

Moderating Power in the 19th Century Brazilian Constitutional Doctrine¹

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1. *Introduction*

The limits to the exercise and the responsibility attributed to central authority are reiterated problems in Brazilian constitutional history. The precise boundaries of political authority have distressed Brazilian constitutionalists, whether during monarchic regimes (1822-1889), in periods of authoritarian rule (1930-1945, 1964-1985), or even in limited republican democratic experiences (1889-1930, 1945-1964, 1985-2019). These constitutionalists sometimes tended to acknowledge expansion of authority, deemed necessary for the maintenance of order and the country's modernization, and sometimes tended to limit authority in favor of greater social participation, be it restricted to elites or extended for the inclusion of the masses. The periodic reemergence of debates on parliamentarism demonstrates the permanence of the controversy. During 200 years since Brazil's independence, the institute of

moderating power, as a reality and a memory, has been a powerful symbolic resource in disputes between jurists over state authority, as the classical studies of Arinos², Bonavides³ and Paim⁴ clearly demonstrate: written during the Brazilian military dictatorship (1964-1985), all of them criticize the excessive concentration of power in the figure of the emperor, in an analogy with the ongoing authoritarian regime.

The Moderating Power, exercised by the Emperor under the terms of art. 101 of the 1824 Constitution⁵, which embodied the theory developed by Benjamin Constant, was politically mobilized throughout the imperial period by both liberals and conservatives. Sometimes it was mobilized as a symbol of agency and despotism against freedoms and popular representation, while in other moments it symbolized the preservation of order and political stability against the risk of chaos and social degeneration. Amidst these political debates, legal discourse was consistently instrumentalized in search of a precise definition of

its limits regarding the current constitutional text and the country's legal order.

This paper aims to clarify the legal debates occurred in the mid-nineteenth century about the legal institute, when the main jurists of the Empire contended over the proper identification of subjects responsible for the acts of the Moderating Power. In order to accomplish that, an archaeological analysis of the structure and content of the arguments used by Zacarias de Góes e Vasconcellos, Paulino José Soares de Sousa and Braz Florentino Henriques de Souza was conducted to understand the rules that compose the discursive order within which the debate developed, and that headed the complex post-independence process of the Brazilian legal discourse modernization⁶. By focusing on the elements of this period's legal discourse, this study enables the recognition of the autonomy and specific density of this discourse in the face of other spheres of social life organization. This allows the understanding that the differences between jurists of the period were not only political or hermeneutic, as most studies on the theme vindicate⁷, but reflected the contrast between two distinct conceptions of legal order: a rational-realist one, which interpreted law as a set of necessary relations drawn from the spirit of the constitutional order, and a legal-formalist one, which conceived law as a set of positive norms institutionalized in the text of the constitution.

These findings led to a deeper understanding not only of the role played by the Moderating Power in the Brazilian constitutional law of the nineteenth century, but also of the characteristics of the legal culture in vogue in the imperial Brazil: a culture subjected to a process of moderni-

zation that is characterized as a *process* and not as a *rupture*. This process did not develop as linear and continuous progress, but unfolded in the vicissitudes of everyday life, in the clash between different political-discursive practices that unintentionally transformed the reality of the existent knowledge, discourse and legal order. In this process, legal logic was presented in its relative autonomy, which demonstrates the impossibility of its reduction to passive instrument of a political intention that precedes it, either as subjective transcendental will or as material infrastructure⁸. Thus, in order to understand it, this paper examines the construction of Benjamin Constant's theory on the Moderating Power; its reception in Brazil through the constitutional text of 1824; and the way Brazilian jurists reinterpreted the concept within the framework of their preconceptions about the national political and legal order, thus raising some conclusions.

2. *Benjamin Constant's theory on Moderating Power*

According to Christian Lynch⁹, the entire French political debate of the Revolution was crossed by the search for a third power, which would be above the Executive and the Legislative Power, and that would be capable of maintaining them within limits defined by the constitutional order. The great question of the nineteenth-century political philosophy was to define how to reconcile the principles of the good revolution of 1789 with governmental authority, and how to establish a stable government capable of offering tranquility to the victorious bour-



Pedro I, portrait of Manuel de Araújo, 1826

geoisie. Thus, the redefinition of the roles of the monarch and his ministers in the government was an indispensable condition for liberal elites that would have their say in the political field, which would allow the end of the use of force and the end of the revolution.

The need to recognize the victorious bourgeoisie power of agency also in legal terms was translated by the political philosophy in accordance with the liberal representative system: the system's logic required that mechanisms were created in

order to enable the "sovereign people" to control the actions of their representatives, thus preventing them from exceeding the limits of their mandates and ensuring the representation of the general will. Without crossing the boundaries of representative democracy towards an unacceptable model of direct democracy, the solution was to define an appropriate power to represent the sovereign will in possible conflicts by distributing the political power between the ruler and other politics. In this sense, the power to speak, with the voice of the eco-

nomic elite, and to have the final decision on the preservation of the political order was given to the ruler.

In this context, Saint-Pierre¹⁰ and Clermont-Tonnerre¹¹ developed the concept of Moderating Power and assigned to the Crown the responsibility for solving these conflicts. Benjamin Constant retakes the thesis and seeks to establish the best arrangement between popular sovereignty, structure of political organization and fundamental freedoms for the construction of a government that would not degenerate into despotism, and would guarantee the freedom of individuals. According to Constant¹², although sovereignty is abstractly conferred on all citizens, once a practical organization of authority is required, people are obliged to delegate their authority to others. This results in inequality in the exercise and submission to power between the different parts of the sovereign body, which can lead choices to rest only with the ruler if there is no clear definition of limits imposed on his exercise.

This demand raises another question: How can the exercise of political power be effectively restricted? For Constant, the abstract limitation of sovereignty is not enough; it was necessary to organize political institutions that combine the interests of the various depositaries of power in order to make it more advantageous for each one to remain within the limits of their powers¹³. As Feldman¹⁴ explains, constitutional rules are conceived, in this theory, as a limitation to power, aiming for a conciliation between modern (private) and ancient (public) liberties. The solution was to combine the separation of powers and the existence of a higher one that would be strong enough to maintain a balance between the

others, and would have no power of government in order to constantly remain in a passive state and without the possibility of independent action. This would be the "neutral power" attributed to the head of state of constitutional monarchies, which is responsible for ensuring that the other powers act in harmony:

The executive, the legislative, and the judiciary branches are three springs that must co-operate with each other on a general movement. However, when these springs disturb each other and cross paths, they may clash and get stuck, thus a higher force is necessary in order to return them to their places. This force cannot exist inside one of the springs, since it could use its power to destroy the others. It must be placed outside the three powers and stay neutral, in order to be necessarily applied wherever needed, and to be a preservative and restorative force instead of a hostile one. The constitutional monarchy creates this neutral power in the person of the head of state. The true interest of this leader is that the powers do not overthrow each other, but that they support and understand one another, and act connected¹⁵.

The neutral power depends on a balanced combination of irresponsibility and passivity. Only a completely irresponsible power would be strong enough to impose its decision as a representative of popular will when there is conflict between the other powers. In addition, only to an absolutely passive power it is possible to recognize such force without it degenerating into despotism, and without it usurping the competences of the others. Under such a regime, monarchs have few discretionary powers, which are linked only to the preservation of the state's form¹⁶. To the ministers, on the other hand, should be attributed the responsibility for all acts practiced in the exercise of the executive power, which is an indispensable condition of the constitu-

tional monarchy since it allows the punishment of rulers who abuse the legal authorization for the representation of citizens.

Of course that doesn't mean absolute passivity of the monarch. According to Lachèè¹⁷, Constant's theory is an attempt to balance the rational and the historical elements, in a complex perspective without which it would be impossible to imagine the rationalization process of the existent constitutional monarchy. He must, therefore, recognize the king's power to choose, defining the always instable balance point between formal and material constitution. And therein lies the rub of the legal controversy on the limits and the responsibility of the moderating power.

3. *The Moderating Power in the Constitution Text of 1824*

As stated by Ambrosini¹⁸, Iberian American elites identified themselves with the interest raised by Constant in maintaining the social order. This concern marked the foundation pact of the new State after the independence revolutions, which was defined by the reinforcement of executive power combined with recognition of the representation space of colonial elites in a model of representative constitutional monarchy. Constant's moderate liberalism offered a valuable theoretical solution to this problem.

Constant's thinking was used in the Political Constitution of the Brazilian Empire in its 5th title, which distinguished the moderating power and the executive one, and established the inviolability and irresponsibility of the emperor. Art. 98¹⁹ mentions

Constant's concept in the text, but with one major distortion: it considered the moderating power to be "the key to all political organizations" and not *the distinction* between the moderating power and the executive one (as elaborated by Constant²⁰), and assigned it the function of ensuring the independence and balance of the other powers.

The theory itself already predicted the excess of power necessary for the exercise of such high function, which the Constitution indirectly formalized in art. 99²¹ when it established the emperor's inviolability, sacredness and irresponsibility. Next, it defines the moderating power prerogatives²²: passive functions linked to the preservation of the State's form, such as appointing senators, summoning the general assembly, sanctioning the assembly's resolutions, approving the resolutions of the provinces' councils, dissolving the chamber of deputies, appointing ministers, suspending magistrates, pardoning convicts and granting amnesty.

However, as stated by Lynch²³, Brazilian governors did not intend to limit royal power, but to preserve royal prerogatives in the face of the growing claims for the monopoly of a sovereign representation by the assembly. Thus, without questioning the central core of the concept, the liberal theory of neutral power was modified by minor changes that contributed to alter the meanings it had in its original formulation – active rather than passive neutrality; discretion rather than preservation; and political-administrative centralization rather than regionalization. In this regard, the main change occurred in the organization of executive power, that recognized the emperor as head of power (not the ministers, as Constant proposed)²⁴ – which granted

him a privileged position of active government, incompatible with the passive neutrality required by the French theory.

The resignification of the idea was completed in the reinterpretation of art. 99: in that new context, the unaccountability for the exercise of the moderating power was also extended, through the "person of the emperor", to the head of the executive, who became immune to any punishments resulting from the abuse of his representative function. Combining these elements with the aforementioned definition of art. 98, which recognizes the moderating power as "key to political organization", the balance safeguards of the Brazilian constitutional monarchy were limited to the possibility of punishing ministers²⁵ who endorsed the executive's acts²⁶, while preserving the emperor's unrestricted freedom of action and government.

The constitutional text's ambiguity produced opposing readings: a conservative one and a liberal one. The first reading understood the emperor as the foundation of government action, acknowledged its importance as an active character of the political-constitutional order and acknowledged his power of decision over the course of the nation. The second understood that the emperor should have his power limited, and that he should act as a mere arbiter of the constitutional system. The key concept of moderating power was precisely the "no man's land" where this war was waged, and the meanings attributed to the extent and limits of the moderating power exercise were constructed in this context.

4. *The legal debate on the responsibility of the Moderating Power*

With the incorporation of the moderating power into the constitutional text, public opinion started to discuss the issue. However, in the first half of the century, the debate was limited to the field of political dispute, in the newspapers, regarding the definition of the institutional structure most suited to the empire's government. After the liberals' harsh criticism on the despotism of the moderating power during the first reign (1822-1831)²⁷, the emptiness of power and legitimacy created by D. Pedro I's abdication made the political game rules fragile and malleable, and the groups in dispute sought to seize the opportunity to implement their own agenda and fight for reforms in the institutional structure of the Empire. The juridical debate, *de iure constituto*, was superfluous in the context: the real possibility of extinction of the moderating power made useless the hermeneutic considerations about the limits established by the legal rule; the concrete disputes, *de iure constituendo*, were more relevant for its re-establishment in a new legislation.

The result of these disputes was a new regulation of the moderating power. After the abdication, the Regency (1831-1840) started to exercise the moderating power, and the Law of June 14, 1831 established an important limitation of its original constitutional powers. After all, the regency authorities lacked the indispensable attributes to its exercise, especially the representative legitimacy and the inviolability, which were constitutionally attributed exclusively to the *person of the emperor*²⁸. Thus, the moderating power had its prerogatives reduced²⁹, and its exercise depended on

the endorsement of the competent minister, who assumed the responsibility for the acts performed. The Additional Act of 1834 suppressed the council of state and increased ministers' responsibility, who became also responsible for advising the moderating power.

The situation changed after the conservative return: the revolts in the provinces in the 1830s reinforced the perception that only a centralized government could guarantee the integrity of the nation, and the restoration of royal power was considered strategic for that purpose. With the anticipation of the age of majority and the ascension of D. Pedro II to the throne in 1840, the Law of Regency was revoked and the moderating power returned with its full force, according to the original constitutional text. The legislative defeat of the liberal project and the stabilization of the empire's institutional structure imposed the transposition of the struggle from the political field to the legal one: the pretext was provided in the following decade, when the emperor became involved in two controversies concerning his constitutional attributions of granting grace and appointing senators. Zacarias de Góes e Vasconcellos³⁰ explains the circumstances of the debate:

The alleged delay in settling an appeal of grace in murder cases led one of the court newspapers to make reflections involving censorship of the ministry, which seemed to be effectively aiming at a highest point, and as such were repelled.

In the meantime, the moderating power named a senator for the province of Minas Gerais, and provoked, from a certain candidate³¹ who considered himself rejected, a circular to his provincial companions, in which he said that, in order to prevent them from further injuries, he abstained himself from a new candidacy and re-ignited that already discouraged controversy.

Then, with the rise of several hypothesis, the dis-

cussion in the press widened. When the two cases that had originated the controversy were ignored – granting grace and appointing senators – the discussions started to focus on the moderating power and conditions of its exercise.

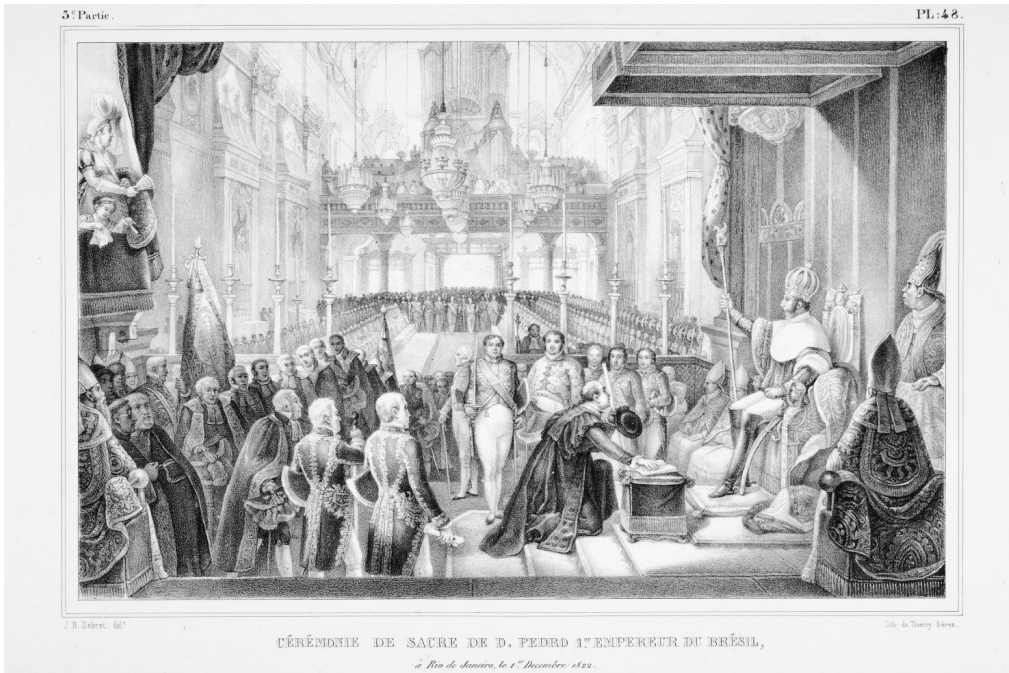
In the new legal field, four fundamental works carefully analyzed the controversy: the pamphlet *On the Nature and Limits of the Moderating Power*, published by Zacarias de Góes e Vasconcellos in 1860; the reply of Paulino José Soares de Sousa (Viscount of Uruguay) in his *Essay on Administrative Law* in 1862; Zacaria's rejoinder in the second edition of *On the Nature and Limits* published less than three months later; and the essay *On the Moderating Power* by Braz Florentino Henriques de Souza, published in 1864.

a) *The Position of Zacarias de Góes e Vasconcellos*

The liberal Zacarias irreducibly defends the need for ministers to be held accountable for acts performed in the exercise of the moderating power. According to the author, the interpretation stems from natural reason, since to recognize the monarch's inviolability without acknowledging the responsibility of the executors of such important functions would violate common sense:

It is common sense that declaring irresponsible (in a free country) a person entrusted with such transcendent duties would imply serious absurdity if his inviolability was not protected by the responsibility of officials, without whom nothing could be implemented³².

This understanding underlies the author's criticism of the four main arguments



Jean Baptiste Debret (1839), *The sacred ceremony of Pedro I Emperor of Brazil in 1822*

used by his opponents: the privative delegation of moderating power to the emperor (art. 98), the absence of a formal provision for a ministerial countersignature (art. 132), the limitation of liability to bad advice from state councillors (art. 143) and the very nature of moderating power.

As for the first argument, Zacarias states that the expression 'privately delegated'³³ means that in this part of national sovereignty the delegation is made to only one individual, the monarch – but advised and served by responsible agents. Although the "constitutional metaphysics" establishes a separation between executive power and moderating power, the reality of facts contradicts it: the "nature of things" leads to the gathering of prerogatives in the figure

of the emperor, and the rational conclusion that ministers are not delegates of the executive, but of the emperor, and therefore responsible for all their acts³⁴.

The second argument criticized is based on an *argumentum a contrario* interpretation of art. 132³⁵ of the constitution, which states that by specifying the performance of ministers in the endorsement of acts of the executive branch, the constitutional rule excluded the endorsement on acts of the moderating branch from its scope of application. The author recalls that "logic teaches" that *argumentum a contrario* affirmations have no demonstrative value, and again refers to the reality of facts to state that, regardless of the constitutional rule, ministers have effectively affixed their sig-

nature to acts coming from the moderating power³⁶.

The third argument criticized by the author is that the sole responsibility for exercising the moderating power is that of the state Councillors, for the council they provide³⁷. Zacarias considers it flawed for not considering the possibility of the crown not complying with good council – thus leading to absolute monarchy, which is contrary to the constitution's intentions. In this way, the responsibility of state Councillors for bad council would be absolutely vain if it were not complemented by the responsibility of ministers in the execution of the moderating power acts³⁸.

Finally, the fourth argument assumes that the mission of the moderating power could be affected by the intervention of members from the executive power in its activities. Zacarias argues that ministers are not the executive power, meaning that their actions could never promote the imbalance among the powers; on the contrary, it is the moderating power itself that could, when unsupervised, promote such imbalance, raising itself to a supreme power immune to any responsibility. Hence, the nation would have no option but to blame the Crown, which would attack the constitutional principle of inviolability of the monarch, leading to the end of the Brazilian legal system³⁹.

Vasconcellos' entire argument is irrigated by the notions of "natural reason", "common sense" and "natural order of things", which conditioned and guided the interpretation of the constitutional text. The legal theory from which the author departs conceives legal order as an objective reality endowed with its own meaning, whose interpretation is not limited to the

semantic translation of the normative text, but demands the explicitness of the rationality that underlies it. This means that laws are not understood in isolation, but as a set of objective relations derived from the nature of things, along with the notion of a legally binding reality to limit the hermeneutic freedom of the interpreter. The theme is dear to the first liberalism, and is clearly perceived in the thought of Montesquieu – still influential in the nineteenth century:

The laws, in their most extensive meaning, are the necessary relations that derive from the nature of things; and, in this sense, all beings have their laws, the divinity has its laws, the material world has its laws, the intelligences superior to man have their laws, the beasts have their laws, mankind has its laws⁴⁰.

It is not, however, a question of Natural law: the interpretation continues to be based entirely on the positive constitutional text, without ever resorting to abstract conceptions of natural law. As Vasconcellos⁴¹ explains, Montesquieu's concept of "natural order of things" is a sociological substitute to the old natural law. It concerns a constitutional hermeneutics that is not exhausted in the text, and requires a careful observation of the rationality present in its interstices for its proper compatibility with the principles that conform the nature of the government and the options made by the legislator – seeking, in short, the "spirit of laws".

b) *The Viscount of Uruguay's replica*

The Viscount of Uruguay opposes the position defended by Zacarias de Góes e Vasconcellos. After defining the concept of

moderating power and identifying Benjamin Constant as the "creator of the theory of that power," he points out that the one responsible for its real existence was D. Pedro I, in the two times he acted as constituent⁴². He thus establishes the starting point of his entire reply to Vasconcellos: the nature of the moderating power cannot be based on theories, only on the positive constitutional text.

Basing on the constitutional text Uruguay interprets the extent and limits of the exercise of moderating power, challenging each of the "common sense" arguments presented by Zacarias. Regarding the "natural" fusion between the emperor and the executive power, stated by Vasconcellos, Uruguay is based more on the text than on the facts, and argues that the constitution uses different expressions because it aims to treat them as distinct realities; interpreting them in another way would imply distorting the meaning of the constitutional text itself⁴³.

Moreover, he argues about the need for a ministerial countersignature: the thesis would simply not have a positive constitutional basis. After all, the constitution itself states that the emperor personally exercises the moderating power, while being the "head" of the executive power, which must therefore be exercised in conjunction with the ministers⁴⁴. In understanding positive law as the foundation and limit of all discussion, it is inevitable to conclude that the mere fact that acts of the moderating power are endorsed in practice cannot be sufficient for the countersignature to be considered its condition of validity. Thus, the only responsibility that can exist for moderating power actions is moral: the censorship imposed by the public opinion.

At the end, Uruguay dedicates chapter 29 of his book to a theoretical analysis of the nature of real power in representative monarchies, evaluating the established formula "the emperor reigns and does not rule". However, he seems to do so only for the sake of academic debate, since the first sentence of the chapter closes the discussion with a single blow – affirming that the question cannot have a theoretical answer, only a legal-positive one. Thereafter, all subsequent theoretical discussion becomes sterile erudition without legal value, eliminated by imposition of the current constitutional text:

Chapter 29

Does the Emperor reign and not rule?

Does the Emperor reign and rule?

The best answer to these questions would be as follows: Our Emperor exercises the powers conferred on him by our Constitution⁴⁵.

Uruguay's disagreement does not only refer to the content of the rules under debate, but to the very theory of law that underlies the hermeneutic work; for the author, interpretation of law must be based on the set of rules explicitly set in the constitution. Discarded the "common sense" thesis as logical nonsense, the prescriptions expressly foreseen in the constitution define the possibilities and limits of constitutional hermeneutics. The opposition reflects in symmetry the criticism of Montesquieu's thought by ideologists, as exposed by Count Destutt de Tracy:

Laws are not, as Montesquieu says, *necessary relationships that derive from the nature of things*. A law is not a relationship, and a relationship is not a law. That explanation has no clear meaning. Let us take the word *law* in its specific and particular sense. This meaning of words is always the first they have had; and it is always necessary to go

back to it to understand them well. In this sense, we understand the *law* to be a rule prescribed for our actions by an authority that we believe has the right to draft it. This last condition is necessary; for when the prescribed rule is missing, it is only an arbitrary order, an act of violence and oppression.

The idea of the law covers the idea of a penalty linked to its infringement, of a court applying that penalty, of a physical force which enforces it. Without all this the law is incomplete or illusory⁴⁶.

Influenced by English materialism, ideologues adopted a pragmatic political stance and advocated liberalism consolidation by force – which led them to support Napoleon Bonaparte's *coup d'état* at first. Philosophical empiricism and political pragmatism have given rise to a state vision of law, which conceives legal order as a set of prescriptions guaranteed by sanctions and identifies it with formal manifestation of the will issued by legitimate authority to ensure its application by force. The idea is not new and has been circulating in Europe since the origins of English empiricism (in Hobbes, for example); but with the promulgation of the Napoleonic Code in 1804, political philosophy could be transformed into legal theory: the theory held by the supporters of the School of Exegesis, which became hegemonic in Western legal culture throughout the 19th century.

c) *The rejoinder of Zacarias de Góes e Vasconcellos*

Vasconcellos' rejoinder is not shy: the author adds to his original manifesto a second and a third part in which he transcribes three speeches made in parliament on the

subject of moderating power, and discusses in detail those arguments put forward by Uruguay. From the outset he marks his point of disagreement, proclaiming that the foundation of the authority of moderating power is not in the constitutional text, but in popular sovereignty itself. For this reason alone, moderating power can be said to be a national delegation, which affects its entire interpretation of the question⁴⁷.

The same position is adopted in criticizing the fundamental separation between moderating power and executive power: Zacarias reiterates that ministers are not power, but only agents of the emperor, who, after all, has constitutional competence to exercise in a private way both the prerogatives of the executive power and those of moderating power – as required by the "nature of things"⁴⁸. As agents of an inviolable monarch, they must assume responsibility for the execution of all acts ordered, whether they refer to the executive power or the moderating one. And their countersignature is as more necessary as it is more true that there is no power which is not susceptible to abuse. Thus, the emperor's mere moral responsibility for his acts is not enough to guarantee freedom; it is necessary to attach to it legal responsibility, not of the emperor (prohibited by the constitution), but of his acts, in the person of those responsible for their execution⁴⁹. Thus, the ministerial countersignature, if it is not based on the constitutional text, stems from the very nature of the political system, which enshrines it as the result of a long administrative practice that corresponds to the true rationality of the fundamental law.

In the end, Vasconcellos faces the theoretical questions proposed by Uruguay in chapter 29 of the *Essay*. However, he does

not despise them as mere academicism in the face of objective prescriptions by positive constitutional law, but considers them relevant for the adequate understanding of the nature of moderating power in the constitution of the empire:

XV

Does the Emperor reign and not rule, or reign and rule?

Proposing to discuss such a serious matter, the author of the *Essay* begins in these terms:

"The best answer to that question would be: our Emperor exercises the powers conferred on him by our Constitution'.

That is to say: the best answer to that question would be to give no answer at all.

An excellent method of discussion, which followed on a large scale would make the task of publicist the easiest task in this world⁵⁰.

Once again, his argument is based on a rational perception of the "nature of things", which never ceases to resort to theory as a necessary element for a proper understanding of legal prescriptions. Thus, he recovers the theoretical debate to conclude that it is of the essence of the parliamentary government that ministers are the agents responsible for royalty in the expedition of acts of their competence – which corresponds to the ideal of freedom enshrined in the Brazilian constitutional text⁵¹.

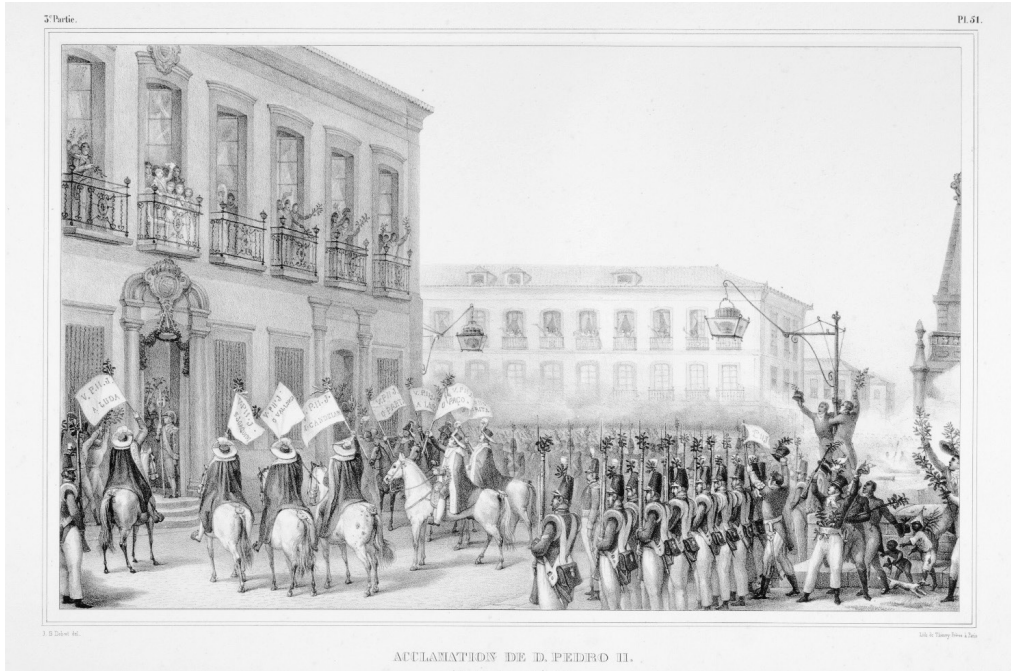
As it turns out, the reply from the Viscount of Uruguay does not affect the argumentative order of Zacarias de Góes e Vasconcellos. Even if he gives in at times, when he accepts to discuss the semantics of a prescription to contest specific statements of Uruguay, he does not give in to the essence of his thesis: the constitution must be interpreted according to the legal rationality present in its interstices; there is no point in the literal application of law without an adequate interpretation of the nature of the constitu-

tional pact, essential for the extraction of its true meaning from imperfect texts.

It would be tempting to interpret these discursive differences as mere rhetorical elaborations of a more fundamental political disagreement, as some analysts tend to do. From this perspective, intellectual flourishing and juggling would be cheap legal ornaments, intended to embellish a more profound and essential confrontation of positions. Deprived of density, law would be diluted in an ocean of politics, and the dispute between the great jurists of the empire would prove to be feeble. But that would be a false interpretation; and the order of the constitutional discourse of the conservative Braz Florentino Henriques de Souza demonstrates that Brazilian legal thought in the period of the Empire has a thickness that cannot be ignored.

d) *Braz Florentino Henriques de Souza's position*

Braz Florentino's opinion revisits the original position of Councillor Zacarias, but reversing it: even when he contradicts his thesis by defending the unaccountability of the moderating power, he agrees with the principle that interpretation of the constitutional order must take into account the inherent rationality of the legal system and the nature of the political regime. Thus, he argues that irresponsibility is not a mere privilege of the emperor, but an attribute inseparable from all representative power, being the representative as irresponsible for the "nature of things"⁵² as would be the nation itself if it could directly exercise its sovereignty. Of course, this "nature of



Jean Baptiste Debret (1839), *Cheer of Pedro II*

things” refers specifically to the nature of the constitutional text in force; the interpretation starts from it, seeking not its literal meaning, but the rational order underlying the positivized norms.

Having demonstrated that the acts of moderating power are inadmissible “in face of the true theory of constitutional monarchic governments”⁵³, Braz Florentino refutes the argument of moral responsibility raised by Zacarias based on the “invincible force of things”⁵⁴. He states that the legal responsibility of ministers would be ineffective and insufficient to avoid the moral responsibility of the monarch.

For the sake of the monarchy, we would wish to follow Councillor Zacarias’ line of thought that the interposition of ministerial responsibility,

in the acts of the Moderating Power, would have the advantage of saving the crown from public censure and from the murmurings of the people on the occasion of such acts; but for the sake of the monarchy we are obliged to confess that it is a dangerous illusion to think so, basing on that the imposition on the crown, in the exercise of its highest prerogatives, of the ministers’ pending countersignature; and, as stated by B. Constant, I believe it is always better to confess in theory that which cannot be avoided in practice⁵⁵.

In the last chapter the author revisits the constitutional provisions that had already been discussed by Zacarias and Uruguay and concludes by analyzing the position of Benjamin Constant on the subject, reiterating that «monarchy, by the nature of things, as well as by the etymology of the word itself, has never been, is not, nor will ever be but a *singular and irresponsible power*»⁵⁶.

Florentino's argument constantly refers to the natural order of things and the rationality of the constitutional order, extracting the meaning of the constitution not only from the cold letter of its provisions, but from the living spirit that animates and underpins it. Thus, even if he disagrees with Zacarias regarding the debate's content, he accepts the discussion in the terms proposed by the author; thus, he does not understand the normative text as a starting point or foundation, but as a criterion for confirming the conclusions drawn from the very nature of the legal-constitutional system, which the text only formalizes. The constitutional text would not have autonomous normative force, and the very concept of constitution is conceived in a broader way than merely legal-formal: beyond the text, it is also composed of the normative order underlying the political-institutional structure formalized in it.

The recovery of Montesquieu's argument in favor of the conservative position demonstrates the relative autonomy of the legal discourse order in relation to the political positions defended by these authors. The confrontation between rationalist realism and formalist legalism does not, therefore, reflect only a fundamental political divergence between conservatives and liberals. On the contrary, it translates the complexity of the legal-discursive order within which Brazilian jurists argued during the 19th century.

5. *Conclusions*

The archaeological method granted us an opportunity to examine the Brazilian constitutional discourse on moderating power

on its own terms; regardless of its authors or their political stance, legal discourse has its own rules, its own order, and its comprehension is crucial for a better understanding of the 19th century legal culture.

The examination of the divergences between the theses defended by Zacarias, Uruguay and Florentino regarding the legal responsibility of the moderating power in the constitution of 1824 allows us to draw three important conclusions regarding the order of the legal-constitutional discourse in circulation in Brazil in the 19th century.

The first one refers to the characterization of the juridical-constitutional field as a specific field of stabilization of normative expectations, to limit the amplitude of the political conflict in the Second Reign. If Samuel Barbosa⁵⁷ is right in stating that the discourse of Luso-Brazilian constitutionalism of the years 1821 and 1822 operates with indetermination, designating the possibility of choices placed to deliberation and dispute, forty years later the uncertainty seems to have been resolved, by legal recognition of the constitutional text's binding character. The analysis clearly shows that, despite deep disagreements, and the absence of a homogeneous concept of constitution, all authors willing to participate in the debate in their legal terms are obliged from some common fundamental and unquestionable premises: the existence of moderating power; the option for constitutional monarchy as political regime and the representative system as form of government; the emperor's constitutional inviolability and his legal irresponsibility; the constitutional text's normative supremacy. It is always within these boundaries, which are legal boundaries, that controversy ensues.

To cross those lines would mean to cross the very lines of legal debate, thus turning them unable to consequently interfere on the material constitution of the political regime – a price not everybody had the luxury or the irresponsibility to pay.

The second conclusion refers precisely to the characteristics perceived in the order of the juridical-constitutional discourse in force in Brazil in the 19th century. The analysis of the legal debate on the responsibility of the moderating power was able to demonstrate that the controversy among the authors is not only verified as to the result of their interpretations of the constitutional norms, but also as to the very conception of law and legal order that they use in their arguments. Thus, it appears that the culture of public law in imperial Brazil easily employs two distinct conceptions of law, both of liberal origin: a rational-realist one, that sees law as a set of necessary relations extracted from the spirit of the constitutional order; and a legal-formalist one, that conceives law as a set of positive norms formalized in the text of the constitution. And notably, at no time do the authors who participate in the debate invalidate the conception of legal order to which they oppose. However, by disagreeing with the conclusions, they acknowledge the contrary premises as legitimate and relevant arguments for the field of interpretation and legal argument. The conclusion is that, along with the political opposition around the Emperor's powers and in addition to the legal opposition on the meaning of the constitutional norms, there is also a third stratum of opposition in the field of Brazilian public law in the 19th century, related to the very concept of Law guiding the constitutional organization of the country.

And this leads us to the third important conclusion of this study: the opposition between different conceptions of the legal order has no relation with the content of the interpretations presented, or with the political positions assumed by each author. Their autonomy is clearly perceived when one compares the works of Zacarias and Florentino, who are in opposing positions in the political spectrum, defend conflicting interpretations of constitutional norms, but employ the same conception of law and legal order in their arguments – both refusing to treat constitutional law as a set of norms positivized by the State, and preferring to extract it from a contextual interpretation of the spirit of the fundamental law.

This confirms the autonomy of the order of legal discourse in relation to the order of political discourse, but it also provides an important key to the interpretation of the characteristics of public legal culture in circulation in imperial Brazil. After all, it allows us to transpose the conclusions reached by Fonseca⁵⁸ in his research on the private legal culture of nineteenth-century Brazil into the field of public law: that the modernization of the Brazilian legal order must be understood, both in the fields of private and public law, as a *process*, and not as a *rupture*; and that this process is not the result of linear evolution, but of the clash between different political-discursive practices, which unintentionally transform the reality of knowledge, discourse and the existing legal order. In this process, legal logic is presented in its relative autonomy, which demonstrates the impossibility of its reduction to a passive instrument of a political intention that precedes it, either as a subjective transcendental will or as an objective material infrastructure.

¹ This text was originally written in Portuguese, and translated into English by Centro de Assessoria de Publicação Acadêmica at Universidade Federal do Paraná.

² A. Arinos de Melo Franco, *Introdução*, in *O constitucionalismo de D. Pedro I no Brasil e em Portugal*, Brasília, Ministério da Justiça, Arquivo Nacional, 1972, s.p.

³ P. Bonavides, *O Poder Moderador na Constituição do Império: exemplo de um desencontro do direito com os fatos*, in «Revista de Informação Legislativa», XI, 41, 1974, pp. 27-34.

⁴ Paim is more explicit, and argues that the practice of Moderating Power hindered the creation of consensus building mechanisms in Brazilian society; the identification of "permanent national objectives" by the dictatorial regime's Superior School of War were not sufficient, as they didn't take into consideration the role played by consensus on their selection, which makes "the question of moderating power still current", A. Paim, *A discussão do poder moderador no segundo império*, in *Curso de Introdução ao Pensamento Político Brasileiro*, Brasília, UnB, 1982, p. 65.

⁵ Art. 101. The Emperor exercises the Moderating Power by:

I. Appointing Senators, in the form of Art. 43.

II. Summoning the General Assembly exceptionally at intervals of the Sessions, when the good of the Empire so requests.

III. Sanctioning the Decrees and Resolutions of the General Assembly, so that they have the force of Law: Art. 62.

IV. Approving and temporarily suspending the Resolutions of the Provinces' Councils: Arts. 86 and 87.

V. Extending, or postponing the General Assembly, and dissolving the Chamber of Deputies, in cases where the salvation of the State requires it; immediately summoning another one to replace it.

VI. Appointing, and freely dismissing the Ministers of State.

VII. Suspending the Magistrates in the cases of Art. 154.

VIII. Pardoning and moderating penalties imposed, and Defendants convicted by Judgment.

IX. Granting Amnesty in urgent cases and when humanity and the good of the State so advise.

⁶ Other authors also wrote about the Moderating Power in the 19th century: probably the most well-known are José Antonio Pimenta Bueno and Tobias Barreto – J.A. Pimenta Bueno, *Direito Público Brasileiro e Análise da Constituição do Império*, Rio de Janeiro, Typographia Imp. E Const. De J. Villeneuve E.C., 1857; T. Barreto, *A Questão do Poder Moderador e outros ensaios brasileiros*, Seleção e coordenação Hildon Rocha, Petrópolis, Vozes, 1977. Despite the quality and importance of their texts, the size and scope of this study imposed its focus on the direct debates of the 1860's, which dealt specifically with the subject of the responsibility of the Moderating Power. For an analysis that includes their opinions on the topic, see W. Guandalini Junior, *O Poder Moderador: ensaio sobre o debate jurídico-constitucional no século XIX*, Curitiba, Editora Prismas, 2016.

⁷ Such is the case of the cited classical works of A. Arinos de Melo Franco, *Introdução*, in *O constitucionalismo de D. Pedro I no Brasil e em Portugal*, Brasília, Ministério da Justiça, Arquivo Nacional, 1972, s.p.; P. Bonavides, *O Poder Moderador na Constituição do Império: exemplo de um desencontro do direito com os fatos*, in «Revista de Informação Legislativa», XI, 41, 1974, pp. 27-34; and A. Paim, *A discussão do poder moderador no segundo império*, in *Curso de Introdução ao Pensamento Político Brasileiro*, Brasília, UnB, 1982, pp. 11-65. But also of more contemporary studies, such as D.R. Ambrosini, *Do Poder Moderador: uma*

análise da organização do poder na construção do Estado imperial brasileiro. Dissertação de mestrado, São Paulo, Universidade de São Paulo, 2004; and S.M. Barbosa, *A Sphinge Monárquica: o poder moderador e a política imperial*. Tese de Doutorado, Campinas, Universidade Estadual de Campinas, 2001.

⁸ This is also, partially, Saldanha's thesis. Though he doesn't extensively develop it, the author clearly states that the theme of moderating power is determined by a "legal-political" ambiguity that must be analyzed by both these sides; especially when we consider the "hermeneutical" character of the legal debate between the period's greatest constitutionalists – Nelson Saldanha, *A Teoria do Poder Moderador e as origens do direito político brasileiro*, in «Quaderni Fiorentini per la storia del pensiero giuridico moderno», 18, 1989, pp. 253-265.

⁹ C.E.C. Lynch, *O Discurso Político Monárquico e a Recepção do Conceito de Poder Moderador no Brasil*, in «DADOS – Revista de Ciências Sociais», Rio de Janeiro, vol. 48, n. 3, 2005, p. 613.

¹⁰ J.H.B. de Saint-Pierre, *Oeuvres Complètes*, Bruxelles, Auguste Wahlen et Comp. Imp. – Libraires, 1820.

¹¹ S. de Clermont-Tonnerre, *Analyse Raisonnée de la Constitution Française*, Paris, Migneret, 1791².

¹² H.B. Constant de Rebecque, *Principes de Politique, applicables a tous les gouvernements représentatifs et particulièrement a la Constitution Actuelle de la France*, Paris, L'Imprimerie de Hocquet, 1815, p. 11.

¹³ H.B. Constant De Rebecque, *Principes de Politique, applicables a tous les gouvernements représentatifs et particulièrement a la Constitution Actuelle de la France*, Paris, L'Imprimerie de Hocquet, 1815, p. 17.

¹⁴ J.P. Feldman, *Le Constitutionnalisme selon Benjamin Constant*, in «Revue Française de Droit Constitutionnel», 76, 2008, p. 677.

- ¹⁵ H.B. Constant de Rebecque, *Principes de Politique, applicables a tous les gouvernements représentatifs et particulièrement a la Constitution Actuelle de la France*, Paris, L'Imprimerie de Hocquet, (1815a) p. 20.
- ¹⁶ H.B. Constant de Rebecque, *Cours de Politique Constitutionnelle*, Paris, Didier, Libraire-éditeur, 1836, p. 188.
- ¹⁷ L. Lacché, *Coppet et la Percée de l'État Libéral Constitutionnel*, in *Coppet, Creuset de l'Esprit Libéral: les idées politiques et constitutionnelles du groupe de Madame de Staël*, Paris, Economica, 1999, p. 139.
- ¹⁸ D.R. Ambrosini, *O poder moderador na construção do Estado imperial brasileiro*, in «Leviathan – Cadernos de Pesquisa Política», n. 1, 2004, p. 47.
- ¹⁹ Art. 98. The Moderating Power is the key to all political organizations, and it is delegated privately to the Emperor as the Supreme Head of the Nation and its First Representative, so that he continually watches over the maintenance of the Independence, and of the balance and harmony of the other Political Powers.
- ²⁰ H.B. Constant de Rebecque, *Principes de Politique, applicables a tous les gouvernements représentatifs et particulièrement a la Constitution Actuelle de la France*, Paris, L'Imprimerie de Hocquet, 1815, p. 34.
- ²¹ Art. 99. The Person of the Emperor is inviolable, and Sacred: He is not subjected to any responsibility.
- ²² Art. 101. The Emperor exercises the Moderating Power by:
I. Appointing Senators, in the form of Art. 43.
II. Summoning the General Assembly exceptionally at intervals of the Sessions, when the good of the Empire so requests.
III. Sanctioning the Decrees and Resolutions of the General Assembly, so that they have the force of the Law: Art. 62.
IV. Approving and temporarily suspending the Resolutions of the Provinces' Councils: Arts. 86 and 87.
V. Extending, or postponing the General Assembly, and dissolving the Chamber of Deputies, in cases where the salvation of the State requires it; immediately summoning another one to replace it.
VI. Appointing, and freely dismissing the Ministers of State.
VII. Suspending the Magistrates in the cases of Art. 154.
VIII. Pardoning and moderating penalties imposed, and Defendants convicted by Judgment.
IX. Granting Amnesty in urgent cases and when humanity and the good of the State so advise.
- ²³ C.E.C. Lynch, *O Discurso Político Monarquiano e a Recepção do Conceito de Poder Moderador no Brasil*, in «DADOS – Revista de Ciências Sociais, Rio de Janeiro», vol. 48, n. 3, 2005, p. 611.
- ²⁴ Art. 102. The Emperor is the Head of the Executive Power, and exercises it through his Ministers of State [...].
- ²⁵ Art. 132. The Ministers of State shall endorse, or sign, all Acts of the Executive, without which they cannot be implemented.
Art. 133. The Ministers of State are responsible for:
I. Treason.
II. Bribe, suborn, or corruption.
III. Abuse of Power.
IV. Lack of Law observance.
V. Acts against citizens' Freedom, security, or property.
VI. Any dissipation of public goods.
- ²⁶ See Machado Faria, Alécia Alvim, *Peita, suborno e a construção do conceito jurídico-penal de corrupção: patronato e venalidade no Brasil imperial (1824-1889)*, Dissertação de mestrado, Belo Horizonte, UFMG, 20018.
- ²⁷ See C.E.C. Lynch, *O Momento Monarquiano: o Poder Moderador e o pensamento político imperial*, Tese de doutorado, Rio de Janeiro, IUPERJ, 2007, p. 143.
- ²⁸ Through articles 11 and 99: "Art. 11. The Representatives of the Brazilian Nation are the Emperor and the General Assembly"; "Art. 99. The person of the Emperor is inviolable, and Sacred: He is not subjected to any responsibility".
- ²⁹ The Law of June 14, 1831 removed from the Regency the power to dissolve the Chamber of Deputies, to pardon the ministers and councillors of state, and to grant amnesty in urgent cases (art. 19), and started to require the consent of the provinces' presidents to the suspension of magistrates (art. 17).
- ³⁰ Z. de Góes Vasconcellos, *Da Natureza e Limites do Poder Moderador*, Rio de Janeiro, Typographia Universal de Laemmert, 1862³, p. 15.
- ³¹ The "certain rejected candidate" is Teófilo Ottoni, who twice headed the triple list to fill the Senate seat of the province of Minas Gerais, and was both times rejected over by the second place – in 1859 by the magistrate Luiz Antônio Barbosa, and in 1860 by the farmer Manoel Teixeira de Souza (Baron of Camargos). In disagreement, he published in September of the same year the Circular to the Voters of Minas Gerais, which defended the reduction of the attributions of the moderating power and demanded the extinction of the State Council, with the progressive absorption of its powers by the ministers. This would ensure not only the accountability for the acts of the moderating power, but also its future extinction, with the progressive assimilation of its attributions by the executive power.
- ³² Vasconcellos, *Da Natureza e Limites do Poder Moderador*, cit., p. 22.
- ³³ Art. 98. The Moderating Power is the key to all political organization, and it is privately delegated to the Emperor, as Supreme Head of the Nation, and his First Representative, to watch ceaselessly over the maintenance of the independence, balance, and harmony of the Political Powers.

- ³⁴ Vasconcellos, *Da Natureza e Limites do Poder Moderador*, cit., p. 30.
- ³⁵ Art. 132. The Ministers of State shall endorse or sign all acts of the Executive so that they may be executed.
- ³⁶ Vasconcellos, *Da Natureza e Limites do Poder Moderador*, cit., p. 33.
- ³⁷ Art. 143. Councillors of State are responsible for the councils when those are intentionally provided in opposition to the Laws and the interests of the State.
- ³⁸ Vasconcellos, *Da Natureza e Limites do Poder Moderador*, cit., p. 35.
- ³⁹ Ivi, p. 44.
- ⁴⁰ C. de Secondat de Montesquieu, *De L'Esprit des Lois*, Paris, Gallimard, 1995, p. 22.
- ⁴¹ A. Vasconcelos, *Teoria e Prática do Poder Moderador*, in «Revista de Ciência Política», 29(4), out.-dez., 1986, pp. 72-81.
- ⁴² P.J. Soares Sousa, *Ensaio sobre o Direito Administrativo*, Rio de Janeiro, Typographia Nacional, 1862, t. II., p. 338.
- ⁴³ Ivi, p. 349.
- ⁴⁴ "Art. 101. The Emperor exercises Moderator Power: [...]"; "Art. 102. The Emperor is the Head of the Executive Power, and exercises it through his Ministers of State. [...]"; "Art. 132. The Ministers of State shall either endorse or sign all the Acts of the Executive Branch, without which they may not be executed.
- ⁴⁵ Sousa, *Ensaio sobre o Direito Administrativo*, cit., p. 390.
- ⁴⁶ A.L.C. Destutt, *Commentaire sur L'Esprit des Lois de Montesquieu*, Paris, Delauney Libraire, 1819, p. 01.
- ⁴⁷ Vasconcellos, *Da Natureza e Limites do Poder Moderador*, cit., p. 101.
- ⁴⁸ Ivi, p. 126.
- ⁴⁹ Ivi, p. 159.
- ⁵⁰ Ivi, p. 214.
- ⁵¹ Ivi, p. 254.
- ⁵² B.F.H. Souza, *Do Poder Moderador — ensaio de direito constitucional contendo a análise do tit. V cap. I da Constituição Política do Brasil*, Recife, Typographia Nacional, 1864, p. 303.
- ⁵³ Ivi, p. 327.
- ⁵⁴ Ivi, p. 420.
- ⁵⁵ Ivi, p. 417.
- ⁵⁶ Ivi, p. 532.
- ⁵⁷ S.R. Barbosa, *Indeterminação do constitucionalismo imperial luso-brasileiro e o processo de independência do Brasil, 1821-1822*, in J.M. Perez-Collados, S.R. Barbosa (orgs.), *Juristas de la Independencia*, Madrid, Marcial Pons, v. 1, 2012, p. 26.
- ⁵⁸ R.M. Fonseca, *A Cultura Jurídica Brasileira e a Questão da Codificação Civil no Século XIX*, in «Revista da Faculdade de Direito da UFPR», Curitiba, n. 44, 2006, p. 76.