

EUROPEANS IN NEO-EUROPEAN WORLDS: THE AMERICAS IN WORLD HISTORY

by
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In studies of World history the experience of the first colonial powers in the Americas (Spain, Portugal, England, and France) and the processes of creating neo-European worlds in the new environment is a topic that has received little attention. Matters related to race, religion, culture, language, and, since of the middle of the last century of economic progress, have divided the historiography of the Americas along the lines of Anglo-Saxon vs. Iberian civilizations to the point where the integration of the Americas into World history seems destined to follow the same lines.¹ But in the broader perspective of World history, the Americas of the early centuries can also be analyzed as the repository of Western Civilization as expressed by its constituent parts, the Anglo-Saxon and the Iberian. When transplanted to the environment of the Americas those parts had to undergo processes of adaptation to create a neo-European world, a process that extended into the post-colonial period. European institutions adapted to function in the context of local socio/economic and historical realities, and in the process they created apparently similar European institutions that in reality became different from those in the mother countries, and thus were neo-European. To explore their experience in the Americas is essential for the integration of the history of the Americas into World history for comparative studies with the European experience in other regions of the world and for the introduction of a new perspective on the history of the Americas. The process of adaptation of laws and institutions is one among many that illustrate this adaptation.

English Law in Colonial New York

The colonial constitution of New York is an example of the overpowering influence of the different realities that existed between England and the Americas. From the first to the last, British governors of New York had to answer questions to the Board of Trade on the

conditions of the colony. One invariable question was, “what is the Constitution of the Government?” Until 1738 the governors usually replied that “the Governor, with the Council and Assembly are empowered to pass laws not repugnant to the laws of England.” In 1749, however, the Governor added: “But the Assembly have made such encroachment on His Majesty’s Prerogatives by having the power of the purse that they in effect assume the whole executive power in their own hands.”² Two years later, in 1751, the Board of Trade recommended that the next governor safeguard the legal prerogative of the Crown, which was being undermined by the Colonial Assembly. Understandably, New York’s colonial constitution was subordinate to the English constitution and dependent on the King’s will. But as Hulsebosch stated, “the fit between English constitutional Law and colonial experience was imperfect, and did not conform to English models,” for conditions in England were different from those in New York.³

In reality English constitutional law transplanted to North America was adapting to the local realities and distancing itself from that of the mother country, thus giving rise to the American revolutionary interpretation of the “constitution” of the British Empire versus the British interpretation. London’s interpretation was that “parliament was omnipotent” to legislate, whereas the colonial interpretation was based on the belief that the rules “limited Parliament’s authority to legislate for the American colonies.”⁴ The passage of time increased the interpretational difference.

By the middle of the eighteenth century there were three versions of the of the Constitution of New York. The first was the imperial version sponsored by the British agents charged with enforcing the constitution and defending the interests of the British Empire. The second was the provincial interpretation that emerged from the growing self-consciousness of the provincial elites and their relations with neighboring colonies, and from their use of voluntary associations and corporate models to create a system of local government based on legal traditions such as “the rights of Englishmen” and to “carry forward the progress of English liberty.” This provincial interpretation amounted to a *de facto* autonomy according to the principle of “each sovereign body within a sovereign body,” an interpretation

similar to that of the Creoles in the Spanish Vice-Royalties in the America during the Hapsburg Dynasty.⁵ The third version resulted from the experiences of New Yorkers in the northern marshlands, the open lands receiving the migration from the British islands and from Western Europe. In the marshlands the great challenge was to English property law, not to English constitutional law, since several groups claimed this land while no one clearly possessed title to it. The imperial agents wanted to control the marshlands for the Crown but provincial law wanted to gain control of these regions. At the same time contending families, ethnic groups, native claims, and claims of other nations and other colonies ensured that English property law, as interpreted and applied in England, had no chance of being implanted in these territories, much less obeyed. On this frontier people ignored English property law totally and did as they pleased by ignoring restricted areas of settlement, royal proclamations, titles, and regulations for the acquisition of land and trade. The disregard for English law was not restricted to New York. The 1777 Vermont Constitution invoked "the freedom of movement" in a similar situation. In the reality of the frontier the inability of the imperial agents to enforce property law caused another casualty, the jury system. New York jurors did not protect "native claims," accepted just about any type of infraction, and thus served as "a shield for individual and group interest."⁶

Yet, all along colonials assumed that the provincial constitution and the English "constitution" were similar and that the provincial constitution was "coordinate, not subordinate to the English."⁷ New York colonials saw no discrepancy in their method of applying English law. Rather, they saw themselves as people who "enjoyed the rights of Englishmen," with a constitution that "confirmed the common law of England," who ruled themselves locally, and who constantly "invoked the spirit and the phrases of common law."⁸ However, English law, constitutional or private, had been transplanted to North America but it could not be applied as in England due to the different conditions and realities of the Americas. Distance and the open territory, combined with the belief in self-government, conspired to weaken and then to promote new interpretations of English laws that, while more in harmony with the local realities, were creating new

concepts in contradiction to the general trend towards centralization then developing in England.

Slave Laws in the Americas

The adaptation of European law to local realities is reflected in the evolution of slave law in the different slave societies in the Americas, which were based on the two judicial traditions of European Law: Roman Law and Anglo-Saxon Law. Each colonizing power brought the laws applicable to its conditions and at the level of the evolution of slave legislation existent in their mother countries at the time. Before European continental law was codified, Roman Law was interpreted by professors, not by judges or practitioners, while in England judges did not have the power to make law. Rather, they relied on precedents.⁹

In the case of slavery and manumission, under Roman private law slaves were regarded as human beings for some purposes and as things for other purposes. In the area of manumission there was a specific body of law relating to slavery. Since Roman slavery was not linked to race but to conquest, there was no obstacle to manumission. Before the sixth century Christianity had made little impact on Roman private law. Therefore, the laws on manumission in the Justinian Code continued to be the laws of the Roman Empire, and as a condition of imperium the laws of Rome applied to all newly conquered lands by the right of *accessio*, that is, the condition of incorporating one into the other. Slave laws in the Americas preserved a major distinction between those that were the product of Roman private law and those that were the product of the Anglo-Saxon Law.¹⁰

In areas colonized by peoples who had received Roman law, such as the Portuguese and Spaniards, slave laws followed the characteristic of Roman law. In Spanish America, the source for slave laws was *Las Siete Partidas*, the legal system of Castile compiled by Alfonso X in 1265, which was steeped in Roman Law. Slaves and manumission were mentioned in this Code, which also seems to have adopted from the Visigoth Code the recognition of the validity of slave marriages. In *Las Siete Partidas* the humanity of the slaves was recognized and an owner could free a slave or punish him/her in due measure. Inhumane treatment or killing a slave was forbidden, and slaves could complain to the courts. In certain cases judges could

order slaves sold. When the Pope granted part of the discovered land in the Americas to Isabel of Castile and Ferdinando of Leon in 1494, the new lands were incorporated into the Kingdom of Castile by right of *accessio* and Castilian law was transplanted to the Spanish American territories, including the laws on slavery. Since it was decided early on that the Indians were free and could not be enslaved, slave laws existed in Spanish America before the introduction of African slavery.¹¹

Conditions in the Americas, however, forced an adaptation of *Las Siete Partidas*. The first was that slavery became a matter of race and not of condition as in the Roman Empire: only blacks and their decedents were slaves. The second was that a marriage between a slave and a free person no longer freed the slave, as in the case of an African slave marrying an Indian. Still, Roman law survived in many ways: a slave's humanity continued to be recognized, excessive punishment was treated as an offense; in some cases slaves had recourse to the courts and they could be ordered sold to another owner; slaves could gain their freedom if they paid a sum to the owner (although the arrangement was not legally binding), and owners could manumit their slaves.

As a result of the persistence of Roman law, manumissions were far more frequent in colonies that received Roman law than in those that received Anglo-Saxon law. Another important aspect of Roman law continued into effect. The *Codigo Negro Carolino* for San Domingo, issued in 1785, stipulated that laws would continue to be made in Spain by jurists but in Spanish America by judges and legislators. Therefore, laws were not as racist as they would have been if made locally, which might be the reason why there were more manumissions in Spanish America than in the other European colonies in America.¹²

In Portuguese America, on the other hand, the influence of Roman Law was indirect. After the Reconquista (the expelling of the Arabs from Portugal), the Visigoth Code was applied. However, since there were no slaves in Portugal except for Moorish captives, town laws had little impact. By the fourteenth century, when black slaves became common, the regulation of slavery became a part of royal legislation, and the doctrine of *accessio* was applied to the

Portuguese possessions in the Americas in the sixteenth century. At that time, the major set of laws was the *Ordenações Filipinas*, the code promulgated by Philip II of Spain, which was recognized by João IV of Portugal in 1643 and remained in force for three centuries, even after the independence of Brazil in 1822. Although it recognized slavery, the code had few provisions except for allowing only moderate punishments and placing slaves at the level of servants, pupils, wives, and children. Since there was no statutory law, and the Portuguese did not use custom to regulate slave law, the major source of law was Justinian's *Corpus Juris Civilis*. Thus, when a part of the Americas was incorporated into the Portuguese Empire there was already a Slave Law based on Roman Law.¹³ But Roman Law was soon supplanted by Natural Law.

Although Roman Law had been incorporated in decisions before 1769, the 1769 *Lei da Boa Razão* was promulgated and Roman Law gave away to Natural Law and universal rules. Custom had the force of law rarely and only "if it was reasonable, not contrary to the written law, and had been followed for a century by the courts." Since the basic premise of Natural Law is that decisions be made not by human judgment alone but as dictated by some intrinsic standard based in Reason, custom had a small role in Portuguese jurisprudence. At the same time, the Casa da Suplicação (Supreme Court of Appeals) in Portugal obtained the authority to issue decisions with the force of law and to validate decisions made elsewhere. Therefore, Lisbon decided upon and interpreted Portuguese statutes on slavery according to the spirit of the law, which was quite divorced from local and regional interests and which allowed the construction of a system of law based on what could be deduced by Reason. One of the rights of Natural Law was the right of property: thus, in Portuguese Brazil the foundation of slavery was ownership acquired by a good title that gave the owner free disposition of his slave, including the power to give freedom. But if Natural Law provided the conceptual framework for broad standards, it was weak as a source of statutory law to deal with everyday regulations. For this reason the Portuguese had to resort again to Roman Law, more precisely the laws of the Byzantine Emperor Leo the Wise (886-912) because they dealt with the *corpus juris civiles* and were treated in Brazil as part of Roman Law.¹⁴

Portuguese-Brazilian slave law, therefore, became a mixture of

Natural law, Roman law, and Christian influence. The slave was not a legal person, but there were exceptions in spiritual matters; manumissions did not require any formality other than a written document or will, or if the owner showed this was his intent at baptism. Slaves were able to acquire a peculium and buy their freedom. Plus, a slave could be freed against the wishes of the owner if he/she found a large diamond or if he/she denounced the owner for smuggling. After 1830 there were more conditions under which slaves could obtain their freedom, such as a female slave who had offered a fair price for her freedom; excessive punishment; abolition of torture; citizenship for freed slaves born in Brazil while others had to undergo a naturalization process. Yet, it cannot be said that slaves were any better treated than those in other parts of the Americas. Some of the extenuating features of slavery came from Roman Law and the influence of Christianity, but Natural Law that upheld the right to property ensured that slavery would remain in place in Brazil until 1888.¹⁵

Slave laws in the French colonies were somewhat similar to those in Spanish America but they were never as developed as the Spanish and Portuguese laws. France received Roman Law but it had no private law. The French used mostly customary law and if no local precedent was available, then those from neighboring authorities, most commonly from Paris (Custom de Paris) were used. Even though France had no slavery and no slaves, acquiring them only in the American colonies, slave laws emanated from France and were made by lawyers trained in Roman Law, although the social conditions of French America were not the same as those of France or of Ancient Rome. The *Code Noir*, for instance, was issued in 1742 and was not the result of judicial evolution as were the *Las Siete Partidas*. Rather, it was the law made in Paris. However, the influence of Roman Law was clear: owners could free their slaves; slaves could be legatees, executors of wills, and tutors; freed slaves received French citizenship even if not born in the colony; and slave could have a peculium. Slaves in the French colonies could not receive gifts or marry free people. Slaves' humanity was recognized; families could not be separated and slave marriages were recognized. Manumissions, on the other hand, were not left completely to the owners' discretion, for written permission from an officer was required if they were to be

valid. The most distinct aspect of French slave law was that in French America masters openly disobeyed the laws, having their children baptized as free even though their mothers were slaves for example, in a way never paralleled in Spanish or Portuguese Americas, perhaps because manumissions there were easier to grant.¹⁶

In Anglo-Saxon America slave laws had a totally different tradition. England had no slavery or heritage of Roman law and, therefore, had no legal tradition for slave laws or for *accessio*. The major difference between the laws in the English colonies and those in Spanish and Portuguese America was that the laws of Castile and the laws of Portugal were the laws of the colonies and could be granted only by the king. In the English colonies the basic laws were made in the colonies and slavery was accepted in the colonies without legal authorization or tradition. Slave laws were made locally by legislators geared to local conditions, not by jurists in London. And, perhaps as a result of the fact that in English America slavery was new to the legal system and unregulated, the law had to develop faster and with greater concern with public rather than private law. Consequently, slavery had a far greater public character in Anglo-Saxon America than in Spanish or Portuguese Americas.¹⁷

In Roman law the state and citizens were not interposed between the owner and his slave. In English America the slave belonged to every citizen and was of interest to every citizen. For instance, English colonists with slave owning experience in Barbados settled South Carolina. The character of South Carolina's slave laws had a public dimension lacking in the other systems, where the legislative authorities determined how the owner should treat his slave, the nature of obligatory punishments, the compensation to the owner in case of death resulting from the punishment, in addition to restrictions on manumissions and prohibitions on slave literacy. Nothing was said about slave marriages, inheritances, acquisitions of ownership, of slaves having legal personalities, or recourses to the courts, all provisions well established in Roman law. Therefore, there was far less distinction between free blacks and slaves, and in some cases, free blacks were treated the same as slaves. The slave code of South Carolina served as model for the slave code of Georgia.¹⁸

Manumission was also unregulated by statute. A 1712 law

ordered manumitted slaves to leave the province or be re-enslaved. Nor could free blacks or descendants of free blacks who left return to the province. Racism accounts for the difference between Roman law and law in English America. A statute issued in 1800 expressly forbade emancipation except by deed executed by the master with many formalities. If a master granted freedom to a slave in his will, his desire was challenged in court. Human nature, however, led many masters to emancipate their slaves despite the letter of the law, and by 1844 cases of emancipation were multiplying with rapidity, thereby challenging the courts. And, as in the French colonies, some masters would go to great lengths to bypass the laws and free their slaves. Watson postulates that had manumission been permitted in South Carolina, the free black population would have been far larger.¹⁹

A brief overview of the background of selective slave laws in the Americas shows the heavy influence of the mother country's system of law and judicial tradition. The influence of Roman Law on the mother country is linked to history and culture even when, as in the case of France, in the absence of slavery and slave law the mother country deferred to Roman Law. History is also the source for the Roman tradition of *accessio* that in the colonial period required all major legislation to emanate from the mother country. The tradition of Roman Law in those countries colonized by nations that had received Roman Law is then fundamentally different from that of those that received the Anglo-Saxon judicial tradition based on customary law, an important distinction to consider in World History and in comparative studies of slave systems.

The Adaptation of the French Conseil d'État in Post-Independence Brazil

The transmigration of European institutions to the Americas did not cease with the end of the colonial period: instead, newly created nations in Latin America looked to European institutions to organize their states. One example is the influence of the Conseil d'État of France on Brazil. In 1841, in the reign of the emperor Dom Pedro II (1840-1889), the Empire of Brazil adopted that model to create the Council of State of the Brazilian monarchy for the purpose of organizing the state and adapting it to the cultural and political

realities of the time.

In early 1840 Pedro II ascended to the throne of Brazil at the tender age of fourteen and a half. His accession had been advanced in order to install a symbol of legitimacy, to restore law and order, and to reinstate the central authority lacking during his minority (1831-1840). Above all, an organization of the state had not been undertaken since independence in 1822. His father, Pedro I, had proclaimed independence but he had abdicated in 1831 in favor of his five year old son to end a convoluted reign marked by the weight of his overbearing personality and impulsive temperament. But the Regency elected to govern during the minority of Pedro II did not fare any better. In fact, by 1839 the centrifugal forces at work had brought Brazil to the verge of political and territorial fragmentation. Thus, during the interregnum not only had the central authority practically disappeared, but the organization of the national state had yet to begin. Clearly, the accession of Pedro II had to be complemented with the means to enable him to govern, to organize the administration, to restore the rule of law, and to enforce legislation, in sum, to mold the national state. In his first address to Parliament in 1840 Pedro II asked for the reinstatement of the Council of State.

The Council of State was not unknown in Brazil. It had existed during the reign of Pedro I as one of the institutions recognized by the Constitution of 1824. Pedro I made ample use of his Council of State, but it was more the Privy Council of the absolute monarchs and caused the Council to be associated with absolute rule. For this reason, the Council was abolished during the Regency but reinstated in 1840. The Council of State of Pedro II had no resemblance to that of his father. Rather, it was organized according to the *Conseil d'Etat* of France of the Napoleonic period.

The *Conseil d'Etat*

The *Conseil d'Etat* was created by Napoleon in the Constitution of the Year VIII (1799-1800). Between 1815 and 1872 the *Conseil* had a checkered existence but through evolution and adaptation its present format remains a fully functioning institution of the French Republic.²⁰ Throughout the period the *Conseil* maintained some of the initial characteristics given it by Napoleon in 1799, and

these were adopted by the Brazilian monarchy in 1841.²¹

One characteristic was the qualifications required to serve in the Conseil. Napoleon appointed as councilors of state some of his chief advisors, men of outstanding ability and learning in legal, administrative, and financial matters, as well as in military skills. Bernadotte, one of Napoleon's favorite generals and the future King of Sweden, served in the Conseil. Its members were not isolated from the administration many were called to serve as Ministers and Prefects and had close and personal links with the active administration. Thus, among its members were some of the most capable men of France in several fields of interests.

A second characteristic was the attributions given to the institution. Napoleon created the Conseil d'État to organize, mold, and consolidate his Empire with a distinctly Napoleonic imprint. Among the principal functions of the Conseil were drafting and interpreting laws and regulations of public administration, and resolving administrative difficulties, an attribution that evolved into the administrative jurisdiction of the Conseil d'État, a role sorely missing in French Administration. In 1790 judges were forbidden to hear cases against the administration, thereby leaving ministers as both as plaintiffs and judges. An 1806 decree allowed appeals against decisions of ministers to go to the Conseil d'État, to the newly created *Commission du Contentieux*, the forerunner of the Litigation Section. The attributions of the Conseil, to draft and mold legislation, which certainly would be according to the Napoleonic spirit, and to serve as the ultimate court of appeal of administrative justice, were essential tools for organizing a new order.²² For this reason the initial attributions of the Conseil were expanded in the subsequent years of the Empire: added were the roles of ruling on conflicts between the administration and the courts in cases of abuse or usurpation of power by ecclesiastic authorities, hearing all the affairs of the high administration, and hearing all complaints against ministers and those in high administration.²³

On the third, fourth, and fifth days of Nivôse, year VIII, the Conseil d'État was organized and received its Regulations. It was organized in five Sections, with a General Assembly for the most important matters. The Sections were the Section of War, the Section of Navy, the Section of Finances, the Section of Legislation, and the

Section of Interior. Each section was staffed with five councilors, one of which was designated as president. A mixture of officers and civilians staffed the War and Navy Sections while the other Sections were staffed by former legislators, administrators, and experts. The Regulations determined the size of its membership (40), the organization of the Conseil, the areas of work of the sections, the rules for convening the General Assembly, and the format for the approval of opinions delivered in the sections. Later in the same year a distinction was made in the membership of the Council with the creation of the ordinary and extraordinary categories. The ordinary councilor had a permanent function, while the extraordinary had a temporary one to serve in the absence of the ordinary.²⁴

The recommendations of the Conseil d'État were advisory only, but Napoleon "almost invariably accepted the advice." In the General Assembly councilors freely debated the issues with Napoleon frequently present. Eventually, the Conseil became "a collective repository of administrative, and especially of legal, wisdom, advising the ruler whenever asked... an institution with a strong corporate spirit concerned with law and the rule of the law." But from the beginning the organization and functions of the institution revealed one of its problems: it was both part of the administration and at the same time set apart and above it, between Napoleon and the administration. The Conseil also had its critics: "incompetent, closed to economic ideas, inefficient, work was uneven," and so forth.²⁵ Yet, the combination of the qualification of its members, of royal support, and of the nature of its functions and attributions made the institution of the Conseil d'État Napoleonic an ideal institution with a structure for establishing a new order, not only in France but in vassal states as well. By 1805 Napoleon began exporting the institution of the Conseil d'État along with the Napoleonic Code to all vassal states of any importance, from Italy, Spain, Holland, Naples, Westphalia, to the Gran Duchy of Warsaw.²⁶

In early 1840, with Brazil fast approaching the abyss of disintegration due to weak law and central authority, the accession of Pedro II provided the symbol of legitimacy recognized by all parties. But a new model for building the new order was lacking; the models of the colonial Portuguese administration and of the reign of Pedro I were

unacceptable. Instead, the Napoleonic Conseil d'État would serve as the model. Even though Napoleon was dead, his administrative legacy survived in France and in the countries he had conquered. Much as in France and the former vassal states after Napoleon, it was impossible for Brazil to return to the models of the old regimes. For American countries following the models of continental Europe, the Napoleonic model allowed the organization of the state according to the latest European parameters.

The Brazilian Council of State

The French model had many supporters in Brazil, including the Visconde de Uruguai, the Marquês de São Vicente, the Marquês de Olinda, all three influential politicians during the Regency and the reign of Pedro II. All were well versed in European politics and familiar with the French system, which they followed closely. Thus, when Pedro II requested the reinstatement of the Brazilian Council of State, the model adopted was that of the Conseil d'État. After a great debate in Parliament the law of reinstatement was approved and in early 1841 the first steps were taken to formally organize the Council of State. In many aspects it was organized like the French Conseil d'État.²⁷

As with its French counterpart, the Brazilian Council was divided into two bodies, the Plenary Council and the Sections. The Plenary Council became the advisory council of Pedro II that convened only at his request. The Council was entrusted with offering advice on all matters requested, especially, on the use of the moderate power held by the emperor (the power that kept the balance between the other three constitutional powers), on declarations of war and peace treaties, and on negotiations with foreign countries. It was also to give advice on conflicts of jurisdiction between administrative authorities, between them and the judiciary authorities, on abuses by ecclesiastic authorities, and, finally, to advise on decrees, regulations and instructions for the orderly execution of laws, and on projects of law submitted by the executive to the General Assembly. Pedro II always presided over meetings of the Plenary Council and councilors gave their opinions freely. Some councilors read their opinions while others were terse, some were unapologetically liberal

and others staunch conservatives. Unlike Napoleon, who took part in the discussions, Pedro II only listened, took extensive notes, and occasionally asked a question. But in these meetings, as in France, the most urgent issues of the Empire were discussed, such as the progressive abolition of slavery.²⁸ Therefore, in 1841 the Brazilian Council of State was given several of the attributions that had been given over the years to the Napoleonic Conseil.²⁹

The size of the Brazilian council's membership was smaller than that of France. Whereas the Conseil d'État had forty members, the Brazilian Council had only twenty-four. Like its counterpart, the Council had two categories of members: councilors ordinary (permanent) and councilors extraordinary (temporary). But in both categories appointments were made for life. The qualifications for membership also paralleled those of the Conseil. The first appointments set the standards for later appointments until near the end of the monarchy in 1889: party allegiance, party leadership, prior ministerial experience, and extensive administrative and legislative experience. Among the appointees were a few military officers of the highest ranks who had administrative and legislative experience, and the church was represented by a bishop. The majority of the first councilors were Conservatives, but a few Liberals with equal qualifications were also appointed. The criteria for qualifications continued until 1889, but in the middle of the 1840s two changes took place. One was the disappearance of the church after the death of the Bispo de Anemuria. The second was the end of the partisanship of the first appointments. Regardless of the party in power, after 1848 appointments were equally divided between Conservatives and Liberals, a norm that had few exceptions for the forty-one years. In 1889, the last appointments showed Liberals and Conservatives were equally represented in the Council.³⁰

The organization of the Council of State also followed closely the organization of the Conseil Napoleonique, but there were some differences. Contrary to its French counterpart, which received its organization in a legislative decree, the Brazilian Council was organized with far greater leeway. The Constitution of 1824 gave the executive power the prerogative of issuing regulations to implement laws approved by the legislative. Law 234 that reinstated the Council

of State gave that prerogative to the executive. Therefore, the same cabinet that made the first appointments also issued the regulations that organized the Council of State. Regulation 124, as it was known, not only organized the Council, it further outlined and explained the functions of the institution. Thus, just as the Conseil d'État met with Napoleon and was divided in sections, the Plenary Council that met with the emperor Dom Pedro was also divided into four sections: the Section of Empire (Interior), the Section of Finances, the Section of War and Navy, and the Section of Justice and Foreign Relations, a organization that followed closely the organization of the sections of the Conseil d'État. Although the number of members was not altered, the same councilors that set on the Plenary Council were the same that served in the Sections in groups of three.³¹

Regulation 124 further clarified the functions of the Council of State. Each Section assisted the respective Ministries in all administrative matters and performed the functions assigned to the institution by Law 234. But Regulation 124 went further than Law 234. Articles 21 to 51 of Chapter II institutionalized Administrative Justice in Brazil and gave to each of its sections the power to exercise not only non-litigious administrative justice but also litigious justice. This judicial function had evolved over the first few years of the Napoleonic Conseil in a series of decrees that eventually led to the Conseil to function as the High Court of Administrative Justice in France. It was introduced in Brazil in a mere Regulation issued by the executive power without any input from the legislative power, and it had the same results: the Council of State in Brazil also became the last Court of Appeals for Administrative Justice, although the Constitution prescribed a unitarian judicial system.

But if the Council of State copied much of the organization and the functions of the Napoleonic Conseil d'État, it also adapted the model to the immediate needs of Brazil, primarily with the aim of restoring central authority within the political reality of an America country in the aftermath of independence. Among the several adaptations of the Conseil in Brazil, a few deserve mention.

At first, the Council seemed to be a copy of the French Conseil but there were differences in the adaptation of the model. Whereas the Conseil had support in the General Assembly and

was seen as a valid institution of France, the Liberal Party and the Chamber of Deputies in Brazil, who were always suspicious of any attempt to restore “absolutism,” were hostile to the Council of State. Therefore, no laws that dealt with the Council were ever approved by Parliament and all internal changes had to be dealt with within the executive. For this reason an exact duplication of the Conseil in Brazil was impossible. The imitation of foreign institutions in new settings also implied adaptations to new realities, adaptations that altered the character of the imported model. This process of adoption and adaptation was widely used by the Brazilian councilors. In 1850 the councilors were requested to draft legislation to reform and improve the electoral law of 1846, adopting those “experiences and lessons of the more civilized nations appropriate to our circumstance.”³²

Second, a symbiotic relationship developed between the membership of the Council of State and the cabinet system, a relationship not present in the Conseil d’État. There developed a revolving door between the Council and the cabinet, whereby councilors took leaves of absence to form cabinets or take portfolios. The councilors were then replaced by councilors extraordinary, and after the fall of the cabinet they returned to the Council. Because councilors were also party leaders and each party had several leaders, the presidents of the Council of Ministers (equivalent to prime ministers) of the Second Reign were mostly councilors of state, with several cabinets having more than one councilor as ministers. Thus, at the highest level of imperial administration the political elite was in the Council of State, not in the ministries. As a result of the practice of appointing party leaders to the Council, the Council became the cabinet members and the cabinets became the members of Council of State. This practice produced a degree of continuity and stability in all governmental decisions for the nearly half a century of the reign of Dom Pedro II, for in the Council the ideological differences between the parties were far less dramatic than those in the Parliament.

Third, in practice, the attributions and functions of both the French Conseil and the Brazilian Council lent themselves to develop from an advisory role into a supervisory role, and then to have a judiciary role. For instance, the Conseil d’État developed all these roles, including that of interpreting the Constitution. The same occurred in

the Council of State, which came to oversee the whole administration from ministers to provincial presidents. In its sections the advisory role evolved from merely offering opinions to drafting legislation and writing regulations to implement laws, to explaining and interpreting the same laws, and eventually to interpreting the Constitution, a prerogative given by the Constitution to the legislative power. The advisory role slowly developed into a supervisory role that enforced legislation and supervised all levels of the administration. Finally, the sections became the Court of Appeals for administrative justice. With the Council of State the executive became a self-contained power, the sole regulator of its administrative actions. In France, the Conseil also developed all these roles but it was sanctioned by legislation. In Brazil, after the reinstatement Law of 1840 and the issuance of Regulation 124 by the executive (which though temporary remained in effect until 1889), no other legislation giving the Council of State new attributions was approved by the General Assembly. Nor did the Council suffer from the various discontinuities that plagued the Conseil, lasting forty-eight years with the same character, and the same organization within the span of two generations.³³ Thus, at close examination the Council of State did not function precisely like the Conseil d'État. Having been adopted to restore centralized government and authority, and to organize the state, it served to bypass opposition with only a small group of elites for about half a century.

Yet both councils were described in similar fashion. The criticism was the same for both Councils: inefficient, slow, and out of touch with modernity. For supporters, as Rendel describes, the Conseil d'État was "the brain of the Consulate, it was the instrument of the reorganization of France under the Empire." In Brazil, the role of the Council of State was seen as the same, "as the brain of the Monarchy," a powerful tool of centralization when centralization "was necessary after the weak period of the Regencies in order to reestablish the principle of authority on a firm basis."³⁴

The Methodology of World History

What can this account of the two councils, of the Laws of England, and of the Slave Laws in the Americas tell us about Eu-

ropean institutions in neo-European worlds, or to be precise, about World History? In transplanting their institutions, the history and culture of the mother countries in the colonial period and of European institutions in post-independence period certainly influenced the colonies and the new nations but all had to adapt to the local needs and realities. The adaptations did not diminish the belief among the colonists that in these neo-European worlds they were preserving the true law of the mother country. In truth, the laws in the mother countries continued to evolve within their own realities, and in the colonies the laws became in fact neo-European. The slave laws offer a different perspective. In each case they were either created in the colonies, as in Anglo-Saxon America, or they were adapted as in the cases of Spanish and Portuguese America. But there is no doubt that in regard to slavery there are two legislative and judicial traditions in the Americas, Anglo-Saxon and Roman, and that in the studies of slavery comparative studies must be cognizant of the two traditions and integrate history and law accordingly.

The new American nations copied European models to fulfill their immediate needs for state organization. But as it is true in the case of laws, the transplanted models were adapted to conform with local and regional circumstances, and they cannot be analyzed with the same variables applied to European institutions. On the surface they may all appear to be the same but if compared on equal terms with their European counterparts they will be found to be different. In the case of neo-European worlds, they should be analyzed in their own environments and areas of adaptation. Adaptation means survivability and a variant of the original model. Several countries in Latin America had, and have, adopted and adapted European laws and institutions. Nicaragua, Mexico, Chile, and Paraguay all had, and still have, councils of state, but of them we know little. In the debates at the U.S. Constitutional Convention of 1787 James Madison reported on the resolutions proposed by Mr. Randolph on May 29, of which no. 8 proposed a Council of Revision to examine every act of the National Legislature; on June 4, Mr. Sherman proposed that in all states the magistrate could not act without a Council of Advice and that even in Great Britain the King had a council, "its advice has its weight with him, and attracts the confidence of the people." The

proposition for a Council of Revision for the Executive was taken into consideration.³⁵ Had the Convention taken place after 1799, perhaps the term used for a Council of Revision would have been a Council of State.

The Council of State was not the only institution copied and adapted. The same happened with the *intendencias*, constitutions, and Parliament practices. According to Oscar Oszlak, in Argentina the models were from the United States and Europe: "North American constitution, French practices, British commercial and administrative organization." In Brazil, the constitution was influenced by that of Spain and the ideas of the Frenchman Benjamin Constant, the administrative model was the French Conseil d'État, commercial practices were part French and part British, and the Parliament functioned according to the British model.³⁶ In studies of World History the adaptation of European institutions in neo-European worlds offers yet another perspective by which to integrate the Americas in the general narrative. This approach, along with the perspectives of encounters, Atlantic history, and the "other", to cite just a few, offer scholars the opportunity to break away from the nationalistic and exceptionalist histories that so fragment the historiography of the continent. The Eurocentric perspective would also add a new insight into the processes of adoption and adaptation of institutions by many countries. If adaptation means survivability as in other areas of World History, then Eurocentrism must be revised and moved away from equating the absence of a perfect replication of institutions in neo-European worlds, or any world for that matter, with inferiority and lack of ability. Analysis shows that the process was actually deliberate.

The absence of informed criticism of European institutions in Latin American history has left the Anglo-Saxon model as the only one against which to measure the organization and the achievements of Latin American states. But, as Rendel so well concluded in her study of the Conseil d'État, the way in which the Conseil was staffed, its functions, and its place in the constitutional system "are quite unlike anything that exists in the British civil service."³⁷ Not surprisingly, Brazilian monarchy in general, and the reign of Pedro II in particular, have been treated as exercises in absolutism and the interregnum between independence and the proclamation of the Republic in 1889.

Again, World History shows clearly that transplantation without adaptation to local environment means certain demise. It happens with religions, it happens with culture, it happens with viruses, and it happens with institutions as well. The American continent is the best example of European adaptability in all the areas of the human experience and should be included in the narrative of World History as such.

End Notes

1. Lydia M. Garner, *Integrating the Americas in World History: Problems and Possibilities*, World History Association of Texas, Fall Conference, Austin, 1997.

2. Daniel J. Hulsebosch, *Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750-1777* in Law and History Review, vol. 6, n. 2 (Summer 1998) pp. 319-320.

3. Ibid., p. 321.

4. Ibid., pp. 321-322.

5. Ibid., pp. 334, 337-338, 340.

6. Ibid., p. 366.

7. Ibid., 343, 344, 354, 356-357, 366.

8. Ibid., p. 8.

9. Alan Watson, *Slave Law in The Americas* (Athens: The University of Georgia Press, 1989), pp. 3-6.

10. Ibid., pp. 22-34, 47.

11. Ibid., pp. 41-47.

12. Ibid., pp. 48-61.

13. Ibid., pp. 91-93.

14. Ibid., pp. 93-98.

15. Ibid., 99-100; Garner, *"Integrating the Americas."*

16. Watson, pp. 83-89.

17. Ibid., 63-69.

18. Ibid., pp. 63-73.

19. Ibid., p. 81.

20. *Le Conseil d'État, son histoire à travers les documents d'époque 1799-1974* (Paris: Éditions du Centre National de la Recherche Scientifique, 1974).

21. Margherita Rendel, *The Administrative functions of the French Conseil d'État* (London: Weidenfel and Nicolson, 1970) pp. 17-19.

22.Rendel, pp. 17-18 for appointments and attributions.

23.*Le Conseil d'État*, pp. 80-81.

24.Ibid., 30-33, 43.

25.Rendel, pp. 18-19.

26.*Le Conseil d'État*, p. 157.

27.Law 234, November 23, 1841.

28.Garner, "The Abolition of Brazilian Slavery: The Imperial Government's Perspective, Plans and Laws, 1867-1888, Southwestern Historical Association, Annual Meeting, San Antonio, 1991.

29.On the organization of the Council of State, see, Lydia M. Garner, "In Pursuit of Order: A Study in Brazilian Centralization, The Section of Empire of the Council of State, 1841-1889," 2 Vols., Ph.D. dissertation, The Johns Hopkins University, 1988.

30.Garner, "Selection of a Political and Administrative Elite," ch. 3, *Organization and Functions of the Council of State of the Brazilian Monarchy, 1841-1889*, manuscript in progress.

31.Regulation 124, February 5, 1842.

32.Garner, "In Pursuit of Order," vol. I, p. 210.

33.Ibid., chps. iii, iv, v, vi.

34.Ibid., chp. ix, p. 765; Rendel, p. 18.

35.*Notes of debates in the Federal Convention of 1787 Reported by James Madison*, with an introduction by Adrienne Koch (New York: W.W. Norton & Company, 1987) pp. 32, 60.

36.Lydia M. Garner, "An Introduction to the Comparative Study of State Formation in Argentina and Brazil," p. 18, **SSSA**, Annual Meeting, New Orleans, 1997.

37.Rendel, p. 17.