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POPULAR JUDGES AND JUDGES OF LAW DURING LIBERALISM. PORTUGAL (1820-1841)

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Abstract

The theme of justice was much discussed and considered as the most important for the new liberal regime. The political confrontation marked the boundaries between the most radical, moderate, conservative and reactionary liberal factions. The options swung between a popular model of justice and an elitist one, going through hybrid choices. The main occasions of these choices were the 1822 Constitution, the 1826 Constitutional Charter, the 1832 Mouzinho da Silveira Reform, the 1837 New Reform (*setembrista*), the 1838 Constitution and the 1841 Newest Reform (*cabralista*). This text analyzes the definition of the liberal justice model.

Keywords

Justice, Liberalism, Judges of Law, Popular Judges

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POPULAR JUDGES AND JUDGES OF LAW DURING LIBERALISM. PORTUGAL (1820-1841)[1]

JOSÉ SUBTIL

Introduction

The debate over the choice between judges of law and elected ones took place in a new parliamentary environment, among newly elected members (Brochado, 2020).

After the revolution of 24 August 1820, the first electoral event that signalled the emergence of liberal elections took place in December 1820 to choose the members who would make up the Constituent *Cortes* (Parliament) (Vieira, 1992). This first electoral experience was regulated by two instructions (31 October and 22 November 1820) forced by the "Martinhada" counterrevolutionary coup on 11 November (Costa, 2019).

The essential of the suffrage was based on the legitimizing power of the electoral boards, presided over by a *juiz de fora* (magistrate appointed by the king) (see Almeida, 2016; Almeida, 2010). In the parishes, these boards were made up of all resident citizens. For every 200 dwellings, one voter would be elected, a citizen over 25 years of age and resident in the parish. These voters would gather at the head of the county to elect the county voter or voters so that they would elect members. The latter had to be over 25 years old, born or resident in the province for over seven years.

Overall, 100 members were elected with the following distribution: Algarve (3), Alentejo (10), Estremadura (24), Beira (29), Minho (25), and Trás-os-Montes (9).

The parliamentary year of the Constituent *Cortes* began on 24 January 1821 and ended on 31 December, starting again on 28 January 1822 and ending on 4 November. On 13 October 1822, the elections for the Lisbon City Council (councillors and attorneys)[2] were held according to the law of 11 July 1822, which also began to regulate the election of members to the Ordinary *Cortes*.

This electoral legislation package was completed with the Law of 27 July 1822, which defined the rules for the election of ordinary judges and chamber officials, fundamental

[1] Article translated by Carolina Peralta.

[2] The election of nine councillors, an attorney and, as substitutes, three councillors and an attorney, was foreseen. In each parish there was a ledger where the parish priest registered the names and professions of all the residents who had electoral capacity. Electoral assemblies (59 for the 74 parishes) met in parish churches. Each voter delivered two lists in two different ballot boxes, one with 12 councillors and the other with two attorneys. After the votes were counted, the councillor with the most votes was elected president of the constitutional chamber.

to following up on the choices of popular judges[3].

According to both laws, citizens over the age of 25 (or married and at least 20 years old) could vote and voters with sufficient income to support themselves, born or resident for over five years in the province where the elections were held could be voted on[4]. The suffrage was direct, secret and census based. "Family children", who lived with their parents, and servants, vagrants, members of monastic orders and women could not vote (Antónia, 2000).

Between the electoral model of 1820 and that of 1822, the main difference was the change from the indirect method to the direct method and the attenuation of the census character, confirming, however, the difficulties felt by the liberals in obtaining an electoral model for the choice of members (Vargas, 1993).

These difficulties had repercussions on the formulas for finding elected judges, whatever the political option, more radical or moderate. The debate focused on three aspects: the choice of judges (of law and elected, the model for selecting elected judges and the formula for holding them accountable and evaluate their roles and careers.

While this was the case during the debate in the Constituent *Cortes*, it continued after the approval of the Constitution because, in the Ordinary *Cortes*, the diplomas related to justice, the regulation of judges and the organization of courts were among the first to be approved.

The boundary that separated the members between the Constituent *Cortes* and the Ordinary *Cortes*, although there were changes in the composition of the two chambers, was the choice between judges of law and popular judges, an option that covered the entire liberal period until the Newest Reform (1841). This choice defined the boundaries between radical liberals, moderates and conservatives, despite the inhibiting factors of the elective choices. Above all, this had to do with three problems.

Firstly, the huge illiteracy rate that hindered the formation of contingents capable of interacting with courts dominated by judges of law, a situation with consequences for the autonomy of these popular judges and for the degradation of bureaucratic procedures.

Secondly, the disagreement between the political space of the *Ancien Régime* and the shaping of a rationalized system, desired by the liberals, did not facilitate the constitution of voter assemblies. This was due to the vast network with over 800 municipalities, of which 228 had less than 200 dwellings and only 177 had more than 1,000 dwellings. The municipal reform, begun with Mouzinho da Silveira (1832) and implemented by Passos Manuel (Decree of 6 November 1836), extinguished nearly five hundred municipalities, reducing them to 351. In 1855 (Decree of 24 October), they were further reduced to 256, numbers close to those at the end of the constitutional monarchy (Manique, 2020 and 2018). But this new territoriality was, on the one hand, adjusted to a broader electoral system, and, on the other hand, met with the resistance of local authorities (Manique, 1996).

[3] For the sessions of the Ordinary *Cortes*, see *Diário das Cortes*, beginning on 15 November 1822, available at http://debates.parlamento.pt/catalogo/mc.

[4] This electoral framework was interrupted by the Vila-Francada Miguelist coup (27 May 1823). The *Cortes* were suspended (2 June) and the model of the old *cortes* (10 and 19 June 1823) was restored. It was maintained until the end of the civil war (1832-34).

Thirdly, the political and cultural framework, dominated by pluralist jurisdiction with a long tradition of autonomy and social practices, was in contradiction with a centralizing culture.

These problems were further exacerbated by the question regarding how magistrates should be held responsible for their acts, which criteria should guide careers and the imposition, or not, of mandatory mobility or one depending solely on the will of each person.

It is therefore important to draw the general lines of the legacy of the traditional monarchy, compare the liberal proposals and identify the moments of reform in the period between the validity of constitutional texts until the definitive imposition of the Constitutional Charter, that is, between the beginning of the revolution (1820) and the Newest Reform (1841)[5].

I. The organization of justicein the Ancien Régime

I.1. The educated justice

According to most members of parliament, aligned with the most inflamed or moderate political discourse, justice was considered central to changing the regime, therefore, one of the greatest emblems of the revolution. For this reason, the magistrates of the Ancien Régime were accused of despotism and protectionist practices. The laws were considered abusive and discretionary because they had no popular basis and did not arise out of an elected body. The courts were seen as an elitist resource for those who had money, could pay lawyers, and bear the financial burden of the lawsuits.

The target of the liberal members was the cultivated justice (*juízes de fora*, senior magistrates, court judges and also ombudsmen involved in the control of the royal accounts), which dominated the courts of first instance and second instance and which judged, decided on appeals, pleas and grievances (Hespanha, 1994; Subtil, 2011; Camarinhas, 2010)[6] . However, this criticism was paradoxical insofar as the majority of the Congress members were, precisely, graduates in Law, who practiced or not their profession. The most notable liberal leaders were almost all magistrates.

The courts of first instance, located in the town halls, could be presided over by *juízes de fora*, in about two hundred halls, or by elected judges, in over six hundred municipalities. The courtroom and the court registry office were almost always next to the council meeting room where the councillors, the council attorney and the mayor sat. The latter was, at the same time, president of the court. In municipalities with a larger population, there could be other judges of law and/or elected judges, like judges for the orphans, judges for the deceased and absent persons, who were in charge of the supervision and tutoring of minors, absent and deceased, widows and orphans.

There were only two courts of second instance. The most important, based in the city of Lisbon, was the *Casa da Suplicação* (House of Appeals) with jurisdiction for the territory

[5] By using the expression "popular judges" we want to identify the categories of judges who did not obtain a degree in law and were elected, in different ways, by the people: ordinary judges, village judges, elected judges from parishes, justices of the peace and jurors. Exception for conciliatory judges, who were chosen by the parties.

[6] On the legal framework, see *Ordenações Filipinas*, Book I, Lisbon, Calouste Gulbenkian Foundation, 1985.

below the Mondego river line. The other court, the *Relação do Norte*, or *Casa do Porto*, based in Porto, had jurisdiction over the region above the Mondego. These two higher courts were governed by a Chancellor and composed of judges, special magistrates who were no longer dependent on the transfer from places and were permanently appointed, no longer requiring residence documents.

There was not a supreme court of justice, but a superior court of "favour", the *Desembargo do Paço* (Subtil, 2011), which did not consider cases in court, but could waive laws and suppress or shorten sentences at the request of the petitioners. The judges of this court constituted, therefore, the elite of magistrates, and were considered as the extension of the hands, ears and eyes of the monarch. Offenses practiced against them were considered as if against the king.

This court was also in charge of managing the career of judges of law and approving the electoral lists of each municipality for the election of councillors, attorneys and, if applicable, ordinary judges.

Whenever the appointment of a judge of law was made for the first time, the *Desembargo do Paço* court took into account the grade obtained in the degree taken at the University of Coimbra and the grade obtained in the "Leitura de Bacharel" examination held in the court itself. This examination was fundamental for their careers, and was preceded by a set of questions about the social and family quality of the candidates (to ascertain "purity" of blood).

If, however, the appointment was followed by the exercise of functions, the result of the "residence document", for which a magistrate of a higher rank than the candidate was responsible, was included in the evaluation of the new members. These records contained opinions and testimonials of the magistrate's performance. Therefore, they constituted an important occasion in the consultation of local elites and the people in general and recorded, in an open hearing, the most relevant events that happened during the three-year term of the magistrate.

Appointments to first instance posts were for a period of three years, after which, as a rule, the magistrates were transferred. Sometimes, at the request of the residents and the judge himself, the mandate was extended, possibly reaching six consecutive years or even more.

The ambition of these judges was to be appointed to a senior magistrate position or ombudsman, positions that covered the jurisdiction of the counties and offices that grouped together several municipalities. In these functions, they had to go through all the town halls in the district throughout the year, conducting hearings and inspections, using their "correction" power. They were, therefore, travelling magistrates, although they had a desk in the main hall, (the most important council) and a provisional seat in the offices of the councils. As the correspondence they had with the *Desembargo do Paço* and other councils and courts of the Crown was done on a mobile basis, there are no local archives, only municipal ones and, naturally, those of the central administration where the cases, reports and letters were kept.

However, a large part of the municipalities was governed by ordinary judges elected by the residents. The vast majority were illiterate, so, in these councils, the behaviour and jurisdiction of the magistrates was different. They could not consider claims or requests

for review of sentences made by their graduate colleagues, as they were the remit of the second instance courts. However, they could review and assess the complaints and claims of the popular judges, the ordinary judges.

The ombudsmen, in the territory under their administration, generally coincident with the territory of the counties (number that varied between 50 and 70) or close to their limits, exercised the same "correction" power, but within a financial scope. They audited the accounts of councils and other corporations with royal jurisdiction, such as charities, fraternities and brotherhoods.

The magistrates and ombudsmen were also appointed for three-year periods, subject to residence documents, and the place was a springboard to access the category of judge and take a definitive position in the courts of second instance, starting in the Court of Appeal in Porto and ending at the *Casa da Suplicação (*House of Appeal*)*.

In the whole of the municipal and district network and in the Courts of Appeal, the global contingent of graduate magistrates was around four to five hundred. At the end of the 18th century, this number was insufficient to absorb the increase in graduates from the University of Coimbra after the reform of the Statutes (1772). Alternatively, these magistrates started to apply to posts overseas, embraced other professions such as lawyers, solicitors and attorneys of the parties, for example, or entered politics as councillors or council advisors.

This mismatch between the Crown's offer and candidates for the magistrate positions constituted a factor of discomfort that fuelled the dissatisfaction of these graduates and motivated the support of many to liberal doctrines and the Enlightenment culture. To some extent, this explains the large participation of magistrates in the 1820 revolution.

I.2. Popular justice

The first instance graduate magistrates were a minority in the set of judges and, consequently, in the government of the municipalities. Of the eight hundred municipalities, only about 20% had *juízes de fora*. In over 80% of the municipalities, the position of first instance judge was held by a popular judge, the so-called ordinary judge, who had no academic training, often did not even know how to read and write and depended on the court clerks for bureaucratic procedures. There were also tipstaff officials, called *vintena* judges who worked in villages with a very small population (between 20 and 50 dwellings), also elected by the residents and confirmed by the senate of the councils.

Let us examine the election model of these ordinary judges to get a sense of the level of political and social representation and voter involvement.

The electoral process coincided with the electoral tabulation of councilors, attorneys and council officials. In a way, the model inspired the one adopted in the liberal regime elections, with a difference regarding the recruitment base of elected officials and voters (see Subtil, 1998).

The start of the elections began with a provision by the *Desembargo do Paço* for the magistrate (judge, ombudsman or *juíz de fora*) who oversaw the elections and checked the lists and those elected for the three-year period in question.

When he arrived at the council, the magistrate would choose two to three people from the notables of the land, known as "*arruadores*", to draw up a list of the nobility they with those considered capable of performing government positions. Those called to vote for these lists, the noble and good men, natives of the land, without any race and with zeal for the common good, were summoned by street call to come to the council.

The first six most voted for formed the set of voters, or "*pauteiros*", and were grouped in pairs, forming three sets of two voters. Each pair then drew up a list with nine councilors (three for each year of the triennium), three attorneys, one for each year of the triennium and, according to tradition, other positions to elect, in this case, three ordinary judges, one for each year of the triennium. The three lists were crossed so that, according to the votes added together, the magistrate in charge of the elections could define the final list for the three-year period.

These lists were then sent to *Desembargo do Paço* for the court to make the appointments, removing from them possible conflicts of kinship, behavioural incapacities or political inconvenience. The court could even withdraw names and replace some, although this procedure occurred rarely. To make these decisions, the court used its own file and the information left on the side lines of each elected person, obtained, by inquiry and 'hearing', by the magistrate responsible for the election records. The process included the records, the lists, the "secret" information and also a report describing the social environment in which the elections took place.

As can be seen from what has been said, the choice of ordinary judges was highly participated and allowed the local notable men to exert influence in the appointments, even though the magistrate presiding over the elections could also influence the decision of the *Desembargo do Paço* Court. In any case, the people were called to the county seat to participate in the voting and, according to the testimonials in the records, they represented the village's various professions and sensibilities. The ritual inherent to the process itself triggered social contacts that tended to ensure the occupation of places by oligarchic and family lineages.

From what has been said, especially due to the plurality of jurisdictions, territories, appointments and elections, we can draw some conclusions (Hespanha, 2019b).

With regard to graduate judges, the permanent evaluation of their competences was a fact, allowing, in principle, the career progression of the most capable, although the group of these judges was small.

As for popular judges (ordinary judges), what the indirect elections reveal is that popular representation was residual. Their jurisdictions were very limited, both for civil and criminal cases, which allowed, on a deferred basis, the intervention of or appeal to graduate magistrates. However, the cases taken by the ordinary judges were the majority and covered what most frequently happened in the communities, whose sentences were without ifs or buts. Unfortunately, we do not know, in a systematic way, the meaning of their actions and interventions because the municipal files did not keep these cases as the records and sentences were carried out orally.

In addition to the appeals, pleas and grievances under the responsibility of the Porto Court of Appeal or the *Casa da Suplicação*, the system also allowed a last appeal, called

"graça", through which the *Desembargo do Paço* could consult the monarch for law waiving or the granting of favours and privileges.

In the ombudsmen offices, whose royal jurisdiction had been transferred to the noble or ecclesiastical donee, it was up to the landlords to give the election process to the ordinary judges, very similar to the royal model, but with the supervision of the graduate ombudsman appointed by the donee.

II. The organization of justice in the first period of Liberalism

II.1. The debate in the Constituent *Cortes* and the constitutional text of 1822

The *Cortes* approved the constitutional text on 23 September 1822 and the royal oath of King João VI took place on 1 October, followed by that of the city councils and other entities. But, even among the defenders of the Constitution, the idea that there were no conditions for its enforcement grew more and more, and in the first debates of the Ordinary *Cortes*, people began to talk about its revision.

Shortly thereafter, the Constitution was suspended, after the "Vila-Francada" coup (May 1823), and the Ordinary *Cortes* were eventually closed (see Hespanha, 2012a, 2009, 2004).

To get a sense of the dimension of the debate on the judiciary that liberals believed to be the guarantee for compliance with the laws, but about which they had a very critical, corrupt and worn image, let us compare the draft constitution with the constitutional text (Moreira, 2018; Pereira, 2018).

First, let us briefly review the categories of judges referred to in the text of the 1822 Constitution (Title V, "On the Judiciary").

One of the innovations of the new liberal regime were the "de facto judges", who dealt with criminal and civil cases and also crimes of abuse of press freedom. These judges would be elected, in each district, through the constitution of lists of persons with the legal qualities for this purpose. One could only appeal against the decisions of these judges to the Court of Appeal so that it could take "knowledge and decide about the same or a different council of *de facto* judges" in cases where the law so determines.

Then, the "judges of law" exercised jurisdiction in each district. There was a first instance judge of law in each to judge by law the cases in which there were *de facto* judges and, to judge *de facto* and *de jure*, in those where there were not any. The jurisdiction of these judges, whose decision was final, both in civil and criminal cases, was determined by law and the appeal to the second instance would cover cases that exceed these limits. In Lisbon, Porto and in the most populous cities, there would be as many graduate judges as necessary. To be a judge of law, it was necessary to be a Portuguese citizen, be 35 years old and have a bachelor degree in Law from the University of Coimbra, which had the monopoly on the education of jurists.

It was also established that judges of law would be permanent, subject to transfer of place at the end of each three-year period and that promotion would follow the rule of seniority.

The "elected judges", chosen for the subdivisions of the districts, would be elected by the citizens in the same way as the councillors of the town halls. These magistrates judged without recourse civil cases of minor importance and minor crimes, whose limits would be established by law. The sentence would be made verbally, listening to the parties and noting the sentence in a public record. They could also be conciliation judges and assume the safety and keeping of public order.

The "arbitrating judges", who could be appointed by the parties to decide "on civil cases and penalties", depended, therefore, on the success of those involved in each case.

Finally, there were the "conciliation judges", who could be used by the elected judges in the cases and in the manner that the law would determine[7].

This typology of judges listed in the Constitution did not correspond, at all, to the text of the constitutional project, presented to the Courts on 25 June 1821. It was discussed on 9 June[8], although the part referring to the judiciary began to be debated only at the beginning of 1822 and took close to two months to be approved (Subtil, 1986).

On the contrary, the constitutional project defended the choice of judges of law, in line with the tradition of *juízes de fora*. This political option was taken by parliament members Sarmento, Borges Carneiro and Pinto de Magalhães, who justified the option due to the complexity of liberal societies guaranteeing freedom, increasing laws and defending the social pact. According to them, "to be free, it is It is essential that we are slaves of the law: a Nation that is free and constitutional must have more laws"[9].

Therefore, the constitutional project did not provide for ordinary judges and admitted *de facto* judges (council of jurors) only in criminal cases, always presided over by a judge of law. Regarding conciliatory judges, the project provided for them as long as they were judges of law.

As for the careers of judges of law, the principle of perpetuity of the job and the principle of seniority as a criterion for progression were affirmed. No control and inspection mechanism was foreseen.

The constitutional project on the judiciary was, therefore, a traditional and conservative text, not in line with the criticisms of the "damned spirit of the body" of the magistracy which, as parliament member Girão said, "in the *Cortes* the magistrates have always predominated, and for that reason they will make the Nation their slave".

The defence of the constitutional project was conducted, in large part, by the undersigning parliament member José de Moura and two of his colleagues, Borges Carneiro and Castelo Branco, who would eventually, during the debate, distance themselves from it. The former, opposing the seniority criterion for career progression, defended a supervising system to hold judges accountable. The latter, more radical,

[7] The Courts of Appeal would judge in the second and last instance and a Supreme Court of Justice, based in Lisbon, composed of judges of law appointed by the king, would recognize the errors of office of ministers, appeal officials, secretaries of state, diplomats, and regents of the kingdom. They had the power to grant or deny appeals, except for *de facto* judges.

[8] The subscribers of the constitutional project were José Joaquim Ferreiras de Moura (Beira), Luís, Bishop of Beja (Beira), João Maria Soares de Castelo Branco (Extremadura), Francisco Soares Franco (Extremadura), Bento Pereira do Carmo (Estremadura), António Pinheiro de Azevedo e Silva (Beira), Manoel Fernandes Thomaz (Beira), Manuel Borges Carneiro (Extremadura) and Joaquim Pereira Annes de Carvalho (Alentejo).

[9] Intervention of Pinto de Magalhães, 11 January 1822, *Diário das Cortes*, volume IV, p. 3.665.

defended the prevalence of ordinary judges and the practice of elections to legitimize the job of judge. The other signatories of the Committee took a more moderate option, as was the case of Fernandes Thomaz, Pereira do Carmo and Pinheiro de Azevedo.

In the opposite field, the political fight against the constitutional project was assumed by José Joaquim Rodrigues de Basto (Minho), who defended, exclusively, the ordinary judges, chosen by electoral suffrage, with removable positions and valid for one year. He was backed by Martins Ramos, Vilela, Barrata and Barreto Feio.

These two positions, the option for judges of law and the defence of ordinary/elected judges, were joined by a third tendency, with a conciliatory predisposition. The latter defended the continuation of judges of law, accepted to review the principle of seniority, permanency, the intervention of *de facto* judges and the accountability of the post, provided that it was framed in a law that covered more public administration offices. This would happen on 13 January 1823, for some the most important day after the revolution (Subtil, 1988).

At the end of the debate, the constitutional text would completely change the text of the constitutional project regarding the jury and ordinary and conciliatory judges. *De facto* judges (jurors) were devoted to criminal and civil cases, ordinary judges would try small criminal and civil claims, without plea or appeal, and conciliatory judges were assigned the important task in filtering disputes for courts.

The pattern that prevailed in the constitutional text, with the enshrinement of *de facto* judges, elected judges[10] and conciliatory judges, aimed to legitimize the new regime regarding popular support and to reduce the flow of cases in court. This would limit the intervention power of judges of law in the courts of first and second instance.

In conclusion, it was a victory for the most radical wing of Congress, well expressed in the words of the moderate and prestigious congressman Fernandes Tomás, who stated, at the end of the approval of the constitutional text, that the intention had been "to cut short the nails" of the magistracy[11].

In any case, with this heated political debate, the motto and arguments for the discussion on liberal models for justice, the choice of types of judges, the role and autonomy of judges of law and the breadth of direct or indirect elections in the choice of popular judges were established for the future.

This will be examined next, focusing on the Reform of Mouzinho da Silveira (1832), the New Reform (1838) and the Newest Reform (1841).

II.2. The reform of Mouzinho da Silveira (1832)

With the repeal of the 1822 Constitution, in an attempt to limit the offensive of the "ultra-realists" and radical liberals, King D. João VI appointed a board formed by moderate personalities of great political and academic prestige, to propose a new Constitution. Some constitutional projects of several citizens were also sent to the board to be included in the new constitutional text (Hespanha, 2004: 128-152).

[10] The election model was regulated by the decrees of 20 July and 9 August 1822.
[11] Session of 5 October 1822, *Diário das Cortes*, volume VII, p. 695.

However, it was the Constitutional Charter, influenced by the political-constitutional theory of Benjamin Constant, granted by King D. Pedro IV, in Rio de Janeiro (29 April 1826), that became the great alternative to a Constitution. This was because it served the interests of various liberal factions, including the more traditional ones. The first period of the Constitutional Charter was in the 1826-1828 legislature and, after the Miguelite defeat in the civil war, when the *Cortes* met again on 15 August 1834.

Regarding judges, the most emblematic feature of the Constitutional Charter was, arguably, the elimination of elected judges within the framework of the organization of justice and the association of the judiciary with the judges of law. The latter came to hold permanent positions, although capable of changing place or be suspended by the king, after hearing the Council of State or following a bribe, corruption, embezzlement or receiving undue advantage.

Despite the adoption of this model, the Constitutional Charter granted the intervention of jurors in civil and crime cases to investigate the facts in accordance with what the laws would determine[12]. It also recognized the justices of the peace, elected in the same way as the councillors, to attempt conciliation before any legal process. The Constitution also admitted arbitration judges in civil and criminal cases by appointment of the parties, and the sentences could be definitive, by agreement between them.

But neither the Constitution nor the Constitutional Charter provided for the regulation of the justice system, leaving this organization to future laws. Thus, the first reform of justice, aiming to replace the model of the Ancien Régime that was still in force, more than ten years after the revolution, was the Decree of 16 May 1832 (Decree no. 23). It was part of a vast legislative package, authored by Mouzinho da Silveira (Manique, 1989; Pereira, 2009). However, the reform was so complex that it was doomed to failure, as happened after the short period between the end of the civil war between liberals and absolutists (1834) and the September revolution (1836)[13].

The programme approved on Terceira Island adopted, for the entire Kingdom, first and second instance judges, permanent, graduates and appointed by the government. They would enforce the law with complete autonomy, except in criminal cases whose facts were investigated by the jury and on which the judges of law would enforce the law[14].

The remaining categories of judges represented a huge panoply, including the justices of the peace, ordinary judges, village judges, arbitration judges and the jurors (Subtil, 2021).

The justices of the peace would be elected by the peoples and their functions, conducted without pay, would consist of reconciling the parties, as already indicated in the

[12] The 1822 Constitution, in article 191, created a Supreme Court of Justice in Lisbon The Constitutional Charter, in article 130, and the 1838 Constitution, in article 126, confirmed the Supreme Court of Justice.

[13] The Mouzinho da Silveira diploma has 293 articles and the judicial apparatus is divided into judicial circles, which in turn were divided into counties. The counties were split into hearing houses and the latter into parishes. By decree of 28 June 1833, the division of the territory was established as follows: four judicial districts (Lisbon, Porto, Lamego and Castelo Branco). The Lisbon one would have 15 counties and 200 municipalities; Castelo Branco would have four counties and 135 municipalities; that of Lamego, eight counties and 232 municipalities; Porto had 13 counties and 230 municipalities. The total accounted for 40 counties and 796 municipalities and 47 judges of law and four courts of appeal.

[14] *Collecção de Decretos e Regulamentos mandados publicar por Sua Magestade Imperial o Regente do Reino desde que assumiu a Regência em 3 de março de 1832 até á sua Entrada em Lisboa em 28 de julho de 1833,* Lisbon, Imprensa Nacional, 1836 (second series), pp. 102-147.

constitutional texts. The election, annual and by secret ballot, took place in the assembly of the heads of families of each parish, gathered in the parish church (parish assembly) on the last Sunday of June of each year and presided over by a councillor. The one who obtained the majority of votes would be elected and, in case of a tie, the eldest would be chosen[15]. The appointment of the secretary and scrutinizers was made by acclamation at the meeting.

In the same assembly, three citizens were elected to form the group of standing up judges[16] and also two representatives per parish to ensure representation in the municipality. These deputies (members of the municipality and representatives from the parishes) later elected three people to form the list of the ordinary judges.

After the lists of ordinary judges had been made, the records were sent to the judge of law of the county, who submitted them to the president of the second instance court, who then chose an ordinary judge and a standing up judge and gave them the respective letter of appointment for a year.

This model shared many features practiced in the corporate monarchy, with the difference, in this case, that the universe of voters was broader. However, this model by Mouzinho de Silveira required an inordinate recruitment of citizens elected for short periods, thus forcing repeated elections and trivializing the exercise of positions (Domingues, 2018).

Let us now examine the typology of judges, roles and competencies, some of which were potentially conflicting.

Ordinary judges could deal with cases that did not exceed 12,000 *reis* in real estate and 24,000 reis in movable property, while standing up judges dealt with cases involving damage caused by people or cattle in "crops, vineyards, gardens, orchards, pastures and groves", with a special intervention in the rural world where the multiplication of conflicts was great, with the advantage of these judges knowing the territory and the population (Domingues, 2018).

The cases these standing up judges dealt with were verbal and could involve pledges, valuation and sale at auction, write records for crimes, avoid brawls, riots and mutinies, arrest in *flagrante delicto* and have the offenders presented to the ordinary or judge of law, and deal with the requests of these first instance judges. As they were appointed by the presiding judge of the second instance court, they could also be suspended by him.

As for the arbitrators, they were chosen by the parties to exercise arbitration and could not refuse the mission.

Finally, the jurors (those who "swear to judge") are removed from a ledger book belonging to the councils' archives and updated in May every year. Registration was done individually and belonged to each citizen who met the conditions for registration. Non-registration entailed sanctions, fines and loss of rights.

[15] The eligibility conditions for the justices of the peace were to have Portuguese citizenship, the full exercise of political rights, a mandatory address in the parish and an annual income of 200 thousand *reis* (in the cities) and 50 thousand in the villages.

[16] Eligibility followed the same criteria as the justices of the peace, but with income limits ranging between 50 thousand *reis* for cities and 20 thousand *reis* for towns and villages.

The annual list of the jurors was determined in the council on the first day of January every year, in a meeting with the judge of law and the delegate of the royal attorney or with the ordinary judge and the royal sub-delegate. From the ledger book, lists were formed. A jury list for the first quarter, another for indictment jurors for criminal cases, and another for sentences regarding civil and criminal cases. When the lists had been made, individual tickets were placed in an box from which the jurors were drawn by a boy under 10 years of age. Then, again, the tickets were placed in another box to make the lists for the following quarters. It was up to the judge of law or the ordinary judge, after tabulation, to notify the jurors of the days they would have to serve the jury court.

In addition to the variety of jurisdictions, Mouzinho da Silveira's reform required a huge contingent of jurors, ordinary judges, justices of the peace and standing judges with an annual rotation. This implied repeated meetings in the municipal councils, elections, and notifications that disrupted the daily life of local political and social life for acts that were not aimed at the true practice of justice.

Whereas this reform was, in itself, impracticable, it remained as an illustration of a pamphlet-letting intention in the context of the civil war and as a speculative example, because it was designed without taking into account the reality of an illiterate country encrusted by oligarchic practices.

II.3. The New Reform (1836) and the Newest Reform (1841)

With the end of the civil war and the victory of the liberals (1834), the fight between the liberal factions returned. Its outcome brought to power the group identified with the most radical options (revolution of 9 September 1836). The 1822 Constitutional text was recovered and a new would be approved in 1838 (Gomes, 2013; Hespanha, 2019a; 2018;2012a;2012b).

However, one of the first measures of the new September government was to decree the judicial reform and organize the justice system through the Decree of 29 November 1836, authored by the Viscount of Sá da Bandeira, Manuel da Silva Passos, and António Manuel Lopes Vieira de Castro. This New Reform detailed, in the report that supported it, two objectives: bringing justice closer to the citizens, hence the concentration of efforts in a new administrative territorialisation and clearer procedures due to the legislative confusion.

The division of the new political space, which had not been implemented with the legislation of Mouzinho da Silveira, was defined in the Decree of 13 January 1837[17] with maps of the 48 counties and municipalities, 351 *julgados* (hearing houses) and parishes, three second instance courts, one in Lisbon (with 21 judges), one in Porto (with 21 judges) and one in Ponta Delgada (with seven). The reform of the civil, ordinary, summary, and criminal procedures was also promised.

In this new orientation, very close to Terceira's legislation, practically the same model of justice was maintained, with clear simplifications.

[17] *Reforma judiciária approvada pelos Decretos de 29 de novembro de 1836 e 13 de janeiro de 1837*, Lisbon, Imprensa Nacional, 1837. The Decree-Law of 13 January 1837 established the civil and criminal procedure rules.

Judges of law, royally appointed and serving for life, would judge in first instance courts in each district and preside over the Correctional Police courts and the Family Councils.

The counties were divided, in turn, into *julgados*, under the jurisdiction of an ordinary judge, elected by the people, with the exception of Lisbon and Porto, where there would be no ordinary judge[18]. These ordinary judges dealt with minor cases, knew about the result of the appeals made to judges elected from the parishes and prepared the cases for the judge of law. The *julgados* were divided into parishes where an elected judge would address minor cases.

There was also a justice of the peace (elected) who could intervene in a single parish or more, depending on the population. There was at least one justice of the peace for 200 dwellings, and it was mandatory for him to try to reach an understanding between the parties before the cases reached the courts[19]. And, finally, the jurors who followed the established guidelines.

The 1838 Constitution[20] addressed justice in a very short title (Title VII) where it identified only judges and jurors, both in civil and criminal matters. The judges of law were to be appointed by the king, the ordinary judges elected by the people, the same applying to the justices of the peace, who always intervened before the cases became contentious. It included Courts of Appeal and a Supreme Court of Justice. The judges of law maintained the immovability of positions, although first instance judges could be moved every three years.

The Newest Reform, implemented by the Decree of 21 May 1841, during the government of the Count of Bonfim with Costa Cabral as Minister of Justice, preceded, in a few months, the definitive restoration of the Constitutional Charter (1842) that established the constitutional monarchy until the establishment of the Republic (1910)[21]. The novelties of this reform were, however, very few and did not solve the intricate problem of multiple jurisdictions, the complicated network of popular judges and the intense calendar of elections.

With regard to the organization of the jurisdictional territory, the hierarchy levels started to include the district, the county, the *julgado* and the parish. Each district would have the right to supervise a court of appeal that would dealt with second and last instance cases. The district of Lisbon had 21 judges, the district of Porto had the same number and the district of Ponta Delgada had seven judges.

The second level was formed by the county, where there would be a judge of law and, on the third level, a *julgado* with an ordinary judge and one or more justices of the peace who would exercise conciliation jurisdiction in their own homes: "No case will begin in litigation, without its object having been previously submitted to the Conciliation Court, by order of the Justice of the Peace, or by voluntary action of the parties (Article 210.)

[18] They were elected by the people, for two years, and could be reelected. The election was made according to lists defined by the judge of law.

[19] The justices of the peace, ordinary and elected judges of the parishes did not need royal confirmation. The election was the same as that of the councillors.

[20] *Diário do Governo*, of 24 April 1838, No. 98.

[21] *Decreto de 21 de Maio de 1841, que contém a Novíssima Reforma Judiciaria com os Mappas da Divisão do Território, e as Tabellas dos Emolumentos Reformadas em virtude da Carta de Lei de 28 de julho de 1848*, Coimbra, Imprensa da Universidade, 1857.

Finally, at parish level, it would be up to an elected judge to decide verbally, after hearing the witnesses and ascertaining the facts.

In line with previous reforms, the parties could appoint arbitrator judges, who could be any citizen.

Among the few novelties of the Newest Reform, we can mention the new institutional outline of the jury. The council of jurors, which ruled on civil and criminal cases, was now dismissed whenever the facts could be proved by documents, inspection, or examination, or when one of the parties did not consent to have a jury trial. These judges were further divided into indictment jurors and sentencing jurors.

Another novelty was the creation of a correctional police court in each county and the intervention of the Public Prosecutor's Office with ordinary judges. The main one was the reduction in popular participation in the administration of justice.

Conclusion

One of the political flags of the first years of liberalism (1820-1841) was the scathing criticism of the justice system of the Ancien Régime. The model adopted by the new regime could not dispense with two legacies: the system of judges of law, similar to the role of *juízes de fora*, and the replication of ordinary judges to affirm the popular character of justice as a support for the independence of the judiciary, the defence of freedom and the enforcement of the law.

Therefore, the various reforms shared four principles: the independence of the courts as a guarantee of the enforcement of the laws, the defence of the permanent nature of positions, hearings with a jury and the representation of the various types of elected judges. The last two principles were considered fundamental to freedom and the defence of the division of powers.

The case of the jury attests to this conviction and highlights the political changes of the new regime. Admitted since the 1822 Constitution to certify the verification of the facts, they left to the judges of law the simple enforcement of the law, while they had merely bureaucratic roles. However, this intervention of the jurors will vary, later, in criminal and civil cases, regarding the limits and in the relationships maintained with the judges of law. In fact, these were the signs that marked the political direction of the reforms, starting with the 1836 one in which the jury lost some relevance in civil cases, which was the most substantive political and social matter for consideration in the courts. And with the Newest Reform (1841), they were subject to the agreement of both parties, removing the mandatory nature that had been imposed since the reform of Mouzinho da Silveira.

As for the ordinary judges, the liberal regime realized, very early on, that it could not dispense with an organization that operated and intervened in more than 700 municipalities, and had a great weight in the life of the communities. And it also realized that it could not do without them to reinforce the popular nature it wanted to give to the liberal justice system.

But this choice of the liberal regime met with a huge setback, the fact that ordinary judges were accustomed to autonomous practices associated with micro-municipal powers, contrary to the centralization desired by the Liberal State. It would prove these

intentions with the drastic reduction of municipalities and the removal of fiscal benefits, in a clear offensive against the municipality inherited from the Ancien Régime.

Regarding non-judicial ways to resolve conflicts and disputes, with recourse to elected judges of parishes, justices of the peace, arbitrators and standing up judges, the liberal regime softened the obligation of its interventions from the New Reform with the support of the judges of law. For the latter, these popular judges were politically and socially inconvenient due to popular radicalization, insignificant legal practice and low cultural level.

But, paradoxically, these popular institutions represented contradictory alternatives to the liberal legal dogma, that is, a two-way situation, positive for the popular affirmation of the system, and negative for the State's centralizing construction.

The independence of magistrates and the safeguard for their effectiveness also ended up giving rise to a certain "government" oriented courts and judges. They progressively saw themselves as important actors in the construction of the State, mixing the sphere of justice with administrative intervention, even after the approval of the September administrative code (6 November 1836) and the Cabralista administrative code (16 March 1842).

The debate systematized here around the choices between judges of law and popular judges shows how the definition of the judicial system was central to asserting the domain of Law in liberal political doctrine. This was so even if the vicissitudes of political choices have heightened the resistance of local authorities, especially after the new jurisdictional and administrative territoriality.

In conclusion, between continuities and singularities, four structuring ideas can be advanced.

The first, of an institutional nature, refers to the importance of the "assemblies", from community and municipal meetings to parliamentary assemblies. Both in the Ancien Régime and in liberalism, it was believed that citizens' meetings, more or less enlarged and legitimated, had the power to "create power" and the right to order society.

The second associates law with the culture of common sense, to readjust and conjugate both legislative and traditional norms with social and political realities. In a way, culture has shaped the construction of law, including unwritten practices based on community forms of justice. More than just laws, there were "judges to do justice", as Bartolomé Clavero stated in an exemplary manner[22].

As a third idea, we would highlight the educated *iustitia*, the network of judges and courts known as the "knowledgeable" of law, to show how liberalism, after the pamphlet stage of the revolution, began to trace the path of a tendential professional justice, to develop jurisprudence as *corpus iuris*, contrasting *ius commune* with *ius proprium*.

And, finally, to emphasize the absolute need, in this new liberal society, for a political right, substantively an administrative law, particular to the executive power, neither parliamentary nor judicial, insofar as parliamentary legislation and the intervention of

[22] Clavero, Bartolomé, *Instituição Histórica do Direito*, Rio de Janeiro, Lumen Juris, 2018.

popular and judges of law proved insufficient to support the government's field of involvement.

This new administrative law would henceforth be entrusted to the executive power, which defined the areas of its control, organizing its own administrative and non-judicial jurisdiction, increasingly closing the field of intervention of popular judges in civil matters, referring them to the sphere of crime and, even so, residually.

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