António Manuel Hespanha and the Brazilian Constitutional History

DIEGO NUNES

António Manuel Hespanha was well known for his contributions to the history of the Portuguese state, elucidating on how the corporate world from medieval age was still fundamental during the absolutist period[1]. But Professor Hespanha had dedicated an important part of his works to the understanding of the formation of constitutionalism in Portugal and, therefore, Brazil as well.

Hespanha had demonstrated the great project that went into changing the old *polis* into the new states, imagining forms to manage people and territory whilst bolstering political representation. The liberal agenda would administrate the permanent threat of rebellions, considering the fragile social cohesion extant in this new political arrangement[2]. Claiming and establishing the communitarian ideas on homeland and nation was necessary[3]. And the found solution within constitutional options was first, to limit state powers, and second, to differentiate civil and political rights[4]: if it was not possible to reduce the state, the strategy was instead to reduce the political universe[5].

We can find the first manifestation of that phenomenon when Hespanha described the "supplication" made by a group of Portuguese politicians to Napoleon during the invasion and the escape of the king of Portugal to Brazil (1808)[6]. It was a request to establish a constitutional regime in the French occupation similar to the one implemented at the Duchy of Warsaw. Regarding Brazil, the *Súplica* proposed that the colonies change their status to provinces, becoming part of the realm and gaining representatives[7]. In the supplication and further negotiations, the idea was to invite King John VI to return to Portugal, which was denied by Napoleon, owing to the fact that the Portuguese monarch was under the protection and sway of England. Also, in secret, the French emperor wished to dissolve Portugal in provinces, putting them under the rule of the Spanish king, who was his collaborator[8]. Despite it being a period that Portugal – and other countries invad-

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ed by France – was not keen on celebrating, Hespanha argued that Napoleonic constitutionalism was fundamental in order to understand any posterior movements, even if the Portuguese constitution arrived only ten years later, at this point closer to the *chartre* model[9].

The next move towards constitutionalism was the "basis" to the Constitution of 1821. That document had granted sovereignty to the nation, a historical creation that maintained power away from the people[10]. The *Bases* were approved by king John VI who, together with his family, sworn it in as constitution while still in Brazil, before to departing to Portugal, where he titled himself "by grace of God and by Constitution, king of the United Kingdom of Portugal, Brazil and Algarves"[11]. It was the result of a large political effort by both the king in Brazil and the aristocracy in Portugal, in order to test which side was stronger and who could impose their own constitutional project, at that moment an unavoidable reality[12].

But regarding this equilibrium, the constitution had created not only one but two supreme courts, at Lisbon but also in the Brazilian kingdom[13]. Moreover, when the draft was presented to the *Cortes Geraes*, some representatives suggested the creation of an "administrative" power for more regional dilemmas, that would support claims of autonomy by Brazilians. But many reasons such as the risk of a secession (political), the absence of a distinction between administrative and executive branch (theoretical) and the centralized perspective (institutional) put a stopper to that possibility[14].

Hespanha was also concerned to understand how constitutionalism penetrates in legal thought. In that sense, he asks us which law theory is put in the center of regulatory activity according to the Rule of Law. The new Law had needed to compete against the old traditions preexisting in the lawyers' minds, and in order for them to become reality they needed to be convinced to change their legal habits[15], because according to him, the "State is only and just the artifice needed for a nature to pass from a fiction to something that works in practice"[16].

Comparing the Portuguese and Brazilian supreme courts[17], Hespanha demonstrated how the *Supremo Tribunal de Justiça* was more open to non-legalist arguments, accepting as answer of "injustice" the invocation of Natural Law. The Portuguese Court's decisions, in turn, are more linked to legality[18]. Another method found by him to understand their Jurisprudence was comparing Portuguese and Brazilian scholars regarding private law[19]. Despite Brazil not innovating so much in this issue the references to constitutional text were more intense; in Portugal they were "hardly legalist, and hardly constitutionalist"[20], while in Brazil they "were convinced constitutionalism must reflect also in private law"[21]. In reality, both experiences were more connected to the tradition of doctrine where comparative law worked as new clothes[22].

But Hespanha's work, as I said at the beginning, was especially important to the understanding of the local autonomy in the imperial space[23] against the traditional view of a centralized government from metropolis to colonies[24]. It is very important to face the interpretations of the "thinkers of Brazil" as Raymundo Faoro and Caio Prado Jr., who, while even researching

Jean Baptiste Debret, Map of Brazil, 1834

Oscar Pereira da Silva, Portuguese parliament, 1822

the sources, denied the signs of similarities between systems in order to invoke the myth of the invader, stunting the protagonism of a mixed-race local elite[25]. According to Hespanha, this entire overview is fundamental to the understanding not only of the complexity of tensions in Brazil (not reserved to the crown and colony) but to the process of Brazilian independence, that had been started in practice before the XIX century[26]. In fact, during the Enlightenment age, the first voices that sought to transform the "Estado do Brasil" into part of an United Kingdom with Portugal began to be noted[27].

There was not a Portuguese colonial project. The justifications were not coherent, and differed, depending on the where (Africa, Asia, America)[28]. The conquest of the territory was more a consequence of the trade network than a goal[29]. Consequently, it was necessary to begin recognizing the existence of local manifestations of law[30], or at least to mix systems, as the cases of Portuguese agents commanding indigenous tribes (*capitães de aldeia*). The law framework was plural, because the tradition of *ius commune* and the particularity of local arrangements. The principle behind this was the personal status, i.e., the *Ordenações*, was not automatically applied against native ones[31]. The general governor could deny the application of Brazilian statutes (*regimentos*) – consulting the bishop, the president of the tribunal (*Relação*) and the general treasurer – and grant the right of grace to accomplish their goals in the ultramarine government[32]. But he did not intervene at the local (*capitanias*) governors' acts such as the granting of land (*sesmarias*), except in defense of the territory or questions relating to general politics. This means the main power in a plantation colony did not belong to the crown's representative. In issues of justice, these local governors had criminal jurisdiction, but in general, did not use the royal law because they were not *letrados*, i.e., they were illiterate, and judges (*desembargadores*) of the tribunal had alliances with them[33]. Public offices could be sold in Brazil, despite the prohibition of this practice in the ordinances, which means another trace of local power, of utmost importance in the *civiltà della carta bollata*, transferred to the new world[34].

In a methodological approach, Hespanha brings us some guidelines to think Constitutional History especially useful when applied to the Brazilian context. First, his thinking helps the understanding of how constitutionalism could be read.

In that sense, he argues to avoid visions which reduce political and institutional phenomena as reflex and consequences of social and economic changes[35]. By contrast, the material conditions of the "power production" are more important, including the legal-constitution imaginary (what is a constitution and what are its categories)[36]. In second, we need to analyze power in a broader way, including techniques, custom, knowledge, public opinion[37]. It means to hear the voices of peripherical powers from ordinary people, low-profile public servants and other innumerous categories of groups that could interfere in the constitutional scenarios[38].

In synthesis, the political-institutional aspect regards to its autonomy, its legal mechanisms, and its relations with the "peripheries". This is fundamental to avoid a dogmatic constitutional history concerned only with legal concepts or constitutional texts[39]. Constitutional contexts would be seen in their complexity. It is a soft reality incarnated in hard devices[40].

These remarks are only a little sample of the possibilities that Hespanha's works could illuminate for new researches on Brazilian Constitutional History. Beyond his texts, the main legacy is his generosity: listening to young researchers, helping then with indications of texts and suggestions of sources to explore, even discussing the legal historians' *metiér*. All of this was recognized in the tributes have made by historians[41], lawyers[42] and legal historians[43] since Hespanha's passing last year. Worldwide Legal History changed after António Manuel Hespanha, and surely, we deeply miss him as one of the masters in our field of research – and even more as an amazing friend. In Brazil, however, his ideas have found a fertile soil that we can continue to expect new outcomes for the coming years.

[1] A.M. Hespanha, *As Vésperas do Leviathan. Instituições e Poder Político Portugal - Séc. XVII*, Coimbra, Almedina, 1994.

[2] A.M. Hespanha, *Pequenas repúblicas, grandes estados. Problemas de organização política entre antigo regime e liberalismo*, in F. Taveira da Fonseca (ed.), *O poder local em tempo de Globalização: uma história e um futuro*, Coimbra, Imprensa da Universidade, 2005, pp. 133-147, pp. 133-134.

[3] Ivi, pp. 138-140.

[4] Ivi, pp. 141-143.

[5] Ivi, p. 147.

[6] A.M. Hespanha, *Sob o signo de Napoleão. A Súplica constitucional de 1808*, in «Revista Brasileira de Direito Comparado», n. 34, 2008, pp. 47-79; also published a short version in A.M. Hespanha, *Sob o signo de Napoleão. A Súplica constitucional de 1808*, in «Almanack braziliense», n. 7, 2008, pp. 80-101.

[7] A.M. Hespanha, *Sob o signo de Napoleão. A Súplica constitucional de 1808*, in «Revista Brasileira de Direito Comparado», n. 34, 2008, p. 52.

[8] Ivi, pp. 54-55.

[9] Ivi, pp. 52 and 59.

[10] A.M. Hespanha, *O constitucionalismo monárquico português. Breve síntese*, in «Historia Constitucional», n. 13, 2012, pp. 477-526, p. 484.

[11] Ivi, p. 488.

[12] A.M. Hespanha, *Hércules confundido: sentidos improváveis e incertos do constitucionalismo oitocentista: o caso português*, Curitiba, Juruá, 2009, p. 69.

[13] They were not like a *Tribunal de cassation*; instead, they are closer to the Old Regime tribunals to correct sentences according to the Law (direito), not the laws (leis). See A.M. Hespanha, *Governo da lei ou governo dos juízes? O primeiro século do Supremo Tribunal de Justiça em Portugal*, in «Historia Constitucional», n. 12, 2011, pp.

203-237, pp. 225-226.

[14] A.M. Hespanha, *Guiando a mão invisível. Direitos, Estado e Lei no liberalismo monárquico português*, Coimbra, Almedina, 2004, pp. 102-104.

[15] Hespanha, *Hércules confundido*, cit., p. 14.

[16] Ivi, p. 16.

[17] A.M. Hespanha, W. Guandalini Jr., *A motivação das decisões sobre revista nas primeiras décadas dos Supremos Tribunais de Justiça no Brasil e em Portugal (1834-1866)*, in «Revista da Faculdade de Direito UFPR», 65, n. 1, jan./abr. 2020, pp. 185-224.

[18] Ivi, pp. 217-219.

[19] A.M. Hespanha, *Razões de decidir na doutrina portuguesa e brasileira do século XIX. Um ensaio de análise de conteúdo*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», 39, 2010, pp. 109-151, p. 116.

[20] Ivi, p. 131.

[21] Ivi, p. 147.

[22] Ivi, p. 142, nt. 88.

[23] A.M. Hespanha, *A constituição do Império português. Revisão de alguns enviesamentos correntes*, in J. Fragoso, M.F. Bicalho, M.F. Gouvêa (eds.), *Antigo Regime nos trópicos: a dinâmica imperial portuguesa (séculos XVI-XVIII)*, Rio de Janeiro, Civilização Brasileira, 2001, p. 167.

[24] Hespanha, *As Vésperas do Leviathan. Instituições e Poder Político Portugal - Séc. XVII*, cit.

[25] Hespanha, *A constituição do Império português*, cit., pp. 168-169.

[26] Hespanha, *A constituição do Império português*, cit., p. 189.

[27] P. Cardim, A.M. Hespanha, *A estrutura territorial das monarquias ibéricas*, in A. Barreto Xavier, F. Palomo, R. Stumpf (eds.), *Monarquias Ibéricas em Perspectiva Comparada (séculos XVI-XVIII). Dinâmicas imperiais e circulação de modelos político-administrativos*, Lisboa, Instituto de Ciências Sociais, 2018, pp. 51-96, p. 93-94.

[28] Hespanha, *A constituição do Império português*, cit., pp. 168-169; A.M. Hespanha, *Caleidoscópio do Antigo Regime*, São Paulo, Alameda, 2012, pp. 7-40.

[29] Cardim, Hespanha, *A estrutura territorial das monarquias ibéricas*, cit., p. 64.

[30] A.M. Hespanha, *Porque é que existe e em que é que consiste um direito colonial brasileiro*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», v. XXXV, 2006, pp. 59-81; A.M. Hespanha, *Modalidades e limites do imperialismo jurídico na colonização portuguesa*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», XLI, 2012, pp. 101-135.

[31] Hespanha, *A constituição do Império português. Revisão de alguns enviesamentos correntes*, cit., pp. 172-173.

[32] Ivi, pp. 175-177.

[33] Hespanha, *A constituição do Império português*, cit., pp. 180-181.

[34] Hespanha, *A constituição do Império português*, cit., pp. 181-185.

[35] Hespanha, *Guiando a mão invisível*, cit., p. 23.

[36] Ivi, p. 24.

[37] Ivi, pp. 24-25.

[38] A.M. Hespanha, *Cultura jurídica europeia. Síntese de um milênio*, Coimbra, Almedina, 2012, pp. 13-67.

[39] Hespanha, *Guiando a mão* invisível, cit., p. 25.

[40] Hespanha, *Guiando a mão invisível*, cit., p. 26.

[41] Dossier: *António Hespanha. Fazer e desfazer a história*, «Práticas da História», n. 9, 2019, pp. 133-218.

[42] D. Nunes, G.F. Santos, J.J.O. Alves, *Linhas Jurídicas do Triângulo: estudos em homenagem ao Professor António Manuel Hespanha*, Uberlândia, LAECC, 2020.

[43] *Per António Manuel Hespanha*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», XLIX, 2020, pp. 457-554.