

Economic policies and bankruptcy institutions: Brazil in a period of transition from colony to an independent nation.

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Summary

This paper studies the legislation on bankruptcy enforced in Brazil by D. João VI (1808-1821) and shows how this legislation was used in this period as an instrument of protection to certain specific economic activities. On one hand, it has the deliberate purpose of incorporating institutions to the study of the Brazilian Economic history, based on the assumption that the lack of interest in the role played by institutions has undermined a better understanding of the economic development of the country in the Nineteenth Century. On the other hand, this paper has the purpose of bringing subsidies to a re-assessment of the economic policies enforced in the period. In fact the study of bankruptcy legislation suggests that the main concern of the government was then to promote the development of the activities directly related to gold and sugar exports. Therefore the general and popular acceptance of the revolutionary character of the economic policy in this period is challenged.

Key words: institutions, bankruptcy, D. João VI, legislation

Sumário

Este trabalho estuda a legislação sobre falências implementada no período Joanino (1808 – 1821) e mostra como essa legislação foi usada no período como um instrumento de proteção a determinados setores da atividade econômica. Por um lado, o trabalho tem o propósito deliberado de incorporar as instituições no estudo da história econômica do período, considerando que um descaso sobre o papel das instituições na história da economia do país tem prejudicado um melhor entendimento do desenvolvimento econômico observado no país ao longo do século XIX. Por outro lado, o trabalho tem o propósito de trazer subsídios para uma reavaliação da política econômica de D. João VI. De fato o estudo da legislação sobre falências implementada no período sugere que o principal objetivo do Governo era promover o desenvolvimento de atividades direta ou indiretamente relacionadas à produção de ouro e açúcar. Portanto, o trabalho questiona a visão da política econômica joanina, como uma política econômica revolucionária, visão predominante entre os historiadores econômicos.

Palavras chave: instituições, falências, legislação, D.João VI

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Economic policies and bankruptcy institutions: Brazil in a period of transition from colony to an independent nation.

Introduction

Changes in Brazilian bankruptcy law introduced in Brazil in 2004 providing better conditions for the recovery of indebted firms have been seen as a major step towards modernization of the Brazilian legislation. The new law expresses a greater concern of economic policy with growth and employment rather than with the safeguard of creditors' rights. Such trend is not new in Brazilian history. It prevailed in colonial times as part of a package of incentives given by Portugal to promote economic activities in its colonies according to the purposes embodied in the mercantilism policies then prevailing.

Considering the definition of institutions as “the rules of the game in a society, or more formally...the humanly designed constraints that shape human interaction”,² one may not say that the relevance of institutions in shaping Brazilian economic development in the Nineteenth Century has been either denied or ignored by economic historians. However, studies of these impacts have not followed the principles and methodology suggested by recent literature. The effects of institutions on economic growth have been mostly assumed and not duly investigated. Consequently, some spurious relationships of cause and effect have been established and become widely accepted. This has been the case, for instance, of one type of institution, the rules embodied in legal texts. On one hand, such institutions are many times called forth to explain developments that took place in the economy without major investigation regarding their ability to account for the phenomena observed. On the other hand, the possibilities that such institutions may be the explanation for the course of certain events are frequently not even taken into consideration. Even though some exceptions may be always mentioned, these attitudes reveal a certain lack of interest in the real role played by legislation in shaping the observed development. Laws have not been properly studied, leading economic historians either to ignore significant institutional changes, or to misinterpret them.

The study of the origins of Brazilian industrialization in the Nineteenth Century is a good example of this claim. Although the literature has emphasized the role of protective policies as responsible for attracting investments in industrial production, most of these studies are restricted to fiscal privileges: concession of financial subsidies, exemption or reduction of import tariffs on machinery and inputs, prohibitive import tariffs on similar products, etc. Such privileges, either reducing the costs of production for domestic firms or enlarging the demand for their products, would have given rise to more favourable forecasts regarding the profitability of the sector. Protection given to industry by means of other institutions, such as bankruptcy legislation, has been overlooked. Notwithstanding, prevailing bankruptcy regimes may have significant effects over the economy performance and changes on such regimes have been used from colonial times to our days as one of the protective devices intended to direct investments to specific sectors .

Any person or firm unable to pay their debts is insolvent. If their state of insolvency is legally recognized, they become bankrupt. Once acknowledged as bankrupts, the payment of their debts must be done according to bankruptcy laws and, when is the case, they may become subject to legal penalties, According to legislation in

²Douglass North, *Institutions, Institutional Change and Economic Performance*, Cambridge USA, 1990

force, losses from individual bankruptcies may be extended to firms as long as they are entirely or partially owned by bankrupt individuals. Thus, the bankruptcy of a firm may result from bad administration - fraudulent or not - , from unfavourable fortuitous business conditions and from individual bankruptcies of their owners.

The consequences of firms' bankruptcies are not restricted to the expulsion of inefficient firms from the market. According to the nature of the firm, its size, and the characteristics of its production process, such consequences may be extended at different rates of speed and different degrees of intensity to other firms and sectors. Considering that bankruptcy laws establish the legal limits to property rights of creditors and debtors, alterations in those laws and changes in those limits may have significant results on the performance of the economy as a whole.

Changes on bankruptcy laws have different effects not only among different firms but also among different agents involved directly or indirectly in the productive process of this firm. Legal measures protecting the property rights of the owners over the firms' assets certainly reduce their individual risks. Such a reduction in risks, everything else constant, will favour investments in these firms and, as far as labour is concerned, it will provide a safeguard against unemployment in the case a firm becomes insolvent. However, it must be considered that, given such increased protection, the firm may face credit restrictions as creditors may see their property rights adversely affected. Therefore, the concession of privileged bankruptcy legislation for specific firms or sectors may work as efficient device of protection only if their protective effects are not counteracted by the adverse effects on credit restrictions.

The purpose of this paper is to investigate the use of bankruptcy legislation as one of the instruments of economic policy used by the Government of D. João VI (1808- 1821) by means of a thorough examination of the legal texts promulgated in this period. The assumption is that the bankruptcy legislation of D. João VI was part of a package of measures of economic policy enforced with the main purpose of increasing revenues collected by the government in order to attend to the increased costs of the Portuguese administration. This policy, stimulating investments on the production of commodities like gold and sugar, had long run effects on the development of the Brazilian economy in the Nineteenth Century, delaying the emergence of an industry. It is not the purpose of this paper to test such correlation as the data available would not be able to provide reliable results.

The period to be examined is particularly interesting in Brazilian economic history, as it is a period of transition from a colonial government to an independent one. In fact, as far as Latin-American countries are concerned, the transfer of the Portuguese Court to Brazil, in 1808, and D. João VI stay in Brazil until 1821 created conditions for a singular experience of transition from colonial to independent status. Not only the transition was relatively peaceful but it did not imply a drastic rupture of institutions. On the contrary, as it has been pointed out by some authors, the government of D. João VI restricted itself to transplant Portuguese institutions to Brasil. In fact, as to the administrative apparatus required by the Government to exercise its functions from its new seat, it was copied from Lisbon, without taking into consideration the peculiarities of the new place where the court was being established.

However, the impact of a great and most diversified set of external factors called for changes in the institutions. Such changes were introduced towards legislation suitable to the new role to be played by the colony under the new circumstances. New institutions were created and old ones modified in order to build an institutional structure compatible with a new economic and political situation. The new institutional arrangements, result of exogenous factors, were left as heritage to the independent Government of D. Pedro I in 1822.

The study of the legislation on bankruptcy enforced by the Government of D. João VI not only allows the incorporation of a new variable to the study of economic development in the period but it also reveals some of the purposes of the economic policy enforced. This paper aims not only to present the body of legislation on bankruptcy created or modified in the period, but also to throw some light on the reasons behind such innovations. By doing so, it expects to contribute to a general review on the nature and characteristics of D. João VI's protectionist economic policy.

As to insolvency is concerned, D. João VI legislation followed the same pattern of Portugal towards its colony. No general law on bankruptcy was promulgated until 1850, but protection to insolvent firms were given to firms operating in specified sectors in order to stimulate investments in those areas more likely to produce higher revenues to the Government.

The exam of the legislation on bankruptcy enforced by the Government of D. João VI, does not only allows the incorporation of a new variable to the study of economic development in the period but also reveals some of the purposes of the economic policy enforced. Thus, this paper aims not only to present the body of legislation on bankruptcy created or modified in the period, but also to throw some light on the reasons behind such innovations. By doing so, it expects to contribute to a general review on the nature and characteristics of D. João VI's protectionist economic policy in Brazil.

The first section describes changes introduced in the Portuguese legislation on bankruptcy law, before the arrival of D. João VI in Brazil, with the purpose of stimulating investments on those activities most capable of producing revenues for the metropolis: gold mining and sugar production. The increase of such protection towards gold and sugar activities in the government of the D. João VI is examined in the following section. The third section investigates the incentives given for the constitution of capital partnerships and presents the bankruptcy legislation for gold mining societies. The fourth section shows how bankruptcy laws were adjusted to deal with the joint stock companies authorized to be constituted in the period. The conclusions are presented in the last section.

1. Bankruptcy laws in Colonial Brazil previous to the transfer of the Portuguese Court to Brazil: privileges for miners and sugar producers

In the colonial period, the Portuguese laws were enforced in Brazil: the *Ordenações Manuelinas*, from 1521 to 1603, and the *Ordenações Filipinas*, thereafter. As to bankruptcy, these legislations did not establish a clear distinction between insolvent individuals and insolvent firms, and did not show any special concern in setting conditions for their rehabilitation.

The *Alvará* of 13 November 1756, enacted by the Marquis of Pombal a year after the Lisbon Earthquake, has been considered by some jurists a landmark in the history of Brazilian legislation on bankruptcy by introducing “very original and authentic proceedings in commercial courts restricted to merchants, traders or business men”³. This *alvará* had the purpose of rehabilitating credit at the Lisbon market, which was chaotic since the earthquake of 1 November 1 that caused a great number of bankruptcies and encouraged fraudulent actions on the part of debtors⁴.

As a first step, the bankrupt was to present himself at the Commercial Court. On the same day –or, at most, on the following day- he was supposed to pay his debts

³ Waldemar Martins Ferreira, *Instituições de Direito Comercial*, 5^o ed., São Paulo, 1955, p.20. *Alvará* was a royal decision that, at least in principle, had a temporary character.

⁴ The main objectives of this *Alvará* are stated in its introduction. This *Alvará* gives a new version to be enforced from then on to the Title LXVI of the *Ordenações* Book V.

according to the contracts. He also had to declare all his possessions, present his books with all entries chronologically registered, declare under oath the causes of his insolvency and hand over the keys of his establishment. After that, an inventory should be made of all his possessions that would be deposited in Court and entrusted to the responsibility of a businessman officially nominated as depositary. Then, news about the bankruptcy should be duly published so that all those interested could manifest themselves. Once this first stage was concluded, a lawsuit would be filed. If the bankrupt were considered guilty, he would be put in jail and submitted, later on, to a trial. Finally, all the bankrupt's possessions would be publicly auctioned. Out of the liquid proceedings from such auction, ten per cent would be put aside for maintenance expenses of the bankrupt and his family, in case the bankruptcy process was not considered fraudulent. The remaining liquid proceedings would be distributed among the creditors.

In spite of the general bankruptcy legislation in force, new legal texts were issued from time to time granting special privileges to some specific sectors that the Government intended to protect and stimulate. In fact, as early as 1618 all the mining enterprises in the *capitanias* of São Paulo and S. Vicente were exempted from impoundment and execution, independently of their sizes⁵. Such a privilege was part of a set of incentives to promote the discovery of new gold deposits in the region. In the 1750's, when, after reaching its peak, gold production started decreasing, this privilege was extended to all miners with more than thirty slaves.⁶

A significant reduction on the revenues collected by the Portuguese Government, resulting from the decrease in gold production in the second half of the Eighteenth Century as well as from increasing tax evasion, led the Portuguese Government to intensify its protection to gold miners. As the decline in gold production was seen as a result of the exhaustion of deposits which could be explored at low costs, the Government started stimulating the organization of capital partnerships. Such partnerships were expected to be able to attract the amount of resources necessary for gold mining under the new circumstances.

The Alvará of 13 May 1803 introduced a new regulation for the organization and administration of diamond and gold mines in Brazil with the purpose of increasing their production and avoiding tax evasion. This *Alvará* gave privileges to companies and capital partnerships but did not include any references to the bankruptcy regimes to be followed. According to the first paragraph of article VI, preference should be given to companies and partnerships in the distribution of mineral lands that required more labour and diligence. And the following article prescribed, that in the case of swollen rivers, work should be given to companies because "...for their work, much more larger expenses are necessary, superior to the faculties of only one individual..."

These capital partnerships and companies should be incorporated by initiative of the General Mining Intendant and supported by the Administrative Council of Mines and the Governor of the *capitania*. The share of those companies and partnerships would be divided among the partners or shareholders according to the number of slaves they had provided. The expenses would be shared by all shareholders according to the number of shares they owned.⁷ Even though this *Alvará* made no innovations to the bankruptcy legislation, it brought about strong incentives for the formation of companies and capital partnerships in gold mining. Once, later on, partnerships under the format of joint stock companies started being formed they required specific regulation on bankruptcy. Such regulation was given to each one through their statutes.

⁵ Alvará of 8 August 1618, § 13.

⁶ Decree of 19 February 1752 and Resolution of 22 June 1758.

⁷ *Alvará* of 13 May 1803, article VII, paragraph 3. Out of the 128 shares which would form the capital's company's, two shares would go to the Government and were not subject to the payment of expenses.

Special bankruptcy legislation in the colonial period was not restricted to gold mining. It was also extended to sugar producers. By the Resolution of 22 September 1758, and the Provision of 26 April 1760, the ownership of sugar mills and sugar farms in Rio de Janeiro were exempted from impoundment and execution for payment of debts, execution being restricted to the profits. In 1807, those benefits were extended to all Portuguese ultramarine dominions.⁸

In the case of the gold mining sector, it is reasonable to assume that this special legislation on bankruptcy encouraged investments, even though the available data does not allow a quantitative measurement of such effects. The high degree of uncertainty associated to gold mining activities in this period was reduced by the legal guarantee that the enterprise's assets would not be lost in case of bad luck and consequent bankruptcy of the owners. As the capital value of the enterprise was almost restricted to the value of the slaves for whom there were alternative uses, it seems clear that such exemption from pledge and execution was welcomed by potential investors. As slaves, working or not, have to be clothed and fed, the costs of keeping an operative mine were quite negligible. Thus, as variable costs were relatively low, it is reasonable to think that a miner at this time did not have to recur to loans for working capital. Therefore, it is possible to conclude that any adverse effects on the credit side, if any, were minor ones.

2. The transfer of the Portuguese court to Brazil and the maintenance of protection for gold and sugar activities by means of special legislation on bankruptcy

Protection for gold and sugar production by means of special legislation on bankruptcy was maintained in the Government of D. João VI (1808-1821). References in the literature to the economic policy enforced in the Government of D. João VI (1808-1821) have emphasized incentives given to the industry. Such emphasis is comprehensible, considering that one of the first measures adopted by D. João VI after his arrival in Rio was to abrogate the prohibition related to the production of cloth in Brazil.⁹ Freedom given to industry and the opening of Brazilian ports to international trade on 28 January 1808, may have suggested a departure from previous mercantilist policies.¹⁰ However, an analysis of the legislation makes it clear that the purposes of the economic policy were still predominantly mercantilists. Brazil, either as a colony, or as part of the Reign of Portugal, was expected to go on producing primary commodities and providing increased revenues for the Royal Treasury. The study of this period's legislation reveals those objectives and points out the sectors that received more incentives: iron and gold mining, transport, colonization and banking. This section will examine such incentives in order to detect privileges related to special bankruptcy regimes in the case of gold mining and sugar production.

Reliable data on Brazilian exports during the colonial period are not yet available. However, even if estimates from contemporary sources diverge significantly in absolute values, they tend to coincide in relative values. There is no doubt that gold and sugar were responsible for most of Brazilian exports during colonial times.¹¹ However, by the first decade of the Nineteenth Century, mining production was in frank decline and sugar exports, even though in recovery, were far from levels reached in the

⁸ Alvará of 6 July 1807.

⁹ The Alvará of D. Maria I on 5 January 1785 prohibited the production of cloth in Brazil, except cloth for "use and dressing of slaves, for sacking and wrapping cloth and other similar uses." By the Alvará of 28 April 1809 everyone in Brasil and in other Portuguese Domains became free to establish any kind of manufacture in the country.

¹⁰ Carta Régia 28 January 1808.

¹¹ According to Simonsen these products would have been responsible for 88% of the exports in the colonial period. Roberto C. Simonsen (1937), *História Econômica do Brasil (1500/1820)*, (6th edition), São Paulo /Brazil : Companhia Editora Nacional, 1969, p.381

Seventeenth Century. Considering that the main source of revenues for the Government were taxes on gold production and taxes levied upon imports and exports, it is not a surprise that, in spite of the growth of the domestic market and all measures taken to tax it, mining and international trade received major attention from the Government. Therefore, it is easy to understand why the Government of D. João VI would try to reverse the process of decay of mining production and to incentive sugar exports. This was done not only by providing direct privileges and incentives to these activities but also to those activities connected with the construction of the necessary infrastructure for the transport of exportable goods.

Although protection given to all these sectors took different forms, this paper will restrict itself to examine one of them: special bankruptcy regimes.

2.1 Special bankruptcy regimes for miners.

In 1813, miners who employed less than thirty slaves requested that privileges related to exemption from impoundment and execution given to large miners in the 1750's were extended to them. They claimed that, without such benefits, their businesses could hardly subsist¹². The *Alvará*, besides complying with such request, establishes other dispositions to be followed in case of bankruptcies in gold mining businesses. In fact, this was the first piece of legislation to deal exclusively with regulation of specific privileges granted to bankrupt gold miners and to reveal an explicit concern with their creditor's rights. Among the justifications for the new legislation, not only the needs of the Royal Treasure are, once more, invoked, but also the need to conciliate privileges granted to gold miners with those of their creditors.

This *Alvará* had four articles. The first one granted to all miners engaged in gold production and employing any number of slaves the privilege of not being impounded nor executed "...either their mines, or their slaves, tools, instruments and other of their belongings". Such privilege covered all kinds of debts, including not only those incurred in before the possession and exploration of mines, but also debts which had buildings, slaves, and tools given as guarantees. The following article makes it clear that such privileges would comprehend also the fiscal debts. The last two articles were concerned with the creditors' rights and show that the purpose of the legislation was not to protect individuals but to keep gold mines at work.

In fact, the third article disposed that, in order to be reimbursed, creditors should look for other debtor's possessions to be pledged and executed. Among those possessions, should be included one third of the business's profits.¹³ And the fourth article introduced the possibility of gold mining establishments being impounded and executed. Such establishments would be liable to execution if their values were equal or inferior to their owners' debts. In this case, plots of land, slaves, tools and remaining belongings could be executed under the condition that the establishment was neither destroyed nor bought by one person alone. If there was no bid at the auction, the ownership of the establishment would go to the creditor, who could not destroy it or divide it.¹⁴

The requirements for impoundment and execution of a mining establishment in this *Alvará* make it clear that the spirit of the legislation was not to protect creditors, in case of insolvency of miners, but to establish certain rules to avoid reduction of gold production. Any reduction in gold production would cause a significant decrease in revenues collected. As mentioned in the introduction of the *Alvará*, one reason for its

¹² A reference to this appeal from small miners are in the introductory part of the *Alvará* of 17 November 1813.

¹³ *Alvará* of 17 November 1813, article 3.

¹⁴ *Alvará* of 17 November 1813, article 4.

publication was the Regent Prince's wish "to promote the increase of this important branch of the mining sector, which is the source of the prosperity of my States and of revenues for my Royal Crown".

Doubts about the real meaning of the "remaining belongings" expression used in the *Alvará* of 1813 lead to another *Alvará*, in 1819, that specified what exactly should be comprehended by this term: houses of miners built in the lands of the mines they explored, repair shos, windmills, store houses for preparing and keeping food for slaves as well as the food kept in them, animals, and anything else necessary for the mining work.¹⁵ Considering that many gold miners were evading the payment of taxes on gold, the privileges of the 1813 *Alvará* became restricted, in 1820, to those bankrupt miners who could prove, with documents duly authenticated by the competent office, that they had taken their production to places authorized to melt the gold and to extract the part due as taxes. Besides, creditors would be allowed to show that miners had failed to do so in order to be exempted of such privileges and forced to pay them.¹⁶

A gold mining gold firm's fixed capital in the early Nineteenth Century was basically restricted to slaves, who could have alternative employments. Therefore, the exemption of slaves from the rigours of general laws on bankruptcy, either because the undertaking turned out to be a failure, or because their owners were in debt due to involvement in previous businesses, was certainly prone to act as an incentive for investment.

2.1 Special bankruptcy regimes for sugar cane producers.

Special bankruptcy privileges for sugar producers were also maintained and amplified in the Government of D. João VI. The *Alvará* enacted on 21 January 1809, responded to a demand from small sugar producers, who required that privileges conceded to sugar producers of the Capitania of Rio de Janeiro in the 1750s should be extended to all producers. The *Alvará* of 1809 makes it clear that the main purpose of the Government was to create a legal apparatus that would allow producers facing financial difficulties to be kept at work. In fact, the advantages for the economy, for the Government and for creditors to come from the maintenance of those establishments at work are emphasized in the text:

" in the present circumstances of great weakness in Commerce, it would be convenient to my service that the use of the mentioned privilege were more largely extended to the farmers able to keep their establishments at work for the general utility of the inhabitants of this State and in favour of the culture what conciliated with the interests of their creditors"

In fact, this *Alvará* reaffirms the privileges of exemption on impoundment and execution of the ownership of sugar mills and farms operating regularly and the limitation of a possible execution to one third of the establishment's yieldings. It also admits the possibility of execution when the debt was equal or greater than the value of the sugar cane farm or the sugar mill, and establishes that the evaluation of the mills should consider slaves, cattle, lands and tools. In this case, the execution should follow rules prescribed by the law of 20 June 1774. However, this *Alvará* introduces an extra protection to the creditor. Referring to paragraph 3 of the *Alvará* of 1807, it determines that, in order to prove that debts reached the value required for execution, the creditor could add other debts incurred by the debtor. But in order to do so, some proceedings were to be followed by the creditor. The *Alvará* of 21 January 1814, made it clear that fiscal debts were included in the privileges conceded to sugar cane and sugar producers.

¹⁵ *Alvará* of 8 July 1819

¹⁶ *Alvará* of 28 September 1820

3. The D. João VI incentives to the constitution of capital partnerships and his bankruptcy legislation for gold mining societies

As discussed above, the Portuguese Government had started to encourage the constitution of capital partnerships for gold exploration even before the transfer of the Portuguese Court to Brazil. This same policy was pursued by D. João VI. In a Carta Régia to the Governor of the *Capitania* of Minas Gerais on 12 August 1817, D. João VI remarks that “the state of decadence of the works in the gold mines, each day more expensive, not only because most of the lands easy to be worked on have already been worked on, but mainly because miners do not have the necessary practical mining knowledge”. In order to allow for the introduction of new technology, he ordered that stock capital partnerships should be constituted in Minas Gerais. The constitution of those partnerships was to be the initiative of the Mining General Inspector or its substitute and should occur under the authority of the General Governor of the *capitania*. The statutes to be adopted by those partnerships, signed by Minister and Secretary of States for the Reign Affairs, were enclosed to the *Carta Régia*.¹⁷

Even though the format of those partnerships, as suggested by the statutes, are similar in many ways to the usual format of joint stock companies, there is no explicit mention to the restriction of the shareholder’s responsibility to the value of their shares, one of the main characteristic of the joint stock companies. Besides, it was made clear that shareholders would not have any right to interfere in the partnership management.¹⁸ An interesting peculiarity of those societies was that the value of the share was expressed in money and in number of slaves. According to article III, each share would correspond to 400\$000, or to “three young and healthy slaves aged from 16 to 26 years.” As to the privileges to be given to those partnerships, their preferences in the distribution of any mineral lands to be discovered, given by the Alvará of 1803, was reaffirmed¹⁹. Besides, they would be able to use the services of mining masters who had been brought from Germany by the Government. Government expenses in the partnership would be reimbursed by the profits corresponding to one or two shares, according to the size of the firm.²⁰ A major indication of the Government’s great interest in encouraging investments in gold mining is given by article XV, that concedes a tax reduction on gold production from 20% to 10%, two years after the firm began to work, and as long as it is proved the right technology had been used. This Alvará may be seen as one of the first attempts from the Brazilian Government to launch public and private partnerships.

According to article XV of the statute, shares could be transferred, by sale, heritage, or by impoundment, but the new owner would not be allowed to withdraw neither the money nor the slaves. In the case of insolvency of one shareholder, the slaves corresponding to his shares could not be sold for the payment of his debts. However, the ownership of those shares could go to his creditors, who would receive all correspondent dividends. Thus the creditor’s rights to receive the payment from their credits were postponed to the future and the value to be received became uncertain. It is also worth considering that, inasmuch they were constituted as joint stock companies, the peculiarities of such partnerships have to be taken into consideration. In a joint stock company, the responsibility of a shareholder is restricted to the value of his shares. Therefore, in principle, if the bankrupt shareholder’s possessions were to be pledged

¹⁷ *Estatutos para as sociedades das lavras das minas de ouro, que se hão de estabelecer na Capitania de Minas Geraes* enclosed to the *Carta Régia* of 12 August 1817.

¹⁸ *Estatutos para as sociedades das lavras*, art.II

¹⁹ *Estatutos para as sociedades das lavra*, art. V

²⁰ *Estatutos para as sociedades das lavra*, art. IX.

and executed, this would mean to pledge and execute part of the assets of the company corresponding to the value of his shares. In the case of gold mining and sugar farms and mills, such executions were already prohibited by the legislation in force. In other undertakings that did not have such protection could the shares of bankrupt shareholders be entrusted to a depositary and afterwards sold in public auction, reverting the proceeds from such sale to creditors? Considering the inexistence of a capital market, this could hardly be a solution.

Even though the responsibility of a shareholder was restricted to the value of his shares, his property rights were not limited to shares, but encompassed dividends distributed to shareholders. Could then the property rights on those future dividends be credited to shareholders? No general legal solution was given to this problem, leading companies to create their own rules regarding the matter. Those rules were included into their statutes and were therefore subject to Government's approval. In fact, by then, any joint company in Brazil, in order to exist legally, had to be authorized to function and have its statute approved by the Government. Thus, each company created its own bankruptcy regime.

The transfer of a share corresponds to a change in the ownership of part of the physical assets of a firm. If the shares could be pledged and executed, the maintenance of a firm's business at work could be jeopardized. Therefore, in order to assure protection, joint stock companies introduced dispositions in their statutes giving their shareholders the privilege of exemption to pledge and execution to their shares.

4. Joint stock companies authorized by D. João VI

Joint stock companies certainly facilitate the assemblage of financial resources from the private sector and they have been used for different governments from different countries to attract savings to investments considered a priority. In order to induce the private sector to invest in such undertakings, and to make feasible government projects, different benefits and privileges are offered to investors. It has not been different in Brazil. This role played by joint stock companies in the enforcement of economic policies is not new. Trade companies created in the early colonial period to operate in Brazil certainly helped the Portuguese Government reach its mercantilist purposes.

In Brazil, authorization from the Government was a necessary condition for incorporating any joint stock company until 1882, even though the need for such authorization was only regulated in 1849. The requirement of such approval created the grounds for the establishment of public and private partnerships. On one hand, the format of joint stock companies was in itself an attractive to individual savers, as it enlarged their possibilities of investments. On the other hand, the need for authorization provided the government with means to attract such savings for projects of its own interest. In fact, acquiescence of the private sector in entering these partnerships was many times obtained thanks to the concession of different benefits to shareholders and to the company.

This section lists (Table1) all the joint stock companies authorized to be constituted in the period and investigates the bankruptcy regime adopted by them. At this point it should be noticed that in spite of the requirement of legal authorization, some companies were organized and started operating without such permission. Therefore it should be pointed out that the list presented does not comprise all joint companies in operation.

Table 1

Joint stock companies authorized by D. João VI (1808-1821)

Years	Legal Document	Company name	Object of the companies	Companies headquarters
1808	Decreto 24/02/1808	Cia de Seguros Boa Fé	Maritime insurance	City of Bahia
1808	Alvará 12/10/1808	Banco do Brazil	Deposit discount and issue	City of Rio de Janeiro
1808	Carta Régia 24/10/1808	Cia de Seguros Conceito Público	Maritime insurance	City of Bahia
1810	Decisão N.5 05/02/1810	Cia de Seguros Marítimos Inemnidade	Maritime insurance	City of Rio de Janeiro
1817	Carta Régia 16/01/1817	Cia de Mineração do Cuyabá	Gold Mining	Na
1819	Decisão N.55 15/12/1819	Sociedade de Agricultura Comercio e Navegação do Rio Doce	Fluvial transportation	Na
1821	Carta Régia 21/02/1821	Cia de Mineração dos Anicuns	Gold Mining	Na

Sources: legislation and companies' statutes mentioned in the text

As shown on Table 1, only seven joint stock companies were approved by legal documents in the period 1801-1821: three marine insurance companies, two gold mining companies, one bank and one fluvial transport company. How those companies protected themselves against the unfavourable effect of the legislation, in case of a future bankruptcy, is investigated in the following sub-sections.

4.1 The maritime insurance companies

As shown on table 1, only three joint-stock maritime insurance companies were authorized to be constituted in this period. It has been mentioned in the literature that seven insurance companies were formed in the city of Rio de Janeiro during the government of D. João VI²¹. Either some of the four companies were not constituted as joint-stock companies or they were informally constituted as such but did not receive the government approval.

The provision of maritime insurance services, highly demanded in an economy specialized in the production of commodities for exports and based on African slave labour could hardly be financed by one individual. Therefore, it should be expected that those services were offered by firms constituted by capital partnerships. Besides, considering that such services responded to pressing needs from export and import merchants, they did not require special privileges from the government to be constituted.

As soon as D. João VI arrived in Bahia, he signed a decree authorizing the constitution of a maritime insurance, the Companhia de Seguros Boa Fé. According to the text of the decree such authorization had been required by the merchants of the city of Bahia.²² Article 4 of this company's statute characterizes this company as a joint

²¹ Lenira M. Martinho and Riva Gorenstein, (1993), *Negociantes e caixeiros na sociedade da Independência*, Rio de Janeiro/Brazil: Secretaria Municipal de Cultura, Turismo e Esportes, Departamento Geral de Documentação e Informação Cultural, Divisão de Editoração, pp.160.

²² Decree of February 24, 1808. D. João disembarked at the City of Bahia on January 24, 1808.

stock company: “the shareholders’ responsibility does not go beyond the value of their shares.”

Insurance companies presented, then, peculiar characteristics. They required very little investments in physical assets and their operational costs were relatively low. Therefore, the company’s capital corresponded mostly to the amount of available financial resources to be needed eventually for the payment of insurance premiums. In consequence, shareholders joining the company were not required to pay for the whole value of their shares. This meant that a significant part of the capital remained with the shareholders and away from the control of the management of the company.²³

Assuming that an insurance company was well managed and responsibilities beyond its ability to pay were not taken, a temporary liquidity difficulty would be expected to be solved by the payment of unpaid shares. If some shareholders refused to do so and the firm went bankrupt, there were no firm possessions to be executed, as the firm’s capital did not correspond to its physical assets. If the company’s capital was inferior to its debts, there was no way shareholders’ possessions could be impounded and executed because, in a joint company, the shareholder’s responsibility would not go beyond the value of his shares. Besides, impoundment and execution of shares belonging to an individual bankrupt shareholder would be a complicated process whenever those shares had not been paid for. Thus, trust among shareholders was the basis of such companies. Consequently, it would be reasonable to expect that insurance capital partnerships, joint stock or not, were formed by a small group of individuals linked to each other by family, friendship or business ties, those ties being more important than the format of the association among them. In fact, this seems to have been the case.²⁴ There is some evidence that, besides those three joint stock companies, formal and informal partnerships were formed in the cities of Bahia and Rio de Janeiro to deal with insurance business.²⁵

In the case of *Companhia de Seguros Boa Fé*, protection against bankruptcy given to investors -besides the restriction of the shareholder’s responsibility to the amount of their shares, given to investors in any joint stock company- were the severe penalties to be imposed to shareholders who refused to pay for their shares whenever they were asked for. Its capital was fixed in 400 *contos* and the statute did not establish any deadlines for the payment of the shares to the company.²⁶ This payment would only become mandatory when the amount of financial resources kept by the company were not enough to pay for the losses of the insured. In this case, shareholders were supposed to pay for their shares, in eight days, the value required to cover the company’s debts - the responsibility of each shareholder being proportional to the number of shares he had subscribed. In case a shareholder refused to comply with his obligation, he would be immediately expelled from the company without any rights.²⁷

Another insurance company authorized to be established in 1808 in the city of Bahia was the *Companhia de Seguros Conceito Público*, also an enterprise of local traders.²⁸

²⁴Manolo Florentino, in *Em Costas Negras: uma história do tráfico de escravos entre a África e Rio de Janeiro*, Rio de Janeiro, 1997, p.126-128, calls the attention for the great demand for insurance services coming from the slave-trade between África and Brazil. According to him the insurance business in the city of Rio de Janeiro was mainly financed by slave-traders

²⁵ Manolo Florentino, op.cit, p. 128 mentions ten insurance companies operating in the city of Rio de Janeiro in 1829.

²⁶ *Condições da Companhia de Seguros da cidade da Bahia*, article 2. These statutes were enclosed to the Decree of February 24, 1808

²⁷ *Condições da Companhia*, art. 11

²⁸ Carta Régia of October 24, 1808. The statutes have not yet been located.

The first joint stock maritime insurance company formed in the city of Rio de Janeiro, Companhia de Seguros Marítimos Indemnidade, received Government approval in 1810.²⁹ According to their statutes, each shareholder should immediately pay the value corresponding to 10% of the shares he subscribed, the remaining amount being paid whenever required by the circumstances.³⁰ The process of official approval of this company's statutes reveals the Government's concern with the creditors' rights. According to a statement from the Junta do Commercio Agricultura, Fabricas e Navegação that supported D. João VI's decision, the statutes originally presented had to be modified in order to make all shareholders responsible for the company's capital in case some of them went bankrupt. The Junta emphasized that mutual trust among shareholders that allowed them to keep ninety per cent of the value of the shares to be used in their own benefit should not be detrimental to the insured. Similarly, problems caused by insurances being taken above the company's capital should not be harmful to the insured. Accordingly, in the statutes approved, the responsibility of shareholders was "in solidum", not only in relation to the capital of their shares, but also in relation to everything they exposed to risks.³¹ "The shareholder who did not accomplish with his obligations related to the payment of their shares would lose his right to past profits, would share the responsibility for losses brought to the company from adverse conditions and would be subject to the payment of interests"³².

4.2 The Bank of Brazil

The transfer of the Portuguese Court to Brazil made radical institutional monetary and fiscal reforms an imperative necessity. The scarcity of currency in circulation increased with the intensification of international trade after the opening of Brazilian ports on January 28, 1808. A monetary reform was demanded to introduce liquidity to the economy so as to support the expansion of commercial activities. Increased administrative expenses to be made in Brazil, as well as the financial difficulties faced by a metropolis at war, also required a substantial need for new sources of Government financial resources. An exam of the legislation enacted in the period shows that an increase in the financial resources at disposal of the Royal Treasure was in fact the main target of D. João VI's economic policy. Not only a great variety of new taxes were levied but activities the most able to generate public revenues, as for instance mining activities, were stimulated. In this context, the establishment of a public bank in Brazil to provide financial resources for the Royal Treasure and to increase money circulation was seen as a top-priority measure to be taken by D. João VI's Government as soon as the Portuguese Court was installed in Rio de Janeiro. The alvará of October 12, 1808, ordered the establishment of a public bank in the city of Rio de Janeiro.

Unable to finance such undertaking, the Government had necessarily to turn to private investors and this first public bank may be seen as the first example of a private

²⁹ N. 5 BRAZIL Resolução de consulta da Real Junta do Commercio , Agricultura, Fabricas e Navegação de 5 de fevereiro de 1810..

³⁰ Although this capital partnership carried the name of the company, usually given to partnerships constituted as joint stocks, the responsibility of the shareholder was not restricted to the value of the shares.

³¹ *Condições da Companhia de Seguros – Indemnidade confirmadas por sua Alteza Real o Príncipe Regente Nosso Senhor, pela immediata Resolução de 5 de fevereiro de 1810, estabelecida nesta prça do Rio de Janeiro pelos negociantes abaixo declarados*, enclosed to N. 5 BRAZIL Resolução de consulta da Real Junta do Commercio, art.2

³² *Condições da Companhia de Seguros– Indemnidade* , article 3

and public partnership.³³ According to the statutes enclosed to the Alvará and signed by the Minister of Finances on October 8, 1808 the bank, denominated Banco do Brasil, would be formed by a joint stock company. In fact, its capital would be divided into shares, and the responsibility of the shareholder would be restricted to the value of his shares.³⁴ Although a joint company to be constituted with private savings, the bank to be created was basically a public undertaking. Government interference in the creation of the bank was not limited to the initiative of its establishment and the elaboration of the statutes. The company's statutes created conditions for governmental interference in the administration and management of the bank, and limited shareholders' rights.³⁵

As far as bankruptcy is concerned, this company introduced a significant innovation. According to its statutes, "any impoundment or execution, either fiscal or civil on the bank's shares was null and prohibited"³⁶ No other clauses of the statutes mentioned any rights of bankrupt shareholders' creditors either to future dividends or past profits. Notwithstanding this protection assured to the shareholders by the statutes, the Government had many difficulties in attracting private savings to constitute the bank's capital. The legislation in this period, as well as some contemporary stories, reveal the pressures of different nature used to force people to subscribe shares. Historians dealing with the creation of the first Banco do Brasil have described the most bizarre concessions and privileges offered to subscribers, but none of them mentions those related to a special regime of bankruptcy. In fact, protection offered by the statutes were not enough to encourage private investors in the first years to be willing to allocate their savings to this Government undertaking.

4.3 The Gold mining companies: Companhia de Mineração do Cuyabá and Companhia de Mineração dos Anicuns.

Considering that very few capital partnerships were legally constituted in the sector of gold mining, the bankruptcy legislation promulgated until 1817 dealt exclusively with the properties of the mining establishment and did not mention what would happen to the share of bankrupt shareholders. The constitution of those companies followed, in general, the legislation on gold mining in force that imposed a great degree of Government interference in its management in order to assure the collection of taxes due over an increased gold production.

The Companhia de Mineração do Cuyabá was the first joint stock gold mining company to have its statutes officially approved by the Government. These statutes, sent by the Governor of the *capitania* of Matto Grosso for royal approval on 31 May 1814, were approved by the Carta Régia of 16 January 1817, eight months before the new legislation regulating the constitution of capital partnerships to explore gold in Minas Gerais was enacted. The approval of such document reveals not only the persistent interest of the Government in the constitution of capital partnerships to explore gold mines but also in extending such explorations to areas outside the *capitania* of Minas Gerais. The reason for such interest was once more made explicit in the text: the possibility that those undertakings would increase revenues collected through taxation.

³³ The creation of the Bank of Brazil, attending not only to the demands from the government but also from those dealing with commerce, implied a very significant institutional change that would have in short and long run, critical direct and indirect effects over future institutional arrangements and on over the development.

³⁴ Alvará of October 12, 1808.

³⁵ *Estatutos para o Banco Publico estabelecido em virtude do Alvará de 12 de Outubro de 1808* enclosed to the Alvará of October 18, 1808, articles IX to XIII. The first directors and the members of the of the Bank Board were nominated by the Decree of January 24, 1809.

³⁶ *Estatutos para o Banco Publico estabelecido em virtude do Alvará de 12 de Outubro de 1808*, art. VI. Those statutes were signed by D. Fernando José de Portugal, appointed Minister of Finances by the decree of March 26, 1808.

In fact, in this document, D. João VI refers to the “the advantages that such establishment may bring to my Royal Treasure”.³⁷

The capital of the company was to be formed by shares, each share corresponding to 100\$000 in currency to be paid at the time of subscription and two slaves dressed and equipped with tools to be handed over to the company as soon as the mining works had began. The payments in currency would be used to finance the preliminary works necessary to prepare the mines to be explored.³⁸

As the mining activities, up to then, were not constituted – at least officially – as capital partnerships, legislation in force related to the consequences of bankruptcy was restricted to the properties and profits of the mining business. According to the legislation in force as given by the Alvarás of November 17, 1813 and July 8, 1819, mining establishments could only be executed under very special conditions and the execution of profits was limited to one third of the total.

The adoption of joint company as a format for new capital partnerships in the sector introduced the possibility of increasing the protection given to creditors of bankrupt miners. This protection was given not by any general law but by the statutes of the company seeking Government approval. That a major interest to safeguard creditors’ rights had appeared in the companies to be formed is easy to understand. Those companies were created to explore gold deposits of harder access and, thus, expected to require larger expenses. Not only equipments would have to be imported but also the assistance of foreign technicians. Such new operations would demand a higher dependence on credit. Thus, the company’s statutes should not only provide encouragement for a large number of individuals to invest in the new undertaking. They also had to safeguard the creditors’ rights.

In the case of the Companhia de Mineração do Cuyabá, its statutes increased the protection towards debtors and creditors. The dispositions of the statutes of the Carta Régia of 12 August 1817 regulating the establishment of companies to explore gold mines to be established in Minas Gerais, had admitted, in its article XIV, the possibility of impoundment of the companies’ shares³⁹. In the case of the Companhia de Mineração do Cuyabá such possibility was drastically denied: “The shares of this company are exempted of any fiscal or civil impoundment or from the Judge of Orphans, Deceased and Absents.”⁴⁰ In spite of the legislation in force that limited the possibility of the execution of the gold mining profits to one third, the statutes of the Companhia de Mineração do Cuyabá did not establish such a limit.⁴¹ However, as one sixth of the profits owed to each subscriber should be kept on reserve by the company, the creditor’s appropriation limit decreased, in fact, from one third to one sixth. In fact, according to article X of its statutes, the debtors’ shares would not be transferred to the creditor, but his debts would be paid by future dividends on his shares: “The creditors’ rights will be restricted to the profits coming from these shares, requiring them only when they are distributed to all shareholders”.

The Carta Régia of 21 February 1821 approved the statutes of another gold mining joint stock company, the Companhia de Mineração dos Anicuns. This company came to replace a previous unsuccessful partnership that had been constituted with the purpose of exploring gold in this province but went into bankruptcy. In his letter to the governor of the capitania giving his approval to the constitution of a new company, D.

³⁷ Carta Régia of January 16, 1817

³⁸ Estatutos para o Governo da Companhia de Mineração do Cuyabá, enclosed to the Carta Régia of January 16, 1817

³⁹ *Estatutos para as Sociedades das lavras das minas de ouro, que se hão de estabelecer na Capitania de Minas Geraes*, enclosed to the Carta Régia, August 12, 1817

⁴⁰ *Estatutos para o Governo da Companhia de Mineração do Cuyabá*, enclosed to the Carta Régia of January 16, 1817, article X.

⁴¹ Alvará de 17 de Novembro de 1813, artigo 3

João VI complained about “the meager profits My Royal Finances have taken from the rich discovery of the Anicuns under the management of the previous partnership.”⁴²

The share’s value of the new company would correspond to 12\$000 and one slave with age between 16 to 35 years and without any disease, dressed and equipped with tools.⁴³

Even though legislation about privileges given to gold miners in 1813 and 1819 did not take into account the peculiarities of societies constituted as capital partnerships, the statutes of these new companies extended to their shares the privileges of not being pledged and executed. In fact, according to article 48 of its statutes, their shareholders, so far as their shares and respective profits were concerned, would have the privileges given by the Alvarás of November, 17, 1813 and July 8, 1819.

4.4. Sociedade de Agricultura Commercio and Navegação do Rio Doce

The Government’s concern in promoting activities able to produce higher public revenues, one of the outstanding characteristics of D. João VI’s economic policy, implied not only granting privileges and concessions to sugar and gold producers. Taxes on imports were another significant source of income. In this context, the development of a transport system that created conditions for an intensification of the import and export trade was certainly seen as an important achievement to be reached. It is in this context that the great interest of the Government in colonizing the north-eastern regions of Minas Gerais and in opening roads from Minas to the ports of the capitania of Espírito Santo should be understood. On one hand, those lands and rivers were expected to contain rich deposits of gold. On the other hand, the establishment of fluvial navigation on the river Rio Doce would allow the access of the old gold regions of the central areas of Minas Gerais and the potential gold areas of the north-eastern areas to the sea ports of the Espírito Santo capitania. Such possibilities may explain Government’s persistence in fighting the indigenous people who lived in the region and in promoting the colonization of the region⁴⁴ The policies implemented by the Government were not successful. It was only in 1819 that a company -Sociedade Agricultura Commercio e Navegação do Rio Doce- was constituted with the purpose of promoting the navigation in this river by offering transport and trade services.

In the process of obtaining governmental approval for its statutes, some alterations had to be made in the company’s proposal. One of these alterations was related to the article dealing with the vulnerability of the company’s shares to pledge and execution. According to the legal text that approved the company’s statutes, the shareholders’ payments to the company were not, at all, exempted from pledge and execution. On the contrary, legal procedures to pledge and execute the resources of the shareholders up to the value of their debts, and in accordance with the judicial decision, could be taken by their creditors. Those resources could not be withdrawn from the company, but the subrogated creditors would have the right to receive the dividends whenever distributed and under the same conditions of the other shareholders. The same procedure would apply to fiscal creditors.

5. Final Remarks and Conclusions

The study of legislation passed by D. João VI suggests that the development of a manufacturing sector in Brazil was not one of the major concerns of the Portuguese administration, as emphasized in the literature. Neither the opening of Brazilian ports to international trade should be viewed be seen as an abandonment of mercantilists

⁴² Carta Regia of February 21, 1821

⁴³ Estatutos para a companhia de Mineração dos Anicuns na Província de Goyaz, enclosed to the Carta Régia of February 21, 1821

⁴⁴ **Carta Régia of May 13, 1808**

policies. Freedom to trade and freedom to establish domestic manufactures were more the result of difficulties faced by a metropolis occupied by Napoleonic troops, than of a sudden adherence to the liberal ideas of Adam Smith. In fact, legislation of the period reveals constant interference of the Government in the economy.

The investigation of legislation on bankruptcy enacted in the period confirms this point of view. This legislation was used as a device- among many others- to induce investment in activities able to produce, in a shorter period of time, greater resources for the Royal Treasure. Such activities were seen as those oriented to the supply of commodities highly demanded by European markets: gold and sugar. The acceptance of Smith's theory of comparative advantages did not imply adherence to the classical principle of non-intervention of the State in the economy.

In this context, legislation on bankruptcy of sugar and gold mining establishments should corroborate to incentive new investments. As long as such activities were not highly dependent on credit, legislation tended to give higher protection to bankrupt producers so as to keep their establishments at work. In the case of miner producers, some regard to creditor's rights was shown once the degree of insolvency of an establishment became too high revealing the possibility of a reduction of production. The legislation of 1813 granting such protection to creditors was introduced in a period when the production of gold started requiring a more sophisticated technology and became more dependent on credit.

Once capital partnerships began being formed as joint stock companies and the physical assets of an establishment were not owned by one individual, changes had to be made in the rules to be applied in case the company, or some of their shareholders, became insolvent. Such changes were not made through special legislation for joint stock companies but through the statutes of these companies. As the constitution of a company was subject to official approval of their statutes, a channel for Government interference was open.