

Serve the Power(s),  
Serve the State



# Serve the Power(s), Serve the State:

*America and Eurasia*

Edited by

Juan Carlos Garavaglia,  
Michael J. Braddick  
and Christian Lamouroux

Cambridge  
Scholars  
Publishing



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This book first published 2016

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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Will, Pierre-Etienne. "The 1744 Annual Audits of Magistrate Activity and  
Their Fate." *Late Imperial China* 18:2 (1998), 1-50. © 1998 The Johns  
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ISBN (10): 1-4438-8877-X

ISBN (13): 978-1-4438-8877-6

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## PROLOGUE

### HISTORIES AND BUREAUCRACIES: ADMINISTRATE AND SERVE THE STATE

JUAN CARLOS GARAVAGLIA,  
MICHAEL J. BRADDICK  
AND CHRISTIAN LAMOUREUX

This book arises from the international conference held at the Pompeu Fabra University in Barcelona in March 2011, which was itself part of a twofold initiative. The project directly at the origin of the conference in Barcelona was primarily pedagogical in intention: a team of young historians, who had been initially educated in Latin America, was formed to study systematically the history of the state, within the framework of fellowships funded by an advanced grant from the European Research Council.<sup>1</sup> The method that underpinned their course of study was based on a principle that most doctoral programs have implemented: “Teaching research by doing research”. Their program aimed at deepening current knowledge of the history of the state in the Luso-Hispanic worlds, the main field of research for historians studying Latin America.<sup>2</sup> But, secondly, it was essential to offer to them access to new approaches, using different historical sources and drawing on different scholarly traditions. The conference held in 2011 was an important part of that second initiative, and this book represents its conclusion.

In this prologue we set out several themes on which general discussions during the conference focused. Many of the participants were cautious in the face of the challenge inherent to the second undertaking:

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<sup>1</sup> *A Comparative History of the State Building Process in Latin America (1820-1870)*, Advanced Grant 230246, European Research Council, FP7.

<sup>2</sup> The results are presented in Garavaglia and Pro 2013.

that of comparative analysis. Such caution was a necessity for the pedagogical program but a key purpose of the conference was to broaden the students' horizons. Contributors set out to compare the conditions in which the Latin American states emerged from the Iberian empires and were consolidated with those that prevailed in other imperial realms: the English colonial rule from which North America was liberated, but also Russia, whose references to the European state continue to be ambiguous, and far from the European experience, the Asian world, in work on India, Japan, and China. The chronological spectrum was thus also obviously very broad: the Chinese bureaucracy emerged and its hegemony was already in place, according to Sinologists, almost eight centuries before the Latin American states were built up. The book is therefore based around a core of chapters offering a longitudinal view of Iberian government, and its expression in Latin America, from the 15<sup>th</sup> to the 19<sup>th</sup> centuries, around which are set comparative studies ranging Song China and Tokugawa Japan, via early modern England to nineteenth century USA and India.

These comparative discussions confront two particular methodological difficulties: to juxtapose the cases presented by the successive papers; and to generate some unity among each participant's particular conclusions and remarks by employing useful but not excessively general categories derived from sociology or political science. One unifying theme was the attempt to understand the state 'from within'. The very title of the conference "Serve the Power(s), Serve the State" prompted us to approach the history of the state through its functioning and from the perspectives of the actors in charge of running its operations. Hence the figures of bureaucrats and the bureaucracy that have haunted historians and sociologists of the state since Max Weber, were naturally able to unify our considerations. Our discussions certainly revealed that we were often tempted to resort to these categories elaborated by the eminent sociologist because generally speaking such categories allow historians to grasp effectively the role that the public services and bureaucratization played in the integration and formation of the state. As many authors point out, however, it is important to employ such categories with caution in order to avoid any distortion of the facts within the diverse historical experiences.

As historians, we are indeed convinced that the realities we study form part of our present, and that the comparison between the political cultures of different societies is enlightening.

Max Weber was therefore an important point of reference on several occasions during our discussions, and it is perhaps appropriate to recall here that he was above all interested in elaborating a theory of domination.



As a consequence, we could not be satisfied by an approach consisting of describing events, analyzing the coherence of operations, and the actors' social framework for action, as if they had been determined by some sort of preconception about the bureaucracy's political or institutional efficiency, or even in search of rationalization or modernization. Such an approach would just replicate the general perspective employed by the sociology of domination as envisioned from the experience in the West. By contrast the essays collected here follow a recent tendency for histories of the state to pay more attention to the human interactions that constitute what states actually do than to overarching institutional and constitutional structures. We might gloss this as a desire to consider state activity as a kind of 'social practice', mediating between material conditions, linguistic resources and the skills and capacities of the individual actor.<sup>3</sup> The roots of this turn may be found in the linguistic turn, the rise of cultural history or the sociology of Foucault or Bourdieu (or in a more restricted field, of Goffman), but they have converged around the deconstruction of abstract notions of the state in favour of the study of these more problematized and complex patterns of social action. This literature is more clearly concerned with state practices or, we might say, with the state as practice (or process), rather than structure.<sup>4</sup> A by-product of this shift of attention is to turn attention away from moments of revolution, and tectonic change in political 'structures', towards the more routine negotiation of the relationship between political power and social interests, and a more organic account of historical change.

If we made a point of employing bureaucracies in the plural, it is firstly because the papers are often written with comparative approaches explicitly in mind. In this context the methodological contributions made by the first German school of social studies, which was already concerned with fostering dialogue between sociologists and historians, are of particular importance, above all perhaps, two central ideas defended by Otto Hintze (1861-1940), which subsequently became widely accepted.<sup>5</sup> Firstly, if the bureaucracy is a central phenomenon of the political life, just like all other political phenomena, it should be contextualized by taking into account its social dimensions. Secondly, if historians studying the

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<sup>3</sup> Reckwitz 2002; Schatzki 1996.

<sup>4</sup> Gorski 2003.

<sup>5</sup> We were largely inspired here by the stimulating issue of the on-line journal, "Max Weber et la bureaucratie", *Trivium*, 7, 2010, see <http://trivium.revues.org/3757>, consulted on 15/12/2014

bureaucracy draw natural benefit from political sociology, it becomes not only legitimate but quite simply essential for them to study diverse historical regimes of authority.

Of course no one today would venture to look at these regimes as the stages of a unique process which evolves from monarchy to aristocracy and finally to democracy. A kind of developmental perspective in which the key categories of patrimonialism, clientage and bureaucracy are drawn into a teleological account of modernity now seems inadequate to capture and explain historical experience. For example, Andújar Castillo shows in this volume, how the apparent distinction between a judicial Hapsburg monarchy of the seventeenth century and an administrative monarchy in the eighteenth, dissolves on close inspection. Such large-scale schematic distinctions are difficult to sustain when exploring the world of concrete action, in which personal incentives of various kinds operated by the rules of a patrimonial order. It is hard to maintain a strong distinction between putting people in a position where they could derive benefits and offering them direct financial reward—and the sale of offices was a way of mediating the difference. Many of these studies show how it was the problem of reward that underpinned the failure to materialize the ideals of a bureaucratic order, of uniform and transparent conduct of office in return for defined benefits. The essay by Carré can be read in this way, tracing attempts to achieve more within constraints of patrimonial administration, leading to modulation, rather than rapid structural change in the relationship between social groups and political power. The powerful imprint of nineteenth century scholarship nevertheless remains, often leading historians to conceptualize evolutions as “regimes”, in which comparable social factors are combined: professional groups, operators and classes granted with statuses. One way of avoiding essentialising bureaucracy, as Hintze himself studied it in the Prussian form, is to see it as a force field: the forces which can merge within this field relate to a functional implementation but remain fundamentally shaped by the pattern of each local political tradition.

Several chapters in this book attest that the state’s agents were not necessarily civil officers. It is consequently essential to grasp how some groups were more apt to construct and fulfill functions that served as the foundation of the bureaucratic regime of government. In Lamouroux’s account of the early Song case we can see in the intertwining influence of military and civil functions how bureaucracy can be seen as institutionalized force—the exercise of legitimate violence by other means. But this affinity between government and legitimate force is not

the only reason for the close association of fiscal-military development and bureaucracy. As Caselli and Ruiz Ibañez also note, in the absence of large and dependable tax flows, closely defined salaries (in respect of closely defined limits on the exercise of office) are difficult to achieve. This is perhaps one more reason why there is an affinity between bureaucratization and fiscal-military power, leading to the assertion that it is warfare that drove the development of the state; a relationship illustrated by Garavaglia's contribution. The monetization of war allows perhaps for the monetization of the administration of war, and that permits the development of a monetized bureaucracy at large.<sup>6</sup> In other contexts, securing collaboration, or co-opting elites as other literatures have it, entailed ceding monarchical control over the detail of administration.<sup>7</sup>

If we were to put this back into Weberian terms, it would probably not be through the construction of developmental typologies, but through the question of legitimation: historians have been more interested in the process of legitimating political action, and how that process interacts with social interests and linguistic resources, than in the progressive achievement of the monopoly of violence or the establishment of bureaucracy. Certainly, this is a question at the core of this book. However, at the heart of studies of the state are institutions, and varying institutional outcomes over time and across space, and the implications of these forms for social and economic life. This emerging literature would tend to see institutions as the outcome of dialogues of various kinds: regularized and routinized forms of legitimate action that successfully negotiate the conditions in which political power is sought and exercised.

Bureaucracy remains therefore at the heart of these questions. For a long time it was treated as something beyond social relations, but that is to accept its central legitimating myth—that the bureaucrat is transformed by his or her position into a neutral instrument of the public good, and that public good has been agreed and instantiated independently of the action in hand. In British history we might think of the contrast between a seventeenth century magistrate, acting as father of his country, or a village constable implementing a local 'concept of order', using their 'discretion' to see justice done in the light of local conditions and norms; and the modern bureaucrat operating uniform and transparent rules, with governed criteria of inclusion and exclusion, explicitly without discretion, in order to ensure equality. The bureaucratic legitimation of routine political action

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<sup>6</sup> Tilly 1990; Brewer 1989.

<sup>7</sup> Beik 1985.

depends on the assertion that bureaucracies are free of social interest, discretion and are efficiently directed toward the public good. Braddick's essay problematizes this distinction by examining the quotidian realities that lie behind these legitimations—the complex relationships between public good and private benefit, and the battles for status and position in the administration. Caselli examines this issue in detail, exploring the social practice of a particular group—judges and judicial officers in 15<sup>th</sup> and early 16<sup>th</sup> century Castile—revealing how, but considering them as 'agents', serving the monarchy, but also exercising their private office, reveals the tensions around their personal benefits. They negotiated the complex rules and legitimations that shaped their service of the Crown, and also the rewards they were allowed in return for that service. The forced tolerance of potentially ad hoc and informal payments created an area of contest, in which judges secured their own livelihood, and also incurred costs in defending it.

Many of the essays approach routine bureaucratic action as a social practice, particularly in contexts in which it can be seen as emergent, a newly agreed settlement on how to exercise political power in a routine way. In doing so they draw attention to the gap between legitimating languages and social practice—a gap in which the negotiation of political power took place. Ruiz Ibañez explores an equally fundamental political task in similar terms—the practice of personal participation in defence as a negotiation of complex and overlapping networks of influence and authority. Defence was only in the most abstract way service of the monarchy—much else was introduced into this practice by the dialogue with other social and personal interests. There is a mismatch between overarching studies of the Empire as an abstract institution, and local realities: “a far too institutional vision continues to predominate in most of the studies about concrete political realities; they therefore do not pay attention to the ways in which the local realities were inserted into the monarchy” (43). In one sense these complexities served to restrain the power of government: for Caselli, for example, provision of justice in fifteenth century Spain was an *act* of government, not simply the “procedural implementation of a predefined regulation or regulations” (3), and that entailed complexities which were on occasion formally resolved by the artful order to “obey but not to comply”.

As Garavaglia concludes on the basis of his wide-ranging analysis of the emergent Latin American regimes: “The notion, sustained repeatedly in many studies ... of the bureaucracy as an *apparatus* is totally inappropriate, as there was no apparatus external to society; there was only

a *network of social relations*” (113). Ingerflom goes further, demonstrating on broadly the same grounds how limited is the utility of the term state—that it embeds a model of “state-society” relations in our analysis, which bears little relation to the realities of social and political life in any period before the twentieth century (and, some would suggest, occludes our understanding of modern states too). The translation and substitution of *gosudarstvo* to or by state reflects the attempt to translate into the modern metaphor of an apparatus something that was not there, and that act of translation prevents us from seeing what is there. The same goes for the transformation of the East India Company, the subject of Raj’s essay. The dramatic transformation of one regime into another disappears on close inspection of the practice of the “company state”—what is often presented as a transition from commerce to empire reflects a more organic development from a corporation which conducted both to a directly state-controlled imperial presence.

Thus, we could see the negotiation of power as a contest between those exercising political office and social interests defined in terms of class, gender, age, ethnicity, and religious identity. How a social problem is defined, and how a deployment of political power is agreed as a solution to that problem, reflects in part the differential capacity of social groups to deploy political power. Administrative action bears the imprint of differentials in social, cultural and economic power. A particularly telling example of this might be the history of measures taken in relation to disease or poverty. For example how the plague bacillus, acting in broadly similar ways on all human bodies, came to be treated as a moral or religious problem, with clear class dimensions.<sup>8</sup>

On this view, of state action as a kind of social practice, there is an inherent connection between the formation of the state—the development of routines of legitimate political action, and the continuous negotiation of their interpretation and of innovation—and the development of political languages and material possibilities. Many institutional economists take this for granted, but tend to reify institutions: here we would see the development of state and economy as dynamically interconnected. Economic change affects the material conditions in which political action takes place—creating risks and opportunities, class interests and class conflicts—but the realm of the economically possible is also a product of the institutionalized practice of political power, which is the outcome of past negotiations of material conditions. A political or economic science

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<sup>8</sup> Slack 1985, 1988.

which seeks to isolate institutional forms from the social environment in which they are practiced will ignore the potential for particular rules and practices to be interpreted and used in very different ways in varying social contexts.

In recent studies of early modern England, these approaches have tended to come together around the analysis of the negotiation of power.<sup>9</sup> As Ruiz Ibañez put it “the king’s authority was absolute in his sphere of powers, but defining this sphere, and the hierarchy that was constructed among the powers that depended on his legitimacy, was contingent on the traditions and political culture of each one of the agents that participated in the administration of royal domination” (47). Such an approach does not dissolve the general entirely into a myriad of particulars; however, it can also reveal an underlying process to which the many local negotiations and outcomes were particular responses. From a governmental perspective, this might look like the mobilization of local energies in order to make a reality of claims to legitimacy, of which Will’s study of Qing administration offers a particularly enlightening example.

The essays presented here approach the exercise of public power from the perspective of the political actor. Refusing any sort of determinism, most of the participants chose to reflect upon the paths followed by groups which were aggregating to defend shared interests, develop alliances, resist or submit to forms of authority, create methods of intervention and fields of expertise, all these groups being differentiated by the specific vocabulary and body of knowledge they jointly developed. Thanks to archival documents, but also to the accounts that they wrote themselves, to the correspondence they carried on, and to statutory obligations or chronicles, we are able to catch a glimpse of these men’s practices and to tackle the question of their role. It is therefore possible to understand their motivations and ambitions, their ideals and sense of group consciousness that they advanced (or did not advance) within corporate organizations that were already established in the society. We can likewise reconstruct the alliances that they invented or consolidated as social and political resources, thanks to family ties, of course, but also through the relations which provided the basis of their sphere of activities and expertise. These groups created their identity partly through activities that allowed them to exercise long-lasting and diverse forms of domination: men of the law in Castile at the end of the fifteenth century or office-holders on both shores of the Iberian Atlantic; merchants and brokers of the East India Company

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<sup>9</sup> Braddick and Walter, 2001; Griffiths Fox and Hindle 1996.

in the shady world of Calcutta; clerks serving at the mint of Kanazawa in Edo Japan; private agents at the service of the tax authorities in seventeenth-century England; officers “attached to the palace” who set up a military bureaucracy in eleventh-century China. Moreover we can reverse the perspective: it is worth recalling that starting in the nineteenth century, the liberal state in the United States was built up durably under the pressure of communities that were organized in order to contest the legitimacy of the fiscal administration, and hence resorted to the most extreme forms of violence.

Beyond the content of all these historical cases, several approaches, which were often dictated by the sources, reveal how most of these groups sought to distinguish from each other and set themselves apart from the mass of those whose interests they “served”; they were capable of conceiving themselves as members of a professional milieu, which had its specializations, hierarchies, and standards for recruitment. We also saw how they could consolidate their own positions and make their interests coincide with those of the collectivity, how they chose (or did not choose) to put themselves at the disposal of the established powers, whom they recognized as eminent insofar as these powers were able to guarantee the long-term stabilization of their collective endeavor and nascent identity. In short, each contribution obviously strove to give substance to the “bureaucracies” thanks to the “networks” their agents constructed.

How then, on the basis of the history of the state “from within” might we explain the trajectories followed by particular states? We must avoid civilizational determinism, but perhaps take account of the way in which history, while not repeating itself, can often “rhyme” (Ollé, 415). Rather than invoke such essentialist arguments, and in place of developmental teleologies, we might instead trace how this local and negotiated history creates a kind of path dependency in political development. For example, Lamouroux traces how early Song bureaucracy had a situational logic in the demands of establishing dynastic authority in the localities using power that was in origin military, but without losing the administrative legitimacy of the central administration. One outcome sets the parameters for a future negotiation, with the result that different institutional environments have different situational logics—in the modern period, different national traditions. It is institutions that do this, by routinizing political power and setting the limits for the negotiation of any particular issue: plague, financial crash, technological changes affecting individual privacy and so forth. Huret shows how the negotiation of a tax administration which could generate sufficient money at an acceptable

political cost during the nineteenth century created a pattern of state finance in the US with which twentieth century politicians then had to work. Raj traces the evolution of Indian bureaucracy in a similar way, seeing changes to the educational formation of bureaucrats as a formalization and standardization of skills that company administrators had developed previously, and a pattern of skills which informed the political practice of the post-colonial state too. Garavaglia shows how regimes in Latin America were transformed by their rupture with the European past, and their trajectories shaped by the conditions of their own existence—for example a high dependency on foreign trade—but also how their encounter with the future was shaped by the legacy of past negotiations of power. Patterns of accepted and routine political action persisted as the basis on which to navigate the future, in this case, particularly, the persisting importance of family to the appraisal of suitability for bureaucratic office. In a complex polity like the Hapsburg Monarchy, as Ruiz Ibañez shows, this means though more than national diversity, a point that emerges more clearly for English historians by considering the diversity of settlements under Stuart authority beyond the English core—in Scotland, Ireland and the colonies of settlement.

On many of these paths the route taken reflects a negotiation between the interests of centre and locality. Pro looks at the development of public administration in the national state which only gradually emerged from the traumas of the Napoleonic period and its immediate aftermath. Here the emergent state entered into negotiation with peripheral regions which by virtue of their physical distance or relative weight, retained considerable powers to administer local affairs. The apparent uniformity of the emerging national state was thus diluted by inherited outcomes of negotiated power. Prior to 1890 local administration was the key to the actual functioning of the national state. Huret unpicks a similarly complex relationship in the USA during the same period, although one in which the hierarchy of powers was more formally defined and institutionalized. Here, the term state-building is perhaps more helpful than state formation, since there was a more purposeful creation of new patterns of political authority through the creation of the groups that were responsible for its exercise, rather than the more organic and undirected process which some other studies seem to have revealed. In Spain, from the late nineteenth century onwards, the full unfolding of a national administration was allowed by the development of a new cadre of individual officers, and we can observe a similar development in China in the wake of the turmoil of the 10<sup>th</sup> century. This process was actively resisted in the USA in the



nineteenth century, as it had been, for example, in England in the seventeenth. Tax gatherers were a focus for the contestation of power, and were gradually replaced by a tariff approach: collection at the point of production or transport defusing resistance and therefore lowering a transaction cost.

Underlying many of our discussions then was the analysis of the functioning of the state as a process and it is a theme that runs throughout the essays in this book. This process could be described as the “institution” of the domination of different groups, which is renewed through alliances, conflicts, innovation, and the sedimentation of various forms of their authority; in this way, the hierarchies historically imposed by these forms are progressively transformed as natural and legitimate regimes of authority. We thus reconsidered questions that have been the subject of long-standing debates: the relations between private interests and public service; the structuration of authorities at the service of leaders whose the leadership itself was open to competition in the context of a society of orders organized by hierarchical statuses; the identification of new forms of domination, whether they were institutionalized, for example, in the form of offices or they took shape when communities organized themselves to fight against this domination; the creation of routines and standardized procedures. But rather than trying to establish a unique model or set of typologies—charismatic and patrimonial domination or bureaucratic rationalization—of which the force of gravitation would explain the accretion of private dominations into a legal domination, we sought to demonstrate this accretion from the historical (thereby somewhat unpredictable) interaction between these groups, which were all in positions to exercise different forms of power. This approach also, perhaps, holds a potentially optimistic message. By considering these institutionalisations as the outcome of agency, and negotiation, we highlight the history of change and the mutability of the state. Structures of state are an extension of social relations and express ideas and values— institutions are an outcome of social practice, and changed social practice can create new, and better, institutions, and also the possibility of managing relations with large and complex polities in accordance with local realities, and aspirations. Behind this process lies a dynamic apparently capable of transforming “particular” collective interests, and not simple private ones, into public interests. The accretion of particular interests is made possible by the force of organized groups, well aware of their authorities and function, avid to conquer new positions while stabilizing those that brought them to the attention of the established

powers, whether they were imperial, regional or simply local. Readers are therefore encouraged to keep in mind some of these questions while considering each particular case explored here: how could the interests of a group embody, rightly or wrongly, the collective interest? How did this group succeed in particular in founding the defense of its own interests as the way of ordering the collectivity? How did this institution, in a self-aware and historically uncertain process, engender a powerful administration of things and at the same time, become a central element in governing men? In these conditions, how did a specific power take the form of a specialized service? How were the agents able to transform the prestige of the service owed to the public authority into a reproducible routine, inseparable from the power of the state? And, finally, how did that enable, but also limit the future negotiation of power in that particular polity?

Paris/Barcelona/Sheffield,

December 2014-October 2015

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## CHAPTER ONE

# RENDERING JUSTICE AND ADMINISTERING THE OFFICE: JUDGES AND JUDICIAL OFFICERS IN CASTILE DURING THE REIGN OF THE CATHOLIC MONARCHS

ELISA CASELLI

Justice in late medieval Castile has been studied countless times and from innumerable angles. The same observation could be made about the reign of the Catholic Monarchs [1475-1516] and the changes that occurred throughout the Hispanic world during this period. The spheres of governance were reorganized and, among them, the administration of justice received particular attention (Calderón 1999).

On this occasion, my objective will be to revise the fundamental characteristics of this essential area of governance and analyze, through the use of examples, the everyday activities of the judges and judicial officers. I will do this by studying normative sources (preferably law codes and rulings from the *Cortes*\*) and in particular by examining lawsuits and *cartas ejecutorias*\* that recount judicial trials. Particular attention will be paid to demonstrating the manner in which these agents served the monarchy and at the same time *privately* administered their own office. Firstly, a very short description of the organization of the judiciary in Castile during that period will be presented, as well as the salient traits of the Royal Council and Chanceries as the highest tribunals of the kingdom. Finally, I will emphasize two exceptional aspects of the judicial offices: the conviction of judges for having proceeded inappropriately, and the use of the courts to procure the effective payment of judges' salary and defend the benefits of their office. Most of the time, both aspects, which were used to safeguard and sustain the position, constituted two sides of the same coin; for example, when a judge tried to seize property that had been

confiscated as a consequence of a judgment that he himself had pronounced. On these occasions, the magistrate could move from being judge to being the denounced party (and the litigant) in the course of the same lawsuit. It should be clear that such incidents were not contingent on the judgment issued during a *juicio de residencia*\*, when it was applicable.

The absence of a centralized tax collecting system meant that the monarchy's servants received their pay through *situados*\* or orders of payment from the treasury, which were to be drawn from royal duties that a tax farmer or local tax collector had to pay (Ladero 2002). In addition, the practice was tolerated whereby the agents guaranteed their own livelihoods through the daily exercise of their office. This *forced tolerance* was a consequence of the impossibility of carrying out effective audits, and of the almost chronic deficit of the Royal Treasury. Specific cases will be cited here to illustrate how these public servants administered, privately or individually, their pay and emoluments; they had to bear the costs and expense of defending them, even the judicial procedure that it could entail.

## Justice and its Administration

“Justice is one of the virtues by which the world is best and most veraciously governed...” The definition of “Justice” is introduced by these words in Hugo de Celso’s compilation, which was published around 1538 (De Celso 1538). For Díaz de Montalvo, justice was the most perfect of all virtues; a virtue that consisted essentially in giving to each individual what he deserved.<sup>1</sup> I should begin this section by emphasizing that *juridical inequality* was one of the principal characteristics of the period that concerns us here. This fact should be borne in mind when addressing any

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<sup>1</sup> “*Porque la justicia es muy alta virtud e por ella se sostienen todas las cosas en el estado que deben e es perfecta más que todas las virtudes porque comunica e participa con todas e distribuye a todos e a cada uno su derecho.*” “Because justice is a very lofty virtue and thanks to it, all things are maintained in the state that they should be in and it is more perfect than all the other virtues because it communicates and participates with all the other ones and distributes to everyone and to each one its right”. Díaz de Montalvo, Alonso [This untitled original work is generally known as *Ordenanzas Reales de 1484*; it is a compilation of laws and pragmatic sanctions that Díaz de Montalvo assembled, so as to comply with an order from the Catholic Kings and which he finished writing, according to what the manuscript states, in Huete in 1484].

subject related to justice, as it implies that everyone possessed a *quality* acquired by birth, and reflecting the estate they were born into; their social horizon was shaped according to it. This *quality* was difficult to modify but was in no way immutable, and it is important to emphasize this aspect. To affirm the contrary would be to deny the existence of any type of social mobility and nothing could be less true. Changes did take place, and these variations often meant a modification of the person's juridical status, which in turn involved alteration to what the individual was thought to deserve, namely, what he *should* receive in accordance with his new social condition. That was what was *just*.

The quotation which opened this section, however, contains another idea that deserves to be underlined: justice was conceived of as an *act of government*. The absence of a division of powers meant that, as Professor Tomás y Valiente (2000: 89) rightly noted, the act by which a court pronounced a sentence was seen as something more than a judicial act in the strict sense of the word, to wit, a unique, procedural implementation of a predefined regulation or regulations, as the prevailing tendency has defined it since the Enlightenment. Such a sentence also represented “an act of government, in function of which the judicial act was permeated by a series of considerations, which transcended the simple, singular justice of the case that was being considered and resolved procedurally”. In addition to dispensing justice, each agent that served as a judge was entrusted with various tasks related to governance. He could be in charge of supervising the maintenance of streets, preserving public order or appointing men to certain offices, to cite a few examples. This duality of the judge's attributes was present on both the local level for the *alcaldes ordinarios*\* or *corregidores*\*,<sup>2</sup> as well as on the highest echelons for the members of the Royal Council or the Chanceries.<sup>3</sup>

At this point, it is essential to keep in mind a concept that is fundamental when we refer to justice in this context; it is *inherence*<sup>4</sup> in the most literal sense of the word, between religion and political power, for it defined the Spanish kingdoms for centuries. Its most evident expression can be found in the conception of the monarchical institution as sacred and

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<sup>2</sup> An interesting analysis of a case can be found in Cortés 1999.

<sup>3</sup> As for this institution, see Gómez 2003, *passim*.

<sup>4</sup> According to the *Diccionario de la Real Academia Española*, “*inherencia*” (from the Latin, *in haerentia*) can be defined as a union of things that are inseparable because of their nature, or that only can be separated mentally and through the process of abstraction.

the king being designated by God. It was believed that he was God's vicar on earth so as to render justice in the divinity's name. According to the theory of the jurists of that era—including those that have been cited above—*divine grace* endowed the king with the *monopoly of grace*, from which the royal prerogatives were derived (among them, for example, the competence to suspend the implementation of a law in certain cases); his was the highest rank of justice in the kingdom. Dispensing justice in itself was consequently an act of government and the image of the “Just King” was one of the most enduring representations of the monarch (Hespanha 1989: 220). As we know, the king was, above all, a judge. He possessed supreme jurisdiction over the kingdom. Thanks to this *summa potestas*, the king could delegate *jurisdiction*, both in *señoríos\** and in cities. Each jurisdictional sphere reproduced the act of *governing* that space when dispensing justice; it could even be considered the principal act.

Within these parameters, justice acquired a dual dimension. On the one hand, as *distributive justice*, it depended exclusively on the monarch; by virtue of it, he could make use of his magnificence and liberality by awarding graces and *mercedes\** to individuals according to their merits. On the other, *commutative justice* dealt with the cases that involved negotiations over conflicts that men had amongst themselves; in such cases the king had the last word. Thus, prescription presupposed that the administration of justice functioned (or *should* function) according to a pyramidal order, in which the monarch would be placed on the vertex (Calderón 1999: 31).

Along with the king, the members of the *Consejo Mayor del Rey\** or *Royal Council* had supreme jurisdiction; they could, in turn, appoint judges to carry out inquiries (*jueces pesquisidores\**) or serve as their delegates with the specific mandate to pronounce sentences (*jueces delegados\**). In addition, the *Alcaldes de Casa y Corte\** formed part of the personal sphere of royal justice (they did not generally hear appeals nor did they send investigators more than five leagues beyond the site where the Court was established). They also had the authority to hear the same types of lawsuits as the aforementioned judges and together they made up what can be considered as the highest legal authority. The *Royal Chanceries* (or *Court and Chancery*) and the *Audiencias\** would be found next (with the difference that their members had to reside permanently in the institutional seats).

Below this were the *Adelantados\** or the *Alcaldes de Adelantamientos\**—the *adelantamientos* or *merindades\** corresponded to territorial divisions that originated in the thirteenth century and were appointed by the king to



“rule and govern” in his name. They had the power to judge and try the appeals that were lodged before the *alcaldes* of their province.

On the local level, *alcaldes ordinarios\**, *alcaldes mayores\**, *corregidores\** or their deputies could administer justice in the first instance; *adelantados\**, governors or their assistants heard appeals (and also in the first instance, provided that they resided in the jurisdiction). The institutions that were appointed to hear specific cases, such as the *Alcaldes de las sacas y cosas vedadas\**, *Alcaldes de la Mesta y cañadas\** or the *Alcaldes de la Hermandad\** should also be included here.

All of the offices that have been introduced so far presupposed two fundamental attributes. Firstly, they were functions that derived, directly or indirectly, from royal instances, that is, they were administrators of royal justice. Secondly, these offices were defined as being *ordinary*, which meant that these judges heard all cases that occurred within the area of their jurisdiction. In contrast, there were also *delegated judges* or *commissioned judges*, who, again by royal mandate, were assigned to take responsibility for a particular case. The royal notaries and accountants of the Royal Treasury should not be overlooked here, for they also had the authority to act as judges, especially when the lawsuits had to do with royal revenues (De Celso 1538; De las Heras 1996; Calderón 1999).

The orbit of the administration of justice did not end there. Broadly speaking, an identical administrative organization was replicated in the jurisdictional spaces that the monarchy ceded to the lords who, in turn, delegated powers to govern, including the authority to levy taxes and render justice (Bernardo 1996: 52). Although variations existed based on the size of the *señorío*, we would generally find there: *alcaldes ordinarios* (generally chosen by the lord, at the proposal of the council), *corregidores* (selected by the lord), *audiencias* (with their judges and sometimes with the office of president and judges) and the lord, as the highest instance in his jurisdiction (García 1996: 215-216). The law stated that under certain conditions, a vassal could subsequently appeal to the royal justice. The highest royal tribunals were obliged to respect seigniorial justice, and limit themselves to hearing appeals, as long as all the instances had been exhausted within the lord’s jurisdiction or if the lawsuit involved the lord himself. Nevertheless, if a vassal managed to prove that his rights were not necessarily going to be respected, he could appear directly before the *Audiencia*.

The administration of justice did not entirely derive from the monarch. As is well known, there existed, at the same time, the very active system of ecclesiastical justice, which had no qualms about interfering in the

spheres of royal jurisdiction—a principal object of concern during the reign of the Catholic Monarchs. It is not at all fortuitous that in the description of each one of the aforementioned judicial offices, those that wrote the laws of this period took care to remind the men that held offices that it was their responsibility to prevent the “ecclesiastical judges” from interfering, and to defend the royal justice that they represented. In the ecclesiastical *señorios*, both the juridical foundation (canon law) and judicial organization (the Court of Justice of the Diocese) acquired specific characteristics, and needless to say, their legitimacy did not derive from royal justice. In practice, the ecclesiastical administration functioned in a similar manner, with offices such as judges, deputies, royal prosecutors, notaries, and lawyers; they even spoke of the “bishop’s *alcaldes*” or the “bishop’s *oidores*”<sup>5</sup> in the procedural jargon. As for appeals within the system of ecclesiastical justice, the verdict of the bishop or archbishop was appealed before the primate of the ecclesiastical province and afterwards, an appeal could only be made to Rome (sometimes the procedure went directly to Rome after the bishop’s ruling). Nevertheless, in the workings of everyday justice, the sentences pronounced by bishops could equally be appealed before the *Audiencia*. When the right to appeal was not granted, the appellant could make a direct presentation to the *Audiencia*; if the judges accepted his appeal, a jurisdictional dispute could certainly arise between the instances of ecclesiastical and royal justice.<sup>5</sup>

### **Concurrent Jurisdictions: Indeterminacy and Conflicts**

Jurisdictional overlaps, which were so common in the period under consideration, led to incessant conflict. It needs to be emphasized that these clashes were not limited to disputes between the royal, ecclesiastical, and seigniorial legal spheres, for they also occurred within the realm of royal justice. Jurisdiction (*iuris dictio*) in itself implies the power to construct, in the words of Pérez-Prendes: “a value judgment masked by coercion” (1996: 144). In order to make use of a jurisdiction, however, it is

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<sup>5</sup> This assertion, just like others that are expressed in this article, refers to aspects of procedural practice revealed in the trials or by the positions of diverse social agents expressed in them, except if a specific source is cited; I have made these assertions based on the careful reading of more than six hundred lawsuits, *cartas ejecutorias*, and reports about cases to the judge (*relaciones de causas*), that are preserved in the *Archivo General de Simancas* and especially the *Archivo de la Real Chancillería* of Valladolid.

necessary to have “cognizance”, which is first defined by considering for whom and for what reasons a specific judge can intercede, and, then, at what moment or instance in the course of the lawsuit he has this right (Pérez-Prendes 1966). The functions and levels of jurisdiction that were assigned to each one of the judicial offices were frequently replicated in different posts, or they were not defined with the requisite clarity. This ambiguity meant that in the same town, for example, different officers considered themselves legally qualified to try the same case. In other words, a crime could become *judgeable* by diverse judges (or “justices”, as they are called in the documents). This lack of precision allowed the litigants to take legal action before different judges, which could lead to parallel lawsuits or a jurisdictional dispute for the continuation of the lawsuit. In this respect, the *fuero*\* (derived from factors such as belonging to the Church or military, or having a specific place of residence) constituted a fundamental aspect. According to how it is appreciated, a *fuero* can easily be considered a *competence*, seen from a tribunal that was mindful of its jurisdiction, or a *right*, seen from the point of view of the defendant, who could contend that he was being deprived of his rights and privileges.

Lawsuits that reveal concurrent jurisdiction are certainly not scarce.<sup>6</sup> They not only document the clash of the ecclesiastical, seigniorial and royal justices when they invade each other’s jurisdictional sphere, but also confrontations among the agents who exercised royal justice. Let us take as an example the *Alcaldes de la Hermandad*, who could only hear cases that involved the theft of personal property or damage to it, as well as the kidnapping and rape of women (if they were not prostitutes); they also judged assaults, murders, and wounds that occurred on routes, provided that they occurred in virtually uninhabited areas (meaning fewer than thirty *vecinos*\*). Nevertheless, this restriction was no longer applicable if the case involved any member of the *Hermandad* or his family members; in these situations, they could hear both civil and criminal cases (De Celso 1538; López 1921; Martínez-Gómez 1996). They could also intervene in all the crimes that were committed in the town where the *Hermandad* was in session. In practice, this lack of definition led to interminable conflicts with *alcaldes ordinarios* and *corregidores*.

The provable overlaps did not end with the aforementioned examples. As Hespanha rightly points out, documents also reveal vestiges of the

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<sup>6</sup> This phenomenon did not just occur in the Hispanic Monarchy. For the case of France see Toureille 2013.

vigorous coexistence of oral justice (1993: 21). It has also been called a lay justice (or even “unlettered”), or an “infrajustice” (Mantecón 2002), which did not leave any trace other than tangential references in the written lawsuits. It was a form of justice that complied with an alternative juridical order. The men that judged were not generally career officers but *honorable* people that were local notables, chosen on grounds of prestige and not for their technical qualifications. Their profound knowledge of what was *just* or *unjust*, defined in terms of local custom, was not easily replaceable. The parties involved selected these “arbiter judges” or “compromise judges” by mutual consent; the arbitrators could proceed “as if they were ordinary judges” and pronounce their “rightful verdict according to the merits of the lawsuit”, that is, they followed the course of a trial even if it were conducted orally. There were also, however, the so-called “amicable arbitrators”, who “because of their goodwill” sought to “extricate the dispute” without having to have recourse to a real lawsuit.<sup>7</sup>

This lay justice aimed to create a consensus among the disputants and sought to avoid the definitive, irremediable defeat of one of the sides; by trying to get both parties to give up something, it tried to procure the maintenance of a stable equilibrium (Hespanha 1993). In any case, even if both sides initially agreed that the arbiter judge should intervene, it was not uncommon that one would accept him at first, but later would appear before the *corregidor* or *alcalde* even while the case was still being argued; two overlapping sentences could thus be pronounced. Another possibility was that one side could appeal to the formal system of justice after the oral sentence. Thanks to the petitions, appeals or depositions of witnesses that refer to these situations, we possess written testimonies about the oral intervention that “compromise judges” made.

It is also important to point out that while religious minorities existed in Castile, both the Jewish and Muslim communities had their own judges, who possessed the power to resolve internal disputes. They could try civil as well as criminal cases, although from the last quarter of the fifteenth century, their authority tended to be restricted to cases of civil law. The official course of appeals would lead first to the *major judge* of each community and then to the Royal *Audiencia* or Council. Nevertheless, the litigants appealed to the tribunal that would best accommodate their interests, just as the Christians did. They did not therefore restrict themselves to the judges of their own communities, which at once gave

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<sup>7</sup> The expressions that have been put in quotation marks in this paragraph were taken from Hugo de Celso 1538.

rise to jurisdictional overlaps and parallel lawsuits were frequently pursued (Caselli 2008).

## The Highest Tribunals of the Kingdom

It was only in the provisions that were issued by the *Cortes* of Toro in 1369 and 1371 that the objectives for the *Audiencia* were established and fixed, even if documents dating back to the first half of the fourteenth century have been located that speak of “the judges of the king’s *Audiencia*” (Díaz Martín 1997: 20). In the ordinances from those years the mission of the *Alcaldes de corte* was defined, and it was resolved that an *Audiencia* would be formed. Seven judges were assigned to it. They were to meet “to hold *Audiencia*” where the king was and, in his absence, in the church where the Chancery or royal seal was. Although it was decreed in 1447 that the Chancery would have its permanent seat in Valladolid, the real organization of the high tribunal was only undertaken during the reign of the Catholic Monarchs.

From the moment of its establishment, the *Audiencia* represented the person of the king; consequently, the decisions that the judges took collegially became unappealable. The documents state: “in our Court and Chancery, before the judges of our Royal *Audiencia*”. The institution possessed a unitary status, although each name had a distinct meaning: *Audiencia*, the supreme royal tribunal; *Chancery*, the keeper of the seal, and *Court*, to manifest the pre-eminence that the royal presence, symbolized in the seal, conferred on the *Audiencia*. The authority that the Chancery had in the kingdom was founded on the fact that it was the keeper of the *king’s great seal*. The origin of this elevated position can be found in the division that was instituted at the end of the thirteenth century, during the reign of Sancho IV, when it was decided the highest tribunal of justice would keep the seal, while the “secret” seal would remain with the king in his residence. The king’s great seal, which was used to validate with lead the most solemn ordinance and privileges written out on parchment, was complemented by metal seals for validating letters and provisions issued on paper. The seal represented not only royal *potestas*, but the king himself; the ceremonial that accompanied the use of the seal existed precisely to remind the onlookers of this fictitious presence (Garriga 1994: 221-229).

In its origin, the jurisdictional confines of the Chancery of Valladolid (the first to have been created) were coincident with the jurisdiction of the king and Royal Council. In 1494 it was divided on the establishment of the

Chancery of Ciudad Real, which was later moved to Granada. The new *Audiencias* that were created starting in the sixteenth century had more strictly demarcated jurisdictional spaces, at least in Europe. It was certainly not the case in America, where the magnitude of the territory made it necessary for each institution to oversee much vaster areas with diverse levels of jurisdiction. In any case, their inclusion allowed for a greater proximity to the highest tribunals of royal justice.

The *Audiencias* and Chanceries fundamentally tried, in the first instance, what were called “court cases”. Also, they were authorized to hear lawsuits that originated within five leagues of the place where they resided [the so called *rastro* jurisdiction], in competition with the local ordinary justice. In spite of the restrictions that the Catholic Monarchs attempted to impose on judges and *alcaldes* in the matter of ordinary cases, so as to advantage the local agents of justice, confrontations continued between the *regidores* and *alcaldes* of Valladolid (the same also occurred in Ciudad Real and then in Granada), which proves that the magistrates did not easily resign themselves to losing their competence. On the level of appeals, they heard all those that were lodged against sentences pronounced by any ordinary or delegated judge. As instances of royal jurisdiction, they were also authorized to hear appeals issued from areas that formed part of *señoríos*.

During the period under analysis, the Chancery of Valladolid was composed of a prelate<sup>8</sup> as presiding magistrate, four *oidores*, though they were soon increased to eight (they passed sentence in two courtrooms with four judges in each one), three *alcaldes de Corte y Chancillería*, commonly called *alcaldes del crimen\** (although the distinction between jurisdiction in civil and criminal cases was not always clearly respected), the major judge of Vizcaya, who paid special attention to the appeals lodged from the *señorío* of Vizcaya, two *alcaldes de hijodalgo* and three provincial notaries, who instituted proceedings in lawsuits about royal taxes (Garriga 2007: 39). The composition of these tribunals was rounded off by the presence of clerks (for hearings and receiving evidence, a task that could involve making copies for its commission), investigating officials, a collector, public prosecutor, a lawyer, attorney for the poor, two doormen or porters at the front door of each courtroom, two officers of the seal and registry, a bailiff and a jailor (de Celso 1538).

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<sup>8</sup> The requirement that this highest authority of the *Audiencia* was a bishop was maintained at least until the middle of the sixteenth century, which did not mean necessarily that he was no longer an ecclesiastic after that date.