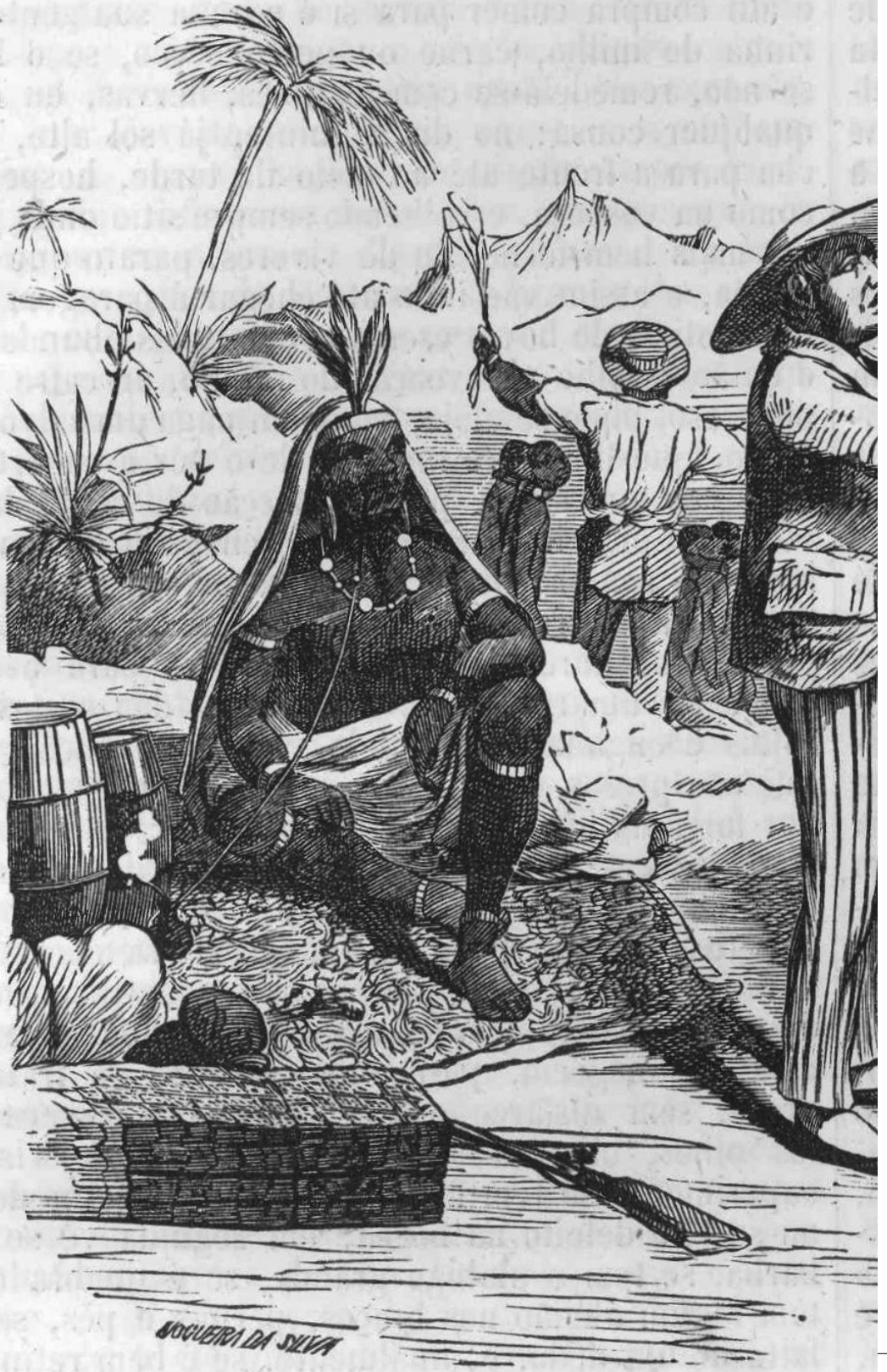
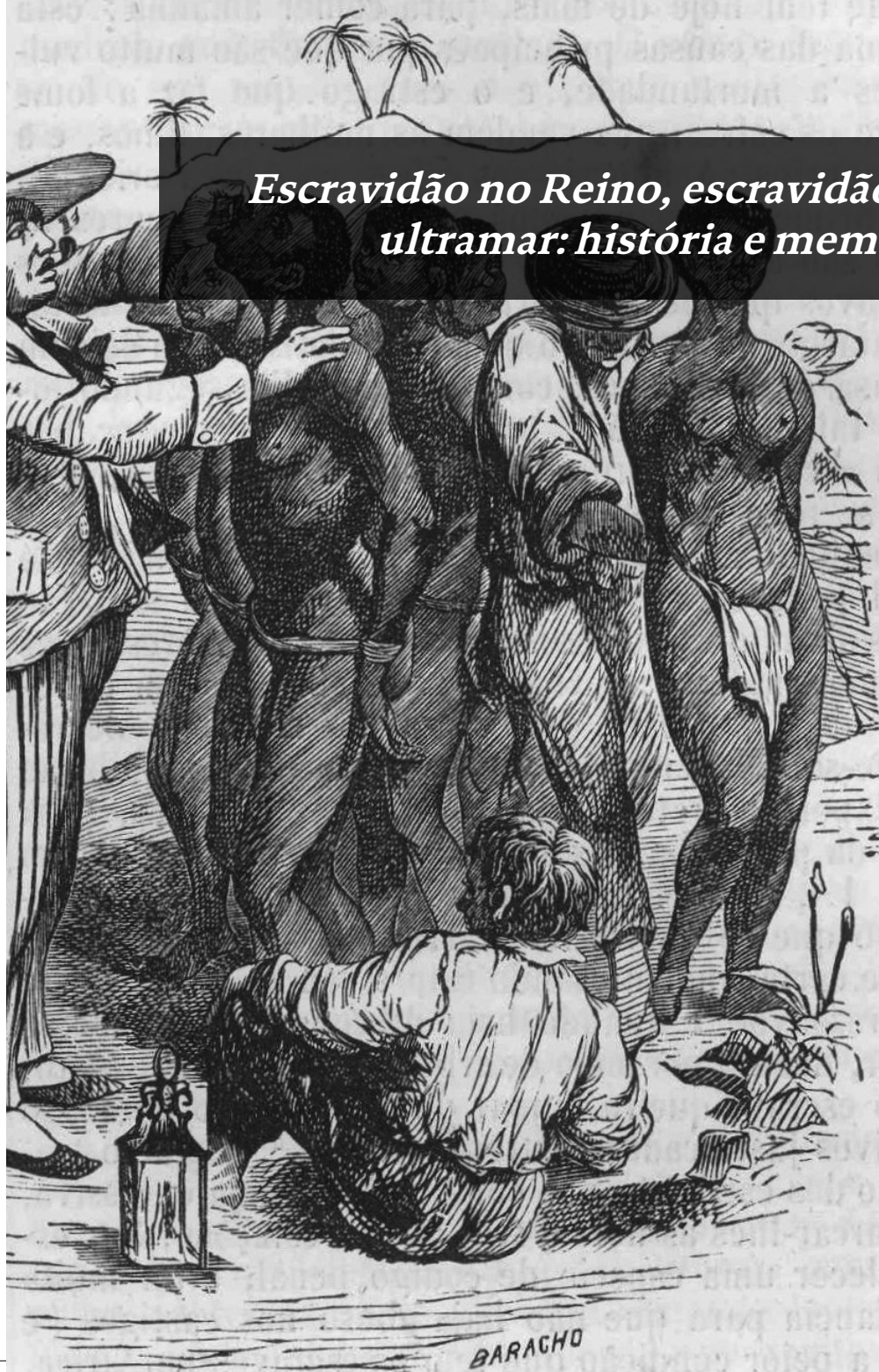


*Escravos, libertos e trabalho forçado  
na era das abolições*





*Esclavidão no Reino, escravidão no ultramar: história e memória*





3

# The French free soil principle in the Atlantic world

Sue Peabody \*

p 17-27

On 19 September 1761, the Marquis de Pombal issued new, striking legislation that prohibited the entry of all blacks and the capture, sale or imprisonment of slaves in Portugal; those who arrived in the kingdom after the date of the law were to be thereby freed. The law's preamble justifies this action by pointing to an "extraordinary number of black slaves" arriving in the metropole as servants, thereby supposedly depleting the overseas colonies in Africa, America and Asia of the labor necessary to cultivate the fields and to work the mines. These slaves take the position of free servants from Lisbon become "homeless" and prone to "idleness and ... the vices that are its natural consequence" (Lara, 2000, 345-346; Monteiro de Campos Coelho e Souza, 1783-91, vol. 2, 117-118; Freitas, 1819, vol. 5, 361-364).<sup>1</sup>

Historians of the Portuguese empire are only recently seeking to understand the origins and ramifications of Pombal's new law (Stella, 2000; Lahon, 2004; Lahon, 2005; Nogueira da Silva, 2009). But I want to argue that Pombal's declaration should be examined within a much wider context than Portuguese national or imperial history. For the timing and content of the Provision of 1761 follow very closely on important developments in French and English law regarding the regulation of slavery and race at the borders of the nation. Given Pombal's admiration for many Enlightenment ideals circulating abroad, I think it is critical that this new and anomalous piece of legislation be understood within the international legal context – particularly the French and English precedents, as well as later developments of the eighteenth century.

This essay, therefore, will review the French tradition of Free Soil, as I call it: the principle that any slave who sets foot on French soil becomes free.<sup>2</sup> By reviewing the French tradi-

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<sup>1</sup> Many thanks to Keila Grinberg for bringing this to my attention and for her translation into English, upon which I have depended.

<sup>2</sup> I have borrowed the term "Free Soil" from nineteenth-century French and American discourse to describe the legal principle that certain political entities – cities, kingdoms, nations – confer free status on those who cross their borders. There was a short-lived political party in the United States before the Civil War, known as the Free Soil party (Foner, 1995). However, by the mid-nineteenth century, French jurists also referred to this principle as the "sol libre de France" (Sue Peabody, 2009).

tion, English iterations, and their important transformations in the eighteenth century, I hope to stimulate new transnational historical research regarding slavery, freedom and the law. By seeking connections across national boundaries we can better understand the world historical processes that intersect with particular local developments in the greater Atlantic world.

## The Free Soil Principle: Origins and Transformations

There are no examples of the Free Soil principle in the ancient Mediterranean world: slavery was pervasive in the social structure of all ancient societies and there were no civic spaces defined as Free Soil. Rather, prescriptions against enslavement emerge along religious lines in the Middle Ages when Jews were prohibited from owning Christian slaves and Muslims were prohibited from enslaving other Muslims (Davis, 1966; Drescher, 2009).

However, in the medieval period, a great many European municipalities drafted charters that explicitly freed bondsmen and recognized the citizenship of those who arrived within their walls – often conditionally (for example, after residence of a year and a day). Some trace the origins of the medieval municipal Free Soil charters to the sixth century Salic Law of Clovis I, which gave all citizens of a city veto power over new residents; if a newcomer resided in the city unchallenged for a year and a day he could stay permanently (Reynolds, 1997, 114). Other historians trace the legal maxim conferring urban liberty to the charters of northern Spain in the ninth and tenth centuries, through southern France and into Flanders, England and Germany (12<sup>th</sup> and 13<sup>th</sup> centuries) (Nicholas, 1997, 157). Yet these surviving documents may simply reflect a trend toward codification a much older oral principle into written charters, rather than the new adoption of the principle of free urban air.

The transition of “city air” charters to national Free Soil principles has not yet been thoroughly examined.<sup>3</sup> In the French case, the city of Toulouse played a key role. In the late thirteenth century, the formerly independent county of Toulouse passed into the French royal domain and although Philippe III rejected an early articulation of the Free Soil principle, he died soon thereafter and city consuls retained the memory and practice of the *coutume*.<sup>4</sup> Almost a century later, in 1373, a Greek slave fled his master in Aragon-ruled Perpignan to Toulouse and claimed his freedom before the city’s *capitouls*; as a result of the proceedings, Louis d’Anjou, the lieutenant of the French king for Languedoc, affirmed the Free Soil principle of Toulouse (Wolff, 1954, 155). Royal support in numerous cases of slaves escaping from Aragon to Toulouse in the early fifteenth century transformed Toulousan municipal Free Soil into a privilege of the French kingdom (de Lafaille, 1687-1701, 156; Loysel, 1657, 1:40; Brutails, 1886, 398; Viala, 1953, 567-72; Verlinden, 1955, 1: 805; Peabody, 2005, 1996, 12 and 144).

<sup>3</sup> A parallel process was apparently underway in England and the Netherlands (see Alsford and Hondius, both forthcoming 2011).

<sup>4</sup> “Item, est usus et consuetudo Tholose quod homines venientes in Tholosa causa habitandi et ibi habitantes undecunqve venerint, quamvis habeant dominos, possunt et debent ibi stare liberi a dominis suis et facere negotia sua sine petitione et impedimento et contradictione dominorum suorum et quod dicti domini non possunt nec debent ipsos homines sic in Tholosa habitantes vel in barriis in aliquo fortiare ratione seu occasione dominii,” quoted in Gilles, 1969, 147; see also Tardif, 1884, ix-xxi and 77; and Tardif, 1886, 18-19, 21.

The late sixteenth century was a critical juncture for the codification of national Free Soil in France, England, and the Netherlands. The Parlement of Guyenne, in Bordeaux, declared a shipment of slaves brought there by a Norman merchant in 1571 free, stating, “France, mère de liberté, ne permet aucuns esclaves” (de Saint-Romuald, 1664, 127). Jean Bodin pronounced France as Free Soil in 1579 (Bodin, 1579, 43). Soon thereafter William Hamilton noted that foreign bondsmen became free in England, “so soone as they set foot on [our] land.” Likewise, the Dutch town council of Middleburg released a ship of captives, referencing a similar tradition in 1596 (Drescher, 2009, 22-24; Hondius, forthcoming 2011).

By the early seventeenth century, French legal scholar Antoine Loysel [Loisel] could declare the Free Soil principle as a “fundamental maxim” of the French nation:

Toutes personnes sont franchises en ce royaume: et sitost qu’un esclave a attenit les marches d’icelui, se faisant baptizer, est affranchi (Loisel, 1608, 1).

In this iteration, French Free Soil was conditionally linked to baptism, but over the course of the seventeenth century, as French colonial ventures in North America and the Caribbean were assisted by missionary efforts, the association of baptism with Free Soil dissolved (Peabody, 1996, 31). When two enslaved stowaways from Martinique arrived in France in 1691, the Roi Soleil embraced the Free Soil tradition made them free, but fined the ship captain for assisting their escape from the colonies (Peytraud, 1897, 375).

## The Eighteenth Century

The Free Soil principle was challenged in England and France during the eighteenth century, as the two kingdoms were drawn economically into the slave trade and colonization based on plantation production.

In two cases before the English King’s Bench court in 1706, Lord Chief Justice Holt gave decisions favoring freedom, stating that “one may be a villein in England ... [but that] as soon as a negro comes into England, he becomes free” and “There is no such thing as a slave by the law of England” (Howell, 1814, vol. 20, col. 54-55; Bauer, 1973, 14-16; Salkeld, D’Anvers and Evans, 1795, 2:666-67; Drescher, 2009, 79, 97). But in 1729, a party of merchants and planters dining at London’s Lincoln’s Hall Inn inquired of the attorney general and the solicitor general their opinion on the legal status of blacks in England because “a notion had prevailed, if a Negro came over, or became Christian, he was emancipated.” The senior law officers pronounced that:

A slave, by coming from the West Indies, either with or without his master, to Great Britain or Ireland, doth not become free; and that his master’s property or right in him is not thereby determined or varied; and baptism doth not bestow freedom on him, nor make any alteration in his temporal condition in these kingdoms. We are also of opinion, that the master may legally compel him to return to the plantations.<sup>5</sup>

<sup>5</sup> William Maxwell Morrison, *Dictionary of Decisions*, 14547, quoted in Bauer, 1973, 18-20.

This widely publicized opinion, though – because it was not iterated as part of a formal legal decision – it held no formal legal standing, effectively stanching the efforts of slaves to seek freedom in British Courts for several decades, though many tested the limits of their masters' dominion by simply walking away to find other jobs with new masters (Drescher, 2009, 96-98; Drescher 1989). The common acceptance of English Free Soil, paired with baptism, is evident in the autobiography of Olaudah Equiano; he has made it to England twice, in 1759 and 1762, and baptized there. It is clear that he understands himself to be free by these actions but his master forcibly removed him to a boat bound for the Antilles, and by this action Equiano was re-enslaved (Equiano, 2001, 68-69; Carretta, 2005, 71-91).

Meanwhile, in France the Free Soil principle was under attack as well. Shortly after the death of Louis XIV, the mayor of Nantes, whose slaving activities would expand throughout the eighteenth century, proposed legislation that would suspend the Free Soil principle for colonists who brought their enslaved servants to the metropole (Peabody, 1996, 15-16; Harms, 2002, 6-28). In October 1716, the regency of Louis XV proclaimed a new edict, suspending the Free Soil principal under certain conditions. This law permitted colonial masters to bring their slaves to France provided that: 1) permission was granted by the colonial administrators before departure; 2) the slave(s) were registered upon arrival in the metropole; 3) the only legitimate purposes for travel to the metropole were for training in a trade or religious instruction; 4) the slaves' sojourn was temporary – though the period of the visit was not specified in the law (Isambert, 1821-33, 21: 123).

Two decades later, a lawsuit by a slave named Jean Boucaux exposed the many loopholes of the Edict of 1716. Boucaux's master had brought him to France from Saint-Domingue as a cook. After more than nine years, Boucaux married – presumably a white French woman (the documents do not specify her race) – upon which his master threatened to send him back to the colonies. Boucaux went to court to challenge his enslavement and won his freedom before the Admiralty Court of France, but his case had revealed that the original legislation had never been registered by the Parlement of Paris and that there were no explicit limits for the duration the slave's sojourn in France. As a result, Louis V issued new legislation, the Declaration of December 15, 1738, which sought to tighten the restrictions:

Nous sommes informés que depuis [1716] ... on y en fait passer un grand nombre [d'esclaves en France]; ... que la plupart des nègres y contractent des habitudes et un esprit d'indépendance, qui pourrait avoir des suites fâcheuses ; que d'ailleurs, leurs maîtres négligent de leur faire apprendre quelque métier utile, en sorte que de tous ceux qui sont emmenés ou envoyés en France, il y en a très-peu qui soient renvoyés dans les colonies, et que dans ce dernier nombre, il s'en trouve le plus souvent d'inutiles, et même de dangereux. (Isambert, 1821-33, 22 :112)

The new law required that masters pay a hefty deposit of 1000 *livres*, which would be forfeited if the slave remained in France for more than three years. More importantly, if the law's conditions (e.g. colonial permissions, registration, etc.) were violated by the master, the slave would no longer be freed to live in France: he or she would be confiscated *au profit du roi* and exported back to the colonies, there to be sold or employed at the public works. The 1738 declaration was dutifully received and registered by all the



sovereign courts of France except the Parlement of Paris, rendering its status ambiguous before the most powerful court of the kingdom (Peabody, 1996, 19, 23-40, and 146-147). Outside of Paris, especially in the maritime provinces, the laws of 1716 and 1738 were registered and enforced by the courts. French slaveholders from Saint Domingue, Guadeloupe, Lorient, Louisiana, Senegal and beyond brought their enslaved domestic servants to these regions in significant numbers. For example, there were at least 885 slaves registered in France according to the 1777 census, as compared with 610 free people of color; the majority of these lived in the Atlantic ports of Bordeaux and Nantes (Boulle, 2007, 190).

Paris Admiralty records show that a modest number of blacks, mostly enslaved, continued to arrive in Paris between 1738 and 1759 (no more than thirty registered with the Paris Admiralty in any given year) and only thirteen won their freedom in cases before the Admiralty Court of France (Peabody, 1996, 55, 72). However, in 1759, only two years before Pombal's Provision, the Parlement of Paris – in its only judicial review of the Free Soil principle – made a landmark ruling that would have important repercussions for the Free Soil principle and modern understandings of race and slavery.

The 1759 case concerned a slave, christened “Francisque,” whose master had purchased him with his brother (ages 5 and 8) as slaves in Pondichery, India, in 1747. On the way back to France, the master, Allain François Ignace Brignon, stopped in Lisbon, but sent the boys on to his mother's home in Saint Malo, where they were duly registered upon arrival in 1750 (and again in 1751, 1752, 1756 and 1757).<sup>6</sup> Brignon moved to Paris and built a splendid house there, bringing the boys to live with him. But in 1757, the young men (now fifteen and eighteen) felt themselves mistreated and sought work as valets with another master. Brignon had them imprisoned and the procureur of the Admiralty court intervened, arguing for their liberty in a freedom suit. Brignon countersued, demanding that they repay his deposit. Francisque remained in prison during the legal wrangling, but André somehow escaped and was never heard from again. In the summer of 1758, the Admiralty Court of France found Francisque free, but Brignon appealed this decision to the Parlement of Paris.

Lawyers representing Francisque before the Parlement argued for his freedom on several grounds: the Free Soil principle, race (his birth in India, rather than Africa, secured his free status), and his master's failure to comply with all the provisions of the Declaration of 1738 which, again, had never been duly registered by the Parlement of Paris. The racial argument advanced by Francisque's lawyer was a new one, asserting the first time that a natural association existed between slavery and Africans. For example, the lawyer's brief read:

Si, par la couleur de leur peau, les individus qui naissent sur les bords de l'Indus & des rivières qu'il reçoit dans sa course, ont quelque ressemblance avec les Negres d'Afrique, au moins different-ils de ces derniers, en ce qu'ils n'ont point le nez si écrasé, si applati, les lèvres si épaisses, si saillantes, en ce que, au lieu de ce duvet cotonneux & crépé qui couvre la tête des Affriquains, ils portent de longues & belles chevelures, semblables à celles dont les têtes Européennes sont décorées.

Tel est Francisque: il suffit de le voir pour se convaincre qu'il n'a point reçu le jour sur les sables brûlans que baignent inutilement le Guin & le Sénéa ; il est vrai que qu'il a le nez un peu large, les lèvres un peu grosses ; mais abstraction faite de sa

<sup>6</sup> Archives Départementales d'Ille-et-Vilaine 98B, Rennes, fols. 41, 43, and 48 v. I remain profoundly in debt to Pierre Boulle for sharing these references with me.

couleur, il ressemble plus aux Européens, que beaucoup de Européens même auxquels il ne manque d'être noirs pour paroître Affriquains (Joly de Fleury, de la Roue and Collet, 25-26).

Despite the lawyer's tortured logic concerning Francisque's race, the Parlement of Paris ruled Francisque free on 22 August 1759. However, as the decisions of the Ancien Régime are *non-raisonnée*, we do not know the grounds of the justices' decision. Later cases, into the nineteenth century, would cite the Francisque decision as grounds that South Asian Indians could not be legally enslaved in the French empire and as evidence of the Free Soil maxim in France.

## Portugal and Beyond

Given the flow of information between Paris and Lisbon (and Brignon's apparent connections there), it seems likely that Pombal and his ministers learned of Francisque's victory at the Parlement of Paris and also the French legislation on which it was based. Like Lisbon, the cities of Paris, Glasgow and especially London had visible populations of color, the majority of whom were young men of the servant class (Brown, 2006, 91-94; Boule, 2007, 171-74; Peabody 1996, 72-87; White, 2006, 13-15; Cairns, forthcoming 2011). When employed, such men were visible status symbols for their masters, signifying both wealth and the exotic sources of their fortunes. Given the importance of travel between the colonies and the metropole for the education of sons and daughters of mixed race, we may also ask whether some of these "idle" young men were not also students. English ridicule of the pretentious "nabobs" – who made their fortunes in India, only to ostentatiously spend them in London – also dates from this time (Smylitopoulos, 2008; Nechtman, 2007). To what extent, then, is the Portuguese erection of a racial barrier in 1761 a result of metropolitan prejudices against not only black and mulatto servants, but the arrogance and self-assertion of the colonial *nouveau-riche*?

Two years after Pombal's declaration, the Seven Years War between England and France came to end, with England the decisive victor. The opening of Atlantic shipping in the following years prompted an unprecedented circulation of both enslaved and free people of color in the northern Atlantic regions served by French and British trade. Thereafter, a series of new laws in France's colonies, especially Saint Domingue, began to restrict the rights of wealthy mixed-race colonists. This marks a decisive turn in French legal history toward the erection of a regime of racial segregation and hierarchy (Desbbasch, 1967; Elisabeth, 1972; Garrigus, 2006).

Meanwhile, in England, the Free Soil principle became the foundation of a lawsuit for freedom that would eventually have monumental repercussions – not only throughout the British empire but the rest of the world as well. A small group of antislavery activists in London initiated a freedom suit to challenge the seizure and forced expatriation of a slave named James Somerset to compel a legal ruling on the Free Soil principle. The judge's ultimate ruling, in 1772, though ambiguously phrased, was widely understood as affirming the principle of Free Soil for England (Bauer, 1973; Nadelhaft, 1966; Wiecek, 1974; Fryer, 1984, 121-126; Oldham, 1988; Cotter, 1994; Paley, 2002; Gould, 2003; Wise, 2006; Van Cleve, 2006). A similar ruling was issued in Scotland the following year

(Cairns, forthcoming, 2011). The first notable success of the English Abolition movement, the Somerset decision set precedent for the law of the United States, where the ruling would be invoked for almost a century until the General Emancipation effected by the US Civil War (Finkelman, 1981).

If Pombal's 1761 Provision was influenced by French jurisprudence, it seems likely that Portugal, in turn, indirectly impacted subsequent French legislation. Guillaume Poncet de la Grave, the *procureur du roi* in the Admiralty Court of France lamented in 1762 that "un deluge de nègres [sont] parus en France. ... La France, surtout la capitale, est devenue un marché public ou l'on a vendu les hommes au plus offrant et dernier encherisseur [sic], il n'est pas de bourgeois ni d'ouvrier qui n'ait eu son nègre esclave. ...". Although Poncet de la Grave certainly exaggerated (a census of blacks conducted the following year found only 159 blacks in Paris), the presence of this young (median age 20), predominantly male (74%) population was visible and viewed by some authorities as problematic (Peabody, 1996, 73-75).

Between Francisque's 1759 victory and 1766, freedom suits in Paris increased – an average of 8 per year – each resulting in the plaintiff's freedom. The Admiralty Court of France was suspended in the judicial crisis of 1771 to 1775, but when it resumed business, so did the freedom suits. Finally, the new energetic Minister of the Navy, Antoine de Sartine, hit upon a solution, and proposed new legislation, promulgated in 1777, which became known as the Police des Noirs. To evade the Parlement's resistance registering legislation that contained the word *esclave*, Sartine proposed a new law, couched in terms of race. This new law prohibited the entry of all "noirs, mulâtres et autres gens de couleur" into the French kingdom. Instead, those domestic servants accompanying their masters across the ocean would disembark in the port cities where they would be housed in "dépôts" consecrated to this purpose. Then they would be sent back to the colonies on the next available ship at the owner's expense. Sartine's preamble to the 1777 Police des Noirs echoes some of the same elements found in Pombal's provision of 1761:

... nous sommes informés aujourd'hui que le nombre de noirs s'y est tellement multiplié, par la facilité de la communication de l'Amérique avec la France, qu'on enlève journellement aux colonies cette portion d'hommes la plus nécessaire pour la culture des terres, en même temps que leur séjour dans les villes de notre royaume, surtout dans la capitale, y cause les plus grands désordres. . . (Isambert, 1821-33, 25 :81-82.)

Although the population of blacks in the French metropole was proportionately less significant than in England or Portugal, their visibility prompted a similar rhetoric and strategy on the part of the state. Each sought to distinguish between the colonial social and legal regimes, where slavery was tolerated, and the metropole, which was increasingly defined as free – and, in the case of France and Lisbon – white.

The principle of Free Soil continued to be contested in a wide range of legal settings, from the Netherlands and the United States in the later eighteenth century, to England, Spain and France, Brazil and French enclaves in Algeria, Senegal and Ile Bourbon. In some instances, this principle was iterated by lawyers and magistrates; at other times it was declared in positive law. Some advocates were, like Somerset's allies in England, explicitly anti-slavery or abolitionist. Other iterations seem more closely related to policies of racial segregation or anti-immigration (Peabody, 2005).

7 Guillaume Poncet de la Grave, quoted in De la Haye, « Sentence de règlement rendue en l'amirauté de la France concernant les déclarations à passer pour les Nègres et Mulâtres » 5 April 1762 (Archives Nationales de France, Z'D 132).

It seems, then, that Pombal's 1761 declaration was not quite so anomalous as it first appears. Rather, this Portuguese iteration of the Free Soil principle shares with the French pronouncements a concern with the immigration of young, non-white men to the metropole, their social control by the state, and a new racializing discourse of exclusion. As such, it appears to be an early experiment in applying northern European, and especially French, ideas of race and freedom to a state with a long legal tradition of slavery based in Roman law.

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