

## **TOWARDS A CONSTITUTIONAL SOCIOLOGY OF PROPERTY RIGHTS: THE SOCIAL PRODUCTION OF STRUCTURAL EXCLUSION IN POSTCOLONIAL BRAZIL**

### **PARA UMA SOCIOLOGIA CONSTITUCIONAL DA PROPRIEDADE: A PRODUÇÃO SOCIAL DA EXCLUSÃO ESTRUTURAL NO BRASIL PÓS-COLONIAL**

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**ABSTRACT:** The article examines the emergence of modern social structures of property rights and their constitutional implications during the formation of world society. While European history has addressed this topic regionally, the process of modernization in colonial and postcolonial contexts, along with its global connections, remains underexplored. This work combines theoretical reflections from the literature on the sociology of constitutions with historiographical research on the formation of modern property rights in Europe and its colonies. It argues that the property structure of colonial Brazil is decisive for social cleavages and the social reproduction of exclusion in the later period. Due to the role land played in the constitution of power and privileges in the colonial times, postcolonial elites remain tied to the land. This results in no considerable and powerful sectors within postcolonial elites, unlike the Central and Northern European context, being interested (and strong enough) to break with the exclusionary social hierarchies inherited from the old regime. The old elite tied to land was also the new elite of independent Brazil.

**KEYWORDS:** Constitutional Sociology; Property; Postcolonial Brazil; Social Exclusion.

**RESUMO:** O artigo examina a emergência das estruturas sociais modernas de direitos de propriedade e suas implicações constitucionais durante o período de formação da sociedade contemporânea. Enquanto a história europeia abordou esse tema regionalmente, o processo de modernização em contextos coloniais e pós-coloniais e suas conexões globais permanecem pouco explorados. Este trabalho combina reflexões teóricas da sociologia das constituições com pesquisas historiográficas sobre a formação dos direitos de propriedade modernos na Europa e suas colônias e argumenta que a estrutura de propriedade do Brasil colonial é decisiva para as clivagens sociais e para a reprodução social da exclusão social no período posterior. Graças ao papel que a terra tinha na constituição de poderes e privilégios, as elites pós-coloniais permanecem ligadas à terra. Isso leva a que, diferentemente do que aconteceu no contexto europeu central, não haja setores consideráveis e poderosos o suficiente nas elites pós-coloniais que tenham qualquer interesse em romper com as hierarquias sociais excludentes herdadas do antigo regime. As novas elites pós-coloniais eram também as velhas elites coloniais.

**PALAVRAS-CHAVE:** Sociologia constitucional; Propriedade; Brasil pós-colonial; Exclusão social.

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## INTRODUÇÃO

When teaching modern political theory, teachers often rely on a few well-known narratives about the emergence of the modern state and the constitutional form of government. One of the most prevalent ones is based on the Hobbesian paradigm, which states that the breakdown of the religious unity of European society around the Church in the 16th century made it impossible for power to be legitimized by overarching societal self-descriptions that justified social hierarchies and the exercise of power by a hereditary monarchy (KOSELLECK, 1973, p. 18–32; POCKOCK, 1975, p. 83 ss). Religious wars followed, leading to new forms of political representation (KAHN, 2009; KANTOROWICZ, 1997), which were soon eroded by the bourgeois drive for power. The rising bourgeoisie raided the structures of social stratification, establishing new legal institutions and a whole new culture: individualism, subjective property rights, and a legally binding structure for political decision-making: modern constitutionalism (HABERMAS, 1991, p. 57–140).

Teaching this story at a university in the global south and in most parts of the world is frequently an awkward experience. The narrative of political modernization as a process of secularization of sovereignty led by an emerging class with an egalitarian rhetoric hardly fits into the common knowledge about the local conditions of state formation in these settings. That story sounds abstract, highly theoretical, and almost outlandish to the aims of understanding the existing institutional structures of the nation states in these contexts.

First, in most cases, the process of state-making hasn't been one of local transformation of regional political and social structures, but one of adaptation to political transformations taking place in Europe<sup>2</sup>. In this context, the bourgeoisie has not been the carrier of a project of rule of law (LYNCH, 2011, 2014). Rather, it often represented a reactionary class that used the ongoing political transformations to assert oligarchic powers and highly hierarchical social orders (NEVES, 2013a). Moreover, constitutions have been mostly nominalist constitutions used by postcolonial elites to legitimize exclusionary political systems (LYNCH, 2014; NEVES, 1992).<sup>3</sup> Property rights played a decisive role in many cases, serving less as the means for the

<sup>2</sup> For the Brazilian case, see (CARVALHO, 2008; SLEMIAN; PIMENTA, 2003)

<sup>3</sup> Surely this description also holds for some regions of Europe. Indeed, the stylized form according to which the emergence of the modern state is described may not hold entirely anywhere.



political affirmation of an emerging new economic class (the bourgeoisie) and more to the maintenance and re-affirmation of existing social hierarchies and power relations (BHANDAR, 2018; FRAGOSO; FLORENTINO, 2001; MOTTA, 1998).

Indeed, the emergence of modern social structures of property rights and their constitutional implications during the period in which the contemporary world society was taking shape is a privileged standpoint to understanding the making of modernity (OSTERHAMMEL, 2016). And for most part this story has been told from the very limited and provincial perspective of European history and sociology. Therefore, important dimensions of how modern society came to be in the diversity of its political, economic, and legal structures remains undertheoreticized. And any attempt to understand how the modern world society of our days came to be implies considering not only its contemporary diversity, but also the diverse evolutionary paths of its socio-structural formation.

This piece intends to advance a dialogue between two important recent interdisciplinary streams of literature to shed light to the constitutional implications of the introduction of modern property rights in the Brazilian context. On the one hand, it draws on theoretical reflections stemming from the ongoing debate on the sociology of constitutions (BLOKKER; THORNHILL, 2017; BRUNKHORST, 2014; FEBBRAJO; CORSI, 2016; MADSEN, 2020; THORNHILL, 2011). On the other hand, it draws on the growing historiographic research on the emergence of modern forms of property rights in Europe and its colonies (BASTIAS-SAAVEDRA, 2020; BHANDAR, 2018; BLAUFARB, 2016; HERZOG, 2015). The aim of this effort consists of shedding light on the broader constitutional meaning of the transformations taking place in the legal and political systems in the post-colonial Brazilian context. It therefore represents a prospective attempt to advance a research agenda that deepens the understanding of the institutional process of production and reproduction of power relations based on property rights in non-European settings. This research agenda still requires further work, of which this text serves as an outline.

## CONSTITUTIONAL SOCIOLOGY AND MODERN NORMATIVITY

The idea of a sociology of constitutions contends that constitutions are not only a set of binding norms that organize political and legal decision-making but are also social facts resulting from internal social processes within society. “The constitutional norms of society are thus always also the constitutional facts of society” (THORNHILL, 2010, p. 323). There are various sociological understandings of these processes, with different theories addressing the central question about the creation of social normativity in diverse ways (MADSEN, 2020). Notwithstanding, from its outset, sociology as a discipline has always been skeptical towards the doctrinal science of law as advanced by lawyers. Constitutions are thus seen as the result of societal structures evolving in time that establish the basic forms of relation between the legal system and its process of legitimization. In other words, the central question of a constitutional sociology is the following: How does the exercise of power becomes legitimate in a given society? (BLOKKER, 2020; BLOKKER; THORNHILL, 2017).

One may answer this question looking at the economic structures, regarding for example how capital and labor interact to make some forms of social interaction legal and others illegal in the benefit of the reproduction of capital, as Karl Marx did and as many other still do today (PISTOR, 2019, p. 205–234). Other possibility is to understand the constitution as the result of ideational figures of how a social collectivity understands itself and its cultural identity (BLOKKER, 2017). Others understand the constitution as a purely power-based artifact, emerging as the result of social relations by which a social elite becomes authorized to define legality on arbitrary grounds (BOURDIEU, 1987, p. 823–832, 1996, p. 371–390). There are surely different ways and possibilities of understanding the constitution as a societal structure emerging from a factual and historical background.

In this article, constitutions are understood, in line with the tradition of systems theory, as an outcome of highly contingent processes of societal differentiation that connects power and law through a structural coupling which mediates and limits their reciprocal irritation and reproduction (LUHMANN, 1990). This means that other uses of the term constitution that apply to social artifacts such as the English *magna charta* (1215) or the “*goldene Bulle*” of the Holy Roman Empire are not useful for our purposes. These social devices, although important for the evolution of the conceptual history of modern constitutions, had very few to do with the current use of the concept (SEELAENDER, 2006). They were rather expression of agreements

between lords and their vassals within a traditional social order in which power and law were expressions of the natural character of the subjects as by divine authority.

Through constitutions, modern society reacts to the erosion of exactly these traditional forms of hierarchy that were responsible for the legitimation of power and for the reproduction of the law under conditions of social stratification (Luhmann 1990, 187–200; Neves 2013, 2). Therefore, under conditions of growing societal differentiation and pluralization, neither the law nor politics can reckon on traditional forms of reproduction anymore. The law can no longer be conceived in terms of its connection with a (religious) foundation of society nor can power be exercised by noblemen and corporative bodies according to social hierarchies justified through similar traditional forms of legitimization (LUHMANN, 2000, p. 417–429; THORNHILL, 2011, p. 20–25). The emergence of new forms of socialization that are largely impersonal and a-topical, such as money and scientific knowledge, makes gradually more implausible the reproduction of traditional forms of socialization based on concrete relationships, such as the one based on stratified kinship among the noblemen and their direct sovereignty over peasants living under their territorial domain. Social complexity brings more social contingency with it and this contingency can only be dealt with, without leading to permanently destructive social conflicts, through new forms of normative communication (LUHMANN, 1981, p. 92–112).

Therefore, constitutions are a replacement to the traditional social hierarchies which stabilized normative expectations under social stratification, and it provides this replacement through structured procedures of political decision-making. This allows societies to remain ordered without resorting to overarching (uncriticizable) worldviews that could hardly play this role under conditions of growing societal complexity. Surely, from the advent of the constitution as a social artifact and as a concept does not necessarily ensue a process of democratization. Yet, constitutions provide even authoritarian and oligarchic modern political orders – such as most of the European states until the twentieth Century – with a new form of legitimizing the exercise of power. Indeed, as Marcelo Neves has rightly noted, constitutions have an important symbolic dimension (NEVES, 2007).

Regarding the law, modern constitutions make possible a social arrangement whereby law can be produced according to its own terms (LUHMANN, 1993, p. 468–575), even if only in

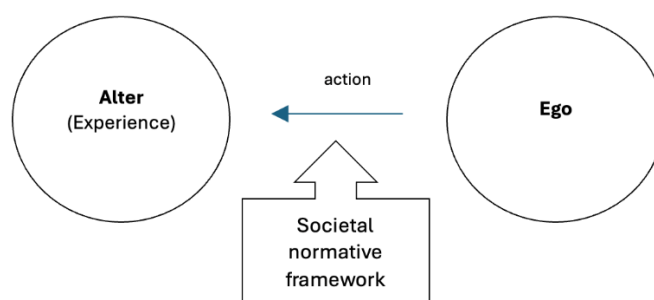
sham and apparent sense. This means that law can serve the stabilization of normative expectations, operating as an immune system of society: it allows society to tolerate an increasing volume of social conflicts that are dealt with by the highly technical mechanisms of a professionalized legal system (LUHMANN, 1981, p. 113–153, 1993, p. 162). Even if the law is arbitrarily produced by oligarchic social elites, in modern functional differentiated society, its production becomes the result of the mechanisms of the respective legal system and not the expression of God's will. In other words, the only criteria to judge the lawfulness of law, in modern society, is law itself (KASTNER, 2006). And this apparent paradox is solved by the development of a new level of legal norms: constitutional law (LUHMANN, 1990, p. 202–203). If the constitution operates as a means to legitimize power through its legalization, it means that power becomes gradually a means of communication that can only be reproduced through law. "Law becomes a second code to power" (LUHMANN, 1997, p. 357). Accordingly, for the modern constitutional order, every manifestation of power must, at least in rhetoric, be in accordance with (constitutional) law (LUHMANN, 1990, p. 193–201, 2000, p. 244–65).

The processes of societal change underlying the emergence of modern constitutional orders extend beyond law and politics. As Luhmann pointed out, the increasing differentiation of a monetary economic system, based on property rights defined in individualistic terms, is a crucial evolutionary condition for the emergence of modern constitutions (LUHMANN, 1993, p. 448–451), since only after its establishment the law can be operationally decoupled of the reproduction of personal forms of political domination.

## A CONSTITUTIONAL SOCIOLOGY OF PROPERTY RIGHTS: CONCEPTS AND PROBLEMS

Indeed, in the same way as constitutions, property rights are not a natural, but a contingent social phenomenon. In abstract sociological terms, property is a way for stabilizing the social expectations experienced by a social actor (*alter*) towards the actions of another (*ego*) (Luhmann 1997, 332–47). This implies that, with regard to property, *alter* experiences the actions of an *ego* from a standpoint from which they cannot interfere; *ego* can, in principle, act however they please regarding the object of its actions (its property). On the one hand, *alter*

should internalize this experience as a reasonable normative expectation. On the other hand, *ego*'s actions are not completely boundless. They depend on the terms according to which they are to be deemed acceptable by an *alter* in a given society. While this definition can be seen as being too abstract, it becomes quite useful and operational when it is embodied in forms of interaction through concrete concepts of property.



Property might be further defined as the social mechanism of defining and delimitating the interactions between the actions of an individual towards others regarding scarce social resources that can satisfy human needs. This concept outlines, thus, the social problem that *property* deals with and for which it has emerged in social evolution. Yet, it leaves open how this problem will be dealt with in different social structures and contexts. The limits and conditions of the actions of *ego*, the way in which it can dispose of scarce resources and how it can exclude others from access to these resources (an exclusion which is experienced by *alter* as acceptable) must be socially defined. And these conditions might take extremely diverse forms, depending on the social conditions of stabilization of normative expectations. What is most surprising about ownership, after all, is not the fact that someone seeks to exclude others from access to scarce resources, but the very fact that others accept this exclusion (one might say: without resorting to violence). The secret of property lies precisely in the fact that it may be exercised without resistance, without being imposed to the others, most part of the time. Therefore, the concept of property should not focus on the possibility of directly opposing one's right over something to another person, but rather on the fact that property generates a potentially general acceptance of others of one's right over a certain object. After all, it is a

socially accepted way of managing scarce resources regarded as valuable in a determined society.<sup>4</sup>

In stratified societies, such as the European societies of the *Ancien Régime* (and their colonies), “it is impossible to separate the economic, political and familial aspects of property” (LUHMANN, 1988, p. 192). In this context, property can hardly be defined as the relationship of ownership between an individual subject and an object. Rather it involves complex social relations, according to which property is seen as the expression of natural relations between the society and its valuable (scarce) resources.<sup>5</sup> Grossi points out that in medieval Europe, a collective conception of property prevails, but not a collective conception based on the idea of a communality of equal individuals towards resources that they collectively manage according to their will. Rather, the very nature of things, as defined per tradition, determine the ways in which they can be used (GROSSI, 1988, p. 390). “The man belongs to the land” rather than the latter belongs to men (GROSSI, 1988, p. 363). To this extent, property is not defined by law, but it is defined in accordance with the general societal understanding about the nature of things. As Luhmann puts it, in stratified societies, ethics and nature become a semantical unity, according to which moral perfection is seen as the natural emanation of virtues (LUHMANN, 1997, p. 931–950).

Technically, this implies that we cannot properly speak of property rights in societies of the *Ancien Régime*, since there is no practical concept of an autonomous right to dispose of resources independently of the communal social relations in which individuals are inserted. Things and people (individually and collectively) are thus connected in networks of belonging which ascribe a very broad array of different and unequal rights and obligations (to people and to things themselves) (BUONO, 2020). This means that communities, individuals – and also things – had different status and privileges in relation to each other.

<sup>4</sup> There is evidence that very early forms of property over previously common share goods, especially land, were in principle justified on religious and ritualistic grounds. Indeed, the erosion of egalitarian societies began first with the emergence of status as a condition for other forms of inequality. Inequality of access to property was a much later development in the history of human inequality. See: (FLANNERY; MARCUS, 2012)

<sup>5</sup> The concept of scarcity is also a very contingent one that changes in different societal contexts. During the European middle ages, for instance, the idea of scarcity was likely to be much more rigid and “finitarian”, based on the idea that humans should limit they desire for consumption and economic growth. In contrast, the “cornucopian” idea of scarcity that dominated modern economic thinking assumes that resources are limited, but humans can expand their exploitation and use in potentially limitless ways through economic growth and technology. See: (JONSSON; WENNERLIND, 2023)

Of course, there was indeed the possibility of excluding others from the use and fruition of resources in this social order, which Durkheim rightly pointed out as the defining feature of property (DURKHEIM, 1992, p. 142). But there were no property rights as a legal abstraction grounded on the law itself. Instead of property rights, if we take its modern concept, one should speak here rather of traditional forms of possession. Possession understood then as a personal connection of resources (mainly land) to those who owns it (*ego*), also implying the relations of the owner to those who were subject to ownership (*alter*) and its effects. This “mentality of possession”<sup>6</sup>, as Grossi calls it, expressed a broader societal order in which individuals could only share the benefits of economic resources according to their social position—their personal conditions of inclusion in the basic unities of society, which were mostly and for a long time articulated around the idea of the household. In medieval and early modern Europe, the household, defined in extremely patriarchal terms, was at the same time a political, economic, legal, and religious structure (LUHMANN, 1988, p. 194–196). It was organized according to a myriad of personal relations along multiple forms of hierarchy, with a landlord standing on the top. In general, noblemen disposed of domain over land and people, concentrating a wide range of powers, including jurisdiction over tenants (HESPANHA, 2015), the right to rents and taxation.

Since property over a household encompassed such a wide range of privileges, under these conditions there is no way to understand politics and law as social structures that can be reproduced as functionally differentiated systems. Indeed, in the *Ancien Régime*, law, politics and economy are indistinct parts of a social order, whose legitimacy emerges from the very nature of things as they have been established by God. If we understand constitutions in the terms exposed above as a new form of separation (and connection) between law and politics (section 2), it becomes immediately clear, as pointed by Luhmann, that modern constitutional orders were only possible through a structural separation between property and power (LUHMANN, 1993, p. 448).

This “great demarcation” (BLAUFARB, 2016) was a delicate and complicated political and legal operation, which was only possible in face of a wide and gradual processes of social

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<sup>6</sup> Seipp points out that for hundreds of years English in the Middle Ages lawyers lacked any concept that reminded the concepts that later became so central to legal professionals such as “property” and “ownership” (1994, p. 31–34).



transformation, involving the emergence of new economic practices, demographic change, urbanization, the advancement of technical tools such as the printing press, the accumulation of power by Kings in central Europe etc. In other words, it was the consequence of functional differentiation itself. Historically, this has often taken place, in the European context, as the result of political decisions advanced by an emerging bourgeoisie, fond of a new definition of property rights that could safeguard their individual economic rights against arbitrary intervention. Property rights were now seen as a manifestation of a solely private matter defined by the possibility of excluding, using and alienating goods with monetary value. Modern property did not bring with it any form of other privileges beyond property itself, that is, it was strictly separated of any form of expression of sovereign powers (BLAUFARB, 2016, p. 3). The economy (as the realm of property rights) and politics (as the realm of power) became consequently distinct domains, what does not mean that they don't intensely interact.

In sociological terms, the social relations among individuals regarding scarce goods in modern, functionally differentiated societies become strictly defined by the legal system and its highly technified tools. Property is now determined according to the law rather than by fragmented normative structures that assume extremely diverse shapes depending on the personal privileges and social statutes of the individuals involved and the objects themselves. To this extent, what *ego* is authorized to do out of their property is defined and controlled by the law and only by the law. The individualistic form it evidently assumes, with the strong support of early bourgeoisie ideologues (and today's economists), is the result of the very process of functional differentiation and the broad push towards individualization that becomes a defining feature of modern society from its beginning.

So, while in the *Ancien Régime* individuals were included in society through their families, corporations, communities, villages, kingdoms etc, in modern society social inclusion and exclusion are increasingly defined by individual's interaction with various means of communication such as money, information, knowledge, law and administrative power (LUHMANN, 1989, p. 156–160). If social inclusion once took the societal form of privileges of domain and titles of nobility, mercies and graces, rights of usage and communitarian memberships, it gradually becomes primarily defined by the individual interactions with those different means of communication (FARZIN, 2006, p. 24–32). Consequently, individuality is

no longer defined by the limits and possibilities of one's actions within a circle of personal connections in a web of relations. Meanwhile, *individualism* becomes a powerful way of experiencing life, as every individual may have diverse experiences with different forms of societal communication over time (LUHMANN, 1989). Individuality as the expression of a unique biography comes to depend on one's access to money, property, political power, education, health, and the consumption of cultural goods (art objects and aesthetic experiences), what might lead to remarkable forms of structural inequality (DUTRA TORRES, 2018, p. 155–159).

This confronts us with the centrality of property rights in its relation to individualistic forms of socialization. On the one hand, individualistic modern property rights are the consequence of a much broader societal transformation. And as such, their form is only a symptom of a more encompassing phenomenon. On the other hand, property rights also are a defining condition to this process of change, since they allow the decoupling of property from personal social relations that limited individualization to strict forms of social inclusion in communitarian social unities defined along structures of privilege, what included communitarian rules regarding the access to resources.

According to the ideologues of the revolutionary bourgeoisie, the new modern form of property rights assumed the configuration of what historians call “absolute property” (GROSSI, 1988). This expression was explicitly adopted by the Napoleon's Code Civil: “Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes” (Book II, Title II, §544). It implied “an all-embracing right rather than the sum of different rights” (GROSSI, 2010, p. 107). As Grossi puts it, “property now reflects the indivisible individual subject with his liberty and so cannot be modified by limitation to real property rights (such as easements requiring passage or access to water)” (2010, p. 107).

In this ideological context, property is seen as the expression of the will of a free subject and its right of self-determination in the face of others,<sup>7</sup> a notion that assumed an epitomized formulation in the works of John Locke, who understood property as a natural (and divine)

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<sup>7</sup> This is clear, for example, in Kant, for whom freedom could be understood in principle as the expression of one's relation of possession over the own body (KANT, 2011).

individual right that existed previously to the very existence of the polity (LOCKE, 2003) and whose violation could even justify civil disobedience. For Locke, the government “cannot take from any Man any part of his Property without his own consent” (2003, parag. 138). Yet, as he accepts the fact that governments need taxation to support its very existence, a limitation that necessarily jeopardizes the idea of an absolute right to property, he envisages consent as a condition for the relativization of property through political legislation. The paradox nature of this notion of property emerges, since property remains for him an individual right which exists prior to individuals entering the political society itself. Locke seems to realize this paradox indicating a way out of it as he states that in governments that exist based on the consent of the governed “the Laws regulate the right of property, and the possession of land is determined by positive constitutions” (2003, parag. 140).<sup>8</sup>

Indeed, the very idea of property as a strictly legal definition, in modern society, is tautological and, thus, also paradoxical.<sup>9</sup> If modern property is defined as the absolute right over an object in accordance with law, property is defined by property itself: Property is property. And this is nothing less than a tautology. But if property is defined as the absolute right of disposing over an object in accordance with the law, this means that property is defined as “an absolute right that is not absolute”, a paradoxical definition that only makes explicit the fact the property has neither a natural nor an absolute foundation, but it is a purely social and contingent construction. The only way of dealing with it consists in its political unfolding. The definition of the limits of property as a legal concept depends entirely on social definitions over what can be owned, how it can be owned, what rights are attached to the relation of ownership and what are the conditions for exercising these rights.

Property rights are thus a highly plastic legal device (ALSTON; MUELLER, 2015; LOMFELD, 2018). In modern society, they have a deciding role in shaping the conditions of social inclusion and exclusion in the economic system. They establish the basis for the production and distribution of scarce resources, thereby regulating the interaction of humans with nature and among themselves concerning valuable goods to meet their needs. Furthermore, property rights provide a crucial means to delineate the boundaries of state’s action in relation

<sup>8</sup> Locke remains convinced of the moral and religious foundations of property rights as a natural right, derived from the fact that God made all men (indeed excluding women) equal and able to work. Therefore, the produce of one’s work shall belong to them as their property. This serves as an ultimate ground for the justification of governments, including democratic ones. (ASHCRAFT, 1993, p. 237–240).

<sup>9</sup> To the structure of this technique of paradoxical thinking, see: (LUHMANN, 1999)

to private individuals and organizations, defining the parameters of the space in urban and rural contexts, as well as outlining the conditions of utilization of sensitive resources such as water, essential raw materials among others.

Property rights not only define the horizons of biographies but also configure the relations of individuals within the political communities in which they participate. Consequently, they inevitably become the object of crucial political conflicts. Thus, if modern politics is a means of organizing collective decision-making to avoid the potential destructive effects of conflicts between different conceptions of future forms of living and sharing the same space and resources (HOLMES, 2013; LUHMANN, 2000; NASSEHI, 2002), property is directly and necessarily connected to politics. Surely, property rights were a condition for the emergence of the modern constitution and, as such, they were constitutive to modern politics. However, they are also constituted by the political conflicts they entail, as they are at the core of modern constitutional politics and its disputes (LOMFELD, 2018).

The history of property constitutional regimes over the past 150 years has witnessed a paradigm shift in the legal conceptualization of property rights. Individualistic notions of property ownership, where property was perceived as an absolute and indivisible right, have largely been supplanted by a more fragmented conception that views property as a bundle of distinct rights, each subject to interpretation considering the public interest (GREY, 1980). The concept of the social function of property spread in political constitutions beginning with the Mexican Constitution of 1917. Today, property rights are at the same time fundamental rights and a field for political struggle. They are at the core of modern constitutional politics. (SINGER, 2014).

## **SOCIOLOGICAL REFLECTIONS ON COLONIAL PROPERTY RIGHTS IN BRAZIL**

The previous description of the evolution of property rights and its constitutional implications is helpful. However, it remains largely general in its formulation and often misleading when applied to the emergence of modern forms of property and their impacts on the emerging constitutional arrangements outside Europe. Its broad and stylized depiction of

historic processes overlooks relevant aspects of how property, power and law interacted in concrete, local contexts. Political structures in different world regions reacted differently to the emergence of modern property rights and modern differentiation (NEVES, 1992). The forms of social inclusion and exclusion operated differently in colonial and postcolonial settings, when compared to the ways in which they operated in Europe. Slavery, the presence of colonial mechanisms of stratification and the forms of insertion of the local economies of the colonial *Ancien Régime* in the Americas in the global economy had extremely different effects on shaping the interests of colonial elites in its drive for asserting modern forms of property. All this must be considered in the understanding of the constitutional evolution of property rights in the context of the Portuguese colonies in the America and in the context of what came to be known as postcolonial Brazilian state.

To begin with, this is important to assert that the *Ancien Régime* also extended its influence on the Portuguese and Spanish colonies overseas, maintaining its impact until the 19th century and perhaps beyond (FRAGOSO; BICALHO; GOUVÊA, 2001). In recent years, a substantial body of literature has convincingly argued that the territorial occupation of the Americas by emerging European powers beginning in the 15th century can only be understood through a careful investigation of the concrete social relations as defined by the legal statutes of communities, noblemen, and common people in the colonial spaces (FRAGOSO; BICALHO; GOUVÊA, 2001; HERZOG, 2015). Herzog has made a strong case in support of an interpretation of the process of territorial occupation that places less emphasis on the broad interests of a supposedly centralized crown, their diplomatic and military representatives, and the agreements between the European kings through treaties (2015, p. 1–15) and more on the local structures of relationships based on traditional personal networks of power operating on the ground.

Although the structures of the *Ancien Régime* had to be rebuilt under different conditions and circumstances in the Latin American context, their basic features were rather preserved at least until the second half of the 18<sup>th</sup> century. Accordingly, as well as in the Peninsula, in the Portuguese colonies in the America the forms of social inclusion and exclusion were based on personal networks of social identification of individuals within families and communities, according to a highly fragmented order based on different levels of privileges and status

(FRAGOSO; GOUVEA; BICALHO, 2000). Moreover, the typical legal structures of the Portuguese *Ancien Régime* – the so-called corporatist monarchy – were also upheld, as well as the political economy of privileges, based on the concession of mercies and state offices by the crown (HESPANHA, 2015) to those who benefited the interests of the King in the colonies (the *common good*). Wealth and power were closely intertwined. Royal offices were exercised as property from which holders could extract fees; and landownership brought with it political and legal jurisdictions for the larger landowners, who could additionally extract rent from other less advantaged freemen or even smaller landowners (ALVEAL, 2012; GOUVÊA, 2001). Instead of the tale of an “absolutist ruling monarch” governing as despotic and voracious ruler, the Portuguese Empire functioned rather as a complex structure of hierarchies and fairly autonomous unities, which had large room to act in the confines of the world, in the name of God and King (HERZOG, 2015; HESPANHA, 2001, p. 170–173). Governance was extremely fragmented, varying according to the very local contexts in which Portuguese settlers had to face extremely different circumstances. To this extent, there was no constitution in the modern sense in this context, just like in Europe. Power and law were produced and reproduced with basis on the existing hierarchies legitimized by tradition and religion.

Notwithstanding, unlike the complex relational property structures prevalent in Europe (GROSSI, 1988), including in parts of Portugal, all land in Portuguese America was, in principle, owned by the Crown, in the name of the Order of Christ (SECRETO, 2007; VARELA, 2005). The King could however concede different forms of land tenure to noblemen or “good men” in exchange for dues and rents. The most important form of land tenure was the *sesmaria*, granted directly by the Crown or its colonial representatives under some conditions and obligations, the most important being its effective cultivation (VARELA, 2005, p. 70–92) – an obligation which remained largely unobserved in practice. *Sesmarias* had no limitations of size until the 18<sup>th</sup> century, and its grant came not only with the right over the land, but often also with seignorial jurisdiction over its possible inhabitants, what was also the practical outcome of the power concentration by the landowner as a superior member of the social order (ALVEAL, 2015a; MOTA, 2012). The recipients of *sesmarias* – called *sesmeiros* – could as well collect rent and dues from free workers and peasants living on their land, and after 1695, they too had to pay rents (*foro*) to the Crown (ALVEAL, 2015b). In many cases, high-ranking

Portuguese noblemen were granted *sesmarias*, without ever taking possession of them, personally or through proxies.

Early on, it became clear that colonization could only succeed with the extensive use of enslaved labor of indigenous and later African workers. So, *sesmarias* were conceded only for those (noble or not) who disposed of enough resources to invest in the establishment of a slave-based *plantation* (VARELA, 2005, p. 79–81). The pressures for occupying the vast territories in the America and the possibility of extracting different forms of rent and taxes, made the King and his proxies (Governors, Captains), including the local councils (*Câmaras*), grant important plots of land in the form of *sesmarias*, to those who could make it productive or, sometimes, to those who had served the interests of the colonial enterprise (RAMINELLI, 2015, p. 30–61). This depicts an interesting relation of mutuality between the structures of the *Ancien Régime* and of the emerging global markets (SMITH, 1990, p. 149–161; VARELA, 2005, p. 79–81), in which property (and not titles of nobility) was beginning to play a defining role.

While in Portugal, this “common good economy contributed to the reproduction of a feudal-corporatist structure”, in the context of the Portuguese colony of the 16<sup>th</sup> and 17<sup>th</sup> Centuries, “people from the low-ranking nobility, or even people coming from the common populace in the metropole or the Atlantic islands – Madeira and Azores –, could thrive and become part of ‘the best families of the land’ through their ‘services’ to the Crown (FRAGOSO; GOUVEA; BICALHO, 2000, p. 72). Indeed, from the beginning of the colonization process, in the 16<sup>th</sup> century, there were not plenty of Portuguese high-ranking noblemen willing to move to the colonies, even if they were granted enormous amounts of land and privileges (ALVEAL, 2012; RAMINELLI, 2015). Consequently, the Portuguese ‘political economy of privileges’ gave place to a “nobility of the land” (RAMINELLI, 2015, p. 23–38) that helps us understand important features of the constitutional origins of property rights in the latter postcolonial context.

In everyday life, property over land and slaves represented the highest honor and materialized as a domain over a household producing goods directed to the colonial flux of commodities. Within the household, the landlord enjoyed almost absolute powers over his family and slaves. Outside the household, he enjoyed the privilege of participating in the Municipal councils (*Câmaras*), where nobles, and the “nobles of the land”, could exercise

political power over the community (BICALHO, 2001; RAMINELLI, 2015, p. 62–91). According to the royal ordinance of 12<sup>th</sup> November 1611, the members of the *Câmaras* should be “the noblest” of the oldest and most honorable families” that could prove to have “no other race”. This made possible for the local landlords to exclude from the *Câmaras* merchants, low-ranking royal officers and those who were “mixed race” at least until the first half of the 18<sup>th</sup> century (FRAGOSO; GOUVEA; BICALHO, 2000, p. 77). In addition to exercising jurisdiction over their land, which they often did through proxies, the owners of large *sesmarias* usually lived in the villages, where they took part in the *Câmaras* and built close relationships with the crown’s representatives, who were frequently responsible for granting them new privileges and further land tenures. Through marriage, acquisition and personal relations with state officials, some landowners managed to accumulate a considerable amount of land, often a sum of numerous *sesmarias* in different parts of a specific colony (*capitanias*) or in other parts of the American territories of the Crown (ALVEAL, 2017, 2012).

Besides landowners and their numerous slaves, who then constituted an important form of property, there has been a group whose importance increased specially during the 18<sup>th</sup> century: the free men and women who lived as villagers and free peasants (FRANCO, 1997, p. 9–20). A few of them, such as merchants and licensed professionals, also enjoyed privileges and, the most important, even participated in the *Câmaras*, but most lived as tenants under the domains of landlords or as employees in the plantations or villages (FRANCO, 1997, p. 98–113). Specially in the late colonial period (1750-1822), it was not uncommon that “adventurous men”, without noble origins, accumulated great wealth, be it through the conquest of indigenous territories, slave traffic or other commercial means (FRAGOSO; FLORENTINO, 2001, p. 63–85). Yet, as pointed out by Fragoso and Florentino, also these enriched men aimed as their greatest achievement the access to land tenure and slave ownership as the basic form of asserting their status and guaranteeing access to other power relationships (2001, p. 227–234).

The close link between ownership of land and slaves, or even urban property and wealth, and political power in Portuguese America is well documented. Historical research shows us how the emergence of local elites around the City Council of Rio de Janeiro, as early as the 16<sup>th</sup> century, was linked to the ownership of wealth, slaves and land (GOUVÊA, 1998). This elites were not necessarily made up by men with noble origin in the new world, but of men who

often rose in the colony through accomplishments such as fighting indigenous peoples or European enemies (FRAGOSO, 2001). For the 17<sup>th</sup> Century, there is evidence of emerging families acquiring large land tenures through contacts with officials through connections in the Municipal Camara, such as the case studied by Alveal in Bahia (ALVEAL, 2012). Analyzing the establishment of the new Câmara in Recife in early 18<sup>th</sup> century, Cabral de Souza found an interesting conflict between the established local elite of landowners, based in Olinda, and the newly emerged commercial wealthy (vendors, merchants etc) based in Recife, the latter being seen as less worth of being members of a Camara by the former, because they weren't landowners (CABRAL DE SOUZA, 2007). His research shows an interesting conflict between the Crown (and its role in constituting the powerful colonial elites through mercies and land grants) and the established landowners in the already existing Camaras, a conflict that reflects the attempt to centralize power by the metropolis' during the 18<sup>th</sup> century (CABRAL DE SOUZA, 2008).

Although the sesmaria was the most important formal way to access land and power in the colony, there were other informal ways that were largely used. The possession of land, through purchase or emphyteusis, owned by a “*sesmeiro*” was one way, what could imply the payment of rents to the owner. Another way was the conquest of indigenous land through violence. And one of the most important ways has always been the access to public offices, which were themselves privileges which were often closely connected with ownership of land, slaves or other forms of wealth. Yet, the ownership of large pieces of land and property granted social recognition and, thus, privileges. In a society of privileges, owning land was gradually becoming a way of accessing privileges rather than a privilege itself. But now ownership of land had a new meaning, since its economic value was being connected to a growing monetary economy.

Given its centrality to the organization of social life, the constitutional character of property must be seen as key to understanding also the deep structural societal responses to the erosion of *Ancien Régime* structures during the late 18<sup>th</sup> and early 19<sup>th</sup> centuries in Brazil. After the abolition of the *sesmaria* (1822) and the imposition of the 1824 constitution, Brazil lived a period of fast and chaotic expansion of its export agriculture. This expansion, especially in the State of São Paulo but also elsewhere, took place in a relative legal vacuum, since there was a great deal of uncultivated land and no clear legal path to acquiring legitimate ownership

(SILVA, 2008, p. 87–104). This led to an array of territorial conflicts, which often ended up in courts. Available historical research indicates that in these cases, legal practice was still largely based on the *ius commune*. Moreover, the social hierarchies of the colonial times remained decisive for the interpretation of the right to land, even after the introduction of modern property rights (MOTTA, 1998). Judges, who often had family ties with landowners, viewed valid property, often, as an expression of the social status of the litigants. Peasants, freed men, and citizens of lesser standing were often not even considered as credible witnesses, let alone as legitimate property owners before the state agents, the *camaras* and the judicial powers (MOTTA, 1998, p. 65–67). Judges and local political authorities very often were themselves property owners, coming from families that were, until few decades before, the nobility of the land with seigniorial jurisdictions over tenants and privileged access to offices and power. These different actors were thus on different sides of what came to be the most important social cleavage of the postcolonial social regime: the cleavage between the haves and the have-nots.

## CONSTITUTIONAL SOCIOLOGY OF PROPERTY IN POSTCOLONIAL BRAZIL: THE SOCIAL PRODUCTION OF STRUCTURAL EXCLUSION

The 1824 Brazilian constitution was mainly a constitution in name only when the Land Law (1850) was introduced, formally establishing a modern regime of “absolute” individualistic property rights in the country. And this is true not only because political power was heavily restricted to the economic elites and oligarchies (NEVES, 1992, p. 118–122). In fact, census suffrage was common in almost every modern state at the time. The Brazilian 1824 constitution also excluded the large population of enslaved individuals (around 30% of the population in 1850) from the condition of legal persons, at least until the 1860s (PAES, 2019, p. 307–311). More crucial is the fact that constitutional provisions regarding individual rights and legislative powers were largely ignored in practice, as they still were largely organized, interpreted and applied according to the social cleavages and structures of inclusion and exclusion of the colonial order. Poor free individuals had access mostly to non-professional judges in civil cases; almost exclusively poor free men were punished by the criminal justice system (Koerner 2010,

52–61). Moreover, legislation regulating land property was largely ignored, when it could hurt the interests of wealthy landowners, even after the introduction of the Land Law (MOTTA, 2009).

In the timespan extending from the last decades of the 18<sup>th</sup> century up to the dramatic escape of the Portuguese royal family from Lisbon to Rio in 1808, social structures were undergoing significant changes. The integration of the colony into the world economy and geopolitical dynamics increased. An important internal market for food, services and other goods, such as enslaved workers, gained importance and size (CALDEIRA, 2011, p. 161–167; PEDROZA, 2014). A market for land was also forming, with an expansion of land grabbing and an increasing treatment of land as a commodity (SANCHES; LIMA, 2022; SECRETO, 2007). Indeed, social differentiation was no longer defined solely by stratification, as different processes of differentiation were replacing the old structures (SLEMIAN; PIMENTA, 2008, p. 57–88). Nonetheless, some of the key structures of the colonial property regime represented decisive constraints to how the emerging modern social structures were evolving. Among them was a systemic exclusion of access to property rights, a keystone of the colonial order that was still a constitutive structure operating over the emergence of the postcolonial social order. The most important being of course slavery itself.

According to the most trustful estimations, in 1822, the year of Brazilian independence, the country's population of enslaved individuals was at least 1.1 million people, most of them of African origin (KRAUSE; SOARES, 2022, p. 21–23). Among the 2.5 million of free individuals, the half were black people who had been freed since no more than two generations. This means that the emergence of modern functional systems such as politics, the economy and the law was directly mediated by a mechanism of exclusion that made one third of the population object of property rights and, as such, objects of emerging market forms of transaction in the form of commodities. And the property over enslaved people was deeply connected to the property over land, be it for the plantation economy, be it for the mining activities which arose during the 18<sup>th</sup> century (SAMPAIO, 2014). Historical research shows, for instance, that upon the arrival of new European settlers brought to be employed as free workforce in coffee plantations, landowners could barely understand that they, in opposition to slaves, could be bearer of rights (SILVA, 2008, p. 143–145). The patriarchal structure of

colonial property was, in fact, much deeper than just a way of organizing the production of export goods. Access to property was a fundamental code (have/have not) that mediated the reproduction of power and the law. It was therefore a crucial social structure that impinged on the emerging constitutional order.

As Fragoso and Florentino point out, during the final decades of the colonial period and immediately after the independence (1822), an important commercial elite emerged, capable of mobilizing large amounts of capital (2001, p. 169–188). This elite controlled the slave trade and played an important role in Brazil's international economic standing. they also managed to establish important control over the domestic market, especially over the supply of food (FRAGOSO; FLORENTINO, 2001, p. 118–158). However, contrary to what happened in other contexts, such as in Europe, this new colonial and post-colonial elites did not turn against the archaic property structures from the old regime. In a country that was still heavily characterized by a massive concentration of property and great political power by landowners, they instead attempted to accommodate and reproduce the economy of privileges founded on social relations mediated by property over land and people, typical of the colonial times. Property owners were then opposed to the small sectors of urban middle classes, often tied to them by relations of patronage, as they claimed the independence in more liberal terms (SILVA, 2008, p. 90–92).

Fragoso and Florentino highlight that there were a significant number of large commercial companies whose existence lasted only one or two generations in the Capital of the emerging Brazilian empire. “Everything indicates that after twenty or thirty years of continuous operation, those in charge ended up abandoning their mercantile activities, becoming urban rentiers or masters of land and slaves” (2001, p. 228). In other words, these actors abandoned activities whose profitability was often double that of sugar production, preferring to aspire to insert themselves into the prevailing social power structures based on the ownership of land and slaves. Fragoso and Florentino argue that this “option” for property instead of focusing on the more profitable reproduction of capital could be explained by the “aristocratic aspirations” of these emerging actors:

In fact, much more than a pursuit for security, the transformation of a big businessman in urban state owner and speculator or an owner of land and slaves had the meaning of a strong ideal of aristocratization, identified with power over men and certain distance from the working world. Nothing more natural, regarding a mercantile elite forged in a system in which the realization of slave-based production presupposed the continuous reiteration of hierarchies and the exclusion of other social agents. This

was, in the end, a structure whose operation had as premise the constitution of power relations (2001, p. 231–232).

Indeed, this is not surprising. But it does not seem plausible to understand this as a true option. Rather it makes more sense to understand this phenomenon as one taking place in a social normative and cognitive framework constituted by specific relations between the colonial structures of stratification based on property and the emerging codes of a new functionally differentiated society, power, law, and money. Under the emerging constitutional framework of a postcolonial political order, in the 19<sup>th</sup> Century, the reproduction of these codes was largely structured by the access to property over land and slaves to produce social hierarchies (and thus a minimally stable social order). Firstly, it is important to remember that the production of commodities for the external market (sugar, tobacco, coffee etc) remained an important economic basis for which much of further mercantile activity was carried out. It also represented 70% of all central government revenues (CARVALHO, 2008, p. 232). The internal circulation of goods for the internal market, international commercial intermediation, and the slave trade still had an important connection to the production of commodities and the fiscal health of the emerging state (CALDEIRA, 2011; KRAUSE; SOARES, 2022; MARQUESE; TOMICH, 2018).

Secondly, but not less important, since the colonial times society was pervasively structured through relations based on the difference between those who had or did not have property over land and slaves. This cleavage, which was indeed common to many societies of the *Ancien Régime*, had a particular trait in the colonial context of the Portuguese colonies. That is, differently to what happened in the Europe (in the Peninsula and in Central and Northern Europe), where a land gentry had privileged access to land in the form of alodial property, often in opposition to the interests of the crown, in Brazil, from its beginning, the access to land had been a fairly porous and chaotic way to men of different origins acquiring power and status, even ascending in the local social hierarchies of the *Ancien Régime* (FRAGOSO, 2024). As we see in different cases which are largely supported by different sources, men with adventurous character could often accumulate wealth (ALVEAL, 2012), which could be then translated in land tenure through the mercy of the King or his representatives in the colony (FRAGOSO; GOUVEA; BICALHO, 2000). Moreover, many of the largest landowners had only precarious

titles of property, especially after the independence, when *sesmarias* stopped being granted and possession became the only way of new land ownership (SILVA, 2008). The structures of ownership over land and slaves were the defining feature of social differentiation, regulating and structuring the hierarchies in the social networks of reproduction of the *Ancien Régime* and, subsequently, the allocation of power, rights and other important social goods in the emerging society of the modern world. This can be found, for example, in the origins of the bureaucratic establishment that was so crucial in the state-building process throughout the 19th century. As with the royal cabinets in the colony, the most important magistrates and officials in the Empire were recruited from the families of landowners (CARVALHO, 2008, p. 95–117).

There were certainly differences between various sectors of the oligarchy, especially between the provincial landowners who resisted the emperor's attempts at centralization after independence and the sectors that supported central power because they benefited more from their proximity to the court (LYNCH, 2014; SLEMIAN; PIMENTA, 2003). These differences, which culminated in the emperor's abdication in 1831, took on an extremely radical form during the 11 years of the Regency, between 1831 and 1840, when there were several provincial revolts demanding autonomy from the central government and bringing with them new social elements of more liberal and urban sectors, less rooted in the agrarian structure of land ownership. Some of these provincial uprisings even brought about the issue of slave emancipation, the greatest fear of landowners (KRAUSE; SOARES, 2022). In 1842, the so-called liberal party, formed largely by the emerging landowners of the coffee plantations of São Paulo and Minas Gerais, revolted against the central government, which had recently been controlled by the conservative leadership represented by the elite landowners of Rio de Janeiro with the support of more traditional oligarchies of the north, who were closer to the emperor and the central government. The feud was resolved briefly with a conservative victory that quickly resulted in a broad process of reconciliation, through which the landowning oligarchy that had previously opposed political centralization came to support a shift towards containing the risks of secession and destabilizing political unrest (CARVALHO, 2008, p. 220). According to Krause and Soares, both sectors of the agrarian elites had then a much more important interest in common: the need to unite in defense of the existing structures of land and slave ownership that seemed to be under threat thanks to growing political instability (2022, p. 131–152). As José Murilo de

Carvalho has shown, although the two parties included sectors of urban liberal professions and merchants (in the case of the liberal party) as well as public servants (especially the conservative party), landowners were almost equally distributed among both parties (2008, p. 210–212). More importantly, they represented most of the parties' top-level leadership.<sup>10</sup> The same was true of the later Republican Party, formed during the 1870s when pressures for decentralization of power to the provinces gained strength again, a party that was led by some of São Paulo's largest landowners, such as Campos Sales, who later became president of the Brazilian Republic. In fact, the Republican Party of São Paulo, which at the end of the 19th century was home to radical figures in the abolitionist movement such as Luís Gama, only declared its support for the emancipation of slaves in 1887 (CARVALHO, 2008, p. 215).

However, contrary to what Carvalho claims (CARVALHO, 2008, p. 229–236), there was in no way a prevalence of political power embodied by bachelors and magistrates, as opposed to a supposed secondary role for landowners in the process of building the post-colonial Brazilian state. His thesis points to an indisputable fact: the literate and relatively homogeneous-minded elites that were accommodated in the bureaucracy were fundamental to the construction of a nation state capable of maintaining its political and territorial unity, against all odds and difficulties that led to political fragmentation in other states in the region (CARVALHO, 2008, p. 63–142). But his research in no way proves that, in this process, the code of power, structured within the fragile bureaucracy of a state in formation, was able to establish forms of reproduction that imposed themselves over the injunctions of another code: the code of having/not having (property). In all decisive circumstances, such as the crisis which led to the abdication in 1831 (KRAUSE; SOARES, 2022, p. 75–84), the need to keep slave trade during the 1840s (PARRON, 2011, p. 196–219) or the attempt to enforce the rights of the central government over the wastelands (*terras devolutas*) (SILVA, 2008, p. 360–361), the self-referential reproduction of administrative power within the state bureaucracy was constrained by the limits imposed by property structures that produced an elite of super-privileged who were consistently able to assert their interests in the face of the fragile political and legal constitutional structures.

<sup>10</sup> Carvalho shows that 47,54% of the ministers of the Conservative Party were landowners in the period between 1840 and 1889, 13,12% were merchants. The number of landowners who became ministers of the Liberal Party in the same period was even larger, 47,83%, while 8,69% were merchants (CARVALHO, 2008, p. 212).

The failure to regulate land ownership, which in practice left the reproduction of the factual circumstances of their power and status in the hands of the lords, is good evidence of this. Since 1822, there had been constant attempts by the imperial bureaucracy to put the ownership structure in order and ensure that the state took over the so-called wastelands (SILVA, 2008, p. 105–125). These attempts remained unrelentingly unsuccessful. Indeed, the introduction of modern property rights based on modern individualistic models only became possible as a common effort, during the years of conciliations of the 1840s, in the face of the apparently unavoidable emancipation of the slaves, resulting from the end of slave trade imposed by the British navy and finally enforced by the Eusébio de Queirós Bill (*Lei Eusébio de Queirós*) (SILVA, 2008). Almost at the same time, the Empire adopted the Land Law, establishing the abstract title of property and a public system of registry, later strengthened by the hypothecary Law of 1864. As different historians noted, the main motivation for the introduction of this law was rooted in the need of keeping the access to land restricted to the few (SILVA, 2008, p. 275–301; SMITH, 1990). Moreover, in the face of the imminent abolition of slave trade and the perspective of future abolition of slavery altogether, landowners anticipated upcoming problems of labor scarcity. Thus, they set a plan to prevent the access of free men, especially European immigrants, but also freed slaves, to land ownership, forcing them to work as wage labor on *plantations*. The closure of the available land became an explicit aim of the law, what has been openly discussed during the legislative process and were among the main justifications for the final design of the law (SMITH, 1990, p. 313–329).

Historical evidence also tells us that the Land Law of 1850, despite never being totally enforced, played an important role in the reproduction of local hierarchies and the power of landowners. Firstly, the implementing decrees passed in 1854 to enforce the law made the confirmation of ownership and the granting of land titles conditional on the actual demarcation and registration of the land, which was a voluntary act done by the owner in front of the local offices (VARELA, 2005). This legal provision gave wide discretionary powers to the provincial governments (frequently under control of the interests of powerful landowners) in deciding conflicts over land ownership that arose in the process of demarcation (CHRISTINILO, 2006; SILVA, 2008, p. 181–230). Most importantly, it gave even more power to the large landowners,

who could now claim property quite independently of how their land was acquired (SECRETO, 2007).

The land law of 1850 also had a significant impact regarding the property over slaves. As Paes (CANTISANO; PAES, 2018) has showed consistently, the introduction of abstract titles of property defined in individualistic terms allowed the redefinition of relations of ownership of slaves who, in many cases, had gained different degrees of freedom based on the fragmented structures of normative dependence typical of the ancient regime. In some cases, the need of proof of liberty, which were difficult to produce, as a means to acquire freedom or as a counterproof in the face of a valid property title showed by a slave owner led even to cases of re-enslavement of free people (PAES, 2018, p. 116–141).

Modern abstract titles of property represent indeed a defining shift for legal and political social structures. They are manifestation of the political grammar of rights that do not rest upon customary, common, or natural law oriented towards hierarchical forms of stratification. Instead, they are an abstract technical construction that rests upon positive law. From a purely legal standpoint, any legal subject can be a bearer of a title of property, at least in principle. Yet, the constitutional structures of society are also highly important to the way in which property titles operate in social practice. In the Brazilian postcolonial context, it became clear during the last decades of the 19<sup>th</sup> century that the Land Law did not had come to make access to property more inclusive, rather the contrary (SILVA, 2008, p. 355–368). The social structures of exclusion operated to confirm the precarious titles of large landowners, often making possible for them to expand their powers and even their domains of ownership at the cost of smaller landowners, tenants and peasants (MOTTA, 1998, p. 191–296). They often used the privileges and status granted by ownership itself, in order to seek better treatment from judicial and general state authorities (MOTTA, 1998, p. 33–56, 65–70). The operation of the law, in practice, was still largely oriented by hierarchical structures of status and personal networks of privilege, making possible to large landowners the legitimation of their factual possession against the claims of other less powerful actors, when necessary (SILVA, 2008, p. 275–302, 343–353).

In fact, as Kerner notes, the ability of landlords and powerful private individuals to assert their interests in legal cases was pervasive throughout the empire's judiciary (KOERNER, 2010). And the legal value of parties and even witnesses was unequal and known to depend on

their social status (MOTTA, 1998, p. 66–85). In short, both political power and the law, as reproductive codes of modern functional systems, were much more often undermined in their reproduction by the code of property (have/ have not) than the other way around. From the point of view of a sociology of constitutions, one could say that the differentiation between those who had property and those who had not was a dominant difference in the management of other crucial forms of modern communication, such as power and law. The code of property (“having/have not”) showed to be stronger and broadly more constitutive to the inclusion and exclusion of other social domains, such as politics, law, public communication, education, science etc. And the form it took in the first century of state-building in postcolonial Brazil seems to have emerged from the colonial distinctions which produced a small group of large landowners. This long-term distinction and the ways in which it has been operationalized during the colonial times were crucial to shape the mechanisms of social differentiation in the postcolonial broader society. Those who owned land and slaves were bound to enjoy a social status that empowered them to exclude other segments of the population from crucial decisions in the political system, in the legal system and in the reproduction of the codes of the functional systems emerging in a world society that was becoming interconnected at a considerable speed (OSTERHAMMEL, 2016).

Yet, as a form of structural means of communication, property titles also set in motion new forms of societal contingency. As Motta also shows, after 1850 in Brazil, poor freemen, tenants and peasants often used the legal idea of property titles to challenge hierarchical relations established through the old privileges of the *sesmarias*. They went to courts, mobilized the law, and sought out lawyers that could advance new interpretations. And they also resorted to political conflict (even to arms) to struggle for what they understood as their right to the land. (MOTTA, 1998). Similarly, slaves also discovered that titles had become key to their freedom. They often used different sorts of documents (wills, letters etc) as titles to argue before the courts. And they resorted to different strategies to buy their titles or establish legal interpretations that favored their freedom. Even though the new established legal structures also made possible the re-enslavement of freed men and women (PAES, 2018, p. 142–153), they also exposed the contingency of the existing law (PAES, 2018). One must also consider the legal and political activism pursued by the abolitionist movement, which was in fact creating a

new constitutional subject, by recurring to legal arguments over the contingency and invalidity of property rights over human bodies.

Modern forms of individual property rights also played an important role in the emergence of an incipient market economy in urban areas, where a prosperous middle class of urban professionals and free people, such as journalists, lawyers and doctors, but also poor sectors of the free population, were able to establish forms of life not directly dependent on the structures of the agrarian-export economy. Often claiming property rights as a way of expanding citizenship (CANTISANO, 2018). Together with military officers and civil servants, these sectors would be pivotal in consolidating the new political struggles that would crucially shape the republic in the second and third decades of the 20th century leading to more complex structures of functional differentiation.

## CONCLUSIONS

A constitutional sociology of property rights in Brazil must be understood within the framework of a global social history (OSTERHAMMEL, 2016), albeit it remains mainly an exercise of historical sociology. Modernity, as a process of social differentiation, undoubtedly assumes extremely different forms around the globe (HOLZER, 2018). Still, efforts to understand the specificities and interconnections of different contexts from a perspective that makes sense of them as part of the formation of a modern world society remain scarce. How has modern differentiation evolved in diverse contexts? How were these contextual societal structures constrained by global processes of differentiation of power, law, and money?

The present article emphasized that the structuring of a colonial society based on the distribution of land through a political economy of privileges that also included non-nobles resulted in the emergence of a distinct and diverse social structure, contrasting with that seen in Europe, or at least in parts of it. While in most parts of Europe between the 15<sup>th</sup> and the 17<sup>th</sup> Century, a blood nobility disputed the powers of sovereignty with the emerging crowns during, in Portuguese America, access to land, by nobles and non-nobles alike, was decisive in its own terms for the structuring of colonial hierarchies. Instead of producing a society based on blood hierarchies, colonization, with its forms of land distribution thanks to the convenience of the

Crown and in the name of advancing the colonial enterprise, produced a particular type of stratification, albeit still within the legal and personal structures typical of the forms of the old regime. Thus in this social context, property became a distinctive form in its own right. There was not social standing with brought with it the access to property, but property itself which brought higher social standing (even for people of humble origins). This was further strengthened by the crucial economic role of land in producing wealth for the crown through the trading of commodities for the nascent global market. At the end of this process, property, as a form of distinction, gained a fundamental role in the production of the nascent political structure, which would also result in a differentiated transition to political modernity.

Thus, in central Europe at the end of the 18th century and the beginning of the 19th century, a rising bourgeoisie had as its fundamental objective the abolition of the property relations of the old regime and the affirmation of a modern property order based on absolute and individual ownership. To this end, they turned against the aristocratic order and sought its abolition, if possible, by force.

In the case of the formation of the post-colonial Brazilian state, property was not in the hands of a blood nobility. In fact, from the outset, property was the path to power and social status, a path which was open even to those who had business astuteness and acumen. The fact that property was already a form of social differentiation from the outset meant that the landed elite sought not to abolish existing relations, but rather to preserve them. It was in their interest to retain property and expand it, as a way of holding on to power. At the same time, emerging capitalist business elites also saw ownership over land and slaves as the most secure path to social privileges that could not be acquired by money. This created, alongside an aristocratic agrarian oligarchy, a bourgeoisie that considered upholding the exclusionary order a more attractive option than a political revolution that could establish a more inclusive form of constitution.

In the end, property has a deep-rooted role in the formation of societal structures in the postcolonial context of the Brazilian state. It was crucial for the definition of social and political roles of old and new elites and for how they understood the social landscape they had to navigate. It also structured the reproduction of legal and political forms of social communication. There is still a large amount of empirical and theoretical work to be done to

improve the understanding of the ways in which property interacts with other social structures in different contexts. This work only tried to delineate some possible fields that can be pursued by further research.

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