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***Ius Commune* in Portuguese America:
Criminal Issues on Local Canon Law in the ‘First Constitutions of the
Diocese of Bahia’ (1707)**

***Ius Commune* en la América portuguesa:
Cuestiones criminales de Derecho canónico local en las ‘Primeras Constituciones
del Arzobispado de Bahia’ (1707)**

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Abstract

This paper aims to analyze criminal matters contained in the “First Constitutions of the Archbishopric of Bahia”, a particular canon law text elaborated during the diocesan synod that took place in Salvador de Bahia in 1707 and one of the few examples of a formal juridical culture in Colonial Brazil. The study is concentrated in criminal issues not in a dogmatic perspective, but it is actually concerned with understanding the possible relations between particular law and *ius commune* tradition.

Resumen

Este artículo tiene como objeto analizar las cuestiones criminales contenidas en las “Constituciones primeras del Arzobispado de Bahia”, un texto de derecho canónico particular elaborado durante el sínodo diocesano que ocurrió en Salvador de Bahia en 1707 y que es uno de los pocos ejemplos de una cultura jurídica formal en Brasil Colonial. El estudio se concentra en cuestiones criminales, pero no en una perspectiva dogmática, sino a partir de una preocupación con la comprensión de las posibles relaciones entre derechos particulares y la tradición del *ius commune*.

Keywords

Ius commune, particular law, canon law, criminal law, Colonial Brazil

Palabras clave

Ius commune, derechos particulares, derecho canónico, Brasil colonial

Summary: 1. Introduction. 2. Law and institutions in Colonial Brazil. 3. Organizing ecclesiastic jurisdiction in Portuguese America: The Archbishopric of Bahia and the making of its constitutions. 4. Crimes on the “First Constitutions”. 4.1 Structure and matters on the Book Five. 4.2. Crimes and punishment in detail. 4.2.1. Heresy. 4.2.2. Blasphemy. 4.2.3. Witchcraft. 4.2.4. Simony. 4.2.5. Sacrilege. 4.2.6. Perjury. 4.2.8. Usury. 4.2.9. Sexual crimes. 4.2.10. Murder and duel. 4.2.11. Moral injuries. 4.2.12. Larceny. 4.2.13. Games. 4.3. List of the quoted authors. 5. Final comments. 6. Bibliographical references

1. Introduction

The study of legal experience in Colonial Brazil is not properly an easy task. Actually, some difficulties rise immediately: a legal culture based on oral procedure, a reduced sphere of institutionalized jurisdiction, the absence of formal juridical

education and a formal jurisprudence, the prohibition of printing books and journals. Consequently, the sources are not so numerous, and the work of legal historian is mainly about reconstructing frameworks from the few found sources.

In this context, canon law can be very useful because of its high level of institutionalization comparing to other spheres of jurisdiction. Each of the seven ecclesiastical circumscriptions created during the Colonial Age had its own court, which decided issues under their jurisdiction with the typical formalities of canon law – and that includes, for example, written process, what was not observed in royal jurisdiction until the creation of the courts of Salvador (1609 and 1652) and Rio de Janeiro (1751). Among the matters under ecclesiastical jurisdiction, criminal issues are particularly interesting, and historical studies such as Eliana Maria Rea Goldschmidt's "Convivendo com o pecado na sociedade colonial paulista (1719-1822)", about sexual crimes, show how relevant these questions are to understand the functioning of an important part of the jurisdiction in Colonial Brazil.

This is the perspective adopted by this paper. I will analyze a specific canon law text, the "First Constitutions of the Archbishopric of Bahia", whose features make it an almost unique example of a juridical text produced in Colonial Brazil considering some idiosyncrasies of the space. In other words, the purpose of this paper is quite related to the analysis of a formal source of law, including its elaboration process, structure and contents, precisely the Book Five, in which the crimes are discussed. Actually, my intention is not to elaborate a dogmatic study of the criminal matters on the "First Constitutions", but rather an analysis of the possible relations between the referred text and *ius commune* tradition. Next section will support the argument that the law in Colonial Brazil cannot be faced as something separated from the *ius commune*, and within the proposed analysis my intention is to prove that.

2. Law and Institutions in Colonial Brazil

Probably the most relevant feature of *ius commune* in Late Medieval and in the Early Modern Age was the capacity of general and particular juridical orders of living together in the same juridical space. In a European perspective, *ius commune*, which was formed under the influence of Roman and Canon Law, had a general relevance while national juridical norms were particular (*iura propria*). If we reduce our analysis to the geographical limits of the National State, we could perceive the existence of simultaneously general and particular norms, and these general norms of the kingdom were directly connected to what is called royal law – *ius regnum*, according to Italo Birrochi¹. In terms precisely described by Meccarelli and Solla, "it is the legal problem that determines the space of reference; hence, space has a reconstructive function".²

From this perspective we analyze Brazilian colonial law, which can be seen both as a particular law, in an overview of Portuguese *ius patrium* as a whole (the so called *ius commune regno*³), and common law, if we look only to the juridical space of

¹ Biocchi, I., *Alla ricerca dell'ordine: fonte e cultura giuridica nell'Età Moderna*, Torino, 2002, pp. 51-54.

² Mecarelli, M. and Solla Sastre, M. J., "Spatial and temporal dimensions for Legal History: an introduction", *Spatial and temporal dimensions for Legal History: research experiences and itineraries* (M. Mecarelli, M. J. Solla Sastre, eds.), Frankfurt am Main, 2016, p. 11.

³ "Ius regium, ius commune est in regno". Gama, A., *Decisionum Supremi Senatus Lusitaniae Centuria IV*, Antuerpiae, 1683, p. 97 (Dec. L, 5). "Nostrum ius regium est nostrum ius commune.

Portuguese America. This last sense is not faced often by scholars, and a methodological issue rises immediately from it: speaking about a Brazilian colonial law as a general category applied to the entire Portuguese possessions in America, in terms quite similar to Hispanic American colonial experience, could be an inaccuracy. While the juridical space in Colonial Hispanic America was regulated by general norms, which were latter collected and organized in the “Recopilación de Leyes de Índias” (1680) –, the Portuguese Crown did not use often its legislative power to make general norms to America nor was concerned about compiling the few existing acts.

To doubt about the existence of a *ius proprium* in Portuguese America seems to be a possible consequence of identifying in the formal acts of the Crown the main source of law where there was no body of specific laws. António Manuel Hespanha argues that a colonial law existed because of the “*local capacity of fulfilling open or indefinite juridical spaces existing in the structure of the common law*”⁴ and recognizes the relevance of other sources of law much more used than acts of the Crown, such as costumes and judgements⁵. Of course there were many laws directly enacted in Portugal to be applied in Brazil, particularly when the Crown perceived the economic relevance of some areas due to discovery and development of gold mining in Minas Gerais, but, except for a private collection latter called “Código Costa Matoso”⁶, the weight of these norms was far smaller than “Recopilaciones”, for example. In a similar perspective, Javier Barrientos Grandón analyzed the “*derecho indiano*” as a part of *ius commune*, in a relation among common and particular law⁷.

Hespanha’s and Barrientos Grandón’s frameworks are very similar to what is defended by this work: Brazilian colonial law is a set of sources of particular orders manifested by different sources such as acts, costumes, administrative norms, judgments etc. and it could not be faced as a system. All the time new lacks appeared in the juridical local reality, and they were fulfilled with the use of an idea of generality, according to which general norms must be applied if there was no rule on the contrary sense. The Portuguese sentence “*sem embargo de decisão ao contrário*” (“despite a contrary decision”) was remembered by Arno Wehling to describe the very common possibility of special norms make void royal norms in many situations⁸.

It is not an exaggeration to affirm that the vast majority of litigation in Colonial Brazil was not decided by Crown-appointed officials. Judicial structure in the colonies grew more complex over the centuries, and a more frequent presence of officials was not seen until the middle of the 18th century⁹. Where the system of hereditary captaincies functioned, until its complete extinction in 1753, the intermediary

Lusitani non possunt consentire in Principem non suum”. Castro, G. P., *Decisiones Supremi Eminentissimique Senatus Portugaliae*, Ulyssipone, 1621, p. 10 (Dec. II).

⁴ Hespanha, A. M., “Porque é que existe e em que é que consiste um direito colonial brasileiro”, *Quaderni Fiorentini* 35 (2006), pp. 59-60.

⁵ *Ibid.*, 60.

⁶ *Código Costa Matoso: coleção das notícias dos primeiros descobrimentos das minas da América que fez o doutor Caetano da Costa Matoso sendo ouvidor-geral das do Outro Preto, de que tomou posse em fevereiro de 1749, & vários papéis*, Belo Horizonte, 1999, 2 v.

⁷ See, among others, Barrientos Gradon, J., *História del Derecho Indiano del descubrimiento colombiano a la codificación. I. Ius commune – ius proprium en las Indias Occidentales*, Roma, 2000.

⁸ Wehling, A., “Sem embargo da ordenação em contrário. A adaptação da norma portuguesa à circunstância colonial”, *Brasil: Construindo uma Nação* (N. M. Souza ed.), Rio de Janeiro, 2014, pp. 114-135.

⁹ An analysis of this process could be seen in: Camarinhas, N., “A administração da justiça em espaços coloniais. A experiência imperial portuguesa e os seus juizes, na época moderna”, *Jahrbuch für Geschichte Lateinamerikas* 52 (2015), pp. 109-124.

jurisdiction was exercised by judges (called, in these cases, “ouvidores”) appointed by the donee of each captaincy, as a typical prerogative of a seigneurial system. In areas with no seigneurial influence, the “ouvidor” was appointed by the Crown and also exercised his jurisdiction in a second level. The first royal court, the “Tribunal da Relação da Bahia”, was founded only in 17th century¹⁰, and its members were exclusively judges with Law degree appointed by the King¹¹. Locally, both in hereditary and royal captaincies, the judges (“juízes ordinários”) were elected in municipal councils, had neither knowledge nor any formal instruction in Law and were normally analphabets¹². Due to the barriers raised by the officials’ and courts’ statutes¹³, only a few cases were not definitely decided by the local judges, whose *arbitrium*¹⁴ was pretty more connected to other matters – moral theology, for example – than to Law¹⁵. Unlike processes in royal courts, judgements and sentences by the “juízes ordinários” were not written, what makes way difficult to understand how they decided – or, in other words, how Law appeared concretely most of time in Colonial Brazil.

In the described context and with the highlighted adversities, understanding the juridical experience in Portuguese America is a very difficult task. There are some possible paths to do that, as I did in a previous work about juridical practice of the “ouvidores” of hereditary captaincies¹⁶. Modern historiography deals with institutional and administrative issues, in part because of the documents of central government and Crown administration in key areas, especially the royal captaincy of Minas Gerais. They have a common feature that should be highlighted: their undoubtful connection to practical activities.

Works concerned about what I can call a “*theoretical perspective*” are not usual in the study of a Colonial Law in Brazil. This is another point of divergence between the Spanish and Portuguese experiences in America: contrary to what happened in Brazil, an academic juridical culture in Hispanic America can be observed, which is rather absent in Portuguese America. Many reasons can help to explain this difference, such as the foundation of universities and Law schools and a greater number of royal courts. An apparently stronger connection among royal jurisdiction and jurisprudence seems to be an essential difference between the two experiences. Some judges in royal “*audiências*”,

¹⁰ Actually the court was installed in 1609 under the name of *Tribunal da Relação do Brasil*, remaining closed from 1626 till 1652, due to the Dutch invasion of Northeastern Brazil. About the court, see Schwartz, S. B., *Sovereignty and society in Colonial Brazil: The High Court of Bahia and its judges, 1609-1751*, Berkeley, 1973.

¹¹ In 1751 the “Tribunal da Relação do Rio de Janeiro” was installed and a few years later it became the most important court of the Colony with the transfer of the head from Salvador to Rio de Janeiro. Two other courts were installed during the Colonial Age, in 1812 (“Tribunal da Relação do Maranhão”) and 1820 (“Tribunal da Relação de Pernambuco”)

¹² In Portuguese local level, alongside with the elected “juízes ordinários”, there were also the “juízes de fora”, which were appointed by the Crown and should have a Law degree, but only in 1697 the first “juízes de fora” were appointed to Brazilian circumscriptions.

¹³ The description of some of these barriers can be found in Cabral, G. C. M. “Os senhorios na América Portuguesa: o Sistema de capitanias hereditárias e a prática da jurisdição senhorial (séculos XVI a XVIII)”, *Jahrbuch für Geschichte Lateinamerikas* 52 (2015), pp. 65-86.

¹⁴ Meccarelli, M., *Arbitrium: un aspetto sistematico degli ordinamenti giuridici in Età di diritto comune*, Milano, 1998.

¹⁵ Ruiz, R., “Probabilismo e teologia moral na prática judiciária na América espanhola do século XVII”, *Revista Brasileira de História & Ciências Sociais* 4 (2012), pp. 7-25.

¹⁶ Cabral, G. C. M., “Senhores e ouvidores de capitanias hereditárias: uma contribuição ao estudo das fontes do Direito Colonial Brasileiro a partir da literatura jurídica (séculos XVI a XVIII)”, *História do Direito Privado: olhares diacrônicos* (G. S. Siqueira, R. M. Fonseca, eds.), Belo Horizonte, 2015, pp. 97-118.

often Spanish-born and educated jurists, wrote juridical works of variable impact, as the famous and relevant works of Juan de Solórzano Pereira (1575-1655) and Juan de Matienzo (1520-1579).

There are only few examples of an indirect connection between juridical practice and juridical books in Brazilian case. In the beginning of the 18th, António de Vanguerve Cabral, a former “*ouvidor de capitania*” in Brazil and later “*juiz de fora*” in Portugal wrote an important book about criminal practice in which he mentioned some events of his time in the Colony¹⁷. The other example is precisely the “First Constitutions of the Diocese of Bahia”, whose structure and arguments, as I will demonstrate, are the single known example of a juridical text produced specifically to the Brazilian reality with a close connection to the *ius commune* tradition during the Colonial Age.

3. Organizing Ecclesiastic Jurisdiction in Portuguese America: the Archbishopric of Bahia and the Making of its *Constitutions*

More than five decades separate the arrival of Portuguese caravels in April 1500 and the foundation of the first diocese in Portuguese America in Salvador da Bahia in 1551. Before that, these territories were under the jurisdiction of the Diocese of Funchal, in Madeira Island, which was responsible for the spiritual jurisdiction of all overseas territories until the progressive creation of new dioceses in the course of 16th century. Papal *bullas* created these new ecclesiastical circumscriptions, but the responsible for the government of dioceses and parishes in the Kingdom and overseas were appointed by the kings of Portugal due to their right of patronage (*jus patronatus*)¹⁸. The medieval origins of the “*padroado régio*” were related to the military orders, and only in the first half of the 16th century, due to succession matters, this right was incorporated into Portuguese Crown, lasting in Brazil until the abolition of the Empire and the emergence of the Republic, in 1889¹⁹.

With the slow but progressive occupation of the areas in America and consequently the growing number of souls that must spiritually governed, the Catholic Church perceived the necessity of being more present in Portuguese America, not only through religious orders, such as the Benedictines, the Franciscans, the Capuchins and specially the Jesuits²⁰, but also with the institutionalized clergy. Although the existence of the Diocese of Bahia since 1551, long vacancies between one bishop and his successor disturbed this intention of institutionalizing the Church in the Portuguese part of the New World²¹.

¹⁷ About the use of this book as a source to reconstruct Brazilian juridical experience in Colonial Age, see *Ibid.*, pp. 112-115.

¹⁸ Hornaert, E.; Azzi, R.; Grijp, K. v.d.; Brod, B., *História da Igreja no Brasil: ensaio de interpretação a partir do povo. Primeira Época – Período Colonial*, Petrópolis, 2008, 5 ed., pp. 163-164. To an analysis of the medieval structure of the *jus patronatus*, see Landau, P., *Jus patronatus: Studien zur Entwicklung des Patronats in Dekretalenrecht und der Kanonistik des 12. und 13. Jahrhunderts*, Köln, 1975.

¹⁹ To understand the origins of the Portuguese *padroado régio* and it worked in the Early Modern Age, see, among many others, Noronha, I. J. C., *Aspectos do Direito no Brasil Quinhentista*, Coimbra, 2005, pp. 23-46.

²⁰ About the male religious orders, see, among many others, Hornaert, E., Azzi, R., Grijp, K. v.d. and Brod, B., *História da Igreja* pp. 211-222.

²¹ About the vacancies, see *Ibid.*, pp. 277-279.

After the stabilization of relevant political questions, mainly the Portuguese Restoration, in 1640, and the final expulsion of the Dutch from Northeastern Brazil, in 1654, some reforms were made in ecclesiastical institutions in the Portuguese America, always under the influence of what had been decided in the Council of Trent. In 1676, two new dioceses were erected in Olinda and Rio de Janeiro, and one year later other was founded in São Luís do Maranhão. In the same year, the Diocese of Bahia was elevated to Metropolitan Archdiocese and, from 1676 on, the space of the new ecclesiastical province was not under the jurisdiction of the Archdiocese of Lisbon anymore. The text of the bulla “Inter pastoralis officii curas” of November 16, 1676, by Pope Innocentius XI, justified this decision on the basis of the distance between Lisbon and America and consequently the impossibility of exercising the ecclesiastical justice as it must be, including in criminal matters²². The same argument was used to exclude from the new ecclesiastical province the Diocese of São Luís do Maranhão²³, whose area seems to coincide with the territory of the State of Maranhão²⁴, which remained in the ecclesiastical province of Lisbon²⁵. The last dioceses erected in Brazil during the Colonial Age were Belém do Pará (1719), Mariana and São Paulo (1745).

Despite the existence of the Diocese since the middle of the 16th century, more than one century and a half later there was still no official document that constituted the specific rules for the territorial circumscription, the so-called episcopal constitutions. Almost all Portuguese dioceses and archdioceses had their own constitutions that time, many of them printed and accessible for the jurists and clergymen. That was the case of the Constitutions of Archdioceses of Lisbon, Braga and Évora and the Dioceses of Coimbra, Guarda, Lamego, Oporto and Viseu. In 1605, the fourth bishop of Salvador D. Constâncio Barradas would have prepared the constitutions of the Diocese, but they were neither printed nor applied, and were consequently lost²⁶.

This situation changed only when D. Sebastião Monteiro da Vide (1643-1722) took office on May 22, 1702, as the fifth Archbishop of Bahia and decided to obey what

²² *Postquam in illis partibus, quantumvis longissime et latissime protendantur, nulla metropolitana Ecclesia existit, ad quam illarum incolae, super eorum querelis et appellationibus justitiae complemento obtenturi, recurrere possint; sed illi ad venerabilem fratrem nostrum archiepiscopum Ulixbonensem, in regno Portugalliae existentem, metropolitanum inde remotissimum, confugere vel jura sua indefensa coguntur relinquere, quo sit, ut saepe numero quamplurimi ad illicita procliviores sint, excessusque et criminal impunita remaneant.* Vicecomte de Paiva Manso (ed), *Bullarium patronatus Portugalliae regum in ecclesiis Africae, Asiae arque Oceania*, Olisipone, 1870, t. 2 (1601-1700), pp. 162-163.

²³ [...] *quod populi illius partis Brasiliae, quae nuncupatur província de Maragñano, atenta longíssima distantia a civitate Bahiae omnium Sanctorum, residentia episcopi Brasiliensis, cujus est dioceses, et ad illam difficilimo accessu, multa incommoda praecipue circa confectionem olei sancti, administrationem sacramenti confirmationis et exercitum officii pastoralis passi jam sunt [...].* Idem, p. 172 (§1).

²⁴ The State of Maranhão was, alongside the State of Brazil, one of the two administrative units of the Portuguese America for more than one century. Located in the North, Maranhão had its own governor and was not submitted to the General-government in Bahia, but directly to central administration in Lisbon. About the State of Maranhão, see: Studart Filho, C., *O antigo Estado do Maranhão e suas capitánias feudais*, Fortaleza, 1960; Wehling, M. J. C. M., “O Estado do Maranhão na União Ibérica”, *El gobierno de un mundo: Virreinos y Audiencias en la América Hispánica* (Feliciano Barrios Barrios, ed.), Cuenca, 2004, pp. 989-1021.

²⁵ Vicecomte de Paiva Manso (ed.), *Bullarium patronatus*, p. 173 (§5).

²⁶ *Constituições primeiras do Arcebispado da Bahia, feytas, & ordenadas pelo illustrissimo, e reverendíssimo Senhor D. Sebastião Monteiro da Vide, Arcebispo do dito Arcebispado, & do Conselho de Sua Magestade, propostas, e aceytas em o Sinodo Diocesano que o dito senhor celebrou em 12. de junho do anno de 1707*, Lisboa, 1719, p. 595.

was ordered by the Council of Trent about the convocation of a Provincial Council²⁷. Different from the experiences on Hispanic America, where, since the middle of the 16th century, councils and synods were held in cities like Mexico and Lima²⁸, in Portuguese America neither councils nor synods had been organized before this event. Letters of invitation were sent to the dioceses belonging to the ecclesiastic province of Bahia in Angola, Rio de Janeiro, São Tomé and Pernambuco, but due to the vacancy of the two last-mentioned and the impossibility of the bishop of Rio de Janeiro to go to Salvador, D. Sebastião Monteiro da Vide decided to celebrate a diocesan synod instead of a provincial council with the single presence of the Bishop of Angola²⁹. Then the Synod took place in the Metropolitan See of Salvador in June, 1707.

The three sessions of the synod lasted no more than three days (June 12-14), and only the first day was dedicated to the public reading of the “First Constitutions”, which were elaborated exclusively by the Archbishop D. Sebastião Monteiro da Vide. The records of the Synod give the notice of that, not only when they show the passivity of the participants of the meeting, including D. Luiz Simões Brandão, Bishop of Angola and highest ecclesiastical authority before the Archbishop, but also when they say, in the very first page, that the “Archbishop decided to rewrite the Constitutions, taking advantage of the winter season, when he could not proceed visiting the vast Archbishopric”. Diogo Barbosa Machado (1682-1772), author of the most prominent Portuguese bio-bibliographical book of the Early Modern Age, attributed to D. Sebastião Monteiro da Vide the authorship of the “First Constitutions”, just after relating some aspects of his life, which included his Jesuit formation and his canon law studies in Coimbra University and the offices exercised before the Archbishopric, highlighting the office of judge (“*desembargador*”) of the Ecclesiastical Court of Lisbon³⁰. Indeed, the final name of the document was “*First Constitutions of the Archbishopric of Bahia, done and ordered by the Illustrious and Most Reverend D. Sebastião Monteiro da Vide, 5th Archbishop from that Archbishopric and of the Council of Your Majesty, proposed and accepted in the Diocesan Synod, celebrated by that Sir on June 12, 1707*”, and that lets almost no doubt about the authorship of the text: elaborated by the hands of the Archbishop himself, but approved, apparently in its integrality, in a synod called and presided by the Archbishop.

The final text of the “First Constitutions”, printed for the first time in Lisbon in 1719, is divided in five books and its structure is quite similar to the most influential canonical document in Vide’s work, the “Constitutions of the Archbishopric of Lisbon”.

²⁷ *Concilii Tridentini canonibus et decretis insertae*, Coloniae Agrippinae, 1619, p. 344-345 (Sessio XXIV, Decretum de reformatione, Caput II).

²⁸ About the provincial councils specially the Third Provincial Council of Lima, see Lisi, F. L., *El tercer concilio limense y la aculturación de los indígenas sudamericanos: estudio crítico con edición, traducción y comentario de las actas del concilio provincial celebrado en Lima entre 1582 y 1583*, Salamanca, 1990; Duve, T., “Das Konzil als Autorisierungsinstanz: die Priesterweihe von Mestizien vor dem Dritten Limenser Konzil (1582/83) und die Kommunikation über Recht in der spanische Monarchie”, *Rechtsgeschichte* 16 (2010), pp. 132-153. About the Third Provincial Council of Mexico, see Galindo Bustos, J., *Estudio del aparato de fuentes del Concilio Tercero Provincial Mexicano (1585)*, Zamora, 2010; Moutin, O. R. *Legislar en la América hispánica en la temprana edad moderna: procesos y características de la producción de los decretos del Tercer Concilio Provincial Mexicano (1585)*, Frankfurt, 2016. For an overview of synods and councils held in Hispanic America in the Early Modern Age, see Dussel, E. (ed), *Historia general de la Iglesia en América Latina*, Salamanca, 1983, t. 1 (introducción general a la historia de la Iglesia en América Latina), pp. 472-516.

²⁹ *Constituições primeiras do Arcebispado da Bahia*, p. 596.

³⁰ Machado, D. B., *Bibliotheca Lusitana, histórica, crítica, e cronológica*, Lisboa, 1752, t.3, pp. 694-695.

Book I deals with issues on faith and the sacraments; Book II with Catholic ceremonies, penances and other obligations of the laymen; Book III with the duties of the clergymen; and Book IV with the ecclesiastical immunities and the regime of the goods of Church. Lastly, in Book V crimes and criminal procedure were the subjects of regulation, and these are exactly the themes of this paper.

4. Crimes in the “first Constitutions”

4.1 Structure and matters in Book Five

Book Five of the “First Constitutions” dealt with issue of criminal law and criminal procedure, naturally restricted to Canon Law, in seventy-four titles divided in four hundred fifty two paragraphs. Similar to other bodies of laws during this period, there was no general part to discuss abstract questions, such as a theoretical definition of crime and the penal relevance of an action and its subjective elements especially the *dolus*. These categories could be better understood consulting the *opinio communis*, especially books like Tiberio Deciani’s *Tractatus criminalis*, probably the most successful text in which this sort of discussion appeared in the Early Modern Age³¹. The contents demonstrate, on the contrary, a perceptible concern about concrete issues, particularly crimes, penalties and how these penalties should be applied.

In the first thirty-two titles of the “First Constitutions”, the crimes were discussed in texts dedicated to clarify the actions in which they were materialized and their possible penalties, always highlighting how serious the action was. This is the case of the falsehood, characterized as one crime “among the very serious”³², or the pandering, which was a “detestable, and terrible, and seriously annoyed by law”³³. The list of crimes is not long: heresy, witchcraft, simony, sacrilege, perjury, falsehood, usury, sexual crimes, murder, physical and moral injuries, larceny and games. Besides the temporal penalties prescribed for each crime (v.g. fine and exile for usury³⁴ or loss of the ecclesiastical office, inability for life to achieve other offices, fine, exile and duty to pay a compensation to the family of the dead person in the case of murder³⁵), the “First Constitutions” also dealt with the spiritual penalties of excommunication, interdict and suspension, detailing the situations in which this sort of penalty should be applied and the procedural questions involved.

As previously argued, the “First Constitutions” were a particular law enacted in a Synod. Although its force of law, a typical character of this kind of ecclesiastical decree, it is perceptible in its structure the presence of some elements that approach them from legal doctrine. Describing offenses and attributing penalties are typical elements of a law in a material sense, and the majority of Book Five did that. However, direct references to books and authors were frequent in these “First Constitutions”, not only to Biblical and other legal references, especially to Portuguese General Laws (“Ordenações do Reino”) and, very often, to other diocesan constitutions (Oporto,

³¹ About this discussion, see Cabral, G. C. M., “Direito penal na literatura de decisiones em Portugal (1578-1660)”, *El derecho penal en la Edad Moderna: nuevas aproximaciones a la doctrina y a la práctica judicial* (G. C. M. Cabral, F. di Chiara, O. H. Santiago, B. R. Arrocha, eds.), Madrid, 2016, pp. 29-30.

³² *Constituições primeiras do Arcebispado da Bahia*, p. 350 (Liv. 5, Tit. XII, 933).

³³ “Este crime é detestável, e péssimo, e gravemente aborrecido por direito”. *Constituições primeiras do Arcebispado da Bahia*, p. 371 (Liv. 5, Tit. XXV, 1002).

³⁴ *Constituições primeiras do Arcebispado da Bahia*, p. 353 (Liv. 5, Tit. XIV, 943).

³⁵ *Constituições primeiras do Arcebispado da Bahia*, p. 372 (Liv. 5, Tit. XXVI, 1006).

Lisbon, Portalegre, Braga and Évora), but also to purely juridical works. Among the mentioned jurists there were some of the most representative names of the *ius commune* tradition, and the use of these jurists' opinions as arguments proves the connection between common and particular law in Colonial Brazil. Tiberio Deciani, Giulio Claro, Prospero Farinacio and Giacomo Menochio were quoted very often, as well as Portuguese jurists (Jorge de Cabedo, Miguel de Reinoso, Belchior Febo, Manuel Themudo da Fonseca, Agostinho Barbosa). Therefore, alongside with their formal character of statutory law, the "First Constitutions" can be analyzed also in a theoretical perspective, and this is precisely the intention of this paper.

4.2 Crimes and punishment in detail

In this moment of the discussion, I will analyze the above mentioned crimes and their respective punishment, as well as the most important aspects in which *ius commune* influenced their construction.

4.2.1 Heresy

Heresy and Judaism were objects of Title I of Book V, and both situations were under the jurisdiction of the Holy Inquisition³⁶. The duty of cooperation with the authorities demanded by the "First Constitutions" is well-known: according to the text, an effective punishment depended on the people of the Kingdom who must denounce heretics and Jews to the Inquisition³⁷. Besides the influence of the "Constitutions" of the Archbishoprics of Lisbon and Oporto, relevant Jesuit theologians and jurists of the *ius commune* were quoted in this title, such as Juan Azor, Tomás Sánchez, Diego de Simancas, Juan de Rojas and Prospero Farinacci, as well as Portuguese Baptista Fragozo and his important *De regimine Reipublicae Christianae*. Farinacci's *Tractatus de haeresi*, probably one of the most remarkable works on heresy, was quoted in a section where he supported that the proof of the accusation was not necessary when someone denounces a heretic to the Inquisition, despite the impossibility of proving the alleged fact³⁸. This rule had a huge impact on the practice of the Inquisition in Portuguese America, because it had guaranteed the obligation of everyone to inform the authority about absence of faith; from this information, the Inquisition could initiate the formal investigation.

4.2.2 Blasphemy

In their definition of blasphemy, the "First Constitutions" referred to specific situations in which someone attributes to God, with injurious words, something that is not related to Him, denies some of God's features, attributes to creatures something

³⁶ About the Inquisition in Brazil, see, among others, Rodrigues, A. C., *Igreja e Inquisição no Brasil: agentes, carreiras e mecanismos de promoção social – século XVIII*, São Paulo, 2014.

³⁷ "Para que o crime da heresia, e judaísmo se extinga, e seja maior a gloria de Deos nosso Senhor, e aumento de nossa Santa Fé Catholica, e para que mais facilmente possa ser punido pelo Tribunal do Santo Officio o delinquente, (...) ordenamos, e mandamos a todos os nossos súbditos, que tendo noticia de alguma pessoa Herege, Apostata de nossa Santa Fé, ou Judeo, ou seguir doutrina contraria áquela que ensina, e professa a Santa Madre Igreja Romana, a denunciem logo ao Tribunal do Santo Officio no temos de seus Editaes, ainda sendo a culpa secreta, como for interior". *Constituições primeiras do Arcebispado da Bahia*, p. 334 (Liv. 5, Tit. I, 886).

³⁸ Farinacci, P., *Tractatus de haeresi*, Duaci, 1616, p. 349 (Quaest. CXCVII, §II, 36).

exclusively divine or speaks in a negative perspective of Holy Mary and the saints. Comparing the penalties for blasphemy in the “Constitutions” of Bahia and Lisbon, one can perceive how similar they are, not only in establishing different penalties according to personal status (clergy- or laymen), economic capacity of paying the fines and recidivism, but also in the penalties themselves: fines were the leading penalties to someone with economic capacity, but they could be replaced by vile penalties (for commoner laymen) or suspension of the orders, imprisonment or exile (for clergymen). However, there are some important differences: for layman sentenced for the second time, the penalty of 5 years-exile in Brazil or Maranhão was not adopted in the “*First Constitutions of the Archbishopric of Bahia*”. On the other, this text granted large arbitrary power to decide the penalty in cases of third-time blasphemy, which was not observed in the “Constitutions” of Lisbon³⁹.

Legislative references in this title included the secular “*Ordenações do Reino*” of Portugal and canon law texts, such as the decrees of the Fourth Lateran Council, the *Extravagantes* of Pío V and particular canon law through the *Constitutions* of the Archbishopric of Braga and the Dioceses of Guarda. On the other hand, Saint Ambrose, Thomas Aquinas and Martín de Azpilcueta (alias Dr. Navarrus) were the main sources of the definition of blasphemy⁴⁰ and were mentioned alongside with Jesuit moral theologians and *ius commune* authors such as Juan Azor, Diego de Simancas, Tomás Sánchez, Prospero Farinacci and Tiberio Deciani. Farinacci’s quoted book was his famous *Praxis, et theorica criminalia*, and in this moment the *Tractatus criminalis* by Deciani, probably the most prominent monography on Criminal Law of the *ius commune* tradition, appeared for the first time, referring to a definition of blasphemy also inspired by Ambrose and Aquinas⁴¹. The direct reference to the arbitrary power of the judge to apply the penalties “*according to the circumstances of the blasphemy, time, place and quality of the person*”⁴² when the blasphemy was addressed to a saint was to Giacomo Menochio’s *De arbitrariis iudicium*, precisely the topic dedicated to blasphemy and where the author spoke about the penalties and how they should be applied⁴³.

4.2.3 Witchcraft

Under this category I refer to the titles (III-V) in which magic, witchcraft, superstition, luck and pacts with the devil were themes, actions considered to be offenses against the catholic faith. Theologians such as Aquinas, Simancas, Sánchez and Francisco Suárez, but also jurists like the Portuguese Manuel Barbosa and his comments

³⁹ *Constituições primeiras do Arcebispado da Bahia*, p. 335-336 (Liv. V, Tit. II, 890-892). *Constituições synodaes do Arcebispado de Lisboa, novamente feitas no Synodo Diocesano, que celebrou na Sé Metropolitana de Lisboa o Illustrissimo, & Reuerendissimo Senhor D. Rodrigo da Cunha Arcebispo da mesma cidade, do Conselho de Estado de S. Magestade, em os 30. Dias de Mayo do anno de 1640*, Lisboa, 1656, p. 417-418 (Liv. V, Tit. II, §1).

⁴⁰ “Blasphemar, es dezir interior o exteriormente alguna iniuria contra Dios, o sus santos. Lo qual se haze atribuyendo a Dios lo que no le conuiene, o negando lo que le conuiene, atribuyendo a la criatura, lo que a solo Dios conuiene”. Azpilcueta Navarro, M., *Manual de confesores y penitentes*, Valiadolid, 1570, p. 116 (Cap. 12, 81).

⁴¹ Deciani, T., *Tractatus criminalis*, Venetiis, 1590, t. 2, p. 1-2 (Lib.6, caput I).

⁴² “E todo aquelle que blasfemar dos Santos, será castigado com as penas arbitradas, que parecer segundo as circunstâncias das blasfêmias, tempo, lugar, e qualidade da pessoa”. *Constituições primeiras do Arcebispado da Bahia*, p. 336 (Liv. V, Tit. II, 891).

⁴³ Menochio, G., *De arbitrariis iudicium*, Coloniae Agrippinae, 1587, p. 508-509 (Questio CCCLXXXV, 29).

to the “Ordenações do Reino” and Farinacci’s treaty on heresy, were quoted to justify the terribleness of these actions and the necessity of hard penalties against them. Spanish theologians Martín Antonio Del Río (*Disquisitionum magicarum libri sex*) and Francisco Torreblanca (*Epitome delictorum sive de magia*) were also mentioned in the definitions of magic.

In a way quite similar to the quoted Constitutions of Braga, Lisbon, Guarda, Lamego and Oporto, the spiritual penalty of excommunication was to be applied in these cases. Temporal penalties, though, considered in nature: while in the “Constitutions” of Lisbon⁴⁴ and Guard⁴⁵, a recidivist person not submitted to vile punishment should be condemned to exile in Africa or somewhere else overseas, in the “First Constitutions” of Bahia the exile should be somewhere outside the limits of the Archbishopric in case of a pact with devil for the first time, with the aggravation of this penalty in further condemnations⁴⁶.

4.2.4 *Simony*

One of the central problems faced by the Council of Trent, simony – understood as giving or receiving spiritual goods not for free, but for money and other temporal goods⁴⁷ – was prohibited in any form⁴⁸. Different from heresy, blasphemy and witchcraft, simony was a crime that only a clergy could commit – and should be severely repressed. Excommunication, suspension of the Orders for ten years and one year of imprisonment were the penalties, similar to provisions in other Portuguese episcopal constitutions.

4.2.5 *Sacrilege*

Essentially, sacrilege is an offense to the Sacred that comprehends three species, according to Aquinas’ perspective adopted by the Portuguese episcopal constitutions⁴⁹ quoted in the Bahian: offense to a sacred person, offense to a Church or other sacred place and offense to sacred or blessed goods or goods dedicated to divine worship. The paragraphs of the Title IX are dedicated to specify the situations considered as sacrilege and comprehended in the three species, such as murders and injuries in churches or during processions, sexual relations in sacred places and larceny of goods dedicated to divine worship. In this crime, the judge must decide according to his *arbitrium* the amount that should be paid in fines or indicate where the offender should serve his sentence in cases of exile, but they gave the power to the judge to decide considering “*personal qualities, fault, excesses and circumstances, provided a severely*

⁴⁴ *Constituições synodales do Arcebispado de Lisboa*, p. 418 (Liv. V, Tit. III, Decr. I).

⁴⁵ *Constituições synodales do Bispado da Guarda, impressas por mandado do Ill. e Reverendissimo Senhor Dom Francisco de Castro, Bispo da Guarda, e do Conselho de sua Magestade*, Lisboa, 1621, p. 242-242v (Liv. V, Tit. III, Cap. I, 8)

⁴⁶ *Constituições primeiras do Arcebispado da Bahia*, p. 338 (Liv. V, Tit. IV, 897).

⁴⁷ “Consiste a malícia, e deformidade da Simonia em dar, ou receber as cousas espirituais, ou anexas a ellas não de graça, mas por dinheiro, ou outra cousa temporal”. *Constituições primeiras do Arcebispado da Bahia*, p. 341 (Liv. V, Tit. VI, 904).

⁴⁸ *Concilii Tridentini*, p. 196-197 (Sessio XXIV, Decretum de reformatione, Caput I).

⁴⁹ *Constituições synodales do Bispado da Guarda*, p. 244v (Liv. V, Tit. V, Cap. Un.); *Constituições synodales do Arcebispado de Lisboa*, p. 420 (Liv. V, Tit. IV, princ.); *Constituições do Arcebispado de Braga*, Lisboa, 1538, fol. LXVIIv-LXVIIIv.

*punishment*⁵⁰. Besides quotations of Aquinas, is worthwhile noting the use of other canonists and theologians, such as Dr. Navarrus, Suárez and Azor. References to jurists are limited to Farinacci's *Praxis, et theorica criminalis* and Portuguese António Cardoso do Amaral's *Praxe*.

In the last paragraph of this title there is an excerpt which is very illustrative of the conscience of the differences involved in elaborating rules to an ecclesiastical province located in the New World: the "First Constitutions" mention the distances inside the Archbishopric as a reason for the lack of respect for sacred places, asking for collaboration of vicars and chaplains with the investigations⁵¹. Any of the quoted ecclesiastical constitutions had a similar text, which was absolutely necessary in a huge and vast territory with isolated villages often very distant from each other.

4.2.6 Perjury

Perjury is the false oath taken by witness before a court. It was described as a very serious offence both to God and to the judge, following Diego de Simancas⁵². Many prominent jurists were quoted in this title to justify positions adopted by the text. Prospero Farinacci's *Quaestio CLX*⁵³, about perjury, was mentioned 14 times, but other names also appeared very often, such as Giulio Claro, Tiberio Deciano, Lluís de Peguera, André Tiraqueau, Baldo Ubaldi, Johannes Petrus Surdus, Belchior Phaebo, Cardinal Thusci and Giacomo Menochio, in one of the sections with more references in the entire Book Five. References to ecclesiastical constitutions (Lisbon, Lamego and Guarda) were related to the penalties. The same goes true for references to the "Ordenações do Reino".

4.2.7 Falsehood

To modify ecclesiastical papers by adding wrong or suppressing correct information, to falsify ecclesiastical seal or any other signal, to make a false paper or to use the product of the falsification – these are the possibilities of incurring the crime of falsehood in the "First Constitutions". In this section, there is no reference to other Portuguese ecclesiastical constitutions. The Constitutions of Lisbon did not detail the actions that could be considered as constituting falsehood, but the Constitutions of Guarda did almost in the same way of Bahia's⁵⁴. The references, instead, linked these species to juridical works of Menochio, Farinacci, Giasone dal Maino and Bernardo

⁵⁰ *Constituições primeiras do Arcebispado da Bahia*, p. 344-345 (Liv. V, Tit. IX, 915).

⁵¹ "E porque as ditancias, e longes deste nosso Arcebispado dão ocasião a se guardar pouca reverencia aos lugares sagrados, presumindo-se, que não nos chegarão á notícia os desacatos, que lhes fizerem, mandamos aos Vigarios, Curas, e Capellães de nosso Arcebispado, que se em suas Igrejas, se commetter algum sacrilégio, tanto que delle tiverem noticia nos avisem por escripto, ou a nosso Vigario Geral, Promotor, ou Meirinho, informando, ou dando conta do caso, com declaração do lugar, dia, mez, e anno, e testemunhas, que se acharão presentes para se poder provar o delicto". *Constituições primeiras do Arcebispado da Bahia*, p. 345-346 (Liv. V, Tit. IX, 920).

⁵² *Nunc autem de falsis testibus dicendum est, quorum crimen grauissimum quidem est; ut enim Isidorus inquit lib. 3. de sum bono: Testis falsidicus tribos est personis obnoxius, primum Deo, quem peierando contemnit: deinde iudici, quem mentiendo fallit: postremo inno ceti, quem falso testimonio ledit*, Simancas, D., *De catholicis institutionibus liber, ad praecauendas & extirpandas haerese admodum necessarius, tertio nunc editus*, Romae, 1625, p. 488 (Tit. LXIV, 84).

⁵³ Farinacii, P. *Variarum quaestionum, & communium opinionum criminalium*, Turnoni, 1648, t. 5 (de falsitate et simulatione), p. 158-201 (Quaestio CLX).

⁵⁴ *Constituições synodaes do Bispado da Guarda*, p. 247v (Liv. V, Tit. VII, Cap. I, 1).

Dias. Quotations of other constitutions (Lisbon, Guarda and Braga) could be observed only when the “First Constitutions” referred to the penalties – fines, imprisonment and exile in Africa for laymen and suspension of the Orders and exile outside the Archbishopric for clergy, meanwhile in Lisbon the offender should go to somewhere overseas⁵⁵ and, in Guarda, they should leave the Kingdom⁵⁶.

4.2.8 Usury

The negative stance on usury, observed in theologians at least since the Middle Ages, was perpetuated by the “First Constitutions”. The text is very clear in saying that usury is “*a malicious and unjust profit, robbery, latrocinium, which causes great damages to the Republic and prejudices not only the spiritual wellness of the soul, but also the temporal human commerce*”⁵⁷. In fact, usury is interpreted both as a crime and a sin, which should be the object of the priests’ sermons according to direct recommendation of the “First Constitutions”. The following title (Title XV) exemplifies cases of usury namely situations involving interest loans, letters of exchange, contracts of companies, contracts of sale, pledge, hiring, among others.

The chapter is very rich in references on usury, and that shows how important the theme was at that time. Besides biblical quotations, the “First Constitutions” used works of Thomas Aquinas, Martín de Azpilcueta Navarro, Diego Covarrubias y Leyva, Jerónimo Castillo de Bobadilla, Juan Azor, Luís de Molina and Leonard Lessius⁵⁸, some of the most relevant specialists in usury during the *ius commune* age. Their role in the justification of the severe punishment to usury was notable and much higher than the influence of other constitutions (in this case, Lisbon, Lamego, Guarda and Braga) that were quoted when penalties were discussed. In this case, the fines could have the value of one thousand “cruzados” if the offender had committed the crime for the third time – very high considering the fines stipulated for other crimes.

Once more an excerpt of the “First Constitutions” demonstrates the necessity of solving specific problems in the space under the jurisdiction of this document: the text has affirmed that “*this vice [usury] prevailed in the Archbishopric, and everyday its debauchery becomes higher because of the commerce*”⁵⁹. Nobody questions the seriousness of usury everywhere in Catholic world, according to the dominant perspective during the *ius commune* age, but what emerges from this excerpt is the urgency in providing a solution for that specific matter. The legislators knew the problem and had demonstrated it in a text that reflects, at least in some points precisely, the necessities of a territory under their jurisdiction.

4.2.9 Sexual crimes

⁵⁵ *Constituições synodaes do Arcebispado de Lisboa*, p. 425 (Liv. V, Tit. VII, Decr. I).

⁵⁶ *Constituições synodaes do Bispado da Guarda*, p. 247v-248 (Liv. V, Tit. VII, Cap. I, 2)

⁵⁷ “É a usura um doloso, e injusto lucro, roubo, e latrocínio manifesto, que redundo em grande damno da Republica, e prejudica não somente ao bem espirital d’alma; mas também ao temporal do comercio humano”. *Constituições primeiras do Arcebispado da Bahia*, p. 352 (Liv. V, Tit. XIV, 940).

⁵⁸ To understand Lessius’ view on usury, see Decock, W., “L’usure face au marché: Lessius (1554-1623) et l’escompte des lettres obligataires”, *Le droit, les affaires et l’argent. Célébration du bicentenaire du code de commerce* (A. Girollet, eds.), Dijon, 2008, pp. 221-238.

⁵⁹ “E porque este vicio tem prevalecido muito neste nosso Arcebispado, e cada dia se aumenta mais sua devassidão por razão do commerio (...)”. *Constituições primeiras do Arcebispado da Bahia*, p. 352-353 (Liv V, Tit. XIV, 941).

Titles XVI until XXV dealt with sexual crimes, comprehending several conducts related to sexual matters, namely sodomy, bestiality, adultery, incest, rape, rapt, concubinage and pandering, some of them considered both crimes and sins and consequently not submitted to the jurisdiction of the Archbishopric. Sodomy, which was under the jurisdiction of the Inquisition, is an example. Most of the crimes could be committed by laymen or clergymen. In some situations, however, it is noteworthy the congruence with the concerns of the Council of Trent about the behavior of the clergy, especially in cases of concubinage. Having a very severe excerpt of the *Decretum de reformatione*⁶⁰ as the basis of their position, the “First Constitutions” exalted the necessity of the clergymen of being pure and chaste in order to the faithful believe and trust in their dignity⁶¹. A comparison with the established on the “Constitutions of the Archbishopric of Lisbon” for the same crimes denotes some differences: it is typical of the “First Constitutions” to recommend silence about the act of sexual misbehavior if it has ceased to exist, which is also a clear indication that these crimes were widespread in Portuguese America, as shown by literature⁶².

Biblical texts and canon Law instruments (papal *bullas* and *extravagantes*) appeared very often in these titles, as well as references to Portuguese secular Law in the “Ordenações do Reino”. Quotations of other ecclesiastical constitutions were even more frequent, mainly the Constitutions of Lisbon, Braga, Guarda and Oporto, but also Lamego, Elvas and Viseu. In almost all cases, this reference is related to the indication of penalties for each crime. The list of quoted jurists and theologians is long and includes important names of *ius commune* tradition: Prospero Farinacci, Manuel de Azpilcueta (Dr. Navarrus), António Gómez, Giulio Claro, Nicolaus Boerius, Giacomo Menochio, Manuel Themudo da Fonseca, Tiberio Deciano, Bernardo Dias, Gabriel Pereira de Castro, Tomás Sánchez, Petrus Gregorius, Nicolaus de Tudeschis (Abbas Panormitanus), Giuseppe Mascardus, Belchior Febo, Tomás Valasco, Mario Giurba, Agostinho Barbosa, Manuel Mendes de Castro, Luís de Molina, Pedro Núñez de Avendaño, Tomás Aquinas, Baptista Fragoso and Petrus Duenas.

4.2.10 Murder and duel

Under the jurisdiction of the Archbishopric of Bahia were also comprised murders committed by clergymen who, according to the Constitutions, “have forgotten their salvation”. The text is clear when it explains that the penalty applied in case of murder by clergy would depend on the penalty referred by Portuguese Law: if the “Ordenações” referred to capital punishment, clergy who murdered should be sentenced to other penalties (fine⁶³, loss of ecclesiastical offices and an exile for life in São Tomé Island)

⁶⁰ *Quam turpe ac clericorum nomine qui se divino cultui addixerunt sit indignum impudicitiae sordibus imundo que concubinato versari: satis res ipsa communi fidelium omnium offensione summo que clericalis militiae dedecore testatur. Concilii Tridentini canonibus*, p. 515 (Sessio XXV, decretum de reformatione, caput XIV).

⁶¹ “Considerando Nós quão indigna cousa é nos Clerigos o torpe estado do concubinato, pois sendo pessoas dedicadas a Deos, é maior nelles a obrigação de serem puros, e castos, e de vida, e costumes mais reformados, para que os fieis os não tenham por indignos do alto ministério que tem, nem de sua deshonesta vida resulte opróbrio ao estado Clerical (...)”. *Constituições primeiras do Arcebispado da Bahia*, p. 368-369 (Liv. V, Tit. XXIV, 994).

⁶² *Constituições primeiras do Arcebispado da Bahia*, p. 368-369 (Liv. V, Tit. XXIV, 994); *Constituições synodaes do Arcebispado de Lisboa*, p. 440-442 (Liv. V, Tit. XII).

⁶³ According to Farinacci, who, by his turn, reasoned his opinion on other notable names of *ius commune* tradition (Johannes Andrea, Antonio de Butrio, Cardinalis Hostiensis, Petrus de Ancharano and Mariano Soccino), statutes could not attribute an exclusive fine penalty in case of murder, because, in

that should be decided arbitrary by the judge⁶⁴. To justify this option for a penalty decided arbitrarily by the judge there is a quotation from Prospero Farinacci⁶⁵, but there is no reference to what was established, in a very similar vein, by the Constitutions of Lisbon⁶⁶. The text also reinforces measures of the Council of Trent, commented upon by Farinacci⁶⁷, about the exclusive papal dispensation of the perpetual impossibility of someone sentenced by murder to be ordered⁶⁸, recognizing the absence of power of the Archbishop in these cases.

Title XXVIII dealt with duels, a forbidden practice according canon law. Indeed, the excommunication of the involved, both the principals (winner/survived and the defeat/dead,) and their seconds, included the prohibition of being buried on catholic cemeteries. In this point, the “First Constitutions” followed other ecclesiastical constitutions and the decrees of the Council of Trent⁶⁹. In this very point the “First Constitutions” recommended strongly “*to abstain from this so detestable and harmful delict*”⁷⁰. Only papal *bullas*, decree of the Council of Trent and the Constitutions of Lisbon were quoted in this title, with no references to opinions of jurists, not even of Diego del Castillo de Villasante, author of the probably most famous book on duels, the *Tractatus de duello* (1525). The same cannot be said of the title dedicated to murder, when names like Tomas Aquinas, Nicolaus de Tudeschis (Abbas Panormitano), Martín de Azpilcueta Navarro, António Gómez, Manuel Themudo da Fonseca, Agostinho Barbosa, Francisco Suárez, Giulio Claro and, above all of them, Prospero Farinacci were quoted.

4.2.11 Moral injuries

While physical injuries were regulated by the same title of murder, moral injuries, which comprehend offences and affronts to clergymen, were the object of the Title XXX. Many references to ecclesiastical constitutions (Lisbon, Lamego, Oporto and Guarda) and to Portuguese “Ordenações do Reino” can be observed in the section, but only few quotations of jurists, namely Prospero Farinacci, Belchior Febo, Manuel Barbosa and Manuel Álvares Pegas, the most relevant Portuguese jurist of the second half of 17th century.

admitting that, the statutes would be saying that human life would have a sale price. Farinacci, P., *Praxis et theoricæ criminalis*, Lugduni, 1631, t. 4, p. 113 (Quaestio CXIX, 27).

⁶⁴ *Constituições primeiras do Arcebispado da Bahia*, p. 372-373 (Liv. V, Tit. XXVI, 1006-1007).

⁶⁵ In Farinacci’s opinion, the *arbitrium* of the judge would be valid in cases of murder with no *dolus* or when admitted by reason. Farinacci, P., *Praxis et theoricæ criminalis*, Lugduni, 1631, t. 4, p. 115 (Quaestio CXIX, 37).

⁶⁶ *Constituições synodaes do Arcebispado de Lisboa*, p. 445-446 (Liv. V, Tit. XV, princ.).

⁶⁷ *Ibid.*, p. 118 (Quaestio CXIX, 58).

⁶⁸ *Liceat episcopis in irregularitatibus omnibus et suspensionibus ex delicto occulto provenientibus excepta e aquae oritur ex homicidio voluntario et exceptis aliis deductis ad forum contentiosum dispensare et in quibuscumque casibus occultis etiam Sedi Apostolicae reservatis delinquentes quoscumque sibi súbditos in diocese sua per se ipsos aut vicarium ad id specialiter deputandum in foro conscientiae grátis absolvere imposita poenitentia salutar. Concilii Tridentini canonibus*, p. 358-359 (Sessio XXIV, Decretum de reformatione, caput VI).

⁶⁹ *Qui vero pugnam commiserint et qui eorum patrini vocantur: excommunicationis ac omnium bonorum suorum proscriptio ac perpetuae infamiae poenam incurrant et ut homicidae iuxta sacros canones puniri debeant et si in ipso conflictu decesserint perpetuo careant ecclesiastica sepultura. Concilii Tridentini canonibus*, p.526 (Sessio XXV, Decretum de reformatione, Canon XIX).

⁷⁰ “Pelo que exhortamos muito a todos os nossos súbditos se abstenhão de tão detestável, e prejudicial delicto, temendo a excomunhão, e graves penas que por ele incorrem”. *Constituições primeiras do Arcebispado da Bahia*, p. 375 (Liv. V, Tit. XXVIII, 1014).

4.2.12 Larceny

Since the beginning of the Title XXXI, the “First Constitutions” used the opinion of jurists to justify the severe treatment to larceny. According to Nicolaus de Tudeschis, it is a *graue delictum*⁷¹, and Giulio Claro stated that *Quaero an furtum dicatur graue delictum*⁷². Larcenies committed by clergymen are the only concern of this title, and the penalties established by “First Constitutions” (deposition of the ecclesiastical office, fines, imprisonment and exile in Angola or São Tomé Island or galley) are quite similar to what was described by other *ius commune* jurists, such as Farinacius, Giacomo Menochio and Themudo, and in the Constitutions of Braga and Lisbon.

4.2.13 Games

The so-called “tabolagens” were a delict related to the practice of playing or organizing games, whether the offender was a clergy- or a layman. The reasons cited for this prohibition were not only the authority of theologians, but also the wider argument about the necessity to protect the “good governing of the Republic”, as clearly said⁷³. Actually, this theme also concerned secular law as perceived in a quotation of the “Ordenações do Reino”, but the center of the “First Constitutions” preoccupation are the ecclesiastical matters – otherwise we would not observe a predominance of references to ecclesiastical constitutions (Lisbon, Braga, Guarda and Oporto) in this section. Among the few authors quoted, the presence of Prospero Farinacci and Paride del Pozzo must be highlighted.

4.3 List of the quoted authors

As I did in previous works⁷⁴, in this section I present the complete list of quotations made in the Titles I until XXXII of the Book V of the “First Constitutions”. It is a list of quoted authors that indicates the amount of appearances of each name, but it is not concerned about texts of other natures, such as statutes or canon law provisions like other ecclesiastical constitutions or the decrees of the Council of Trent. These texts were very important to this “First Constitutions” and their relevance was highlighted in the other section.

Author	Number of quotatios
Prospero Farinacci	57
Gabriel Pereira de Castro	14
Giulio Claro	14
Manuel Barbosa	13

⁷¹ Tudeschis, N., *Consilia et quaestiones qua fieri potuit diligentia ab erroribus vindicata*, Augustae Taurinorum, 1577, p. 12 (Consilia XXV, 2).

⁷² Claro, G., *Opera, quae quidem hactenus edita sunt, omnia; plurimis locis emendata*, Augustae Taurinorum, 1586, p. 170 (Liber V, §. Furtum, 6).

⁷³ *Constituições primeiras do Arcebispado da Bahia*, p. 380 (Liv. V, Tit. XXXII, 1025).

⁷⁴ Cabral, G. C. M., *Os decisionistas portugueses entre o direito comum e o direito pátrio*, São Paulo, 2013; Cabral, G. C. M., “Direito penal na literatura”, pp. 47-50; Cabral, G. C. M., “Case law in Portuguese decisions in the Early Modern Age: Antonio da Gama’s Decisiones Supremi Senatus Lusitaniae”, *forum historiae iuris* (2015), available in: <http://www.forhisiur.de/2015-06-machado-cabral>.

Giacomo Menochio	11
Martín de Azpilcueta (Dr. Navarrus)	11
Tomás Sánchez	10
Francisco Suárez	8
Manuel Themudo da Fonseca	8
Abbas Panormitanus (Nicolaus de Tudeschis)	7
Agostinho Barbosa	7
António Gómez	7
Juan Azor	7
Tomás de Aquino	7
Luís de Molina	5
Manuel Mendes de Castro	5
Belchior Febo	4
Diego de Simancas	4
Ignacio López de Salcedo	4
Petrus Gregorius Syntagma	4
André Tiraqueau	3
Martín Antonio Del Río	3
Petrus Philippus Corneus	3
Tiberio Deciano	3
Vicenzo Figliucci	3
Antonino Diana	2
Baptista Fragoso	2
Bernardo Dias	2
Francisco Torreblanca	2
Leonard Lessius	2
Manuel Álvares Pegas	2
Sebastiano Guazzini	2
Tomás Valasco	2
Álvaro Valasco	1
António Cardoso do Amaral	1
Baldo Ubaldi	1
Diego Covarrivias y Leyva	1
Giasone dal Maino	1
Giuseppe Mascardus	1
Innocentius IV (Sinibaldo de' Fieschi)	1
Jerónimo Castillo de Bobadilla	1
Johannes Petrus Surdus	1
Juan Bautista Valenzuela y Velázquez	1
Juan Rojas	1
Lluís de Peguera	1
Mario Giurba	1
Nicolaus Boerius	1
Paride del Pozzo	1
Pedro Núñez de Avendaño	1

Petrus Duenas	1
Saint Ambrose	1

The most important authors of criminal law in the *ius commune* tradition were quoted very often, with a clear predominance of Prospero Farinacci and Giulio Claro. Theologians (Tomás Sánchez, Thomas Aquinas, Juan Azor, Francisco Suárez, Luís de Molina), canonists (Abbas Panormitanus, Miguel Themudo da Fonseca, Agostinho Barbosa) and commentators of national Law (Manual Barbosa, António Gómez) had also a relevant role, but the frequent presence of Portuguese authors is noteworthy. A comparison between this list and others done in some other works⁷⁵ indicates that Portuguese jurists were much more quoted in the “First Constitutions” than in previous juridical books.

5. Final comments

As last words, I should state: the “First Constitutions of the Archbishopric of Bahia” are one of the few – probably the sole – formal juridical texts produced in Portuguese America in the Early Modern Age in which the connection with the *ius commune* tradition is particularly obvious, especially through the explicit references to the opinion of late medieval and early modern jurists and theologians from the *ius commune* tradition⁷⁶. The list in the section 4.3 shows some of the most remarkable names that time, such as Farinacci, Menocchi or Nicolau de Tudeschis (Abbas Panormitano), what is quite normal considering a text produced in the *ius commune* tradition. In all criminal law themes above discussed, the use of other Canon Law sources is also apparent, especially decrees of the Council of Trent, *extravagantes*, papal *bullas* and ecclesiastical constitutions.

Considering that one of the main reasons for the elaboration of the “First Constitutions” was the necessity of giving specific canonic rules to Brazil in the Colonial Age and, consequently, solving practical problems specific to that reality, as emphasized in the section 4.2, one can ask if there is any paradox in creating particular law from general norms and the *opinio communis doctorum*. The answer is no. At least in criminal matters, as analyzed in this paper, particular law in the New World was directly influenced by, and even reproduced, the structure and the tradition of the *ius commune* and early modern scholastic theology model. By doing that, the formal Law produced specifically for Portuguese America was clearly a part of the *ius commune*: a particular law contained in a more complex system and integrated into it through many factors, including the use of juridical literature.

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⁷⁵ See footnote n. 74.

⁷⁶ To understand the connection between the scholastic theologians and the *ius commune* tradition, see Decock, W., *Theologians and Contract Law: the moral transformation of the Ius Commune (ca. 1500-1650)*, Leiden/Boston, 2013.

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