

History of an «Extra-constitutional Situation»: Banishment in Brazil (1824-1978)¹

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1. *Introduction: a Punishment between Law and Politics*

A strange, exceptional penalty, which was applied very few times in the history of independent Brazil: the banishment. It was a sanction that implied expulsion of the citizen from his own country. Despite its exceptional nature in the Brazilian legal system, also in a quantitative sense, it is an interesting punishment for making a history of legal culture because it leads us to the heart of the intertwinings among law and politics; code and constitution; constitution, statutes and other normativities.

The period of this research is long: from 1824 to 1978, i. e., from the first constitution of independent Brazil until the last abolition of the ban. Though missing some details, this perspective allows us to set up comparative interpretations, so it will help us to make more complex the similarities that connect all practices and discourses during this long period.

The 1824 Brazilian constitution prescribed that the person banned by sentence loses the rights of Brazilian citizen (art. 7).

Our first criminal code of 1830, in its general part, regulated the ban: «art. 50. The sentence of banishment will deprive perpetually the defendants of the rights of Brazilian citizen and will prohibit them perpetually from living in the territory of the Empire». The problem is that in the special part there was no crime to which such a penalty was inflicted: in the first drafts of the code there were², but in the final version of the code there weren't. Later we will return to the problem of this strange asymmetry between the general and the special parts.

After the fall of the empire in 1889, a new penal code and a new constitution supervened in 1890 and in 1891 respectively. With the end of the so-called First Republic (*Primeira República*) in 1930, a new constitution was issued in 1934 and the penal code was replaced in 1940 during the New State (*Estado Novo*) dictatorship (1937-

1945). A new constitution in 1946 marked the beginning of a new democratic interregnum that would last until 1964 and a new one was granted in 1967.

In the midst of all these normative documents, betwixt significant silences and few legally relevant texts, there are two cases that we will have to deal with: one from the passage from the empire to the republic (the banishment of the imperial family) and the other at the peak of the dictatorship established in 1964 (the banishment of left-wing partisans). Both are linked to political facts, and therefore are well known in our political historiography³, but I would like to emphasize a possible legal historian contribution, that is, to use them as a window to understand the relationships between different normativities and the exercise of state power, between law and politics.

Banishment (and similar penalties) is a classical issue within legal historiography of pre-modern legal orders. In Brazilian history, it carries also an identitarian problem: was Brazil made up by banned people? Conversely, about the nineteenth and twentieth centuries, monograph legal historian analyses about banishment are very rare⁴ – probably because this penalty became indeed rare.

Notwithstanding its rareness, I think that ban, exactly as a frontier institute, could help us to understand legal order dynamics that the “normal” ones would not allow us to. The philosopher Giorgio Agamben also analysed exile as a frontier concept, but with very different purposes. He was concerned with the definition of the «*relación jurídico-política originaria*»⁵. In this sense, Agamben called exile the «*relación entre la norma y la excepción que define el poder soberano*»⁶. Then, for politics, exile

would be «*más original que la oposición entre amigo y enemigo que, según Schmitt, define la política*»⁷. Instead of defining the “original” political relationship through a legal concept (exile), I would like to map different relationships between law and politics in history, more specifically this article aims to grasp the different levels of political instrumentalization of law within a modern legal system that claims to be founded upon statutory law and written constitution. And for this purpose, a legal historical analysis of the banishment I think is useful⁸.

2. *A Punishment without Crime: the Ban during the Empire (1824-1889)*

On the presence of the banishment in the general part and the absence in the special part of the 1830 criminal code, a jurist of that time, Manoel Dias de Toledo⁹, thought that this strange phenomenon occurred because the opposition party to the Emperor at the moment of the promulgation of the code constituted the majority and its own representatives were afraid of being banned. Even if only for the future, it is likely that the provision for a ban in the general part of the 1830 criminal code was intended to facilitate things if a subsequent law were to be provided for such a penalty for some crime, as pointed out by the famous imperial jurist José Antonio Pimenta Bueno¹⁰.

Then, considering the special part of the code, there was a detachment from one of the most important models of the nineteenth century: the 1810 French *code pénal*, which inflicted ban sanctions especially for several crimes of political nature (but not exclusively¹¹). On the other hand, in com-

parison with the French code, regarding the general part of the Brazilian legislation was even more severe: the banishment of the Brazilian law was perpetual (art. 50), while in the French law the term was determined (10 years) (art. 32). The 1822 Spanish penal code (art. 28, 4) was among the few laws that established the banishment in its perpetual form: one of the crimes for which was provided perpetual banishment was the «*tentativa de abolir ó variar en España la religion católica, apostólica, romana*» (art. 268).

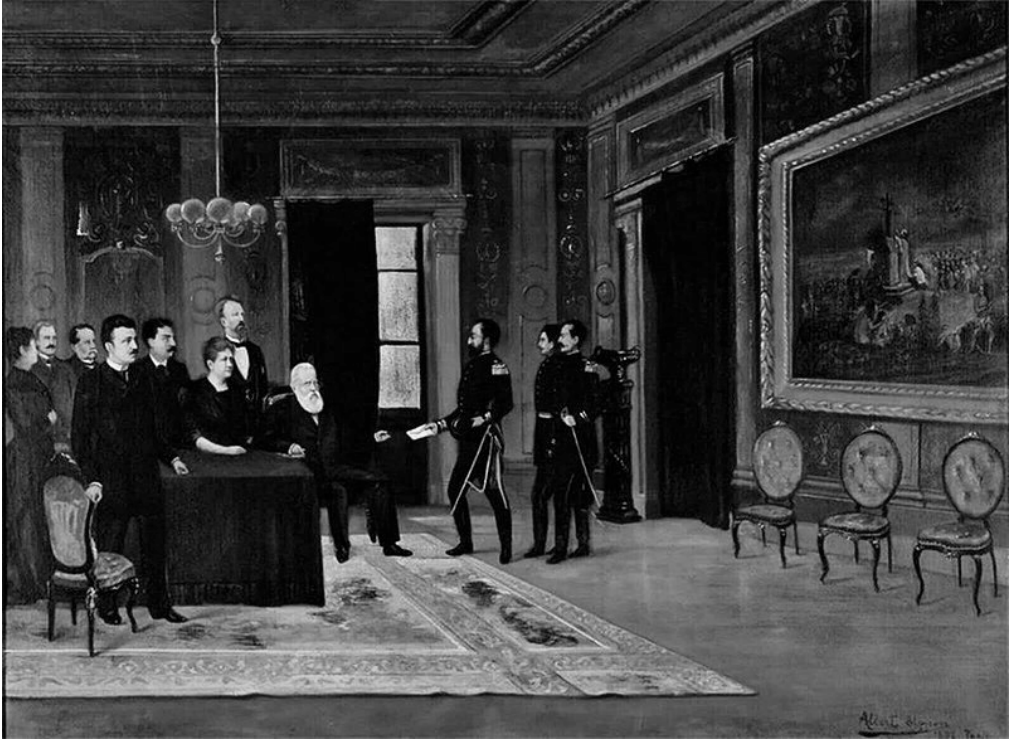
Within the nineteenth century codes that adopted the penalty of banishment, it was most common to inflict it with time limitation. The Spanish code of 1870, for example, even though it still envisaging the existence of the perpetual banishment (art. 52), did not specifically commit this kind of sanction to any crime of the special part, but only the temporary one¹². The Brazilian code did not commit the ban penalty for any crime only in its own concept of banishment, i. e., as a perpetual punishment that implies losing of the rights of Brazilian citizen. However, there were two very extraordinary crimes for which the code imposed the «*desterro para fóra do imperio*» [expulsion from the empire¹³] with time limitation and without the losing of all rights of Brazilian citizenship (i. e., losing the political rights, similarly to what occurred also regarding other penalties): conspiracy of at least twenty people (between 4 and 12 years of expulsion)¹⁴ and a type of insubordination in the exercise of military command (15 years of expulsion)¹⁵. Nevertheless, we are going to focus on the banishment (*bani-mento*) as it was defined by the imperial Brazilian legislation.

In Brazil, the debate around this kind of punishment was a minor one, a com-

prehensible fact if we consider the aforementioned situation of the 1830 criminal code. Notwithstanding, there were some interesting fragments within Brazilian legal doctrine about this penalty.

Among Brazilian jurists, one of the reasons for the negative view of the ban was the violation of the «principles of the *ius gentium*» because it would have forced a foreign state to receive a criminal in its territory¹⁶. This reason appeared in Brazilian legal doctrine only once, but foreign jurists discussed this issue extensively. In France, for example, Joseph-François-Claude Carnot, Adolphe Chauveau and Faustin Hélie were sceptical about banishment because there was no way for the government to compel another State to receive banned people¹⁷. Still in France, the possibility of transformation of the banishment into imprisonment in case of absence of authorization of another State to receive the banned was criticised¹⁸.

Imprisonment is a more convenient penalty than banishment, but there are few exceptions: this was the opinion of the important Tuscan jurist Francesco Carrara¹⁹. The flaws of banishment penalty, according to him, were inequality, the absence of exemplarity and the inability to promote public morality²⁰. For these reasons, «*le moderne legislazioni hanno moderato l'abuso che in addietro [...] fecesi dello esilio; e sono venute ad applicarlo soltanto a certe mancanze che non rivelano decisa proclività al male*»²¹. The absence of «tendency towards evil» refers exactly to political crimes. Therefore, regarding this type of delict, the not very prestigious banishment still convinced some jurists. This is the case of an author widely read by Brazilian nineteenth century jurists: Pellegrino Rossi, for whom such



Albert Chapon, *Emperor Pedro II receives the order of banishment*, 1892

penalties were immoral, however, still useful in cases of political crimes²².

In Brazil, some jurists of the nineteenth century thought that such a punishment should not have been imposed for any crime, not even to the political ones. Manoel Mendes da Cunha Azevedo argued that banishment would be a kind of civil death and that it was very unequal²³. Regarding the exceptionality of the banishment for political crimes, he was concerned with the fact that it could be politically instrumentalized, even if applied by judicial means²⁴.

Other Brazilian scholars assumed that the ban would be a reasonable penalty for some political crimes because of its par-

ticular features. Prison and forced labour would not be worthy sanctions for criminals who were not "perverse", but sometimes "virtuous" – we are dealing here with the liberal image of the political delinquent²⁵. For this reason, José da Silva Costa criticised the article 110 of the 1830 criminal code that inflicted prison with work (*prisão com trabalho*) for the political crime called rebellion (*rebellião*)²⁶. Thomaz Alves Junior was persuaded – by Adolphe Chauveau and Faustin Hélie arguments – that banishment would not be a good penalty even for political crimes, but he also thought that *desterro* – temporary expulsion from a place determined in the judicial sentence (art.

52 of the 1830 criminal code) – is «worthy of a code of a civilised nation» for political crimes, because, through detachment of the crime environment, these kind of criminals would become «almost harmless»²⁷. It is important to highlight that Alves Junior was alluding also to the «*desterro para fóra do imperio*» (expulsion from the empire) because he quoted explicitly the aforementioned conspiracy (art. 107)²⁸. Obviously, the special features of the political crimes were at stake, i. e., this kind of penalty could not be prescribed for a wide range of conducts. For this reason, even considering that Cesare Beccaria had played a very important role in overcoming the “barbarian” ancient legal order, Alves Junior disagreed with the «broad application» of this sort of punishment within Beccaria’s penal philosophy²⁹.

Now we must return to the banishment in the strict sense of the article 50 of the 1830 criminal code. So, under this legislation, obviously, it was not possible to ban someone for any crime. In fact, it seems that this did not happen³⁰, at least through ordinary judicial means. In theory, however, some jurists envisaged that the emperor could apply this punishment through grace. Grace was part of the emperor’s «moderating power», a sort of fourth power (1824 Constitution, art. 101, VIII)³¹. Thus, when replacing a death penalty, for example, the emperor could theoretically substitute it with a ban³², but so far, I have not found any case like this. The Belgian jurist Adolphe Prins raised a similar hypothesis, but denied the possibility of the king applying the ban as a substitute penalty in the exercise of his power to bestow grace, among other reasons, because it would introduce a pen-

alty that did not exist in Belgian legal order at that time³³.

«Banishment as a penalty could only be imposed in accordance with an existing law and through a judicial sentence»³⁴, stressed Pimenta Bueno in 1857. There was no such a law in Brazil then. For this reason, insisting on the topic of legality, the jurist Joaquim Rodrigues Sousa stated that neither the government nor the parliament could ban a Brazilian citizen³⁵. Years later, the jurist Carlos Perdigão, in his criminal law handbook published in 1882, conceived a difference between banishment (*bani-mento*) and exile (*exilio*). The latter could have been imposed as a «measure of public salvation» that in history «was applied against royal families who had fallen from the throne or against political enemies»³⁶. The fact that there was no previous law to impose such a penalty for a crime was irrelevant. In Brazil, it was a theoretical hypothesis because in this moment there was no decree or law formally imposing banishment against an individual or a group of individuals. Then, it is not a surprise that Perdigão’s few lines about political banishment (exile) were unique within the universe of the commentators of the 1830 criminal code, whilst in France, for example, the situation was quite different.

As the legal historian François Saint-Bonnet has well pointed out,

l’alternance des régimes politiques de la Révolution à la fin du XIX^e siècle en France offre [...] un terrain particulièrement favorable pour l’éclosion de [...] mesures de proscription: chaque nouveau régime jugeant utile de proscrire les principaux serviteurs de l’ancien³⁷.

In this context, several jurists and politicians discussed the constitutionality of proscription, its adequacy to the principle of legality, whether it was acceptable for a political body that was not a court to apply a penalty in the name of necessity (which would suspend guarantees and freedoms), whether the proscription could be extended to the family of the banned, whether or not there was political necessity in certain specific cases, and so on and so forth³⁸. Edme-Théodore Bourg, for example, identified political banishment with a *coup d'état*. Although accepting that «*cette déportation politique était toutefois une mesure de salut publique moins inhumaine que les meurtres juridiques*», he stated that

comme toutes les mesures arbitraires et violentes, elle a toujours contribué plutôt à perdre qu'à sauver les gouvernemens qui l'ont employées. Puisse-t-on enfin, éclairé par l'expérience, renoncer à ces mesures extra-légales! Les seuls gouvernemens durables sont ceux que s'appuient sur la loi et sur la justice³⁹.

3. The Abolition of the Ban and the Case of the Brazilian Imperial Family (1889-1934): an «Extra-constitutional Situation»

In 1889, we will find a situation in Brazil that could be considered accurately as a case of exile for Perdigão's theory or the well-known *proscription* of the nineteenth century France.

I can't tell here all the complicated political events of the last years of the Brazilian empire, so I'm going directly to the aspect that interests us most closely. Emperor's Pedro II fall was marked by the decree 78-A

that banned the imperial family on the 21st of December 1889⁴⁰. Then, Pedro II and his family left for Portugal⁴¹. Clearly, there was a reaction from monarchy's partisans who insisted that this was an absolutely unfair ban, but the most delicate legal problems began years later.

The new penal code of 1890 imposed the ban for a single political crime⁴² because the new republic's provisional constitution still prescribed this kind of penalty (provisional constitution of the 22th of June 1890, art. 71, § 2, c) and the author of the code, despite being contrary to this type of punishment, did not want to leave the constitutional disposition without implementation⁴³. Anyway, in the following year, the 1891 republican constitution abolished the «judicial banishment» (article 72, paragraph 20). The expulsion of a Brazilian citizen from the country (in the imperial legislation wording, «*desterro para fora do imperio*», as we have already seen) also disappeared with the 1890 penal code.

In January 1903, the Brazilian Supreme Court received a *habeas corpus* requesting in favour of Count D'Eu (Pedro II's son-in-law) and descendants of the imperial family the revocation of the ban decree because it would be unconstitutional and the decree in itself would be an illegal constriction (*constrangimento ilegal*) against the family. Therefore, could the supreme court to revoke the ban decree for constitutional reasons? Actually, the court's decision focused another problem: the lack of evidence of the «imminent danger of being subjected to violence or illegal coercion or abuse of power», that was one of the constitutional requirements of the *habeas corpus* (1891 constitution, art. 72, § 22). According to the court's decision, the mere existence

of the decree was not enough as proof of the abovementioned danger and the court considered itself not competent to judge the revocation of the decree, which was instead an attribution of the legislative power⁴⁴. According to the judge João Barbalho, who followed the argument of the attorney general, Epiácio Pessoa, the decree was a «constitutional act because it was linked to the constitutional life of the nation [...], it is clear that it is not the responsibility of the judiciary to suppress its effects»⁴⁵. The ban against the imperial family was a «purely political measure» that had avoided a «civil war»⁴⁶.

Notwithstanding this decision, in 1903 there was no member of the imperial family travelling to Brazil. But in 1907 there was a different situation. Pedro II's grandson reached a Brazilian port within a vessel, which forced the government to make a decision: prohibit the landing or not. On the 10th of May 1907, the President of the Republic Affonso Penna – by the way, the patriarch of my faculty, known as the «Affonso Penna's ancient house» – sent a telegram to Ruy Barbosa – a famous jurist, then president of the Senate and one of the signatories of the ban decree in 1889 – with a question: had the 1891 Constitution revoked the ban against the imperial family? Ruy Barbosa's answer was delivered in the Senate a few days later:

during the drafting of the Constitution of the Republic, the banishment existed in two different forms: as a state measure in the decree banishing the family who had fallen from the throne and as a means of repression in the penal code⁴⁷.

Therefore, the specification “judicial” banishment in the Constitution was a sign that the aim was to abolish only the penal

code ban, and not that of the imperial family. So, Barbosa stated that:

the ban decree was created before the Constitution and was not abolished, then this extra-constitutional situation is not unconstitutional [...]. If today the abolition of this exception no longer brings risks (which I really don't think so), the national representation must decide about it⁴⁸.

On this case there was also a *habeas corpus*. In the same interpretation line of Ruy Barbosa, the supreme court asserted that the imperial family's banishment «was not a penalty, it was not applied by a judicial sentence, but it was a political act [...], which is outside the constitutional rules designed for the future»⁴⁹. Nevertheless, there was a dissenting vote by the judge Alberto Torres. In his vote, he stated that «legally there is no pre-constitutional or extra-constitutional law»⁵⁰. Thus, banishment is a penalty and therefore the ban decree against the imperial family was abolished by the Constitution. But it was only Torres dissenting opinion.

By this time, former emperor Pedro II and his wife, Theresa Christina, had already died and there was a debate about bringing their mortal remains back to Brazil. But the political situation only became favourable to the inclusion of the imperial family in the Pantheon of our historical heroes in 1920, when President Epiácio Pessoa – the same one we saw as attorney general in the first *habeas corpus* case – signed the decree⁵¹ that revoked the ban against the imperial family and authorized the return of their mortal remains⁵².

During the First Republic (1889-1930), there were many cases of expulsion of foreigners. It was a time of growing immigration, but also of fear of the communist and anarchist ideas brought by foreigners⁵³. On

this subject, I would just like to say that, in some of these cases that ended up in court, the argument was that the accused was not a foreigner, but a Brazilian. And this was a very efficient defence. As I have pointed out elsewhere,

if exists political banishment – and the expulsion was precisely an act of executive power – what legally prevented the government from banishing those individuals just as the imperial family? If it were possible to abstract law from its own contexts, the answer would be: absolutely nothing. At the same time, this hypothesis was unthinkable. To explain this problem, we need to understand law within a given historically established culture. It is in this cultural background that the frontiers of exception, the possible senses of exception, are outlined. Therefore, the banishment exception was linked to dramatic situations, such as that of the imperial family, which also marked an institutional turning point, therefore incomparable with respect to foreigners expulsion cases. The historical-cultural senses of the exception did not reach these situations⁵⁴.

An expansion of the historical-cultural senses of the exception regarding removal of Brazilian citizens from their own country will be found later, in the era of military dictatorship. But let us proceed with order.

4. *The Abolition of the Banishment and the Kidnappings in the Military Dictatorship (1934-1978): Once Again «Extra-constitutional Situations»*

Before the military dictatorship, we had three Constitutions. The 1934 Constitution abolished the ban in general, i. e., without the adjective “judicial”. The 1937 Constitution – once again under a dictatorship – did not refer to the subject. The 1946 one was

practically the same as the 1934 one, so it abolished the banishment without the “judicial” specification⁵⁵.

In the few lines found in the Brazilian doctrine about the 1946 Constitution exclusion of the ban penalty, some jurists sought to safeguard the possibility of political measures not expressly provided by legislation, but in a very peculiar way. Political exile (*desterro político*), criminal policy measures with an administrative character, could still be employed. In both cases, however, the hypotheses put forward did not involve the departure of the Brazilian citizen from the national territory, that is, he could only be forced, for example, to remain, due to exceptional circumstances, somewhere within Brazilian frontiers⁵⁶.

In 1964 there was a *coup d'état* that established the military dictatorship in Brazil. A dictatorship that very often used a type of norm called “institutional act” (*ato institucional*), that is, the commands of the military junta that had come to power, the legal form of the *coup* itself. Once again, I cannot relate here all the complicated political events of the 1960s and 1970s in Brazil, so it is enough to say that there were left-wing groups fighting against the government, in peaceful or non-peaceful forms, with or without weapons.

The 1967 Constitution, under the military dictatorship, maintained the abolition of the banishment.

However, on the 5th of September 1969, the military junta bestowed the institutional act number 13: «Art. 1. The executive power may, on the proposal of the Ministers of Justice, Navy, Army or Air Force, ban from the national territory the Brazilian who, demonstrably, becomes inappropriate, harmful or dangerous to national secu-

city». The second article explicitly excluded the possibility of judicial review of any of the provisions of the institutional act. Moreover, the concept of national security was very broad and open. On the same day, another institutional act (number 14) was bestowed:

Paragraph 11 of Article 150 of the Constitution of Brazil [the one regarding banishment] remains in force with the following wording: there will be no death penalty, perpetual imprisonment, banishment or confiscation, except in cases of adverse external psychological, revolutionary or subversive war within the terms determined by the laws [i. e., the law about national security⁵⁷].

I would like to focus for a moment on some aspects: the provision of a sanction not in line with the Constitution, the amendment of the Constitution itself by an institutional act, and the expansion of the concept of war.

In fact, to explain these strange normative dynamics, some jurists of that time asserted that there was a double normativity in Brazil: the constitutional one and that of institutional acts. The second one could condition the first because the institutional acts, in their opinion, were the direct expression of the «counterrevolutionary revolution» that ruled the country⁵⁸. Therefore, the institutional acts were also assumed as an expression of original constituent power⁵⁹; therefore, the military junta was conceived as revolutionary in the legal sense, but politically, it was counter-revolutionary.

Through the expansion of the war concept, we are dealing with the expansion of the possible senses of exception. One of the most important jurists of that time explained the new war concepts. According to Manoel Gonçalves Ferreira Filho, «psy-

chological war [...] is the struggle for power through all means that do not involve the use of force but that can influence minds». Afterwards, Ferreira Filho clarifies that the government also makes psychological war, but this is legal and legitimate because it is not «adverse», i. e., it is not «against legal power»⁶⁰. Revolutionary war is basically the one carried out by a national group to bring down the government by force or other illegal means with the help of foreign governments. Moreover, according to Ferreira Filho, «the so-called revolutionary war presents a very clear ideology and standards of action. They are inspired by Marxism»⁶¹. The subversive war, in his opinion, is very similar to the revolutionary one, but it would be a sort of initial phase, in which strikes, demonstrations and so on take place⁶².

Between 1969 and 1971, 128 Brazilian citizens were banned. And I only counted those who were legally banned, but there are still the families of them, the “voluntary” exiles for fear of political persecution and so on. The first «complementary act» (*ato complementar*) – another type of norm of this moment: an act of the military junta to complement an institutional act – with a list of banned citizens is of the same day as the two institutional acts we have seen: the 5th of September 1969. And all the acts with these lists – which later became decrees – the military junta bestowed in the context of political kidnappings by left-wing groups⁶³. There were four kidnappings of foreign ambassadors or diplomatic officers perpetrated by left-wing groups during this period. The idea was that in exchange for the kidnapped’s life, the government would release some of those groups’ militants from prison. The tortures that occurred in

these prisons of the dictatorship are now known by Brazilian historiography. Moreover, under torture, those militants could have denounced their comrades. In the first kidnapping case, the group asked that the prisoners should be sent abroad to a place where they could become political refugees. The government's response was different, i. e., the banishment: institutional acts 13 and 14 and the first complementary act with a list of banned citizens (all on the same day). And then, for each episode of kidnapping there is a ban decree.

I would not like to discuss whether the banishment was "less worse" for the prisoners because the aspect that I would like to underline as a legal historian is the juridical-institutional one, i. e., the creation of a legal form and a sanction to respond to political contingencies.

The reactions of the jurists to the banishments were very few. In an era of censorship, of persecution, the fact is not surprising, also because there were other more serious forms of political repression to denounce in the few means available: torture, for example. One of these few voices is that of Heleno Cláudio Fragoso, a famous criminalist, also a lawyer of political activists, who expressed a criticism against the ban in 1971:

the banishment against political prisoners, whose exit from the national territory is imposed as a condition for the liberation of kidnapped diplomatic officers, is a repressive measure with political nature. In this way it was applied against the imperial family when the Republic was proclaimed. However, it is a punishment and as such it violates both the legality principle and the justice, because it is applied with no prior statutory provision to any offense and on individuals who were not the perpetrators of the crime, and even against those who (in the past) expressly refused to leave the national territory⁶⁴.

In 1976, Ronaldo Poletti, then consultant to the Ministry of Justice, wrote an article in which he stated that the banishment was a "humanitarian" measure that managed to save the lives of the diplomatic officers «without sacrificing the sovereignty of the State»⁶⁵. In the same article, Poletti asserted, resonating old polemics that we have seen on the previous period, that:

even if the Constitution had not restricted the expression ban in its judicial form, it is certain that *raisons d'état* would remain in its extra-constitutional form. [...] If the imperial family today would represent a threat to the Republic, they could be banned even if the Constitution had abolished this measure, which would be outside the Constitution, but not against it. By the way, historically unpredictable political facts brought new *raisons d'état* for the new ban established by the Institutional Act number 13⁶⁶.

In fact, the *raisons d'état* arguments and the "extra-constitutional" statement are almost paraphrases of Ruy Barbosa's speech of 1907. On the other hand, in Barbosa's argument, the adjective "judicial" of the substantive "banishment" in the 1891 Constitution article was important⁶⁷.

The long and complex constitutional amendment number 11 of the 13th of October 1978 restored the prohibition of banishment without the adjective "judicial". This specific part of the amendment regarding banishment did not arouse controversy in the Parliament. By then Brazilian political institutions were in the moment of the so-called «slow, gradual and safe opening» (I would say perhaps too safe) and it was not difficult to recognize that the ban was an exceptional measure not desirable for the future. Therefore, institutional acts 13 and 14 were revoked and the banned citizens could return to Brazil, even if it was not the end of

the political persecution that characterized the military dictatorship.

5. Conclusions: Instrumentalization of Juridical Forms

Banishment and politics articulate themselves at least in two levels: within the remnant use of this sanction as legal punishment almost exclusively for political crimes and as a political measure that creates tension with some constitutional principles and normativities.

In the two cases we have seen – that of the imperial family and that of the left-wing political prisoners – we are faced with the government of the emergency through the exception⁶⁸. But, the conceivable senses of exceptionality regarding the removal of Brazilian citizens from their own country in these two historical-cultural universes are different. The imperial family ban for a long time seemed too serious and unique, a strong symbol of a very important institutional change. Perhaps in the nineteenth century France, the cultural background of the *proscription* was a little different, however, in the Brazilian case, there was no comparison with any other exception. More precisely, there was one more important institutional rupture in the nineteenth century Brazil: when the first emperor, Pedro I, abdicated in favour of his son that was five years old. It was the 7th of April 1831. Pedro I retired to Europe and there was discussion if it would be necessary to formally ban him because of the risk of a restoration. The proposal was approved on the Deputies Chamber, but it was rejected by the Senate and Pedro I died months later⁶⁹. During

the military dictatorship, there was an expansion of the notion of exception. Without the cultural transformation behind the legal rules, it would not even be plausible to use banishment to respond to the political contingency of the political kidnappings. This shift is clearly noticeable in the enlargement of the war concept, which became much more than the traditional external war. An expansion, it must be said, also facilitated by the fact that some left-wing political partisans considered themselves in a kind of war. However, as a legal historian, what I would like to stress is that banishment is part of an authoritarian inflection of the repressive apparatus to react with exceptional measures to political contingencies.

Moreover, how exception is conceived is quite different in these cases. In the first one – that of the imperial family – there was a “real” institutional rupture (a political “revolution”) clearly taking place. The republicans successfully completed the *putsch*; immediately the emperor and his family were banned. Dissimilarly, in 1969, there was not such an institutional rupture going on. The *putsch* had taken place five years before. Two “fictions” underpinned the exceptional measures: the idea of a permanent “revolution” from which derived the legality of the institutional acts and the idea of internal war against left-wing subversion. In the first case, maybe the republicans would be the political criminals for the imperial legal order before arising to power, so there was not normal legal means for consolidating their position; in the second case, the banned left-wing persons were doubly exposed to the state political power: through ordinary national securi-

ty laws and through exceptional measures, such as banishment.

In both cases we have noticed political instrumentalization of juridical forms. Actually, perhaps modern legalism is in itself a form of political instrumentalization of juridical forms, as we can conclude by reading Paolo Grossi's provocative analyses⁷⁰. Therefore, banishment allows us to identify – even if it is not among the most dramatic forms of political struggle such as torture or assassination by the police – some of the different historical forms of the relationship between politics and law. Thus, in modernity, beyond legalism, there are other levels of instrumentalization of juridical forms⁷¹. These levels of instrumentalization put in friction the different normativities – law, decree, institutional act and Constitution. The last period – military

dictatorship – probably marks the deepest level of the abovementioned instrumentalization, of the subordination of the juridical form to politics; subordination symbolized perfectly by the theory that asserted that an institutional act could condition the Constitution.

¹ This research was carried out within the framework of the following projects: *L'influence de la révolte positiviste sur le droit pénal au tournant des XIX^e et XX^e siècles: un état de la discussion en Europe et en Amérique latine* (Groupe Européen de Recherche sur les Normativités); *História do Direito Penal Brasileiro em Perspectiva Comparada entre os Séculos XIX e XX* (FAPEMIG, *editado demanda universal* 1/2017); and *Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial de los Códigos decimonónicos* (ref. DER2016-78388-P), financed by the Spanish Ministerio de Economía y Competitividad.

² See M.P. Macário, *José Clemente Pereira e o debate jurídico do Império (1830-1850)*, Dissertação (Mestrado em Filosofia e

Teoria Geral do Direito), São Paulo, Universidade de São Paulo, 2011, p. 64, note 121 and V.C. Costa, *Codificação e formação do Estado-nacional brasileiro: o código criminal de 1830 e a positivação das leis no pós-independência*, Dissertação (Mestrado em Filosofia), São Paulo, Universidade de São Paulo, 2013, p. 118 note 229, p. 121.

³ About the transition from the empire to the republic, see C. Castro, *A Proclamação da República*, Rio de Janeiro, Zahar, 2000 and M.deS. Neves, *Os cenários da República. O Brasil na virada do século XIX para o século XX*, in J. Ferreira, L. de A.N. Delgado (orgs.), *O Brasil Republicano – o tempo do liberalismo excludente – da Proclamação da República à Revolução de 1930* (livro 1), Rio de Janeiro, Civilização Brasileira,

20136, pp. 27-34. About the dictatorship established in 1964, see C. Fico, *O golpe de 1964*, Rio de Janeiro, FGV Editora, 2014. About the political repression during this period and the experience of exiled and banned individuals, see D. Rollemberg, *Exílio: entre raízes e radares*, Rio de Janeiro, Record, 1999; about the effects of the different legal concepts "banned" and "exilated" within the status of the individuals, see J.R. Luiz, *Brasil: Deize-o. Considerações acerca do instituto do Banimento Político e sua aplicação na Ditadura Civil-Militar Brasileira (1969-1979)*, in *Anais do XXVI Simpósio Nacional de História – ANPUH*, São Paulo, julho 2011. About the apparatus of political repression including the banishment and the concept of national security

(*segurança nacional*), from a legal historian point of view, see A. Dal Ri Júnior, *O Estado e seus Inimigos. A repressão política na história do direito penal*, Rio de Janeiro, Revan, 2006, p. 289 and *Sicurezza nazionale e regime di eccezione in Brasile dall'Estado Novo alla dittatura militare (1935-1985)*, in M. Meccarelli, P. Palchetti, C. Sotis (a cura di), *Le regole dell'eccezione. Un dialogo interdisciplinare a partire dalla questione del terrorismo*, Macerata, eum, 2011, pp. 364-365.

⁴ One of these rare legal historian analyses is that written by Saint-Bonnet's about the proscription in nineteenth century France: F. Saint-Bonnet, *Un voile sur la liberté: les lois de proscription au XIX^e siècle*, in C.-A. Chassin (sous la direction de), *La proscription en droit*, Bruxelles, Éditions Bruylant, 2013. I myself have dealt with this issue two times: R. Sontag, T.E.Q. Ferreira, V.M. Jacob, *Banimento em sua forma "extra-constitucional" e cultura jurídica no Brasil (1969-1978)*, in «Revista Culturas Jurídicas», vol. 4, n. 7, 2017 and R. Sontag, *História de uma "situação extra-constitucional": o banimento entre direito e política no Brasil (1824-1934)*, «Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno», vol. 47, 2018. Then, this article revisits some previous sources and ideas, with some new sources and new purposes, as I have expressed in the second paragraph of this text. *A propos*, for esthetical reasons, mere paraphrases of these two previous texts will not be always explicitly remarked because I can do it here: some ideas of the parts II and III of this article are available on the second article and some ideas of the part IV on the first one.

⁵ G. Agamben, *Política del exílio*, in «Grifos», n. 13, 2002, p. 107.

⁶ Ivi, p. 106.

⁷ Ivi, p. 107.

⁸ For a criticism of Giorgio Agamben's analysis about

exception from a legal historian point of view, see M. Meccarelli, *Regimes jurídicos de exceção e sistema penal: mudança de paradigma entre Idade Moderna e Contemporânea*, in A. Dal Ri Júnior, R. Sontag (orgs.), *História do direito penal entre medievo e modernidade*, Belo Horizonte, Del Rey, 2011.

⁹ M.D.de Toledo, *Lições acadêmicas sobre artigos do código criminal*, Rio de Janeiro, Garnier, 1878, p. 574.

¹⁰ «A lei não a commina [the banishment] senão em casos excepcionaes e de natureza tal, que a reclamão como unica apropriada; nossa legislação não tem mesmo feito ainda applicação systematica desta punição, cujo uso no entretanto reconhece que pôde ser empregado» (J.A. Pimenta Bueno, *Direito Publico Brasileiro e analyse da Constituição do Imperio*, Rio de Janeiro, Typographia Villeneuve, 1857, pp. 459-460). It was also João Vieira's opinion regarding the banishment in the 1830 criminal code. See J.V.de Araújo, *Código penal commentado theorica e praticamente*, Rio de Janeiro, Lammert, 1897, To. II, p. 246.

¹¹ Some French jurists criticised the maintenance of the banishment penalty for some crimes that had no strict political nature even after the 1832 reform which, in some cases, replaced this type of punishment with prison. See, for example, A. Chaveau, F. Hélie, *Théorie du code pénal*, Paris, Marchal et Billard, 1887, pp. 147-148 and F. Berriat-Saint-Prix, *Analyse du code pénal, table synoptique et raisonnée des délits et des peines*, Paris, Cotillon, 1855, p. 84.

¹² The Spanish jurist Joaquin Francisco Pacheco approved the use of the temporary banishment for political crimes, but rejected perpetual sentences – including the perpetual ban – because they hindered all and any hope of the condemned: J.F. Pacheco, *El código penal concordado y comentado*, Madrid, Manuel Tello,

To. I, 18815, p. 472, p. 315. In any case, the 1870 Spanish code had a provision establishing that the perpetual banishment would be pardoned in the thirtieth year, except for some serious reason (art. 29).

¹³ It was only one of the types of removal of the citizen from a certain place that constitutes the legal concept of *desterro*. Its definition within the 1830 criminal code was quite wide: «Art. 52. A pena de desterro, quando outra declaração não houver, obrigará os réos a sahir dos termos dos lugares do delicto, da sua principal residencia, e da principal residencia do offendido, e a não entrar em algum delles, durante o tempo marcado na sentença».

¹⁴ «Art. 107. Concertarem-se vinte pessoas ou mais, para praticar qualquer dos crimes mencionados nos artigos sessenta e oito, sessenta e nove, oitenta e cinco, oitenta e seis, oitenta e sete, oitenta e oito, oitenta e nove, noventa e um, e noventa e dous, não se tendo começado a reduzir a acto. Penas – de desterro para fóra do imperio por quatro a doze annos». The quoted articles within the article 107 were: «Art. 68. Tentar directamente, e por factos, destruir a independencia ou a integridade do Imperio»; «Art. 69. Provocar directamente, e por factos, uma nação estrangeira, á declarar a guerra ao Imperio»; «Art. 85. Tentar directamente, e por factos, destruir a Constituição Política do Imperio, ou a fôrma do Governo estabelecida»; «Art. 86. Tentar directamente, e por factos, destruir algum, ou alguns artigos da Constituição»; «Art. 87. Tentar directamente, e por factos, destronzar o Imperador; privar-o em todo, ou em parte da sua autoridade constitucional; ou alterar a ordem legitima da successão»; «Art. 88. Tentar directamente, e por factos, uma falsa justificação de impossibilidade physica, ou moral do Imperador»; «Art. 89. Tentar directamente, e por factos, contra a Regencia, ou Regente, para privar-

os em todo, ou em parte da sua autoridade constitucional»; «Art. 90. Provocar directamente por escriptos impressos, lithographados, ou gravados, que se distribuirem por mais de quinze pessoas, aos crimes especificados nos artigos sessenta e oito, oitenta e cinco, oitenta e seis, oitenta e sete, oitenta e oito, e oitenta e nove»; «Art. 91. Oppôr-se alguém directamente, e por factos, á prompta execução dos Decretos, ou Cartas de convocação da Assembléa Geral, expedidas pelo Imperador, ou pelo Senado, nos casos da Constituição, artigo quarenta e sete, paragraphos terceiro e quarto»; «Art. 92. Oppôr-se alguém directamente, e por factos, á reunião da Assembléa Geral Legislativa em sessão ordinaria ou extraordinaria; ou á reunião extraordinaria do Senado nos casos do artigo quarenta e sete, paragraphos terceiro e quarto». In the 14th of January 1843, the government proposed a bill replacing the wording «twenty persons» for «several persons» in the conspiracy crime discipline, thus extending the temporary exile for a large range of political crimes (see *Annaes do parlamento brasileiro. Camara dos srs. Deputados. Primeiro anno da quinta legislatura. Primeira sessão de 1843*, Rio de Janeiro, Typ. de Hippolyto J. Pinto, To. I, 1881, p. 206), but this proposal did not succeed.

¹⁵ «Art. 141. Arrogar-se, e effectivamente exercer, sem direito, ou motivo legitimo, commando militar; conservar commando militar contra a ordem do Governo, ou legitimo superior; ou conservar reunida a tropa, depois de saber que a lei, o Governo, ou qualquer autoridade competente tem ordenado, que largue aquelle, e que separe esta. Penas — de desterro para fóra do Imperio por quinze annos no gráo maximo; de degredo para uma das provincias mais remotas da residencia do réo, por oito annos no gráo médio; e por quatro no minimo».

¹⁶ Toledo, *Lições académicas sobre*

artigos do codigo criminal, cit., p. 290.

¹⁷ J.-F.-C. Carnot, *Commentaire sur le Code pénal*, Paris, Warée, To. I, 1823, p. 45; A. Chauveau, F. Hélie, *Théorie du Code pénal*, Paris, Marchal et Billard, 1887, To. I p. 145.

¹⁸ See, for example, Carnot, *Commentaire sur le Code pénal*, cit., p. IX, p. 45; Berriat-Saint-Prix, *Analyse du code pénal, table synoptique et raisonnée des délits et des peines*, cit., p. 84; A.-H. Taillandier, *Réflexions sur les lois pénales de France et d'Angleterre*, Paris, Warée, 1824, p. 151. All of them critically referred also specifically to a *Ordonnance* of the 2nd of April 1817 that provided that «les individus condamnés au bannissement [...] seront transférés à la maison de Pierre-Châtel, et y resteront pendant la durée de leur ban, à moins qu'ils n'obtiennent la faculté d'être reçus en pays étrangers».

¹⁹ F. Carrara, *Programma del corso di diritto criminale*, Lucca, Tipografia Giusti, Vol. I, 1867, p. 391.

²⁰ Ivi, p. 392.

²¹ Ivi, p. 393.

²² P. Rossi, *Traité de droit pénal*, Paris, Guillaumin et Cie, To. II, 1855, p. 320.

²³ M.M.daC. Azevedo, *Codigo Penal do Imperio do Brasil com observações sobre alguns de seus artigos*, Recife, Typographia commercial de Meira Henriques, 1851, p. 298.

²⁴ «Alguns autores pretendem que o banimento pode ser legitimamente applicado nas grandes conjuncturas politicas como huma pena excepcional e extraordinaria. Nós facilmente conviriamos com estes autores, se a politica fosse sempre moral, e a moral nunca politica; mas quando a moral se tem feito huma sciencia positiva e peculiar de cada hum dos Estados em apoio da politica que a cada hum convem adoptar, e a politica huma sordida especulação de commando e de fortuna, e hum systema de corromper, e degradar as virtudes mais heroicas e civilisadoras

da especie no interesse, único interesse, de huns poucos velhacos, que usufruem as nações, como os particulares o seu patrimonio, o banimento não pode deixar de ser hum acto de espolio, de vingança e de violencia, ainda mesmo que seja judiciariamente imposto» (Ivi, p. 299).

²⁵ About this issue, see F. Colao, *Il delitto politico tra Otto e Novecento: da "delitto fitizio" e "nemico dello Stato"*, Milano, Giuffrè, 1986.

²⁶ J.daS. Costa, *Como tem lugar o crime de rebelião? - Até que ponto conserva elle esse nome? - O que são cabeças? - Porque não comprehendeu o legislador nos fins deste crime os arts. 93 a 97? - Propriedade da pena applicada ou determinada para este crime*, in «O Direito: revista mensal de legislação, doutrina e jurisprudência», mai-ago, vol. 10, 1876, p. 19.

²⁷ T. Alves Júnior, *Anotações theoricas e praticas ao codigo criminal*, Rio de Janeiro, Francisco Luiz Pinto & C., 1864, vol. 1, p. 556.

²⁸ Ivi, p. 555.

²⁹ «Os escriptores têm divergido na apreciação desta pena em relação aos crimes politicos. Se não adoptamos a opinião de Beccaria, que quer della fazer applicação lata, influenciado, no dizer de Chauveau, por essas idéas ainda das republicas antigas, como Grecia e Roma, onde o exilio era a pena a mais commun ou vulgar, tambem não applaudimos o pensar de Pastourel, que entende que essa pena demonstra o egoismo da sociedade; em vez de se congraçarem como irmãos, procurão lançar-se mutuamente um mal temível. Como Rossi e outros, acreditamos que a pena de desterro deve ser aproveitada pelos Codigos criminaes em crimes politicos, sem mesmo a limitação que lhe quer dar Chauveau cortando entre o desterrado e a pátria todas as relações, porque acreditamos que, quaesquer que estas sejam, o desterrado já soffre uma pena que o inhabilita de proceder e praticar como antes no lugar de seus desvarios» (ivi, p. 557).

- ³⁰ Even the «*desterro para fóra do imperio*» [expulsion from the empire] – that was different from the banishment, i. e., it was not perpetual and did not cancel the citizenship rights – was probably very rare. In order to find such a punishment “in action”, further research should focus on the political tumultuous period called *Regência* (1831-1840) during which several uprisings occurred in different regions of the empire. Until now, I have found only two cases: a Brazilian citizen who was almost (his sentence has been modified) expelled from the country in the context of a revolt at Rio de Janeiro in 1832 (see M. Basile, *Revoltas regenciais na Corte: o movimento de 17 de abril de 1832*, «Anos 90», jan-dez, vol. 11, 2004, p. 283); and another one was sentenced to *galés* [hard labour] because of a revolt at Ouro Preto in 1833, but his sentence has been commuted by a government decree to «*desterro para fóra do imperio*» for 15 years in 1835 (see *Decretos*, «Echo do Norte», 3 de junho, n. 78, 1835, pp. 313-314).
- ³¹ About the royal grace in Brazil, see A. Barrêto de Almeida Costa, *Poder e punição através da clemência: o direito de graça entre direito penal e constitucional na cultura jurídica brasileira (1824-1924)*, «Revista do Instituto Histórico e Geográfico Brasileiro», set-dez, vol. 481, 2019.
- ³² See J.R.de Sousa, *Analyse e Commentario da Constituição Política do Imperio do Brazil*, São Luiz do Maranhão, Typ. B. De Mattos, 1867, p. 52 and A.H.deS. Bandeira Filho, *O recurso de graça segundo a legislação brasileira*, Rio de Janeiro, Typografia Imperial Instituto Artístico, 1878, p. 80.
- ³³ A. Prins, *Science pénale et droit positif*, Paris, Marescq, 1899, p. 549 nt. 1.
- ³⁴ Pimenta Bueno, *Direito Publico Brasileiro e analyse da Constituição do Imperio*, cit., p. 459.
- ³⁵ «*Póde o cidadão vir a ser tão indigno e infenso ao paiz, que seja preciso banil-o, da mesma sorte que o corpo humano amputa-se um membro podre; pelo que é sempre infamante a pena de banimento. O Cod. Cri., não tendo declarado em que crime ha de ella executar-se, parece que sóé possível verificar-se por commutação da pena de morte, ou galés perpetuas em consequencia de crime politico, em virtude da attribuição que ao Poder Moderador compete pelo art. 101 § 8o. Nem o governo, como defensor da sociedade, nem mesmo a assembléa geral, como representante d’ella, pódem privar o brasileiro, por meio de banimento, de seus direitos de cidadão; e em garantia dos mesmos só realisa-se esta perda por sentença judicial na forma dita*» (Sousa, *Analyse e Commentario da Constituição Política do Imperio do Brazil*, cit., p. 52).
- ³⁶ C.F.M. Perdigão, *Manual do codigo penal brasileiro. Estudos syntheticos e praticos*, Rio de Janeiro, Garnier, 1882, Tomo Primeiro, pp. 266-267.
- ³⁷ Saint-Bonnet, *Un voile sur la liberté: les lois de proscription au XIX^e siècle*, cit., p. 47.
- ³⁸ Ivi, pp. 47 ss.
- ³⁹ E.-Th. Bourg, *Dictionnaire de la pénalité dans toutes les parties du monde connu*, Paris, chez l’Éditeur, 1825, tome 2, p. 325.
- ⁴⁰ «*Art. 1^o É banido do territorio brasileiro o sr. D. Pedro de Alcantara, e com elle sua familia*».
- ⁴¹ Three other monarchists were banned too, but their ban decree was very soon revoked, so it had little effects in comparison with the imperial family decree, as we will see in the next lines of this article. Nevertheless, one of them, the Viscount of Ouro Preto, wrote a harsh reply against the decree, denying that it would be impossible for “to crumble national character” or “encourage public disorder”, that were the “necessity arguments” of the ban decree (Visconde de Ouro Preto, *O advento da dictadura militar no Brazil*, Paris, Pichon, 1891, pp. 8-9).
- ⁴² «*Art. 107. Tentar, directamente e por factos, mudar por meios violentos a Constituição politica da Republica, ou a fórmula de governo estabelecida: Pena - de banimento, aos cabeças; e aos co-réos - a de reclusão por cinco a dez anos*».
- ⁴³ J.B. Pereira, *O código penal de 1890: notas históricas (partes I-VIII)*, in «*Revista de Jurisprudência*», vol. II, 1898, pp. 261-263.
- ⁴⁴ Superior Tribunal Federal, *Habeas corpus n. 1974*, in «*O Direito: revista mensal de legislação, doutrina e jurisprudência*», vol. 91, mai-ago 1903, p. 428.
- ⁴⁵ Ivi, p. 431.
- ⁴⁶ Ivi, p. 432.
- ⁴⁷ R. Barbosa, *Banimento da família imperial, I*, in J. Câmara (org.), *Obras Completas de Rui Barbosa*, Rio de Janeiro, Ministério da Educação e da Saúde, 1962 Vol. XXXIV, To. I, Discursos parlamentares, pp. 6-7.
- ⁴⁸ Ivi, p. 9.
- ⁴⁹ Superior Tribunal Federal, *Habeas corpus n. 2437*, in «*O Direito: revista mensal de legislação, doutrina e jurisprudência*», vol. 103, mai-set 1907, p. 428.
- ⁵⁰ Ivi, p. 432.
- ⁵¹ Decree n. 4.120 of the 3rd of September 1920.
- ⁵² About this process, see L.P. Fagundes, *As ‘batalhas’ no Congresso Nacional em prol da revogação do banimento da família imperial e do traslado dos despojos de D. Pedro II e Thereza Christina para o Brasil (1891-1920)*, in XXVII Simpósio Nacional de História: conhecimento histórico e diálogo social, Natal-RN, 22-26 de julho de 2013.
- ⁵³ About this issue, see D. Nunes, *Le “irrequietas leis de segurança nacional”. Sistema penale e repressione del dissenso politico nel Brasile dell’Estado Novo (1937-1945)*, Tesi (Dottorato di ricerca in Storia del Diritto), Macerata, Università degli studi di Macerata, 2014, pp. 60-74 and M.P. dos S. Guerra, *Anarquistas, trabalhadores, estrangeiros: a*

- construção do constitucionalismo brasileiro na Primeira República, Curitiba, Prismas, 2015.
- ⁵⁴ Sontag, *História de uma "situação extra-constitucional": o banimento entre direito e política no Brasil (1824-1934)*, cit., p. 501.
- ⁵⁵ See Sontag, Ferreira, Jacob, *Banimento em sua forma "extra-constitucional" e cultura jurídica no Brasil (1969-1978)*, cit., pp. 193-194.
- ⁵⁶ See the sources about these issues in *ivi*, pp. 194-195.
- ⁵⁷ On the concepts of national security, adverse external psychological, revolutionary and subversive war during this period from a legal historian point of view, see Dal Ri Júnior, *Sicurezza nazionale e regime di eccezione in Brasile dall'Estado Novo alla dittatura militare (1935-1985)*, cit.
- ⁵⁸ See, for example, A. Britto, *O problema da vigência dos atos complementares posteriores à edição do AI-5*, in «Revista de Direito da Procuradoria Geral», vol. 32, 1977. For a legal historian analysis of this problem, see O.L.S. Valerio, *A Toga e a Farda: o Supremo Tribunal Federal e o Regime Militar*, Dissertação (Mestrado em Direito) – Curso de Pós-Graduação em Direito, Departamento de Filosofia e Teoria Geral do Direito, Universidade de São Paulo, São Paulo, 2010; Sontag, Ferreira, Jacob, *Banimento em sua forma "extra-constitucional" e cultura jurídica no Brasil (1969-1978)*, cit., pp. 195-198.
- ⁵⁹ C. Paixão, L.deA. Barbosa, *A memória do direito na ditadura militar: a cláusula de exclusão da apreciação judicial observada como um paradoxo*, in «Revista do Instituto de Hermenêutica Jurídica», vol. 6, 2008, p. 58; C. Paixão, *Direito, política, autoritarismo e democracia no Brasil: da Revolução de 30 à promulgação da Constituição da República de 1988*, in «Araucaria. Revista Iberoamericana de Filosofia, Política y Humanidades», vol. 26, 2011, pp. 157-159.
- ⁶⁰ M.G. Ferreira Filho, *Comentários à Constituição brasileira*, São Paulo, Editora Saraiva, 19753, p. 99.
- ⁶¹ *Ivi*, p. 101.
- ⁶² *Ibidem*.
- ⁶³ About these kidnappings, see C.M.deA. Luna, *Os sequestros de embaixadores na ditadura civilmilitar*, in G.C. de M. Silva (org.), *Os crimes e a história do Brasil: abordagens possíveis*, Maceió, EDUFAL, 2015.
- ⁶⁴ H.C. Fragoso, *Observações sobre o Princípio da Reserva Legal*, in «Revista de Direito Penal», n. 1 jan-mar., 1971, p. 8.
- ⁶⁵ R. Poletti, *Notas sobre o Banimento e seus efeitos*, in «Arquivos do Ministério da Justiça», a. 33, jan.-mar., 1976, p. 90.
- ⁶⁶ *Ivi*, pp. 94-95.
- ⁶⁷ Sontag, Ferreira, Jacob, *Banimento em sua forma "extra-constitucional" e cultura jurídica no Brasil (1969-1978)*, cit., p. 206.
- ⁶⁸ About this issue in criminal law history, see Meccarelli, *Regimes jurídicos de exceção e sistema penal: mudança de paradigma entre Idade Moderna e Contemporânea*, cit.
- ⁶⁹ The sources about this proposal are quoted in Sontag, *História de uma "situação extra-constitucional": o banimento entre direito e política no Brasil (1824-1934)*, cit., pp. 484-489.
- ⁷⁰ P. Grossi, *Mitologias jurídicas da modernidade*, Florianópolis, Boiteux, 20072.
- ⁷¹ Sontag, *História de uma "situação extra-constitucional": o banimento entre direito e política no Brasil (1824-1934)*, cit., pp. 504-505.