dismisses the servant was supposed to pay him all his wages, while the servant which did the same must return the wages he has received and serve for free all the time he has left and could be constrained by justice wherever he was. The nature of this judicial constraint, however, was not specified, and the penalty of imprisonment was provided for only if the servant, in addition to leaving the master's house early, placed himself at the service of someone else. The new law gave judicial constraint a much more specific discipline.

Both employer and employee, on paper, were subject to imprisonment if they failed in their contractual obligations, a reciprocity that was formally consistent with the rhetoric that the law also served to attract – and not just punish – immigrant workers, showing them "the help they will find in the government"[352]. The employer could be "compelled by the Justice of the Peace, after being verbally heard, to pay the wages, or price, and all the other conditions of the contract, and shall be imprisoned if

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[349] *Annaes do Senado do Imperio do Brazil. Segunda sessão da Primeira Legislatura de 1 de Julho a 3 de Setembro de 1829,* t. II (Rio de Janeiro, 1914): 187.

[350] *Annaes do Senado do Imperio do Brazil* (1830), t. II, 276.

[351] Book 4, tit. XXXIV of the *Ordenações Filipinas*: "*Do que lança de casa o criado que tem por soldada*". See: Almeida, *Codigo Philippino,* t. 4, 811.

[352] *Annaes do Senado do Imperio do Brazil* (1830), t. I, 125.

within two days of being sentenced he does not effectively make the payment or does not provide sufficient security (art. 2º)."[353] But the reciprocity was only apparent. After all, the law's main target was "these people, who rent themselves out, [and] ordinarily don't do what they say (...) men whom experience has taught that it is necessary to subject to the rigor of the laws."[354] It was for the man without recourses, otherwise "he wouldn't subject to it [to the work for another]; so he pays with his person; and after applying the correctional means, all that remains is to make him pay in prison."[355] Such a penalty would serve, according to the Senator, to persuade these people, who "usually have no other hypothec to give apart from their person."[356]

For this purpose, it was allowed to the "Justice of the Peace to constrain the service provider to fulfill his duty, punishing him correctionally with imprisonment, and after three ineffective corrections, he will sentence him to work in prison until he compensates the other party (art. 4º)."[357] The combination of the disciplinary scope and its precedence over the compensatory aspect meant that the sanction foresaw in this first Brazilian law on service rental contracts was not merely intended to secure debt but to dissuade and punish with deprivation of liberty any worker who dared to breach a contract, regardless the underlying motivation. This perspective helps elucidate the imprisonment incident of Domingos Pereira Braga, a land worker in a coffee plantation in the province of Minas Gerais in Southeastern Brazil.

On July 19, 1878, the Justice of the Peace of Freguezia do Campestre, a city in the province of Minas Gerais in Southeastern Brazil, received a petition signed by Braga's contractor, farmer Pedro Custódio do Lago, requesting the judge's intervention since he was "threatened with enormous damage."[358]. On May 29, 1874, the petitioner had signed a contract with Braga to plant 30.000 coffee trees on his farm

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[353] *CLIB (1830)*, pt. I, 32.
[354] *Annaes do Senado do Imperio do Brazil* (1830), t. II, 278.
[355] Ibid., 277.
[356] *Annaes do Senado do Imperio do Brazil* (1830), t. I, 392.
[357] *CLIB (1830)*, pt. I, 32.
[358] Processo número 332, fundo Supremo Tribunal de Justiça – BU, série Revista cível - RCI, código de referência BU.0.RCI.2405, recorrente Domingos Pereira Braga, recorrido Pedro Custódio do Lago, ano inicial 1878, ano final 1879, maço 1603, gal. A, Arquivo Nacional do Rio de Janeiro (ANRJ): 2.

Cachoeirinha, starting in October of that year, for a period of 4 years for the price of *7* million réis*,* 2 of which the worker received in advance, and the rest in three installments paid in 1875, 1876 and 1877. Having come to know of an "imminent moving of the contractor", which he considered "a true escape", although not yet materialized, and which "would make it extraordinarily difficult for him to exercise the rights that the law gives him as a lessee" , Pedro Custódio Lago requested the application of the consequences predicted in articles 3 and 4 of the Law of September 13, 1830 for the breach of service rental contracts.

Based on these provisions, he requested that the contractor be brought before the judge so that he could be forced to comply with the contract, or restitute the payments made in advance, discounting the services already provided, and paying half of what he would have earned if he had fulfilled the full term of the agreement. If he failed to do so, that he be detained in prison until his duty was complied, what according to the plaintiff were all legitimate measures to prevent the planned escape. To these demands, he added the request that in the same act and by the same warrant, all the movable and immovable goods the defendant owned and was trying to transport with him outside the city be deposited in the hands of a reliable person, in order to effectively guarantee his rights.

The next day, following the order of the Justice of the Peace, the judicial officer not only arrested the accused, but seized all the goods he found, which included 5 slaves, 1 brown horse, 1 donkey, 4 pigs, 1 cow, 1 table, 1 large closet, 2 stools, 2 garment bags, 1 small table, 2 cots, 2 copper pans, 2 iron cookware, 2 bean pots and 1 cotton bedcover, all of which were estimated at more than 9 million *réis*, and were deposited in the hands of Candido Jose Pinto, a private depositary. Notwithstanding the defendant's protests that he had not moved and was still living at the plaintiff's residence, where he was detained, and that he was profoundly ill with a cancerous wound and unable not only to work but also to move, the Justice of the Peace, convinced that the defendant had left the service with the intention of moving out of the city and thereby failing to fulfill the contract, ordered that he was detained, along

with all his movable property seized, until the full compliance with the contract he had entered into, and was also ordered to pay the judicial fee[359].

Not only the property seizure, but also the imprisonment, were confirmed by the judge to whom the defendant appealed, which considered the first as an order to secure the debt and the imprisonment as a preventive measure against escape, all in accordance with the law of September 13, 1830. The judge of appeals also determined that the worker would only be released from prison and the seizure on his property lifted when the liquidation was concluded and what was owed to the plaintiff fully paid. The worker, even if he had more than enough assets to cover his debt – after all, there were only a few months left to fulfill the contract, and the seized property exceeded by far the total price agreed for his services – was kept in prison for the breach of his labor contract.

If Braga's court case makes it clear that this penalty could affect even those who "have hypothec to give apart from their person" – to recall Vergueiro's statement – he was certainly not the representation of the agricultural worker par excellence, with no other capital than his own labor workforce. The majority of Brazilian agricultural workers were not hired for specific work (*empreitada*) but rather rented all their services for a period of time, founding themselves in an even more vulnerable situation as lay judges were given such broad powers, "without further formalities". In fact, the sequence of the law only provided that the service provider who absented from the workplace of the contract would be brought back to it under arrest by simple request of the judge of peace, proving in his presence the contract and the infraction (art. 5). Following article further clarified that the "requests of the justice of the peace (...) will be simple letters, containing the mandate, and the reasons for the arrest, with no other formality than the signature of the Justice of the Peace, and his Clerk (art. 6º)"[360].

The allowed lack of formality, combined with the possibility of resorting to incarceration for disciplinary purposes, was what permitted many Brazilian and foreign

[359] Processo número 332 (ANRJ), 16.
[360] *CLIB (1830)*, pt. I, 33.

workers during the nineteenth century to be surprised by the bailiff with an arrest warrant and taken to jail without trial before they had a chance to say a word. This is what Tobias Rodrigues da Fonseca complained about in the lawsuit filed against him on November 22, 1877 by the Company Viúva Barbosa Aranha & Filho under the accusation of breaching their labor contract. On February 26, 1875, he was hired as a rural laborer on its farm in Campinas, in the province of São Paulo, "to work in the fields or any other occupation as long as it is not beyond his strength and capacity."[361]. Upon a considerably more modest salary compared to what was stipulated in Braga's contract—15,000 réis per month, along with an advance payment of 280,000 réis—he had committed himself, in an agreement signed by two witnesses as he couldn't read, to work on the farm for five years, undertaking "all the services entrusted to him by the lesseesor whoever takes their place." However, a little over two years after the signature, he left the farm on the eve of Lent 1877 and moved to the parish of Conceição. The landlords then asked the Justice of the Peace on May 16 to issue an arrest warrant against him "in accordance with the law."

The next day, the justice of the peace issued the arrest warrant and Tobias was taken to jail by the bailiff on May 21. His first appearance before the justice of the peace was only a week later, on June 30, with the sole purpose of carrying out the mandatory attempt (by constitutional mandate) at prior conciliation, which was unsuccessful. On the same occasion, the plaintiff asked the judge to remand Tobias in prison, "protesting at the earliest opportunity to bring the relevant criminal proceedings against him, in order to coerce him into fulfilling the contract to which he is obliged, or until he pays his debt in full".[362] Another six days would elapse, during which Tobias would continue to be imprisoned, until the plaintiff presented his petition on June 5, asking the judge to prove with witnesses that Tobias had left the service

[361] Processo número 4638, fundo 1º Ofício do Tribunal de Justiça de Campinas, justificantes Viuva Barboza Aranha & Filho e Tobias Rodrigues Fonsecas, ano 1877, caixa 228, Centro de Memória da UNICAMP (CMU). The same court case was studied, with a different focus, looking for information on the daily lives of free workers on plantations, by Denise A. Soares de Moura, *Saindo das sombras: homens livres no declínio do escravismo* (Campinas: Centro de Memória-Unicamp, 1998): 142 ff.

[362] Processo número 4638 (CMU): 13.

without just cause and that he owed him the sum of 984,000 réis, including the costs of his capture. The opening sentence of the petition was precisely the observation that Tobias "was already in jail in this city."[363].

It was the first time the plaintiff revealed the sum of the purported debt owed to him through an accompanying spreadsheet detailing expenses, primarily linked to his capture. He then asks for it to be proven after the Tobias had already spent 15 days in prison without an opportunity to present his side. The hearings for both the defendant and the witnesses were scheduled for the upcoming weeks. When the judge finally heard him, Tobias admitted that he had left the farm before the deadline established in the contract but claimed to have done so after being beaten by the farm manager, Felisbino, and "the instrument used being a whip for beating slaves, and, certainly, the signs of the blows are still there."[364] He said it was common for free workers like him to be punished with beatings and named cases similar to his, including his colleagues Mandú, Pedro Correa, João Chafas, and Mariano. Asked why he didn't leave the farm at the time of the beating, he replied "there was a watchman, and besides they slept locked in the corral and that it was only that night that he and other companions went to work on another farm."[365]

Not until August 11, 1877, did the judge pronounce the sentence. Despite acquitting the defendant, as he disregarded the debt's substantiation by witnesses, the judge explicitly declared having not taken into account the defendant's physical assault. He said to base this omission on the September 13, 1830 law, which did not recognize any justifiable reason for contract breach. Tobias eventually regained his freedom, but his employer remained unaccountable for the harm endured during his service and the unjust imprisonment lasting over three months following the contract's termination.

[363] Ibid., 14.
[364] Ibid., 18.
[365] Id.

Many instances of wrongful imprisonment later declared illegitimate can be attributed to the ambiguity surrounding the term "correctional." The lack of stipulations regarding when this sanction should be applied—whether preventively or post-conviction—and the absence of a defined maximum duration only aggravated that ambiguity. The previously mentioned law's article – empowering the justice of the peace to "constrain the service provider to fulfill his duty, punishing him correctionally with imprisonment, and after three ineffective corrections, he will sentence him to work in prison until he compensates the other party," – allowed for the issuance of arrest warrants at various stages of the process. This occurred "without further formalities," or clear parameters, enabling the detention of free workers who hadn't been heard or who were later acquitted of the charge of contract breach.

Of another imprisonment legitimized by the provisions of the same law, only later declared illegal, we learn from the Habeas Corpus petition filed by João Dias do Prado on December 20, 1860, after being arrested the previous day by a warrant issued in the context of an ongoing lawsuit for breach of a labor contract brought against him by his contractor Ignacio Leite do Couto[366]. Aware of the threat of imprisonment hanging over workers in cases like these, the patient had raised concerns during a hearing before the justice of the peace with his ex-employer three days prior. In this meeting, he specifically requested that the judge handling the case, whom he accused of having close ties with Ignacio Leite, be officially marked as suspicious. Despite the patient's request and the subsequent acknowledgment of suspicion, an arrest warrant was issued just two days later, on December 19. Consequently, João Dias was taken into custody in the town of Mogymirim, in the São Paulo province.

In his habeas corpus plea, the petitioner asserted the absence of any documentation supporting the arrest order. The bailiff, in possession of the arrest warrant, declined to provide a copy unless expressly directed by the judge. Submitting

[366] Processo número 666, fundo Relação do Rio de Janeiro – 84, código de referência 84.666.cx.83, recorrente O Juízo, recorrido João Dias do Prado, ano inicial 1860, ano final 1861, caixa 83, gal. C, ANRJ.

the same request to the judge presiding the case, he disavowed the jurisdiction to comply, having previously been deemed incompetent due to suspicion. Ultimately, when João Dias do Prado requested a certificate of arrest from the jailer, the records only indicated that he had been confined to prison under the determination of the justice of the peace, but there was no arrest warrant either.

Emphasizing his ignorance regarding the motivation behind the arrest, he dismissed the possibility of it being a correctional sanction. He argued that neither the case file nor any other document declared such a scope. Instead, "the case file contained only an order for arrest and the issuance of a warrant, compelling the plaintiff and his children to appear before the judge. However, this did not constitute a condemnatory sentence, nor did it mandate the plaintiff's prolonged incarceration (...). The petitioner is unaware of the law that determines such preventive detention. Your criminal legislation for crimes for which the penalty is simply six months in prison does not oblige the defendant to be imprisoned before he is sentenced, so how can it oblige him to be imprisoned for a merely civil misdemeanor for which the penalty cannot be more than a few days in prison before he has been sentenced?" [367]

Despite the justice of the peace's assertion that the arrest warrant remained valid as issued before his suspicion was officially noted, the judge to whom the case was appealed took a different stance. Considering the ongoing proceedings involving suspicion, he argued that such circumstances would inhibit his colleague from ordering such an action, deeming the constraint on the patient's freedom to be illegal. Additionally, the judge contended that the petitioner could have only been "compelled to appear before the justice of the peace to acknowledge the facts and not subjected to imprisonment. According to Article 4 of the aforementioned law, imprisonment is strictly reserved as a corrective measure."[368] Yet, in declaring the arrest illegal primarily due to suspicion involving his fellow judge, the judge of appeals refrained from

[367] Processo número 666 (ANRJ): 5.
[368] Ibid., 20.

offering a clear definition for when a "correctional" arrest should be considered appropriate and under what specific circumstances.

It was among the numerous issues left unresolved by a concise 8-article law on service contracts, providing no details on the types of work it governed, contract durations, justifiable causes for termination, or the procedural aspects of the imprisonment sentence stipulated in case of contract breach. The hasty enactment of such a law in the specific context of the 1830s Atlantic anxieties goes without saying, and more than one deputy emphasized the urgency of its passage and the risk of amendments causing delays. However, it must also be considered as a quintessential product of nineteenth-century labor law regulation, marked by intentional deregulation and deliberate omissions in legal provisions[369]. The free market needed to be guaranteed - with state mechanisms to enforce the contract and punishment in the case of non-compliance - but not excessively regulated.

Shortly thereafter a new proposal on the same subject reached Parliament, this time exclusively focused on contracts with foreign laborers willing to be employed in the country. On August 9, 1836, the *Sociedade Promotora da Colonisação do Rio de Janeiro* sent a request to the Chamber of Deputies to re-examine the law of September 13, 1830, offering a bill to revise the discipline relating to the rental of services. This time, the initiative was not the idea of a single man, but of an association founded the previous year in the capital of Rio de Janeiro. While during the debates of 1829 and 1830, private companies specializing in colonization merely embodied the expectations of parliamentarians, by 1836, it had acquired a more palpable and concrete existence. The pioneering examples in Brazil were the *Sociedade* of Rio de

[369] On the laconism of nineteenth-century labor legislation and its functionality to the legal-economic model of the liberal state, see Alonso Olea, "La abstención normativa en los orígenes del Derecho del Trabajo moderno"; Simitis, Spiros, "The Case of the Employment Relationship"; Cazzetta, "Lavoro e impresa".

Janeiro[370], and its Bahian counterpart created in 1835[371], but it was an investment model that already had very similar forms on the Anglo-American scene[372]. They acted decisively, here and abroad, in the recruitment, transportation and distribution of migrants on an intercontinental scale. Even though they operated under the well-known combination of private capital and government privileges, these companies are different from the intermediary actors (the old colonial chartered companies) and the

[370] The *Sociedade Promotora da Colonisação do Rio de Janeiro* was officially created in January 1836, just over six months before the bill was sent to the Chamber of Deputies. Its Statute, approved at the General Members' Meeting on February 7th of the same year, explicitly outlined its mission as a facilitator for the arrival of "colonists with useful arms." Additionally, it delineated its responsibility as an advance bearer of travel expenses and the primary creditor for the initial debt incurred by immigrants: "*O objeto e fim da Sociedade é promover a vinda de Colonos braços uteis, a saber: - pagando a despesa do seu transporte, á sua chegada a este porto (mediante convenção e ajuste com os mesmos Colonos), ás pessoas com as quaes elles tiverem contractado as suas passagens, - proporcionando-lhes emprego ou ocupação acomodada às suas faculdades e misteres, - amparando-os nas suas necessidades – e protegendo-os nas suas pessoas e fazenda, com sujeição ás Leis do Imperio do Brazil*". See *Estatutos da Sociedade Promotora da Colonisação* (Rio de Janeiro: Typographia Americana de I.P. da Costa, 1836). BNRJ, Seção de Livros Raros – OR-00063 (03).

[371] Founded in November 1835, the Companhia de Colonisação da Província da Bahia was conceived by then Deputy Miguel Calmon du Pin e Almeida, indisputably the foremost advocate of the colonization system through private companies in the Empire. During that very year, Calmon authored a Memoir addressing the subject, delving into discussions about the potential to foster colonization, the optimal sources for colonists, the challenges and benefits of the endeavor, and a draft of the Society's statutes. See Miguel Calmon du Pin e Almeida (Visconde de Abrantes), *Memória sobre o estabelecimento d'uma companhia de colonisação nesta província* (Bahia: Typographia do Diario de G. J. Bizerra e Companhia, 1835). The Bahian company, despite its initial promise, faced a premature demise, succumbing to liquidation in April 1837. This abrupt end was primarily attributed to the waning commitment and lack of contributions from its members. By the time of its closure, the company had facilitated the entry of 804 colonists into Brazil. Similarly, the *Sociedade* of Rio de Janeiro had a relatively short-lived existence, lasting no more than three years before shutting down in 1839 due to mounting debts. Throughout its operational period, the society managed to import at least 2,112 settlers, the majority hailing from Portugal and the Azores, with a small contingent of 7 settlers from Hamburg and 226 from Germany. See José Juan Pérez Meléndez, *The business of peopling: colonization and politics in Imperial Brazil, 1822-1860* (PhD dissertation, University of Chicago, 2016): 264-267; 295-302.

[372] From the 1820s and 1830s onwards, overseas commercial initiatives in the British colonies experienced a remarkable surge. Notable instances include Upper and Lower Canada, southern Australia, New Zealand, and the Northern Mexican state of Coahuila and Texas. Evidence of the imperial elites' familiarity with the British context can be found in the epigraph to Miguel Calmon's memoirs, as mentioned in the previous note. This epigraph quotes an article titled "On Colonial Undertakings," published in Blackwood's Magazine in Edinburgh in 1826 under the pseudonym "Bandana." The actual author was John Galt, a director of the Canada Company and the British American Land Company, both being among the most significant British companies of their kind. See Meléndez, *The business of peopling,* 253.

colonial initiatives of previous centuries, which operated under the more traditional notions of settlement and physiocratic doctrines[373].

Now mobilized under the new principles of political economy, aimed at extracting the maximum revenue from migrant transfers, they became protagonists in driving the growing migratory flows which were crossing the Atlantic in those years. It's enough remembering that the year 1834 marked the enactment of the Abolition of Slavery Act across all British territories, excluding India. Concurrently, the same year witnessed the establishment of the Zollverein, as traditional bastions of mercenary recruitment in Würtemberg and Baden aligned with Prussia, culminating in the formation of the preeminent customs union in German lands. Additionally, the period between 1832 and 1834 coincided with the Portuguese Civil War, which further fuelled the migration of poor segments of the Portuguese population to Brazil.

In this multifactorial scenario, the revived momentum of British abolitionism would inevitably play a fundamental role. It was not a mere coincidence that the bill mobilized senators just as the Atlantic trade in Africans was once again on the Senate's agenda. The historian Joseli Mendonça was the first to notice that the Senate started to deliberate on the bill proposed by the *Sociedade Promotora da Colonisação do Rio de Janeiro* in the same month, June 1837, when the discussions on the revision of the 1831 law, which abolished the slave trade, would also restart[374]. On June 30, 1837, Felisberto Caldeira Brant, Marquis of Barbacena, who had also authored the 1831 law, presented a bill to revoke his own creation and prohibit once again the already

[373] During the Pombaline reforms in the mid-eighteenth century, Azorean families had been relocated to southern captaincies (Rio Grande do Sul, Paraná and Santa Catarina) as part of efforts to consolidate Portuguese presence in these border regions and stimulate population growth. Still during the colonial period, there were limited initiatives to encourage European colonization on a smaller scale, particularly involving German and Swiss settlers. A decree on November 25, 1808, issued during Dom Joao's initial twelve months in Brazil, granted foreigners the right to own land, and in 1818, several colonization nuclei were established. However, until the 1830s, immigration policies were primarily driven by the imperative to populate the territory and address "demographic gaps." See Paulo Pinheiro Machado, *A política de colonização do Império* (Porto Alegre: Editora da Universidade Federal do Rio Grande do Sul, 1999); José Juan Pérez Meléndez, "Reconsidering colonization policy in Imperial Brazil: the regency years and the world beyond," *Revista Brasileira de História* 34, no. 68 (2014): 35- 60.

[374] Joseli Maria Nunes Mendonça, "'Leis para os que se irão buscar' – imigrantes e relações de trabalho no século XIX brasileiro," *História: Questões & Debates,* no. 56 (2012): XX.

forbidden slave trade. That this was a maneuver to legalize the illegal ownership of the thousands of Africans illegally imported in the previous six years, he himself admits, and ample historiography has already pointed it out[375]. But it is important here to re-emphasize the feedback effect of this debate on colonization proposals. As the fight against the slave trade returned to the fore, so did the calls for the importation of "white colonists", a "panacea" [376] for all the ills of the alleged lack of arms.

However, acknowledging this undisputable connection in the debates does not mean to uncritically accept the sources' narratives that "there is no way to connect them, they repel each other. So, to promote colonization, it is necessary to extinguish slavery"[377]. Neither does it mean adhering to the already much criticized historiographical paradigm of transition or replacement of one workforce by another. Colonization did not simply replace slavery but overlapped, and was often even a cover, rather than a substitute for the slave trade. The growth in the import of colonists between 1835 and 1842 coincide with the upsurge in African trade, as much as many

[375] Caldeira Brant's new proposal, unlike the previous law, exempted the purchasers of illegally enslaved Africans from any penalty for the crime of smuggling. Article 14 stated: "*Nenhuma ação poderá ser tentada contra os que tiverem comprado escravos, depois de desembarcados, e fica revogada a lei de 7 de novembro de 1831, e todas as outras em contrário.*" The senator did not mince his words when he told his colleagues in the plenary that the measure was intended to take care of "the fate of the farmers": "*A Assembléa Geral Legislativa que, com tanta previsão politica, soube occupar-se da cessação do trafico da escravatura, saberá agora, com igual previsão benefica, occupar-se da sorte dos lavradores. Longe de mim fazer o elogio daquelles que infringiram a lei com pleno conhecimento de causa; mas confesso ingenuamente, que nenhuma infracção de lei jamais houve que apresentasse tão plausíveis razões para ser attenuada, se não esquecida como aquella que tem commettido os lavradores do Brazil*". *Annaes do Senado do Imperio do Brazil. Ultima Sessão da Terceira Legislatura da Camara dos Snrs. Senadores de 1837,* tomo unico (Rio de Janeiro, 1923): 176. The initiative was discussed at length by Bethell, *The Abolition of the Brazilian Slave Trade,* 82 ff; Parron, *A política da escravidão no Império do Brasil,* 146 ff.; Rodrigues, "O fim do tráfico transatlântico de escravos para o Brasil," 327 ff.

[376] Expression by Meléndez, "Reconsidering colonization policy in Imperial Brazil: the regency years and the world beyond," 39.

[377] "*Nem só há uma antipatia entre o trabalho livre e o forçado; como este, por assim dizer, depõe no solo germens [sic] tão funestos, que afugentam o outro. Não há [como] ligá-los, repelem-se mutuamente. Assim que, para promover a colonização, força é extinguir a escravatura*", so said the editor of the newspaper *O Philantropo* on June 22, 1849. See *O Philantropo,* vo. 1, no. 12 (1849): 2. The newspaper was published between 1849 and 1852 by the *Sociedade Contra o Tráfico de Africanos e Promotora da Colonização e Civilização dos Indígenas*, an anti-slave trade association that received British funding. The relevance and contents of the journal are discussed at length by Mamiognian, "Africanos livres", 230-240.

ships participating in the colonist trade also brought slaves from the coast of Africa[378], not to mention that many colonists became slave owners themselves[379]. That's why great caution is needed when placing the enactment of the laws of 1830 and 1837 within the broader context of the anti-trafficking abolition movement. It is crucial not to inadvertently strengthen the problematic narrative that portrays colonization as flourishing as slavery declined. The relationship between these two systems of labor recruitment in the subsequent decades is not a straightforward linear progression; instead, it is intricate and deeply intertwined.

Caldeira Brant's proposal, although approved in the Senate, ended up stalling in the Chamber of Deputies, while the law proposed by the *Sociedade Promotora da Colonisação no Rio de Janeiro* on the rental of services was sanctioned on October 11, 1837[380]. The deep involvement of some of its members with the top echelons of the Imperial Government also contributed to this legislative success. To mention just one, the first President of the Rio Society, Viscount Pedro de Araújo Lima[381], was also

[378] Out of the ninety-one confirmed vessels identified by historian José Juan Pérez Meléndez as involved in the *colono* trade, over half also carried out enslaved people from the African Coast during the period from 1828 to 1842. This indicates that the importation of immigrants coincided with the emergence of the so-called "second slavery," and even played a role by providing ships to its illicit voyages. See Meléndez, *The business of peopling,* 307.

[379] This was in direct contravention of one of the conditions established in the first royal decrees, still in the Joanine period, for the granting of land to foreigners: the non-use of slave labor. Studies carried out in the Leopoldina Colony, in Bahia, and in Nova Friburgo, in Rio de Janeiro, show how this provision was perennially disregarded, causing the slave population in these colonial centers to exceed the number of settlers by up to ten times. To make just one example, just 25 years after its establishment, Leopoldina had approximately 1,159 slaves per 132 whites, alongside a mobile Indian labor force. An estimate from 1858 indicated that the colony's population consisted of 200 whites, comprising Germans, Swiss, some French, Brazilians, and 2,000 blacks, without differentiation between enslaved and free. See Alane Fraga Carmo, *Colonização e escravidão na Bahia: a Colônia Leopoldina, 1850-1888* (Master's dissertation, Universidade Federal da Bahia, 2010); Rodrigo Martins Maretto, *A escravidão velada: a formação de Nova Friburgo na primeira metado do século XIX* (Master's dissertation, Universidade Federal da Bahia, 2014).

[380] "Lei n. 108, de 11 de outubro de 1837. Dando varias providencias sobre os Contratos de locação de serviços dos Colonos," printed in *CLIB (1837)*, pt. I (Rio de Janeiro: Tipografia Nacional, 1861): 78 ff.

[381] Marquis of Olinda (22 December 1793 – 7 June 1870) served as President of the Chamber of Deputies between 1835-1837 and then as Regent of the Empire of Brazil (1837-1840). Symbol of the rise of the Conservative "Return", he stayed in office until the Majority Coup, architected by the liberals, anticipated Dom Pedro II to power. In 1838, Antônio Francisco de Paula de Holanda e Cavalcanti, another rising political figure in the Empire and equally a token of the Conservative party, assumed the company's presidency, soon receiving a permanent seat in the Senate. See Meléndez, *The business of peopling,* 287; 298.

President of the Chamber of Deputies when the bill was offered and became regent of the country with the rise of the Conversationist cabinet that same year.

The law's final version bore clear marks of the Company's authorship. Firstly, it applied exclusively to foreign workers: the colonists to be brought to the Empire. Furthermore, it granted Colonization Societies the authority to designate guardians for minors in municipalities lacking a General Curator of Colonists or a General Curator of Orphans (Article 3). Moreover, it allowed these Societies to retain the deposits of wages from contracts for minors in their coffers (Article 6).

In contrast to the 1830 law governing service rental contracts, the new legislation featured significant alterations and boasted over twice the number of articles (17 in total) of the previous one. The initial distinction lies in the legal categories employed in each of them. Unlike the 1830 law, which regulated the "contract for the provision of services," the law of 1837 represented an innovation within the context of Portuguese-Brazilian civil legislation [382]. Following the broader contemporary trend of continental codifications discussed earlier, it redefined the nature of this contract as a "*locação de serviços*" (rental of services) and assigned the roles of "lessor" and "lessee" to the contracting parties.

Under this new framework, fixed term and advance payment do not appear, as they did under the previous law, as inherent requirements of the labor agreement. Mention to the length of the contract, in the new law, appeared in the article that allowed adult foreigners to rent their services for as many years as they deemed suitable (art. 5), permitting, and even stimulating, lasting work arrangements. However, even without specifying a maximum time limit for the agreements, the 1837 law explicitly prohibited either party from prematurely terminating the contract before any established period was completed. This led the jurist Aureliano Souza e Oliveira

[382] In terms of legislative sources, the use of the category of rental of services for employment contracts in Portuguese law appeared for the first time in the Commercial Code of 1833. However, this solution did not end up penetrating Portuguese civil legislation. The first Civil Code in 1867, as noted in the previous chapter, diverged from other European nations and did not submit employment relationships to the *locatio* scheme, opting instead to regulate them under the formula of the "contract for the provision of services". See *Codigo Civil Portuguez,* 236 ff.

Coutinho, writing on the "*Locação de serviços civil*" in Brazil's most widely circulated law review, *O Direito*, in 1873, to argue that despite the law's omission, the 1837 legislation did not exempt the need to specify a fixed period or a particular task. The same for the advance payment of either the entire or a partial contracted amount. According to his interpretation, "Articles 7 and 9 clearly refer to the inclusion of an agreed-upon timeframe, within which the lessor cannot terminate the contract, and dismissal without just cause is impermissible."[383]

In the same vein a judge in São João do Rio Claro, São Paulo province, delivered a verdict in the same year, later published in the same journal in 1875, overturning the decision of a justice of the peace who had adjudicated a dispute involving a farming service contract. Asserting the justice of the peace's lack of jurisdiction in the matter, the magistrate emphasized that, "according to the Law of October 11, 1837, for a contract to be deemed a service rental, it is essential to specify a definite time and a certain salary, as per Articles 7, 8, 9, and 13 [which foresaw the penalties for breach of contract] of the aforementioned law" [384]. In this particular case, which concerned the cultivation of a coffee plantation, even though a price of 500 réis per bushel was stipulated, the judge reasoned that because the harvest varied annually, the total amount remained indeterminate in the contract. Consequently, the magistrate concluded that the contract could not be subject to the aforementioned law. In this specific instance, the judge's ruling ended up favoring the foreign worker, who had been sentenced to imprisonment by the justice of the peace until he paid his debt, plus a fine.

Successfully evading the sanctions imposed by the new law was truly quite an achievement for immigrant workers. The penalties provided in case of non-compliance

[383] The author (1847-1897), son of the well-known politician of the same name, the Viscount of Sepitiba (1800-1855), when published the article he had just completed his law degree (1870) and, after a period as a lawyer at the Court, held the position of municipal judge in the district of Amparo, Province of São Paulo. See Aureliano de Souza e Oliveira Coutinho, "Locação de serviços civil," *O Direito. Revista de Legislação, Doutrina e Jurisprudencia* 1, no. 1-9 (1873): 300-305 (300).

[384] See "1º Locação de serviços, civil. 2º Intelligencia da Lei de 11 de outubro de 1837," *O Direito. Revista de Legislação, Doutrina e Jurisprudencia* 3, no. 7 (1875): 713-714.

by the laborer were much more severe in the new regulation, while the provision for criminal sanctions for employers' offenses disappeared. While the 1830 legislation provided for a prison sentence even for the employer (art. 2) if he interrupted the contract before the end of the term and did not pay the due amount (the services rendered plus half of the contracted price), the 1837 law did not provide any specific sanction for the lessee if he failed to pay the due wages in case of early dismissal.

The only case in which the law provided for imprisonment for an employer offense, was the penalty imposed for the practice of enticement[385]. Even in the cases of just cause for termination of the contract by the lessor, such as injury to the laborer or his family, not even monetary fines were provided for, only the forgiveness of any debt the employee might have. This means that mistreating or starving one's own employees, from the point of view of the legal consequences, was a much less serious offense than enticing someone else's workers by offering better working conditions. The employer's only obligation was giving the worker a discharge certificate, under penalty of being compelled to issue the document by the Justice of the Peace, but the law itself stated that the lack of this title would be sufficient reason to presume that the lessor had unlawfully absconded from the contract (art. 11).

On the other hand, the penalties for the contract interruption became noticeably worse for the worker-lessor. Envisaging to protect the interests and investments of the extensive network of intermediaries involved in migrant transportation, the new law enhances and extends legal mechanisms to ensure and enforce contracts against workers. First of all, the laborer was obliged to indemnify the employer not only in the hypotheses of quitting without a just cause, but also when

[385] One of the rare alterations in the original Senate text involved this article, aiming to amplify penalties for third parties enticing a worker already under contract. Initially, the bill outlined that anyone harboring or accepting into their homes, farms, or establishments a foreigner bound by a service rental contract with another party would incur a pecuniary penalty equivalent to the sum owed by the lessor to the initial lessee. Additionally, a fine amounting to fifty percent of the owed sum was specified. However, Senator Paula Sousa's amendment, proposed and ratified during the June 21, 1837 session, modified the article to mandate the new service taker paying double the amount owed by the lessor to the original lessee, thereby eliminating the earlier-mentioned fine. See *Annaes do Senado do Imperio do Brazil* (1837), 158.

fired for just cause (an institute that did not exist in the previous regulation). In the latter case, of justified dismissal by the employer, the worker was obliged to pay whatever he owed immediately, under penalty of being arrested and sentenced to work in public works or to prison with labor (art. 8).

It is worth noting that the penalty of prison with labor was introduced before the construction of Brazil's first labor prison – and Latin America's first penitentiary – the *Casa de Correção* in Rio de Janeiro, had been completed. Construction of this prison began just a few years before the law's enactment, in 1834 – involving the labor of sentenced persons, liberated Africans, enslaved and free workers – and would only be finished in 1850[386]. It followed the line already adopted by the Criminal Code of 1830, which had provided the penalty of prison with labor for almost one-third of all offenses it contained, in accordance with the broader trend of what was considered penal modernity in the Western world in that century[387]. In fact, commenting this law in the press, the well-known jurist and writer José Martiniano de Alencar raised concerns that "imprisonment with work has never been a guarantee of a civil contract. (...) This provision is an odious exception to the law, and in its application, it equates negligent workers with the criminals of the houses of correction."[388]

Finally, the 1837 law also determined that if the worker himself resigned, he would be arrested wherever he was found and would remain so until he paid the lessee everything *in double* or served him for free for the entire time remaining to complete

[386] For a detailed investigation of the workers involved in the construction of this first labor prison in Brazil and its project to insert Brazil into penal modernity, see Carlos Eduardo Moreira de Araújo, *Cárceres Imperiais: A Casa de Correção do Rio de Janeiro. Seus detentos e o Sistema prisional no Império, 1830-1861* (PhD dissertation, Universidade Estadual de Campinas, 2009). To the significance of the penitentiary in incubating changes in labor relations and punitive mechanisms in nineteenth-century Brazil, see Martine Jean, *Policing Freedom: Illegal Enslavement, Labor and Citizenship in Nineteenth-Century Brazil* (Cambridge: Cambridge University Press, 2023).

[387] Costa, *Codificação e formação do Estado-nacional brasileiro,* 227.

[388] José de Alencar was editor-in-chief of the *Diário do Rio de Janeiro*, considered the first newspaper to be published in Brazil, from 1821, and one of the most widely read in the Court throughout the Empire. In an essay published in three parts, entitled "*Locação de serviços com estrangeiros*", the author exposed what he considered to be the main problems of the 1837 law twenty years after its enactment. See José Martiniano de Alencar, "Locação de serviços com estrangeiros," *Diário do Rio de Janeiro* vo. 37, no. 27 (1857): 1.

the contract (art. 9). Remarkably, none of these articles contained the word "correctional", one of the most contentious points, as we have seen, around the previous law. However, neither this time was there a maximum length of prison sentence, giving room to workers to be held in prison indefinitely unless they found another employer willing to pay their debt. Historian Joseli Mendonça narrates the story of a Portuguese colonist named Thereza Soares, who was incarcerated in 1858 at the request of her employer on a farm in the city of Campinas. She had to endure two years in jail before finding a new employer willing to assume her debt[389].

Instead, the substantial controversy generated by the phrasing of the new law was regarding the nature of the very legal action that would derive from it. When linking imprisonment so directly to the compensation of the debt, the new law left room for doubt as to whether it was a civil or criminal in case. One of Brazil's most widely circulated handbooks, the *Formulario de Todas as Acções Civeis Conhecidas no Foro Brasileiro,* by Carlos Antonio Cordeiro, is illustrative of this lack of clarity. In the book's first note, the jurist declared his embarrassment at the inclusion in that section of an action arising from the breach of a colonist's labor contract. "Since this process contains penalties imposed on colonists who breach their contract" – argued Cordeiro, "it seems, at first glance, out of place to deal with it in the purely civil part; but since I do not consider the process of rental of services to be properly criminal, as it can end without imposing penalties, I cannot help but to deal with it when addressing the processes that fall within the jurisdiction of the Justice of the Peace. (...) If the

[389] Detained in 1858 for allegedly abandoning her work before the contract expiration and settling the debt, she remained incarcerated until September 21, 1860. Only then was she released, securing a loan from another individual who might likely become her new creditor and employer. See Joseli Maria Nunes Mendonça, "On chains and coercion: labor experiences in south-central Brazil in the nineteenth century," *RBH* 32, no. 64 (2012): 33-47. I also had access to the manuscript file, kept by the Centro de Memória da UNICAMP, under the reference code: Processo número 12811, fundo Tribunal Judiciário de Campinas, título "Infração de contrato", autor Bernardino José de Campos, ré Thereza Soares, ano inicial 1858, ano final 1859, 1o Ofício, caixa 625, CMU.

placement is not well done, forgive me readers, because I lacked another opportunity to deal with this species."[390].

The same ambiguity appeared in judicial disputes, especially when the lack of prior conciliation, a constitutional mandate laid down for civil, but not criminal, actions, put the entire trial at risk of annulment. It was precisely by emphasizing the criminal nature of this type of action that the attorney for the landowner Antonio de Moura Almeida, landlord of a farm in the city of Campinas, São Paulo province, sought to preserve the positive result he had already obtained at first instance in a breach of contract suit against the Portuguese colonist Manoel Ferreira. Manoel and Antonio had signed a contract on July 17, 1860, when the worker committed his labor force and that of his entire family in "all and any service that they know how to do and that is ordered by Moura"[391]. On January 2[2nd] 1862, Antonio claimed that Manoel, his wife Clementina Rosa and their children Manoel and Guiomar had left his house without paying what they owed him. That they were in the house of José Guedes Pinto de Vaconcelos without his consent or order, and that "this is not convenient for him, since the defendants have no guarantee, nor assets that can insure them"[392]. For this reason, he asked the Justice of the Peace to issue a warrant to bring them before the judge "under a stick", and that the magistrate, after investigating the case, impose on them the penalties they had incurred for breaching the contract.

During the trial, Manoel Ferreira sought to prove the brutal treatment of Antonio's wife and daughter upon the defendant's family. It's surprising to read that

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[390] Carlos Antonio Cordeiro, *O Assessor Forense ou Formulario de Todas as Acções Conhecidas no Foro Brasileiro,* t. II: *Formulario de Todas as Acções Civeis Conhecidas no Foro Brasileiro* (Rio de Janeiro: Eduardo & Henrique Laemmer, 1858): 1.

[391] Processo número 3417, fundo Tribunal Judiciário de Campinas, título "Infração de contrato", autor Antonio de Moura Almeida, réus Manoel Ferreira e sua esposa, ano 1862, 1o Ofício, caixa 160, Centro de Memória da Unicamp (CMU). This lawsuit was also quoted in a paper by the Brazilian historian Joseli Mendonça, but to raise a different argument than the one discussed here. The author used the suit to emphasize the conflicting expectations of employers and foreign workers in the transition for free labor in nineteenth-century Brazil and only marginally discussed the legal regime established by the 1837 law. See Joseli Maria Nunes Mendonça, "Livres e obrigados: experiências de trabalho Centro-Sul do Brasil," Paper presented at the *5o Encontro Escravidão e Liberdade no Brasil Meridional*, Universidade Federal do Rio Grande do Sul, Porto Alegre (2011): 1-17.

[392] Processo número 3417 (CMU), 3.

even the author's own witnesses, presented before the court to prove that Manoel Ferreira and his family had left the farm before completing the full contract term, ended up corroborating the accounts of mistreatment by Antonio's wife and daughter towards the defendant's family. Both witnesses affirmed that, on multiple occasions, the lessee's wife had punished Manoel Ferreira's children using horsewhips. Strikingly, one of the witnesses, acknowledging the gravity of the statement, emphasized that at least "they had not died."[393]. Despite the repeated witnesses' accounts, the Justice of the Peace considered that there was no evidence in the records that the plaintiff did not treat Moura's children well and sentenced the whole family to return to Antonio's house.

Their acquittal ended up being assured later by the annulment of the entire process by the judge of appeals for the lack of conciliation attempt before the action was filed. Not, however, without the lawyers disputing the legal nature of the case, precisely because of the presence of a prison sentence. Manoel Ferreira's lawyer, who was the one who proposed on appeal that the case be declared null and void due to the lack of a prior attempt at conciliation, as provided for in the Constitution for civil cases, began his argument by feeling the need to justify that this was, in fact, a civil action. He did so by arguing that the Bahian jurist Teixeira de Freitas had inserted the contents of the law of October 11, 1837, into his *Consolidação das Leis Civis*, from which it could be deduced that an action derived from it had a civil nature. Additionally, that Decree no. 143 of March 15, 1842, regulating the execution of the civil part of the criminal procedure code, included the actions arising from rental of services contracts in the title relating to the civil jurisdiction of the justice of the peace.

Arguing in the opposite direction, Antonio de Moura Almeida's lawyer tried to differentiate a civil case as "one that concerns a citizen's assets and a criminal case is one that involves the imposition of penalties as a result of a fact that is harmful to society". According to him, "in a suit for breach of a rental of services contract, is it or is it not a matter of imposing penalties on those who have breached the law and the

[393] Processo número 3417 (CMU), 14v.

contract? No one will say no because it is enough to read the provisions of the Law of October 11, 1837 to understand that it is a criminal law, so there can be no doubt about the criminal nature of these causes of action" [394]. In order to uphold the ruling in favor of his client, he even cites the *Formulario de todas as acções conhecidas no Foro Brasileiro* by the aforementioned Carlos Antonio Cordeiro. He argues that Cordeiro only questions the criminal nature of the proceedings when they do not end with a prison sentence. As in the present case the defendants were convicted, the criminal nature was, according to him, undeniable, and therefore unnecessary a previous attempt of conciliation. However, the judge did not endorse this argument, contending that imposing a prison sentence did not automatically classify the breach of contract as a crime, especially in the absence of criminal law explicitly designating it as such[395].

If in this case the uncertainty surrounding the nature of the sanction prescribed by law may have worked in Manoel's favor, it is crucial to remember that the justice of the peace nonetheless overlooked his accounts of mistreatment on the farm. Even if it was not considered proven, what Manoel and his family told could be a typical account of the everyday life of nineteenth-century Brazilian farms where forms of slavery and migrant labor flourished alongside one another. "The precariousness of freedom" [396] – a historiographical concept that in Brazil was applied specially to designate freedmen's experience –, was also a shared condition lived by free –national, and immigrant– workers as long as slavery still existed. Even subjected to the clauses of a labor contract, whose object was exclusively the provision of services, employers, who were often also masters of slaves, still considered themselves entitled to exercise extensive control over the persons of their employees. An arrangement of the kind of Manoel, which engaged him and his entire family "and all the services compatible with their force" put them in

[394] Processo número 3417 (CMU), 44.
[395] Processo número 3417 (CMU), 52.
[396] Espada Lima, "Sob o domínio da precariedade," 289-326; Chalhoub, "Precariedade estrutural," 33-62.

close contact with his employer's own family circle, subjecting them to the extended and unguarded private power inside the household.

That this led to excesses and abuses of authority is not surprising when we see a proposal for an amendment like that of Senator Costa Ferreira being voiced in Parliament, when the 1837 law was still under discussion. He suggested to his colleagues in the Chamber of Deputies that employers should have "the same rights over workers as parents and teachers have over their children and disciples"[397]. Despite the "claps" the idea received, it was not approved, and even with the manifestly unequal penalties, at least in the formal language and categories adopted by the law, it left behind the legal regulation of the old regime.

In turn, the word that succeeded in penetrating the legal text was "debt": it appeared seven times in only seventeen articles. Such a conspicuous presence in the description of the original bond between the lessor (of a service) and lessee made it clear, as observed by Henrique Espada Lima, that the law "explicitly and intentionally entailed worker indebtedness to the employer"[398]. Immigrants were typically responsible for covering their own transportation costs (both for the transatlantic journey and to the plantations), often subjected to charges above the standard rates. Most contracted workers found themselves compelled to work for several years without paying to discharge their accumulated debts[399]. Workers largely relied on planters for essential provisions such as food, medical care, and tools. Their employers, also creditors, then imposed exorbitant prices and subtracted the costs from future wages, amplifying the risk of escalating debt and perpetuating bondage for workers and their families. To protect this credit, the legislation continued allowing workers to be arrested before being heard. Their fate, however, could be reversed by taking

[397] *Annaes do Senado do Imperio do Brazil* (1837), 159.

[398] Henrique Espada Lima, "Unpayable Debts: Reinventing Bonded Labour through Legal Freedom in Nineteenth-Century Brazil," in *Debt and Slavery in the Mediterranean and Atlantic Worlds,* ed. Alessandro Stanziani, Gwyn Campbell (London: Pickering & Chatto, 2013): 123-132 (125).

[399] I analyzed examples of this type of contract, emphasizing their similarities with the work arrangements of freedmen who paid for their freedom in Souza, "Negotiating the terms of wage(less) labour: free and freed workers as contractual parties in nineteenth-century Rio de Janeiro," 245-263.

advantage of a legislative innovation provided for in the same law. Although conceived to protect primarily labor contractors, the same statute also delivered safeguards for foreign workers. Legal remedies they could resort to in courts of justice even when the suits were filed by the employers.

In the same city of Campinas, a few years later the dispute between Antonio and Manoel, Francisco Pacheco de Macedo filed a suit in 1865 for breach of a labor contract against four German workers – Cristiano Alfes, João Alfes, Detles Tellan e João Tellan, saying the four colonists ran away from his house before the completion of the agreement[400]. In his initial petition, he asked the justice of peace to recapture the four workers and keep them in prison until they have satisfied their debt.

In the copy of the contract signed on October 1, 1864 which he attached to the petition, each of the colonists started out bound by an initial debt corresponding to the advances that Macedo had made for the payment of the workers' former creditor, Serafim Bueno d'Oliveira Fontes. In addition to these sums, the employer also committed to advance the money necessary for each of them to buy a cow and sums that could be urgently needed in the first year, as long as they did not exceed three thousand reis per month, but no remuneration was expected for their services in Macedo's coffee plantation in the next four years. In the farm they would be allowed to plant whatever supplies they needed, such as corn, beans, potatoes and other offal as long as they did not harm the coffee plantation, and the owner would also give each of them a quarter of a bushel of land to plant what more they could want.

During the first year, however, Macedo committed to supply them with the necessary food at the city's market price, which would eventually also become another cause of increasing debit. This probably contributed to the fact that the total debt

[400] Processo número 3653, fundo Tribunal Judiciário de Campinas, título "Infração de contrato de locação de serviços", autor Francisco Pachedo de Macedo, réus Cristiano Alfes, João Alves, João Telan e Detles Telan, ano inicial 1864, ano final 1865, 1o Ofício, caixa 213, doc 3653, Centro de Memória da Unicamp (CMU). The same lawsuit has been quoted by Joseli Mendonça in an article dedicated to the role of the justice of peace in the first national laws on the rental of services. See Joseli Maria Nunes Mendonça, "Os juizes de paz e o mercado de trabalho – Brasil, século XIX," in *Diálogos entre Direito e História: cidadania e justiça*, edited by Ribeiro, Gladys Sabina; Neves, Edson Alvisi; Ferreira, Maria de Fátima Moura (Niterói, RJ: Editora da Universidade Federal Fluminense, 2009): 237-255.

indicated in the initial petition corresponded to three times the amount initially indicated in the copy of the contract[401].

On the same day the plaintiff's request was received, the Justice of the Peace issued a warrant for the arrest of the four Germans "as set forth in the law of October 11, 1837, for having breached their service rental contracts" [402]. They were found in another farm in the same city of Campinas and taken to jail by the judicial officer. Once having them arrested, it was the petitioner himself to inform that the colonists did not understand the Portuguese language and to solicit the appointment of an interpreter for the conciliation hearing. Only in the week following they were finally brought to be heard before the Justice of the Peace, which asked each of them how long they had been away from work and why. All four colonists said they had left the farm 15 days before because were "suffering from hunger"[403], once the employer had not provided them with food. They also said that all the times they went to Macedo, he answered to have no supplies and that they should talk to the slaves and get it from them. If slavery and freedom throughout the century were defined by contrast in relation to each other[404], they were also often practiced by analogy on Brazilian plantations, where free and enslaved worked side by side, performing the same activities and often sharing the same house and food.

To verify what had been claimed, the Justice of the Peace heard two witnesses appointed by the petitioner, and two others indicated by the defendants. While the defendants indicated two German countrymen, the plaintiff indicated two carpenters employed by him on the farm. One of them, even though visibly trying to favor the plaintiff and describe him as a zealous fulfiller of his obligations, when asked if there was an abundance of food for the carpenters, ended up admitting, in a perhaps

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[401] Cristiano Alfes, who started the contract with a debt of 58.400 *réis*, appeared in the initial petition with an updated debt of 159.515 *réis*; João Alfes, from 55.960 *réis* reached 161.610 *réis*; Detles Tellan, from 77.790 *réis* went to 174.705, and João Tellan, from 68.740 *réis* to 136:305 *réis*. See Processo número 3653 (CMU), 3; 7.

[402] Processo número 3653 (CMU), 7.

[403] Processo número 3653 (CMU), 10-12.

[404] As discussed at length by Stanley L. Engerman, "Introduction," in *Terms of labor. Slavery, serfdom and free labor,* edited by Stanley L. Engerman (Berkeley: University of California Press, 1998): 1-24.

involuntary resentful statement, that there was not, "as a consequence of the petitioner distributing to the colonists"[405]. Asked, still, if there has ever been a lack of supplies for the carpenters, he admitted to an episode of shortage, which he tried to remedy by saying that the master, as soon as he arrived from the city, solved the situation by sending himself the testimony to buy the necessary supplies.[406].

Based on these accounts, and despite the legal constraints and unequal resources among the litigants, the Justice of the Peace decided that it had been fully proven in the case records that the employer, "for several times", had failed to provide the "indispensable provisions for the subsistence of the workers" [407] and this way had himself breached the contract, from then on considered rescinded. He ordered the colonists be immediately set free and absolved them of any amount they might owe the lessee, who was also obliged to pay the court fees and issue a certificate to the colonists stating they were free from their services.

Such an outcome was possible because of a legislative innovation introduced by the law of 1837. This innovation was the inclusion of just causes for the termination of the contract, marking an unprecedented provision in Portuguese-Brazilian legislation. Neither the Philippine Ordinances nor the 1830 law had any provisions for just causes. As discussed in the previous chapter, legal doctrine had to turn to foreign codes, especially that of Prussia, to enumerate instances where employers or workers were authorized to terminate the contract.

Under the 1837 law, there were five valid causes justifying dismissal by the employer (Article 7: the lessor's incapacitating illness, imprisonment, habitual drunkenness, insulting him or his family, and demonstrating malpractice). In contrast, there were only three valid just causes for the termination of the contract by the lessor (Article 10: the lessee failing to comply with stipulated conditions, injuring or insulting the lessor, and demanding services not specified in the contract). Although more

[405] Processo número 3653 (CMU), 16.
[406] Processo número 3653 (CMU), 16.
[407] Processo número 3653 (CMU), 19.

numerous for the employers and always judged in the lessee's jurisdiction[408], they provided grounds – as in the Germans' case – for some workers' fortunes to change in the courts of justice.

Even though the plaintiff had appealed the judgment, the defendants' attorney remained convinced that "the Judge's decision could not have been any other, otherwise it would be horrible and with diplomatic implications, because there is in this city who, in the name of the Government of the Appellants, is surveilling this business [409]". It's possible that the nod to the diplomatic protection was related to the still fresh memory of the most important immigrants' revolt in nineteenth-century São Paulo, initiated in December 1856 by Swiss and German workers on Senator Vergueiro's model plantation Ibicaba: the so-called Ibicaba Revolt or Revolt of the Partners[410]. The presence of a Swiss school teacher, Thomas Davatz, contributed to converting the resentment of the immigrants into an organized movement of protest and to crystallize a memory of the revolt through the voice of colonists[411]. Reports like his and multiple complaints against what they felt were grave irregularities in the fulfillment of contracts prompted European diplomatic missions and special attention to the situation of colonists emigrating to Brazil.

In the specific case of the Germans, we are following here, the judgment appealed was confirmed on June 3, 1865, and the plaintiff, who had filed the suit and

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[408] Art. 14 of the law of 1837 established the lessee's forum as the jurisdiction responsible for hearing all actions arising from rental of services contracts. See *CLIB (1837)*, pt. I, 79.

[409] Processo número 3653 (CMU), 30.

[410] For a brief but effective discussion of the revolt which puts it in perspective with the enslaved labor employed on the same farm, see Isadora Moura Mota, "Cruzando Caminhos em Ibicaba: Escravizados, Imigrantes Suíços e Abolicionismo durante a Revolta dos Parceiros (São Paulo, 1856-1857)," *Afro-Ásia,* no. 63 (2021): 291-326.

[411] The account of the revolt leader Thomas Davatz became one of the most powerful testimonies of the labor and exploitation regime to which the foreign colonists were subjected in the Brazilian plantations. It was first published in German in 1858 in Switzerland under the title: "*Die Behandlung der Kolonisten in der Provinz St. Paulo in Brasilien und deren Erhebung gegen ihre Bedrücker. Ein Noth- und Hilfsruf an die Behörden und Menschenfreunde der Länder und Staaten, welchen die Kolonisten angehörten*" (The Treatment of the Colonists in the Province of Saint Paulo in Brazil and Their Revolt against Their Oppressors. A Call for Help and Emergency to the Authorities and Philanthropists of the Countries and States to which the Colonists Belonged). For the Brazilian edition, see Davatz, Thomas. *Memórias de um colono no Brasil* (Belo Horizonte: Itatiaia, São Paulo: Ed. da USP, 1980).

had provisionally even succeeded in sending the colonists to jail, was eventually convicted for breaching the contract. Since the law did not provide for criminal consequences for non-compliance on the part of the employer, it was only up to the employer to pay the costs, but in any case, it meant that the workers were no longer obliged to continue the contract.

What is important to note that the prerogative that the German workers could use was a legal protection that Brazilian workers did not have until 1879. The same jurist already mentioned here by his article in the law review *O Direito*, from 1873, makes this difference in legal treatment very clear. Aureliano de Souza Oliveira Coutinho justified the introduction of this novelty in 1837 as "a sign of the hospitality with which he waved to the foreigner, who was unaware of our criminal laws, so full of formalities, to prevent such embarrassment"[412].

The assumption of the jurist was that the Brazilian worker, already expected to be familiar with the country's laws, wouldn't require such allowances. According to him, the Brazilian worker could only pursue criminal action against the lessee in cases of personal injury or harm to the honor of their wife, children, or family members. Regarding services not covered by the contract, the worker would be entitled to their salary, protected by Ord. L. 4, tit. 31 §12. However, he was not allowed to "refuse to provide the services to which he was obliged, nor when the lessee injures him or insults the honor of his wife, children, or family members, nor when the lessee demands services from him that are not included in the contract."[413]

Exclusion from a contractual regime, while on the one hand could mean being exempt from the most severe penalties for breach of contract, on the other hand meant being uncovered from the legal protections provided by the same law. A game of two weights and two measures which, in nineteenth-century Brazil, stemmed from the fact that the paradigm of contract would rise without an indispensable connection with the unification of the subject of law. It rather grew in parallel with the maintenance

[412] Coutinho, "Locação de serviços,", 399.
[413] Idem.

and even strengthening of some legal statuses. Still, it should be borne in mind that legislative targets and legal barriers were only part of the story. In the notarial archives and courts of justice, these were much more permeable and traversable frontiers than the strict targets of the law might suggest. In the following pages, the experience of enslaved and freed Africans, born outside Brazil or nationals, offers another, somehow transgressive and creative, dimension of these same legislative texts.

§2. **"Barbarian Africans" and "those who currently exist in Brazil": emancipation under contract**

The declared aim of facilitating colonization and the importation of foreign labor behind the two first Brazilian laws on service contracts indeed played a role in limiting their recipients and scope. Nonetheless, while the 1837 law explicitly targeted only foreign colonists, the 1830 law, despite sharing the same implicit motivations, encompassed both foreigners and Brazilians. Including, as expressed by Vergueiro, those who "were here"[414], at least the first act became potentially applicable to a broader and more plural social landscape of workers. Throughout the nineteenth century, Brazil continued to be a labor scene of slaves, freedmen, nationals, foreigners, and stateless people, who worked side by side in the streets, farms and factories, often performing the same jobs and under very similar working conditions. Not coincidentally, during the deliberations on the 1830 law, Antônio Ferreira França, a deputy from the province of Bahia, seized the moment to introduce a certain differentiation among these workers. He proposed an additional article that would stipulate that "the remuneration for the service provider should be no less than double the salary of a slave man in Brazil". Neither the idea, nor the congressman's motivation – that "the free man at least works twice as hard, and should be paid at least twice as much as the slave"[415] – convinced his colleagues, and ended up being rejected.

The amendment that ultimately found its way into the final draft, also originating in the Chamber of Deputies, went beyond merely differentiating between workers. Instead, it amputated the scope of the law by specifying that the term "foreign" did not encompass "*bárbaros africanos*" [416]. In the final version of the law, the wording was slightly altered to make it clear that the prohibition applied to those arriving from then on, but not to those already living in the country: "the contract

[414] *Annaes do Senado do Imperio do Brazil* (1830), t. I, 278.
[415] *Annaes do Parlamento Brazileiro* (1830), t. II, 422.
[416] Ibid., 374.

maintained by this Law may not be entered into, under any pretext whatsoever, with barbarous Africans, with the exception of those who currently exist in Brazil" (art. 8).[417]

This was not the only restrictive Brazilian legislation for Africans in that decade, when the fear of the "black danger", which had been on the rise in the Atlantic since the Haitian Revolution of 1792[418], reached its peak in Brazil after the outbreak of numerous slave revolts. After a particularly turbulent quadrennium of revolts between 1826 and 1830 in Bahia, in the capital and in the villages of the Recôncavo[419], associated mainly with Africans of Nagô origin, suspicion of African-born people became a widespread fear, reaching its peak in 1835[420]. Considered to be the "inciters and provocateurs of the riots and commotions to which those in slavery have given rise"[421], Black people were forbidden, in that same year of 1830, even to move outside their domicile without a passport.

Despite being explicitly articulated, the racial motivation at that time was merely one among several reasons for incorporating such a provision into the law on service contracts in 1830. Certainly, there were individuals who justified their opposition to the importation of Africans as free labor by the desire "that the race of

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417 The original sentence reads: "*Art. 7º. O contracto mantido pela presente Lei não poderá celebrar-se, debaixo de qualquer pretexto que seja, com os africanos barbaros, á excepção daquelles, que actualmente existem no Brazil*."

418 On the menacing example of Haiti across the Atlantic and the different reactions and political connotations black freedom assumed in different slave societies, see Ariela J. Gross, Alejandro de la Fuente, *Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana* (Cambridge, Cambridge University Press, 2020).

419 João José Reis, "Slave Resistance in Brazil: Bahia, 1807-1835," *Luso-Brazilian Review* 35, 1 (1988): 111-143.

420 Year of the outbreak of the "Malê Uprising", a slave revolt in Salvador, Bahia, primarily organized by Hausa and Nagô Muslism Africans. It was the most important enslaved uprising in Brazilian history, involving na estimated six hundred rebels. For a detailed account, see João José Reis, *Slave rebellion in Brazil. The Muslim Uprising of 1835 in Bahia*. Baltimore: The Johns Hopkins University Press, 1993.

421 Textual words of art. 3 of the Decree of December 14, 1830, which determined "the police measures to be taken in the Province of Bahia with regard to slaves and black African freedmen": "*Nenhum preto ou preta, forros africanos, poderá sahir da cidade, villas, povoações, ou fazenda, e predio, em que fôr domiciliario, á titulo de negocio, ou por outro qualquer motive, sem passaporte, que deverá obter do Juiz criminal, ou de Paz do lugar* (...) *por quanto ha toda a presumpção, e suspeita de que taes pretos são os incitadores, e provocadores dos tumultos, e commoções, á que se tem abalançado os que existem na escravidão*". See "Decreto de 14 de dezembro de 1830. –Estabelece as medidas policiaes, que na Provincia da Bahia se devem tomar com relação aos escravos, e aos pretos forros africanos", printed in *CLIB (1830),* pt. I, 97.

Brazil will one day be the only race and that this race of black men will disappear, because they are not harmful to Brazil as slaves, but as black"[422]. For non-humanitarian abolitionism, blackmen, "whether slave or free, were accused of corrupting the customs of White Society, devaluing the concept of work, and obstructing the flow of White European immigrants"[423]. In turn, for the Europeans, "arms that would come to civilize us", it was necessary "to do them some favors"[424], as the Decree of April 18, 1836, exempting from paying the anchorage tax ships arriving in Brazil with more than one hundred *white* colonists [425].

Nor was it a concern for the fate of the Africans, since even those who considered the amendment unnecessary, such as Deputy Antonio Pereira Rebouças [426], justified his stance by stating that, given the law's focus on "guarantees and the manner of contracting," it did not apply to them, whereas one could "contract ad libitum" with Africans[427]. On the contrary, the inclusion of such a provision was more connected to the challenges brought about by the importation and employment of free African labor in a nation that had recently outlawed the slave trade but maintained – and would do so for a long time to come – the legality of slavery. And which, mirroring other slave societies in the Americas and across the Atlantic, would only

[422] This is what deputy Paulino de Albuquerque, province of Pernambuco, said in a session of the Chamber of Deputies on August 5, 1830, during the debate on the 1830 law: "*Estou persuadido que a raça do Brazil venha a ser algum dia a unica e fazer desaparecer esta raça de homens pardos; pois que elles não são nocivos ao Brazil na qualidade de escravos, mas sim na qualidade de pardos*". See *Annaes do Parlamento Brazileiro* (1830), t. II 426.

[423] Flory, *Judge and Jury in Imperial Brazil*, 24.

[424] "*Para adquirirmos colonos, forçoso é fazer alguns favores*", argued Senator Francisco de Assis Mascarenhas, Marquis of Palma, on June 22, 1830. See *Annaes do Parlamento Brazileiro* (1830), t. I, 298.

[425] "Decreto de 18 de abril de 1836. Declarando o art. 18 da Lei de 31 de Outubro de 1835, que isenta as embarcações que conduzirem colonos para o Brasil do imposto de ancoragem", printed in *CLIB (1836)*, pt. II (Rio de Janeiro: Typographia Nacional, 1861): 20-21.

[426] *Annaes do Parlamento Brazileiro* (1830), t. II, 422.

[427] The same deputy, the "Black jurist in a Slave Society", as Keila Grinberg's biography crystallized him, in 1846 would put forward a proposal that Brazil import Africans as settlers. Once again, the proposal was not argued out of a particular fondness for the Africans, but because he considered that they would be an important source of tax revenue and trade inflow, as he saw no difference between Africans and Europeans in terms of the work done. See Keila Grinberg, A *Black Jurist in a Slave Society. Antonio Pereira Rebouças and the Trials of Brazilian Citizenship* (Chapel Hill: The University of North Carolina Press, 2019): 78-81.

grant freedom to Africans rescued from illegal trade after subjecting them to a period of compulsory labor. "We are accustomed to serving ourselves with them," conceded Deputy Evaristo da Veiga after the discussion on the 1830 law. "And the same barbarity" – he continued – will serve to keep them in slavery, under the pretext of serving for 8 or 10 years, which has already happened with the blacks who came from Sierra Leone, and who went to several houses; some of them are still kept in slavery with manifest injustice, or an infringement of the law of the people."[428].

By mentioning the "blacks of Sierra Leone", the Deputy was referring to a specific group of subjects, which in recent decades has received particular attention in Atlantic historiography: "*africanos livres*", "*emancipados*" or "liberated Africans" were those who, illegally transported from Africa during a period when national treaties and laws aimed at suppressing trafficking were already in effect possessed the acknowledged right to emancipation following a period of "apprenticeship" or mandatory labor[429]. Newly disembarked Africans, whether here or in other parts of the Atlantic, could not contract freely, but had to become "worthy of enjoying the full rights of their freedom"[430]. After the enactment of Britain's 1807 Act for the Abolition of the Slave Trade, and the vigilant patrols conducted by the British Royal Navy in both the Atlantic and Indian oceans, Sierra Leone became the primary destination for the Africans recaptured from intercepted vessels.[431].

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[428] *Annaes do Parlamento Brazileiro* (1830), t. II, 422.

[429] In the British Empire, the first rule addressing individuals rescued from trafficking was the Order in Council issued on 16 March 1808, which determined the enlistment of Africans in the Army or Navy, or their placement as apprentices to "prudent and humane masters and mistresses". See Lisa Ford, Naomi Parkinson "Legislating Liberty: Liberated Africans and the Abolition Act, 1806-1824," *Slavery & Abolition* 42, no. 4 (2021): 827-846. In the wake of Britain's negotiations for international treaties against the slave trade with Portugal, Spain and the Netherlands, corresponding statutes were created in the Portuguese, Spanish and Dutch territories in the Americas. See Jake Christopher Richards, "Anti-Slave-Trade Law, 'Liberated Africans' and the State in the South Atlantic World, c. 1839-1852," *Past & Present* 241, no. 1 (2018): 179-219.

[430] "*Dignos de gozar do pleno do pleno direito da sua liberdade*," as phrased at the "Alvará de 26 de Janeiro de 1818. – Estabelece penas para os que fizerem commercio prohibido de escravos", printed in *Collecção das Leis do Brazil de 1818* (Rio de Janeiro: Imprensa Nacional, 1889): 7-10.

[431] The British colony of Sierra Leone, situated on the western coast of Africa, functioned as the primary center for almost all joint commissions established through bilateral agreements to adjudicate ships suspected of involvement in trafficking. It also served as the location for a vice-admiralty court, tasked

In Brazil, the collective experience of these subjects is described in detail by Beatriz Galotti Mamigonian [432], which extensively documents and analyzes the challenges and setbacks in the administration and treatment of approximately 11,000 Africans who, between 1821 and 1864, were under the responsibility of the Portuguese Crown and later the Brazilian imperial state. This group of recaptured Africans constituted only a portion of the 800,000 Africans who arrived in Brazilian ports through smuggling until the effective abolition of trafficking in 1850[433]. In Brazil, as in the British Empire, they had to do years of compulsory labor before achieving "full freedom". As Deputy Evaristo da Veiga astutely noted during the 1830 discussion, many of them were frequently "kept in slavery" with evident injustice or a violation of the law of nations. Moreover, starting from 1831, this practice contradicted the Brazilian law that abolished the slave trade.

The status of *Africanos livres* was defined for the first time in Brazil with the charter of January 26, 1818[434], mandated by the King of Portugal to regulate the protocols for the employment of confiscated Africans found aboard slave trade ships

with trying both British and non-British ships. Designated "Freetown" by its abolitionist founders, this colony's capital handled the majority of ships subjected to trial for illegal trafficking, captured by the Royal Navy squadron's patrolling of the coastline. Consequently, many Africans emancipated during the abolitionist campaign went through this process in Sierra Leone: approximately one hundred thousand Africans disembarked between 1808 and 1863. After 1830, many of these emancipated individuals were relocated to areas where their labor was in high demand. See Suzanne Schwarz, "The Impact of Liberated African 'Disposal' Policies in Early Nineteenth-Century Sierra Leone," in Liberated Africans and the Abolition of the Slave Trade, 1807-1896, edited by Richard Anderson and Henry B. Lovejoy (New York: University of Rochester Press, 2020): 45-65.

[432] Mamigonian, *Africanos livres*.

[433] Similarly, it is estimated that people documented as "liberated Africans" across the Atlantic and Indian Oceans represent only 6 percent of the total slave trade leaving Africa between 1807 and 1896. See Henry B. Lovejoy and Richard Anderson, "Introduction: 'Liberated Africans' and Early International Courts of Humanitarian Effort," in *Liberated Africans and the Abolition of the Slave Trade, 1807-1896,* edited by Richard Anderson and Henry B. Lovejoy (New York: University of Rochester Press, 2020): 1-24 (2).

[434] This charter was drawn up to regulate the Treaty of 1815 and the Additional Convention of 1817, which had previously defined the status of Africans rescued from slave ships bound for Portuguese territories south of the equator in a notably vague manner. They simply stipulated that the slaves discovered on these vessels would be issued a letter of release by the Joint Commission and entrusted to the government of the country where the Commission rendering the judgment was based, to be engaged as "servants or free workers." No deadline or procedures were set for the employment of these subjects. See Mamigonian, *Africanos livres,* 38.

coming from the African coast north of the equator. According to the charter, those Africans were considered "freed" persons and were to be assigned to labor service or an apprenticeship lasting a maximum of fourteen years. Such service was to be carried out either in public establishments of for the benefit of private persons "of known integrity" and only after that period could they enjoy full freedom[435].

Following the enactment of the first national law aimed at abolishing the slave trade (1831), the situation of these individuals underwent slight changes, and the prospect of hiring Africans as free laborers was further complicated by the legal framework regarding the slave trade. The first national anti-slave-trade law of November 7, 1831, declared already in its first article that "all slaves who enter the territory or ports of Brazil from abroad are free" – and not merely "freed" as had stated 1818 charter. The fate of those illegally held in slavery upon arrival in Brazil, without the awareness of either Brazilian or British authorities, was also improved the subsequent year with the publication of a Regulation for the Execution of that law on April 12, 1832. Issued prior to the formation of the Conservative Cabinet (1837), during a time when the government still actively pursued efforts to suppress trafficking, the decree governed the treatment of cases involving *africanos boçais* ("unacculturated" Africans) found on land and permitted Africans themselves to file complaints of illegal enslavement. Article 10 provided that "at any time when a black person claims to any Justice of the Peace or Criminal Court that he came to Brazil after the traffic was extinguished, the Justice of the Peace (...) may clarify the fact. (...) If there are strong presumptions that the black person is free, he shall have him deposited, and shall proceed under the other terms of the law."[436].

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[435] According the original wording of §5º "*(...) por não ser justo que fiquem abandonados, serão entregues no Juizo da Ouvidoria da Comarca, e onde não houver, naquelle que estiver encarregado da Conservatoria dos Indios, que hei por bem ampliar unindo-lhe esta jurisdicção, para ahi serem destinados a servir como libertos por tempo de catorze anos ou em algum serviço público de mar, fortalezas, agricultura e de ofícios, como melhor convier, sendo para isso alistados nas respectivas Estações, ou alugados em praça a particulares de estabelecimento e probidade conhecida*". See *Collecção das Leis do Brazil de 1818*, 9.

[436] "Decreto de 12 de abril de 1832. Dá Regulamento para a execução da Lei de 7 de Novembro de 1831 sobre o trafico de escravos," printed in *CLIB (1832)*, pt. II (Rio de Janeiro: Typographia Nacional, 1874): 101.

The terms of the law, strictly speaking, since 1831, was the shipment back to Africa, justified by the undisguised fear of releasing a large number of unassimilated Africans – the so called "Barbarians" – upon society. The re-export statistics, as we know (only 748 of the circa. 11,008 rescued from illegal trade up to 1869, not even 7%)[437], are almost as small as the number of rescued Africans compared to the universe of those illegally landed in Brazil (11,000 to 800,000). However, even if the law didn't prevent almost a million enslaved people from entering and remaining in illegal slavery, the fact is that the legal regime established to repress trafficking made importing Africans as free and hired labor a very risky business. With the legislation issued in the 1830s, slave Africans could be emancipated not only by the Mixed Commissions in the event of a cargo being seized, but also at any time by a justice of the peace, in a procedure that, by law, had to be conducted "summarily, without superfluous delays for the interested parties"[438]. Although "the illegal trade far exceeded confiscations", as Beatriz Galotti Mamigonian points out, "the owners of new slaves were not safe from being denounced and losing their illegal property"[439] as the repression of trafficking expanded from sea to land, even if the recognition of the right to freedom was still many years away from its actual enjoyment.

The loss of his property was what Eduardo Heinrick had to suffer at the end of the libel of "slavery, revindication and rescission of contract" that he brought against his former slave João, from the Monange Nation, on October 29, 1841[440]. Heinrick claimed to have purchased João as a slave from Leopoldo Albert, a well-known dealer in the city of Rio de Janeiro, for the sum of 300,000 *réis*. According to Heinrick, João had been in Albert's possession for more than twelve years, and Albert had acquired him "new" before the abolition of the slave trade. At no point in the lawsuit does the

[437] Based on information presented in the 1870 Ministry of Justice Report. See Mamigonian, *Africanos livres,* 387.
[438] *CLIB (1832)*, 101.
[439] Mamigonian, *Africanos livres,* 95.
[440] Processo número 340, fundo Supremo Tribunal de Justiça – BU, série Revista cível - RCI, código de referência BU.0.RCI.2386, recorrente João, recorrido Eduardo Heinrick, ano inicial 1842, ano final 1846, maço 1604, gal. A, Arquivo Nacional do Rio de Janeiro (ANRJ).

author indicate the precise date of arrival, with only a generic reference to a period "longer than twelve years," in order to suggest his entrance before the anti-slave trade treaty came into force in 1830. Heinrick further asserted that João had run away, been apprehended, and brought before the Justice of the Peace of the 2nd District of São José. There, by pretending to be "*boçal*", and with minimal inquiry, João was declared free and subsequently sent to the Orphans' Court. In this court, he was then transferred to Candido Jozé Gonçalves, the bailiff who served for the Justice of the Peace who declared him free and was responsible for his arrest, under what he called – erroneously – a "contract" in which Gonçalves was obliged to pay the annual and derisory sum of 20,000 réis.

A similar authority had been conferred upon the judge of orphans a few years prior, driven by the Minister of Justice's intent to alleviate the public coffers of the responsibility for sustaining liberated Africans housed in warehouses. The announcement of October 29, 1834, reasoned that, given the absence of legislative measures for the swift re-exportation of Africans unlawfully brought into the Empire, as mandated by the Law of November 7, 1831, and considering the escalating expenses associated with those housed in the House of Correction, these Africans could be auctioned by individuals of "recognized probity and integrity." [441] These individuals were expected to be capable of ensuring "the best treatment and civilization" for such Africans. The Africans were then compelled to work for these auctioneers, receiving in return "food, clothing, care, and a modest salary that will be gathered annually by the Curator who is appointed to them, deposited in the safe of the auction judge, which will serve to help their re-exportation, when it should occur". Not even the modest remuneration attributed to their services was given to them during this period of "preparation for the enjoyment of freedom." Instead, it was funneled into a public fund to subsidize re-exports, an initiative that seldom materialized. In the decrees and instructions published in the 1830s, unlike the 1818

[441] "Aviso n. 367 – Justiça – Em 29 de outubro de 1834. Dá instrucções para a arrecadação dos serviços dos africanos", printed in *CDIB de 1834* (Rio de Janeiro: Typographia Nacional, 1866): 278 ff.

charter, there was no mention of apprenticeship, vocational training, or even a stipulated maximum period for mandatory service.

The authority to assign the services of Africans rescued from trafficking or discovered in illegal slavery to individuals of "recognized probity" would remain to the judge of orphans until 1850, when the second national law on the repression of slave trade prohibited the concession of their services to private individuals.[442] Up to that date, it was left to the "prudent arbitration of the judge to regulate this distribution as he deems most convenient and for the good of humanity"[443]. The bidders of the Africans' services then signed a "bid agreement" with the judge of orphans, committing themselves to feed, clothe and care for them in the event of illness, and to notify the court in case of flight or death. There was, therefore, no consent from the Africans, and their auction agreements could only improperly be called contracts like Eduardo Heinrick does in his libel, but also historians[444] or pieces of legislation[445]. Newly-arrived Africans – barbarians, in the terms of the law – could not contract under the 1830 law but had their labor force negotiated between the Imperial Government and persons – such as the justice official – of "known integrity", "the respectable individuals", as defined by Robert Conrad, "who were most able to pay bribes to officials charged with renting them out"[446]. Unofficially, there were accusations that the judges of orphans received bribes of up to ten times the amount stipulated for the

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[442] The law that finally achieved effectiveness in repressing the trade in Africans, Law n. 581, of September 4, 1850, determined that seized slaves should be re-exported and that if this re-exportation did not take place, they should be employed under the tutelage of the Government, "*não sendo em caso algum concedidos os seus serviços a particulares*" (art. 6o). See "Lei n. 581, de 4 de setembro de 1850. – Estabelece medidas para a repressão do trafico de africanos neste Imperio", printed in *CLIB (1850),* 267.

[443] *CDIB de 1834,* 280.

[444] For instance, Manuela Carneiro da Cunha, *Negros, estrangeiros. Os escravos libertos e sua volta à África,* 2ª ed. rev. e amp. (São Paulo: Companhia das Letras, 2012): 96.

[445] In the Ministry of Justice's notice giving instructions for the auctioning of Africans' services (October 29, 1834), the auctioneer's obligation to allow the curator to visit the free Africans on a monthly basis is fleetingly referred to as "contractual" (art. 2º). It was, however, a determination about the act of auction which, legally, was not a contract, but a procedural act of coercive transfer. See *CDIB de 1834,* 279.

[446] Robert Conrad, "Neither Slave nor Free: The Emancipados of Brazil, 1818-1868," *HAHR* 53, no 1. (1973): 50-70 (61).

annual salaries of the liberated Africans, which in the case of João Moange was merely 20,000 *réis* annually. An effectively "modest" salary, as the Instructions from the Minister of Justice of 1834 recommended, when compared to the average day's pay for a manual laborer at that time in Rio de Janeiro, who historians estimate reached this amount with only 20 days of work[447].

Prior to the judge of orphans assigning João Moange to service, the justice of the peace, upon his capture, adhered to the provisions of the Decree of April 12, 1832. The African was examined by experts who determined that he was entirely unfamiliar with the Portuguese language, attested to his status as a "*boçal*" African – and therefore a newcomer, in violation of the 1831 law. Heinrick claimed that João Moange, a "slave too cunning and shrewd", had pretended to be *boçal* to evade slavery, stating before the court interpreter that he had only seen two new moons in Brazil. According to him, that ignorance of the Brazilian language could not constitute incontrovertible proof, because what we saw were "many Africans who, because of their stupidity, never understand the language of the country well, and even less speak it, just as it is no less possible that others, through trickery and cunning, pretend to be *boçais*."[448] The document of purchase for the African, dated 1840, and the testimonies provided by witnesses affirming that the African had been in the possession of the previous owner, Leopoldo Albert, for more than twelve years, were deemed satisfactory by the trial judge. As a result, the ruling of the justice of the peace was declared null and void, as it had not followed the appropriate procedures for verifying the identity and origin of João.

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[447] Nineteenth-century Brazilian currency was *mil réis*, or a thousand *réis* (1$000). Historians estimate that by mid-century two units of *réis* were the average day's pay for a skilled manual laborer. See Henrique Espada Lima, '"Until the Day of His Death": Aging, Slavery and Dependency in Nineteenth-Century Brazil," *Radical History Review,* no. 139 (2021): 52-74 (72).

[448] Processo número 340 (ANRJ), 40. For a study that emphasizes the political dimension of language and the strategies of Africans against illegal enslavement, see Marcos Abreu Leitão de Almeida, *Ladinos e boçais: o regime de línguas do contrabando de africanos (1831-c. 1850)* (Master's dissertation, Universidade Estadual de Campinas, 2012), but also chapter 6, "*O que os escravos sabiam*", in Sidney Chalhuob, *A força da escravidão. Ilegalidade e costume no Brasil oitocentista* (São Paulo: Companhia das Letras, 2012).

Eduardo Heinrick's stroke of luck, however, proved to be short-lived. Both the Court of Appeal, to which resorted the curator of the Free Africans, José Baptista Lisboa, and the Superior Court of Justice, validated the judgment of the justice of the peace who had declared João free, dismissing the plaintiff's claim as unsubstantiated. Despite the testimony of the four witnesses endorsed by Eduardo Heinrick, all of whom attested that the African had resided in Brazil for more than twelve years, both courts favored the opinions of experts who had examined João and declared him "*boçal*" due to his unfamiliarity with the country's language. A positive outcome for João, even if this didn't mean he would enjoy immediate freedom, since the obligation to provide compulsory services to his auctioneer remained, upon a modest salary that wasn't even handed over to him. His illegal enslaver, in turn, although could hardly be punished, as often happened in this type of case[449], at least suffered the loss of his illegal property.

The uncertainties surrounding the legal status of recently arrived Africans and the British's vigilant scrutiny of Brazilian vessels had a deterrent effect on all proposals brought forth in Parliament in subsequent years, advocating for the admission of African colonization. These proposals were not only put forward by conservative figures like Bernardo Pereira de Vasconcelos[450], but also by liberals such as the already

[449] Under the Law of 1831 and the Decree of 1832, the legal pathways for prosecuting the purchase or importation of new Africans and determining the status of those suspected of illegal enslavement were distinct within the Brazilian judiciary. Perpetrators, including traffickers and buyers, faced penalties outlined in Article 179 of the Criminal Code, charged with the crime of reducing a free person to slavery. Conversely, adjudicating the seized person's right to freedom took the form of a civil action. As demonstrated by Beatriz Galotti Mamigonian and Keila Grinberg, in practical terms, the Brazilian judiciary facilitated the liberation of individuals in the civil domain while created challenges, if not outright impediments, to convicting slaveholders in the criminal domain. See Beatriz Galotti Mamigonian and Keila Grinberg, "O crime de redução da pessoa livre à escravidão no Brasil oitocentista," *Mundos do Trabalho,* 13 (2021): 1-21; Mamigonian, *Africanos livres: a abolição do tráfico de escravos no Brasil*.

[450] In 1843, Deputy Rodrigues Torres presented the Land Law Bill to the Chamber of Deputies, which was designed to regulate the system of land appropriation in Brazil, lacking a legal framework since Independence in 1822. During the discussions on the bill, which would become law only in 1850, Senator Bernardo Pereira de Vasconcelos expressed his opposition to the distribution of land to immigrants in the first three years of their arrival and defended Africans as the best human type to perform non-slave labor in Brazil. To this end, he used climatic, cultural ("the European is educated to

mentioned Antonio Rebouças[451], as much as it was proposed, without success, as a precondition for the renewal of the trade treaty with England between 1841 and 1844[452]. On the contrary, both the ban on freedmen entering Brazil (as stipulated in Article 7 of the 1831 law) and, up until 1879, the prohibition outlined in the 1830 law against engaging in contracts with "barbarous Africans" under any pretext, were kept in force within Brazilian legislation. As stated earlier, the second law on the rental of services introduced in Brazil in 1837 wasn't applicable even to Brazilians, let alone Africans.

Nevertheless, just as the law against trafficking failed to prevent the entry of nearly a million Africans, the limitations imposed by the laws on service rental contracts proved ineffective in preventing their expansive and creative invocation. Notaries across the country saw these laws being utilized by individuals not originally intended as their designated and exclusive beneficiaries. One of them was the freedman named Antonio, identified as "*pardo forro*" (freed Black)[453] and carpenter, who appeared on

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be a landowner") and economic ("in Brazil, land is easily acquired") reasons. The Senator, like conservatives in general, claimed to be based also on the English experience, which had adopted the method of picking up Africans on the coast of Africa to cultivate their colonies. Even under protests from the abolitionist movement, Britain was effectively promoting small waves of migration from Africa and the Indian Ocean to the Caribbean and Mauritius in those years, in addition to the Africans rescued from the slave trade also being sent to Jamaica, British Guiana and Trinidad. See Parron, *A política da escravidão no Império do Brasil,* 211 ff.

[451] Rebouças' proposal, as mentioned above, dates from 1846. His view, however, was not the predominant one among liberals. Liberal pro-immigration senators, including Vergueiro, rejected the arrival of Africans as free colonists and openly declared their preference for white settlers. Vergueiro, in particular, disqualified the immigration of blacks or Orientals into the country, stating that "no colonists other than the white race should be imported: the mixture of races is harmful. What is needed are European colonists". See again Grinberg, A *Black Jurist in a Slave Society,* 78-81 and Parron, *A política da escravidão no Império do Brasil,* 216.

[452] The trade and navigation treaty signed between Brazil and England in 1827, which imposed high tariffs on Brazilian sugar on the British market, was due to expire in 1844. In order to open up its trade to Brazilian producers, the London government demanded concessions on the slave trade: Brazil had to sign a new anti-trafficking treaty. The two leaders of the Conservative Party, Vasconcelos and Carneiro Leão, said they would accept this condition if London allowed the acquisition of free Africans. The proposal did not succeed. See "Slave trade, slavery and sugar duties, 1839-1844" in Bethell, *The Abolition of the Brazilian Slave Trade,* 214-241; Parron, *A política da escravidão no Império do Brasil,* 218.

[453] Like the term *crioulo*, *pardo* also referred to Black people born in Brazil, usually of mixed ascendency, which is frequently translated to English as 'mulatto'. See Mary C. Karasch, *Slave Life in Rio de Janeiro, 1808–1850* (Princeton: Princeton University Press, 1987): 4.

February 3, 1841 before Notary João Pinto de Miranda in the 1st Notary Office of Rio de Janeiro to register a "Deed of debt and obligation with rental of services" with Mariano Joze da Silveira[454]. Occupying little more than one page of the notary's book, the deed doesn't tell us much more than the fact that Antonio had been Joaquim Barboza Guimarães' slave and had borrowed 750$000 réis from Mariano to obtain his freedom. Consequently, Antonio was obliged to rent out his services until he paid him in total, a commitment he had to fulfill within three years. For the lessee's greater security, he stated that he was subject to "the penalties imposed by the Colonization Law on colonists who refuse to sign the contract," making an apparent reference to the legislation passed four years earlier, on October 11, 1837, even though Antonio was not even remotely among its express beneficiaries. Silent about the working conditions, the tasks to be performed, the reciprocal obligations of the contracting parties, the contract merely stated the amount of the debt and invoked the 1837 law in the event of non-compliance by the worker. On the other hand, the lessee was not expressly threatened with applying that law, not least because the contract did not foresee any further obligation on his part other than the advance payment of wages for the loan made.

Antonio was not the first freedman to appear in that same notary's office with the aim of compensating the price of freedom and signing deeds that were equally laconic about the working conditions, but eloquent about the hypotheses of non-compliance. Between 1830 (the year of the first law on service rental contracts) and 1888 (abolition of slavery in Brazil), like Antonio, 95 other workers with a past of enslavement came to the same notary's office in the city of Rio de Janeiro[455] – the

[454] "Escriptura de divida e obrigação com locação de serviços que faz o liberto Antonio a Mariano Joze da Silveira", Livro 247, do *1o Ofício de Notas do Rio de Janeiro,* tabelião: João Pinto de Miranda, 3/2/1841, fl. 74 (ANRJ).

[455] All the notarial books of the 1st Notary's Office of Rio de Janeiro for the selected time period have been digitized by the National Archives and are accessible online through the National Archives Information System Platform (SIAN), under the cataloguing code BR RJANRIO 5D.0.LNO, notarial books no. 234 to 395, at http://sian.an.gov.br.

oldest in the city and the first in Brazil[456] – to sign employment contracts. 92 of which were signed for the same purpose as Antonio, to guarantee the loan that had made their freedom possible. In the total number of service rental contracts registered in that notary's office during this period (129), freedmen stand out as the main protagonists of this type of expedient, a pattern that has also been attested to in similar research carried out in the notary's offices of the island of Desterro[457] and the city of São Paulo[458].

[456] The first notary public's office in Rio de Janeiro - also the first in the entire colony - on which I decided to focus my research, was created, according to Portuguese custom, at the same time as the city was founded, by Captain Estácio de Sá, on March 1, 1565. Pero da Costa was appointed its first official. The 1st Office retained the attributions of Notary Public and Registrar of Sesmarias until it was abolished by Law No. 601 on September 18, 1850. See Deocléclio Leite Macedo, *Tabeliães do Rio de Janeiro do 1o ao 4o Ofício de Notas: 1565-1822* (Arquivo Nacional: Rio de Janeiro, 2007).

[457] Searching through the surviving documentation in five different notary offices on the island of Santa Catarina between 1829 and 1888, Henrique Espada Lima found 260 rental of services contracts, all signed by freed workers. Although he did not inaugurate the use of this type of documentation in Brazilian labor historiography, his effort to systematically investigate the time frame between the enactment of the first law on labor contract and the abolition of slavery in a specific geographical context was pioneering in historiography. The main results of this research are: Espada Lima, "Freedom, precariousness, and the Law," 391- 416; Espada Lima, "Trabalho e lei para os libertos na ilha de Santa Catarina no século XIX," 137-175. Before him, freedmen's contracts had already been the subject of attention by historiography, but without the systematic pretension of examining all the deeds registered within a specific geographical context for the six decades of that time period. Regina Xavier had already drawn attention to the existence of this type of documentation in notary archives in her master's dissertation published in 1996 on the trajectories of freedmen in the city of Campinas in the second half of the nineteenth century. However, either because of the time frame of her own research or because of the deeds she had access to, the author approached this type of contract only as a corollary of the law of the free womb and the formal possibility it opened up for the enslaved subjects to negotiate with third parties the compensation for their freedom through a rental of services contract, but she did not deal with previous records of this same type of expedient. See Regina Célia Lima Xavier, *A conquista da liberdade*. Libertos em Campinas na segunda metade do século XIX. (Campinas: Área de Publicações CMU/UNICAMP, 1996).

[458] The second study to undertake a systematic survey of rental of services contracts in notary books over the same period of time was published by Marília Ariza, based on sources available in the Notary Offices of São Paulo and Campinas. In the set of documents consulted between the archives of the two cities, the author also identified a high percentage of deeds mentioning freedom, confirming the result that the most frequent use of this instrument was registered by former slaves who hired out their services in order to compensate for a freedom obtained in return for payment. Marília Ariza identified 55 contracts among the 106 found in the First Notary's Office of São Paulo (81 deeds) and the First Notary's Office of Campinas (25 deeds) with express mention of freedom for the same period. See Marília Bueno de Araújo Ariza, *O ofício da liberdade: trabalhadores libertando em São Paulo e Campinas (1830- 1888)* (São Paulo: Alameda, 2014): 67.

One could argue that in the total landscape of laborers in Rio de Janeiro [459] this number is hardly eye-catching, since as historian Joseli Mendonça says, "the majority of labor relations were not established through written and formalized contracts." However, it does serve to contradict what affirmed by the same historian, that "slave labor relations could include adjustments, agreements and commitments based on personal combinations and values considered morally acceptable, but that such agreements were not defined, from a legal perspective, as contractual, nor were they contemplated by the law."[460] These adjustments carry a contractual dimension that should not be overlooked, the same for the utility in invoking these laws. When considered together, these aspects compel us to reassess the implications of slavery legacies on the laws of service rental contracts and, conversely, the horizons of opportunity that these laws presented for individuals leaving captivity.

Antonio and the other freedmen who came to this notary's office, like the liberated Africans, had to undergo a period of compulsory labor before they could enjoy their full freedom. Whether it was because they were considered unfit to fully enjoy their freedom, or because they had to indemnify their former masters, the fact is that they remained for years under a work regime, albeit apparently contractual, that was not very different from slavery: their pay was completely absorbed by their debt, and they only received sustenance and care in the event of illness. However, in the set of documents found in that Rio de Janeiro registry office, if the pattern of the deeds does not belie the more general picture of the precariousness of freedom[461], the variety present in these arrangements also reveals a universe of unique and singular negotiations, and the intrinsically contractual dimension of these arrangements.

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[459] In 1821, Rio de Janeiro had a population of 86,323 inhabitants, of which 40,376 were captives. By 1849, the Court's population had risen to 266,466 inhabitants and slaves still accounted for 41.5% of the total: 110,602 captives, the largest urban slave population in the Americas. Freedmen, in turn, made up 10,732 of the inhabitants of the urban parishes. In 1872 there was a significant reduction in the slave population, 48,939 slaves, less than half of the previous survey, among the 274,972 inhabitants counted. See Chalhoub, Sidney, *Visões da Liberdade:* uma história das últimas décadas da escravidão na Corte (São Paulo: Companhia das Letras, 1990): 186 ff.

[460] Mendonça, "'Leis para os que se irão buscar'", 64.

[461] Recalling once again Espada, "Sob o domínio da precariedade"; Chalhoub, "Precariedade estrutural".

While it is true that in most of the freed people's contracts a wageless life continued to be the norm (81 out of 96 deeds foresaw no money payment), that 15 of the 96 freedpeople deeds provided for monetary wages shows how the negotiation around salary was nevertheless an open field of dispute. The Black tinsmith Januario, hired on 30 October 1876, was to compensate the loan with which he bought his freedom with services, but he would still be paid 12,000 *réis* per month, having free 'the holydays, death celebrations or evenings'[462]. Belisia, committing to render 'the services the grantee needs' on 28 April 1869, was to pay in this way the price of her manumission, but would also receive 14,000 *réis* in Brazilian currency or seven pesos of Spanish currency at the end of each month.[463] That Januario was a skilled labourer and Belisia a domestic worker shows that the ability to bargain for one's own wage was not strictly or exclusively associated with professional specialisation. Other factors, such as personal relationships with one's employer, could also increase the worker's bargaining capacity. Perhaps this explains why, besides the salary, Belisia was additionally provided with lodging, food and medical care by her employer. Januario instead would only receive his work clothes.

That each of these contracts presupposed unique negotiations becomes also evident when observing how very similar work could be valued at very different prices, decisively impacting the number of years the laborer would be compelled to provide services. While Dionizio José Elias, of whom we know nothing more than the fact that he was "*pardo*", had to pay the price of 400$000 *réis* for his manumission, obliging himself in 1861 to serve the Reverend Friar Francisco do Amor Divino, a Carmelite religious, for no less than nine years,[464] on the same day, in the same notary office, the freed Leopoldina Mina – of which we are also only told the color "black" – rented 'her

[462] 'Escriptura de contracto de obrigação de serviços que fazem entre si Januario libertado por meio de pecúlio com Francisco Manoel Martins', Livro 345 do *1o Ofício de Notas do Rio de Janeiro,* tabelião Mathias Teixeira da Cunha, 30/10/1876, fls. 47v–48r (ANRJ).

[463] 'Escriptura de locação de serviços que faz a liberta Belisia a Dom Estanislau Camino digo a Antonio Pino', Livro 308 do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Carlos Augusto da Silveira Lobo, 22/4/1869, fl. 41 (ANRJ).

[464] 'Escriptura de locação de serviços que faz Dionizio José Elias ao Reverendo Frei Francisco Ruivo do Amor Divino na forma abaixo', Livro 282 do *1o Ofício de Notas do Rio de Janeiro,* 1861, fl. 90 (ANRJ).

services' – described in an equally generic way, which suggests that both were unskilled workers – to pay for a manumission valued at a price almost three times higher – 1.900$000 réis – for the much shorter period of only five years, three months and ten days[465].

Moreover, when no wages were stipulated beyond the compensation of debt, many other aspects of the working relationship were subject to negotiation and varied greatly from one deed to another. Most of the freedmen's deeds (61 out of 96) mentioned the provision of some or all of the basic necessities of survival (clothing, food, housing and treatment for illness), advantages that were sometimes stated in the most typical logic of paternalism, as obligations 'of a good master to his servants or servants'[466] or of treatment 'as a member of the family',[467] and sometimes as a treatment of 'humanity appropriate to his condition of a free man'.[468] Even under unequal bargaining positions, these workers discussed and negotiated the terms and conditions of their work as active parties in their freedom deals, pressing for time, housing, food and health care. It shows that these agreements were the product of bilateral – although unbalanced – agreements and mutual calculus of opportuneness, aimed at guaranteeing, even temporarily, a non-conflictual stability over the reception and provision of services.

Although brief, and at times unique, these documents not only shed light on the experience of freedom but also offer additional perspectives on the laws regarding

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[465] 'Escriptura de locação de serviços que faz a preta liberta Leopoldina de Nação Mina a Antonio José da Silva Pinto', Livro 282 do *1o Ofício de Notas do Rio de Janeiro,* 1861, fl. 93v (ANRJ).

[466] 'Escriptura de locação de serviços que faz José Francisco Ribeiro na qualidade de Tutor do menor Anastacio Guilherme de Roquette', Livro 308 do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Carlos Augusto da Silveira Lobo, 23/6/1869, fls. 174v–175r (ANRJ).

[467] 'Escriptura de locação de serviços que faz a liberta Belisia a Dom Estanislau Camino digo a Antonio Pino', Livro 308 do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Carlos Augusto da Silveira Lobo, 22/4/1869, fl. 41 (ANRJ).

[468] 'Escriptura de locação de serviços que faz Marcos crioulo a José Maria Maciel Pinto', Livro 284 do *1o Ofício de Notas do Rio de Janeiro,* tabelião interino: Francisco de Paula Fernandes São Thiago, 6/1/1861, fls. 124r–124v (ANRJ). In this same deed, it was also foreseen that if the worker's services were sublet, his conditions could not be worsened and he should be well treated in the house where he had to go, continuing to be always under the responsibility of the first lessee, receiving the provisioning of clothing and health care, besides being given for his expenses the monthly remuneration of 6,000 *réis*.

the rental of services. In fact, such brief deeds, in which little was said about working conditions, the reference to the laws and the consequences in the event of non-compliance seemed to be the greatest motivation for going to the registry office to register the document. Regardless of the possible judicial (un)enforceability of these arrangements, the fact is that the extensive invocation of these laws in the deeds did shape practices and behaviors and were themselves producers of normativity[469]. Freed workers and employers acted contemporaneously as beneficiaries and builders of the legal regime inaugurated by these statutes.

This becomes evident when reading one of these deeds more carefully, the '*Escriptura de contracto de locação de serviços'*, signed between the *parda*[470] Carolina and Caetano José de Paiva on 30 October 1871. Caetano and Carolina, once master and slave shortly before they became lessee and lessor before a notary public, also faced each other as appellant and defendant in the courts of Rio de Janeiro. Caetano, who had acquired Carolina from her former mistress, Anna Rosa de Jesus, was appealing against a sentence enacted by the Municipal Judge of the city in favour of a freedom suit brought by Carolina against Anna Rosa. Carolina alleged that her former owner, instead of assigning her to domestic service, "had subjected her to an illicit life". Caetano, who was now Carolina's master, filed an appeal against the decision with the intention to keep her as a slave. Carolina then asked him to drop the suit in exchange for the promise that she would provide him with all domestic services for four years as compensation for the amount she had cost. The contract that Carolina and Caetano signed subsequently states that she "thought it more reasonable and convenient for her interests to appeal to the lessee's generosity", considering "that the appeal filed

[469] Mariana Dias Paes has stressed the limited usefulness of common dichotomies in the historiography of law and slavery that usually oppose 'law' and 'reality', or 'law' and 'social practice'. She states that "*distinções acabam sendo pouco produtivas, na medida em que obscurecem as interações complexas que guiam a produção cotidiana e não solene do direito. As categorias e institutos jurídicos não possuem um significado per se (apesar de serem apresentados como se tivessem). O seu significado concreto é fruto de entendimentos compartilhados, práticas habituais e reiteração cotidiana de formas*." See Dias Paes, "Direito e escravidão no Brasil Império," 194.

[470] 'Escriptura de contracto de locação de serviços que faz a parda Carolina a Caetano José de Paiva', Livro 317 do *1o Ofício de Notas do Rio de Janeiro, tabelião: Mathias Teixeira da Cunha*, 20/10/1871, fls. 122–22v (ANRJ).

by the lessee against the sentence could not fail to have the effect of revoking it".[471] The decision in her favor was thus doubtful, and the uncertainty as to the success of the claim made negotiation a safer alternative: she would indemnify her price by negotiating her services, "now that she is in full enjoyment of her freedom" and would do it "in the form of the law of 11 October 1837, to whose conditions, penalties and jurisdiction she is subject".

If the invocation of the 1830 law was already reckless in 13 of these 96 deeds, where the freed workers were identified either with the name of an African nation or simply as Africans[472], the 1837 law was not even applicable to Brazilians, let alone freedmen with the aim of indemnifying the price of their freedom. Even so, in addition to Antonio and Carolina's contracts, another 35 deeds from Rio de Janeiro's 1st Notary Office expressly mentioned the law of October 11, 1837. This was the most cited law among the deeds found in the sample. The 1830 law was not cited once on its own, and only appeared expressly one time in combination with the 1837 law[473]. It can be considered that it was mentioned indirectly among the 35 deeds that did not mention either of the two by name, but made generic references to "the laws that regulate

[471] Ibid., 122v.

[472] The laconism of these deeds was equally striking when it came to the nationality or anagraphic data of these individuals. 9 of the 96 deeds of individuals identified as freedmen contained only their first name. An equal number were accompanied by surnames common in Brazil and Portugal, 1 of them with the mere addition that the freedman was "creole" and another 3 that he was "*pardo* (brown)". Most of them identified the worker simply as "*pardo*" (33), of which 1 specified that he was "Brazilian", 1 "*pardo escuro crioulo*", and 1 simply "creole". The second most common identification was as "black" (*preto*) (29 deeds), of which 8 were specified as "creole", 1 as a native of Campos and 3 as "African." The color "black" was effectively no guarantee that the worker was Brazilian or African, as it appeared an almost equal number of times combined with the word "*creole*" or the birthplace of a Brazilian city (summed, 9 times) or combined with the name of an African nation (8 deeds). In 10 deeds the workers were identified simply as "creoles", among which the color "brown" (*pardo*) was added to 1 of them and "black" (*preto*) to 5. Finally, 1 freed worker was identified as "*cabra*", a common designation for descendants of indigenous people and Africans.

[473] "For the safety of the contractor", the "black José Angola", "*se sujeitava às disposição das Leis de treze de setembro de mil oitocentos e trinta, e onze de outubro de mil oitocentos trinta e sete, na falta de cumprimento das obrigações a que por esta Escriptura se sujeitava*". See 'Escriptura de locação de serviços que faz o preto José Angola a Gabriel Manera', Livro 262 do 1o *Ofício de Notas do Rio de Janeiro,* tabelião interino: José Cardoso Pontes, 18/12/1851, fl. 107 (ANRJ).

engagements"[474], "the penalties that the laws impose in such a case"[475], or "the penalties established by law"[476] in the event of non-compliance with the contract, always on the part of the worker. This is another noteworthy observation: only 4 deeds in the total of those found involving freedmen, when referring to any of the laws, said that they applied to both, while all the others addressed only the worker, to subject them to their penalties and jurisdiction and threaten them with their legal consequences in the event of a breach of contract. Finally, the 1837 law also appeared once in combination with the Free Womb law of 1871[477], and another time even after it had been repealed by the 1879 law, which in turn was only cited once in the sample[478]. In most of the deeds that referred to the Act of 1837, there was not only explicit mention of the fact that this was the "law of colonists", but it was not uncommon for the lessor to say that he was aware of its content "because it had been read to him"[479].

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[474] "*Sujeitando-se como se sujeita as Leis que regulam os engajamentos*", such as Thereza Cabra in 'Escriptura de confissão de divida e engajamento que faz Thereza Cabra a D. Perpetua Felicidade de Souza', Livro 242 do *1o Ofício de Notas do Rio de Janeiro,* tabelião: João Caetano Oliveira de Guimarães, 15/12/1836, fl. 10 (ANRJ).

[475] The formula "*sujeitando-se a todas as penas estabelecidas por lei*" was often in many scriptures, including by way of example 'Escriptura de locação de serviços que faz a parda Laurentina a Manoel José Lopes', Livro 343 do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Matthias Teixeira da Cunha, 27/7/1876, fl. 169 (ANRJ).

[476] The same for "*sujeitando-se as penas que as leis impõem em tal caso*", which appears among others in 'Escriptura de locação de serviços que faz a preta liberta de nome Joanna a Vicente Peluso', Livro 348 do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Matthias Teixeira da Cunha, 22/3/1877, fl. 90 (ANRJ).

[477] On September 27, 1873, Celestino Patricio Borges "*obriga-se ao cumprimento do presente contrato sujeitando-se as penas a lei de mil oitocentos e trinta e sete combinada com a disposição da novíssima lei e seu regulamento*". See 'Escriptura de locação de serviços que faz Celestino Patricio Borges a João Martins da Cunha Xavier," Livro 333 do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Matthias Teixeira da Cunha, 27/9/1873, fl. 37v (ANRJ).

[478] The "freed black Anastacia" subjected herself "*em tudo as disposições do decreto n. 2827 de 15 de março de 1879 que regula os contratos de locação de serviço*": 'Escriptura de reconhecimento de dívida e locação de serviços que faz Anastacia preta liberta a D. Deolinda Maria Rosa Vidigal Guimarães," Livro 375 do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Matthias Teixeira da Cunha, 26/9/1881, fl. 91 (ANRJ).

[479] By way of example of a recurring expression, "Escriptura de locação de serviços que faz a parda Minervina de Jesus a Antonio José Martinho de Magalhães", Livro 269 do *1o Ofício de Notas do Rio de Janeiro,* tabelião interino: Jozé Cardoso Fontes, 7/12/1855, fl. 146v-147 (ANRJ).

While it is true that taking out loans to pay for freedoms and compensating them through the provision of services were certainly not practices inaugurated by the first Brazilian rental of services laws, nor were they exclusive to nineteenth century Brazil among the slave societies of the Americas[480], it is undeniable that this type of arrangement took on specific legal contours from the enactment of these laws in the 1830s. At the same time, by mobilizing their legal lexicon and expressly citing them to invoke the punitive measures that they introduced as a novelty in the Brazilian legal system, these subjects contributed to giving a broad and unforeseen use to those same laws.

The extension of a strict punitive regime inevitably meant that the very mechanisms that facilitated the imprisonment of free Brazilians such as Domingos Pereira Braga, Tobias Rodrigues da Fonseca, João Dias do Prado and the four Germans discussed in the previous section also enabled the incarceration of freedmen who had negotiated their freedom. Jacintho Valladão de Aguiar, employee in a house of commerce in Desterro, Santa Catarina Island, also arrested without being heard by verbal order of the Sub-delegate of Police. We know his story from a habeas corpus petition he filed with the judge of that same city.[481] His arrest had been requested by a person claiming to be the purchaser of his services in the bankruptcy proceedings of the merchant Antonio Lorega, then Jacintho's employer. Lorega had become his employer by providing Jacintho with the amount necessary for him to purchase the manumission of his former mistress, Maria Roza da Silveira, on the condition that he pay the debt by hiring his services.

Lorega however, after settling accounts between the two, limited himself to tearing up the contract, maintaining Jacintho's obligation to provide services among the credits of his commercial house. The purchaser of these receivables in the

[480] Paulina Alberto gives information on this practice in Argentina in Paulina L. Alberto, "Liberta by Trade: Negotiating the Terms of Unfree Labor in Gradual Abolition Buenos Aires (1820-30s)," *Journal of Social History* 52, no. 3 (2018): 619-651 (633).

[481] Processo número 788, fundo Relação do Rio de Janeiro – 84, série Habeas Corpus - HCO, código de referência 84.788.cx.158, recorrido Jacinto Valadão de Aguiar, ano inicial 1865, ano final 1865, Caixa 158, gal. C, Arquivo Nacional do Rio de Janeiro (ANRJ), 23.

bankruptcy proceedings, João Pinto da Luz, then requested the Subdelegate of Police that Jacintho be taken to prison to force him to render his services. Without being heard or having a written decision, Jacintho was imprisoned until the first hearing was held two days later. Jacintho could have remained there, had it not been for the Judge of Law of the District of Desterro who observed that the "authority that ordered his arrest had no competence to order it, since the law of September 13, 1830 determines that issues arising from the hiring of services are the exclusive competence of the Justice of the Peace, and therefore it is clear that the police authorities have no authority in this respect"[482].

The decision, which for Jacintho fortuitously assumed a favorable outcome, confirmed the controversial possibility of applying the law of 1830 and the jurisdiction of the justice of the peace to service rental contracts by freedmen compensating their manumission. For better or worse, this implied, on the one hand, recognizing the applicability of the prison sentence – when determined by the competent authority – in the event of non-compliance with the contract; on the other, however, it clothed the manumission agreements in another legal dimension, not at all unfavorable in relation to the other forms of manumission.

Testamentary provisions, or a deed of conditional manumission, even if they subjected the enslaved person to an equal period of compulsory service, placed the freed person in a different legal situation from the freed person who bought his manumission through a loan offset by a contract for the provision of services. Even though in all cases the enslaved worker was also subject to a period of forced service to compensate for a debt that had the same origin – the payment of the manumission – the legal situation of those who did so as a condition imposed in the legal act of manumission itself was different from that of those who did so under a labor contract signed at a later time and distinct from the unconditional manumission act.

The crucial aspect lies in how the labor contract altered the condition of paying with services into something external to the manumission. This transformation

[482] Ibid., 23.

rendered the act of manumission unconditional and the burden of providing services merely an obligation on the part of a free individual. Instead of waiting for the condition to be met before handing over the letter of freedom, it was promptly given as the whole price had been paid for an advance payment. The services to be provided served as compensation for the loan that facilitated this immediate payment, yet this obligation stemmed from a legal transaction distinct from the manumission arrangement.

Freedmen who signed a contract to provide services to compensate for the price of their manumission thus separated the manumission into two acts: one, the granting of unconditional manumission, as long as it was paid in full; the other, the contract to provide services intended to compensate for the advance of the price for subjects who would otherwise not have had the full amount immediately available. From this distinction into two acts – and two documents – came a series of legal implications, not at all disadvantageous to the freedmen, however unbalanced the terms of these contracts might be.

The first implication of separating the act of manumission from the compensation for services could be that it exempts the freedman from the legal conundrum that the legal condition of the "*statuliber*" represented. This controversial legal status of Roman origin for centuries has not been the subject of specific regulation in Brazil, and the Roman laws themselves provided solutions that were greatly modified and relativized over time. The generic definition of the fragment by Paul, in Book 40, Title 7 – *De statuliberis* – of the Digest (or *Pandectas*), was of little help simply defining them those "whose freedom is established and determined after a term or condition has been fulfilled" (*statuliber est, qui statutam et destinatam in tempus vel conditionem libertatem habet*). Rivers of ink have thus been spent to determine whether this definition made the individual free from the promise of freedom or only from the advent of the condition or term; on the legal status of children who conceived during this period and the existence or extinction of the obligation to serve them; on the faculties of legal personality that they were authorized

to exercise, etc. In imperial Brazil, lawyers, magistrates, members of the Council of State, and scholars engaged in numerous debates about the condition of enslaved subjects benefiting from a future right to freedom often supported completely opposing theses, that found different, and not stable, successes in the courts of justice[483]. Obtaining manumission immediately, without having to wait for a condition or term to be met, therefore, removed the freedman from the uncertainties hovering over this legal status.

The second legal implication of the adoption of this legal venue is avoiding the revocation of manumission. This was a topic to which jurists used to give different solutions, depending on whether the freedoms were granted causa mortis (to be implemented only after the testator's death, essentially revocable[484]) or by *inter vivos* acts, applying analogous reasoning to donations. Among the latter, a distinction was made between manumissions subject to the provision of future services, the so-called (i) conditional: subject to a condition, a future and uncertain fact, which created what

[483] The most recalled debate by historiography is undoubtedly the deliberation held at the Institute of Brazilian Lawyers in 1857 on the fate of *statuliberi's* offspring: children born before the completion of the prescribed conditions or terms for female enslaved workers attaining freedom. This event led to the resignation of its then President, Augusto Teixeira de Freitas, due to his disagreement with the prevailing stance of his colleagues. Exactly three decades later, the same Institute revisited a similar issue in response to a new law determining 60 as the age limit until which enslaved individuals were obligated to serve. In examining these debates, Sidney Chalhoub notes how the identical legal arguments took on markedly distinct political implications within a span of just a few decades. In 1857, those advocating for freed individuals to enjoy a future right to freedom from the promised date were considered the most progressive faction in the emancipationist movement. However, 30 years later, on the brink of abolition, these very arguments were employed by those seeking to prolong the mandatory service of enslaved individuals as much as possible. Conversely, those rejecting this interpretation aimed to emphasize the immediate and complete abolition of slavery. The first historian to delve extensively into these discussions was Eduardo Spiller Pena, *Pajens da casa imperial: jurisconsultos e escravidão no Brasil do século XIX* (Campinas: Editora da UNICAMP, 2001): 79 ff.; but was later revisited by Sidney Chalhoub, "The Politics of Ambiguity: Conditional Manumission, Labor Contracts, and Slave Emancipation in Brazil (1850s–1888)," *IRSH* 60, no. 2 (2015): 161-191; Waldomiro Lourenço da Silva Júnior, "No liminar da escravidão: uma mirada global sobre os debates em torno de *coartados* em Cuba (1856) e *statuliberi* no Brasil (1857)," *Revista de História,* no. 179 (2020): 1- 33; Marjorie Carvalho de Souza, *Periodismo jurídico oitocentista:a Revista do IAB na cultura das revistas jurídicas brasileiras do século XIX (1862-1888*) (Undergratuate thesis, Universidade Federal de Santa Catarina, 2018): 222-225.

[484] Teixeira de Freitas, expressly affirming that last will provisions can also grant freedom, explains, in the 2nd edition of his *Consolidação das Leis Civis*, that this type of provision is essentially revocable at the discretion of the author of the liberality until the date of his death. See Augusto Teixeira de Freitas, *Consolidação das Leis Civis*, 2. ed (Rio de Janeiro: Typographia Universal de Laemmert, 1865): 233.

the jurist Lourenço Trigo de Loureiro called "imperfect" freedmen [485]); (ii) with charge: also called future cause, that is, an obligation to do something, which, if provided for a fixed term, is called a term obligation; or (iii) remunerative: the cause is past or present, that is, the relief is granted to compensate for previous or current services[486]. Following the reasoning of these doctrinal distinctions means that conditional manumissions and those with charges could be revoked for failure to comply with the promised mode, condition, or clause, while conditional ones could be revoked at the mere discretion of the manumissioners, if so stipulated[487]. On the other hand, remunerative deals tend to be considered irrevocable without the consent of the beneficiaries, as bilateral legal agreements [488]. As doctrinal distinctions, these classifications were subject to many disputes and divergent readings not only in legal literature, but also, and above all, in the courts. Illustrating these distinctions serves to demonstrate, once again, that obtaining unconditional manumission, even if it was subject to the provision of future services, was an advantageous option as it could avoid, for the freedman, a series of risks derived from the provisional and fragile condition associated with conditional manumission. Finally, Portuguese-Brazilian law also admitted the revocation of manumission for ingratitude, which, for some jurists, and even from a literal reading of the Philippine Ordinances, until 1871 was legally a hypothesis that could invalidate not only conditional manumissions with charges, but also pure and simple manumissions without condition or cause. The issue was the subject of various controversies, as many jurists did not even consider that this

[485] "*Entendemos aqui por libertos imperfeitos aquelles que ainda não entrarão no pleno gozo da liberdade natural, por terem ficado sujeitos ao serviço dos seus patronos por certo e determinado tempo, por virtude da condição acrescentada ao acto da manumissão*". See Loureiro, *Instituições de Direito Civil Brasileiro* (1861), 34.

[486] Joaquim José Pereira da Silva Ramos, *Apontamentos juridicos: contractos. Por Joaquim José Pereira da Silva Ramos. Doutor em Direito, Advogado provisionado pela Relação da Côrte autor de diversas obras de jurisprudencia, etc.* (Rio de Janeiro: Eduardo & Henrique Laemmert, 1868): 75-76.

[487] Freitas, *Consolidação das Leis Civis* (1865), 234.

[488] Ibid., 235.

provision was still in force[489], while others consider it a necessary remedy against atrocious ingratitude[490], until the advent of the Free Womb Law, which finally expressly

[489] As early as 1843, Teixeira de Freitas published an article in the newly founded Gazeta dos Tribunaes, one of the first periodicals to publish specifically legal content in Brazil, opining on the impossibility of revoking freedom on the grounds of ingratitude under the legislation in force at the time. He based his argument mainly on the fact that, once freed, the individual acquired political rights inherent to the condition of citizen, which could only be revoked in the exceptional cases provided for in the constitutional text, which did not include the revocation of freedom. He therefore considered that since the promulgation of the Constitution of the Empire of 1824, the provision of Title 63 of Book 4 of the Philippine Ordinances had been virtually abrogated. The same opinion was held in the first edition of his *Consolidação*, in which he reinforced that revocation of manumission for ingratitude was impossible for freedmen born in the country under the constitutional rules, and later confirmed in the second edition. Augusto Teixeira de Freitas, "Sera actualmente revogavel a alforria por causa de ingratidão?" *Gazeta dos Tribunaes* 1, no. 15 (1843): 1-2; Freitas, *Consolidação das Leis Civis* (1857), 158; Freitas, *Consolidação das Leis Civis* (1865), 238.Lourenço Trigo de Loureiro shared Teixeira de Freitas' reasoning, but also extended it to slaves born in Africa: "*Tanto para brasileiros quanto africanos condicionais porquanto, se são creoulos, ou nascidos no Brasil tornão-se desde logo cidadãos brasileiros e como taes não podem perder os direitos conexos com essa qualidade senão por alguma das três causas referidas no art. 7 da Constituição, e se são africanos, opõe-se o art. 179 do Cod. Crim. que nessa parte revogou a Ord. acima citada, enquanto permitia reduzir o liberto á escravidão em que antes estava, em cada um dos casos nela declarados*." Loureiro, *Instituições de Direito Civil Brasileiro* (1861), 34. Agostinho Marques Perdigão Malheiro, in 1864, when he was President of the Institute of Brazilian Lawyers, in his inaugural speech to the commemorative session of the 23rd year of the Institute's life, declared to his colleagues that he considered it inadmissible "*no estado atual do Direito e das ideias*" to revoke manumission for ingratitude. See Agostinho Marques Perdigão Malheiro, "Discurso proferido pelo Presidente do Instituto por occasião do anniversario de 7 de Setembro de 1864 em sessão de 22 do mesmo mez," *RIOAB* 3, no. 1-3 (1865): 43-52. This position was reaffirmed two years later in his three-volume monograph on slavery: Agostinho Marques Perdigão Malheiro, *A Escravidão no Brasil. Ensaio historico-juridico-social, v. 1: Direito sobre os escravos e libertos* (Rio de Janeiro: Typographia Nacional, 1866): 201-20. Joaquim José Pereira Ramos glossed over the content of the quoted title of the Philippine Ordinances with the opinion: "*Esta é a disposição de direito, mas duvido muito que hoje, com as ideias liberais que se tem manifestado, haja tribunal que assim o julgue*". See Ramos, *Apontamentos juridicos: contractos*, 93.

[490] Antonio Rebouças outlined this position commenting on the note to art. 421 of the 1st edition of the *Consolidação das Leis Civis* by Teixeira de Freitas: "*que tem que os libertos pelo facto de o serem adquirão a qualidade de cidadão para que deixem de a perder uma vez tornados ao captiveiro? O ingenuo é sujeito a perder a qualidade de cidadão, incorrendo nessa pena em qualquer dos casos previstos na Const., por mais que seja impossivel deixar de ser ingenuo desde que nascido de ventre livre. E como não perder o liberto a qualidade adventicia de cidadão pelas mesmas razões por que a póde perder o ingênuo, á quem a mesma qualidade é inherente, e muito essencialmente perdendo a indispensavel qualidade de liberto, e por causa de qualificada ingratidão para com seu libertante? Frequentemente se tem visto investirem-se da qualidade de cidadãos e soldados homens captivos na suposição de serem restituidos ao dominio e posse de seus senhores uma vez por estes justamente reclamados, deixando desde logo de ser cidadãos e soldados. E entretanto esse mal é remediavel e o tem sido effectivamente da conta da nação por medidas geraes no interesse da causa publica. Que outro remedio contra a ingratidão atroz senão puni-la? E que remedio mais adequado a evita-la senão a certeza de não ficar impune?*". Antonio Pereira Rebouças, "A Consolidação das Leis Civis pelo Dr. Augusto Teixeira de Freitas. Observações do advogado Antonio Pereira Rebouças," *Correio Mercantil*, Rio de Janeiro, no. 126 (1859): 1.

revoked that provision of the Ordinances, determining, in its article 4, §9, that it was "derogated Ord. liv. 4º, titl. 63, in the part that revokes freedoms for ingratitude".

The third legal implication of adopting this procedure, in addition to avoiding the conundrum of the legal status of statuliber and the threat of manumission revocation, is precisely the consequence in the event of non-compliance with the obligation to provide services. Once again, due to the fragility of his legal status, a conditionally freed person could not refuse to provide services without putting himself at risk his own legal status at risk. "Conditional freedom is not implemented until the condition is fulfilled" declared a member of the same Institute of Brazilian Lawyers, Carlos Frederico Taylor, in one of the most widely circulated newspapers in the Court in 1857, the *Correio Mercantil*, "so that if the slave refuses to provide the services to which he is obliged, he cannot legitimately claim his freedom at the end of the time set for providing them"[491]. The obligation to provide services, as a necessary condition for the implementation of freedom, if breached, prevented the subject from becoming free. In contrast, someone already enjoying freedom, who failed to meet his obligation to provide services, could only be subject to contract enforcement mechanisms and even penalties such as imprisonment for breaching a voluntarily accepted obligation. Nevertheless, such a transgression does not alter their fundamental status as a free individual. Before the enactment of the Free Womb Law in 1871, which finally prohibited the nullification of freedoms granted on condition for service non-compliance, the safest strategy to mitigate this risk was to secure a loan for freedom expenses and offset it by entering a labor contract.

If the novelties this law introduced regarding the revocation of manumission (by ingratitude or non-compliance) would already deserve out attention, it is even more important here for its pioneering role in disciplining manumission through contract, after at least forty years of contracts of this kind having been made in the registry offices of the Empire. The Law No. 2,040, also known as the "Free Womb

[491] Carlos Frederico Taylor, "Questão de liberdade," *Correio mercantil* 14, no. 315 (1857): 1-4 (2).

Law"[492], partly inspired by the processes of emancipation elsewhere in America[493], is most remembered within the gradual abolition of slavery path in Brazil as it granted freedom to the children of enslaved mothers born in Brazil from that date onwards. Since the abolition of the slave trade, the incorporation of enslaved people had theoretically only taken place by birth, so this law was a frontal attack on the only legally accepted source of renewal of slavery.

However, this was not its only scope. The law addressed the problem of the so-called 'servile element' – a euphemism used for slaves and ex-slaves during the period of gradual abolition – in a broader way, providing for various measures for slaves already born and living in Brazil at the time. Among them, in combination with Decree No. 5135 of November 13, 1872, which approved the General Regulations for its implementation, were the formal admission of the formation of a savings account; permission for slaves to receive and acquire property through inheritance; recognition of the slave's right to manumit himself, compensating the master through arbitration in a summary action; creation of an emancipation fund; liberation of slaves from the nation, from lying heirlooms, from abandoned slaves and those who were not given special registration.

Among the possibilities for freeing the slaves by then living in Brazil, article 4 of the law foresaw the legal possibility of slave manumission through a contract of rental of services. Being responsible for the financial compensation of their former

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[492] See "Lei n. 2.040, de 28 de setembro de 1871. Declara de condição livre os filhos de mulher escrava que nascerem desde a data desta lei, libertos os escravos da Nação e outros, e providencia sobre a criação e tratamento daqueles filhos menores e sobre a libertação annual de escravos," printed in *CLIB* (1871), pt. I (Rio de Janeiro: Typographia Nacional, 1871): 147-152. For a collection of recent texts on this law, which turned 170 years old in 2021, exploring several of these aspects, see Maria Helena Pereira Toledo Machado et al. (eds.), *Ventres livres*. Gênero, maternidade e legislação (São Paulo: Editora UNESP, 2021).

[493] A similar law had been passed in Cuba only a year earlier, the 1870 Moret Law, while in Chile, Argentina, Colombia, Ecuador, Uruguay, Peru, Venezuela, and Bolovia Free Womb Laws were approved already between 1811 and 1831. See Camillia Cowling, *Conceiving Freedom: Women of Colour, Gender, and Abolition of Slavery in Havana and Rio de Janeiro* (Chapel Hill: The University of North Carolina Press, 2013); Joseph Dorsey, "Women Without History: Slavery and the International Politics of partus sequitur ventrem in the Spanish Caribbean", *Journal of Caribbean History* 28, no. 2 (1994): 165–207.

owners – the "original debt" they never incurred [494] – slaves might contractually offer their future services to a third party for a period of no more than seven years to pay for their freedom, but only with the consent of the master and the approval of the Judge of Orphans[495]. Thus, the law of 1871 recognized as a prerogative[496] a practice that had already been carried out for more than 40 years before public notaries, making it conditional on the consent of the master and requiring it to be done in front of orphans' judges. Contracts stipulated before the orphan's courts of the same city of Rio de Janeiro[497] show that, show that, similar to what was being done for decades before notaries, Africans continued to hire out their labor without pay to obtain their freedom. More than that, the research carried out at the 1st Notary Office in Rio de Janeiro reveal that the same type of contract continued to be drawn up in notary offices, with 60 deeds registered after September 28, 1871. The penalties of the 1837

[494] Espada Lima, "Unpayable Debts", 167,

[495] The formulation of the 1871 law described this possibility as a "faculty" of the slave "in favor of his freedom", subject, however, to the master's consent: Art. 4o §3 foresaw: "*É, outrossim, permittido ao escravo, em favor da sua liberdade, contractor com terceiro a prestação de futuros serviços por tempo que não exceda de sete annos, mediante o consentimento do senhor e approvação do Juiz de Orphãos*". See *Collecção das Leis do Imperio do Brazil de 1871,* 149.

[496] While obtaining freedom by contract was an option, those who had benefited from freedom in some way by virtue of the law were obliged to contract their services under penalty of being forced to work in public establishments (Art. 6 §5). Something that, fifteen years later, on the eve of abolition, would be further aggravated: Sexagenarian Law obliged freedmen to "*celebrar contrato de locação de serviços, sob pena de 15 dias de prisão com trabalho e de ser enviado para alguma colonia agricola no caso de reincidencia*" (Art. 3 §18).". See "Lei n. 3.270, de 28 de setembro de 1885. Regula a extinção gradual do elemento servil," printed in *Collecção das Leis do Império do Brasil de 1885: Parte Primeira* (Rio de Janeiro: Typographia Nacional, 1885): 14-20.

[497] Consulting the fund "*Juizo de Órfãos e Ausentes da 2a Vara – ZM*" of the National Archives in Rio de Janeiro (ANRJ), it was possible to find at least 4 contracts made under the procedure of the Law of 1871. Under them, on August 22, 1873, the pardo Chrispiniano undertook to provide four and a half years of service as compensation for the sum he had received in advance to obtain his freedom; on November 14, 1874, Thereza preta and her daughter Leopoldina parda undertook to provide five years of service, receiving only food and clothing; on May 2, 1882, Emilia Crioula obliged herself to serve the Comendador who had lent her the sum needed to pay for her freedom for 2 years; on November 18, 1876, Ieda parda and Iria parda obliged themselves to serve for 6 years. See Processo número 3395, fundo Juízo de Órfãos e Ausentes da 2ª Vara – ZM, suplicante Fernando Júlio da Cruz Guimarães, suplicado Crispiniano, ano inicial 1873, caixa 208; Processo número 2282, fundo Juízo de Órfãos e Ausentes da 2ª Vara – ZM, suplicante Francisco Correia do Amaral, suplicada Teresa Leopoldina, ano inicial 1874, ano final 1874, maço 2292, gal. A; Processo número 3248, fundo Juízo de Órfãos e Ausentes da 2ª Vara – ZM, suplicante Carolina Umbelina de Sá, suplicada Emília Menor, ano inicial 1882, maço 162, gal. A; Processo número 2319, fundo Juízo de Órfãos e Ausentes da 2ª Vara – ZM, suplicante Francisco Domingos Machado, ano inicial 1876, caixa 2292.

law continued to be invoked by the contractors, with an express mention in 14 of them. At the same time, only two of them expressly mentioned the Free Womb Law (one, as already pointed out, in combination with the 1837 law).[498]

Nevertheless, certain legal innovations have paradoxically enhanced the safety of this practice. As previously noted, these include the prohibition against annulling manumission due to a failure to fulfill service provisions (Article 4, §5) and the restriction on revoking manumission for ingratitude (Article 4, §9). However, the pivotal shift brought about by this regulation regards the consequences in the event of a contract breach. The General Regulation for the Execution of the Free Womb Law approved in 1872 determined that in cases of a breach of a contract for service provision, the procedural protocol shall mirror that of the law established on October 11, 1837. The designated authority for adjudication is the orphans' judge in general districts and the judge of law in special districts in the absence of a private orphans' judge (Article 83)[499]. Not enough, it went beyond mere procedural details by stipulating that if there is a risk of flight or in the event of an actual flight, the contracted freedman may be subject to preventive arrest, albeit for a duration not exceeding thirty days. This imposition of a maximum limit represents a significant innovation, as, until then, no such boundary had been established for Brazilians and foreigners, leaving them susceptible to indefinite imprisonment.

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[498] The enslaved Antonio of Nation Mozambique had his services contracted "*Em face do art. 4 par. 3 da lei 28.9.1872 e do Alvara passado pelo Juiz de Orfaos da 2a vara registrado liv. 84*. See 'Escriptura de locação de serviços de seu escravo que faz José Antonio Pereira a Dona Anna Maria Goulart na forma abaixo," Livro 326 do 1o *Ofício de Notas do Rio de Janeiro,* tabelião: Matthias Teixeira da Cunha, 20/12/1872, fl. 53v (ANRJ). See also the aforementioned deed in footnote 467, which combined the laws of 1837 and 1831: 'Escriptura de locação de serviços que faz o preto José Angola a Gabriel Manera', Livro 262 do 1o *Ofício de Notas do Rio de Janeiro,* tabelião interino: José Cardoso Pontes, 18/12/1851, fl. 107 (ANRJ).

[499] "*Art. 83. No caso de infracção do contracto de prestação de serviços, a fórma do processo é a da lei de 11 de Outubro de 1837; e o juiz competente é o de orphãos nas comarcas geraes, e o de direito nas comarcas especiaes, onde não houver juiz privativo de orphãos. Paragrapho unico. Havendo perigo de fuga, ou no caso de fuga, pôde ser ordenada a prisão do liberto contractado, como medida preventiva, não podendo, porém, exceder de trinta dias*". See "Decreto n. 5.135, de 13 de novembro de 1872. Approva o regulamento geral para a execução da lei n. 2040 de 28 de Setembro de 1871," printed in *CLIB (1872),* pt. II (Rio de Janeiro: Typographia Nacional, 1872): 1053-1079.

Moreover, the fact that the 1837 law was expressly extended to freedmen seems to be the umpteenth confirmation that the legislative recognition of this arrangement was very much informed by the contractual practices recorded in the notary offices over the previous four decades. In them, the legislative palettes that separated the legal regime of the contract for Brazilians and foreigners, free and freed, were frequently subverted and crossed, in spite of the distinctions in status that the legislation had insisted on maintaining until then. When the legislature decided to intervene and sanction this type of agreement, which was already widely practiced, it had no choice but to admit and acknowledge how the experiences of colonists and enslaved people had intersected and informed each other in those years.

Indeed, the long coexistence between subjects with different legal statuses in nineteenth-century Brazil shaped a dynamic of significative reciprocal influence. If it is the case, as discussed by extensive historiography and also corroborated by the documented experiences of immigrant labor detailed in the previous section, that "slavery informed both free and slave labor for as long as it lasted," [500] viceversa was also true. The emerging free labor legislation of the 1830s, rooted in the liberal principles embodied by the contractual framework, not only shaped the dynamics of free labor but also exerted a transformative influence on the institution of slavery. Branded with the cosmovision of the contract, "that worldview which idealized ownership of self and voluntary exchange"[501], the novel labor laws of the 1830s were mobilized both by free and enslaved individuals, ushering in new possibilities much beyond the scope initially envisioned by their drafters. Even under a strict punishment regime – and perhaps precisely because of it – enslaved workers were able to bargain their work conditions and register their freedom deals. Successive legislative initiatives on labor matters could no longer ignore them.

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[500] Cunha, *Negros, estrangeiros,* 89. But as also emphatically discussed by Maria Sylvia de Carvalho Franco, *Homens livres na ordem escravocrata* (São Paulo: UNESP, 1997) and Peter L. Eisenberg, *Homens esquecidos. Escravos e Trabalhadores Livres no Brasil. Séculos XVIII e XIX* (Campinas: Editora da UNICAMP, 1987).

[501] Amy Dru Stanley, *From Bondage to Contract. Wage Labor, Marriage and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998): X.

§3. **Migrants, nationals, and freed workers: rethinking labor in the 1870s**

While the initiatives to create a labor legislation in the 1830s were spurred by the debates on the abolition of the slave trade, the subsequent significant mobilization in Parliament to reform the laws on service rental contracts unfolded in the 1860s and 1870s were closely linked to the debates on the gradual abolition of slavery. From North to South of the continent Brazil's endorsement of legal slavery was an ever-more isolated option[502] and initiatives for gradual emancipation started to move from merely speech exhortations[503] onto the core of ministerial and parliamentary agendas. As soon as the first discussions in the Council of State in 1867 on proposals to reform the "servile element" began, the need to "review the law on the rental of services in order to adapt it to the needs of colonization and the consequences of emancipation" was defended as one of the related measures to be adopted alongside any project for gradual abolition[504]. "It was a matter of urgency to re-regulate the rental of services in a complete way," would state a member of Parliament on the eve of the approval of Brazil's third law on service rental contracts. "Slave labor is decreasing among us day

[502] After the abolition of slavery in Venezuela, Peru and Argentina between 1853-1854 and in the Dutch colonies in 1863, only Brazil, Cuba and the southern United States remained as bastions of slavery in the Americas. In the aftermath of the American Civil War and the enactment of the 13th Constitutional Amendment in the USA in 1865, Brazil's position became ever more unsustainable. See Parron, *A política da escravidão no Império do Brasil,* 319 ff.

[503] In 1863, Perdigão Malheiro, then President of the Institute of Brazilian Lawyers, delivered a speech during the association's 21st anniversary, claiming that if "*decretasse o nosso legislador que ninguém mais nasceria escravo, e o Brasil, associando-se ao grande movimento intellectual e moral do seculo XIX, teria avançado de séculos na vereda da civilisação.*" See Agostinho Marques Perdigão Malheiro, "Illegitimidade da propriedade constituida sobre o escravo. Natureza de tal propriedade. Justiça e conveniencia da abolição da escravidão; em que termos," *RIOAB* 2, no. 3 (1863): 134-152 (151). Emperor Pedro II, in his speech at the opening of the General Assembly's activities in 1867, suggested to the parliamentarians that "*O elemento servil no Império não pode deixar de merecer oportunamente a vossa consideração, provendo-se de modo que, respeitada a propriedade atual, e sem abalo profundo em nossa primeira indústria – agricultura – sejam atendidos os altos interesses que se ligam à emancipação*." The following year, he added: "*O elemento servil tem sido objeto de assiduo estudo, e oportunamente submeterá o governo à vossa sabedoria a conveniente proposta*." See *Falas do Trono de Dom Pedro I, Dom Pedro II e Princesa Isabel* (Brasília: Edições do Senado Federal, 2019): 488- 489; 497.

[504] Statement by Jurist Nabuco de Araujo in the Plenary of the Council of State in April 1867, one of the protagonists of the law that will be discussed in this section. See José Thomaz Nabuco de Araujo and José Antonio Pimenta Bueno, *Trabalho sobre a extincção da escravatura no Brasil* (Rio de Janeiro: Typographia Nacional, 1868): 67.

by day, and within a short time, which is not far off, it will have disappeared. It will be replaced by free labor, and free labor presupposes the rental of services."[505]

If it was conceivable in the 1830s to propose and pass an act addressing exclusively the service contracts of foreign immigrants, disregarding the diverse components of Brazil's nineteenth-century workforce, such a limited scope no longer appeared justifiable or desirable three decades later. Although foreign immigrants remained a privileged target, and distinctions were maintained in the contractual regimes of national and foreign, free and freed workers, no initiative from then on dared to disregard, among its targets, the other subjectivities present in the Empire's social landscape. In fact, in all the five proposals to reform the legislation on rental of services that were presented in the Chamber of Deputies or the Senate between 1866 and the final approval of the 1879 law, Brazilians were the competing or exclusive targets[506].

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[505] "*Era de grande urgência regular de novo e de uma maneira completa a matéria da locação de serviços O trabalho escravo diminui entre nós de dia para dia, e dentro de um termo, que não está longe, terá desaparecido. Esse trabalho vai sendo, e há de se ser substituído pelo trabalho livre, e trabalho livre, pressupõe a locação de serviços*": *Annaes do Parlamento Brazileiro. Camara dos Srs. Deputados. Primeiro Anno da Decima-setima Legislatura. Sessão de 1878,* t. I (Rio de Janeiro: Typographia Nacional, 1878): 102.

[506] The first of the bills to bring the issue of the rental of services back to the attention of Parliament was presented to the Chamber of Deputies by the liberal Ignacio de Barros Barreto on May 14, 1866. The proposal - which disappeared soon after the first discussion - consisted of extending the provisions of Law No. 108 of October 11, 1837, to Brazilian lessors. In an attempt to offer "a powerful incentive to work" for nationals, it proposed exempting workers who effectively employed themselves in the cultivation of the main export crops - coffee, cotton and sugar - from conscription into the navy and army, at a time when the country was still in the throes of fighting in the Paraguayan War. The proposal, perhaps due to the impertinence of the moment and the unpopularity of the measures, would not be discussed again. Still, it did establish some parameters that would be taken up in successive initiatives. In 1867, Aureliano Candido de Tavares proposed seven immigration bills, including a proposal on partnership contracts and the rental of services. Even though it was part of a package of measures aimed at foreigners, the bill - which consisted of amending some articles of the 1837 law and applying its provisions to partnership contracts - extended the scope of that law to Brazilians as well. This bill did not receive a second discussion either. The next bill to appear in the Chamber, on August 7, 1869, proposed by deputies Tristão Alencar Araripe, M. J. Mendonça Castello-Branco and M. Casado Araujo Lima, was born exclusively focused on the rental of services by nationals, without mentioning freed workers. After numerous discussions and reformulations, it became law in 1879. Before that, Deputy João Cardozo de Menezes e Souza presented a plan to promote emigration and colonization in the country, entitled Theses on the Colonization of Brazil. Annex "B" of the Report also provided for a "Draft law for rental of services and partnership contracts", making the provisions

In fact, when the bill that became law in 1879 entered the Chamber of Deputies 10 years earlier, Brazilians were the only recipients.[507] Upon its arrival in the Senate in 1877, the opportunity for legislative action was recognized, considering that the country was "in a new era, which must necessarily arise from the law of September 28, 1871" [508]. However, a question arose regarding the convenience of determining whether the law should maintain a restrictive character or include provisions that could apply indistinctly to the hiring of services by both nationals and foreigners[509]. The Congressman representing the province of Paraná, Manoel Francisco Correia, inquires whether, when legislating on contracts, the Senate ought to "retain the distinctions from earlier times or amalgamate the provisions, applying the same law to contracts

of Law no. 108 of October 11, 1837 applicable to all rental of services and partnership contracts, "whether the lessor or partner was a foreigner, national, freedman or slave, contracted with the master's consent". The fifth proposal, finally, can be considered the substitute bill that would be presented to the Senate in 1877 by a Commission presided by Nabuco de Araujo as an alternative proposal to Araripe's project of 1869. See Maria Lúcia Lamounier, *Da escravidão ao trabalho livre: a lei de locação de serviços de 1879* (Campinas: Papirus, 1988): 81 ff.

[507] During its long legislative iter – which would result in the approval of the 1879 law and which was delayed, among other reasons, by the discussions on the reforms of the servile element - its targets would be greatly expanded. From its presentation until 1874, it remained dormant in the Chamber of Deputies, a period during which, in turn, debates raged about legislative initiatives aimed at the gradual emancipation of slavery. After the end of the Paraguayan War - which was often pointed out as an obstacle to the adoption of any reform in this direction - on May 24, 1870, the Chamber appointed a special commission, headed by Deputy Jeronymo José Teixeira Junior, to give an opinion on the measures it deemed appropriate to adopt regarding the servile element in the Empire. On August 10, 1874, the civil justice committee of the Chamber of Deputies revived the proposal presented five years earlier by deputies Araripe, Castello-Branco and Lima on the rental of services by nationals, suggesting that the bill be put back on the House's agenda. Alencar Araripe, taking the floor to defend the proposal in the discussion held the following year, argued that "*muito falamos de colonisação e não nos lembramos que com a adopção do presente projecto teremos feito mais do que despendendo quantias avultadas para transporte de estrangeiros que chegão ao paiz incapazes do trabalho rural, que é aquele de que hoje mais precisamos e ao qual elles se não querem sujeitar*". See *Annaes do Parlamento Brazileiro. Camara dos Srs. Deputados. Quarto Anno da Decima-Quinta Legislatura. Sessão de 1875*, t. 4 (Rio de Janeiro: Typographia Imperial e Constitucional de J. de Villeneuve & C., 1875): 138. During the discussions in the House, the bill saw its controversial provisions on the exemption from military conscription for individuals employed in rural establishments, or as servants for domestic service, rejected, but it was approved within a few months to go to the other legislative house with the other provisions intact, which included the penalty of simple imprisonment from 5 to 20 days for non-compliance with the contract and the restriction of the targets: only national workers.

[508] *Annaes do Senado do Imperio do Brazil. Segunda Sessão da 16ª Legislatura no mez de julho de 1877*, v. 2 (Rio de Janeiro: Typographia do Diario do Rio de Janeiro, 1877): 115.

[509] Idem.

for services made by both nationals and foreigners, while establishing differences guided by public convenience?"[510]. The Senator then suggests that, instead of merely extending several of the provisions of the law of October 11, 1837, as the Chamber's bill initially intended, to the rental of Brazilians, it would be "a better agreement to make a single law regulating all types of rental of services"[511]. As the discussion continued, one of the first amendments approved was precisely the inclusion of the word "foreigners" in Article 1 of the bill, broadening its scope of application, which was originally restricted to nationals[512].

The impact of a change of this kind on existing labor legislation motivated the Senators to determine, on August 6, 1877, that a committee be set up specifically to examine the matter, so that "the Senate may deliberate with maturity"[513]. Expressing his agreement with the need for more study and reflection, the head of the Cabinet that approved the Free Womb Law, Visconde do Rio Branco, then Senator for Mato Grosso, asked the committee responsible for reviewing the bill to "address the doubt" as to whether the law to be approved would revoke the analogous provisions of the law of September 28, 1871. Noting that the bill established different time limits to those provided for in the Free Womb Law for contracts of the same nature, as well as the competence of the justice of the peace when the latter provided for the jurisdiction of orphans over the same contracts, he then asked, "the illustrious commission to compare its project with the law of September 28, 1871". He took the opportunity to express his opinion, while acknowledging that it was "at the discretion of the illustrious commission", that the maximum term of seven years established by the 1871 law was preferable to the five-year term set in the bill, in view of "the convenience of industries. Lessees can make advances for which they cannot be compensated in such a short

[510] Ibid., 116.
[511] Id.
[512] Ibid., p. 120
[513] *Annaes do Senado do Imperio do Brazil. Segunda Sessão da 16ª Legislatura no mez de agosto de 1877,* v. 3 (Rio de Janeiro: Typograhia do Diario do Rio de Janeiro, 1877): 62.

period of time; raising this period seems to me to be useful to both parties, the lessor and the lessee; it is better not to constrain their discretion so much"[514].

The alert from Rio Branco found a prepared audience. The committee responsible for reviewing the bill was chaired by a jurist who had more than once grappled with the challenges of creating norms for such a plural social landscape of workers. Before spearheading this enterprise, the Bahian jurist José Tomás Nabuco de Araújo Filho (1813-1878)[515] had already participated in crucial legislative commissions for the legal history of the Empire, such as the one that organized the regulations necessary for the execution of the code of commerce (1850-1852) and the one that presented the first drafts to the Council of State for the reform of the Servile Element (1866-1868), in addition to the task that since 1872 he performed under contract with the Imperial Government of drafting a Civil Code for the country, kept unfinished due to his death in 1878. Once again, as with Vergueiro, the synchronicity and reciprocal influence between legislation on slavery and free labor intersected in the pen and biography of a single jurist.

The outcome of the studies of this commission, led by Nabuco de Araujo, culminated in the submission of an alternative project, on October 1, 1877, to the initial proposal of the Chamber of Deputies, in which they expressed the intent to address "as much as possible the complaints that have aroused from the execution of the laws of 1830 and 1837"[516]. Precisely in those years, reports were circulating in Parliament, in Brazil and even abroad [517], pointing to the consensual diagnosis of the inadequacy

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[514] Ibid., 62.

[515] His most complete biography, written by his own son and well-known abolitionist Joaquim Nabuco, serves also as a detailed political history of the country released in 3 volumes: Joaquim Nabuco, *Um estadista do Imperio. Nabuco de Araujo: sua vida, suas opiniões, sua época. Por seu filho Joaquim Nabuco*, 3 volls. (Rio de Janeiro: Garnier, 1897-1899).

[516] *Annaes do Senado do Imperio do Brazil. Segunda Sessão da 16ª Legislatura no mez de outubro de 1877*, v. 5 (Rio de Janeiro: Typograhia do Diario do Rio de Janeiro, 1877): 2.

[517] Following the numerous "*queixas que chegaram á camara popular*", in 1873 Portugal's Parliament opened a Parliamentary Inquiry on Portuguese Emigration. The investigation, aimed to gather information about the immigration process and "*investigar se effectivamente os portuguezes, que se contratam para o serviço de cultivadores no Brazil ou nos estados da America livre, podem, pela legislação de um ou pela malicia subtil na outra, perder os direitos civis que a constituição entre nós*

of Brazil's existing laws. Among the criticisms were the inequalities between nationals and foreigners and the excessive ruthlessness towards the latter; the possibility of preventive detention upon simple request by the employer, without the worker being heard and without a maximum time limit; the prevalence of the employer's jurisdiction, before a lay justice of the peace, subject to the lessee's sponsorship; and the fact that there was no established form of procedure. Two Agricultural Congresses held the following year would only reinforce this diagnosis of dissatisfaction from the farmer's point of view, giving final impetus to the approval of the new law in 1879[518].

While many of the workers' grievances were addressed, as will be detailed below, the main focus of the legislator's attention once again seemed to be the punitive aspect in the event of non-compliance with the contract. This was also the reason for its narrower scope of application, despite having a larger number of beneficiaries than the previous laws: it was restricted to regulating work in

garante a todos os filhos d'esta terra". Throughout the whole report, including the testimonies of Portuguese consuls working in Brazil, it comes out a unanimous verdict that the fragility of the legal status of the emigrant worker in Brazil was largely due to the law of October 11, 1837, "*a qual não é applicavel a locadores brazileiros. Essa lei é altamente iniqua e discordante de todos os principios juridicos que regem as condições dos contratos particulares. Pune as simples faltas civis do colono no cumprimento do contrato, com penas a que nos codigos criminaes correspondem delictos de summa gravidade. Sujeita o mesmo colono a uma especie de servidão, de que mui tardia e difficilmente se liberta, e entrega o conhecimento e julgamento de todas as questões, que se suscitarem na execução do contrato, ao juiz de paz do fôro do locatario*": See *Primeiro Inquerito Parlamentar sobre a Emigração Portugueza. Comissão da Camara dos Senhores Deputados* (Lisboa: Imprensa Nacional, 1873): 3, 110.

[518] In January 1878, the liberal João Lins Vieira Cansanção de Sinimbu took over the presidency of the new ministerial cabinet and the "Agriculture, Commerce and Public Works" ministry, after ten years of conservative dominance. Sinimbu then proposed the organization of an Agricultural Congress to discuss the two most pressing issues at the time, credit and workforce, but restricted the invitation to the provinces of Rio de Janeiro, Minas Gerais, São Paulo and Espírito Santo. In response, the Agricultural Aid Society of Recife took it upon itself to organize another congress, to be held almost in parallel with the one in Rio de Janeiro, to bring together farmers from the northern provinces. The report of the latter congress, in response to the questionnaire proposed by the government about the problems and solutions for farming in Brazil, stated that the first measure to be taken was "*Uma boa lei de locação de serviços, que regule também os direitos e obrigações reciprocas do senhor de engenho e do lavrador ou morador*". See *Trabalhos do Congresso Agricola do Recife em outubro de 1878 comprehendendo os documentos relativos aos factos que o precederam collegidos e publicados integralmente por deliberação do mesmo Congresso pela Sociedade Auxiliadora da Agricultura de Pernambuco* (Recife: Typ. De Manoel Figueiroa de Faria & Filhos, 1879): 315; Lamounier, *Da escravidão ao trabalho livre,* 96 ff.; Eisenberg, *Homens esquecidos,* 131-186.

agriculture[519]. Nabuco justified his choice by claiming that the expedients of the "special system" established by the project "could not be extended to other objects, without becoming an odious general rule, and implicating the doctrine and the provisions of all the codes"[520]. If for the rental of domestic, construction, industrial or contracting services, the commission considered it was necessary "to wait for the civil code", for "an imperative and current interest of public order, which is the need for arms for agriculture, and the influence that the rental of services can have on their acquisition, urgently requires an exceptional law".[521].

The jurist who, in those same years, was drafting a Civil Code in which it was declared that "there is no difference between nationals and foreigners", and which "abolished the penalty of imprisonment in civil and commercial matters against nationals or foreigners"[522], could not but consider "exceptional" and even "odious" the remedies employed by the project coming out of his own pen. In addition to the different time limits for the rental of services to Brazilians and foreigners that we will see below, the bill that became law in 1879 continued to provide for the "lessor who,

[519] This is the same reason why the law has regulated the sharecropping system alongside the rental of services itself. It was a system that became popular in Brazil from the 1850s onwards, relying on the experience of Senator Vergueiro's Ibicaba farm, but which had no regulatory framework until then. This system, however, was soon abandoned in favor of the labor-leasing contracts as sharecroppers were often accused to divert labor from coffee to food crops as a means to protest against what they considered unfair contracts. See Maria Lúcia Lamounier, "Between Slavery & Free Labour. Early Experiments with Free Labour & Patterns of Slave Emancipation in Brazil & Cuba," in *From Chattel Slaves to Wage Slaves: The Dynamics of Labour Bargaining in the Americas,* edited by Mary Turner (London: James Currey, 1995): 185-200 (194).

[520] *Annaes do Senado do Imperio do Brazil*, v. 5 (1877): 2.

[521] Ibid.

[522] "*Não há diferença entre nacionais e estrangeiros para a acquisição e exercicio dos direitos civis*" (Book I – art. 5º); "*A prisão fica abolida em materia comercial ou civil contra nacionais ou estrangeiros*" (Preliminary title – art. 114): José Thomaz Nabuco de Araujo, *Projecto do Codigo Civil. Trabalho apresentado ao Governo Imperial pela familia do falecido Conselheiro José Thomaz Nabuco de Araujo, que se achava encarregado do mesmo Projecto* (1872). Nabuco had signed a contract with the Imperial Government in 1872, approved by Decree No. 5,164 of December 11 of that year, to draw up the first Brazilian Civil Code. The jurist, however, was unable to complete it within the time limit set in the contract (5 years), nor before his death in 1878, and we only know the partial result of this work, as it was handed over by his family to the emperor in 1881.

without just cause, absents himself" or "who, remaining in the establishment, does not want to work" the "penalty of imprisonment for 5 to 20 days"[523].

One of the main leaders of the liberal party and one of the most active voices in the defense on Brazilian soil of the codificatory principles that were blowing in from the old continent, Nabuco gives details of his dilemma in handwritten notes prepared during the drafting of the law and compiled at the end of the 1870s[524]. Beginning with a page entitled "Troplong", in which the words "conventional penalty" are immediately highlighted, he offers a free translation, without information on the work and page, of a well-known text by the same author: "The lease of things produces the personal constraint that obliges the lessor to put the lessee in the enjoyment of them. There is nothing similar in the rental of works and industry. This lease involves personality, work and intelligence to a certain extent. Freedom would be deprived if man could be pursued in this inviolable domain, if he could be constrained in what is most personal, independent and intimate. Non-execution is resolved in damages and interests. The principle (sic) *nemo potest* protests in favor of the dignity of the one who contracts"[525].

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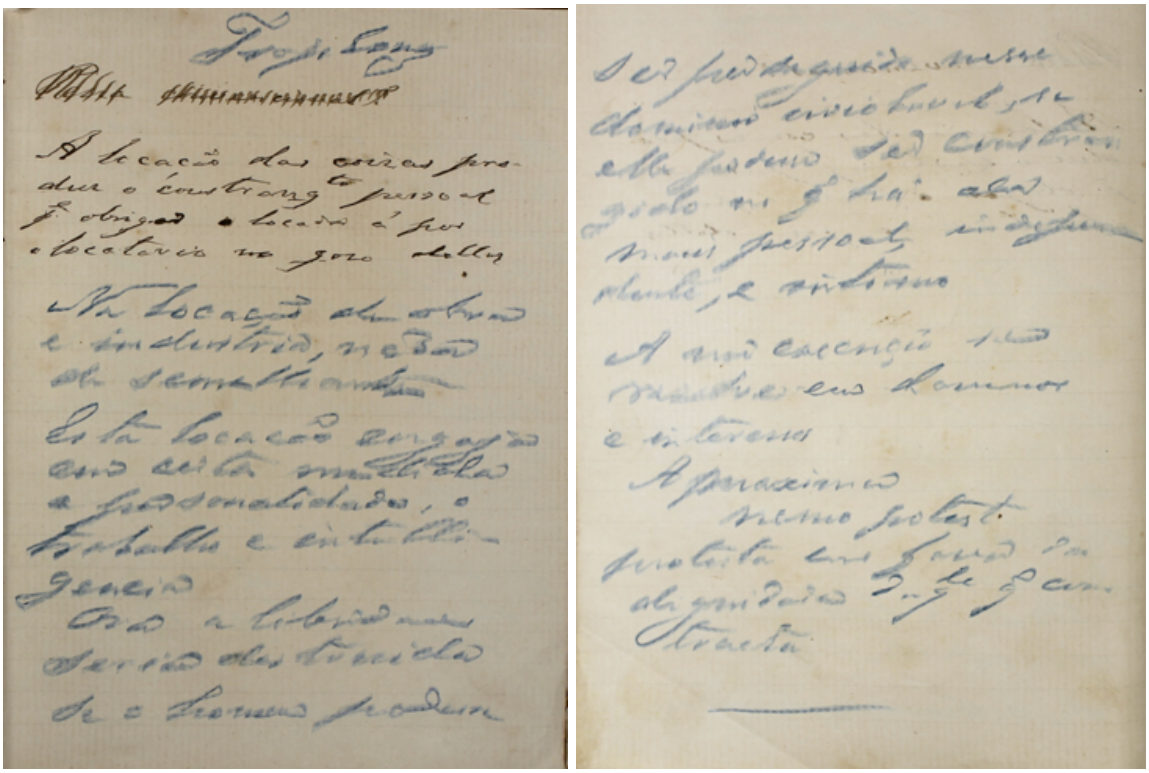
[523] "Decreto n. 2.827, de 15 de março de 1879. Dispondo o modo como deve ser feito o contrato de locação de serviços", printed in *Collecção das Leis do Império do Brazil de 1879: Parte Primeira* (Rio de Janeiro: Tipografia Nacional, 1880): 11.

[524] The notes, collected by the same Nabuco, are today kept in the archives of the Brazilian Historical and Geographical Institute, of which the jurist was a member. See José Thomaz Nabuco de Araujo, *Locação de serviços*, lata: 387, pasta 5, Instituto Histórico-Geográfico Brasileiro (IHGB).

[525] Despite the omission of reference, the excerpt is easily found in one of the best-known volumes of his extensive and famous *Droit Civil expliqué suivant l'ordre des articles du Code,* in the first commentary to art. 1779 of the *Code Napoleon*, that opens the chapter III "*du louage d'ouvrage et d'industrie*" -, where he addresses the "*différence entre la louage des choses et le louage d'ouvrage*" y responde "*Porquou le premier a pour sanction la manus militaris? Porquoi le second ne peut jamais se résoudre em une exécution corporelle?*": "*Le louage des choses produit une action en délivrance, au bout de laquelle est la voie de la contrainte personnelle (manus militaris), pour obliger le locateur à mettre le locataire en jouissance. Ici rien de semblable; la liberté humaine ne le permet pas. Le louage d'ouvrage engage dans une certaine mesure la personnalité, le travail, l'intelligence; or, la liberté serait anéantie si l'homme pouvait être poursuivi dans ce domaine inviolable, s'il pouvait être contraint dans ce qu'il a de plus personnel, de plus indépendant, de plus intime. L'inexécution du louage d'ouvrage se résout donc en dommages et intérêts, et la maxime nemo potest cogi ad factum vient protester en faveur de la dignité de celui qui a contracté l'obligation*". See Raymond-Theodore Troplong, *Le Droit Civil expliqué. De l'échange et du louage. Commentaire des titres VII et VIII du livre III du Code Napoléon,* 3. ed, Tome second (Paris: Charles Hingray, 1859): 236.



Source: José Thomaz Nabuco de Araújo, *Locação de serviços*, lata: 387, pasta 5 (IHGB): 66-67.

Without adopting the same doctrine that would prevail in post-revolutionary France, Nabuco, in reproducing this passage, shows himself to be aware of the legal tradition that entailed the adoption of the conceptual scheme of the *louage d'ouvrage*. To frame the employment relationship as a patrimonial contract of exchange of reciprocal benefits, through the figure of the *locatio*, implied transforming the employment contract into an obligation like any other of private law, whose consequence for non-performance is only the payment of damages. Troplong, like Pothier before him[526], sustained that "*l'obligation de faire l'ouvrage dans le temps*

[526] Already in the first volume of his well-known treatise on obligations, the direct source from which Portalis and his *confrères* would drawm on: "*Lorsque quelqu'un s'est obligé à faire quelque chose, cette obligation ne donne pausa u créancier le droit de contraindre le débiteur précisément à faire ce qu'il s'est obligé de faire, mais seulement celui de le faire condamner en ses dommages & intérêts, faute d'avoir fatisfait à son obligation. C'est en cette obligation de dommages & intérêts, que se resolvent toutes les obligations de faire quelque chose, car nemo liber potest praecise cogi ad factum*". See Robert Joseph Pothier, *Traité des obligations, selon les regles tant du for de la conscience, que du for extérieur. Nouvelle Edition revue, corrigée & considérablement augmentée par l'Auteur,* Tome Premier (*Paris: Debure,* 1764): 175.

convenu", if the lessor "*ne la remplit pas, et si le conducteur éprouve un véritable dommage par la retard*" could only "*se résout en dommages et intérêts*"[527].

It's widely acknowledged that the triumph of the formal liberties of the post-revolutionary constitutions did not imply, neither before nor now, the complete proscription of imprisonment in the civil sphere. Troplong himself, in those years, devoted another volume of his *Droit expliquée* exclusively to the treatment of the *contrainte par corps*, where he expressed his opinion with conviction already in the preface that "*Ni la peine de mort ni la contrainte par corps n'excèdent le droit de la société. (…) J'y trouve avec évidence ce droit de punir par le sang, ce droit de coaction sur la liberté, qui par ses expiations formidables ou par ses dures contraintes est, dans certains cas exemplaires, un effroi nécessaire pour le méchant, une sauvegarde publique, une garantie du crédit et de la propriété*"[528]. In addition to political motivations, the author also justified this exception by the legal nature of the measure: "*La contrainte par corps, examinée en soi et d'après le but de la loi, n'est pas une peine; on n'entend pas punir personnellement le débiteur qui ne paie pas; on veut seulement l'obliger, par la contrainte exercée sur sa personne, à remplir ses obligations. En un mot, la contrainte par corps n'est qu'un moyen de coaction, une preuve de solvabilité. (…) Elle n'est donc qu'un moyen rigoureux de procurer l'exécution de l'engagement, le paiement de la dette*[529].

However, while admitting this type of measure exceptionally in the realm of civil obligations, Troplong and his civilist peers considered coercive force admissible only to secure claims, but not to compel performance of the principal obligation, which led them to reject its application to the rental of services[530]. Nabuco, in turn, legislating

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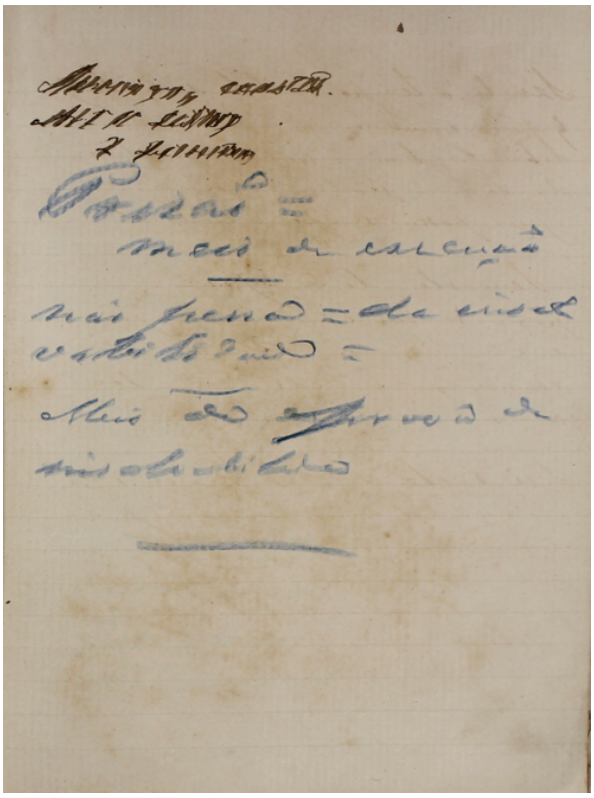
[527] Troplong, *Le Droit Civil expliqué. De l'échange et du louage*, t. II, 272.

[528] Raymond-Theodore Troplong, *Le Droit Civil expliqué. De l'échange. De la contrainte par corps en matière civile et de commerce. Commentaire du titre XVI, Livre III, du Code Civil,* Tome dix-huitième (Paris: Charles Hingray, 1847): IV.

[529] Ibid, 16-17.

[530] In literal words, another important commentator on the *Code Napoleón,* Désiré Dalloz: "*Tandis que l'exécution du louage des choses peut, en cas de refus du bailleur, être obtenue par la forcé, manu militari, ainsi que nous l'avons vu. Louage, n. 159, la contrainte ne peut être appliquée à l'exécution du louage*

in Brazil, and especially for labor relations in agriculture, combines the principles outlined in the two books to legitimize the application of imprisonment penalties in the Brazilian law of rental of services of 1879. On the next sheet of his notes, he writes: "*imprisonment = means of execution*" and, in another free translation of the lines we have just read, he adds: "*No penalty = of insolvency / Means of evidence of insolvency*".



Source: José Thomaz Nabuco de Araújo, *Locação de serviços*, lata: 387, pasta 5 (IHGB): 70.

By establishing this remedy within a civil law on the rental of services, Nabuco admitted being aware that "only an imperative reason of public order can justify imprisonment, even in the few cases in which the commission's substitute project admits it, because the maxim of law is that the non-implementation of the obligation to do or not to do is resolved in damages and interests. *Nemo potest cogi ad factum*. In fact, it would be anachronistic to impose imprisonment as a sanction for the rental of services in general, and outside the goal and targets of this law. In addition to

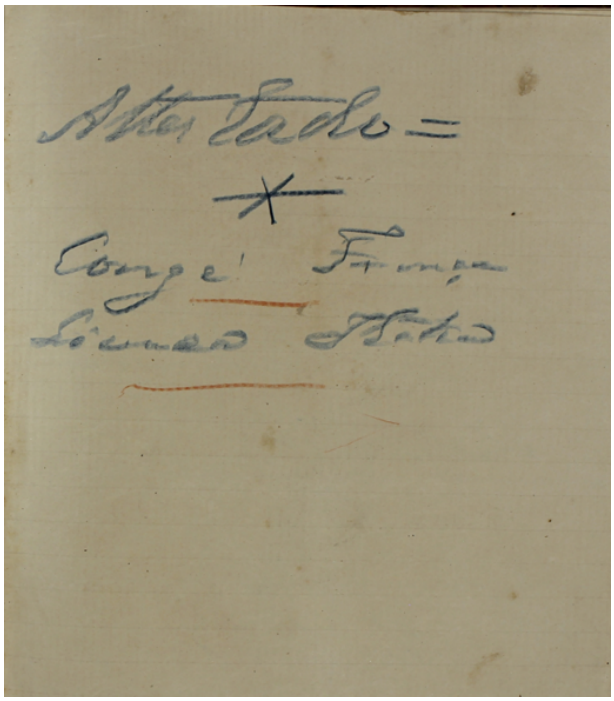
d'ouvrage, en vertu de la maxime nemo potest cogi ad factum, et qu'ainsi l'inexécution de ce contrat se résout en dommages-intérêts, par application de l'art. 1142 c. nap." See Désiré Dalloz, *Répertoire méthodique et alphabétique de legislation de doctrine et de jurisprudence en matière de droit civil, comercial, criminel, administratif de droit des gens et de droit public,* Tome trentième (Paris: Bureau de la jurisprudence générale, 1853).

imprisonment, the commission proposes other measures, constituting a special system for the rental of services applied to agriculture, which could not be extended to other objects, without becoming an odious general rule and implicating the doctrine and the provisions of all the codes."[531]. For Nabuco, "punishing the breach of contract with imprisonment" was indeed "violating the principle *Nemo potest cogi ad factum*", but "an imperative reason of public order, which is the need for arms for agriculture, and the influence that the rental of services can have on their acquisition"[532], justified the "odious" measure. The faithful execution of agricultural contracts by workers who "have no other hypothec to give apart from their person," as Vergueiro used to say, more than a matter of purely private agreements, was regarded as a political concern that involved general interests. As such, it legitimized the police's authority and the public nature of the penalties enforced. However, as "an exceptional measure" within the system of private obligations, it could not be part of the Civil Code the same jurist was drafting. All the rental of services outside agriculture "would have to wait" its – never achieved – completion.

The question remains, however, to what extent this was indeed an anachronism in the nineteenth century? A few pages further on in the same notebook, scribbled another page with the notation "*attestado*" – the certificate that the 1879 law obliged the lessee to hand over to the lessor whenever he rescinded a contract[533] – and a sign of equivalence followed by the words "*congé França*" and "*libretto Itália*". What was required of Brazilian workers as proof that they had concluded the contract without debts in relation to the previous employer was, in truth, a requirement already imposed on French workers since the middle of the reign of Louis XV, when through the *Lettres patentes of January 2, 1749,* it has come to require *"des Compagnons &*

[531] *Annaes do Senado do Imperio do Brazil*, v. 5 (1877): 2.
[532] Idem.
[533] Art. 26 of the Decree n. 2.827 of March 15, 1879 predicted that "*Findo ou resolvido o contrato, dará o locatario ao locador um attestado consignando achar-se findo ou resolvido o contrato*", obligación de la que estaba isento "*se, no ajuste definitivo da conta corrente, alguma quantia lhe dever o locador, e não puder pagal-a, sem apparecer quem por elle pague, ou se constitua seu fiador*" (art. 28). See *Collecção das Leis do Império do Brazil de 1879,* 13.

Ouvriers qui travaillent dans les Fabriques & Manufactures du Royaume" to terminate a contract "*un congé exprès et par écrit de leur maître*". If failure to comply with this requirement in pre-revolutionary monarchical France entailed "*100 liv. d'amende, au paiement de laquelle ils seront contraints par corps*", in the years when Nabuco was writing, there was still a *Loi sur les livrets d'ouvriers* approved by Napoleon III, which imposed the same obligation of "*se munir d'un livret*", whose non-compliance could be "*poursuivies devant le Tribunal de simple police*" and give way to, "*suivant les circonstances, un emprisonnement de un à cinq jours.*"[534]



Source: José Thomaz Nabuco de Araújo, *Locação de serviços*, lata: 387, pasta 5 (IHGB): 108.

The *livret* was also a well-known institute in Belgium and Italy[535] – both mentioned directly in Nabuco's notes – in addition to the emblematic Prussian case,

[534] On the French *livret* and its reformulation in the post-revolutionary period, see Alain Cottereau, "Industrial Tribunals and the Establishment of a Kind of Common Law of Labour in Nineteenth-Century France," in *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany and the United States,* edited by Willibald Steinmetz (Oxford: Oxford University Press, 2000): 203-226; Alain Dewerpe, "En avoir ou pas. À propôs du livret d'ouvrier dans la France du XIXe siècle," in *Le travail contraint en Asie et em Europe XVII-XXe siècles,* edited by Alessandro Stanziani (Paris: Fondation de la Maison des sciences de l'homme, 2010): 217-239.

[535] Prior to the unification, at least in the *stati de Terraferma*, according to the *Regie Patenti per le quali Sua Maestà estende a tutti gli Stati di Terraferma l'obbligo di ottenere il Libretto, a cui sono sottoposti in alcune città di detti Stati gli operai e le persone di servizio, ed approva l'annesso Regolamento, del 23 gennaio, pubblicate l'8 marzo 1829*. See Veneziani, "L'evoluzione del contratto di lavoro in Europa dalla Rivoluzione Industriale al 1945," 34-36.

where, beyond the *Gesindedienstbuch*, criminal penalties for breach of employment contracts were reinforced in 1845 within a policy of "freedom of trade" (*Gewerbefreihei*). This "free market" reform in the Prussian States, while depicted the relationship between masters and their journeymen in the artisanal sector, and factory workers and their employers in the industrial sector as a matter of free contract, also subject factory workers, journeymen and other wage workers to penal sanctions, including prison, for the breach of their freely negotiated contracts. It would be only in 1869 that penal sanctions for contract breaches by manufacturing workers were eliminated by the Industrial Law (*Gewerbeordnung*) of 1869, being maintained for domestic and agricultural workers until the Weimar Republic[536].

It would be difficult to leave out of the discussion the English scenario, perhaps the most striking example of a country in which the long medieval tradition of criminal sanctions for breach of labor contracts under the Statute of Labourers (1350-1351) and Statute of Artificers and Apprentices (1562), far from being progressively abandoned with the advance of industrialization, were revived and redefined in direct response to the heightened demand for labor created by expanding markets[537]. From 1720 to 1843, the English Parliament passed over half a dozen statutes that imposed penal sanctions for contract violations, while between 1857 to 1875, approximately 10,000 workers per year in England faced criminal proceedings for breaching their labor contracts[538]. The affirmation of freedom of contract in nineteenth-century England was fully reliant on mechanisms for the criminal enforcement of "free agreements", then considered an ordinary contract remedy entirely consistent with the liberal principles and the idea that *pacta sunt servanda.* It was only under the intense mobilization of the organized labor movement from the 1860s that penal sanctions began to be recharacterized as

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[536] See Ojeda Avilés, *Las cien almas del contrato de trabajo,* 728-740; Keiser, "Between Status and Contract?", 32-47.

[537] P. S. Atiyah, *The rise and fall of freedom of contract* (Oxford: Oxford University Press, 1979): 523; Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century*, 3 ff.

[538] Steinfeld, "Changing legal conceptions of free labor", 147; but also Douglas Hay and Paul Craven, "Introduction", in *Masters, servants, and magistrates in Britain & the Empire, 1562-1955,* edited by Douglas Hay and Paul Craven (Chapel Hill: University of North Carolina Press, 2004): 1-58.

a contract remedy inconsistent with the liberal principles and the freedom of contract, culminating in its abolition in 1875. Neither a necessary movement, nor one that immediately accompanied the advance of the free market and freedom of contract, but which rather had to be "invented" [539], in English law.

Whether or not this represented a contradiction with a liberal model of contract, the fact is that the stipulation of Nabuco's law represented a protective novelty within Brazilian legislation. Until then, as discussed above, the law of 1830 provided for correctional imprisonment and work in prison until the debt was cleared, and the law of 1837 also provided for prison with work and incarceration until double the debt was paid, but neither provided for a maximum length of the penalty. The commission chaired by Nabuco then stated that it would "take this discretion away from the justice of the peace and says that the penalty will be from 5 to 20 days only."[540]

The new law actually contained an entire chapter entitled "criminal matter" with 11 articles, almost longer than the two previous laws in their entirety (arts. 69-80). It was, without any honor to the principle of equality, primarily devoted to the faults committed by the worker. The new law did not provide for any kind of criminal sanction for the employer, not even in the case of enticement, punishable only for expenses, costs and fines. Workers, on the other hand, were punished with imprisonment not only if they were absent, but also if they "remain in the establishment and do not want to work". The punitive, and not merely compensatory, nature of the sanction was clear from Article 73, which stipulated that the sentence that condemned the worker to prison for abandoning or interrupting work would also "oblige him to return to work as soon as the sentence was served". Once the lessor returned to work, in case of recidivism, he would again be sentenced to imprisonment for twice the length of the first sentence. All these cases remain within the jurisdiction of the Justice of the Peace, at least no longer in the lessee's jurisdiction, but in that of the rustic building (art. 81).

[539] Steinfeld, *The invention of free labor*, 7.
[540] *Annaes do Senado do Imperio do Brazil*, v. 5 (1877): 95.

It was still a summary procedure, but at least it provided for the defendant to be summoned, and for witnesses to be heard, before any prison sentence was issued (art. 82). Finally, the 1879 law was also more detailed on just causes for contract interruption, which were now more numerous even for workers (six) than for employers (five). It even expressly provided for executive action to recover wages (art. 42).

While these provisions on criminal procedure and matters pertained indiscriminately to nationals and foreigners, other rules applied differently to each of them. After all, regulating labor outside a civil code allowed the attribution of diverse guarantees for the distinct recipients of the act, moving away from the modern ideal of unification of the subject of law. The most important disparity was precisely with the duration of the contract, an issue in which the reverence to the principles of freedom was most strongly proclaimed. On the hand, made the caveat for the prohibition of perpetual services by the "fear that in the shadow of the contract for the lease of services, obligations may be contracted that may result in servitude"[541], for the Brazilians it was left the maximum freedom to determine the contract duration. The bill's sponsor said to have relied on what "Troplong wrote on the French Civil Code", for whom the convention fixed the duration, the custom of the place and the extent of work; and to the fact that the agricultural service "variable according to its object, cannot have a legal duration, and therefore this duration must be entrusted to the freedom of the parties so that the work is carried to completion and not interrupted". [542]

"When it comes to foreigners" – a senator quick objected – "the project is different"[543], establishing a maximum duration for the contract of 5 years. The opponent, senator Mendes de Almeida, representative of the province of Maranhão, then questions "why should one allow that only the national conclude a contract for a time that must be presumed to cover all the time in which he can render services" if

[541] *Annaes do Senado do Imperio do Brazil*, v. 5 (1877): 52.
[542] *Annaes do Senado do Imperio do Brazil. Segunda Sessão da 16a Legislatura: Appendice* (Rio de Janeiro: Typographia do Diario do Rio de Janeiro, 1877): 211.
[543] *Annaes do Senado do Imperio do Brazil: Appendice* (1877): 164.

there was no "sufficient reason to place the national in a different position from the foreigner in this point"[544].

The president of the commission insisted to justify the difference by saying that "there is a specialty here". The project, determining a term for the rental of services from foreigners and not allowing its extension except by express renewal, "prevents the abuse that has been committed in our country and in other countries, extending infinitely the duration of the contract; it removes all suspicion of servitude, with which much harm has been done to immigration to our country; so that the project in this way satisfies the complaints that have been made against our laws, demoralized by the suspicion of servitude" [545]. It was meant as a protective initiative, as "the foreigner comes to a country he doesn't know; he may find the place, the customs, the climate strange and disgusting. He can also, as a foreigner, be easily deceived; consequently, it is advisable to set a deadline, and a shorter one than for the national, who is here and not subject to the same motives of ignorance"[546].

The same objector, Senator Mendes de Almeida, soon counterargues that the motivation provided for "the foreigner, also applies to the national because the national who is illiterate or can barely read will be as in the dark as the foreigner who arrives on our land for the first time. If it is made easier for the foreigner on the principle that he is ignorant of the customs of the land, why should we force the national to a greater burden?". After all, "where the same reason is given the same disposition must be given, justice and good reason demand it."[547] And he goes on to ask for the same protection for the national, who was "also in the case of being protected, once he is going to contract with another individual in a superior position by the lights and resources of power and influence". [548]

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[544] Ibid., 52.
[545] *Annaes do Senado do Imperio do Brazil: Appendice* (1877): 143.
[546] Ibid., 144.
[547] Ibid., 113.
[548] Ibid., 136.

These criticisms and the debate they aroused effectively conducted the senators to alter the duration term for nationals, establishing for them a limit of "six years, except for renewal" (art. 11 of the final law approved in 1879). It continued, however, to be larger than that provided for foreigners and, unlike the latter, not dependent on an "express" manifestation of will for renewal. Therein lay precisely the second point of distinction between nationals and foreigners, which also generated many controversies among the senators.

For nationals, the contract of services would be considered renewed for another time, agreed or presumed (in the absence of stipulations, the same project presumed three agricultural years), if until the last month of the agricultural year, neither the lessee of such nor the lessor declared the will to interrupt the service. For the foreigner, instead, the renewal had to be express, otherwise it would be limited by the provision that the contract did not exceed five years[549]. Nabuco insisted on affirming the special condition of the foreigner as deserving tutelage, arguing "the national has more knowledge of the country, its laws and its things, while the foreigner, being alien to the country, may be violated[550]. It wouldn't go unnoticed to his objector that this kind of argument controverted the liberal principles so strongly defended by the bill's sponsor. Mendes de Almeida then ironically suggested that the foreigner "should also enjoy that supposedly broad freedom that is given to the national. (...) if the foreigner has already been in Brazil for five years, it is no longer the case to start his life here, he already knows the country a little, he should also be free"[551].

Despite these objections, the Senate not only maintained the distinctions regarding the common dispositions but devoted several articles of the act to special provisions about immigrant labor, introducing many guarantees that had previously been the leitmotif of international criticism against emigration to Brazil. The transfer of services without the lessor's consent was now prohibited (art. 17); the contracts

[549] *Annaes do Senado do Imperio do Brazil*, v. 5 (1877): 2.
[550] *Annaes do Senado do Imperio do Brazil: Appendice* (1877): 166.
[551] Ibid., 164.

became void if the lessor was required to pay debts other than those of his wife and child under 21, as well as if he was required to pay interest on debts or pay more than 50% of the passage and installation expenses (art. 19); the foreign worker had the right to terminate the contract and sign a new one with a third party, up to one month of his arrival, paying the expenses incurred until then (art. 20).

In addition to these special provisions, and even though Brazilians and foreigners were subject to distinct contractual rules, for the first time after four decades they would all be governed by the same just cause hypotheses for termination; identical penalties for abandonment of the contract and the same procedural rite. The bill, finally approved by the Senate on October 12, 1877[552], was discussed only once in the House of Representatives on December 20, 1878, and was finally enacted, without any changes, on March 15, 1879, by Decree No. 2,827, "*dispondo o modo como deve ser feito o contrato de locação de serviços*".

Even if it aimed to accommodate a wide array of demands and interests, the law was not able of garnering unanimous support or having a long life. Some say it would end up "displeasing everyone, failing from the north to the south of the country"[553]. There are even reports of a Government Circular Notice sent to provincial presidents on May 8, 1880, prohibiting the execution of some of its articles [554]. Even so, in the itinerary we are following, it is a point of particular relevance as it promotes, in an unprecedented way, the gathering, within a single piece of legislation, of the legal

[552] *Annaes do Senado do Imperio do Brazil*, v. 5 (1877): 139.

[553] The expression comes from Monica Duarte Dantas and Vivian Chieregati Costa, "O 'pomposo nome de liberdade do cidadão': tentativas de arregimentação e coerção da mão-de-obra livre no Império do Brasil," *Estudos Avançados* 30, no. 87 (2016): 29-48 (40). Lamounier also reports on the criticism it would receive, with special emphasis on the manifestations of São Paulo's farmers and their preference for subsidized immigration: Lamounier, *Da escravidão ao trabalho livre,* 147-159.

[554] These provisions concerned, respectively, the registration of the contract with the Municipal Council of each District (art. 8); the measures that the Government should take with regard to the bookkeeping of lessees of rustic properties, as well as the process and peremption of disputes and complaints (art. 25); and the validity of the certificate issued by the justice of the peace as a substitute for the lessee's refusal to issue a certificate stating the end of the lease if a new contract was not presented (art. 31). Deputy Manoel Portella reported on this Circular Notice at a session of the Chamber of Deputies on July 7, 1884, during a discussion on Bill 241-A of 1882 to reform the legislation on the rental of services. See *Annaes da Camara dos Srs. Deputados do Imperio do Brazil. Quarta Sessão da Decima Oitava Legislatura de 3 de julho a 2 de agosto de 1884*, v. 3 (Rio de Janeiro: Typographia Nacional, 1884): 42.

regulation of the employment contracts of subjects with different legal statuses, even though it maintains some differences in the contractual regime of each of them. If we consider the documentary sample surveyed by this research, it is also worth mentioning that its possible inadequacy for the targets aimed at in the agricultural universe did not prevent its creative use in the notaries' offices of urban centers of the empire, and it was possible to identify, on September 26, 1881, in the 1st Notary's Office of Rio de Janeiro, a freedwoman's contract with express mention of her. Anastacia, signing a deed of "acknowledgment of debt and rental of services" with Deolinda Maria Rosa Vidigal Guimarães, obliged herself to provide "her good services" to the grantee for a period of four years, to compensate for the loan of 720$000 réis she had received from her. To guarantee the contract, he said that "the grantor was subject to the provisions of Decree number two thousand eight hundred twenty-seven of March fifteenth, one thousand eight hundred seventy-nine, which regulates rental of services contracts."[555]

The application of this legislation to freedmen still seemed to raise doubts, although the 1879 law did not prohibit it, and they were even mentioned, albeit fleetingly, when it dealt with the duration of contracts[556]. This can be seen from a later attempt at legislative reform in the last years of legal tolerance of slavery in the Empire, and also in the Monarchy itself: Bill 241 of 1882, which came up for discussion on September 19 of that year in the Chamber of Deputies. The proposal, which provided for the amendment of some provisions of the 1879 law, also aimed to apply to freedmen with a service clause the criminal sanctions provided for in that law in the event of non-compliance with the contract, "in this case with no time limit"[557]. One of

[555] 'Escriptura de reconhecimento de dívida e locação de serviços que faz Anastacia preta liberta a D. Deolinda Maria Rosa Vidigal Guimarães," Livro 375 do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Matthias Teixeira da Cunha, 26/9/1881, fl. 91 (ANRJ).

[556] Art. 16 of Decree no. 2827, of March 15, 1879, limited itself to referring to the provisions of the Law of 1871 to set the term of contracts for freedmen: "*Art. 16. O prazo da locação de serviços dos libertos é o mesmo determinado pela Lei de 28 de Setembro de 1871*". See *Collecção das Leis do Império do Brazil de 1879,* 12.

[557] *Annaes do Parlamento Brazileiro. Camara dos Srs. Deputados. Segundo Anno da Decima Oitava Legislatura. Sessão de 1882. Prorogação*, v. 5 (Rio de Janeiro: Typographia Nacional, 1882): 46.

the parliamentarians responsible for drafting it, the conservative deputy for the province of São Paulo, José Luis de Almeida Nogueira, justifies the measure "in view of the difficulties that arise daily in the execution of one of the most worthy provisions of the law of September 28"[558], given the impotence of the country's legislation, in his opinion, "to oblige the freedman subject to this legal onus enshrined in the instrument of freedom to work"[559]. According to him, "both masters who wish to grant their slaves conditional freedom, and third parties who also wish to contribute out of their own pockets to this philanthropic result, will recoil at this expedient"[560] by realizing how precarious the protection of the law in force was. Rather than making it explicit - although, in principle, there was nothing to prevent it – that this law would also cover the contracts of freedmen, the aim of the proposal was obviously to make the criminal sanctions stricter for these subjects, removing the limits on the duration to which they were subject by law. The proposal, however, did not make it out of the House, and the 1879 law remained in force until the end of the Empire.

The Proclamation of the Republic would bring with it a strong impetus to renew legislation on labor, already noticeable with the issuing of a decree just three months after Marshal Deodoro's ascension to the Presidency, repealing "the laws of September 13, 1830, October 11, 1837, n. 2827 of March 15, 1879 and all the exorbitant provisions of common law, relating to contracts for the rental of agricultural services". The provision was motivated by the aim of "attracting a spontaneous, permanent and abundant stream of immigrants to Brazilian territory", for which it was considered "necessary to eliminate from the body of national legislation all the provisions and precepts that might contradict the customs, tendencies and aspirations of foreigners". According to the Decree's explanatory memorandum, this would not be complete "as

[558] Ibid., 44.
[559] Id.
[560] Id.

long as the vexatious precepts that regulate rental of services contracts remained in national legislation."[561]

On the grounds that penalties for breach of contract were "vexatious", all the labor legislation from the monarchical period, conceived for a special attention to immigrant workers, would also be repealed on their behalf. The subjects in favor of which so many legal novelties regarding labor would be introduced in the Brazilian legal system, would also find themselves, precisely at the peak of mass migration and boost of industrialization, into a scenario of deregulation that would affect both nationals and foreigners. Brazil would face the new global context of Atlantic displacement of workers relying on premodern legislative references, as much as foreigners, nationals, rural, urban and domestics and laborers would still be subject to a long history of distinctions in status and separation of contractual regimes whose complete unification, even today, is an unfinished task.

[561] "Decreto n. 213, de 22 de fevereiro de 1890. Revoga todas as leis e disposições relativas aos contractos de locação de serviço agrícola," printed in *Collecção das Leis da Republica dos Estados Unidos do Brazil de 1890* (Rio de Janeiro: Imprensa Nacional, 1895): 94.

CHAPTER 3

The law of labor beyond labor laws: merchants, slaves and servants

SUMMARY: §1. **A general law out of a special jurisdiction: mercantilizing the law of labor. –** §2. **Person, then worker: discourses and disputes for a law of slave labor**. – §3. **At last, back to the first: domestic labor under focus at the fall of a slave monarchy**.

Investigating the law of labor of the nineteenth-century as a distinct object from the later and specialized labor law meant inevitably going back to the natural cradle of this legal sector: the private law. Even without a global codification of civil law, the legal regulation of labor was also part of the broader process of construction of a liberal legal order in Brazil, which in the field of labor gave rise to three civil statutes on the rental of services. Nevertheless, they represented more a pivotal moment in this long curve than a definitive solution. Neither were they alone able to fully implement – or illustrate – this project of legal modernization, nor are they the only legal sources to make up the broader framework of the law of labor. Besides civil statutes, other branches of law governed labor relations in nineteenth-century Brazil. Either because the discipline was not yet specialized, or because distinctions in legal status had not been abolished, it's necessary to look at other normative pieces to see the broader tapestry of laws and subjects regarding the labor relationships.

The first parallel normative piece to receive our attention here is commercial law, the first and only branch of private law to be codified in Brazil during the nineteenth century. Beyond providing special rules for workers more clearly involved in commercial activities, it also included a very generic – and therefore tendentiously expansive – definition of the rental of services, which practically coincided with the one already offered by the civil statutes we have discussed so far. It was a Brazilian legislative option that was not paralleled by contemporary European commercial

codes, also enacted before the approval of a civil codification, such as the Spanish commercial code of 1829 or the Portuguese one of 1833, but which had not an insignificant impact on the lives of workers and employers. It was responsible for bringing to the mercantile jurisdiction, with its special rules and procedures, workers who, in principle, were not linked, either by the nature of their trade or profession, to commercial activities. The consequences of this absorption, not always to the advantage of just one of the parties, for the possibilities of negotiating and disputing labor relations, will be the focus of the first section.

Less as a specific sector of law, and more as an intersectional legal problem, the second set of norms to receive our attention in this chapter is the law of slavery. This choice is part of the determination, already announced, not only to value the legacy of enslaved workers in the construction of the legal regulation of labor, but also to value the legal framework of slavery as an important piece of the law of labor. The goal is to show some of the possible paths and potential sources for investigating legal aspects of the enslaved subjects' labor relationships that openly challenge the classic discourse of their complete irrelevance – or nonexistence – from the legal regulation of labor point of view. Beyond the acknowledgment that enslaved workers were subject to intense restriction of movement, the cruelest treatment, and inhumane labor, there is a range of other possibilities for the investigation of their labor experiences under the realm of law.

Lastly, our attention turns to a third theme: the domestic work, a subject that garnered legislative attention during the culminating decade of the slave monarchy. Domestic laborers were tendentially excluded both from the legislative innovations of the nineteenth century, as they targeted written contracts and they rarely signed one, but also from the umbrella of mercantile legislation, however expansive it was. Nonetheless, as the Empire drew to a close, they became the primary focus of legislative scrutiny. Even though special legislation had also interested other specific professional sectors in nineteenth-century Brazil, this particular group of workers function as a pertinent epilogue to this thesis, both chronologically and thematically.

Many of the themes discussed so far – as the non-irreversible change in the legal lexicon, the punitive nature of contract law; and the creation of special and plural legal regimes despite the trend towards unification of the subject of law – intertwine in a particular way around these workers. Even just adding a brick of intricacy rather than exhausting all the elements of the mosaic, this epilogue serves to close the narrative illustrating in a definite, albeit not static, way the plurality, complexity and density of a real, fluid and heavy legal landscape of labor.

§1. **A general law out of a special jurisdiction: mercantilizing the law of labor**

Only two years following the enactment of Brazil's first law on service rental contracts – 1832[562] – the groundwork to draft a commercial code was already launched, one more among the various legislative reforms envisioned by the regency during the liberal decade. Until then, a similar initiative on the continent had only taken place in Haiti, which limited to implementing in 1826 the French Commercial Code of 1807[563]. The move would precede any similar mobilization for a Civil Code in Brazil by more than 20 years and would also succeed long before it, culminating in Law n. 556, of June 25, 1850[564]. Once again, a time of too many confluences not to notice: Parliament was debating in those months both the second (and finally successful) law to abolish trafficking (from which entrepreneurs expected a substantial release of capital to be redirected towards financial and industrial ventures) and the first Brazilian Land Law[565], all enacted in September of that year. The Code would also be followed by a regulation on November 25, 1850, detailing the commercial procedure, in whose

[562] On the wave of liberal reforms, Brazilian Regency appointed a commission to draft a commercial code on March 14, 1832. The almost 20 years of legislative deliberations are described in detail by Brasílio Machado, "O Codigo Commercial do Brasil," *Revista da Faculdade de Direito,* no. 17 (1909): 13 ff; and in a effective synthesis by W. R. Swartz, "Codification in Latin America: The Brazilian Commercial Code of 1850," *Texas International Law Journal* 10, no. 2 (1975): 347-356.

[563] The same happened in Saint-Domingue in 1845. Adopting commercial codes from the former metropolis was also a recurring practice in Hispanic America, as evidenced by Ecuador (1831), Bolivia (1834), Peru (1853) and Costa Rica (1853), as well as some Paraguayan and Argentine provinces. On the Spanish code of 1829 as a "Hispanic" code, due to its dissemination in the former lands of the monarchy, see Ezequiel Abasolo, "El código de comercio español de 1829 en los debates y prácticas jurídicas del extremo sur de América," *AHDE*, 58-59 (2008-2009): 447-460.

[564] The Imperial Government's first contract with Teixeira de Freitas for preparatory work on the Civil Code, as already noted here, dates to February 15, 1855. A first version of this product would only be published two years later and an imperial contract for the actual drafting of a Civil Code would not take place until January 1859, with the hiring of the same jurist.

[565] Law no. 601, of September 18, 1850, was conceived to regulate the access to private land ownership, being traditionally remembered by historiography for introducing the modern sense of liberal property in the Brazilian legal order. More recent studies, however, have been relativizing the importance of this milestone, with emphasis on the social and negotiated construction of this process. See Mariana Armond Dias Paes, *Esclavos y tierras entre posesión y títulos. La construcción social del derecho de propriedade en Brasil (siglo XIX)* (Franfkurt am Main: Max Planck Institute for Legal History and Legal Theory, 2021); Ricardo Marcelo Fonseca, "A 'Lei de Terras' e o advento da propriedade moderna no Brasil, *Anuario Mexicano de Historia del Derecho,* no. 17 (2005): 97-112, 2005.

drafting the Bahian jurist José Thomaz Nabuco de Araujo, by now well known to readers of this thesis, would take an active part.[566]

That a codification of commercial law preceded the civil one, reversing the French sequence, was not unique to Brazil. Notable European examples, such as Spain (two commercial codes,1829 and 1885, before the civil one of 1889) [567] and Portugal (commercial code in 1833; civil one in 1867), and even the neighbour Paraguay (1834; 1876) – albeit closely modelled after the Spanish code – followed a similar pattern. What sets Brazil apart is that when this novelty appeared, civil laws governing the rental of services had already been in place for two decades, significantly diminishing the originality of the Code's Title X – "*Da locação mercantil*" (commercial rental). The expression of labor relationships under a contractual framework, the scheme of *locatio-conductio* or institutes such as the termination for just cause were no longer ground-breaking legal categories within Brazilian private law. Even so, the Code's generic definition of rental of services, which partly coincided with the existing civil laws, and its submission to a specialized jurisdiction, whose special courts were abolished only in 1876[568], made this an allegedly extensive subject that generated a great deal of controversy – certainly not only national[569] – over the next quarter of century.

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[566] In March 1850, Nabuco was appointed as a member of the commission in charge of organizing the regulations for the Code of Commerce. His work on the commission is described in detail by Joaquim Nabuco, *Um Estadista do Império. Nabuco de Araujo, sua vida, suas opiniões, sua época,* t. 1: 1813-1857 (Rio de Janeiro: H. Garnier, 1897): 125 ff.

[567] A phenomenon finely discussed at the chapter 1, § 2. "*El Código y los Códigos*" in Petit, *Otros códigos,* 26-37; but also, for the "idea" of codifying commercial law as early as 1829, chapter XIII, "Derecho mercantil y codificación (1829) in Carlos Petit, *Historia del Derecho Mercantil* (Madrid: Marcial Pons, 2016): 349 ff.

[568] The special organization of the commercial jurisdiction lasted from March 1850, following the approval of the Commercial Code, until the abolishment of the contentious jurisdiction of the Commercial Courts by Decree 2.342 in 1873. Subsequently, in October 1875, Decree 2.662 led to the complete abolition of the Commercial Courts. However, it wasn't until November 1876 that the allocation of responsibilities to the Commercial Boards was formalized (Decrees 6.834 and 6.835 dated November 30, 1876). See José Reinaldo de Lima Lopes, "A formação do direito comercial brasileiro. A criação dos Tribunais de Comércio do Império", *Cadernos Direito FGV* 4, no. 6 (2007): 1-80 (8).

[569] A similar complaint about the confusion between commercial and civil jurisdiction also among the Portuguese courts was made by the jurist José Homem Corrêa Telles: "*De estarem tão mal designadas*

Unanimity, to tell the truth, was absent even apropos the creation itself of a specialized commercial jurisdiction during the code's discussions in Parliament. At the proposal to organize commercial courts consisting of special chambers within the Courts of Appeals (*Tribunais da Relação*), in which professional judges and lay judges (deputies, representatives of the merchants) would sit together, with ordinary jurisdiction in some cases and appellate jurisdiction in others, some congressmen expressed strong opposition. Arguments of political-corporate or legal-constitutional nature (in defense of a modern and liberal state) were mobilized, ranging from fiscal objections (the bloating of the civil service)[570]; concern over the potential capture of the courts by the big merchant houses[571]; the risk of conflict between a commercial class largely composed of foreigners and a judiciary made up of Brazilians[572]; the unconstitutionality of admitting temporary magistrates who did not enjoy constitutional guarantees, elected by a class of citizens (the merchants), not appointed by the emperor or the other national political bodies[573]; and, not least, the difficulty of distinguishing commercial from civil matters.

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as causas da competência comercial resultam casos que se anula o processo na jurisdição civil por falta de competência, e depois apresentado na jurisdição comercial, se anula pelo mesmo motivo". See José Homem Corrêa Telles, *Formulario de Libellos e Petições Summarias á imitação do formulário de Gregorio Martins Caminha* (Rio de Janeiro: Typographia Universal de Laemmert, 1850): 45.

[570] "(…) *não convinha nas atuais circunstâncias criar juízes privativos de comércio em toda a extensão que talvez fora para desejar, porque esta criação, que devia estender-se a todo o império, ou pelo menos à maior parte dele, importava a criação de uma despesa que teria de exceder 100 contos de réis*" would warn the Senator José Clemente Pereira on May 27, 1848: *Anais do Senado do Império do Brasil: 1848,* t. 1 (Brasília. Senado Federal, 1978): 274.

[571] "A *eleição concedida aos commerciantes ha de apresentar em certas praças commerciaes do Brazil, onde existirem esses tribunaes, um mal, e vem a ser que duas ou tres casas commerciaes hão de compor o tribunal, conforme quizerem, de pessoas de suas creaturas*", argued the Deputy Silvio Ferraz on July 2, 1845: *Annaes do Parlamento Brazileiro. Camara dos Srs. Deputados. Segundo Anno da Sexta Legislatura. Segunda Sessão de 1845, colligidos por Antonio Henoch dos Reis,* t. II (Rio de Janeiro: Typographia de Hipollyto J. Pinto, 1881): 24.

[572] "*Acresce que em nosso país quase todo o comércio é estrangeiro; sujeitar a maior do comércio a juízes brasileiros, pode acarretar muitos inconvenientes",* argued Bernardo Pereira de Vasconcelos on August 21, 1848: *Anais do Senado do Império do Brasil: 1848,* t. 4 (Brasília. Senado Federal, 1978): 279.

[573] "*Temos pois juízes de direito que não estão na letra e espírito da constituição, que garante os empregos aos juízes de direito enquanto uma sentença os não condenar a perder esses lugares*": Ibid., 278. This issue, in particular, would return to the agenda of the Brazilian Lawyers Institute 15 years later, when José Thomaz Nabuco de Araujo, then president, commissioned his colleague Manoel de Oliveira Fausto on November 15, 1866 to write an opinion on the matter: "*Quanto aos tribunaes de commercio,*

The system that was ultimately drawn up in the Brazilian Commercial Code continued to assign the jurisdiction of first-instance mercantile disputes to municipal judges, the same responsible for civil cases. The combination of a special magistracy with ordinary justice, acting where the former could not reach within the vast territory was a solution also adopted by the French and Spanish codes[574]. Specialized judges of commerce (still professional magistrates) were appointed only in the most commercially important cities – "*comarcas especiais*" – and in the capitals of the provinces where there was a Court of Appeals (São Luis, Recife, Bahia and Corte). Only in Rio de Janeiro and in two of the Empire's other major ports, Bahia and Recife, were commercial courts created, composed in the Capital of a professional judge and six merchant deputies and in Bahia and Recife of a professional judge and four deputies[575]. Yet, all of them would exercise jurisdiction following the special rules of the Code and the specialized procedure established by the accompanying regulation,

qual a legitimidade dessa instituição em face do art. 153 da constituição? Inconvenientes dessa jurisdição especial por causa da dificuldade de se determinar a sua competência, de onde resultam frequentes questões de incompetência e grande número de processos anulados. Falta de pessoal habilitado para os cargos de deputados commerciaes". The jurist's opinion, published a year later in the Institute's journal, was also that these courts had no legitimate existence under the constitution, once again based on the argument that they were elected magistrates and not for life. See Manoel de Oliveira Fausto, "Ilegitimidade dos tribunaes do commercio, como tribunaes da segunda instancia," *RIOAB,* no. 1 (1867): 7-22.

[574] Carlos Petit observes the solution's seemingly incongruent yet reasonable nature, as it made the commercial specialty something purely material, not reliant on a singular jurisdiction responsible for hearing commercial cases. See *Historia del derecho mercantil,* 474. The use of foreign models, by the way, had been expressly ordered by the Minister of Justice when convening the commission responsible for drafting the Code. He determined the jurists in charge of the job to carry out the task "à *vista do que se acha disposto nos códigos, leis e decretos especiais das nações clássicas neste poderoso objeto*." When delivering its first draft, the commission admits to having drawn extensively on these sources: "*Fácil foi à comissão desempenhar a primeira parte dos seus deveres: para isso consultou os códigos mais conhecidos, especialmente o da França, o da Espanha e o de Portugal, assim como os escritores de direito comercial mais notáveis.*" See Waldemar Ferreira, "O centenário do Código Comercial do Brasil," *Revista da Faculdade de Direito da Universidade de Minas Gerais*, 2 (1950): 7-37 (14-15). Nonetheless, the copious amendments suffered by the commission's draft and the originality of many solutions adopted by the Brazilian Code prevent it to be considered a mere copy of foreign models. See Mariana Pargendler, "Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil," *The American Journal of Comparative Law* 60, no. 3 (2012): 805-850.

[575] See "Decreto n. 696 de 5 de novembro de 1850. Dá instrucções para a eleição dos deputados e suplentes dos Tribunaes do Commercio", printed in *CLIB (1850),* pt. II (Rio de Janeiro: Typographia Nacional, 1851): 131 ff.

designed "*ratione urgentiae et necessitatis*" [576] with summary and simplified trials to commercial causes: "all commercial cases must be processed briefly and summarily, on the basis of the known truth, without it being necessary to strictly observe all the ordinary forms prescribed for civil cases: it is only indispensable that the essential forms and terms be observed so that the parties can claim their rights and produce their evidence" (art. 22)[577].

More than the creation of a special jurisdiction, "peculiar to a certain class or those who come into contact with them"[578], with their own procedures and judges appointed according to different criteria, what caused the most concern, both before and after the approval of the statute, was the room it opened up for the expansion of this justice to matters or persons not immediately or necessarily involved in commercial activities. Without mentioning the "*actes de commerce*", as the French code[579]; or the "*actos de comercio*", as the Spanish[580] and Portuguese[581] ones, the

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[576] With this expression, Carlos Petit describes the grounds that had authorized the corporation of merchants already in the *Ancien Régime* to establish a special forum or separate justice "*con un proceso ágil y breve donde el conocimiento plenario de la causa fuese compatible con la rapidez exigida por la mercadería*". Whether as *ius mercatorum* first, or national law after, facilitating the flow of commercial exchanges continued to be the rationale behind simplified procedures. See Carlos Petit, "*§ 24 Jurisdicción contenciosa: el tribunal mercantil" in Petit, Historia del Derecho Mercantil, 128-132 (130).*

[577] See "Lei n. 556 – de 25 de Junho de 1850. Codigo Commercial do Imperio do Brazil" printed in *CLIB (1850)*, t. 1, 236-237.

[578] Waldemar Ferreira, *Tratado de Direito Comercial. Primeiro volume: o Estatuto Histórico e Dogmático do Direito Comercial* (São Paulo: Saraiva, 1960): 9.

[579] Responsible for inaugurating the objective criterion for defining the commercial jurisdiction – although without completely removing the reference to professional status – the French Code presented a list of what "*la loi répute actes de commerce*" (art. 18, titre II. *De la Compétence des Tribunaux de Commerce*). See *Code de Commerce,* tome premier (Paris: Firmin Didot, 1807): 158 ff.; Paolo Spada, "Il *Code de commerce* 1807 e la costituzione economica," in *Le matrici del diritto commerciale tra storia e tendenze evolutive. Atti del Convegno, Como, 18-19 Ottobre 2007,* edited by Serenella Rossi e Claudia Storti (Varese: Inusbria University Press, 2009): 33-38.

[580] The Spanish Code was in line with the French one by accepting a concept of commercial law as the law of commercial acts – equally occasionally accepting the subjective criterion –but in turn it did not present a catalog of acts. Nonetheless, it expressly made the jurisdiction of the commercial courts dependent on this concept, excluding from its scope "*las demandas intentadas por los comerciantes ni contra ellos sobre obligaciones ó derechos que no procedan de actos mercantiles*" (art. 1201). See *Código de Comercio, decretado, sancionado y promulgado en 30 de mayo de 1829* (Madrid: D. E. Aguado, 1829): 499; Petit, *Historia del derecho mercantil,* 472 ff. ("*§ 72. Actos de comercio y justicia mercantil*").

[581] The closest formulation to the Brazilian rule came from art. 1029 of the Portuguese code, which, however, expressly mentioned the acts of commerce alongside the generic phrase "causes arising out

delimitation of commercial causes in the Brazilian code was still very much linked to a subjective criterion: "all cases arising from rights and obligations subject to the provisions of the Commercial Code, *as long as one of the parties is a merchant,* will be deemed commercial"[582]. To this subjectivist definition, the Code also added three hypotheses – made into four with the November regulation[583] – to be "judged in accordance with the provisions of the Commercial Code, and by the same form of procedure *even if no merchant person intervenes*" (art. 19). Neither of these were acts of commerce, but one and the other represented, as in European codes, the defect that the rules of jurisdiction dictated the content of substantive law, and not the other way around.[584]

For the main objector of the commercial jurisdiction in the Senate, the leader of the Conservative party and spokesman of the farming industry, Senator Bernardo Pereira de Vasconcelos, the vagueness of this clause would open "the door to infinite cheating, to endless pleading."[585] Similar concerns were voiced in the Chamber of Deputies, where it was also warned of the risk "that the commercial courts will absorb all issues, because anything that touches on commercial matters, no matter how remote, the commercial courts can call upon."[586] But farmers indebted to the merchants of the major ports were not the only ones to fear a "colonization of private law" by the commercial branch. In the following decades, the pages of Brazilian legal journals or judicial proceedings were filled with protests at what was considered an

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of obligations governed by this code": "*São da competencia e privativa jurisdicção dos tribunaes ordinarios de commercio ou juizos commerciaes de primeira instancia todas as causas, que respeitam a acto de commercio, ou nascerem de obrigação, que tem legislação neste codigo*". See *Codigo Commercial Portuguez,* 150.

582 *CLIB (1850),* pt. I, 236.

583 They were: questions between private individuals about public debt titles; questions about companies and corporations; questions arising from rental contracts; questions about bills of exchange (art. 20). See "Decreto n. 737 de 25 de novembro de 1850. Determina a ordem do Juizo no processo Commercial", printed in *CLIB (1850),* pt. II, 271-371 (274-275).

584 Petit, *Historia del derecho mercantil,* 472. In Brazil, the definition of merchancy only appeared in article 19 of the Regulation on Commercial Procedure of November 25, 1850, but it was not present in the Code. See Ibid., 274.

585 *Anais do Senado do Império do Brasil: 1848,* 380.

586 *Annaes do Parlamento Brazileiro* (1845), 24.

"extremely irritating" trend, particularly in the sphere that holds the most significance for us here: conflicts stemming from labor relations. "Issues arising from rental contracts included in the provisions of Title X of the Commercial Code" were precisely one of the matters to be "judged in accordance with the provisions of the Commercial Code, and by the same form of procedure, even if no commercial person intervenes" (art. 19, III). Distinguishing it from civil rental of services, given its generic and coincidental definition, remained an unresolved – but laded with consequential implications – task in the following decades.

That's because the Code, in addition to dedicating a specific chapter to the commercial workers par excellence – foremen, clerks and bookkeepers, of which more will be said below – included a separate chapter on the "commercial rental of services" (Title X – "*Da locação mercantil*") with a definition that overlapped with the civil laws that already existed in the country. This coincidence was the result not only of the aforementioned fact that Brazil had already legislated on the rental of services before the Commercial Code was enacted but also of the legislator's deliberate choice to regulate commercial rental in a generic way[587]. This was not the case, for example, in the Portuguese Commercial Code, which in 1833 had also included a chapter on commercial rental, but had specified that "this code stipulates the rules on the rental of services of foremen, clerks, and other employees in commerce, who earn a price for the provision of work"[588].

In the Brazilian Commercial Code, in turn, the commercial rental was generically defined as "the contract by which one of the parties undertakes to give the other, for a certain period of time and at a certain price, the use of something, or of

[587] An odd choice, in fact, compared to the legislative technique of European codes, as pointed out by Ojeda Avilés, "Los códigos civiles y la exclusión del contrato de trabajo," 27: "*No hallamos em ningún Código de Comercio referencia alguna al contrato de trabajo, ni tampoco algo que pudiera aproximarse a uma regulación marco em donde insertarlo, del tipo del arrendamiento de servicios del Código Civil.*"

[588] "*Sobre a locação-condução d'obra ou trabalho, ficam dadas neste codigo as regras conducentes ácerca dos feitores, caixeiros, e mais empregados no commercio, que vencem um preço pela prestação d'um trabalho*" (Art. III – Tit. XI – "*Da locação-mercantil*"). See *Codigo Commercial Portuguez seguido de um appendice que contém a legislação que tem alterado alguns de seus artigos publicada ate ao fim do anno de 1878* (Coimbra: Imprensa da Universidade, 1879).

their labor"[589] in a totally separate chapter and more than 150 articles after the dispositions on the commercial workers, with no mention to them. There was no similar clarification that this kind of contract only concerned employees in commercial houses. In addition, the elements mentioned in the definition almost mirrored those implied by the 1830 law, which in turn regulated the "written contract by which a Brazilian, or foreigner inside or outside the Empire, undertakes to provide services for a fixed time, or for a specific work, with an advance in whole, or in part, of the contracted amount". In the following years, rivers of ink have been produced to distinct those spheres with practical consequences for workers' lives. The competent court determined which legislation workers and employers could resort to, what coercive mechanisms were at their disposal in the case of non-compliance, what types of just causes they could allege, what procedure their judicial action would follow, all conditions that strongly influenced the course and outcome of labor negotiations and disputes on the ground.

Not even the most famous civil law scholar in nineteenth-century Brazil, Augusto Teixeira de Freitas, had an immediate answer to this controversy. In the second edition of his work *Consolidação das leis Civis*, in the very first footnote of Chapter VIII – "*Locação de serviços*", he poses the question, without, however, offering an answer: "what is the civil rental of services, what is the commercial? A difficult question, which depends on detailed analysis"[590]. The author would only offer a solution to the question in the third edition of the work, after an intense debate with his peers in the law review *O Direito*. The journal, launched in 1873[591], dedicated privileged space to the issue in the doctrine section of its very inaugural issue, occupying the very first pages of its first volume with an article by lawyer Antonio

[589] *CLIB (1850),* pt. I, 96-97.

[590] Freitas, *Consolidação das Leis Civis* (1865), 354.

[591] For a monographic study on the creation of the journal, its founders and the main jurists who contributed to the enterprise, see Henrique Cesar Monteiro Barahona Ramos, *A Revista "O Direito": Periodismo jurídico e imprensa no final do Império do Brasil* (Master's dissertation, Universidade Federal Fluminense, 2009); for a contextualization of the journal in the broader picture of the Brazilian culture of legal journals in the nineteenth century, see Souza, *Periodismo jurídico oitocentista*, 84-99.

Joaquim Ribas, entitled "1º How does the commercial rental of services differ from the civil one? 2º By what laws is the civil rental of services governed?"[592].

Ribas dedicated his article to refuting the doctrinal trend that defined as commercial any and all rental of services that met the conditions of Article 226 – a fixed period of time and a fixed price – regardless of the service contracted. He considered necessary for applying commercial legislation the presence of a special element: the commercial nature of the relationship. Regarding commercial rental, this meant encompassing only the services necessary to carry out commercial operations (what the Code called auxiliary agents of commerce; workers employed in warehouses, offices and commercial establishments of any kind; craftsmen, employees in the manufacture of furniture, utensils or any work necessary for commercial traffic) and services relating to branches of manufacturing or factory industry. Excluded from this definition, for the jurist, would be craftsmen working on materials supplied by the consumers themselves; services relating to the agricultural industry; and domestic servants or workers not employed in commercial or manufacturing establishments.

The extension of the Commercial Code to cases lacking that distinctive commercial element, according to him, was unjustified. It would imply the revocation of the Law of September 13, 1830, when it was still currently applied in practice. Instead, he proposed that in the absence of a clear commercial nature, service rentals should be regarded as civil, and regulated by Law no. 108 of October 11, 1837 if the lessor was a foreigner and there was a written contract; and that of 1830 if the lessor was a national, with a written contract stipulating a fixed period of time and an advance on salary; and by the Ordinances of Book 4, titles 29 to 35, whenever the contract did

[592] Antonio Joaquim Ribas, "1º Em que a locação de serviços mercantil se distingue da civil? 2º Por que leis se rege a locação de serviços civil?" *O Direito. Revista de legislação, doutrina e jurisprudência* 1, no. 1-9 (1873): 3-7. A similar discussion had also been proposed at the Institute of Brazilian Lawyers by Thomaz Nabuco de Araujo, then President, on December 3, 1866, when he charged Antonio Gonçalves Barbosa da Cunha with drafting an opinion on the issue: "*Quando a locação é mercantil? Seu caracter e requisitos? Doutrina? Jurisprudencia?*". The result of the study, however, was never published in the journal. See *RIOAB* 7, no. 1 (1871): 150.

not meet the conditions of the laws mentioned (therefore covering all non-written contracts)[593].

Three years later, the same stage of the legal journal *O Direito* was given to Teixeira de Freitas, to support a contrary position, which he declared he would utter "only for the love of the truth (...) until the fates want it"[594]. The jurist opposed his colleague's opinion as he considered the requirement of a third "special element" for the application of commercial law to be an improper addition to the only two requirements established by the law – a fixed period of time and a fixed price. On the contrary, he considered that the commercial character of the contract was precisely the confluence, and nothing more, of these two elements, and that commercial legislation did not distinguish the nature of the services to qualify their rental, nor the quality of the people involved. The author did not see any problem with the 1830 law being considered repealed on this basis, even though it was still constantly enforced, as he did not consider it to be a "*noli me tangere*" or a sacred provision that the Code of Commerce could not virtually repeal[595]. To reinforce his position, he takes the floor again in the same journal in the following volume, answering the question: "What laws govern the civil rental of services?" In this second article, he is even more categorical: "even if the lessor is a foreigner, the rental of services is commercial, if it is agreed for a fixed period of time and with a fixed price (...)"; if the lessor is a national, whenever it was agreed under these two conditions, the rental of services would be commercial, "even if it is a written contract, even if it is for a specific work, even if there is an advance on the salary"[596].

Behind such a fierce defense of the extension of commercial jurisdiction could be a broader motivation of legislative policy: is what can be inferred from the final

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[593] Aureliano de Souza e Oliveira Coutinho corroborates the same opinion, in the next volume of the journal, in the aforementioned article dedicated to the same topic: Coutinho, "Locação de serviços civil," 300-305.

[594] Augusto Teixeira de Freitas, "Em que a locação de serviços mercantil se distingue da civil?," *O Direito. Revista mensal de legislação, doutrina e jurisprudência* 4, no. 9 (1876): 193-203 (193).

[595] Ibid., 202.

[596] Augusto Teixeira de Freitas, "Por que leis se rege a locação de serviços civil?" *O Direito. Revista mensal de legislação, doutrina e jurisprudência* 4, no. 9 (1876): 423-427 (426).

comment of Freitas' text, where he suggests to those dissatisfied with his conclusions that they recognize the artificiality of the "*actos de commercio*" and insert the Commercial Code within the Civil Code - his well-known banner of unification of private law that ended up costing him the failure of his codification project[597]. Until this happened, the rental of services would remain with its mercantile criterion – a fixed time and a fixed price – extending commercial jurisdiction to all types of services in which these two conditions were met. With this position, the Bahian jurist, who was not always accompanied by the majority opinion in the Empire[598], was not alone.

Declaring that he was aware of the controversy in the pages of *O Direito*, the commercialist Salustiano Orlando de Araújo Costa, the first Brazilian jurist to publish an annotated edition of the Commercial Code, adhered to Teixeira de Freitas' position, with the caveat that "this should not be taken to mean that the law of September 13, 1830, has been repealed"[599]. Admitting the existence - and validity - of this civil law, however, did not prevent him from opining that "in the absence of civil legislation on such an important subject, the code filled a gap with its provisions." As he saw it, "for a rental to be commercial, it is not necessary for the obligation to derive from a contract of a commercial nature (...). Art. 226 does not require it: according to it, and according to Art. 19 §3, only rentals of rustic or urban buildings are not commercial." Thus, if there is "a contract for the rental of services in which a fixed price and a fixed

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[597] In his draft of civil code – "*Esboço*" –, Freitas tried to advance the proposal to unify private law, going against the prevailing trend at the time, led by the French Napoleonic codifications, of separating commercial and civil matters into two separate codes. This position, at the time a counter-majoritarian one, was one of the main reasons for his project being abandoned by the Imperial Government, but his idea ended up anticipating the model that would be adopted by various codifications in the following decades, such as the Swiss Code of Obligations (1911), the Polish Code of Obligations (1933), the Italian Civil Code (1942) and the most recent Brazilian Civil Code (2002). Once again, I refer to Carvalho, "Teixeira de Freitas e a unificação do direito privado," 1-59.

[598] In the previous chapter of this dissertation, it was mentioned the controversy that led Teixeira de Freitas to resign from the Presidency of the Institute of Brazilian Lawyers in 1857. Faced with the opposition of his colleagues in the debate on the fate of *statuliberi*'s offspring, Freitas, then President of the association, simply resigned his position. For a synthesis of the episode, see Souza, *Periodismo jurídico oitocentista,* 218-219; and specially *"A desrazão do direito romano e a desventura de uma 'abelha trabalhadora*' in Pena, *Pajens da casa imperial*.

[599] Salustiano Orlando de Araujo Costa, *Codigo Commercial do Imperio do Brazil,* 3. ed. (Rio de Janeiro: Eduardo & Henrique Laemmert, 1878): 109.

time are agreed, the matter is subject to the special commercial jurisdiction". His considerations would also be reproduced by the lawyer Joaquim José Pereira da Silva Ramos[600] in his aforementioned monograph on contracts, and by Cândido Mendes de Almeida[601], when he updated the work of the best-known Brazilian commercial scholar, who died in 1835, the Viscount of Cairu[602].

Before all of them, however, and much more emphatically, the expansive affirmation of commercial jurisdiction came neither from doctrine nor from jurisprudence, but from the emperor's advisory body. The opinion that Teixeira de Freitas so ardently defended in the journal *O Direito* had already been expressed with determination by the Justice section of the Council of State, although he did not cite it, when confronted in 1859 with the query about "which is the law that regulates the rental of services of nationals"[603]. As an auxiliary advisory body to the emperor[604],

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[600] On the book's chapter dedicated to the rental contract, the author argues that "*para que a locação seja mercantil não é preciso que a obrigação derive do contracto com caracter mercantil, como em todos os contractos commerciaes em que essa condição é essencialmente exigida pelo Codigo. O art. 226 não requer.*" See Ramos, *Apontamentos juridicos: contractos,* 316.

[601] Glossing over the code's chapter on commercial rental, the work's updater opined: "*Essa matéria necessita de completo exame por não termos bem descriminados os limites da locação civil e comercial, não obstante haver para esse fim reclamado uma providencia o Ministro da Justiça no anno de 1865*": José da Silva Lisboa, *Principios de Direito Mercantil e Leis de Marinha divididos em sete tratados elementares, contendo a respectiva legislação pátria, e indicando as fontes originaes dos regulamentos maritmos das principaes praças da Europa. Sexta edição accrescentada com os opúsculos do mesmo author intitulados regras da praça e reflexões sobre o commercio dos seguros, além da legislação portuguesa anterior á independencia do Imperio e brasileira até a epocha presente, adicionadas a cada um dos tratados por Candido Mendes de Almeida,* t. II (Rio de Janeiro: Typographia Academia, 1874): 572.

[602] Born in Bahia (1756-1835) and a graduate of the University of Coimbra, he was famous in both Portugal and Brazil for this study of mercantile and admiralty law, the first treatise of its kind written in Portuguese (seven volumes published between 1806 and 1811). He is also considered to be the man responsible for convincing Dom João to sign the decree that opened Brazil's ports in 1808. Notes on his scholarship and political action on Swartz, "Codification in Latin America," 352 ff.

[603] "Resolução de 26 de Maio de 1860. Sobre qual seja a Lei que regule o contracto de locação de serviços de pessoas nacionaes," printed in José Prospero Jehovah da Silva Caroatá, *Imperiaes Resoluções tomadas sobre Consultas da Secção de Justiça do Conselho de Estado. Desde o anno de 1842, em que começou a funcionar o mesmo Conselho, até hoje, Colligidas em virtude de autorisação do Exm. Sr. Conselheiro Manoel Pinto de Souza Dantas, Ex-Ministro e Secretario de Estado dos Negocios da Justiça,* pt. I (Rio de Janeiro: B. L. Garnier, 1884): 876 ff.

[604] First established in Independent Brazil by Emperor Pedro I following the dissolution of the Constituent Assembly of 1823, this institution played a pivotal role in the formulation of the Constitution of 1824. However, it was later suspended by the Additional Act of 1834 as part of the

despite enjoying a great deal of political and legal prestige, the Council of State's decisions did not function as an "authentic interpretation of the law" (in other words, with binding effects for all cases), which explains why its pronouncement did not settle the controversy. Even so, it is worth looking at the arguments that led it to pronounce the commercial jurisdiction's primacy as the "official position of the government" on the matter.

The issue was raised upon the request of the Justice of the Peace of Ubatuba and the President of the Province of São Paulo, as they approached the Council seeking guidance on the legislation governing the rental of services by nationals and inquiring about the competent jurisdiction court to handle cases arising from such contracts. Throughout the Second Reign, judges and governors of provinces often turned to the Council of State seeking clarification on the application of decrees and laws in a legal system where the Supreme Court did not have the function of standardizing jurisprudence[605]. Between 1842 and 1889, the Justice Section of the Council of State received 185 queries from judges or other members of the judiciary and 192 queries from presidents of provinces and other administrators[606].

In the case that concerns us, before pronouncing its position, the Justice Section heard the opinion of the Ministry of Justice's Consultant, the jurist and literary scholar José Martiniano de Alencar, who replied categorically: "It is my opinion that

package of liberal reforms. Subsequently, in 1841, during the Second Reign and under the Conservative Cabinet, it was reinstated and continued its function until the advent of the Republic. Comprising 10 life-appointed councillors chosen by the emperor, this advisory body held significance in crucial matters and general measures of public administration. The Constitution, in Article 142, specified that the emperor should consult them "in all serious business and general measures of the public administration, as well as on all occasions when the Emperor proposes to exercise any of the attributions proper to the moderating power." For an in-depth exploration of this institution's role in Imperial Brazil, the most comprehensive historiographical study is José Reinaldo de Lima Lopes, *O Oráculo de Delfos. O Conselho de Estado no Brasil-Império* (São Paulo: Saraiva, 2010).

[605] The Supreme Court of Justice, created in 1828, examined cases in the form of *"recurso de revista*", consisting of a mere declaration of manifest nullity or notorious injustice, which did not, however, replace the decision a quo, but merely referred the case back to one of the Empire's appellate courts. For a collective study on this institution's role within the judicial structure of Brazil Imperial and its restricted function as a standardizing court of jurisprudence, see José Reinaldo de Lima Lopes (ed.), *O Supremo Tribunal de Justiça do Império* (São Paulo: Editora Saraiva, 2010).

[606] José Reinaldo de Lima Lopes, "Consultas da Seção de Justiça do Conselho de Estado (1842-1889): A formação da cultura jurídica brasileira," *Almanack braziliense,* no. 5 (2007): 4-36.

our mercantile legislation currently regulates the contract for the rental of services."[607] The only exception, for him, would be foreign workers, subject to the regime of the 1837 law, "a child of the special circumstances of the country, demanded by colonization." On the other hand, all rentals of services involving Brazilians should be judged per the provisions of the Commercial Code. The author of the opinion, most remembered today for his literary works[608], justified this conclusion by arguing that given the gap in Brazilian civil law on the rental contract and the imperfection of the Law of September 13, 1830 to regulate it, the legislator had opted to regulate this contract through the Commercial Code, thus comprehending it within commercial law. Not even the contracts of domestic workers, in his opinion, would escape this conclusion, although he considered that they should also be an exception, as they would fall better within the scope of the administrative police. However, since this branch had not yet been organized in Brazil, the only exception remained foreigners. For Brazilians, whatever their profession, he concluded that "the Commercial Code should govern the contract for the rental of services. And the competent jurisdiction is the commercial one, with a legitimate arbitration court"[609].

The next to be heard was the Crown Prosecutor, expressing reservations about his colleague's expansive interpretation of the Commercial Code. Nevertheless, he lent his support to the conclusion, contending that "it echoed the prevailing opinion within jurisprudence on the specific matter at hand."[610] Despite showing his lack of conviction, as he recognized that such a position would go so far as to cover even the contracts of servants, he considered its adoption prudent so as not to contradict the practice already accepted while the Legislature did not rule on the matter.

After hearing these two jurists, the Justice Section of the Council of State, composed of the Viscount of Uruguay, the Viscount of Maraguape and Eusébio de

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[607] Caroatá, *Imperiaes Resoluções tomadas sobre Consultas da Secção de Justiça do Conselho de Estado*, 876.
[608] Idem.
[609] Idem.
[610] Ibid., 877.

Queiroz, opted to adopt the opinion, with the caveat that it considered it inappropriate to define as commercial the contract by which a bricklayer, for example, was obliged to provide his services in a farming establishment. Even so, they also felt it was better not to "go against the established practice" until a law had been passed to regulate the matter fully and in accordance with the different nature of the services that could be the subject of a contract. With this conclusion, the Council officially answered, and received the emperor's "as it seems" on May 26, 1860, to the question of what legislation was in force to regulate the services performed by Brazilian workers, explicitly pointing to the Empire's Commercial Code.

More than an "established practice", it was a highly contentious one. For some, all this jurisprudence proved to be "extremely irritating". Carlos Frederico Marques Perdigão – soon-to-be a defendant in a collection action invoked by the commercial court[611] – more than once used the stage of his journal *Gazeta Juridica. Revista Semanal de Jurisprudencia, Doutrina e Legislação* to protest against what he considered an improper generalization of a special jurisdiction. Reporting a ruling by the Court of Appeals of Rio de Janeiro, which held that the civil court lacked jurisdiction to settle a dispute arising from a work contract for the construction of a house, the journal's editor posed a thought-provoking question: "Is Civil Law so deficient that it lacks a single provision regulating building contracts, one that would remove non-trader contractors, engaged in acts entirely unrelated to commerce, from their natural legal forum?" The brief note continued, "Every era has its distinctive trends, and in our

[611] Sued in the commercial court of Rio de Janeiro to pay a debt for the purchase of printing presses with which to publish the journal, the editor, defendant and also lawyer, publishes the exception of incompetence he filed and the decision in the case. At first instance, the court rejected his claims, considering the printers to be commercial companies. The decision was reversed by the Court of Appeal, which ruled that the commercial court had no jurisdiction in the case. See Carlos Frederico Marques Perdigão, "Typographia. Jurisdição Comercial. O redactor de uma publicação essencialmente jurídica e para a qual adquirir os materiais necessários, não está sujeito á jurisdição commercial," *Gazeta Juridica. Revista Semanal de Jurisprudencia, Doutrina e Legislação* 3, no. 8 (1875): 440-447.

current age, the prevailing inclination seems to be the commercialization of everything—we find ourselves being commercialized by force!"[612]

A few months later, the same criticism was declared apropos of a ruling by the Rio de Janeiro Commercial Court concerning the wage suit of an engineer hired to supervise the construction of a textile factory. Disagreeing that such a cause was ruled in a commercial court, the editorial once again advised readers "not to categorize any labor contract as commercial." Sustaining it has been a persistent and serious error to extend commercial jurisdiction—naturally limited in scope—to cases lacking a distinctive commercial element, the editorial emphasized that it wasn't sufficient for "one of the parties to be a merchant"; there needed to be genuinely commercial acts involved. According to his perspective, contracting for constructing and operating a cotton fabric factory did not inherently constitute a commercial act for at least one of the parties. Likewise, he believed that the code's provisions were not applicable "between non-professional traders, even for actions that constitute acts of commerce, because the quality of the individuals involved must align with the nature of the act." He concluded offering a "protest against that prevailing absolute theory, which indiscriminately brings all work contracts under the domain of commercial law."[613] Even those who subscribed to an expansive interpretation of the Commercial Code's concept of commercial rental, when faced with the growing confusion in the courts, concurred with that opinion. Despite advocating for a broader understanding of commercial rental, the earlier mentioned commercial law scholar Salustiano Orlando de Araujo Costa expressed his alignment to the *Gazeta*'s editor, noting "The illustrious editorial board of this journal describes all this jurisprudence as extremely irritating and, unfortunately, with good reason. The tribunals do not consider a certain uniformity, with which they would recommend themselves to general respect."[614]

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[612] Carlos Frederico Marques Perdigão, "Locação mercantil – Empreitada," *Gazeta Juridica. Revista Semanal de Jurisprudencia, Doutrina e Legislação* 4, no. 11 (1876): 138-141.

[613] Carlos Frederico Marques Perdigão, "Locação mercantil. – Competencia do Juizo Commercial para contracto de Fabrica de Tecidos," *Gazeta Juridica. Revista Semanal de Jurisprudencia, Doutrina e* Legislação 5, no. 14 (1877): 99-107 (99).

[614] Araujo Costa, *Codigo Commercial do Imperio do Brazil,* 110.

The controversy indeed persisted within the country's courts, as neither the doctrinal debates nor the statements from the Council of State had managed to quell the clash of divergent opinions. This enduring discord resulted in contradictory outcomes and gave rise to ambiguous consequences. If this was true for the hiring of works ("*empreitadas*"), to which a portion of historiography has inaccurately confined the scope of commercial jurisdiction[615] and to which the Commercial Code devoted the main articles of the commercial rental chapter[616], even more so for wage workers. For a specific class of laborers, this controversy began to pop up in the Empire's journals even before the Code was enacted, in tune with debates already raging in foreign jurisprudence: workers and artists employed in public spectacles.

In 1844, within the recently launched *Gazeta dos Tribunaes*, considered the first legal journal in Brazil, an article raised the query: "Do the directors and artists of public spectacles enjoy the exceptional forum of commerce? [617]" The author noted that in France, despite the French Code classifying public spectacles as commercial activities, a heated debate ensued over whether all matters stemming from public spectacles should be deliberated and adjudicated before commercial courts. The author expressed the opinion that granting "both entrepreneurs and the artists they hire

[615] This is what Monica Dantas and Vivia Costa suggest, stating that "*as especificações presentes em tais artigos, no entanto, dão a entender que, nos casos de locação de trabalho (e não de coisas), o código compreendia unicamente os serviços por empreitada, nos quais o contrato era firmado entre empreiteiro e locador, excluindo-se os operários de semelhante transação contratual e não se conformando, portanto, quaisquer vínculos de trabalho assalariado com os mesmos*" (Monica Duarte Dantas and Vivian Chieregati Costa, "O 'pomposo nome de liberdade do cidadão': tentativas de arregimentação e coerção da mão-de-obra livre no Império do Brasil," *Estudos Avançados* 30, no. 87 (2016): 29-48 (37)) and Henrique Espada, according to which "*o código comercial, em seu artigo 226, no caso do trabalho, era da empreitada e não propriamente do trabalho assalariado que a lei tratava*" (Espada Lima, "Trabalho e lei para os libertos na ilha de Santa Catarina no século XIX," 149). Both authors seem to infer this misguided conclusion from the fact that the chapter on commercial rental mostly contains provisions on hiring of works ("*empreitadas*"). However, the generic definition presented in the first article – "to give his work for a certain time and a certain price" - also included wage workers, equally brought under commercial jurisdiction in the following years.

[616] Out of the twenty articles in the chapter on *locação mercantil* in the Brazilian Commercial Code, 14 were dedicated to the hiring of specific works ("*empreitadas*"). See *Collecção das Leis do Imperio do Brazil de 1850: Parte Primeira,* 96-99.

[617] João de Sousa dos Santos Ferreira, "Competencia de foro. Os directores e artistas dos espectaculos publicos, gozam entre nós do foro excepcional do comercio?", *Gazeta dos Tribunais: dos juizos e factos judiciaes, do foro, e da jurisprudencia* 2, no. 183 (1844): 1-3.

access to the jurisdiction of commerce is characteristic of the spirit of that light-hearted, voluble, and leisurely nation." Instead, "amongst nations known for their seriousness and sobriety, more inclined towards contemplation than sensuality, the inclusion—not just of a stage comedian, but even of a clown from a troupe of acrobats or a jester from a company of farceurs—into the esteemed community of merchants would be considered scandalous." He deemed it a "prostitution that contradicts the reason for the same privileges given to commerce, manufacturing industry, as sources of this wealth" to extend them to public spectacles, "which are the drainers of wealth".

The commercial regulation of 1850 would slightly alter this picture by categorically declaring public spectacles as merchandise (art. 19, § 3) [618]. Despite this unequivocal classification, the controversy endured. The *Gazeta Juridica* documents a first-instance decision in which the commercial nature of an artistic labor relationship was denied. In February 1872 the gymnastics and equestrian artist Agostinha Emilia Luiza Porreti brought a wage suit against her employer Guarda Velha Circus in the city of Rio de Janeiro. Sued in the civil court, the defendant argues that the court lacked jurisdiction, sustaining such a wage claim should have been brought before the commercial court. The author then seeks to preserve the suit, asserting that "the acknowledgment of public entertainment companies as commercial entities does not grant their owners the privilege to litigate all matters related to purely civil contracts and agreements exclusively in commercial court. While a public entertainment company operates in commerce, designating its proprietor as a merchant, individuals such as ushers of theatres or circuses, actors, musicians, and other similar artists have never been recognized as merchants, let alone auxiliary agents of commerce." [619] The judge at first instance ruled in her favor, stating that "since artists and other employees of theatres cannot be considered merchants, even though businessmen of public spectacles are considered such, the competent court for the matter in question is the

[618] *CLIB (1850),* pt. II, 274.

[619] Carlos Frederico Marques Perdigão and Alvaro Caminha Tavares da Silva, "Competencia do fôro commercial. Excepção de nullidade. Autorização á mulher para litigar," *Gazeta Juridica. Revista Semanal de Doutrina, Jurisprudencia e Legislação* 2, no. 79 (1874): 378-385 (380).

civil court." The decision, however, didn't last long. The Court of Appeals of Rio de Janeiro, to which the defendant appealed, reversed the ruling, considered that "as a contract for the provision of artistic services for a commercial company, it is unquestionable that it falls within the commercial jurisdiction (...). If the contract concerns an object of commerce, which is the company of public spectacles; if one of the parties is a merchant, as is the defendant in his capacity as entrepreneur of the Guarda-Velha Equestrian Circus, and if the time and price of the services are fixed by the nature and purpose of those same services, the true commercial rental, the issues arising from that contract, are subject to the commercial court under the terms of art. 19, par. 3, of the Commercial Code."[620]

Workers involved in public spectacles wouldn't be the only ones facing opposition to their wage claims on the same grounds. Other employers used their merchant status as a pretext to invoke commercial jurisdiction and defer the resolution of a wage suit. After working for eight months in Antonio de Magalhães' restaurant – "*casa de pasto*" – without receiving any wages, the cook Joaquim de Sousa Santos also suffered a similar delay attempt when he sued his employer in Rio de Janeiro's civil court in 1877. To preserve his suit, the petitioner argued that he had worked "neither as a depositary, nor a bookkeeper, nor a foreman, nor a clerk, nor a trappist, nor a warehouse manager for the defendant, nor a guarantor, but a cook's assistant and a cook, not being entitled to the privileges that commercial law authorizes for those, because being a law of exception, it cannot extend beyond what is stated in it." [621] The defendant insists that "it does not matter that the claimant was not a clerk or bookkeeper, because this favor extends to all employees or agents of commercial establishments." This time, however, the Court of Appeal did not accept the employer's argument and considered the civil court to be competent to hear the case, since "only

[620] Ibid., 388.

[621] Processo número 2419, fundo Relação do Rio de Janeiro – 84, código de referência 84.0.ACI.06397, apelante Joaquim da Silva Santos, apelado Antônio de Magalhães, ano inicial 1877, ano final 1879, caixa 147, gal. C, ANRJ: 20.

the employees of commercial houses, whose titles are registered in accordance with article 74 of the Commercial Code, have the privilege of the commercial court."[622]

Even though this was a procedural prerogative to postpone the claim most often invoked by employers, who alluded to commercial jurisdiction as a "favor" or "privilege" of merchants, to assume that commercial jurisdiction was convenient only for employers oversimplifies the nineteenth-century itinerary of defining legal categories of labor. The opportunity of any normative provision, as has already been pointed out with regard to the expansive uses of the law on the rental of services of colonists, is rarely univocal and mobilized by a single pole of the employment relationship.

Nicolau Barcelo, having worked as a baker at José Alcaver's bakery in Rua do Conde, n. 38, Rio de Janeiro, sued his employer before the 3rd Commercial Court in 1853, seeking to use the Commercial Code's summary procedure for wage actions. He had resigned from the defendant's service to work "in another house that offered him more advantages", but when he went to settle his accounts with the defendant, the latter did not want to pay him more than R$25,000 as salary for each of the 8 months and 25 days that he had worked in his bakery. Claiming to have a verbal contract stipulating a salary of R$40,000, and not agreeing with the sums he was offered, Nicolau received no money. He then went to the commercial court asking for what he estimated to be his unpaid wages of 204$000 *réis*[623].

The summary action, which could be resolved orally in a single hearing, could indeed be convenient for a worker who wanted to receive his wages as soon as possible. However, his employer quickly contended that he had no right to exercise this prerogative. Arguing that Nicolau was not his clerk, but an oven operator in his bakery, the defendant claimed he was not entitled to a summary action under the terms of article 236 of Regulation 737 of 1850. Under this regulation, would be

[622] Ibid., 22.

[623] Processo número 7076, fundo Relação do Rio de Janeiro – 84, código de referência 84.0.ACI.01143, apelante José Alcover, apelado Nicolau Barcelo, ano inicial 1853, ano final 1853, maço 147, gal. 2, ANRJ: 20

summary in the commercial court small claims or claims not exceeding 200$000 (the amount exceeded by Nicolau's claim); claims relating to the adjustment and dismissal of the individual in the crew; and claims for the payment of wages of foremen, bookkeepers and salesclerks, the commercial workers par excellence. Since the plaintiff was a baker, he did not fall into any of these categories, and the suit could not be processed as a summary action before that court.

Nicolau's strategy was even successful at first instance, where the defendant's argument was rejected, and he was ordered to pay back wages and court fees. However, dissatisfied with the result, he filed an appeal insisting on the argument that Regulation 737 of 1850 did not determine the competence of the commercial summary action for all cases involving wages, but only for wages owed to foremen, bookkeepers and salesclerks. He suggested that the "noble judge seems to have paid attention only to the word wages without noticing that this word is subordinate to the others that follow it, foremen, bookkeepers and salesclerks, which strictly limit his intelligence. A commercial summary action can be brought for any wages that are not due to the persons expressly mentioned in the aforementioned article only when their amount is less than 200$000 *réis*."[624]. To be considered a "foreman, bookkeeper and clerk", in turn, the employee had to be registered before the Commercial Court "under penalty of being deprived of the favors granted by this Code to those of their class" (art. 74 of the Commercial Code). This argument seemed to convince the Court of Appeal, which laconically ruled that "the appellee lacks standing to sue since he did not legally prove the quality for which he was entitled to bring the summary action".

The brevity of the decision, consisting of only two lines, makes it unclear whether the Court deemed it impossible to parallel a baker to a commercial clerk or if formal registration with the Commercial Court was a prerequisite for being classified as a commercial clerk. However, endorsing the latter notion would contradict a previous 1857 ruling by the same court, wherein it affirmed that "Employees of trading

[624] Ibid., 33.

houses, even without written appointments and court registration, have the right to pursue wage claims in the commercial court." [625]

The crucial point is that those termed "assistants to commerce" – *auxiliares do comércio* or *Handlungesgehilfen* in German doctrine[626] – were indeed subject to a distinct labor framework. Foremen, bookkeepers, and salesclerks, acting not as pure renters of services but also as merchants' representatives[627], were subject to a special labor regime. While this included, on the one hand, the obligation to register a written appointment with the Commercial Court (art. 74), it also provided them with special guarantees that were absent in civil law, such as the protection of wages in the event of unforeseen or inculpated accidents at work (art. 79)[628].

Thus, it is not surprising that it might also be in the interest of workers who did not act as commercial assistants to have their employment relationship equated to them or processed in the commercial jurisdiction according to its summary procedures. After all, compared to civil law, not all commercial law provisions were disadvantageous for workers. Notably, in contrast to the 1830 law, the Commercial Code allowed for the validation of commercial contracts not only through written form (public or private deed) but also through witnesses[629], so that the lack of a written

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[625] See "Assento VII. – Codigo do Commercio, arts. 75, 79 e outros" in *Correio Official de Minas,* no. 74 (1857): 2-3: "*O guarda-livros, como preposto de casa de commercio póde demandar os seus salários no juízo commercial, ainda que não tenha nomeação escripta e inscripta no tribunal do commercio respectivo, pois nem tal nomeação é sempre precisa para obrigar ao preponente, nem pela falta de inscripção que só o priva dos favores outorgados pelos arts. 79, 80, 81, 876 e outros do mesmo código, fica desaforado do juízo commercial, que não é proteção no sentido do art. 15 do dito regulamento n. 737; a jurisdição neste caso nasce do ato e da pessoa do preposto (regulamento n. 737 art. 10), porque a causa deriva de obrigações sujeitas ao código e ele é agente auxiliar do comercio e como tal comerciante em relação as operações que na sua qualidade lhe respeita*".

[626] Werner Ogris, "Geschichte des Arbeitsrechts vom Mittelalter bis in das 19. Jahrhundert. Ein Überblick,"in *Elemente europäischer Rechtskultur. Rechtshistorische Aufsätze aus den Jahren 1961-2003,* edited by Thomas Olechowski (Böhlau: Wien, 2003): 575-611 (589-591).

[627] Merchants were "*responsaveis pelos atos dos feitores, guarda-livros, caixeiros e outros quaiquer prepostos praticados dentro das suas casas de comercio*" (art. 75). See *CLIB (1850),* pt. I, 74.

[628] "*Os acidentes imprevistos e inculpados, que impedirem aos prepostos o exercício de suas funções, não interromperão o vencimento do seu salário, contanto que a inabilitação não exceda a 3 (três) meses contínuos*". See Ibid., 73.

[629] According to art. 122: "*os contratos commerciaes podem provar-se: I. por escrituras publicas; II. Por escriptos particulares; pelas notas dos corretores, e por certidões extrahidas dos seus protocolos; IV. Por correspondencia epistolar; V. pelos livros dos commerciantes; VI. Por testemunhas*". See Ibid., 80.

contract did not, in principle, make the contract claim unfeasible[630]. Moreover, the Code required that "owners of businesses in any kind of commerce", maintained "uniform order in accounting and bookkeeping, and have books for these necessary purposes"[631]. This provision accentuated the formalization of labor arrangements, to the extent that it was expected that wages and money paid and owed would be registered in the accounting books. As Fabiana Popinigs and Henrique Espada Lima observe, "the Commercial Code had the effect of reinforcing the contractual character of labor relations in wholesale and retail stores, favoring formalized relations to the detriment of the informal and sometimes familial arrangements that were so common both in domestic labor and in the relationships between bosses and their apprentices in commercial establishments"[632].

More importantly, the Commercial Code did not provide for heavy fines or imprisonment in case of a breach of contract, either in the chapter on commercial rental or in the special provisions relating to commercial employees, the hallmark instead of civil legislation. The only possibility of imprisonment for a contract breach was the case of seamen registered as crew members, whose rules did not apply to other workers. The legal regime for seafarers, in fact, was the most detailed[633] and severe among all the commercial workers: a special attention, as Ojeda Áviles notes, compensated by the captain's rigid disciplinary rights[634]. On the one hand, there were details absent from any other labor legislation, such as the obligation to pay for burial in the event of death during the trip (art. 561). On the other, crew members were prohibited of bringing claims against the ship or captain before the voyage was over, even if they were mistreated or lacked sustenance, and they had to wait until the ship

[630] In 1869, the Supreme Court of Justice ruled that the lack of a written contract did not preclude an action for wages in the commercial courts. See Carlos Frederico Marques Perdigão, "Pagamento de soldadas – Acção competente," *Gazeta Juridica. Revista Semanal de Doutrina, Jurisprudencia e Legislação* 1, no. 27-95 (1873): 495-496.

[631] *CLIB (1850),* pt. I, 59-60.

[632] Espada Lima and Popinigis, "Maids, Clerks, and the Shifting Landscape of Labor Relations in Rio de Janeiro, 1830s- 1880s," 63.

[633] An entire title, with 22 articles, of the commercial code was dedicated to the "adjustment and wages of officers and crew, their rights and obligations" (arts. 543-565). Ibid., 157-162.

[634] Ojeda Avilés, *Las cien almas del contrato de trabajo*, 436. See Ibid, "*Contrato de embarque*", 646-677.

was in good port to sue for the termination of the contract (art. 557). If they abandoned the voyage before it had begun or left before it had ended, they were also the only ones to be "compelled by imprisonment to fulfill the contract, to pay back what they had been paid in advance and to serve a month without receiving wages." (art. 546)[635]. Another exception – Pothier lamented as early as 1765 – to the principle "*nemo cogi potest ad factum; & que l'inéxécution de son obligation ne donne lieu qu'à des dommages & intérêts*"[636], which would not find a place into any of the post-revolutionary European Commercial Codes, but which was accommodated in Brazilian legislation, both civil and commercial, under the guise of a not so confined "specialty".

[635] Many of these provisions were already included in the Decree n. 447, of May 19, 1846, which established port captaincies in the coastal provinces of the Brazilian Empire and created a new bureaucratic and administrative apparatus for the seafolk enrollment, being only repeated in the commercial code. On the legal regulation of maritime labor in Brazil, see Diego Schibelisnki, *Trabalhadores de um mar sem fim: a capitania dos portos e a experiência laboral de marítimos, pescadores e construtores navais: Santa Catarina, c- 1840- c.1870* (Master's dissertation, Universidade Federal de Santa Catarina, 2020).

[636] Joseph Robert Pothier, *Supplement au Traité du Contrat de Louage ou Traité des Contrats de Louage Maritimes* (Paris: J. Rouzeau-Montaut, 1765): 171. See also Alain Cottereau, "Droit et bon droit. Un droit des ouvriers instauré, puis évincé par le droit du travail (France, XIX^{e} siècle)," *Annales HSS*, no. 6 (2002): 1521-1557 (1534).

§2. **Person, then worker: discourses and disputes on the law of slave labor**

While a renewed emphasis on the 'property paradigm' in defining and examining slavery might still be useful today in framing internationally punishable actions[637], within historical analysis, it operates an inverse – perhaps even perverse – effect of invisibilization and misapprehension of the object of study. Portraying the legal relationship between master and slave exclusively as an ownership bond is what lastingly discouraged labor law scholars from considering the period in which slavery endured under the realm of law as a timeframe worthy of studying. As its protagonists constituted in principle only "objects" of property, but not "subjects" to be properly considered "laborers", the legal problems arising from this relationship have long been investigated – and explained – as a matter unrelated to the law of labor but exclusively pertinent to the law of things. If epistemologically this is a limiting conception, its untenability becomes even more evident when we observe its lack of support in historical sources: enslaved people's lack of legal personality was not an absolute condition in ancient legal texts – just think of Buckland's classical treatise on *The Roman Law of Slavery*, which contains two chapters on "The Slave as *Res*" followed by six on "The Slave as Man"[638] – let alone in nineteenth-century's legal culture.

From a survey of the nine most quoted textbooks – Brazilian and Portuguese alike – in Brazilian freedom suits during the Empire, Mariana Armond Dias Paes points out how Augusto Teixeira de Freitas was the exception among a *communis opinio* that considered that slaves had lost their state of freedom but were still persons from a

[637] The definition included in the 1926 Slavery Convention of the League of Nations has become canonical in slavery studies, as it is set out in Article 1(1): "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". On its relevance in international court judgments and historiographical research, see Jean Allain, "Introduction" in *The Legal Understanding of Slavery. From the Historical to the Contemporary,* edited by Jean Allain (Oxford: Oxford University Press, 2012): 1-5.

[638] Buckland, Wiliam Warwick, *The Roman Law of Slavery. The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1908).

legal point of view[639]. The first jurist commissioned with the never finished task of drawing up a civil code in Brazil was the only one to argue emphatically, even if he contradicted himself several times over the years, that "slaves, as articles of property, should be considered things"[640]. As a result, his remarks regarding slavery were largely confined to a footnote within the chapter on property of his *Consolidação das Leis Civis*[641]. Conversely, Portuguese civil law scholars such as José Homem Correa Telles, writing in 1835, addressed the issue within the law of persons, affirming the legal personality of enslaved people[642]. His compatriot, Manuel Borges Carneiro, writing a few years earlier, in 1826, went so far as to declare that: "a person is a man considered in his rights, whatever his age, sex or condition. Children and slaves are therefore true

[639] Mariana Armond Dias Paes, "'Eu vos acompanharei em vosso vôo, contanto que não subais muito alto': as escolhas de Teixeira de Freitas sobre o direito da escravidão," *Anais Eletrônicos do XXVIII Simpósio Nacional de História* (2015): 1-16 (3); Dias Paes, *Escravidão e direito,* 29-47.

[640] Augusto Teixeira de Freitas, *Consolidação das Leis Civis*, 3. ed. (Rio de Janeiro: Typographia Universal de Laemmert, 1876): 35. In 1860, in the Introduction to his Draft Civil Code, he states that "*Sabe-se que neste Projeto prescindo da escravidão dos negros, reservada para um projeto especial de lei; mas não se creia que terei de considerar os escravos como coisas. Por muitas que sejam as restrições, ainda lhes fica aptidão para adquirir direitos; e tanto basta para que sejam pessoas*". Augusto Teixeira de Freitas, *Código civil: Esboço* (Rio de Janeiro: Ministério da Justiça e Negócios Interiores, Serviço de documentação, 1952): 24.

[641] In the first edition of his compilatory work, the *Consolidação das Leis Civis*, published in 1857, the author makes a clear choice not to mention slavery, as he considered to address such a topic would "tain civil law with shameful provisions", promising that "*as Leis concernentes à escravidão (que não são muitas) serão pois classificadas á parte e formarão o nosso Código Negro*". Freitas, *Consolidação das Leis Civis* (1857)*,* 11. The revising commission in charge of approving the work disagrees with the author's position, pointing out in his opinion of January 4, 1858 that "although [provisions on slavery] should be a special law for political and public order reasons, it was still convenient to know the defective state of the legislation in this respect". See "Relatório da Commissão incumbida de rever a Consolidação das Leis Civis" in Freitas, *Consolidação das Leis Civis* (1865): 6-11. Confronted with the commission's exigencies, the solution he found in the second edition was to address the topic in footnotes, to avoid changing the main text and at the same time to give notice of existing laws regarding slavery. Brazilian historiography has called it "Black Code at the margins" ("*Código negro de rodapé*"). See Eduardo Spiller Pena, *Pajens da casa imperial. Jurisconsultos, escravidão e a lei de 1871* (Campinas: Editoria UNICAMP, 2001): 71. His comments were then substantially concentrated in a note to the first article of Title II – *Das cousas* – art. 42.

[642] In the *Digesto portuguez* by José Homem Corrêa Telles, the regulation of slavery was included in the title on servants ("*Dos criados*"), an appendix to Book II: "*Dos direitos e obrigações das pessoas de uma família*". Even as an appendix, and therefore a separate section, slaves were covered in the book on the rights and obligations of the "persons of a family". See Telles, *Digesto Portuguez,* t. II (1835), 219.

persons"[643]. For the Brazilian Antonio Ribas, slavery "did not, therefore, entirely depersonalize the slave, nor could he be, since his incapacity was subject to restrictions"[644]. Already in 1866, he stated: "we are a long way from the times when slaves were equated with things and subject to the full discretion of their owners."[645] In both doctrinal and legislative texts, whether in the Luso-Brazilian law of the old regime or in the law of slavery shaped in the century of liberalism[646], the incapacity of the slave would only be stated piecemeal but never in an absolute way, with restrictions for some specific aspects of civil life[647], a condition that over time "our laws have greatly softened"[648].

In light of this insight, recent but ever more vigorous historiography has shed light on the nuances of the legal status of enslaved subjects and the array of civil faculties that – despite their bondage condition and multiple legal constraints – they have acknowledged by the legal order. Both in the colonial period but even more so in the Imperial era, this has included forming a family, baptizing, and marrying[649], but also with ever-growing state recognition, enduring customary practices such as the

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[643] "*Pessoa é o homem considerado em seus direitos, qualquer que seja a sua idade sexo condição. Os filhos famílias e os escravos são pois verdadeiras pessoas*". See Manuel Borges Carneiro, *Direito Civil de Portugal contendo três livros. I. Das pessoas. II. Das cousas. III. Das obrigações* (Lisboa: Impressão Regia, 1826): 65.

[644] Antonio Joaquim Ribas, *Curso de Direito Civil Brasileiro.* 2. ed. t. II (Rio de Janeiro: B. L. Garnier, 1880): 50-51.

[645] Antonio Joaquim Ribas, *Direito administrativo brasileiro* (Rio de Janeiro: F. L. Pinto & C., 1866): 378.

[646] Pedro Cantisano e Mariana Armond Dias Paes mostram como se passou de uma teoria dos estados para a capacidade civil de fato e de direito Cantisano and Dias Paes, "Legal Reasoning in a Slave Society (Brazil, 1860-188)," 471-510.

[647] Margarida Seixas, *Pessoa e trabalho no Direito português (1750-1878): escravo, liberto e serviçal* (Lisboa: AAFDL, 2016): 87.

[648] Loureiro, *Instituições de direito civil brasileiro*, t. I (1857), 5.

[649] At the beginning of the 18th century, the first compilation of rules of canon and ecclesiastical law in Brazil, the First Constitutions of the Archbishopric of Bahia (1807), recognized the divine and human right of male and female slaves to marry captive or free people, without their masters being able to prevent them. For the extensive historiography on the slave family and marriage, see Hebe Mattos, *Das cores do silêncio. Os significados da Liberdade no sudeste escravista – Brasil, século XIX,* 3. ed. (Campinas: Editora da Unicamp, 2013): 65-83; Adriana Pereira Campos and Patrícia M. da Silva Merlo, "Sob a benção da Igreja: o casamento de escravos na legislação brasileira," *Topoi* 6, no. 11 (2005): 327-361; Seixas, *Pessoa e Trabalho no Direito Português (1750-1878),* 90-94; Robert Slenes, *Na senzala, uma flor: esperanças e recordações na formação da família escrava (Brasil, Sudeste, século XIX)* (Campinas: Editora da Unicamp, 2011): 72-73; Dias Paes, *Escravidão e direito*, 103-147.

right to own property[650], to inherit[651], to make contracts[652], to sue and be sued in the civil courts[653].

However, legal aspects regarding their condition as workers still deserve to be more thoroughly explored to highlight the nuances that Portuguese-Brazilian law gave to the dominical faculty of use of "the slave's capacity to work in an absolute

[650] In rural areas or urban centers, slaves carried out paid economic activities that allowed them to accumulate goods and money, with which they frequently could even buy their freedom. What had been an abundantly documented customary right since the colonial period, from 1871 onwards became a legally recognized prerogative, but still subordinate to the master's will: "*É permittido ao escravo a formação de um peculio com o que lhe provier de doações, legados e heranças, e com o que, por consentimento do senhor, obtiver do seu trabalho e economias*" (art. 4º). For allusions to slave savings in travelers' accounts from the colonial period and its ever-more widespread practice in the imperial period, see Manolo Florentino, "De escravos, forros e fujões no Rio de Janeiro imperial," *Revista USP*, no. 58 (2003): 104-115.

[651] While there was an express rule in Portuguese-Brazilian law forbidding slaves to testify in wills (OF, book 4, tit. 81), there was no explicit impediment to the right to receive goods. Based on this "loophole", despite negative precedent decisions, and contradictory opinions in the doctrine (Dias Paes, *Escravidão e direito,* 187-192), the Court of Appeals of Rio de Janeiro acknowledged, and the Supreme Court confirmed, in 1876 the right to inheritance of a slave recognized by his free father. See "*Reconhecimento do filho escravo pelo pae livre – escravo tem direito á herança. 1o A Lei de 2 de Setembro de 1847, respeitando o direito dos filhos naturaes ás heranças paternas, direito consagrado na Ord. do Liv. 4º, Tit. 92, equiparou os filhos dos nobres aos dos plebeus, para poderem herdar dos paes, restringindo a prova do reconhecimento paterno á escriptura publica ou ao testamento. 2º Como consequencia, o pae livre que reconhece em testamento ao escravo por seu filho, usa do direito, si o filho é natural e não pertence á ordem dos que canonicamente não podem gozar desse beneficio. 3º E, posto que o filho seja escravo ao tempo do fallecimento de seu pae, nem por isso é inhabil para adquirir; porque, pela Lei, e pelo Direito escripto, não pertence o escravo á classe dos excluído. 4º Testar, sim, é que não póde o escravo, que o prohibe a Ord. do Liv. 4º, Tit. 81, §4º, e o que é mui diverso da faculdade de adquirir; e toda a faculdade tem sempre interpretação restricta. 5º E si as disposições de ultima vontade, além disso, tem força de Lei, o escravo, ainda que posteriormente promova a sua liberdade, tem direito incontroverso á herança paterna*" in *Gazeta Juridica. Revista Semanal de Doutrina, Jurisprudencia e Legislação* 4, no. 13 (1876): 549-557.

[652] Alongside trading practices involving payment for work, buying, and selling goods and products, enslaved individuals in nineteenth-century Brazil were allowed by statute as clients of banking institutions and insurance companies, engaging in deposit and insurance contracts. See Keila Grinberg, "A poupança: alternativas para a compra da alforria no Brasil (2ª metade do século XIX)," *Revista de Indias* 71, no. 251 (2011): 137-158; Dias Paes, *Escravidão e direito,* 166-187.

[653] The historiography that has drawn on freedom suits in Brazil is now vast, so it is sufficient to reference just a few of the major publications that have shaped the field. For both the colonial period and post-Independence nineteenth-century, see Fernanda Domingos Pinheiro, *Em defesa da liberdade. Libertos, coartados e livres de cor nos tribunais do Antigo Regime português (Mariana e Lisboa, 1720-1819)* (Belo Horizonte: Fino Traço, 2018); Sidney Chalhoub, *Visões da liberdade: uma história das últimas décadas da escravidão na corte* (São Paulo: Companhia das Letras, 1990); Keila Grinberg, *Liberata: a lei da ambiguidade. As ações de liberdade da Corte de Apelação do Rio de Janeiro no século XIX* (Rio de Janeiro: Centro Edelstein de Pesquisas Sociais, 2008); Elciene Azevedo, *O direito dos escravos: lutas jurídicas e abolicionismo na província de São Paulo* (Campinas: Editora da Unicamp, 2010); Mattos, *Das cores do silêncio* (1ª ed. 1993); Dias Paes, *Escravidão e direito,* 55-112.

manner[654]." It was precisely the limitation on the possibility of extracting labor that was one of the clearest pieces of evidence that the legal relationship between master and slave was not an absolute dominical bond. Without minimizing an inch of the authoritarian, asymmetrical, and violent aspect of this relationship, but considering it as the beginning rather than the conclusion of the analysis[655], we must not lose sight of the fact that the legal order limited the exercise of the rights of ownership by masters. Their relationship with enslaved people was permeated by acts of exchange and negotiation involving the provision of services. While this has been an argument already strongly developed by the social historiography of labor for decades now[656], what I propose here is to look more specifically at the legal relevance – and the problems that arose from it – of the limits the legal order established to the masters' dominical power over the slave's labor and the daily acts of negotiation around the provision of services as two defining moments of the master-slave relationship's nature.

"Our ancient and modern laws have formally denied masters the right of life and death over slaves" – asserted Perdigão Malheiro in 1866, in the most complete monograph on the law of slavery published in nineteenth-century Brazil, "and only give them the power to punish them moderately, like parents to their children, and teachers to their disciples. If the punishment is not moderate, there is an excess which

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[654] Once again, a declination of the aforementioned definition of slavery by the 1926 Slavery Convention. This time, it came from a clarification of a Report by the Secretary-General of the United Nations in 1953, designed to guide the interpretation of the meaning of the expression "power attaching to the right of ownership". Among other principles, it described those powers as the master's faculty to use "the individual of servile status, and in particular his capacity to work, *in an absolute manner*, without any restriction other than that which might be expressly provided by law"; and the consequence that "the products of the labour of the individual of service status become the property of the master without any compensation commensurate to the value of the labor". See United Nations, *Slavery, the slave trade, and other forms of servitude: report / submitted by the Secretary-General pursuant to resolution 388 (XIII) of the Economic and Social Council, of 10 September 1951* (Geneva: UN, 27 January 1953).

[655] In Sidney Chalhoub's lucid remark: "*a constatação da violência na escravidão é um ponto de partida importante, mas a crença de que essa constatação é tudo o que importa saber e comprovar sobre o assunto acabou gerando seus próprios mitos e imobilismos na produção historiográfica*". See Chalhoub, *Visões da liberdade,* 36.

[656] A historiographical overview of this production is accurately offered by Jean M. Hébrard, "Slavery in Brazil: Brazilian Scholars in the Key Interpretive Debates," *Translating the Americas* 1 (2013): 47-95.

the law punishes, as if the offender were not a slave; and with good reason" [657]. In fact, as early as the first century of colonization, the Portuguese crown had already issued decrees—such as the one dated January 26, 1599—that allowed slaves to file complaints and compelled owners convicted of inflicting excessive punishments to sell them[658]. Later, on July 20, 1642, King João IV directed the governor of Rio de Janeiro to enforce the sale of slaves by their masters to those offering better conditions if it was found that the slaves were being unduly punished[659]. A few years later, a Royal Letter of March 20, 1688, condemned the abuses of masters in the treatment of their slaves, stating that they could only be given "that moderate punishment which is permitted by law". "Wishing to prevent the poor slaves from perishing", the statute determined that the masters who mistreated their slaves "be obliged to sell them to people who treat them well" and that denunciations of such behavior be considered even when they come from "the same slaves who were punished."[660] Although protests from the masters and slave revolts made the king of Portugal retreat in the following year, alleging "the inconveniences that the execution [of this charter] caused to the

[657] Malheiro, *A Escravidão no Brasil,* 7.

[658] The letter was edited based on complaints about the mistreatment of enslaved people in the city of Goa, in the state of India, but was framed as a measure against acts of cruelty that offended the law of the crown: "*querendo prover de remédio* (...) *e se castigarem os delinquentes como por direito merecem* (...) *mando a todas as justiças do dito Estado que, sendo informados que algumas pessoas tratam os ditos escravos com crueldade rigorosa, intolerável, ou os matam de fome ou lhes fazem injúrias insofríveis e vergonhosas, e queixando-se os ditos escravos disso e achando-se ser assim, constranjam aos senhores deles a os vender a pessoas que os tratem bem, como devem, com condição que não torne nunca mais a[o] poder dos ditos senhores. E o conhecimento que tomarem as ditas justiças neste caso será sumário e breve; e entretanto que a verdade judicialmente se julgar, os ditos escravos serão tirados do poder de seus senhores, à custa dos quais se lhe darão alimentos até se determinar finalmente se devem ser constrangidos a vendê-los ou não*". See Silvia Hunold Lara, "Legislação sobre escravos africanos na América Portuguesa", in *Tres grandes cuestiones de la historia de Iberoamérica,* edited by José Andrés-Gállego (Madrid: Fundación Ignacio Larramendi-Mapfre, 2000): 167.

[659] Idem: "*Ordena ao governador do Rio de Janeiro que constando-lhe se dessem desumanos castigos aos escravos, obrigasse aos senhores a vendê-los com favoráveis condições, mas esta determinação não chegou a ser executada*".

[660] Ibid., 198. Those were years, it should be noted, of great awareness about slave uprisings, particularly the protected conflict in Palmares, the largest community of escaped slaves ("*quilombo*") in colonial Brazil. To put these measures into context, see Waldomiro Lourenço da Silva Júnior, *História, Direito e Escravidão. A Legislação Escravista no Antigo Regime Ibero-Americano* (São Paulo: Annablume, 2013): 148-151.

conservation of the State"[661], similar measures would still be taken in the following decades, albeit with less emphasis[662].

After independence, Brazil's liberal criminal code of 1830 also reaffirmed this prohibition, admitting the master's punishment of slaves as long as it was moderate and not contrary to the laws in force, in the same way as that of parents over their children, and of masters over their disciples[663]. Although by law mistreatment was not a cause for expropriation, at least since 1852, an Emperor's Resolution provided that

«if there are reasons to suspect that the masters of the slaves in question are willing to abuse the right conferred on them by the Laws to punish them moderately, intending to commit a crime, Your Excellency must order the Chief of Police of this province to oblige them to sign a security agreement; and at the same time recommend to the said Chief of Police the greatest zeal and vigilance in its observance and faithful execution; and that if, in spite of this, the masters violate the term, practicing violence against the slaves, thus incurring the established penalties, these should be imposed on them; in addition, the fact of the violence will give the slaves the right to bring against the masters the action that is theirs, in order to force them to sell them». [664]

Nor could the master "demand criminal, illicit or immoral acts from the slave"[665], would point out Malheiro still in 1866, and the "abandonment of the slave because he was old or invalid (...) implied freedom; with the loss to the master of the rights of patron" [666].

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[661] The Royal Letter just quoted in the previous note was revoked by another from February 23, 1689, in front of the "*inconvenientes que de sua execução resultavam ao meu serviço e à conservação desse* Estado (...) *para se que se evitem as perturbações que entre eles [escravos] e seus senhores já começam a haver, com a notícia que tiveram das ordens que se nos haviam passado.*" See Lara, "Legislação sobre escravos africanos na América Portuguesa," 201.

[662] In a Letter dated February 7, 1698, King Pedro II, informed that some masters used to attach iron rings to certain parts of their bodies in order to punish their slaves more rigorously, instructed the governor of the captaincy of Rio de Janeiro to investigate the observance of this practice with "prudence and caution", and, "*achando que assim é, o façais evitar pelos meios que vos parecerem mais prudentes e eficazes, procurando que estes não causem alvoroço nos donos e que se consiga o fim que se pretende sem ruído ou alteração dos mesmos escravos*". See Ibid., 211.

[663] Art. 14 stated: "*Será o crime justificável, e não terá lugar a punição delle: (...) 6º Quando o mal consistir no castigo moderado, que os pais derem a seus filhos, os senhores a seus escravos, e os mestres a seus discipulos; ou desse castigo resultar, uma vez que a qualidade delle, não seja contraria ás Leis em vigor*". See "Lei de 16 de dezembro de 1830. Manda executar o Codigo Criminal," in *Collecção das Leis do Imperio do Brazil de 1830: Parte Primeira,* 144-145.

[664] See "N. 263. – Aviso de 25 de Novembro de 1852. *Ao Presidente da Provincia do Rio Grande do Sul, declarando o modo por que se deve proceder a respeito dos escravos que depuserem em Juizo contra seus senhores"* in *CDIB,* t. XV (Rio de Janeiro: Typographia Nacional, 1852): 267-268.

[665] Malheiro, *A Escravidão no Brasil*, 67.

[666] Ibid., 119.

In the pre-modern legal order that penetrated independent Brazil, many of these provisions were, in fact, the product of the Christian morality that always shaped the law of slavery in the Americas[667] and a consequence of the insertion of slaves into the broad concept of family in the legal order of the *Ancien Régime*[668]. Under this logic, since the early colonial period, limits were set on the extraction of labor from slaves, and they were provided with safeguards as workers that went beyond the prohibition of mistreatment. It was certainly not comparable to the French possessions in the Antilles, where the *Code Noir, ou Recueil d'Édits, Declarations et Arrets, Concernant les Esclaves Négres de l'Amérique* promulgated in 1685 by Louis XIV[669] went as far as

[667] The eighteenth-century was especially fertile in the publications of theologians trying to adapt slavery to moral, theological and legal values capable of making it fully licit and legitimate, correcting the errors and abuses resulting from its practice. The most quoted in Brazil are the Portuguese priest Manoel Ribeiro Rocha, *Ethiope resgatado, empenhado, sustentado, corregido, instruido, e libertado. Discurso theologico-juridico em que se propoem o modo de comerciar, haver, e possuir validamente, quanto a hum, e outro foro, os Pretos cativos Africanos, e as principaes obrigações, que correm a quem delles se servir,* (Lisboa: Na Officina Patriarcal de Francisco Luiz Ameno, 1758); and the italian Jorge Benci de Armino, *Economia christaã dos Senhores no Governo dos Escravos deduzida das palavras do Capitulo trinta e tres do Ecclesiastico: Panis & disciplina & opus servo. Reduzida a quatro Discursos Morais* (Roma: Officina de Antonio de Rossi, 1705). The historiography is vast, so it suffices to mention: Ronaldo Vainfas, *Ideologia e escravidão: os letrados e a sociedade escravista ano Brasil colonial* (Petrópolis: Vozes, 1986); Rafael de Bivar Marquese, *Feitores do corpo, missionários da mente: história das idéias da administração de escravos nas Américas, séc. XVII-XIX* (São Paulo: Companhia das Letras, 2004); Rafael de Bivar Marquese and Fábio Duarte Joly, "Panis, disciplina, et opus servo: the Jesuit ideology in Portuguese America and Greco-Roman ideas of slavery," in *Slave Systems: Ancient and Modern,* edited by Enrico Dal Lago and Constantina Katsari (Cambridge: Cambridge University Press, 2008): 214-230.

[668] The counterface of the legal ideology of paternalism, and its "insistence upon mutual obligations – duties, responsibilities, and ultimately even rights", as Eugene Genevose observes, was that it "implicitly recognized the slave's humanity." See Eugene D. Genevose, *Roll, Jordan, Roll. The World the Slaves Made* (New York, Pantheon Books, 1972: 5.

[669] The corpus is a complex and articulated set of 60 articles regulating all practical aspects of the life of slaves in the colonies (distributed in seven titles named Religion, Police, Nourishment, Status and Incapacity, Crimes and Punishment, Seizures and Slaves as Movables, and Emancipation). Its deeply racialized language, already discernible from the title, called a "*Code Noir*" and not a merely "*Code de l'Esclavage",* runs through the whole text, where the term "*nègre*" is used as a synonym for the word "*slave*". Known for its draconian penalties and its particular focus on questions of public order and security, the application of this code was not limited to the Antillean possessions but was also "transplanted" to other French domains in Africa (Mascarene Islands) and in North America (Louisiana). See Ariela J. Gross, "Legal Transplants: Slavery and the Civil Law in Louisiana," *University of Southern California Law School's Legal Studies Work Paper Series,* 32 (2009): 1-35; and also, Marco Fioravanti, *Il pregiudizio del colore. Diritto e giustizia nelle Antille francesi durante la Restaurazione* (Roma: Carocci, 2012).

forbidding the French subjects "to make their slaves work Sundays and holidays" and obliging masters to furnish specific amounts of food (art. XXII), cloth (art. XXV), without being able to "unburden themselves of the food and subsistence of their slaves by permitting them to work a certain day of the week for own ends" (art. XXIV) and under the threat of being prosecuted "for the cries and barbarous and inhumane treatments of masters towards their slaves" (art. XXVI)[670]. Although distant from the French model, and even from the neighboring Spain, interfering much less incisively in the masters' domestic sovereignty[671], the Portuguese crown also issued recommendations and prohibitions to its subjects regarding the "treatment" [672] of slaves dating back to the first centuries of colonial rule. Sustenance, health, and physical integrity were matters of concern by measures that addressed the legal relationship between master and slave not simply as the bond between owner and object, but at least as a relationship between master and servant.

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[670] Consulted in the edition *Code Noir, ou Recueil d'Édits, Declarations et Arrets, Concernant les Esclaves Négres de l'Amérique avec Un Recueil de Réglemens, concernant la police des Iles Françoises de l´Amérique & les Engagés* (Paris: Libraires Associez, 1768).

[671] In a comparative legal-historical study between the Portuguese and Spanish colonial politics of slavery, Waldomiro da Silva Jr. observes that legislative intervention to prevent excessive punishment and ill-treatment was the most dissonant area in the slave legislation of the Iberian states. Unlike the Portuguese, both at local and metropolitan legislative level, the Spanish crown issued a series of provisions to restrict excessive punishment and mistreatment of slaves, and to ensure that they were provided with adequate living conditions. See Silva Jr., *História, Direito e Escravidão*, 151. Alejandro de la Fuente, looking at the Cuban context, Alejandro de la Fuente describes the procedures known as "*pedir papeles*" (asking for paper), a kind of license to be sold requested by slaves from the authorities on the grounds of mistreatment, whether it was excessive punishment or a shortage of food, with which they were allowed to look for a new master. Eventually, this practice evolved into coartación, enabling slaves not just to change masters but also to secure their own freedom. See Alejandro De La Fuente, "Slaves and the Creation of Legal Rights in Cuba: *Coartación* and *Papel,*" *HAHR* 87, no. 4 (2007): 659-92.

[672] Eugene Genovese points out the importance of defining the meaning of the word "treatment" in comparative studies and offers three basic denotations for the term. Although comparison is beyond the scope of this study, its definition is also useful here. They are: (i) day-to-day living conditions (regarding measurable items such as quantity and quality of food, clothing, housing, length of the working day, and the general conditions of labor); (ii) conditions of life (family security, opportunities of an independent social and religious life and cultural developments); (iii) access to freedom and citizenship. Within the argument of this chapter, I mean the first sense. See Eugene D. Genovese, "The Treatment of Slaves in Different Countries: Problems in the Applications of the Comparative Method," in *Slavery in the New World. A Reader in Comparative History,* edited by Laura Foner and Eugene D. Genevose (Englewood Cliffs: Prentice-Hall, 1969): 202-210 (203).

The first instruction in this regard in Portuguese America is the Royal Letter of December 2, 1682, which recommended the major provider of the Treasury of the State of Brazil that when slaves were sick, they should be treated with "all care" so that they would not die for "lack of medicines"[673]. Royal Letter of January 31, 1701, ordered the governor of Brazil to oblige mills' owners to give the slaves "the necessary sustenance" or "one day a week so that they may earn it with their industry"," according to the masters' choice. The justification: "according to human and divine law, just as slaves are obliged to serve their masters, so are they obliged to give them the necessary sustenance so that they do not die [...]"[674]. Faced with the difficulty that the governor of Pernambuco had expressed in forcing the masters of the mills and plantations of that province to support their slaves with what was necessary, Royal Letter of July 24, 1704, ordered the governor to find out what was "necessary for the slaves' sustenance", with which they could "get by comfortably", then calling in the mill owners and agreeing on what they should give the slaves, both for "their cover at night" and for "their sustenance during the day", determining that those who failed to comply would be punished with penalties appropriate to their guilt[675]. Always because "so was prescribed by Christian reason and piety", the provision of April 17, 1720, addressed to the governor of Brazil, also ordered him to oblige the owners to support the slaves unable to serve and, when they failed to do so, to arbitrate to the slaves the amount "necessary to live comfortably at the expense of the goods and farms" of their masters.[676]

Having the Portuguese slave enterprise started at the beginning of the modern era, with administrative institutions and legal order still operating in the most typical logic of the *Ancien Régime*, it would be a huge mistake to look for slave law simply by

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[673] Lara, "Legislação sobre escravos africanos na América Portuguesa", 190.

[674] "*Conforme o direito humano e divino, assim como os escravos são obrigados a servirem a seus senhores, também esses têm obrigação de lhe darem o necessário para que não morram; me pareceu ordenar-vos obrigueis aos senhores de engenho que ou dêem aos seus escravos o sustento necessário, ou lhes dêem um dia na semana para o poderem com a sua indústria granjear o que desta alternativa escolherem os ditos senhores de engenhos. Escrita em Lisboa a 31 de janeiro de 1701. Rei*". Ibid, 215-216.

[675] Ibid., 224.

[676] Ibid., 259.

looking at legal statutes or governmental provisions. Custom was at least a co-equal form of law-making throughout the era of *ius commune*, playing a central regulatory role even in matters already subject to statutory regulation. When it comes to slavery, whose initial basis rested more on the force of practice and theological debates and only later were regulated by statutes that often merely consecrated established usages, it is even truer. The few existing provisions that provided the legal framework for the enslavement of Africans had been originally written to contemplate the relationship between the Portuguese and the Moors at the time of the Reconquest. Originally established with the *Ordenações Afonsinas,* issued in 1446 by King Afonso II, and later with the *Ordenações Manuelinas*, updated by King Manuel I in 1512, the main provisions related to Moorish captives were contained in Book II, dedicated to ecclesiastical goods and privileges (as well as royal rights and the prerogatives of the nobility). Enslaved black Africans began to be mentioned with the *Ordenações Filipinas* in 1603, and after the occupation of the Americas had been well consolidated, moving from the field of religion to the books related to commerce and criminal law[677]. Despite these changes, statutory rules would avoid dealing "specifically with the ownership and dominion over slaves"[678]. Slave autonomy and leisure were restricted, and offenses

[677] Unlike the previous two *Ordenações,* the Philippine Ordinance moved addressed African slavery in Book IV, concerning substantive civil law, and Book V, related to criminal law and procedure. Thus, the legislation related to slavery, from being subordinated to the field of religion, would be integrated to the fields related to commerce and criminal law. For Silvia Lara, this change results from the specific form of domination and exploitation inaugurated with the colonization process of the New World. In her words, "slave, from the colonization of overseas lands, refers to a reality objectively distinct from that which covers the Moorish captive or the metropolitan servant". See Silvia Hunold Lara, "Do *mouro cativo* ao escravo *negro*: continuidade ou ruptura?" *Anais do Museu Paulista,* 81 (1980): 375-398 (386).

[678] Lara, 'Legislação sobre escravos africanos na América Portuguesa', 38. The existing norms stipulated the nullity of the sale of slaves with diseases or lameness (OF, Book IV, Title 17: "*Quando os compram escravos, ou bestas, os poderão enjeitar por doenças ou manqueiras*"); regulated the revocation of manumission (Book IV, Title 63: "*Das doações e alforria, que se podem revogar por causa de ingratidão*"); prohibited enslaved of making a will (Book IV, Title 81: "*Das pessoas a que não é permitido fazer testamento*") or act as witnesses (Book IV, Title 85: "*Dos que não podem ser testemunhas em testamentos*"); the return of fugitives (Book V, Title 62: "*Da pena que haveram os que acham escravos, aves, ou outras coisas e as não entragam a seus donos nem as apregoam*"); and penalties to those who helped them (Book V, Title 63: "*Dos que dão ajuda aos escravos cativos para fugirem ou os encobrem*"); obligation of baptism (Book V, Title 99: "*Que os que tiverem escravos de Guiné os batizem*"); and the control over the trade with Africa (Book V, Title 106: "*Que coisas do trato da India e Mina, e Guiné se*

against masters were punished[679], but it did not go further in determining the limits of the relationship on both sides, avoiding greater legislative interventions.

As legal statutes were not the most dynamic vehicle of legal change in premodern legal order, they contained only a fraction of the "law" that regards us here. For working conditions in particular, the limits of the master-slave relationship were also, or above all, set through daily individual and collective negotiations, resistance, and mobilizations by enslaved subjects. They only eventually reached the courts of justice, but even without judicial validation, they shaped behaviors, set limits, and altered the labor relationship during slavery itself or under the obligation of performing compulsory labor. The manifestations of preferences and disputes relating to the labor relationship, in fact, did not necessarily and exclusively involve a claim for freedom. Sometimes it was simply a matter of changing the conditions of service by showing predilections regarding the employer or the place of work.

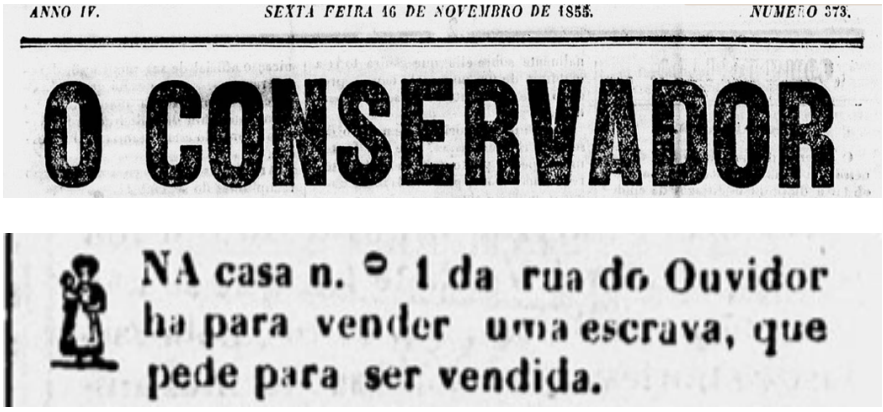
One of the preferred moments for this kind of manifestation was precisely during the purchase and sale transactions, one of the powers attaching to the right of ownership, for which any consent from the enslaved worker was theoretically dispensed. Whether by demonstrating their unwillingness to serve a former master or a new buyer or asking actively to be sold, the "objects" of slave affairs were not infrequently able to have a say in the choice of their new employer or even to influence the outcome of a deal already concluded and perfectly valid. And they did so already from the moment of the notice of sale. From north to south of Brazil, it is possible to find newspaper ads[680] with "slave preferences" literally expressed, as those published in the provinces of Santa Catarina and Ceará in the 1850s. On November 16, 1855, the

não poderão ter, nem tratar delas" and 107: "*Dos que que sem licença do Rei vão, ou mandam à India, Mina, Guiné; e dos que indo com licença não guardam seus Regimentos"*.). See Almeida, *Codigo Philippino,* t. 4, 798-799; 863-867; 908-911; 919-920; t. 5, 1212; 1247; 1252-1259.

[679] OF, Book V, Title 41: "*Do escravo, ou filho, que arrancar arma contra seu senhor, ou pai*"; Book V, Title 70: *"Que os escravos não vivam por si e os Negros não façam bailos em Lisboa*". See Almeida, *Codigo Philippino,* t. 5, 1190-1192; 1218.

[680] For a comprehensive survey, see Rafael da Cunha Scheffer, "Transações desejadas: anúncios de vendas de cativos e os diversos sentidos dessas negociações, Brasil, 1850-1888," *Revista Tempos Históricos* 25, 2 (2021): 99-128.

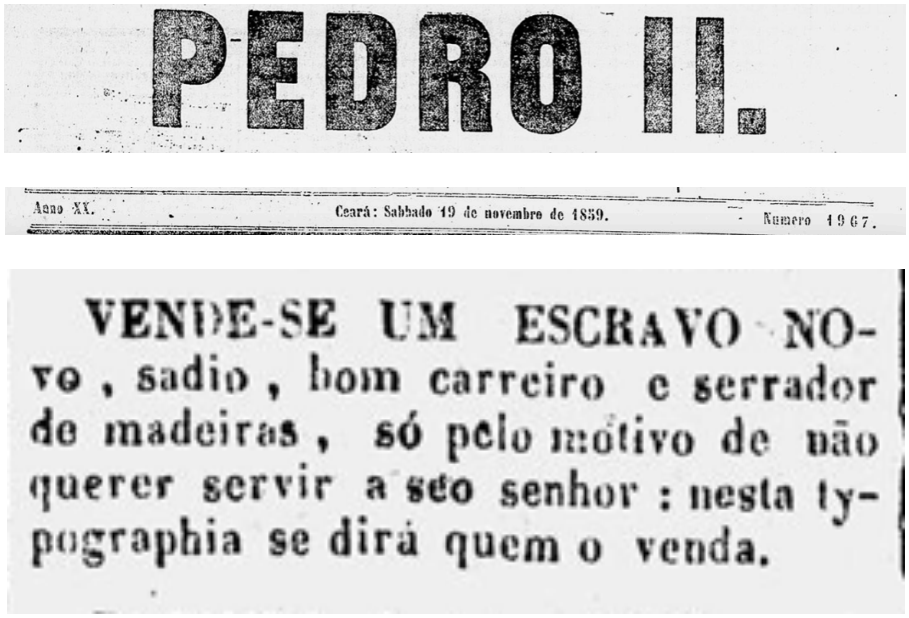
newspaper *O Conservador* announces that in house no. 1 on Ouvidor Street, in the center of the island of Desterro, there was a "female slave for sale, who is asking to be sold". A few years later, at the other extreme of the country, in the capital of the province of Ceará, the newspaper *Pedro II* announced the sale of a "new slave, healthy, good carter, and wood sawyer, just for the reason of not wanting to serve his master". [681]


ANNO IV. SEXTA FEIRA 16 DE NOVEMBRO DE 1855. NUMERO 373.

O CONSERVADOR

NA casa n. º 1 da rua do Ouvidor ha para vender uma escrava, que pede para ser vendida.

Source: *O Conservador (SC),* 4, 373 (1855): 4


PEDRO II.

Anno XX. Ceará: Sabbado 19 de novembro de 1859. Numero 1967.

VENDE-SE UM ESCRAVO NOVO, sadio, bom carreiro e serrador de madeiras, só pelo motivo de não querer servir a seo senhor: nesta typographia se dirá quem o venda.

Source: *Pedro II (CE),* 20, 1967 (1859): 4.

The moment that epitomized their status as a "property object," a transferable commodity, was precisely when they seized the opportunity to voice their rejection of

[681] For a comprehensive survey, see Rafael da Cunha Scheffer, "Transações desejadas: anúncios de vendas de cativos e os diversos sentidos dessas negociações, Brasil, 1850-1888," *Revista Tempos Históricos* 25, 2 (2021): 99-128.

the rules of captivity and their preferences regarding how and whom they wished to work for. Even without putting an end to the condition of enslavement, and only by demonstrating their unwillingness to serve, enslaved workers expressed their desire to have a new employer and eventually had it acknowledged. At times, this strategy involved escaping[682], yet in other instances, the worker could articulate his preferences without quitting his duties, remaining in the workplace, and still seeing enforced the choices made "of his will". In 1875, in the Orphans' Court of the Municipality of Campinas, northwestern of the São Paulo province, Dona Francisca Soares de Camargo, owner of the slave Ignácio, registers a petition requesting the court to sell him, because this slave "has the vice of getting drunk and thus performs the service badly, and has no desire in serving the supplicant, so much that he asked her to be sold and for this he has already chosen a master of his will. As the petitioner cannot dispose of him without the license of the Judge of Orphans, asks for authorization".[683]

Conversely, when the sale was completed, the resistance of enslaved individuals had the value to invalidate it, underscoring the necessity of obtaining the enslaved worker's consent. On January 3, 1880, Francisco José da Costa Lima sold his 32-year-old black domestic slave Amelia to Madame Clemence Bournier for 1,500$000 réis. A little over three months later, the buyer filed a lawsuit to annul the sale, claiming that the slave had "the vice of running away, which makes her useless for domestic service, which is continuous, and a slave given to such a vice is no good for it"[684]. The author relates that only three days after the purchase, the said slave ran away from her house, for no plausible reason, and forced her to promote her capture, at great expense, and it was only after 2 months and 2 days that she was captured. Madame

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[682] Mattos, *Das cores do silêncio,* 158; Chalhoub, *Visões da liberdade,* 56 ff.; João José Reis and Eduardo Silva, *Negociação e conflito. A resistência negra no Brasil escravista* (São Paulo: Companhia das Letras, 1989): 62-78.

[683] Arquivo Central do Poder Judiciário de Campinas, Maço de Alvarás 1840-1899, Cartório do Terceiro Ofícil Civil, retrieved by Robert W. Slenes, Robert, "Escravos, cartórios e desburocratização: o que Rui Barbosa não queimou será destruído agora?" *RBH* 5, no. 10 (1985): 166-196 (176).

[684] Processo número 5209, fundo Relação do Rio de Janeiro – 84, código de referência 84.0.ACI.07499, apelante Francisco José da Costa, apelado Clemence Bournier, ano inicial 1880, ano final 1884, caixa 258, gal. C, ANRJ, fl. 3.

Clemence claimed that she would never have made the purchase "if she had known that the slave was addicted to the habit of running away"[685]. He further claimed that the slave Amelia, "with this vice, is not worth half the price that the respondent sold her for, and neither does the plaintiff want her for any price, because she won't be able to serve"[686]. And that the sale of a "slave with defects and vices that make it unfit for the purpose for which it is intended can be rescinded, especially when there is a huge damage because it is not worth the price given, not even half of it"[687]. She then asked for the sale of the slave Amelia to be declared null and void, and for the defendant to be ordered to receive her, returning the price received and compensating her for the expenses incurred.

The defendant even contested this, claiming that running away was not a valid reason for annulling a purchase and sale, unless it was an incurable illness, such as "an attack of gout". This was because the Philippine Ordinances allowed for the return of slaves or beasts if they suffered from illnesses, but the behavior of running away did not constitute a disease[688]. The deliberate choice to flee, he suggested, was perhaps due to despair "at the treatment given by the plaintiff"[689], but it was not a disease, nor did it authorize its return. Nevertheless, the author's argument that "the vice of running away in a slave authorizes a redhibitory action, because it considerably reduces her value and renders her worthless"[690] is accepted by both the Justice of the Peace [691], as well as by the Court of Appeal of Rio de Janeiro, and the "vice of running away" is considered sufficient grounds for annulment of the sale and change of employer.[692]

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[685] Ibid., 4v.
[686] Id.
[687] Id.
[688] OF, Book 4, Title 17: "*Quando os que compram escravos, ou bestas, os poderão enjeitar, por doenças ou manqueiras. Qualquer pessoa, que comprar algum escravo doente de tal enfermidade, que lhe tolha servir-se dele, o poderá engeitar a quem lho vendeu, provando que já era doente em seu poder de tal enfermidade, com tanto que cite ao vendedor dentro de seis mezes do dia, que o escravo lhe fôr entregue*". See Almeida, *Codigo Philippino,* t. 4, 798.
[689] Ibid., 21v
[690] Ibid., 31
[691] Ibid., 91.
[692] Ibid., 111.

While those described so far were individual strategies, from the nineteenth century onwards, it became more common for enslaved subjects to resort to collective mobilization, which has also been the subject of huge historiography aimed at valorizing slave agency. While the "*quilombo*"[693] was a form of collective resistance that spanned the long history of slavery in Brazil, revolts became more common from the early nineteenth century, coinciding with the peak of African arrivals until the definitive abolition of the slave trade in 1850. A high proportion of slaves in the cities and, among these, a higher number of Africans reinforced as never before the collective identity and the willingness to revolt. However, as said so far about individual strategies, it is also valid to say that not all revolts aimed at the destruction of the slave regime. Many sought only to correct masters' excessive tyranny by reducing oppression to a tolerable limit, claiming specific benefits – sometimes the regaining of lost earnings – or punishing particularly cruel foremen and supervisors, bringing important modifications to the labor relationship.

Still in the colonial period, at the end of the eighteenth century, a slave revolt is unusually documented in the *Engenho Santana*, one of the oldest and largest sugar plantations of Ilhéus (state of Bahia) in 1789. Fifty of the three hundred slaves of the *Engenho,* after killing their overseer, disrupting the operations of the plantation taking with them all its equipment (so that the mil remained inactive for two years), fled to the forests establishing a *mocambo* (escaped slave community from which they resisted all attempts to recapture them). After failed punitive expeditions, the fugitives offered a peace treaty to their former master, Manoel da Silva Ferreira, in which they sought to define the conditions under which they accepted to return to captivity[694].

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[693] Portuguese term to refer to a community organized by fugitive slaves. The most famous in Brazil was the already mentioned Palmares, an independent, self-sustaining community near Recife, established in about 1600. See João José Reis, "Quilombos e Revoltas escravas no Brasil," *Revista da USP,* no. 28 (1995): 15-39.

[694] "Tratado proposto a Manuel da Silva Ferreira pelos seus escravos durante o tempo em que se conservaram levantados," stored at the Public Archive of Bahia (*Secção Histórica, Cartas ao Governo 207*) and first published as an appendix in Stuart B. Schwartz, "Resistance and Accommodation in Eighteenth-Century Brazil: the Slaves 'View of Slavery," *HAHR* 57, no. 1 (1977): 69-81. Later also

The treaty establishes a series of *desiderata* that comes from minimum needs of physical comfort to the elimination of unpleasant tasks, reduction of the daily labor obligations, request of a five-day work week and change of the present overseers. Even if the enslaved workers were finally tricked, captured and re-enslaved, their written list of requests and the protracted duration of the conflict are a valuable record of the self-awareness of enslaved subjects as workers with bargaining power.

Already in Independent Brazil, on March 29, 1828, the slaves employed at the São João de Ipanema Iron Factory sent the president of the São Paulo Province a petition in which they presented their claims, informing him that they had not received the proper food or blankets to protect themselves from the cold for weeks, although "always continued with their work" [695]. Throughout the letter, the workers manifest the belief that the factory managers owed them a duty since they were fulfilling their counterparts and "never interrupted their service". Before resorting to revolts and escapes, the slaves at the Ipanema factory continued their daily work, fighting, more than for freedom, for their immediate interests, in particular for more and better food. Although there is no record that their request has been accepted, instead notices of new protests in the factory, these workers still tried to advocate their interests through institutional and legal channels, even affirming they would like to be paid a small amount for their work on Sundays and holy days.

From Nova Friburgo, a city in the province of Rio de Janeiro, a criminal case filed in 1850[696] reports a strike carried out by a group of enslaved men from the coffee farm "Ponta das Tábuas" for almost three months. Alleging mistreatment by the farm's administrator, the group of enslaved workers took refuge for that period in the woods

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reproduced and discussed in the chapter "Entre Zumbi Pai João, o escravo que negocia," in João José Reis and Eduardo Silva*, Negociação e conflito. A resistência negra no Brasil escravista* (São Paulo: Companhia das Letras, 1989): 13-22; 123-124.

[695] Afonso Bandeira Florence, "Resistência escrava em São Paulo: a luta dos escravos da fábrica de ferro São João de Ipanema," *Afro-Ásia* 18 (1996): 7-32 (7).

[696] Trial record custodied by the ANRJ, under the signature Processo número 1191, ano 1850, maço 185, caixa 593, galeria C, Vila de Nova Friburgo and discussed by Luiz Alberto Couceiro, "A greve dos escravos na fazenda Pontes das Tábuas em 1850 (Nova Friburgo, Rio de Janeiro)," *Revista de Estudos de Conflito e Controle Social* 3, no. 8 (2010): 125-157.

belonging to the master and located on the farm's territory, refusing to return to work unless the master dismissed the foreman. They alleged that the overseer had disrespected the "rules" of the plantation, such as rest days, provision of food and the ones regarding discipline, with the application of indiscriminate punishments. They fled to the forests adjacent to the farm, claiming that they could no longer continue to suffer the mistreatment and threats that the farm manager, João Antonio, was inflicting on them. They remained "fugitives" for about three months, never leaving the forests, feeding themselves with corn and pumpkins that they harvested in the farm's fields. During that period, they would have told people in the neighborhood that they would only return to work if certain rules changed on the farm, all concerning the relationship they wanted to establish with the administrator and the appointment of a foreman other than their own.[697]. This kind of allegation shows that the social relations on the farms involving slaves, masters, administrators, and foremen were governed by "implicit agreements". These agreements were based on local usages, comprising a set of reciprocals, non-legislated obligations. By crossing their arms at the plantation, they were demanding from the master the maintenance of rights that they considered to be legitimate and acknowledged that it was important to remain where they lived, on their master's land, but not on the plantations. As Couceiro suggests, the forests, thus, gained in their experience an ambiguous meaning because they were both a place outside the disciplining gaze of the administrator and the master, but which still belonged to him. In this way, they managed to disfigure the unquestionable authority of the administrator, effectively living on the farm, but not in the place intended for the enslaved workers, and demanding that someone else take his place, without the function having to be extinguished. Even if the outcome of the case was criminal repression at the moment of escalation of the conflict and invasion of the forest, the fact is that the protest lasted for a not insignificant time of almost three months[698].

[697] Ibid., 126.
[698] Ibid., 150.

Still, the most remembered insurrection by Brazilian historiography, and which is of particular interest to us here, is the 1857 street wage-earners strike in Bahia. Slaves and freedmen, most of them Africans, protested against a series of police control measures proposed by the City Council, such as the obligation to register and the payment of a professional tax, by paralyzing for ten days their activities in the streets of Salvador. As historian João José Reis defines, "it was not a revolt, it was not a 'quilombo', the classic forms of slave resistance. It was not even a protest against slavery, but a suspension of African labor, and not just enslaved"[699]. In 1857, these workers were responsible, above all, for the movement of objects and people through the city. They carried everything: packages large and small, from letter envelopes to heavy boxes of sugar and barrels of brandy, tubs of drinking water to supply the houses, barrels of feces to be thrown into the sea; and also, people in their shoulders, canoes and deckchairs. Blacks also circulated in the streets in search of their jobs as mechanical officials (masons, blacksmiths, cooperages, shoemakers, tailors, etc.), and women covered the widespread urban territory as peddlers.[700]

Such measures were designed by the public authorities of Salvador to control, constrain, discipline, and, in the extreme, expel African wage earners from the city. As a labor force that could not be dispensed, since it was good business for some, and a source of services and comfort for all, it had to be better controlled.[701] In protest, the workers suspended transportation in the city for more than a week, in a movement that appears to have been the first general strike by an important sector of the urban economy in Brazil. The strike anticipated that of the typographers in early 1858, in Rio de Janeiro, until then considered the pioneer in the Brazilian working-class history textbooks. [702]

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[699] João José Reis, *Ganhadores. A greve negra de 1857 na Bahia* (São Paulo: Companhia das Letras, 2019): 17.
[700] Ibid., 19.
[701] Ibid., 26.
[702] Mattos, *Laborers and Enslaved Workers,* 15.

Instances like these directly contradict the traditional understanding in legal literature regarding the "nature of slave labor," according to which "there weren't legal duties on the part of the owner by virtue of which he was obliged to have the will of the slave into consideration (...) It was not necessary to consider the slave's will simply because the slave lacked it, since, being a thing, they were incapable of legal volitions and, of course, the volition to work or not."[703]. Either individually or collectively, enslaved workers gave several demonstrations of awareness of their bargaining and negotiation capacity, the need for a certain level of acceptance of the rules of captivity, and used it to improve their working conditions, without necessarily resorting to violence or rebellion.

Even though "the paternalistic code of slave domination transformed any expansion of the space of autonomy within captivity into a concession (rest days, pieces of farming, the purchase of freedom, the conditions to form a savings account and the granting of recognition of that property)"[704], the fact is that many of these prerogatives were mutually agreed upon, or sometimes without the will of the masters due to pressure from the captives themselves. As shapers of behavior, they produced normativity, even if they did not come from a legislative command or were not judicially validated. Recognizing that "the masters' duties were the result of the moral demands of their Christian conscience, of the search to optimize the productivity and useful life of the captive"[705], "a calculation of the risks of insubordination"[706], or "the goal of creating "trustworthy captives and loyal dependents"[707], does not imply that it was only the masters who defined the contours of the labor relationship, leaving intact the conclusion – unsuitable in my view – that "slavery was defined precisely by the

[703] Alonso Olea speaks of an "*inexistencia de deberes jurídicos por parte del dueño en virtud de los cuales viniera obligado a contar con la voluntad del esclavo (...) No había que contar con la voluntad del esclavo, sencillamente porque el esclavo carecía de ella, en cuanto que como cosa era incapaz de voliciones jurídicas y, por supuesto, de la volición de trabajar o dejar de hacerlo*". See Alonso Olea, *Introducion al Derecho del Trabajo,* Madrid, 43-44.
[704] Mattos, *Das cores do silêncio*, 160.
[705] Ibid., 165.
[706] Ibid., 198
[707] Ibid., 200.

absence of rights"[708]. Without trying to recognize an anachronistic idea of "labor rights", to which the legal literature tends to restrict the scope of the discipline of labor law, what I think is worth noting is that creating an opposition between positive and customary law that suggests that everything that came from customary law was unenforceable is a very limiting approach. Reiterated behaviors and negotiation practices are normativity-producing instances in a legal order where the legislation is not the only source of law. This is where the need is argued for, when studying the legal regulation of slave labor, to look also at customary practices, even if legal statutes did not formally recognize them, as the best way to challenge the schematic representations of a complete legal disability of the enslaved. As historian Vernon Palmer suggests,

«the living, unwritten rules that owners and slaves jointly authored were some of the most vital parts of slave law and played a significant role in legal evolution. The authors of this spontaneous creation were an invisible collectively. They did not sit in the legislature, the sovereign councils or colonial ministries and apparently did not use political rights to assert their will. They were simply anonymous individuals in the filed who struggled, exploited, compromised, and used all means to advance and defend their interests»[709].

Thus, more than enclosing these men and women in rigid and static categories, we must understand enslaved people's legal position as defined by daily practices and negotiations on the ground, which, even when performed at odds with their alleged legal disabilities, were important legal aspects of a relationship that was not completely resolved in a bond of dominion. In this chapter, I will look more closely at two of them, which are particularly relevant to understanding the legal bond between master and slave as also a legal labor relationship during the nineteenth century: (i) the remuneration for slave labor and its progressive (ii) contractual dimension.

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[708] Despite carrying out a study under the premise of valuing the slave agency, Hebe Mattos reinforces this conclusion: "*com direitos não há escravos e tento mostrar neste trabalho que não apenas os senhores, mas também os que se encontravam sob o jugo do cativeiro sabiam disso.*" Ibid., 165.

[709] Vernon Palmer, *Through the Codes Darkly. Slave Law and Civil Law in Louisiana* (Clark, NJ: The Lawbook Exchange, 2012): 49.

2.1 Compensating wageless work

The other consequence of reading the legal relationship between master and slave as "*pura y simplemente la de dominio*", as defined by Antonio Alonso Olea, is to consider that property over man also encompassed property over the fruits of labor:

"the ownership of the fruits of the slave's labor corresponded immediately to the owner, and not to the slave himself. In this aspect, the uniqueness of slavery lies in the very special nature of the legal relationship by which the transfer of ownership of the fruits of labor took place; this legal relationship was purely and simply that of dominion; the master made the fruits of the slave's labor his own as of the slave himself, through whom it was the owner himself who performed the work; legally the slave was degraded to the quality of a thing or a semi-movable, of course, incapable of dominical juridical relations over any object, including the fruits of his labor. Thus, the acquisition of the fruits by the owner was not so much a transfer of dominion as an original acquisition of property; the slave or slaves were part of the owner's patrimony, and the products of the slave's labor were directly incorporated into it."[710]

Beyond this traditional legal conception, slave remuneration was also theoretically rejected by Marxist readings, which defined "wage" as the payment made to a worker for a period during which he is supposed to be at his employer's disposal, being "free" to dispose of his own time. As the slave was supposed to be entirely at this owner's disposal, paying wages in return for slave labor was described as a complete "antithesis"[711]. As historian Nigel Bolland suggests, "situations in which slaves received payment for their labor are anomalous in so far as they imply a conceptual abstraction of the slave's labor power from the person while at the same time the slave remains a

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[710] "*La titularidad de los frutos del trabajo del esclavo correspondía inmediatamente al dueño, y no al esclavo mismo. En este aspecto la singularidad de la esclavitud se halla en la muy especial naturaleza de la relación jurídica en virtud de la cual se operaba la traslación de titularidad de los frutos del trabajo; tal relación jurídica era pura y simplemente la de dominio; el amo hacía suyos los frutos del trabajo del esclavo a título de propietario o dueño del esclavo mismo, a través del cual era el propio dueño el que ejecutaba el trabajo; jurídicamente el esclavo estaba degradado a la calidad de cosa o semoviente, por supuesto incapaz de relaciones jurídicas dominicales sobre objeto alguno, los frutos de su trabajo incluidos. Y así, la adquisición del os frutos por el dueño, no tanto era una traslación de dominio como una adquisición originaria de propiedad; el o los esclavos formaban parte del patrimonio del dueño y a este patrimonio se incorporaban directamente los productos del trabajo del esclavo*". See Alonso Olea, *Introducion al Derecho del Trabajo*, 44.

[711] O. Nigel Bolland, "Pro-Proletarians? Slave Wages in the Americas," in *From Chattel Slaves to Wage Slaves. The Dynamics of Labour Bargaining in the Americas,* edited by Mary Turner (London: James Currey, 1995): 123-147 (125).

commodity." [712] Both the dominion legal paradigm or the economist vision of slave labor as a commodity contributed to consolidate rigid understandings of slavery as a legal status of civil "non-freedom" completely opposed to being "free" in legal terms; and to the idea that "non-free" labor coincided with unpaid labor, as totally distinguished from free and paid labor[713].

Confirming that slavery law was less a static conceptual scheme and more a set of everyday normative practices, numerous records from both plantations and urban centers attest to slave remuneration as a frequent arrangement across the Americas. "*Escravos de ganho*" in Brazil, "*jornaleiros*" in Cuba[714], "money-earning slaves" in the British Caribbean[715] have in common the experience of being enslaved laborers who nonetheless had the right to sell their own labor power and to receive remuneration – often as cash payments – for their work or at least a portion of it.

Historiography describes at least three modalities in which this could occur: (a) slave-owners and slave employers arranging the rate of hire; (b) slaves actively seeking and rating his or her own hire; and (c) slaves being paid for overwork[716]. The first one turned out to be especially widespread as slave labor became increasingly scarce and expensive in the footsteps of the crusade against the abolition of the slave trade, but still the cost to hirers, or employers, was less than that of free workers. Slaves here could not always choose their master or influence the definition of their wages, receiving or not a small allowance from the stipulated price. Owners benefited from such arrangements when they couldn't or didn't want to put the slaves to work themselves; those who rented the slaves benefited from this system as they only need to

[712] The expression is borrowed from Rebecca Scott, *Slave emancipation in Cuba. The Transition to Free Labor, 1860-1899* (Pittsburgh: University of Pittsburgh Press, 2000): 181.
[713] French, "As dicotomias entre escravidão e liberdade," 75-96.
[714] Manuel Barcia and Claudia Varella, *Wage-earning slaves: Coartación in nineteenth-century Cuba* (Gaisnesville: University of Florida Press, 2020).
[715] Mary Turner, "Chattel Slaves into Wage Slaves; A Jamaican Case Study," in *From Chattel Slaves to Wage Slaves. The Dynamics of Labour Bargaining in the Americas,* edited by Mary Turner (London: Macmillan, 1988): 33-47.
[716] Bolland, "Pro-Proletarians? Slave Wages in the Americas," 128.

pay for them when they specifically needed their labor; and enslaved workers eventually could keep what they earned above the stipulated price[717].

The second modality will receive more attention in this section, since was the one to give room for enslaved workers to influence their work conditions and rewards, as they often bargained directly about his or her own wage rates. In these cases, enslaved workers were allowed to rent themselves independently, paying a certain amount per working day or month to their owner, and keeping for themselves whatever they earned above that specified sum they gave their masters. A third kind of slave wage was the payment for special or extra work by the slave-owner himself, from which we have notices in many cities of Latin America, and which implicitly acknowledged a limit to the slave-owner's right to his slave's labor power and the slave's right to remuneration[718].

Not coincidentally, these practices, although common, were greatly feared, and even targets of persecution in some slave societies. It was what motivated, for instance, legislation against slave hiring in all the slave states of the USA, even if it did not, as Morris suggests, slacken the trend[719]. The measures were the expression of the anxiety that slaves, avoiding the supervision of their owners, would challenge the traditional relation of control and hierarchy between master and servant, besides serving as a potentially dangerous example for those who do not possess the same privileges. Despite the attempts, it was such a widespread practice, involving too many people – masters, employers, and slaves – to be eliminated.

If, on the one hand, the payment of slaves for their labor was perceived as a concession of excessive freedom that would lead to the disintegration of slavery, on the other hand, it was also seen as an incentive system designed to get more out of the slaves and to control them by rewards instead of traditional punishments[720].

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[717] Ibid., 129.
[718] Ibid., 132.
[719] Richard B Morris, "The measure of bondage in the Slave States," *The Mississippi Valley Historical Review* 41, no. 2 (1954): 219-240 (234).
[720] Bolland, 'Pro-Proletarians? Slave Wages in the Americas', 125.

For the enslaved, in any case the attractive of greater autonomy with the promise of material benefits was not insignificant. Nevertheless, acknowledging this very possibility that slaves had time of their own, which was compensated as such – in working extra for their owners or working for themselves – implies recognizing a space of autonomy, but also a condition of further exploitation. As the slaves' remuneration began only after they had completed their regular tasks or customary workload, any little compensation they could obtain implied working a great deal more. While there were some obvious advantages to slaves in these arrangements, it goes without saying what this added to their lives in terms of precariousness and instability. It is well know Frederick Douglass' account, the famous former enslaved American who became an important abolitionist (1817-1895), commenting on the period when he hired his services under the obligation to give his owner a weekly sum:

"Master Hugh seemed to be very much pleased, for a time, with this arrangement; and well he might be, for it was decidedly in his favor. It relieved him of all anxiety concerning me. His money was sure. He had armed my love of liberty with a lash and a driver, far more efficient than any I had before known; and, while he derived all the benefits of slaveholding by the arrangement, without its evils, I endured all the evils of being a slave, and yet suffered all the care and anxiety of a responsible freeman"[721].

That's why this scenario of slaves searching work, bargain for wages, disposing of their own time, being responsible for their own food, clothing and lodging, despite being unneglectable shades of freedom in captivity, cannot lead us to hastily and unconditionally affirm that such slaves enjoyed real autonomy. Still, for the purpose of the legal history of slave labor, it remains important to recognize, even relative, that the master's right to his slave's labor power was not complete and absolute, and work was not a sphere of total dominion by the master.

Masters could still, and in fact did, by law and force, establish the boundaries of the relationship both defining rewards and mobilizing punishments, but it did not tell us everything about slaves' capacity to bargain and negotiate. As Ira Berlin notes, the playing field was never level but "the master-slave relationship was nevertheless

[721] Frederick Douglass, *My Bondage and My Freedom* (New York: Miller, Orton and Mullingan, 1855): 232.

subject to continual negotiation"[722]. Since there was not a written norm stipulating what was due to slaves for their overwork, pacts regarding what the slave owed his master and what the master should pay his slave for, what constituted a fair task, day journey, or adequate wage were established through a process of mutual accommodation, coming from bilateral agreements and mutual calculus of convenience.

Looking specifically at the Brazilian case, according to Luiz Carlos Soares, in Rio de Janeiro, slave rental was an existing slave practice since colonial times[723], but that would have increased and spread from the nineteenth century on, with the increase of the economic and social dynamics of the Imperial Court[724]. With the growth in demand for enslaved workers for domestic services, for various modes of street earning, and industrial activities from 1810 onwards, this modality expanded considerably, evidencing how the changes in the institution of slavery throughout the nineteenth century were directly tied to an ever-greater integration into the capitalist world-economy as much as the daily actions of the enslaved and their masters[725].

This customary practice in Brazil in which slaves agreed with their masters to obtain outside the master's supervision and household a certain amount of money, was called "*ganho*", a highly studied topic by historiography about Rio de Janeiro and other southern and northern provinces of the country as a common practice both on plantations and in urban centers.[726] This practice could be translated into a wide variety of

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[722] Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge: Harvard University Press, 2010): 2.

[723] Luiz Carlos Soares, *O "povo de Cam" na capital do Brasil: a escravidão urbana no Rio de Janeiro do século XIX* (Rio de Janeiro: 7Letras, 2007): 53-54.

[724] Ynaê Lopes Santos, "Global porque escravista: uma análise das dinâmicas urbanas do Rio de Janeiro entre 1790-1815," *Almanack* 24 (2020): 1-31.

[725] Rafael de Bivar Marquese, "Capitalismo & Escravidão e a historiografia sobre a escravidão nas Américas," *Estudos Avançados* 26, no. 75 (2012): 341-354.

[726] For just but a few references, see Carlos Eduardo Valencia Villa, *Produzindo alforrias no Rio de Janeiro do século XIX* (Master's dissertation, Universidade Federal do Rio de Janeiro, 2008); Leila Mezan Algranti, *O feitor ausente. Estudo sobre a escravidão urbana no Rio de Janeiro* (Petrópolis: Vozes, 1988); Manolo, Florentino "Sobre minas, crioulos e liberdade costumeira no Rio de Janeiro, 1789-1871," in *Tráfico, cativeiro e liberdade (Rio de Janeiro, séculos XVII-XIX),* edited by Manolo Florentino (Rio de Janeiro: Civilização Brasileira, 2005): 331-366.

configurations in a very negotiated system, where the percentage of the remuneration that would remain free to the slave would depend on the agreement that he and his master made regarding the provision of food, board, clothing, and medical treatment. If the master did not contribute to the slave's sustenance, he was expected to remunerate him. This form of work made their lives, in practice, very similar to those of the freedmen and freedwomen who did small jobs at the Court of Rio de Janeiro in the mid-nineteenth century and with whom they competed in the labor market.

In this type of activity workers with the most different types of occupation were involved. They were effectively key actors in the city operation, being engaged in activities of production, collection and transportation of foodstuffs and goods; transportation of people and any sort of porterage; acting as factory workers and skilled craftsmen and artisans; being employed as "printers, lithographers, painters, sculptors, orchestral musicians, nurses, midwives, barber-surgeons, seamstresses and tailors, goldworkers, gem cutters, butchers, bakers, sailors, ships' pilots, coachmen, stevedores, fishermen, hunters, naturalists and gardeners"[727], to name but a few of the extraordinarily varied functions enslaved men and women performed in Rio de Janeiro.

It is also worth mentioning the frequent choice of the workers involved in this type of arrangement of joining brotherhoods (*confrarias*) composed of people who practiced the same crafts. "Black lay brotherhoods," following Patricia Mulvey's definition, "were fraternal organizations of free blacks, African slaves and mulattoes dedicated to religious education and social benevolence in the Iberian Peninsula, Spanish America, Portuguese Africa, and Brazil. Medieval in origin, modeled on white brotherhoods, these religious organizations provided various social welfare services and mutual aid activities not normally performed by the state authorities"[728]. Since the beginning of colonization, among the many fraternities founded, those that were

[727] Karasch, *Slave Life in Rio de Janeiro 1808-1850,* 205.

[728] Mulvey, Patricia A. "Black Brothers and Sisters: Membership in the Black Lay Brotherhoods of Colonial Brazil," *Luso-Brazilian Review* 17, no. 2 (1980): 253-279 (253).

supposed to gather slaves and their freed and free descendants stand out. The oldest known commitments are those of *Irmandades do Rosário* of Rio de Janeiro, of Belém and of Bahia, erected in 1639, 1682 and 1685. The creation and especially the proliferation of the black brotherhoods are related to the growth of the slave and slave population, with the need for catechization implicit in the colonial project and, also, with the great interest of slaves and freedmen for them[729].

Also active in Imperial Brazil, those associations were frequently used by wage-earning slaves as networks to share information about employment opportunities and also for collectively defining wage rates as a sort of proto-labor unions. Aimed at helping slaves with their daily struggles to earn a living, they contributed to encourage solidarity and mutual aid among black workers, enslaved and free: all of them participated in a labor market in which the remuneration rate for their labor was "influenced by and influenced the wages of free workers, and they combined to limit competition between themselves and so raise their wages"[730].

These institutions certainly acted as facilitators for the acquisition of freedom, but neither from their participation nor from the accumulation of money can one imagine that it derived a certain right to manumission. Although enslaved workers in Brazil had greater chances, if compared to other places in Latin America, to use his or her savings to purchase freedom, in any case Brazilian masters for a long time were not obliged, unlike in Cuba, to grant the manumission just because the slave presented his or her sale price. This possibility, which in Spanish America had been formally admitted by royal document as early as 1768[731], in Brazil had unstable successes both

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[729] Lucilene Reginaldo, "Irmandades," in *Dicionário da Escravidão e Liberdade: 50 textos críticos,* edited by Lilia M. Schwarcz and Flávio Gomes (São Paulo: Companhia das Letras, 2018): 283-290 (289).

[730] Bolland, "Pro-Proletarians? Slave Wages in the Americas," 137.

[731] The Royal Charter of June 21, 1768 "*que manda se observar la práctica para el cobro de la alcabala en la venta de negros en Nueva España y en Perú y la hace extensiva a la isla de Cuba*", signed by Carlos III of Spain, expressly provided that when slaves delivered to their masters the value of their price, acquired lawfully by honest means for manumitting themselves "*son obligados los expresados dueños a otorgarles llana y jurídicamente la carta de libertad, y los títulos em cuya virtud los poseían, quedando cancelados y anotados en sus respectivos lugares*". In the following years, the practice was further regulated, with the confirmation, in 1778, by a new Royal Charter, that the lords would be obliged to

in the courts and in doctrine and was even expressly denied by the Council of State in 1855[732], until its formal recognition by the Free Womb Law in 1871[733].

Where a written law guaranteeing the same protection to slave's remuneration was lacking, enslaved workers were not always successful in obtaining before the Courts what they undoubtedly saw as their right, even when cash payments had taken deep root in custom, or the requests were regarding a period of illegal enslavement. Take for instance the enslaved Raymunda do Nascimento, from the city of Itabira, Minas Gerais. By July 1862, her former mistress had died and her will stipulated that she should serve her heir until the age of 40, but if she had children during that time, she would become a freedwoman. In 1865 Raymunda gave birth to Antonio and in 1871 she filed a freedomsuit, asking for her wages since 1865, when she should have been free. She even ordered by the heir of her former mistress to pay her years of wages for the period she claimed to have worked, even though she was already freed. The first instance judge even ordered the defendant to pay "the plaintiff the wages that should have been paid since the time of her full freedom," but the Court of Appeal of Rio de Janeiro reversed the sentence, considering that "the master of the slave cannot be obliged to pay wages, when he owns them in good faith, by

grant freedom whenever the price was presented to them, estimated not at the initial purchase price, but at the updated market value. For a more detailed discussion of this itinerary, see Manuel Lucena Salmoral, "El derecho de coartación del esclavo en la América Española," *Revista de Indias,* 216 (1999): 357-374.

[732] On December 21st of that year, notice no. 388 was issued by the 3rd Section of the Ministry of Justice, in response to a query from the Vice-President of the Province of São Paulo. Even though its title suggests that its content was restricted to "the manner in which the Orphans' Judge must proceed when in the act of selling in a public auction a slave belonging to several heirs a bidder is presented to offer the price of his appraisal to free him," the discussions and deliberation in the Council face the theme of forced manumission in the Brazilian legal system. By deciding that "in no case, opposing one or more heirs can one accept directly from the slave or from a third party (not interested) the price of the appraisal to grant freedom," the ministers enshrined their opinion that the master could not be forced to free his slave against his will, even when presented with the price of compensation. See *CDIB,* t. XVIII, pt. II (Rio de Janeiro: Typographia Nacional, 1855): 453.

[733] Art. 4º § 2º: "*O escravo que, por meio de seu peculio, obtiver meios para indemnização de seu valor, tem direito a alforria. Se a indemnização não fôr fixada por accôrdo, o será por arbitramento. Nas vendas judiciaes ou nos inventarios o preço da alforria será o da avaliação*." See *CLIB* (1871), 149 and also Manuela Carneiro da Cunha, "Sobre os silêncios da lei. Lei costumeira e positiva nas alforrias de escravos no Brasil do século XIX," *Revista Mexicana de Sociologia* 46, no. 2 (1985): 45-61.

principles of high order and harmony with the same law."[734]

When publishing the decision, the editors of *Gazeta Jurídica* strongly criticized the ruling. They declared the decision "unjust, incomplete and even illegal when it did not oblige the owner to pay, from the time of the fulfillment of the condition, the amount of the salaries paid to the freedwoman." They claimed that the argument of the holder's good faith was not valid, nor the principles of high order and harmony with the law; because these abstract principles, at most, what they can advise is that no one gets rich at the expense of other people's work" [735].

Even when the right to wages was recognized by the definitive ruling, it could be considered paid off by the "compensation of expenses". This is what happened in the freedom action brought before the Municipal Court of the town of São José, the second district of the province of Santa Catarina. The former enslaved women Deolinda and Maria had filed a civil suit for freedom against Raulino Antonio Godinho and Infancia. The two had received the slaves as a gift from Rosa Ignacia de Jesus, donation which was later revoked due to ingratitude, with Rosa decreeing the slaves' freedom in her will. Despite the defendant's opposition, the municipal court declared Deolinda and Maria to be free persons and ordered the defendant not to disturb them

[734] "Liberdade com condição alternativa – verba testamentaria – mãe livre e filhos captivos – salários devidos desde o tempo da liberdade. 1º A liberdade póde ser conferida em testamento sob a condição alternativa, ou de gozal-a a escrava de tal idade por diante ou depois de ter filho, ficando, porém, este no captiveiro do herdeiro ou legatário. 2º Si a verba do testamento, porém, disser FILHOS, só pode ser cumprida, em relação ao captiveiro, quanto ao primeiro deles; porque os outros são LIVRES, nascidos de VENTRE LIVRE: o mais é absurdo em que a Lei não convem. 3º O senhor do escravo não póde ser obrigado ao pagamento de salários ou jornaes, quando o possue em BOA FÉ, ainda que pelos Tribunnaes seja DEPOIS CONSIDERADO esse escravo com direito á liberdade, por PRINCIPIOS DE ORDEM ELEVADA E DE HARMONIA COM O MESMO DIREITO," in *Gazeta Juridica. Revista Semanal de Doutrina, Jurisprudencia e Legislação* 5, no. 15 (1877): 272-281 (272).

[735] Idem. It should be noted, however, that a year later, the same magazine published another decision with a completely opposite outcome, saying that, on the contrary, it followed the Court's doctrine. In this case, a slave master "in good faith" had illegally kept a free worker in captivity but was exempted by the Court from paying him the wages due for that time, "since the master in good faith makes all the fruits received his own, even if he becomes richer with them, as is current in law". See "Indenisação dos serviços do homem livre que serve como captivo. 1º Quando o senhor do homem livre possue a este por titulo legitimo e o supõe seu escravo, não fica, nem por si nem pelos seus herdeiros, obrigado ao pagamento de taes serviços. 2º Porque o senhor de boa fé faz seus todos os frutos percebidos, ainda que com os mesmos se torne mais rico," in *Gazeta Juridica. Revista Semanal de Doutrina, Jurisprudencia e Legislação* 6, no. 20 (1878): 36-42.

their freedom and to pay them for the services they had unduly provided. The Court of Appeal upheld the decision regarding the recognition of freedom but reversed the condemnation to pay wages for the period of illegal enslavement. Arguing the purpose of the action was to declare and maintain freedom, the right to claim services rendered was unfounded, unproven, and even if rendered, should be offset by costs incurred in their upbring and education, given they were brought into the appelant's household at a young age."[736] The connection with the household and the provision of sustenance nullified the right to wages by the weight of the duty of gratitude, obedience and obsequiousness [737]. The unequivocal right to freedom did not always dispel the old imagery of labor. As much as slave wage, without guaranteed support from the solemn instances of law, remained the subject of negotiation and disputes, in the less formal – but equally powerful – realm of the daily normative production in slave relations.

2.2 Contractualizing slave labor

As an institution that survived in Brazil for almost four centuries, the law of slavery was shaped in the old regime but also underwent remarkable changes when Brazilian national state forged a path toward a liberal legal order. Without becoming incompatible with the new regime[738], it didn't remain unchanged either. Able to coexist with both the patrimonial spirit of the old regime and the exasperation of the right of property of the liberal law, the institution was modified and updated by the new principles and vocabulary. If on the one hand this meant protecting the rights of ownership – including the property on persons – as never before –, it also privileged

[736] José Prospero Jehovah da Silva Caroatá, *Apanhamento de Decisões sobre Questões de Liberdade, publicadas em diversos periódicos forenses da Corte* (Bahia: Typ. De Camillo de Lellis Masson & C., 1867): 49-50.
[737] Hespanha, "Carne de uma só carne," 962-963.
[738] See *supra,* footnote 54.

the principle of liberty – now seen as an individual right – and placed the contract at the center of social relations.

Such operation and combination of contrasting principles could not but imply setbacks and contradictory outcomes. On the hand, the intentional avoidance of State intervention into the master-slave relationship, in adherence to the liberal principle of non-interference in private property, was responsible for reverting upholding historical doctrines like the right to manumission of captives forced into prostitution[739], or the right to freedom upon the payment of price[740]. On the other hand, it was a new conception of law as legislation that brought about the recognition of many customary practices through legal statutes (such as the prohibition of family separation [1869][741], the right to savings [1871], the ban on whipping [1886][742]), although they were certainly part of a wider context – not only related to rising liberalism – of slavery's loss of legitimacy and enslaved people's own fights and resistance[743].

[739] It is a phenomenon widely documented by historiography the attention that the prostitution of female slaves received from the public authorities in Rio de Janeiro in the 1870s. On the grounds of morality and sanitation, and with the combined efforts of the Chief of Police and the Municipal Judge of the 2nd District Court, 1604 manumission processes were proposed, with at least 729 slaves freed in those years. In 1876, however, the Supreme Court of Justice ruled against the application of the Roman law principle that a slave prostituted against her will by her master had the right to freedom, as the Constitution guaranteed the right to property in fuull. See "Escrava forçada á prostituição pelo senhor não fica liberta," in *Gazeta Juridica. Revista Semanal de Doutrina, Jurisprudencia e Legislação* 5, 14 (1877): 28-34; Lenine Nequete, *O escravo na jurisprudência brasileira. Magistratura e ideologia no 2º Reinado* (Brasília: Fundação Petrônio, 1988): 79-90; Chalhoub, *Visões da liberdade,* 151 ff.

[740] As the Council of State decided in decision no. 388 of 1855, which denied the right to freedom to a slave against the master's will, even if remunerated, reiterating precisely that "*a isso se opõe o direito de propriedade.*" See *CDIB (1855)*, 461.

[741] Decree no. 1695 of 1869 forbade the separation of husband and wife and children under the age of 15 from father and mother in slave sales. See *CLIB (1869),* pt. I (Rio de Janeiro: Typographia Nacional, 1869): 129; Dias Paes, *Direito e escravidão,* 133 ff.

[742] "Lei n. 3.310 de 15 de outubro de 1886. Revoga o art. 60 do código criminal e a lei n° 4 de 10 de junho de 1835, na parte em que impõem a pena de açoutes," in *CLIB (1886),* pt. I (Rio de Janeiro: Typographia Nacional, 1886): 52.

[743] Maria Helena Pereira Toledo Machado, *Crime e Escravidão. Trabalho, Luta e Resistência nas Lavouras Paulistas (1830-1888)* (São Paulo: Edusp, 2014): 99 ff.; Azevedo, *O direito dos escravos*, 3 ff.; Joseli Maria Nunes Mendonça, *Cenas da abolição. Escravos e senhores no Parlamento e na Justiça* (São Paulo: Perseu Abramo, 2001).

Other contradictory trends could also be mentioned. The ever-increasing demand for the formality of written titles [744] on the one hand generated greater obstacles to verbal manumission [745], while the lack of written registry was later acknowledged as a presumption of free status[746]. Similarly, a more organized judiciary branch and the possibility of arguing for freedom as an individual natural right expanded the possibilities of obtaining manumission in courts, also through revisited legal sources from the old colonial regime, such as the Royal Charter of 1682[747], or the famous phrase from Title XI, Book 4 of the Philippine Ordinances – "*em favor da liberdade são muitas cousas outorgadas contra as regras geraes*"[748] – intensely mobilized in freedom suits and in the abolitionist campaign from the 1860s.

Beyond the growing relevance of positive law, the emphasis on property, freedom and legal security, the law of slavery was also not impervious to the growing accent on voluntary agreements – and the submission, even of slave masters, "to what

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[744] A by-product of the liberal demand for legal security, acutely described by Dias Paes, *Esclavos y tierras entre posesión y títulos,* 78 ff.

[745] "Alforria não se pode conceder verbalmente (...). A simples manifestação desse projecto desacompanhado de testamento, carta de liberdade ou qualquer outro instrumento, não póde servir de base á acção", ruled by the Rio de Janeiro Court of Appeals on February 23, 1872. The ruling was later confirmed by the Supreme Court of Justice on February 28, 1874. See *Gazeta Juridica. Revista Semanal de Doutrina, Jurisprudencia e Legislação (Rio de Janeiro, 1874-1887)* 2, no. 2 (1874): 42-46; 412.

[746] The Free Womb Law also institute the Slave Registry and determined that slaves who were not registered within a year were to be considered free. See *CLIB (1871),* 151. It should not be forgotten that the downside of this medal, however, in not requiring proof of ownership at the time of registration, was the legitimization of illegal ownership over thousands of Africans illegally introduced into Brazil after the abolition of the slave trade. See Beatriz Galotti Mamigonian, "O Estado nacional e a instabilidade da propriedade escrava: a Lei de 1831 e a matrícula dos escravos de 1872," *Almanack*, 2 (2011): 20-37.

[747] Issued in the context of the repression of the maroon community of Palmares, in the seventeenth century, it stipulated that all those who had been enslaved before joining the quilombo would revert to slavery if their former masters reclaimed them within a five-year period. Its appeal with another connotation in nineteenth-century freedom suits is documented by Nequete, *O escravo na jurisprudência brasileira,* 263; Keila Grinberg, "Reescravização, direitos e justiças no Brasil do século XIX," in *Direitos e justiças no Brasil: ensaios de história social*, edited by Silvia Hunold Lara and Joseli Maria Nunes Mendonça (Campinas: Ed. Unicamp, 2006): 101-128 (108).

[748] The phrase is inserted in the title "*Que ninguem seja constrangido a vender seu herdamento e cousas, que tiver, contra sua vontade*," and it concerned the eventuality that an enslaved Moorish subject was found in the Kingdom and that his liberation was required as a condition for freeing a Christian who was in an identical condition. In such a case, the Moor's heir would be forced to sell him, in favor of the Christian's freedom. In the nineteenth century, it became the most cited argument in freedom suits by slave curators. See Grinberg, "Reescravização, direitos e justiças no Brasil do século XIX," 109 ff.

was agreed upon"[749]. It is precisely the impacts that the rise of the contract paradigm had on the institution of slavery, beyond the more obvious effect of strengthening abolitionist rhetoric, that we intend to emphasize in this section. To acknowledge it serves us not only to reaffirm the unfulfilled legends and promises of contract freedom but also to show how these two ideas fed off each other. Slavery shaped and lent substance to the notion of freedom of contract[750], while this same ideal permeated the logics and dynamics of slave relationships.

Looking closely at a court case gives us a glimpse of how lawyers and judges mobilized this vocabulary, as well as how the viability of pacts made between masters and slaves – something the draft of 1823 constitution already tried to protect[751] – was recognized even by those who claimed some cause for nullity. Beatriz Lins Lopes, with the assistance of her curator Bento José de Souza, filed a freedom suit against her mistress Dona Maria Querubina Lins[752], claiming to have "agreed with her" on August 8, 1844, to buy her freedom for the sum of 350,000 réis. At the time of the agreement, Maria Querubina gave Beatriz the sum of 71,000 réis, as proven by the attached receipt. Now that she had withdrawn the rest of the sum and asked for the contract to be

[749] In 1850, the Court of Appeal of Rio de Janeiro considered that a slave mistress was "bound to comply with what she had agreed" with her slave, considering that the testimony of witnesses proved "that the defendant had agreed to give freedom to the appellant for the sum of 1,500$000". See "4ª Questão. A promessa feita pelo Senhor ao escravo de lhe dar a liberdade mediante certa retribuição pode provar-se por testemunhas," in Caroatá, *Apanhamento de Decisões sobre Questões de Liberdade,* 50-51.

[750] On the inseparable relationship that the idea of freedom has established with the slave societies in which it developed, becoming inseparable from the experience of slavery and servitude, compared to which it emerged as its opposite, from the Greeks to its spread in the Roman and then Christian worlds, see Orlando Patterson, "Freedom, Slavery, and the Modern Construction of Rights," in *The Cultural Values of Europe,* edited by H. Joas & K. Wiegandt (Liverpool: Liverpool University Press, 2008): 115-151.

[751] The draft of constitution, elaborated by the General Constituent and Legislative Assembly in 1823, predicted alongside other liberal guarantees, that "*A Constituição reconhece os contractos entre os Senhores e os Escravos; e o Governo vigiará sobre a sua manutenção*". The article, however, was not reproduced in the Constitution granted in 1824 after the dissolution of the Assembly. See *Diário da Assembleia Geral, Constituinte e Legislativa do Império do Brasil (1823),* t. II (Brasília: Senado Federal, Conselho Editorial, 2003): 699.

[752] Processo número 3034, fundo Relação do Rio de Janeiro – 84, código de referência 84.0.ACI.07092, apelante Beatriz Luis Lopes, apelado Maria Querubina Luis, ano inicial 1854, ano final 1860, caixa 181, gal. C, ANRJ.

fulfilled, the defendant refused. Beatriz petitioned the judge to compel Maria Querubina to receive the remaining 279$000 and honor the contract, granting her a letter of manumission.

Maria Querubina's defense contended that she had signed the contract mistakenly believing that she could dispose of Beatriz, but only later learned that she lacked this right due to her marital status. As a married woman, she couldn't dispose of any of the couple's assets during her husband's lifetime. Asserting that she was married "at the time she contracted with the plaintiff," she claimed the contract attached was "null and void" as a married woman "during the constancy of marriage cannot contract without her husband's consent".

It was the condition of the defendant, the slave's mistress, and not Beatriz condition as an enslaved woman that invalidated the pact. Both the defendant in her plea and the judge in his ruling acknowledged the existence and viability of the pact, which would have held legal weight had the defendant obtained her husband's authorization. Not only the lexicon of the contract, but even its presuppositions of validity – a capable subject – were considered admissible for an individual under slavery, and all the parties involved in the case acknowledged it, even if the outcome was not in Beatriz's favor. The judge in fact dismissed her claim and forced Beatriz to return to Maria Quitanda's service but ordered her to "give back to Beatriz the sum of 71$000 received", recognizing that the money belonged to her, despite her condition as an enslaved subject.

If the private agreement between Beatriz and Maria Quitanda has already managed to obtain judicial recognition, we saw in the second chapter of this thesis how subjects who were born in slavery were also the protagonists in the notarial archives among the rental of services contracts registered from north to south of the country. In the first notary's office in Rio de Janeiro, from which we collected 96 contracts of freedmen in the sample of 129 contracts consulted, 24 of them were signed precisely between freedmen and their own masters. The lexicon of the contract

did permeate relations between masters and enslaved workers, even when it came to agreements about years of compulsory labor or the "gift" of freedom.

The change in the grammar in which manumission was expressed is an aspect that deserves attention. From a legal point of view, the Lusitanian tradition – from the Afonsine Ordinances, but copiously up to the Philippines[753] – tended to categorize manumissions alongside donations, leading not only Portuguese jurists, such as the well-known José Homem Correa Telles [754], but also Brazilians [755] and even official documents from the imperial government [756] – to refer to acts of manumission as such. It was not, of course, a unanimous position, and dissenting jurists voiced concerns about the inadequacy of this categorization.

Agostinho Marques Perdigão Malheiro, in the first volume of his well-known trilogy, published in 1866 and dedicated to "*Direito sobre os escravos e libertos*", answering the question of "what happens when a master releases his slave?" firmly affirms that it was impossible to recognize manumission as a donation. This is because,

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[753] The Alphonsine Ordinances (1446) addressed the topic in title 70 of book IV, entitled "*Das Doaçoões, que se podem revogar por causa de ingratidooem*", mentioning the admitted hypothesis of revocation of freedom "*se alguum homem tevesse alguum servo, e o forrasse livrando o de toda servidooem, se depois que elle assi fosse forro, que se chama em Direito liberto, cometesse ingratidooem contra aquelle que o forrou, a que chamaõ os Direitos padroeiro*". The Manueline Ordinances (1521) deal with the same subject in book IV, title 55 "*Das doações, e alforria, que se pódem revoguar par causa de ingratidam*"; while the Philippine Ordinances do so in the well-known Title 63 of Book IV: "*Das doações e alforria, que se podem revogar por causa de ingratidão*". See Lara, "Legislação sobre escravos africanos na América portuguesa," 36.

[754] He sustained "*O senhor do escravo póde dar-lhe a liberdade, ou por disposição de ultima vontade, ou por doação pelo mesmo modo que póde doar os seus moveis. Esta doação da liberdade póde ser revogada pelo senhor se o liberto lhe for ingrato*". See Telles, *Digesto portuguez,* 221.

[755] Lourenço Trigo de Loureiro also spoke of "*doação da alforria*" in *Instituições de Direito Civil Brasileiro* (1851), 3; and the book without authorship *Conselheiro fiel do povo ou Collecção de Formulas para qualquer pessoa saber regular-se em seus negocios; conhecer seus direitos e deveres civis; proceder em todos e quaesquer contractos; fazer quaesquer escriptos particulares, apontamentos, memorias e minutas, e terminar qualquer contestação, sem que lhe seja preciso recorrer a advogado, tabellião, ou official publico. Obra utilíssima a todos, colligida e organisada dos principios do direito patrio e estranho subsidiário por ****,* 3. ed. consideravelmente augmentada, t. I (Rio de Janeiro: Eduardo & Henrique Laemmert, 1860): 115, defined manumission as "*a doação que o senhor de um escravo faz a este de sua liberdade natura*".

[756] Decree no. 2.708 of December 15, 1860, providing for the collection of the inheritance and legacies tax, exempted from this payment "*Art. 6º 4. As alforrias ou doações de liberdade feitas em testamento e os legados deixados para esse fim*". See "Decreto n. 2.708, de 15 de Dezembro de 1860. Manda executar no Municipio da Côrte o regulamento desta data para a arrecadação da taxa de heranças e legados," in *CLIB (1860)*, pt. II (Rio de Janeiro: Typographia Nacional, 1860): 1109.

in the act of manumission, "there is no object, nor subject; unless it is not intended to be the slave himself who acquires, despite being a slave, his own freedom or slavery; which is ridiculous, and would be admissible only by an almost puerile fiction". On the contrary, the jurist recognized that in such an act the master "does nothing more than dismiss from himself the dominion and power he had (against the law) over the slave, restoring him to his natural state of freedom, in which all men are born" [757]. For the author, manumission was thus nothing more than "the renunciation of the master's rights over the slave, and the consequent reintegration of the latter in the enjoyment of his freedom, suspended by the fact of which he was the victim; the slave does not, therefore, strictly acquire freedom, since he has always retained it by nature, although latent (the term is permissible)" [758]. The legal nature of this act, therefore, cannot be confused with a donation, as it is more appropriately a "deconstruction of ('fictitious') ownership over a person"[759], nor with other legal transactions, such as acquisition or exchange [760].

In the same vein, Teixeira de Freitas even recognized analogies between these two acts [761], and a few years later to have used precisely the donation theory to discuss the status of conditionally freed slaves in the famous debate that resulted in his resignation from the presidency of the Brazilian Lawyers Institute in 1857[762], also stated, in the second edition of the Consolidation of Civil Laws, that it was improper to

[757] Malheiro, *A Escravidão no Brasil,* 162.

[758] Id.

[759] Reading the same passage by Malheiro, it is the expression used by Márlio Aguiar, "Direito (romano) e (boa) razão: uma análise do tratamento jurídico da alforria no Ensaio A Escravidão no Brasil de Perdigão Malheiro," *Quaestio Iuris* 12, no. 1 (2019): 246-286 (272).

[760] According to Malheiro, it was not to be confused with a legacy, even when it was made by an act of last will, as demonstrated by the tax exemption (he referred in this regard, among other provisions, to the Regulation no. 2,708 of December 15, 1860). When granted for a price, it was also not to be confused with a sale and was therefore exempt from stamp duty or tax. See Malheiro, *A Escravidão no Brasil,* 164.

[761] In the second edition of his *Consolidação das Leis Civis* (1865), he affirmed that "*a alforria gratuita tem analogia com a doação*" (p. 230), and therefore many of its rules were applied to it, with the caveat, however, a few pages later, that "*não são propriamente doações as alforrias*" (p. 234).

[762] At the October 8, 1857 Conference of the Institute of Brazilian Lawyers, the author states: "*ninguém ignora que as nossas ordenações tratando da alforria a consideram como doação.*" See Caroatá, *Apanhamento de decisões sobre questões de liberdade,* 16.

consider manumissions as donations, since "one of the parties abandons a portion of their property, and the other acquires their freedom"[763]. While on the master's part the essential conditions of the donation were met, since he was sacrificing real property out of liberality, the freed slave, on the other hand, received "the greatest benefit that one man can do to another." In this way, what happens is not the transfer to the freedman of the property that the master had over the slave. The property is completely annihilated, and "manumission creates a free man, a capable legal subject"[764].

Both authors claimed to rely on the "deep and analytical Savigny" to bolster their stance[765], so it could be useful to revisit the pages of the German jurist on which the arguments of the two Brazilians were based. The leader of the German Historical School of Law [766], notorious in that century for his positions against the codification of civil law[767], was the man behind a legal project for the renewal of the national legal system that entrusted to a class of *Gelehrten*, the jurists, the task of a scientific – rather than legislative – renewal of legal order. In pursuit of this goal, the ancient sources of the Romanist tradition were considered particularly useful, as a material provided by the history and cultural tradition of Western Europe – hence the famous reference to the *Volksgeist* – and seen as "the highest expression of legal experience and of the elaborations and improvements progressively made by its interpreters"[768]. To

[763] Freitas, *Consolidação das Leis Civis* (1865), 234.
[764] Idem.
[765] The expression comes from Malheiro, *A Escravidão no Brasil,* 163; but also Teixeira de Freitas referred expressly Savigny in *Consolidação das Leis Civis* (1865), 234.
[766] Franz Wieacker, *História do direito privado moderno.* Translation by António Manuel Hespanha, 3. d. (Lisboa: Fundação Calouste Gulbenkian, 2004): 435-454; Hespanha, *A Cultura Jurídica Europeia,* 409-413.
[767] The text that made Savigny known for his opposition to codification, entitled *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814), was first translated precisely into English in 1831. See Cristina Vano, "Della vocazione dei nostri luoghi. Traduzioni e adattamenti nella diffusione internazionale dell'opera di F. C. von Savigny," *Historia et ius,* 10 (2016): 1-16 (11).
[768] Aldo Mazzacane, *Savigny e la storiografia giuridica tra storia e sistema. Con un'appendice di testi* (Napoli: Liguori, 1974): 21.

accomplish the task of building a new "historically oriented legal science"[769] by ancient sources, Savigny not only led a hunt for manuscripts from classical times, which led – not by chance – to the spectacular rediscovery of the only complete copy of a pre-Justinian manuscript that has survived to the present day[770], but he also produced eight volumes, between 1840 and 1849, of a treatise entitled *System des heutigen Römischen Rechts*. In this work, which materialized his proposal for an alternative "system" to codification, he described in an organic and systematic way numerous institutes of private law, whose theses were frequently invoked in Brazil in the nineteenth century to interpret current issues and ancient sources, which, it is worth remembering, were still in force as subsidiary law in the Empire and were especially used in the law of slavery[771].

Within his systematic exposition of the types of legal relationships, Savigny paid special attention to donation and specifically discussed how it differed from manumission. The fundamental element of that legal transaction would be precisely the donor's granting of a disinterested beneficence – *beneficium*, *liberalitas* – aimed

[769] Which would literally give name to the journal founded in 1815 to disseminate the school's scientific project. The main lines of this program were clearly summarized in the inaugural issue: Friedrich Carl von Savigny, "Ueber den Zweck dieser Zeitschrift," *Zeitschrift für geschichtliche Rechtswissenschaft* 1, no. 1 (1815): 1-17.

[770] The *Institutas*, a didactic work composed by the Roman jurist Gaius between 168 and 180 AD, was found in a palimpsest in the Capitular Library of Verona in September 1816 by the German jurist Barthold Georg Niebuhr. Not only can the retrieval and transcription of the manuscript be traced back to Savigny's guidance and the collective collaboration of various jurists who aligned themselves under the heading of the Historical School, but Niebuhr's recommendation to visit Italian libraries in search of classical manuscripts during his stay in Italy as Prussia's diplomatic representative to the Holy See was part of a series of expeditions guided by Savigny himself. For a history of the discovery and its insertion into the organizational-scientific program of the Historical School, see Cristina Vano, *Il "nostro autentico Gaio". Strategie della Scuola Storica alle origini della romanistica moderna. Seconda edizione rivista e ampliata con un saggio introduttivo* (Napoli: Editoriale scientifica, 2020).

[771] As discussed in the first chapter, Roman law remained a valid source, albeit a subsidiary one, as was determined during the colonial period by the Law of Good Reason approved with the Pombal reforms on August 18, 1769. Under this rule, Roman Law would continue to have the force and authority in the gaps in national laws and where it was based on "good reason." Brazilian jurists would continue to refer to Roman texts during the whole nineteenth-century, especially regarding slavery. See "Slavery and the Transformation of Brazilian Law" em Cantisano; Dias Paes, "Legal Reasoning in a Slave Society," 480-486; "O panorama normativo do Brasil Império e direito romano subsidiário em particular ao direito sobre a escravidão" in Aguiar, "Direito (romano) e (boa) razão," 256-263.

solely at the *utilitas* or *commodum* of the other party, and not at his own benefit. [772] Any donation would be a liberality of this nature - the reverse, however, would not be true. Not every liberality would constitute a donation, as it corresponded only to the beneficence in which the agent took something from his assets. On the recipient's side, the essential element of the donation would be enrichment. In a nutshell, donation was defined as the addition of one asset through the diminution (also called alienation) of another. Wherever there was a lack of pecuniary sacrifice on the part of the donor – for example, when the benevolence was manifested by an act that did not alter the extent of the estate – or enrichment on the part of the donator – when a portion of the donor's estate was sacrificed, but on the other hand a right external to the estate was acquired – there would be no donation.

It is precisely in the case of a reduction in property without enrichment that Savigny places the manumission of a slave[773]: it is the typical case in which someone removes a portion of their estate to the advantage of another, but the latter acquires a right that is outside the estate. Through manumission, the master abandons a real property with "liberal intent", so that all the necessary for a donation has taken place on his part. The right acquired by the slave, freedom, in turn, is not a property right. It would be wrong, the author explained, to consider that the master had passed on to the slave the dominion he had over him. That dominion is reduced to nothing, and a free man is created again, a being who is capable under the law. For this reason, neither testamentary manumission nor manumission *inter vivos* could be considered a donation.

The use – not very scrupulous, according to Savigny – of the word *donatio*, which appears among Brazilians, but also among Roman jurisconsults [774], and the fact that some of these rules (such as those relating to suspensive conditions and

[772] Friedrich Carl von Savigny, *System des heutigen Römischen Rechts,* vierter Band (Berlin: Veit und Comp., 1841): 9-10.
[773] Ibid., 51-52.
[774] The author points out that the expression *datio libertatis* to designate manumission was one of the improprieties coined by the Romans themselves, as much as the definition, present in L. 36 de leg. II, of the legacy as a *donatio*. See Ibid., 51; 26.

revocation, for example) applied analogously to manumission, did not mean that it was the same legal transaction. Even so, it was precisely its conceptual construction within the civil law doctrine as a liberality or "disinterested beneficence" equivalent to donation from the donor's part – present even in those scholars who had the prudence to distinguish them – to serve as one of the most important ideological and cultural factors in the production and maintenance of relations of submission and dependence under the master rule. It was responsible for guaranteeing, from a legal point of view, the freedmen's duties of obedience and personal subjection even after the end of captivity[775], but also for making the right to freedom subject to the will of the master, for whom a mere promise was not even binding[776].

The logic of the gift permeated the acts of manumission even when it came to onerous freedoms, where the slave paid his own price. From the colonial period onwards, paid manumissions accounted for a large part of the number of manumissions granted in Brazil[777], but even so, as Orlando Patterson observes, "the fee the slave or his redeemer pays is a mere token, an expression of gratitude for the master's freely given decision to release the slave from his eternal bondage.[778]" Nonetheless, even if this construction remained hegemonic and dictated the legal and

[775] Even if they were much attenuated when compared to the duties laid down in Roman law, in which a fictitious kinship between master and freedman constituted a true *jus patronatus* – by which freedmen not only took the names and prenames of their masters, but were considered agnates and permanently linked to their home and family – Brazilian lawyers also spoke of a subsistence "*do liberto para com o patrono os deveres de respeito, bons officios, e piedade filial, á semelhança de um filho agradecido; pelo que, se o tiver de chamar a Juizo, deve querer a devida vênia ao Juiz*". See Malheiro, *A Escravidão no Brasil,* 196.

[776] In 1849, the Brazilian Supreme Court ruled that a promise of future freedom, written on paper that was not given to the slave, was not considered a title for the slave to enjoy freedom, nor did it give him the right to bring an action, since it was only a manifestation of future will, which had not been implemented, and which could be changed at any time, especially since it had not been given to the slave. See Caroatá, *Apanhamento de decisões sobre questões de liberdade,* 51.

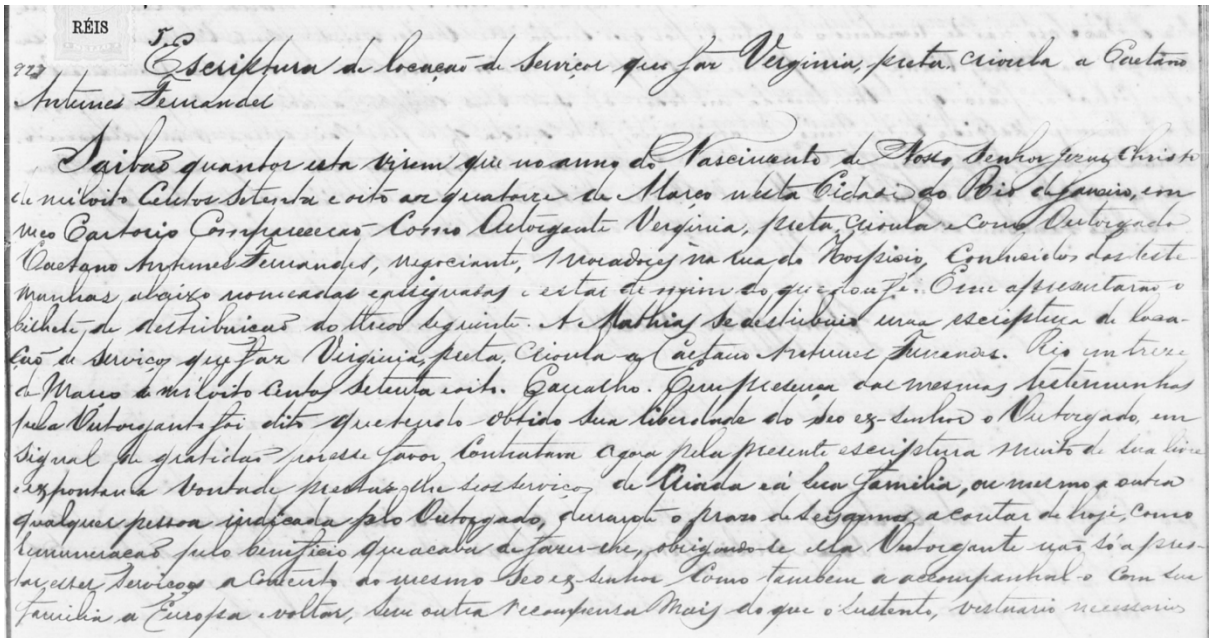
[777] In almost all regions of Brazil, self-purchase always made up a significant share of manumissions. See Klein and Luna, *Slavery in Brazil,* 179 ff.

[778] Orlando Patterson, "Three Notes of Freedom: The Nature and Consequences of Manumission," in *Paths to Freedom: Manumission in the Atlantic World*, ed. By Rosemary Brana-Shute and Randy Sparks (Columbia: University of South Carolina Press, 2009): 16-29 (18).

social construction of this act, "this was a cultural process, the way in which the transaction was made meaningful, explained, and rationalized"[779].

As a construction, it was not the only way of expressing this very act, and what we see in nineteenth-century Brazil is the coexistence of this reasoning with the ever-more pervasive logic of contract as a bilateral agreement, of reciprocal obligations, and meeting of two wills. Just take a closer look at the deed of rental of services that Verginia, a black Creole woman, signed with her former master Caetano Antunes Fernandes, on March 14, 1878, before the notary public of the 1st Notary Office in Rio de Janeiro. In the role of grantor, Verginia, "*preta crioula*", stated that

"having obtained her freedom from her former master the grantee, *as a sign of gratitude for this favor*, hereby contracts of her own free will to render her services as a servant to him and his family, or even to any other person indicated by the grantee for a period of six years from today, as remuneration *for the benefit which he has just granted her*, the grantor obliging herself not only to provide these services to the satisfaction of her former master, but also to accompany him and his family to Europe and back, with no other reward than sustenance, necessary clothing, and treatment when ill, subjecting herself in all things to the laws governing the contracts of colonists, which are considered as such for all purposes of this deed."[780]

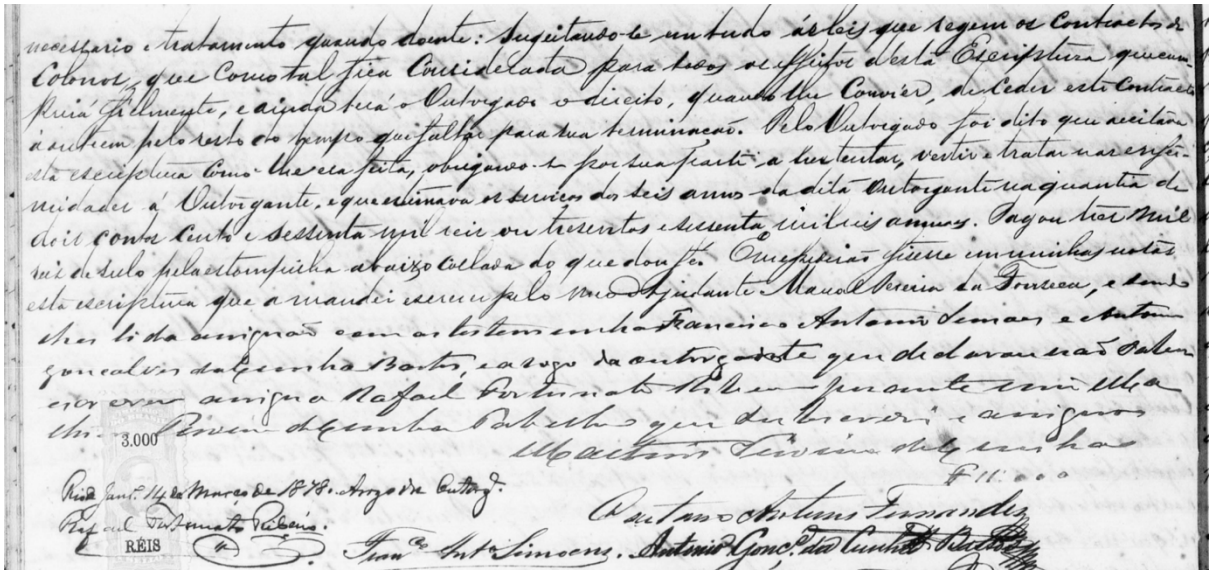

RÉIS

Escriptura de locação de serviços que faz Verginia, preta crioula a Caetano Antunes Fernandes

Saibão quantos este virem que no anno do Nascimento de Nosso Senhor Jesus Christo de mil oito centos setenta e oito aos quatorze de Março nesta Cidade do Rio de Janeiro, em meo Cartorio Compareceo Como Outorgante Verginia, preta crioula e Como Outorgado Caetano Antunes Fernandes, negociante, morador nesta rua do Hospicio, Conhecidos das testemunhas abaixo nomeadas especificadas e estas de mim do que faço fé. E logo apresentarão o bilhete de distribuição do theor seguinte. Matthias Distribuição uma escriptura de locação de serviços que faz Verginia, preta, crioula a Caetano Antunes Fernandes. Rio quatorze de Março de mil oito centos setenta oito. Carvalho. E pela presença das mesmas testemunhas pela Outorgante foi dito que tendo obtido sua liberdade do seo ex-senhor o Outorgado, em signal de gratidão por esse favor contratava agora pela presente escriptura prestar de sua livre expontanea vontade prestar-lhe seos serviços de Criada só sua Familia, ou mesmo a outra qualquer pessoa indicada pelo Outorgado, durante o prazo de seis annos a contar de hoje, como remuneração pelo beneficio que acaba de fazer-lhe, obrigando-se ella Outorgante não só a prestar estes serviços a contento do mesmo seo ex-senhor como tambem a acompanhal-o com sua familia a Europa e voltar, sem outra recompensa mais do que o sustento, vestuario necessario

[779] Id.

[780] "Escriptura de locação de serviços que faz Verginia, preta crioula a Caetano Antunes Fernandes," Livro 353, do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Matthias Teixeira da Cunha, 14/3/1878, fl. 78 (ANRJ).



Source: Livro de notas n. 353 – BR RJANRIO 5D - ofício de notas do rio de janeiro, 1- Fundo – 5D.0.LNO.234 (ANRJ)

Appearing alongside her master before the notary, she became a part in the agreement that express her entry in the world of freedom, declaring as a grantor the conditions in which the compensation would be provided. Even without completely breaking with the logic of the gift and announcing her "gratitude for a benefit received", she appeared as a fair and agreed part of her freedom deal, not a mere recipient of the unilateral will of the master or the object of negotiation between third parties. Like Verginia, 23 other workers among the 96 freedmen mentioned in the second chapter of this thesis signed service rental contracts before the public official of the 1st Notary Office of Rio de Janeiro directly with their own former masters, and not simply with the third party who had provided them with a loan. Even though it was often recorded that the pact was made "due to the appeal made to their generosity"[781], "and to prove in the most positive way their recognition and gratitude,"[782] by expressing their freedom deals as an agreement with reciprocal

[781] "Escriptura de locação de serviços que faz a parda Maria a Dona Maria Rosa da Gloria," Livro 315, do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Carlos Augusto da Silva Lobo, 24/4/1871, fl. 34v.

[782] "Escriptura de locação de serviços que fazem as pardas Marcolina e Adelaide a Dona Carolina da Silva," Livro 315, do *1o Ofício de Notas do Rio de Janeiro,* tabelião: Carlos Augusto da Silva Lobo, 9/5/1871, fl. 69.

obligations and defined clauses, they transformed the logic and grammar of the act that ended the dominion relationship.

Enjoying self-ownership and being in the “exercise of their liberty”, they appeared as “fair and agreed” parties before the Notary Public, who gave public faith to their agreements. In the presence of witnesses, they undertook to fulfill “faithfully”, and in the “form in which it was accepted and stipulated”, obligations signed “voluntarily” and “to their satisfaction”. Despite the working conditions to which they were subjected, and the common past of enslavement that accompanied them, under the notary's pen they became bearers of “free will” and “equal parties” to their former masters. Compulsory unpaid labor for years to come and contract were certainly not incompatible, but their combination reciprocally altered the limits, and the contents, through which the two were expressed and understood in nineteenth-century Brazil.

§3. **At last, back to the first: domestic labor under focus at the fall of a slave monarchy**

The last, but not least, topic of this dissertation brings us back to the original environment of the law of labor: the household and the loyalties of the domestic world. The prototype worker of the old regime, who seemed to have been relegated to oblivion in the world of written contracts required by the rental of services laws, is once again the object of special attention in the final decade of slavery. While the creation of a special legal regime with exceptional rules was hardly surprising in Brazilian slave legal order, it is worth noting that even in France of the unification of the subject of law, domestic workers were the target of special legislation, yet it was claimed that they had not passed unscathed through the revolution.[783] Beyond the notorious restrictions to civil and political rights of servants long present on the liberal constitutions throughout the continent[784], which made them holders of a "submerged citizenship"[785], special rules also targeted domestic labor itself[786], as "*les domestiques sont ceux qui sont attachés d'une manière particulière à la personne, au ménage, à la maison du maître.*"[787] The short life of the revolutionary aim that "*la loi ne*

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[783] "*La révolution a profondément bouleversé nos mœurs*", stated the French jurist François Laurent in 1877, as "*nous ne tenons plus à honneur d'être des domestiques. La domesticité Même se transforme, elle tend à devenir um servisse régulier, semblable à celui des fonctionnaires, c'este une fonction qui a ses lois; ce n'est plus le servisse indefini de la personne, soumis à l'arbitraire du maître; il est réglé et défini. Les domestiques cherchent à conquérir l'indépendance, et ils y ont droit dans une certaine mesure*". See Laurent, *Principes de Droit Civil Français,* 541.

[784] See Raffaella Sarti, "Un giro d'orizzonte europeo," in *Servo e padrone, o della (in)dipendenza. Un percorso da Aristotele ai nostri giorni* (Bologna: Alma Mater Studiorum Università di Bologna, 2015): 156-170.

[785] Passaniti, "La Cittadinanza Sommersa. Il lavoro domestico tra Otto e Novecento," 233-258.

[786] In France, an Imperial Decree of October 3, 1810, obliged all domestic laborers in Paris to obtain a "*billet d'inscription*" from the police department, a stipulation later extended to all cities with more than 50.000 habitants by Decree of September 23, 1813. In German territories, the *Gesindeordnungen* of November 8, 1810, in Prussia and January 10, 1855, in Saxony also created a special regime for these workers. In addition, they wouldn't be included in the Reich Trade Act of the North German Confederation, adopted in May 1869, which allowed freedom of association for many trades but excluded domestic servants, sailors, and public servants from this freedom. See Veneziani, "L'evoluzione del contratto di lavoro in Europa dalla Rivoluzione Industriale al 1945", 39 ff.; Keiser, "Between Status and Contract?", 41 ff.

[787] Troplong, *Le Droit Civil expliqué. De l'échange et du louage*, t. II, 278.

reconnaît point de domesticité"[788] would not prevent jurists of regarding "*la domesticité est dans les états libres celle qui rappelle le plus l'esclavage* (…) *le degré inférieur de la société.*[789]"

More than a theoretical analogy to slavery, in nineteenth-century Brazil it represented a tangible correspondence. In urban centers, domestic service had been primarily carried out by slaves allocated within households, owned by the families served or provided by an intense slave rental market[790]. While the authority over these workers, whether enslaved, liberated, or free[791], always revolved around the private power of the *pater familias*, in the last decade of the slave monarchy, this issue emerged prominently in public debate. Though attempts of regulating domestic labor appeared already in the mid-nineteenth century, it was in the 1880s[792] that anxieties regarding the police control of these laborers gained free rein amidst rapid urban growth, immigration policies drawing impoverished immigrants and freed workers to major cities, and particularly the imminent slavery's demise. The emphasis on the need for loyalty and trustworthiness in arrangements of intimacy and often cohabitation,

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[788] Art. 18 of the *Constitution du Peuple Français du 24 Juin 1793, l'an deuxième de la République* (footnote 133).

[789] Troplong, *Le Droit Civil expliqué. De l'échange et du louage*, t. II, 279.

[790] Flavia Fernandes de Souza, "Repensando o aluguel como modalidade de trabalho escravizado: um estudo a partir da prestação de serviços domésticos (Cidade do Rio de Janeiro, segunda metade do século XIX)," in *Anais do 10º Encontro Escravidão e Liberdade no Brasil Meridional* (Universidade Federal de São Paulo e Universidade Estadual Paulista, 2021): 1-18.

[791] In addition to the strong slave presence in the sector, it was also distinguished by the intense coexistence between workers with different legal statuses. According to data from the 1872 census, for the urban and rural parishes of the city of Rio de Janeiro, for instance, the number of domestic slaves was 22,843 (41.52% of all workers in this category) and the total number of free domestic workers was 32,169 (58.47% of all domestic servants at the time). Among the free servants, the number of freedmen and foreigners was significant. See Flavia Fernandes de Souza, "Criados ou empregados? Sobre o trabalho doméstico na cidade do Rio de Janeiro no antes e no depois da abolição da escravidão," in *Anais do XXVII Simpósio Nacional de História. Conhecimento histórico e diálogo social* (Natal, RN: 2013): 1-16 (7).

[792] As early as 1853, for example, a proposal was already circulating in the Rio de Janeiro City Council to oblige all individuals, free or slave, who rented themselves out for domestic service to register with the council. This proposal already contained all the elements that would mark this legislation in the following years: registration, passbook, chief of police, servants as a class of individuals requiring special vigilance, whether free or slave. See Flavia Fernandes de Souza, *Criados, escravos e empregados. O serviço doméstico e seus trabalhadores na cidade do Rio de Janeiro (1850-1920)* (Rio de Janeiro: Arquivo Nacional, 2017): 226.

which had hitherto kept them an exclusive private matter, was precisely what brought it to the public fore within a context of generalized social anxieties.

Even if these workers had never been formally excluded from the rental of services laws, the common absence of a written contract – not to mention the often absence of even a stipulation on salary [793] – had majorly sent them back to their natural cradle of the old regime, the Philippine Ordinances.[794] However, as slavery ties were soon to be removed both in the household and the street, growing concerns about the need to control a mass of workers who occupied domestic spaces and "dangerously"[795] shared the intimacy of their employers made an issue hitherto exclusively private into a target of public intervention. Leveraging the perceived risk of potentially criminals infiltrating households, the proposals put forward among various Brazilian municipalities during the 1880s bore a deeply coercive nature. The declared intention to monitor and surveil domestic workers was implemented through stringent identification protocols and close scrutiny by public authorities[796].

While the national legislative bodies were engaged in the debates about the definitive abolition of slavery [797], the municipal and provincial level were preferred to regulate this particular social group, also as the bodies with legislative power more directly linked to the city's population and urban problems. The role of municipalities

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[793] Drawing on a sample of lawsuits claiming for unpaid wages of both free and freed domestic laborers, Henrique Espada Lima from the Brazilian National Archive, shows how difficult it was for these women to demand unstipulated wages from masters who used their intimacy and private power to enjoy their labor under unpaid dependence. See Henrique Espada Lima, "Wages of Intimacy: Domestic Workers Disputing Wages in the Higher Courts of Nineteenth-Century Brazil," *International Labor and Working-Class History,* no. 88 (2015): 11-29.

[794] While both the law of 1830 and also the law of 1837 spoke of written contract as the only kind of agreement covered by their rules, the law of 1879 even required the public form: "*Art. 4º O contrato de locação de serviços exige, para sua fórma e para sua prova, a escriptura publica, celebrada perante o Escrivão de Paz do districto onde fôr situado o predio rustico, ao qual se destinar o serviço, ou na capital das provincias maritimas, perante Tabellião de Notas, ahi achando-se o locador.*" (Decree n. 2.827 of March 15, 1879). In the absence of a written contract, the subsidiary legislation of reference remained the Philippine Ordinances.

[795] Espada Lima and Popinigs, "Maids, Clerks, and the Shifting Landscape of Labor Relations in Rio de Janeiro, 1830s–1880s," 72.

[796] Souza, *Criados, escravos e empregados,* 227.

[797] For the last gradual abolition projects that engaged Parliament in the final decade of slavery, see Joseli Maria Nunes Mendonça, *Entre a mão e os anéis. A Lei dos sexagenários e os caminhos da abolição no Brasil,* 2. ed. (Campinas: Editora da UNICAMP, 2008).

in labor regulation wasn't a recent phenomenon. Dating back to the enactment of the initial Regiment of the Chambers of Independent Brazil in 1828, they had already taken on duties involving the regulation of the local economy, commercial establishments, workers mobility, and public health. This granted their decisions significant sway over daily work life within the city. In addition, the Municipal Police Department, by virtue of the reform of the Code of Criminal Procedure of 1841, accumulated judicial authority, being competent to arrest, judge and sentence without the intervention of other instances of power, becoming a key instance for the implementation of codes of conduct and measures of social control over workers[798].

With partially coinciding terms and scope, attempts or actually implemented measures to regulate domestic service were made in São Paulo[799], Salvador[800], several municipalities of Rio Grande do Sul[801] and the capital of Rio de Janeiro[802]. They had in common, among other aspects, the determination that domestic workers should be registered, with a description of the individuals' physical features and certificates of behavior and origin; should carry an identification passbook ("*caderneta*") to record personal data and hiring history and register their labor contracts in specific books for this purpose at the Police Department.

Beyond a maniacal preoccupation with identification and inspection, the primary objective, once again, was to ensure the enforcement of the work agreements. To this end, another common feature that ran through all these regulations was the punitive measures in the case of non-compliance with the contract. All the projects

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[798] Juliana Teixeira Souza, "As câmaras municipais e os trabalhadores no Brasil Império," *Revista Mundos do Trabalho* 5, no. 9 (2013): 11-30.

[799] Lorena Féres da Silva Telles, *Libertas entre sobrados: cotidiano e trabalho doméstico em São Paulo (1880-1900)* (Master's dissertation, Universidade de São Paulo, 2011).

[800] Walter Fraga Filho, "Migrações, itinerários e esperanças de mobilidade social no recôncavo baiano após a Abolição," *Cadernos AEL* 14, no. 26 (2009): 96-132.

[801] Margaret Marchiori Bakos, "Regulamentos sobre o serviço dos criados: um estudo sobre o relacionamento Estado e Sociedade no Rio Grande do Sul (1887-1889)," *Estudos Ibero-Americanos,* 1-2 (1983): 125-136.

[802] Sandra Lauderdale Graham, *House and Street: The Domestic World of Servants and Masters in Nineteenth-Century Rio de Janeiro* (Austin: University of Texas Press, 1992): 123 ff.; Souza, *Criados, escravos e empregados,* 219 ff.

provided for prison sentences (between 4 and 8 days) for early abandonment of the contract. The measure was justified in order to prevent servants from abandoning their jobs, as the high turnover of domestic servants was often pointed out as one of the sector's main problems.

In resembling the service rental laws discussed in the previous chapter by this punitive character, they displayed significant differences. The requirement for registration in a general registry, the creation of an identification passbook, and the recording of contracts in a specific police department book shifted the authority to which labor laws, until then, had subjected workers and employers. It moved away from the realm primarily governed by private autonomy, symbolically represented by the notary, and brought it to the core of administrative law and public authority: the police department. It also removed the jurisdiction of the non-literate, yet still a member of the judicial power, the justice of the peace, and placed them under administrative and police authority.

Just like the national laws governing service rentals, the public intervention on private agreements also implied the other side of the medal of formalization and control: establishing unprecedented boundaries for employers. The inclusion of clauses allowing the agreement to be terminated in cases of illness, non-payment, or mistreatment marked a renewed restriction in a previously private, personal, and potentially illimited domain. Prohibiting physical punishment of servants and mandating that employers provide "healthy living quarters" and "nutritious food" while, on the one hand, functioned as a clear testimony to the tradition of violence in the treatment of domestic workers[803], on the other hand, balanced the hierarchies of the household and represented a nod towards the impersonalization of these work arrangements.

But the legal lexicon adopted in these regulations shows how the contract paradigm was able to penetrate them only to a limited extent. The terms used to designate domestic servants varied slightly in the different urban contexts, but they all

[803] Souza, *Criados, escravos e empregados*, 229.

bore the mark of the old regime. The term "*lacaio*" ("lackey") appears in the definition of the class in Salvador[804] and some municipalities in Rio Grande do Sul, while others mentioned the term "*servente*" and "*condição de fâmulo*" – another synonym for servant[805]. In São Paulo a clear legal definition of "*criador de servir*" inaugurated the statute: "any person of free condition (...) who performs domestic service"[806]. Even though this lexicon now appeared under the guise of a legislative intervention aimed at a specific group of workers and no longer as the general prototype of laborer as under the Portuguese Ordinances, it meant, in any case, a return to a legal vocabulary that the liberal reforms had initially tried to dispel.

In the different forms they took, the legislative efforts aimed at regulating domestic service ended up displeasing both master and servants. The ones for what they perceived as undue intervention in private power within their households, the others for the markedly coercive nature of the measures. While in cities like Rio de Janeiro, despite numerous debates and projects, they were not even approved, in São Paulo and Salvador they had limited application, being repelled just a few years after the proclamation of the Republic. Once again, the rule of contract, as much empowering as it was binding, was defeated by the imperative of deregulation: "an equally ambiguous world, but certainly less favorable to those who lacked a better alternative."[807]

More than an ambiguous silence, the successive chapters in the history of the regulation of this specific group of workers tell us much more about a deliberate exclusion from social legislation. When labor legislation became a prominent concern in Brazilian politics after the end of the First Republic (1889–1930), domestic labor was intentionally left out of the new laws, and developments in social legislation largely overlooked domestic servants. This trend wasn't unique to Brazil. Just think of France,

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[804] Fraga Filho, "Migrações, itinerários e esperanças de mobilidade social no recôncavo baiano após a Abolição," 120.

[805] Bakos, "Regulamentos sobre o serviço dos criados: um estudo sobre o relacionamento Estado e Sociedade no Rio Grande do Sul (1887-1889)," 129.

[806] Telles, *Libertas entre sobrados*, 38.

[807] Espada Lima, "Freedom, Precariousness and the Law," 414.

which didn't include them in early twentieth-century laws limiting working hours and establishing weekly rest days. Belgium's 1900 employment contract law also excluded domestic workers, and in the Netherlands, they were left out of legislation regulating working hours and protecting women and minors (except for the 1907 employment contract law). Additionally, in Italy, neither the 1893 law on *probiviri* nor the 1898 law on industrial accidents, nor subsequent legislations in 1903 and 1904, made any references to domestic servants[808]. If distinctions of normative regimes and plurality of contractual frameworks are rather a nineteenth-century story, in Brazil and abroad, even today, a complete integration of domestic workers in the broader legal framework of contract labor there and elsewehere is an unfinished task. Now, as before, however, it is rather an ambiguous target – not necessarily a desirable one.

[808] Veneziani, "The Evolution of the Contract of Employment," 46-47.

FINAL REMARKS

Non chiederci la parola che squadri da ogni lato
l'animo nostro informe, e a lettere di fuoco
lo dichiari e risplenda come un croco
perduto in mezzo a un polveroso prato
Ah, l'uomo che se ne va sicuro,
Agli altri ed a sé stesso amico
E l'ombra sua non cura che la canicola
Stampa sopra uno scalcinato muro!
Non domandarsi la formula che mondi possa aprirti
In qualche storta sillaba e secca come un ramo.
Codesto solo oggi possiamo dirti,
Ciò che non siamo, ciò che non vogliamo[809]

The long creating curve trudged by the Brazilian post-colonial legal order from Independence to the abolition of slavery is not a legal and social landscape that can be safely waved away with a single word that squares it off on each side. Diving into a legal landscape of labor that underwent important changes but was still strongly marked by the colonial pluralism of legal sources and legal subjectivities is a task which offers us anything but a secure and simplifying formula.

The new independent country soon adhered to the broader movement of modernization of the legal lexicon on labor matters with the same determination that it decided to keep old Portuguese legal sources and human property as a legal and lively institution. Whether because of the perceived need to reconcile with the colonial heritage, or because the first Brazilian laws regulating free labor developed in tandem with legislation concerning slavery and the slave trade, Brazil's period of state formation and nation-building had not been a linear trajectory of legal modernization.

[809] "Don't ask us for the word to frame / our shapeless spirit on all sides, / and proclaim it in letters of fire to shine / like a lone crocus in a dusty field. / Ah, the man who walks secure, / a friend to others and himself, / indifferent that high summer prints / his shadow on a peeling wall! / Don't ask us for the phrase that can open worlds / just a few gnarled syllables, dry like a branch. / This, today, is all that we can tell you / what we are not, what we do not want". See Eugenio Montale, *Collected Poems 1920-1954,* translated and annotated by Jonathan Galassi (New York: Farrar, Straus and Giroux, 1998): 37-38.

If the inconsistent yet unashamed coexistence of the old and the new was less surprising in legal literature – which in the peninsula and the former colony combined the labor categories of family universe with the representation of the employment relationship as a purely obligatory bond between formally equal subjects before the law – neither were civil statutes embarrassed to introduce the contract paradigm without unifying the subject of law. As early as the first decade after independence, two laws on service rental contracts were enacted addressing different subjects and creating different contractual regimes for citizens, foreigners and "barbarian Africans". "Status" and "contract," rather than substituting one for the other in the new legislative order, and instead of presenting themselves as opposing terms of a schematic and simplified representation, coexisted throughout the century, inextricably intertwining new principles with an old imaginary about labor.

That labor became one of the focal points of state reforms in post- colonial Brazil is not surprising in the context of the Atlantic pressures of the beginning of the century. The rising prominence of Britain's crusade against the African slave trade led to important legal reforms in labor policies all over the continent. Already in 1830, a first statute intended to establish and regulate a labor force consisting of legally free people, including native, but especially White immigrant workers. For this purpose, the liberal contractual language seemed to fit perfectly. Yet, it also contained an exclusion of one category of workers from its ambit of application: the last article explicitly rejected *africanos bárbaros*, Black people born in Africa. Regarding the contracting parties, at least formally it waved towards the ideal of equality providing for identical fines for both the worker and the employee who failed to comply with the contract, as much as both were subject to imprisonment if they failed in their contractual obligations.

However, it didn't go further in regulating important aspects of work relationships and left unregulated crucial themes as contract length, just causes for termination or the procedural aspects of the imprisonment sentence stipulated in case of contract breach. Investors involved with migration policies and politicians –

functions often accumulated by the same individuals, alongside that of lawmakers – soon came to see the existing framework as inadequate to regulate the written contracts with the colonists. And so, a second act on service rental contracts was enacted only seven years after targeting exclusively foreigners. Under the initiative of the *Sociedade Promotora da Colonisação do Rio de Janeiro*, a private company founded in the capital of the Empire in 1836, law no. 108 was approved on 11 October 1837, expanding, and refining the legal mechanisms of labor control to the disadvantage of White immigrants. On the one hand, provision for sanctioning employers completely disappeared from the new regulation. On the other hand, for the worker-lessor the penalties for breach of contract became noticeably more severe.

If narrow targets of legislative texts suggest parallel and divergent paths, the investigation with primary sources showed those were plural yet not incommunicable frameworks. First, colonization did not simply replace slavery but overlapped and was often even a cover rather than a substitute for the slave trade. Within this scenario, a strict opposition between 'free' and 'unfree' labor, especially one based on the formal status a worker enjoyed under the law, misleads about the realities of both. The court cases brought to analysis were further evidence that slaves, freed persons, national and foreigners poor alike experienced the precariousness of labor in nineteenth-century Brazil. But a careful reading of these documents served us to understand that not only their social but also their legal experiences were much closer to one another than legal historiography has hitherto assumed.

Firstly, the legal framework under contract law had a predominantly punitive character, enforced under a deliberate lack of formalities. Penalties for contract abandonment aimed not only to ensure specific performance but also served for "correctional purposes" without an established procedure, either preventively or post-conviction. Whether the law of 1830 or 1837, the employer's jurisdiction prevailed before a lay justice of the peace, which could provide for preventive detention without any defined maximum time upon a simple request by the employer.

Secondly, beyond the highly denounced inequalities between nationals and foreigners and the excessive ruthlessness towards the latter, the new contract regime also distinguished 'barbarian Africans' from freed workers already present in Brazil. The first were not allowed to hire their services but were forced to perform compulsory labor for 14 years. The others, although ideally included in the regime for nationals, were the protagonists of the most expansionist use of legislation for foreigners in Brazil's notarial archives. It was precisely by invoking the punitive regime from which they were excluded that these subjects managed to navigate alternative routes to freedom, registering rental of services contracts to compensate for their manumissions for payment. Beyond that, just as the laws against slave trade failed to prevent the entry of nearly a million Africans, legislative targets and legal exclusions proved ineffective in preventing civil statutes' expansive and creative invocation. Even under a strict punishment regime – and perhaps precisely because of it – enslaved workers gave new meanings to free labor categories.

Even though the labor question considerably changed between the 1830s and the 1870s – in tandem with the major debates on the replacement of slave labor, which concerned the extinction of slave trade first and, later, the gradual and final abolition of slavery– a national workforce composed of free workers and the importation of foreign migrants kept as part of the "space of experience" and the "horizon of expectations" of jurists and lawmakers involved in the parliamentary debate. The third Brazil law on rental of services, enacted in 1879, was passed when the Imperial Government had already adopted gradual emancipation policies, covering for the same time within a single legislative text Brazilians, foreigners and freedmen, but lading down different rules for each of them. Once again, the punitive regime gathered the greatest attention in parliamentary debates, exposing as never before the theoretical embarrassments and the practical problems accumulated in the experience of the previous thirty years of adopting public criminal sanctions in civil statutes without clear procedures.

However, civil statutes regulating the free rental of services were only a fraction of a broader tapestry of norms and subjects regarding labor in nineteenth-century Brazil. Commercial law, the sole branch of private law codified during this period, was also a parallel – yet partly concurrent – normative piece of the complex and plural normative mosaic of labor under study. Apart from allocating a specific section to the commercial workers par excellence – foremen, bookkeepers and salesclerks – the Brazilian code included a separate chapter on the "commercial rental of services" with a definition that overlapped with the civil laws that already existed in the country. A Brazilian legislative choice without parallel among contemporary codes that would cause great controversy in doctrine and judicial practice about the extent of this special jurisdiction in the following decades. After all, the competent court determined which legislation workers and employers could resort to in their plea, the available coercive mechanisms in case of non-compliance, what types of just causes could be alleged, and the procedural aspects governing their judicial actions. A condition that strongly influenced the course and outcome of labor negotiations and disputes on the ground with implications for both parties. Employers using their merchant status as a pretext to invoke commercial jurisdiction and defer the resolution of a wage suit as much as workers resorting to those special courts as an opportunity to suit wages with briefer procedures reinforced the observation that the opportunity of any normative provision is rarely univocal and mobilized by a single pole of the employment relationship.

The second special normative set to receive our attention was the law of slave labor. Placing this legal framework within the scope of the law of labor extends an invitation to contemplate slave labor relations as a legitimate aspect incorporated into the legal regulation of labor, not solely confined to property law. For years, the portrayal of the master-slave legal relation merely as a dominance-based bond has dissuaded scholars studying both the nineteenth century and slavery itself as worthy fields of interest within the history of labor law. Since its participants were ostensibly regarded merely as "property objects" rather than properly acknowledged as

"workers," the legal aspects arising from these legal relationships were long scrutinized—and explained—solely within the realm of law of things.

One of the consequences of this reasoning was to assume - without support in historical sources – the automatic transfer of ownership of the fruits of the slave's labor to the owner or possessor of the slave, not conceiving that the slave could own the fruits of his labor or any other property. However, extensive historiography, recovered in this thesis, has also shown how the "*escravos de ganho*" in Brazil, the "*jornaleros*" in Cuba and the "money-earning slaves" in the British Caribbean had in common the experience of being enslaved workers who nevertheless had the right to rent their own labor power and to receive remuneration – often in cash – for their work or at least for part of it. The slave's remuneration was therefore one illustrational aspect of the law of slavery with juridical legal relevance within a legal regulation of labor.

In the same way, I sought to inquire how the broader tendency towards the contractualization of legal relations that ran through the law of labor in the century of liberalism also penetrated this specific domain. As much as slavery informed both free and slave labor for as long as it lasted, vice versa was also true. With the gradual construction of a liberal order in Brazil, not only were property rights increasingly privileged, keeping the legality of slave property intact, but labor relations were also generally rethought through the paradigm of the contract. Branded with the cosmovision of the contract, that worldview which idealized ownership of self and voluntary exchange, the emerging free labor legislation of the 1830s not only shaped the dynamics of free labor but also exerted a transformative influence on the institution of slavery. Once again, with ambiguous results, but not necessarily only unfavorable to those who came out of slavery.

Finally, a last section sheds light on specific group of workers who, in the nineteenth century, garnered distinctive legislative focus both in Brazil and abroad: domestic labor. If in the old-regime framework they were the prototype of workers, in the end of the nineteenth century they were subject to special legal regimes that separated them from the general framework of the laws on rental of services, usually

with the aim of establishing more pronounced police and punitive measures. In Brazil, this type of regulation proliferated mainly at the municipal level and in the last decade of slavery, reintroducing terms such as "servants" into the legal lexicon, transferring the power to supervise labor relations from the justice of the peace to the sub-delegate of police, and invariably providing for imprisonment in the event of non-compliance. A group of workers who, on the one hand, was excluded both from the legislative innovations of the nineteenth century, as they targeted written contracts and they rarely signed one, and from the umbrella of mercantile legislation, however expansive it was. On the other hand, they were the object of the greatest legislative attention at the end of the Empire, bringing together many of the debates that ran through the thesis: (a) the imposition of prison penalties for breach of contract; (b) the tensions surrounding the modern legal lexicon of the rental of services; (c) and the creation of special and plural legal regimes in front of the trend towards the unification of the subject of law.

With this itinerary, which is by no means exhaustive of the legal problems that a plural panorama of workers and sources of law implied for labor relations, I sought to shed light on local solutions to Atlantic legal problems forged in Brazilian Parliament, courtrooms, notary offices, farms, and urban centers, in which jurists, legislators, employers and workers converged as relevant actors. Although many of these singular solutions were the result of Brazil's singular position as the largest importer of slave labor in the Americas and the destination of thousands of foreign workers at the dawn of mass migration, they were at the same time the outcome of debates and trends that were circulating more widely in the Atlantic world – but which, in Brazil's fluid social and legal landscape, flowed and collided in a unique way.

CONCLUSIONES

Non chiederci la parola che squadri da ogni lato
l'animo nostro informe, e a lettere di fuoco
lo dichiari e risplenda come un croco
perduto in mezzo a un polveroso prato
Ah, l'uomo che se ne va sicuro,
Agli altri ed a sé stesso amico
E l'ombra sua non cura che la canicola
Stampa sopra uno scalcinato muro!
Non domandarsi la formula che mondi possa aprirti
In qualche storta sillaba e secca come un ramo.
Codesto solo oggi possiamo dirti,
Ciò che non siamo, ciò che non vogliamo[810].

La larga curva de maturación recorrida por el orden jurídico poscolonial brasileño desde la Independencia hasta la abolición de la esclavitud no es un paisaje jurídico y social que se pueda saludar con una sola palabra que lo cuadre por entero. Sumergirse en el paisaje jurídico del trabajo, que sufrió importantes cambios pero que seguía fuertemente marcado por el pluralismo colonial de las fuentes y subjetividades jurídicas, es una tarea que nos ofrece todo menos una fórmula segura y simplificadora.

Poco después de la independencia, la nueva nación pronto se adhirió al movimiento de modernización del léxico jurídico en materia laboral con la misma determinación con que decidió mantener las antiguas fuentes jurídicas portuguesas y la esclavitud como institución legal y viva. Sea por la necesidad de reconciliarse con la herencia colonial, sea porque las primeras leyes brasileñas que regularon el trabajo libre se desarrollaron paralelamente a la legislación relativa a la esclavitud y a la trata de esclavos, el período de formación del Estado y de construcción de la nación brasileña no fue una trayectoria lineal de modernización jurídica.

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[810] "Don't ask us for the word to frame / our shapeless spirit on all sides, / and proclaim it in letters of fire to shine / like a lone crocus in a dusty field. / Ah, the man who walks secure, / a friend to others and himself, / indifferent that high summer prints / his shadow on a peeling wall! / Don't ask us for the phrase that can open worlds / just a few gnarled syllables, dry like a branch. / This, today, is all that we can tell you / what we are not, what we do not want". See Eugenio Montale, *Collected Poems 1920-1954,* translated and annotated by Jonathan Galassi (New York: Farrar, Straus and Giroux, 1998): 37- 38.

Si la coexistencia incoherente, aunque desuenvuelta, de lo viejo y lo nuevo era menos sorprendente en la literatura jurídica que en la península, y en la antigua colonia combinaba las categorías laborales del universo familiar con la representación de la relación laboral como un vínculo puramente obligatorio entre sujetos formalmente iguales ante la ley, tampoco vacilaban las leyes civiles en introducir el paradigma contractual sin unificar el sujeto de derecho. Ya en la primera década tras la emancipación política de Portugal, se promulgaron dos leyes sobre contratos de arrendamiento de servicios que se dirigían a sujetos diferentes y creaban regímenes contractuales distintos para ciudadanos, extranjeros y "africanos bárbaros". "Status" y "contrato", en lugar de sustituir uno al otro en el nuevo orden legislativo, y en lugar de presentarse como los términos opuestos de una representación esquemática y simplificada, coexistieron a lo largo del siglo, entrelazando inextricablemente nuevos principios con un viejo imaginario sobre el trabajo.

Que el trabajo se convirtiera en uno de los puntos centrales de las reformas estatales en el Brasil poscolonial no es sorprendente en el contexto de las presiones atlánticas de principios de siglo. El creciente protagonismo de la cruzada británica contra la trata de esclavos africanos condujo a importantes reformas legales en las políticas laborales de todo el continente. Ya en 1830 un primer estatuto brasileño pretendía estimular y regular una mano de obra formada por personas legalmente libres, incluidos los trabajadores nacionales, pero apuntaba especialmente hacia los inmigrantes blancos. Para este propósito, el lenguaje contractual liberal parecía encajar perfectamente; contenía también, sin embargo, la exclusión de una categoría de trabajadores de su ámbito de aplicación: el último artículo rechazaba explícitamente a los "africanos bárbaros", los negros nacidos en África. En cuanto a las partes contratantes, al menos formalmente esa ley se intentaba acercar al ideal de igualdad previendo multas idénticas tanto para el trabajador como para el empleado que incumplieran el contrato, del mismo modo que ambos estaban sujetos a penas de prisión si incumplían sus obligaciones contractuales.

Sin embargo, no fue más allá en la regulación de aspectos importantes de las relaciones laborales y dejó sin regular temas cruciales como la duración de los contratos, las causas justas de rescisión o los aspectos procesales de la pena de prisión estipulada en caso de incumplimiento. Inversores implicados en políticas migratorias y políticos –funciones a menudo acumuladas por las mismas personas, junto a la de legisladores– pronto llegaron a considerar inadecuado el marco existente de regulación de los contratos escritos con los colonos. Así, sólo siete años después se promulgó una segunda ley sobre contratos de arrendamiento de servicios dirigida exclusivamente a extranjeros. Por iniciativa de la *Sociedade Promotora da Colonisação do Rio de Janeiro*, empresa privada fundada en la capital del Imperio en 1836, el 11 de octubre de 1837 se aprobó la ley nº 108, que ampliaba y perfeccionaba los mecanismos legales de control del trabajo en perjuicio de los inmigrantes blancos. Por un lado, las disposiciones para sancionar a los empleadores desaparecieron por completo de la nueva normativa. Por otro, para el trabajador-arrendador las sanciones por incumplimiento de contrato se hicieron notablemente más severas.

Si los limitados destinatarios de los textos legislativos sugieren caminos paralelos y divergentes, la investigación con fuentes primarias demostró que se trataban de marcos jurídicos plurales pero no incomunicables. En primer lugar, la colonización no sustituyó sin más a la esclavitud, sino que se superponía a ella y a menudo era más una tapadera que un sustituto de la trata de esclavos. Dentro de este escenario, una oposición estricta entre trabajo "libre" y "no libre", especialmente una basada en el *status* formal que disfrutaba un trabajador ante la ley, induce a error sobre las realidades de ambos. Los casos judiciales traídos a análisis fueron una prueba más de que esclavos, libertos, nacionales y extranjeros pobres experimentaron por igual la precariedad laboral en el Brasil del siglo XIX. Pero una lectura atenta de estos documentos nos sirvió para comprender que no sólo sus experiencias sociales, sino también las jurídicas, estaban mucho más próximas entre sí de lo que la historiografía jurídica ha supuesto hasta ahora.

Primeramente, el régimen contractual del trabajo libre tenía un carácter predominantemente punitivo, aplicado con una deliberada falta de formalidades. Las penas por abandono de contrato no sólo pretendían garantizar el cumplimiento específico, sino que también servían con "fines correctivos", sin un procedimiento establecido, ni preventivo ni posterior a la condena. Ya se trate de la ley de 1830 o de la de 1837, la jurisdicción patronal prevalecía ante un juez de paz lego, que podía disponer la detención preventiva sin plazo máximo definido a simple petición del empleador.

En segundo lugar, más allá de las desigualdades tan denunciadas entre nacionales y extranjeros y de la excesiva crueldad contra estos últimos, el nuevo régimen de contratos también distinguía a los “africanos bárbaros” de los trabajadores libertos ya presentes en Brasil. A los “bárbaros” no se les permitía contratar sus servicios, sino que se les obligaba a realizar trabajos forzados durante 14 años. Los otros, aunque idealmente incluidos en el régimen previsto para los nacionales, protagonizaron el uso más expansionista de la legislación para extranjeros que conservan los archivos notariales de Brasil. Fue precisamente invocando el régimen punitivo del que estaban excluidos como estos sujetos consiguieron navegar por vías alternativas a la libertad, registrando contratos de arrendamiento de servicios para compensar sus manumisiones a título oneroso. Más allá de eso, del mismo modo que las leyes contra la trata de esclavos no consiguieron impedir la entrada de casi un millón de africanos, los objetivos legislativos y las exclusiones legales resultaron ineficaces para impedir la invocación expansiva y creativa de las leyes civiles. Incluso bajo un estricto régimen de penalidades, y quizá precisamente por ello, los trabajadores esclavizados dieron nuevos significados a las categorías del trabajo libre.

A pesar de que la cuestión laboral cambió considerablemente entre las décadas de 1830 y 1870, en paralelo a los grandes debates sobre la sustitución de la mano de obra esclava, que se referían a la extinción de la trata de esclavos primero y, más tarde, a la abolición gradual y definitiva de la esclavitud, la mano de obra nacional compuesta por trabajadores libres y la importación de inmigrantes extranjeros se

mantuvieron como parte del "espacio de experiencia" y del "horizonte de expectativas" de los juristas y legisladores involucrados en el debate parlamentario. La tercera ley brasileña de arrendamiento de servicios, promulgada en 1879, se aprobó cuando el Gobierno Imperial ya había adoptado políticas de emancipación gradual, abarcando al mismo tiempo en un único texto legislativo a brasileños, extranjeros y libertos, pero estableciendo normas diferentes para cada uno de ellos. Una vez más, el régimen punitivo acaparó la mayor atención en los debates parlamentarios, exponiendo como nunca antes las dificultades teóricas y los problemas prácticos acumulados en la experiencia de los treinta años anteriores de adopción de sanciones penales públicas en leyes civiles sin procedimientos claros.

Sin embargo, las leyes civiles que regulaban el arrendamiento libre de servicios eran sólo una fracción de un tapiz más amplio de normas y temas relativos al trabajo en el Brasil del siglo XIX. El derecho mercantil, única rama del derecho privado codificada en ese período, era también un cuerpo normativo paralelo, aunque en parte concurrente, del complejo y plural mosaico normativo del trabajo en estudio. Además de asignar una sección específica a los trabajadores comerciales por excelencia (capataces, contables y cajeros) el código brasileño incluyó un capítulo aparte sobre la "locación comercial de servicios", con una definición que se superponía a las leyes civiles que existían en el país. Una opción legislativa brasileña sin parangón entre los códigos contemporáneos que causó gran controversia en la doctrina y en la práctica judicial sobre el alcance de esta jurisdicción especial en las décadas siguientes. Al fin y al cabo, el tribunal competente determinaba a qué legislación podían recurrir trabajadores y empleadores en sus peticiones, los mecanismos coercitivos disponibles en caso de incumplimiento, qué tipos de causas justas podían alegarse y los aspectos procesales que regían sus actuaciones judiciales. Condiciones que influían fuertemente en el curso y resultado de las negociaciones y disputas laborales concretas, con implicaciones para ambas partes. El hecho de que los empleadores utilizaran su condición de comerciantes como pretexto para invocar la jurisdicción mercantil y aplazar la resolución de un pleito salarial tanto como que los trabajadores recurrieran

a esos tribunales especiales como una oportunidad para demandar salarios con procedimientos más breves reforzó la constatación de que la oportunidad de cualquier disposición normativa rara vez es unívoca y movilizada por un único polo de la relación laboral.

El segundo cuerpo normativo específico que mereció nuestra atención fue el derecho del trabajo esclavo. Situar este marco jurídico en el ámbito de la regulación jurídica laboral es una invitación a contemplar las relaciones laborales esclavistas como relaciones jurídicas de trabajo, no vínculos circunscritos únicamente al derecho de propiedad. Durante años, la representación de la relación jurídica entre el amo y el esclavo como un mero vínculo basado en la dominación ha disuadido a los estudiosos de mirar tanto el siglo XIX cuanto la propia esclavitud como campos dignos de interés dentro de la historia jurídica del trabajo. Dado que los indivudos esclavizados eran considerados ostensiblemente como meros "objetos de propiedad" en lugar de ser reconocidos propiamente como "sujetos trabajadores", los aspectos jurídicos derivados de sus arreglos de trabajo fueron durante mucho tiempo examinados y explicados únicamente en el ámbito del derecho de las cosas.

Una de las consecuencias de este razonamiento fue asumir, sin apoyo en las fuentes históricas, la transferencia automática de la propiedad de los frutos del trabajo del esclavo al propietario o poseedor del esclavo, no concibiendo que el esclavo pudiera ser dueño de los frutos de su trabajo o de cualquier otra propiedad. Sin embargo, una amplia historiografía recuperada en esta tesis también ha demostrado cómo los "*escravos de ganho*" en Brasil, los "jornaleros" en Cuba y los "*money-earning slaves*" del Caribe británico compartían la experiencia de ser trabajadores esclavizados que, sin embargo, tenían el derecho de alquilar su propia fuerza de trabajo y recibir una remuneración, a menudo en dinero, por su trabajo o, al menos, por parte de él. La remuneración del esclavo era, por lo tanto, un aspecto ilustrativo del derecho de la esclavitud con relevancia dentro la regulación jurídica del trabajo.

Del mismo modo, traté de indagar cómo la tendencia más amplia hacia la contractualización de las relaciones jurídicas que recorrió la regulación jurídica del

trabajo en el siglo del liberalismo también penetró en este ámbito específico. Así como la esclavitud informó tanto al trabajo libre como al esclavo mientras duró, también fue cierto lo contrario. Con la paulatina construcción de un orden liberal en Brasil, no sólo se privilegiaron cada vez más los derechos de propiedad, manteniendo intacta la legalidad de la propiedad esclavista, sino que, en general, las relaciones laborales fueron repensadas a través del paradigma del contrato. Bajo esta cosmovisión que idealizaba la propiedad de uno mismo y el intercambio voluntario, la naciente legislación del trabajo libre de la década de 1830 no sólo moldeó la dinámica del trabajo libre, sino que también ejerció una influencia transformadora sobre la institución de la esclavitud. Una vez más, con resultados ambiguos, pero no necesariamente desfavorables, sólo para los individuos antes esclavizados.

Finalmente, una última sección arroja luz sobre un grupo específico de trabajadores que, en el siglo XIX, concitó un interés legislativo particular tanto en Brasil como en el extranjero: los trabajadores domésticos. Si en el marco del antiguo régimen eran el prototipo de trabajadores, a finales del siglo XIX fueron objeto de regímenes jurídicos especiales que los separaban del ámbito general de las leyes de arrendamiento de servicios, normalmente con el objetivo de establecer medidas policiales y punitivas más pronunciadas. En Brasil, este tipo de reglamentación proliferó principalmente a nivel municipal y en la última década de la esclavitud, reintroduciendo términos como "sirvientes" en el léxico jurídico, transfiriendo la potestad de supervisar las relaciones laborales del juez de paz al subdelegado de policía, y previendo invariablemente penas de prisión en caso de incumplimiento de obligaciones contratuales. Un grupo de trabajadores que, por un lado, estaba excluido tanto de las innovaciones legislativas del siglo XIX, que ya apuntaban a los contratos escritos y los domésticos rara vez firmaban uno, como del paraguas de la legislación mercantil, por expansivo que éste fuera. Por otro lado, fueron objeto de la mayor atención legislativa al final del Imperio, aglutinando muchos de los debates que recorrieron la tesis: a) la imposición de penas de prisión por incumplimiento de contrato; b) las tensiones en torno al léxico jurídico moderno del arrendamiento de

servicios; c) y la creación de regímenes jurídicos especiales y plurales frente a la tendencia a la unificación del sujeto de derecho.

Con este itinerario, que no es en absoluto exhaustivo de los problemas jurídicos que un panorama plural de trabajadores y fuentes del derecho implicaba para las relaciones laborales, pretendí arrojar luz sobre soluciones locales a problemas jurídicos atlánticos, forjadas en lo que hace al Brasil en el Parlamento, los tribunales, las notarías, las haciendas y los centros urbanos; soluciones en las que confluyeron como actores relevantes juristas, legisladores, empleadores y trabajadores. Aunque muchas de las mismas fueran el resultado de la singular posición de Brasil como el mayor importador de mano de obra esclava de las Américas y el destino de miles de trabajadores extranjeros en los albores de la migración en masa, también lo fueron de debates y tendencias que circulaban más ampliamente en el mundo atlántico, pero que, en el fluido paisaje social y jurídico de Brasil, fluían y colisionaban de forma particular.

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Processo número 788, fundo Relação do Rio de Janeiro – 84, série Habeas Corpus - HCO, código de referência 84.788.cx.158, recorrido Jacinto Valadão de Aguiar, ano inicial 1865, ano final 1865, Caixa 158, gal. C.

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