Legal Culture and Public Law in the Brazilian First Republic (1889-1930)

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Introduction

This article aims to introduce and analyze the main characteristics of legal culture in the Brazilian First Republic (1889-1930), with a focus on public law (in the context of Private Law, some relevant variations may exist, but will not be analyzed here).

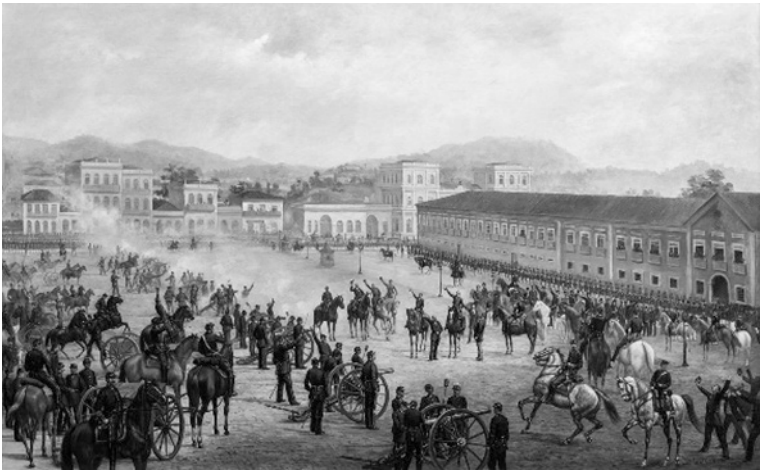
This analysis is intended for several audiences: those unfamiliar with Brazilian law; legal scholars who have completed their studies outside of Brazil; or legal scholars or students who have studied in Brazil and are researching the period covered in this analysis. Although several relevant works on the topic will be discussed in the article, analysis of the legal culture of the period is still incipient and there is still a lot to be explored.

Moreover, this article seeks to connect legal culture[1], legal-doctrine creation and case-law practice with the political and economic context of the Brazilian First Republic. The goal of such analysis is to develop a greater understanding of the relationship between lawyers' practices and concrete problems, in order to grasp how both legal doctrines and legal practices are contextually shaped and legitimized.

Thus, I approach legal history here from both an internal and external point of view, seeking to engage legal discourse with reality (i.e., with the human and social sciences). I have used both primary sources (court decisions, newspapers, journals and books of the time) and secondary sources.

1. *Interpretations of the Origins of the First Republic*

Two principal lines of interpretation about the transition from monarchy to republic arose in the early years of the First Republic. Unsurprisingly, those different interpretations represented the different perspectives of the victors – the republicans



Benedito Calixto, Proclamation of the Republic, 1893

– and the losers, the royalists. According to the republicans, the Republic had always been a national aspiration; the monarchy was a corrupt and arbitrary regime characterized by violence and injustice and, above all, the discretionary exercise of personal power, alien to the interests of the people. For the royalists, on the other hand, the proclamation of the Republic was merely a military uprising – hardly a representation of the will of the people, with the exception of a small contingent of wealthy landowners disgruntled after the abolition of slavery (1888). It was, by royalists' understanding, a big mistake: The monarchical regime had given the country seventy years of internal and external peace, ensuring national unity, progress, freedom, and international prestige. A simple military parade had replaced this regime with an unstable one, incapable of guaranteeing security and order or of promoting economic and financial equilibrium and, above all, restricting individual freedom[2]. Two paradigmatic works representing these opposing perspectives are Felisbelo Freire's, for the republicans[3], and Oliveira Viana's, for the royalists. (Although Viana's work appeared more towards the end of the First Republic, it consolidated royalist interpretations that were debated during the period)[4].

Any discussion of the rise of the republican movement (usually dated back to 1868) should include mention of the *Manifesto do Partido Liberal* (Liberal Party Manifesto), drafted after the fall of the liberal ministry and its replacement by a conservative one. In that *Manifesto*, the Liberal Party argued for «administrative decentralization, giving more action to the executive element in the provincial administrations, in order to emancipate the provinces from dependence on the Court in the provision of many offices»[5]. Especially in the case of São Paulo, the theme of federalism was central and often more important than the repub-

lican ideal itself. Another type of republicanism – a positivist version – was best presented by the Pernambucan politician Silva Jardim. Jardim, clearly influenced by contemporary French political philosophy, advocated a centralized, rational, modernized and dictatorial regime (in the positivist sense), legitimized by plebiscites. Silva Jardim was aware that such language would appeal to the nation's military elite: Positivist ideas underpinned the education offered at Rio de Janeiro's prestigious Military School, where most of the military elite – and their intellectual colleagues – had studied, from at least 1850, and notions such as the value of technique and rationalization, anti-clericalism, political centralization, and effective government were widespread among intellectuals within and outside of the armed forces. Silva Jardim realized this and openly sought military support for the republican cause[6].

Even with this collaboration, among republicans, two distinct narratives were immediately formed about the proclamation of the Republic: one version could be called militarist, the other civilist. The former celebrated the military; the latter, the civilians and the glory of the movement. One emphasized the benefits that had stemmed from military intervention, while the other condemned the military's role in politics as harmful[7]. Except in the early days of the Republic, in the governments of Deodoro da Fonseca (1889-1891) and Floriano Peixoto (1891-1894), or during the Hermes da Fonseca government (1910-1914), when this symbolic dispute gained currency, for the most part, the civilist version predominated in elite politics of the period.

2. *Economy, Society and Politics in the First Republic*

From the point of view of the socioeconomic characteristics of the republic, the economic power of coffee prevailed, as the sugar and rubber economies of the north-northeast went into steep decline, which helps explain the strength of São Paulo (the most powerful state in the Union) in the period under analysis here. And from the social point of view, agrarian oligarchies were the dominant group in Brazil (at the time, about 80 percent of the Brazilian population still lived in rural areas). For Carone, for instance, what existed in the period was the total predominance of agrarian oligarchies, which would also explain the existence of the phenomenon of *coronelismo*, and the importance of federalism for these actors[8].

Of course, the dominant groups were heterogeneous and their differences still came out in the Constituent Assembly, with disputes over different conceptions of federalism. Among the republicans, liberals tended to favor unionism, while conservatives tended to favor ultrafederalism[9]. In such a context, a broader version of federalism prevailed, although it was challenged throughout the Republic. That federalism favored the emergence of Campos Sales's *Política dos Governadores* (Governors' Politics). By that political arrangement, the political decisions fundamental to the balanced dynamics of the Republic were made by a very small elite, a small circle of chiefs, who aimed to keep the whole under their direct control and govern according to their subjective assessments of the situation, based on their sovereign titles as occupants of political office. In exchange for supporting the president in key political areas, pro-

vincial governors were granted near total autonomy in local politics[10].

In the First Republic, federalism consolidated a party structure at the state level and an anti-party structure at the national level, despite attempts at organizing associations such as the Federal Republican Party (PRF) and the Conservative Republican Party (PRC). With the advent of the new regime, national parties not only disappeared but also became stigmatized, seen as a threat to the good functioning of the government[11]. Meanwhile, fraud was common, as evidenced by the *eleições de bico de pena* (quill-pen elections)[12], in which election officials, chosen by the local powerful men, would register the results according to the will of these men, not mattering for whom the electors actually voted. In that system, the so-called *Comissão de Verificação de Poderes* (Committee for the Verification of Credentials), called *the third scrutiny*[13], was a crucial piece of that fraudulent First Republican system. Senator Pinheiro Machado (1851-1915) became a key figure in the Republican politics because he found a way to control that Committee, which had the power to give the final word about who won the elections, in a context which all sides declared themselves as winners and all sides declared that the other sides had commited fraud. (This is why it would be created, in 1932, the Brazilian Election Justice.)

In the absence of a moderating power such as the one that existed during the Empire – namely, the emperor – the legal order provided for three remedies intended to arbitrate intra- and interoligarchic quarrels: the State of Siege (Articles 6 and 81 of the Constitution) and Federal Intervention – both of which were under the responsibility of the President of the Republic and Congress – and the Judicial Review of Legislation (arts. 59, § 1, "a" and "b"), which was ultimately under the responsibility of the Supreme Federal Court. All three of these instruments would be widely used during the First Republic[14]. But there was dispute over which one should be used in any given situation. Indeed, during the First Republic there was never a minimal consensus on how institutions such as the State of Siege, Federal Intervention, Judicial Review of Legislation, Habeas Corpus and the principles of federative organization should function[15], and the quarrel involving the Extraordinary Appeal (*Recurso Extraordinário*) should also be mentioned. Those whom Lynch calls liberals advocated unionism and judicialism. Those whom Lynch calls conservatives advocated ultrafederalism and presidentialism[16].

This even affected the functioning of the Supreme Federal Court itself, as outlined below.

3. *Supreme Federal Court, Judicial Power and its Relations with Other Powers*

With the Republic, the powers of the new Supreme Federal Court (founded 1829) were dramatically expanded[17]. This expansion profoundly altered the functioning of the judiciary, the relation between state powers and even the legal culture.

Ruy Barbosa, when reviewing the draft of the 1891 Constitution, rewrote almost the entire chapter on the Judicial Power and inserted the Judicial Review of Legislation. In the transition from Empire to Republic, Barbosa sought to replace the Moderating

Power of the head of state (the emperor) with the Judicial Review of Legislation. Yet this doctrine would quickly come into conflict with the *Política dos Governadores* (Governors' Politics). That dispute continued throughout the First Republic, in the clash between the *judiciaristas* (who preferred the judiciary as "Moderating Power") and federalists (who preferred the Governors' Politics as "Moderating Power")[18]. It should be noted, for instance, that in the Hermes da Fonseca government (1910-14), when São Paulo became opposition, the Supreme Federal Court judge Pedro Lessa (an ally of the *Paulistas*) favored the judicial model.

Supreme Federal Court justice appointments were made according to the game of federal political alliances and state oligarchies, and those justices' decisions varied according to the position adopted by the state groups to which they were linked[19]. The justices came from diverse backgrounds, which speaks to their selection based on connections rather than professional preparation: many had a previous political career, while others were police chiefs, journalists, or authors of fiction and poetry. All had graduated from Brazilian law schools (with the exception of one, who studied law in the United States) between 1851 and 1888. Other lawyers, journalists, politicians, etc., who also contributed to the practice of law, such as Ruy Barbosa, had a similar education.

4. *The Education of Lawyers*

It is important to analyze the academic context in which the education of republican lawyers took place in order to understand how they formulated their legal doctrines.

To begin, it should be pointed out that the Pombaline Reforms in Portugal (1769-1772) had a powerful impact on the education and legal practice of Brazilian lawyers[20], especially as regards the heavy reliance on foreign literature – a tendency whose legacy remains in the legal academy to this day. What's more, the Pombaline *Lei da Boa Razão* (Law of Good Reason), introduced below, was still applicable in Brazil during the period researched here.

The Law of Good Reason represented a complete remodeling of the sources (and thus the content) of Portuguese law and, under the aegis of this remodeling, introduced new methods of interpretation and integration of law, a task that the Marques de Pombal (1699-1782) completed in the *Estatutos Pombalinos da Universidade* (Pombaline Statutes of the University); both laws have to be understood together. Pombal, more than just editing laws, set lawyers to work for him as agents of transformation, profoundly changing the nature of lawyers' work. He resorted to the new doctrinal body that the legal dogmatics productions of German lawyers had adapted from the old Roman Justinian law, responding to the needs of rapidly developing societies in Central Europe. Such a dogmatic and normative system had originally been called *usus modernus pandectarum* (modern use of pandectas, that is, the texts of Roman law); but now, with the progressive naturalization of the bourgeois worldview, it has been adorned with a more prestigious denomination, that of "natural law". In such a context, the Roman law susceptible to subsidiary application in Portugal would be only that which was in accordance with

the principles of natural law or the law of the people in force in the Christian and civilized nations – that is, according to "good reason." To assess the "reasonableness" of Roman law, lawyers should inquire about «the modern use of the same Roman laws among the aforementioned nations, which today inhabit Europe»[21].

Subsidiary Roman law in Portugal would be the modernized version given to it by the German jus-rationalists of the school of *usus modernus pandectarum* (Strik, Boehmer, Heinnecius, Thomasius, etc.). According to Hespanha, the authentic "suction bomb" of foreign doctrine constituted by the traditional processes of legal dogmatics, now applied to the new doctrinal body of Enlightenment legal literature, gave way in little over thirty years to a massive invasion of modern legal principles. First, the German authors of the *usus modernus pandectarum* – to whom the Law of Good Reason referred – and the seventeenth- and eighteenth-century French privatiste lawyers (e.g., Domat, as well as the Dutch Vinnius); then the modern codes: Prussia (1794), France (1804), Austria (1811), Sardinia (1827), etc. For Hespanha, this massive importation of foreign law and the doctrinal opinions based on it completed the great revolution of Portuguese national law, bringing it in line with the new nature of political power and the worldview of the leading social strata in the first half of the nineteenth century. In such a project, moral philosophy was the central discipline of a project where the laicized ideology of the Enlightenment encapsulated the inspiring themes of the bourgeois worldview[22].

After the Independence of Brazil (1822), the first two Brazilian law schools were created in São Paulo and Olinda, Pernambuco, in 1827 and opened in 1828, and both were provisionally guided by the University of Coimbra Faculty of Law Statutes[23]. The Law of Good Reason remained in force in the First Republic.

Seeking its own course, Brazil would nonetheless largely reproduce the approach adopted in Coimbra, and this is understandable[24]. Although criticism towards Coimbra's model of legal education was common at the time, this criticism coexisted with the inspiration and adoption of *Coimbran* practices. The Statutes of the Viscount of Cachoeira (Luís José de Carvalho e Melo) (*Estatutos do Visconde de Cachoeira*) were greatly inspired by the statute and scholarly practices of the University of Coimbra, and his recommendations reveal what was introduced from Coimbra into Brazilian legal culture[25]: Melo Freire is recommended in two disciplines, both Civil and Constitutional Law. Regarding Natural Law, it was recommended to take the works of Grotius and Pufendorf, as well as Heinecius. For Ecclesiastical Public Law (not Canon Law itself) Melo Freire should be consulted again. In Criminal Law, the Illuminists Filangieri, Beccaria, and the reformer and utilitarian Bentham were recommended. The Brazilian José da Silva Lisboa (Viscount of Cairu) dominated Commercial Law with the *Princípios de direito mercantil* (Principles of Commercial Law, published in Lisbon between 1798 and 1804) and also Political Economy, alongside Adam Smith, Ricardo and Malthus[26]. The statute, in its introduction, not only extolled the virtues of teaching Roman Law, but also established that it should be the primary source of Brazilian Law. It turned out that the chair of Roman Law was only formally introduced, or restored to the Vis-

count of Cachoeira model, in the Empire's legal curriculum in 1851. However, the early teachers, as well as books such as those of Melo Freire, maintained the *Coimbran* tradition[27].

With regard to legal teaching in Brazil, at no time in Brazilian imperial history was there any policy encouraging or making possible education for legal teaching. In turn, teaching staff, not always trained in law, were drawn from the ranks of lawyers and attorneys and, mainly, politicians and parliamentarians[28]. This may be related to the size of the elite, which was very small.

This also may reveal a strategy for using jurists as agents of development. This would, then, be connected with a relevant point for the period researched here: namely, that the terms "constitutional thinking" and "political thinking" were to some extent the same. Since there was no clear separation between the reflection and the practical activities involving Constitutional Law and political institutions, the main theorists of the Constitution were also the main figures of its practical operationalization[29]. This, of course, served to eliminate those resistances that law usually creates and which, in a new country, would not be desirable.

With a reform in 1854, the courses were subdivided into the Course of Legal Sciences, focused on the formation of lawyers, and Course of Social Sciences, focused on the formation of administrative and diplomatic staff. That reform had significant effects on the curricular structure[30]. It is often remarked that until about 1870 Brazil's law schools were not centers of debate, and that legal cultural life took place in the forum or in the court[31]. But this is a slightly exaggerated view, as it suggests a later radical shift,

Aurelio de Figueiredo, Promulgation of the first republican Constitution, 1891

which did not really happen. The sociopolitical context was undergoing changes and some political ideas were being embraced in academia, but this did not imply a change of method or of *locus* of debate.

In the Northeast, the transfer of the law school from Olinda to neighboring Recife in 1854 marked a geographical as well as intellectual turn. From then on, Recife would prove itself a true center for the creation of ideas and the gathering of intellectuals engaged in the problems of their time and their country. This led to the emergence of a new group of intellectuals whose production crossed Brazil's narrow regional boundaries. The Faculty of Recife would express a tendency towards scholarship, illustration and the acceptance of foreign influences linked to liberal ideas. Further,

the simultaneous introduction of evolutionary and social-Darwinian models (especially from 1870 onwards) resulted in a rather immediate attempt in Recife to adapt the law to these theories, applying them to the national reality. Recife may have been the center that most fervently embraced both deterministic doctrines of the time and certain scientific ethics that were then being propagated[32].

The São Paulo Law School, on the other hand, was a privileged setting for liberal *bacharelismo* (ie, the predominance of the *bacharel* in the political and social life of Brazil, directing politics and exercising the most relevant public positions) and the São Paulo agrarian oligarchy, and fostered political reflection and militancy, journalism and artistic and literary erudition. In fact, intense academic journalism was perhaps the major feature that prevailed in the Largo de São Francisco tradition, leading the bachelors to engage publicly in various political struggles. Some philosophical-cultural tenets found shelter in the interest of the academic body, such as jusnaturalism, philosophical eclecticism, secularism, and finally positivism itself.

The Paulista School is said to have been characterized by self-taught eclecticism, since its members were not limited to the study of legal culture, but rather practiced journalism and political militancy[33]. The main proponent of this understanding, Lilia Schwarcz, states that while Recife was prepared to produce doctrinal theorists, "men of science" as they were considered at that time, São Paulo was responsible for the formation of the great state politicians and bureaucrats[34]. For Christian Lynch, this interpretation confuses São Paulo's political growth on the national scene (which would justify law school graduates occupying more political and bureaucratic offices in the state administration) and the declining political relevance of the Northeast (which would justify that law school graduates had less room in national politics and bureaucracy, and in turn, a higher percentage of professional lawyers, doctrinal theorists, and teachers) with the analysis of law school education. For Lynch, Schwarcz's interpretation fails to address this external view, rendering it misleading.

It should be noted that throughout their history, Brazilian law schools also had a strategic function. In the imperial imagination, the lawyer was considered the best-prepared figure to participate in the so-called political sphere and guide the country toward so-called civilization. The Empire's effort to establish law schools in Brazil represented a response to the need to educate individuals to manage politics when Brazil became independent from Portugal. Law schools were places where the elite were homogenized by education, giving their students common values and languages[35].

Of course, much criticism has been aimed at students' education in those law schools. It is important to note, however, that the precariousness (which was real) of nineteenth-century legal education corresponded to the structural precariousness of the state itself and Brazilian intellectual life of the period[36].

The criticism that legal instruction was weak, that it did not cultivate students' education, and that the relevance of law schools was less in the knowledge imparted than in the political networks established, is exaggerated. When one considers the curriculum, works and legal thinking of professors

and their students, continuities are evident[37]. Of course, parallel issues that were part of the students' lives were important, such as engaging in journalism, writing literature, especially poetry; devoting themselves to the theater, being good orators; and participating in literary and political guilds, and secret societies such as Masonic lodges[38]. But those influences do not exclude the relevance of the classes themselves. Some former students, such as Silvio Romero, who wrote criticisms of faculty, and who called themselves "self-taught," did so to legitimize their supposedly innovative "breakthrough" positions; the influence of their professors is clearly present in their work. It is understood here that this kind of lawyer (Romero) is the typical kind of Brazilian learned lawyer, with the characteristics identified below (*see* 6). Others, writing at the beginning of the twentieth century, criticized their legal education in the context of the conflict between the "men of science" and the "men of letters," when the prestige of bachelors fell and it was felt that everything related to those law schools should be criticized.

With the emergence of the Republic, the monopoly of Recife and São Paulo ended, allowing the creation of free faculties in several states, and this, at least potentially, broadened the institutional field of reflection on legal and social ideas in the country[39]. As regards education, the Republic was proclaimed without a definite prospective program, although the federative ideal that had been associated with the republican program, especially with the collaboration of Ruy Barbosa, reflected the hopes of the late empire's radical liberals, and freedom-of-teaching proposals reflected the educational ideal of some idealists[40]. In fact, the establishment of law schools in different states suited the federalist ideal and enabled the predominant local oligarchies to better shape and control the education of their staff.

5. *Means of Circulation of Law and Legal Ideas*

Regarding the means and space of production and circulation of Law, newspapers and parliamentary debates were especially important spaces for public discussion, where jurists performed political and journalistic activities. These were important sites for the formation of Brazilian Public Law and also arenas in which the eloquent lawyer showcased both the oratory power of his word and the sound construction of his phrases. Aimed at intervention in the public sphere, these skills were important for success as a public figure, either through oral defense of ideals and interests in speeches delivered in the parliamentary rostrum, or in the pages of the gazettes[41].

Certain institutes also played an important role vis-à-vis the circulation of law and legal ideas of the period. The *Instituto da Ordem dos Advogados Brasileiros* (Institute of the Brazilian Bar Association) was the place *par excellence* for intellectual debates on the most varied aspects of the construction of Brazilian nationality. It is important to keep in mind that the creation of the ideal model of a lawyer was inserted as part of a broader process of centralization and consolidation of the national state in the period. Also noteworthy here is the *Instituto Histórico e Geográfico Brasileiro* (Brazilian Historical and Geographical Institute), which also

played a relevant role in the First Republic, with the participation of lawyers and contributions to Brazilian law[42].

Equally important for the formation of lawyers and specific discourses were academic societies, which taught students to defend "causes," and cultivated networks those students would sustain for the rest of their professional lives[43].

Congresses played an important role in the legal culture of the First Republic, and emerged as a new space for bringing together lawyers from different parts of the country who, as a group, would try to demarcate a space of preponderance in the elaboration of theses that would serve as reference for the interpretation of the constitutional text of 1891[44].

Also relevant were Brazil's law journals, which dealt with the juridical-doctrinal thinking of law schools, defended liberal constitutionalism, and made case law known among lawyers. These journals reported statutes and codes, criticized court decisions, and discussed old and new theories; they also fostered a specialized legal discourse through the periodic legal press, with a strategic disciplinary character[45].

Books (by Brazilian authors) had a secondary role in the legal culture of the period, as they were usually more generalist in nature (although there were some exceptions)[46]. They did not define the debate, but rather usually followed the debate, which was developed mainly in other more dynamic media such as newspapers and parliamentary discourse. It should be remembered that, in general, the most cited books were published legal briefs – extracted from legal processes – such as *Atos Inconstitucionais* and *O Estado de Sítio*, by Ruy Barbosa, or handbooks such João Barbalho's. And the authors of public law books were most often general practitioners, as was the case with Ruy Barbosa himself.

6. *Model of Brazilian Lawyers*

There is a large scholarly bibliography in Brazil around the bachelor (*bacharel*) topic, with several approaches[47].

One important point is the debate between "men of letters" and "men of science" in Brazil in the early decades of the twentieth century, which eventually left lasting stigmas in relation to bachelors of law[48]. With this debate and stigma, bachelors began to be looked down upon. Many critiques of law schools and bachelors appeared during this period, reflecting this debate.

Here, for instance, is how Dominichi Miranda de Sá characterizes how the difference in perception was constructed between one of the period's leading "men of letters", Ruy Barbosa, and one of the leading "men of science" of the time, Oswaldo Cruz, at the turn of the century:

> There was a time when Ruy Barbosa was unbeatable, having been hailed as the greatest 'actor' of all, or the greatest intelligence of all on the planet. He mastered the 'art of good saying' and delighted audiences with such sonorous words and well-decorated sentences that he seemed to want to snatch the spirits of the listeners who enjoyed him in rapture. In the period when Barbosa reigned, Oswaldo Cruz, for instance, did not make "presentations". He did not master the technique of public display. He was not a speaker, had no vast memory. He was neither carved nor educated for this kind of public performance. He had no time; in fact, he preferred to dedicate himself exclusively to the dramatic figure he had chosen for himself. Moreover, in comparison

> with Barbosa, he would be considered limited by the public, due to his speeches being very specific and his display being so esoteric. However, by the time Oswaldo Cruz was acclaimed as a single-character actor – the 'Brazilian Pasteur' – Barbosa was already the target of the biggest jokes, for the alleged uselessness of the whole pieces that he brought to mind. The audience became suspicious of such a good memory, insisting on knowing the usefulness of the knowledge paraded on stage[49].

In the specific case of Ruy Barbosa, the "bachelor", the "man of letters", the evolution of the criticism was as follows:

> Taking Ruy Barbosa as the greatest example of the Brazilian encyclopedic literate, it is impossible not to mention his notability as an 'extraordinary cerebration,' 'a memory that is hardly ever found'; a memory that allowed him to be the "greatest erudition in Brazil", if not of all the planet! Apart from that, he was considered a speaker of the highest order, whose talent could only be rivaled by Cicero and [Antônio] Vieira" (Moacir Silva. 'Rui Barbosa como poeta', Revista do Brasil, No. 94, Oct. 1923, p. 119). In addition, there are abundant comments that such a vast breadth of knowledge such as Barbosa's was only possible in countries that had not yet made the division of intellectual labor. And it was therefore urgent to adopt it. And, as in the formula of aspiring specialization, intellectual generality and lack of social use were inseparable synonyms; it was argued that Brazilian cultural production could no longer be carried out with affection and dilettantism, as *art d'agrement*, like the piano or embroidery, but, on the contrary, as a profession exercised by vocation and seriousness (José Veríssimo. 'O movimento literário brasileiro em 1910', Revista Americana, No. 4, April 1911, pp. 6-14; Afonso Celso. "Trabalho intelectual: crise de que se sofre. Como remediá-la', Revista do Brasil, 88, abr. 1923, p. 374)[50].

Clearly, the men of letters once viewed so positively had fallen from favor.

If even in the nineteenth century the denomination "men of letters" encompassed the work of individuals from various fields of activity – from journalists to men of science, from artists to doctors, lawyers and bachelors to historians or even poets – a common core for all of them was the possession of an encyclopedic knowledge, supported by rhetorical exercises, full of references in foreign language and authoritative arguments[51].

Author Dominichi Miranda de Sá put together the following description of the "men of letters" based on the reports of the time:

> To begin with their description in magazines, the presumed sumptuousness of these 'men of letter' is highlighted. All with their ponderous facial expressions, solemnly dressed in black frock coat and top hat ('Bilhetes à Cora', *Fon-Fon!*, no. 28, Oct. 1907). Not to mention the monocle and cigar between the fingers, and always jealous of the elegant ways of behaving in houses outside. *Habitués* of the Monroe Palace's worldly parties, dances, banquets, and sweets tables, they would recite verses, long prose passages, and monologues that would memorize in droves; besides singing songs, dancing waltzes and the *pas de quatre*. They would, of course, know French, and read novels in English, German, and Spanish. They would have their doses of philosophy, criminal law, sociology, and political economy. On the shelf, Augusto Comte, Plato, Socrates, Balzac, Zola, La Fontaine, Byron, Shakespeare – after all, 'a little of everything' ('Vendo autores', *Careta*, n. 8, jul. 1908). Once in possession of these attributes, everyone was greeted as a 'doctor', the magazines tell. That expression, like the bachelor's degree itself, became increasingly confused in the contemporary language of the city under the generic term 'men of letters.' Ideas would proliferate in public space like flies, innumerable, and by any pretext "the people spoke [to] a high-ranking sage" (Moscas', *Fon-Fon!*, 11, 22 June 1907; 'O astrônomo da avenida', *Fon-Fon!*, no. 8, jun. 1907)[52].

Against the tradition of these men of letters, largely organized around orality and disseminated in lecture halls and confer-

ences, local scientists of the early twentieth century sought to erect a new style of cultural production. Bachelors and lawyers began to be identified as the "anti-modern" *par excellence*, typical examples of the old paradigm that was intended to be overcome[53].

The characteristics of the lawyers of the period should also be noted here. It could be said that the lawyers were "eloquent". The "eloquent" lawyer is the one who greatly values the attributes of the spoken word, the form, the ornament, the sound (even when in written form), as well as the advantages of orality. This type of lawyer has the attorney as the model *par excellence* and is the one who typically is a tribune, one who effectively and grandiloquently conveys his knowledge through declaimed speech. Thus, memory is the greatest ally of the legal profession's members. Literature (and more particularly poetry) proves essential raw material in the attorney's profession. Literary worship represented the fulfillment of a professional duty that was rooted in the eloquent tradition. Fonseca points out that another obvious characteristic of this kind of professional would be, on the one hand, of course, that of journalistic intervention, where the attorneys were, in fact, a constant presence, and on the other hand, political intervention – the lawyer acting as a public figure, the "man of causes"[54].

Another characteristic often attributed to the Brazilian lawyers of this time is auto-didacticism, in a pejorative sense. This criticism was leveled at lawyers to the extent that, as students, they debated new artistic, social and political ideas, especially from the second half of the nineteenth century, outside the classroom and away from professors. It also alluded to their tendency to generate compelling legal theses from a broad and disconnected framework of national and foreign references[55].

In that regard, eclecticism should also be mentioned as a characteristic attributed to the Brazilian lawyers of the period: in other words, judging all schools of thought equally, trying to take what was true and eliminate what was false. Pairing theses with unlikely, seemingly contradictory doctrines was a feature of this eclecticism[56]. Of course, this is more a feature of auto-didacticism, as mentioned above, than really "eclecticism," because there was no real analysis and scrutiny of different authors – just the construction of a text defending ideas that the author already intended to defend, using citations from incompatible authors.

In terms of the tactics of constructing and defining Brazilian law, lawyers looked to authors from countries that ostensibly represented civilizational ideals. Rather than revealing mere doctrinal preferences (since, as already discussed, doctrines could be manipulated according the preferences of the actor), this dispute also had great importance to the extent that it established aspired ideals: what kind of nation should serve as an inspiration, what kind of institutions should be copied to achieve those ideals, and so forth. Throughout the Empire and the Republic, three great traditions predominated in this regard: the Anglo-American, the Franco-Portuguese (which predominated in the Empire) and the Germanic[57]. Of course, these preferences were also grounded in reality, not just the fruit of idealism.

The Franco-Portuguese tradition prevailed in the Empire, with its cultural translations for legal issues relating to central-

ization, parliamentarism, administrative justice, the Council of State and the Court of Cassation, as well as the Moderating Power. This did not disappear in the Republic when other conceptual disputes arose. In this model, in a new country, the legislator should intervene in law and society in a desired direction, legislation was necessary to achieve their political ends. Customs, case law and legal doctrine would hinder the necessary social and economic progress that the legislative reform could bring. This is why, according to this view, law should be legislator-made. Law should not be controlled neither by judges nor professors. Among other things, there was a distrust of both judges and professors, who were seen as tied into the local system of *coronelismo*, controlled by selfish individuals with no regard for the common good. The important thing would be to limit the power of the such judges so as to limit, to the extent possible, the power of the local boss. Judges should act as the mouth of the law. Faculties and law professors should play a modest role, teaching legislation. This debate sometimes involved other elements, such as advocating greater centralization of power.

The Germanism of the so-called Recife School is the result of Germany's rise after its unification, circa 1870, and was likely adopted because these lawyers did not exactly defend a Republic, but rather a reformed Empire along the lines of Bismarck's German unification, something that would have been more in the interest of the northeastern elite of the period. (And indeed, with the Republic, from 1889 on, the economic decline of the northeast would be accentuated, increasingly due, as well, to the political predominance of São Paulo).

As a bonus, German culture also assigned a more prominent role to professors and universities as compared to the other traditions (especially in its centralization versus decentralization translation key). The actors in this tradition sought a professor-made law. Professors would have the necessary knowledge and depth to find the best solutions, something that a judge, with all the practical needs of his profession, could never have. Professors would also have greater independence and be more detached from the central power than legislators. Professors would produce legal doctrine, mediating between legislation and jurisdiction. The legislator could not create any law, freely, just as judges would be limited by legal doctrine when interpreting and applying legislation, by rendering their decisions, making these more predictable, providing legal certainty and legal clarity.

Of course, in the period researched here the Anglo-Americans prevailed[58]. Several actors sought to translate this model in different ways, according to their imagination and personal preferences, among other elements. This mainly involved issues related to federalism, presidentialism, autonomous judiciary, supreme federal court, and judicial review of legislation. Ruy Barbosa's cultural translation not only had its own translation for each of these elements, but also sought to give the judges in the regime a greater role by creating what was called judicialism, making them oracles of the law. Ie, according to this view, law should be judge-made. The legislators would be pursuing its own politically orientated, selfish interests and the professors would not be either powerful, or independent, or

in a privileged position, just like the judges were, to give fast answers to new problems.

Moreover, in analyzing sources of the period, the Supreme Federal Court rulings show an obvious effort to mirror the United States Supreme Court. This does not seem to exclude actors who used the same legal and political literature with a different meaning, specially those trying to import the Anglo-American model with a kind of legislator supremacy (an eclectic translation).

These cultural translations[59] were not mere copies, nor absolutely original creations. It would be wrong to present things in one of these extremes. Rather, they correspond to a negotiation between the reality of the actors (their practical knowledge, desires, expectations, etc.), their scholarly knowledge (such as the reading of a foreign author's legal work) and their imagination, which resulted in the cultural dialogue found in the sources.

This dispute would leave deep practical imprints on contemporary Brazilian law, starting with an identity crisis or a kind of "double personality" of the legal system: is Brazil part of the Civil-Law or the Common-Law tradition? Although it is most often answered that Brazil belongs to the Civil-Law tradition, the fact is that, although the legislation is fruitful, the legal dogmatics, fundamental for the legal certainty and legal clarity in such a system, has a smaller space, as often pointed out. On the other hand, the role of the judiciary is increasing, and the 2015 Brazilian Civil Procedure Code has even adopted a system of binding precedents (although in a more restrict way).

Regarding general use of foreign doctrine, Seelaender's classification refers to the figure of the "adaptive jurisconsult", the ideal type of the eclectic strategist, uncompromised with "progressivisms", "conservatism" and "orthodox guidebooks" in general, but able to move quickly, in an unstable political framework and in a scientifically gelatinous academic environment, within a broad spectrum of distinct ideological, doctrinal and methodological choices. It differs from the "refractory-conservative" type, which would have as its basic attitude a relative distrust of "outside news" – changes inspired by European doctrine would be defended here only insofar as they represented adaptations or updates seen as "inevitable" or of extraordinary convenience. The other type could be called the "modernizing-assimilationist" – not because he generates "progress", but because he seeks to generate broad modernization by assimilating foreign standards. The jurists we are dealing with here could be better classified as what Seelaender called "adaptive jurisconsults", who came up with convincing theses using authors and citations from a variety of places at random[60].

In fact, according to Hespanha, this is a tradition that continues in contemporary Brazil, because, according to him, foreign doctrine, with European and American origin, is cited and used, but in a cherry-picked fashion, sometimes to obtain results that do not have much at all to do with its original logic. However, for the author, this instrumental use of the doctrine, which at first might seem opportunistic, can be explained not as opportunism or superficiality, but rather as a problem-oriented reading of the doctrine[61].

Regarding background theoretical references, José Reinaldo de Lima's research points to the rise of what he calls "legal naturalism" in the last decades of the nine-

teenth century in Brazil: a way of treating Law as an empirical phenomenon – one process among many that took place in the world and for which the best type of approach, and soundest knowledge, would be that of the sciences, no longer that of moral theory or that of pure and simple conceptual systematization. This would have occurred in opposition to the jusnaturalist and conceptualist models. Lopes himself dismisses "purisms" and points to a "miscegenation" of models[62]. The use of these background views can be seen in discussions about Habeas Corpus in the Brazilian Federal Supreme Court, for instance, as in the case when Enéas Galvão pointed to an evolution of the institution and Pedro Lessa (usually seen as a positivist) responded by pointing to a "concept" of Habeas Corpus[63]. Although scholars have often tried to draw up rigid lists pointing out which author was affiliated with which current, it is understood here that this was often not well resolved in the minds of the actors themselves: they used the authors of the period according to convenience and with a problem-solving purpose.

7. *The Construction of Public Law From Private Law*

In the period at hand, the civilist conception of law predominated. In the sense in which the term is used here, it is argued that Public Law was constructed from categories and concepts originating from Private Law – something contrary to what is considered the "constitutionalization of Private Law" in Brazil in the early twenty-first century.

Perhaps the most relevant public-law issue of the First Republic, the Brazilian Doctrine of Habeas Corpus was formulated by Ruy Barbosa and, later, by Pedro Lessa, from Ihering's theory of possession.

The first republican constitution of the country, instituted in 1891, had a broad list of fundamental rights and guarantees; it included a long chapter on the roles of the judiciary, but did not include a proper legal instrument for protecting those fundamental rights and guarantees. With regard to Habeas Corpus, the language of the 1891 constitution left space for broad debate about its scope of protection: Art. 72. § 22 – Habeas corpus shall be given every time the individual suffers or finds himself in imminent danger of suffering violence or coercion by illegality or abuse of power».

From that propositional statement, interpretations emerged broadening the scope of protection of habeas corpus.

In this regard, Ada Pelegrinni, Gomes Filho, and Scarance Fernandes stated:

> In fact, three views were consolidated with the advent of the republican constitution: some, like Ruy Barbosa, argued that the guarantee should be applied in all cases in which a right was threatened, stifled, unable to be exercised due to abuse of power or illegality; in the opposite direction, it was stated that habeas corpus, by its nature and historical origins, was a remedy intended solely to protect the liberty of movement; and finally a third view, the winner within the Supreme Federal Court, proposed the inclusion in the protection of Habeas Corpus not only of the cases of restriction of liberty of movement, but also the situations in which the offense to that liberty was a means to offend other rights. Thus, argued Pedro Lessa: when religious liberty is offended, hindering anyone from entering the temple, Habeas Corpus is suitable, because it was in the restraint of liberty of movement that religious liberty was wounded; when religious liberty is offended, because churches are devastated, or ob-

jects of worship are destroyed, it is not possible to apply the same remedy, because then liberty of movement of the persons is not at stake[64].

Ruy Barbosa said during a speech before the Brazilian Senate on January 22, 1915: «If the 1891 Constitution aimed to keep in Brazil the Habeas Corpus with the same limits of this guarantee as under the Empire, the 1891 Constitution would have done with Habeas Corpus the same as it did with the institution of the jury. About the jury, the constitutional text formally states: the institution of the Jury is maintained. The scope of this proposition is transparent in its simplicity». According to Barbosa, under the Habeas Corpus model of the Brazilian Empire «the body restraint was [...] a *sine qua non* condition for granting habeas corpus». But the new Republican Constitution broke openly with the narrowness of that concept of habeas corpus under the old regime. In the new republican constitution «there is no mention of prison, there is no mention of body restraints. It speaks widely, indefinitely, absolutely, about coercion and violence, so that, whenever it arises, whenever it manifests violence or coercion by one of these means, there is established the constitutional case of Habeas Corpus».

This reconstruction of the doctrine of Habeas Corpus was based on a theory of possession. In another text, rejecting nineteenth-century Brazilian doctrine, which limited the possessory actions to corporeal things, Ruy Barbosa shows that Portuguese practice always extended them to intangible rights. He proves his statement by transcribing seventeenth-century Portuguese case law in which the court at times orders a magistrate to return to someone the possession of the office of prosecutor, at times orders someone to hold the office of municipal prosecutor. Turning to Brazilian law from the time of the Empire, Ruy Barbosa says that José Higino, when a judge in Pernambuco, in 1873, granted a warrant for the maintenance of a certain society to continue to operate a funeral service. Another judge, finally, in Recife, in 1888, granted a maintenance warrant to a society that had the privilege of numbering property and buildings along all streets, avenues and other public ways within the City of Recife[65].

Pedro Lessa rejected Barbosa's position. Lessa, on a legal decision given on January 23, 1909, opposed himself to this doctrine but, nevertheless, anticipating the debates that, twenty years later, would precede the institution of the writ of mandamus as constitutional guarantee, sustained:

> Repelled the theory of possessive protection of intangible things, many individual rights will inevitably be left without defense, and the agents of the supreme authority or power of the country, [will become] the sole arbiter of the rights, duties and privileges of the citizen." In another famous opinion that he drafted when the Supreme Court ruled the HC n. 3567 on 1 July 1914, he stated: "it is clear that liberty of thought, conscience, and religion can be violated in two ways: either by coercion of liberty of movement, preventing the journalist, typographer, and other employees of the newspaper from entering in the newspaper building or preventing the practice of any other acts of movement, necessary for publication of the newspaper; or by preventing that the speaker go to the public square, or walk to the tribune where he has to speak, making the supporter of certain religious beliefs withdraw himself from the place where his beliefs are offended, preventing that the follower of a cult commits to acts of external worship, dependent on the liberty of movement, or by any other means, the constraint of the exercise of other rights, hindering, for example, the construction of a building having the form of a temple, seizing in a publishing house all copies of a book, demanding the appointment to certain

public offices, or all, the profession of a certain religious faith. In the first case it is clear that the legal remedy is Habeas Corpus, given that there is unlawful coercion to liberty of movement, condition, means, way, for the exercise of a number of rights. Habeas Corpus is granted for the petitioner to go to the public square or the newspaper building, and to express his thoughts through the tribune or the press; to go to his temple and then perform the acts of external worship, which are accomplished only by movement, liberty of movement. In all cases, therefore, that physical liberty is necessary for the exercise of liberty of thought, liberty of conscience, or religious liberty, Habeas Corpus is a suitable means to protect the liberty-condition, the liberty-means, so that it is possible to exercise the liberty-purpose. But when liberty of thought, liberty of conscience and of worship, or religious liberty, are hampered by other means, that are not coercion to liberty of movement, it would be absurd to grant Habeas Corpus to secure any of these basic rights. If a despotic authority destroys a temple, arbitrarily seizes the printed media of a newspaper and voids it, burns the copies of a book or of a daily newspaper, who in the enjoyment of his mental faculties would think to file for a Habeas Corpus for the destroyed temple, voided printed media, or the ashes of the book or the newspaper? He may file, of course, but when he has the need to move himself, to build a new temple, to print books, to press new printed media; then Habeas Corpus would be well suited, exactly because the guarantee of liberty of movement, the physical liberty, is at stake[66].

Pedro Lessa gave Habeas Corpus a narrower scope of protection, functioning in a similar way to a possessive action, as he formulated Habeas Corpus as a means to protect "freedom-condition, and freedom-environment, to enable the exercise of freedom-end".

Conclusion

This article aimed to introduce and analyze the main characteristics of Brazilian legal culture of the First Republic (1889-1930), with a focus on Public Law, weaving together analysis of legal culture, doctrinal production and case-law practice with the political and economic context of the First Brazilian Republic. As mentioned above, analysis of the period's legal culture is still incipient. While there have been substantial contributions, mentioned above, the most interesting works have yet to generate sufficient debate. Others are Eurocentric, have little reflection, or, when coming from a different field of study, even have the legal profession as a target in an effort to establish themselves and their work within the Brazilian academy.

This conclusion is not intended to repeat what has already been stated throughout the article. The main point here is that, unlike many argumentative shortcuts that are found in the analyses of the legal culture of the period, the unorthodox practices (from a European point of view) were not usually established due to the lawyers' supposed lack of good education at the time (which are the more obvious conclusions from Eurocentric-based analyses and/or from the ones produced by rival fields of study within the Brazilian academic universe), but due to concrete problems, not merely abstract intellectual choices, not even deficiencies in the intellectual education of the lawyers. There was a need and/or strategy involved. The great challenge for those who analyze the Brazilian legal culture is to try to find the relationship between these practices and these concrete problems, as I have attempted here.

[1] The concept of legal culture is used here in the sense of a set of meanings (doctrinal patterns, standards of interpretation, marks of national and foreign doctrinal authority, influences and particular uses of legal-philosophical conceptions) that effectively circulated in the production of law and were accepted during this time in Brazil (R.M. Fonseca, *Os juristas e a cultura jurídica brasileira na segunda metade do século XIX*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», 35, n. 1, 2006, p. 340).

[2] E.V. da Costa, *Da monarquia à república: momentos decisivos*, São Paulo, Fundação Editora da UNESP, 1999[6], pp. 387-394.

[3] C.E.C. Lynch, *Da Monarquia à Oligarquia: história institucional e pensamento político brasileiro (1822-1930)*, São Paulo, Alameda, 2014, pp. 173-174.

[4] J.M. de Carvalho, *Discurso de posse na Academia Brasileira de Letras*, available at: <http://www.academia.org.br/academicos/jose-murilo-de-carvalho/discurso-de-posse>, September 2020.

[5] V. Russomano, *História constitucional do Rio Grande do Sul*, Porto Alegre, Assembléia Legislativa do Estado do RS, 1976[2] [1932], pp. 149-152.

[6] S. Schwartzman, *Bases do autoritarismo brasileiro*, Rio de Janeiro, Publit Soluções Editoriais, 2007[4], pp. 182-186.

[7] da Costa, *Da monarquia à república: momentos decisivos*, cit., pp. 401-402.

[8] E. Carone, *A República Velha: Evolução Política*, São Paulo, Difusão Européia do Livro, 1971, pp. VX and 249-271.

[9] Lynch, *Da Monarquia à Oligarquia: história institucional e pensamento político brasileiro (1822-1930)*, cit., p. 90.

[10] A. Koerner, *A Ordem Constitucional da República: uma análise política da jurisdição constitucional no Brasil (1889-1926)*, Tese (Livre Docência) - Universidade Estadual de Campinas, Instituto de Filosofia e Ciências Humanas, Departamento de Ciência Política, Campinas, 2015, p. 200.

[11] S.C.S. Pinto, *Só para iniciados... o jogo político na antiga capital federal*, Rio de Janeiro, Mauad X/Faperj, 2011, p. 77.

[12] V.L.B. Borges, *Morte na República, Os Últimos Anos de Pinheiro Machado e a Política Oligárquica (1909-1915)*, Rio de Janeiro, IHGB/Livre Expressão, 2004, pp. 129-137.

[13] P. Ricci, J.P. Zulini, *Quem ganhou as eleições? A validação dos resultados antes da criação da justiça eleitoral*, in «Revista de Sociologia e Política», 21, n. 45, March 2013, pp. 94-97.

[14] C.E.C. Lynch, C.P. de Souza Neto, *O constitucionalismo da inefetividade: a Constituição de 1891 no cativeiro do estado de sítio*, in C.C. da Rocha, G.E. Pinheiro, H.B. de Sousa, L.R. Barroso, V. Pontes Filho (eds.), *As constituições brasileiras: notícia, história e análise crítica*, Brasília, OAB Editora, 2008, p. 48.

[15] Lynch, *Da Monarquia à Oligarquia: história institucional e pensamento político brasileiro (1822-1930)*, cit., pp. 17-18.

[16] Ivi, p. 90.

[17] A. Venâncio Filho, *Juízes e Tribunais – Perspectivas da História da Justiça no Brasil – O STF na República Velha*, «DPU», 41, September/October 2011, p. 192.

[18] According to the usage of the term at the researched time. In this regard, see L. Carneiro, *Judiciarismo e federalismo*, Rio de Janeiro, Alba, 1930, pp. 127-177.

[19] C.E.C. Lynch, *O momento oligárquico: a construção institucional da República brasileira (1870-1891)*, in «Historia Constitucional», 21, 2011 pp. 307-311; A. Koerner, *Judiciário e cidadania na constituição da República Brasileira*, São Paulo, Hucitec/Departamento de Ciência Política, USP, 1998, p. 30; C.E.C. Lynch, C.P. de Souza Neto, *O constitucionalismo da inefetividade: a Constituição de 1891 no cativeiro do estado de sítio*, in C.C. da Rocha, G.E. Pinheiro, H.B. de Sousa, L.R. Barroso, V. Pontes Filho (eds.), *As constituições brasileiras: notícia, história e análise crítica*, Brasília, OAB Editora, 2008, pp. 29-30 and p. 56.

[20] A.W. Bastos, *O Ensino Jurídico no Brasil*, Rio de Janeiro, Lumen Juris, 1998, *passim*.

[21] A.M. Hespanha, *A História do Direito na História Social*, Lisboa, Livros Horizonte, 1978, pp. 73-82.

[22] Ivi, pp. 82-108.

[23] S. Adorno, *Os aprendizes do poder: o bacharelismo liberal na política brasileira*, Rio de Janeiro, Paz e Terra, 1988, p. 82.

[24] This tradition of seeking in foreign law, especially in the foreign law of some admired country or culture, the solutions to contemporary Brazilian problems, often as a first option, without considering Brazilian legal history or even leaving it as a second option, has taken root in the legal culture.

[25] Bastos, *O Ensino Jurídico no Brasil*, cit., p. XV.

[26] J.R. de Lima Lopes, *O direito na história: lições introdutórias*, São Paulo, Atlas, 2011[3], 3rd reprint, p. 316.

[27] Bastos, *O Ensino Jurídico no Brasil*, cit., pp. 34, 47.

[28] Ivi, p. 53.

[29] P. M. Pivatto, *Idéias impressas: O direito e a história na doutrina constitucional brasileira na primeira república*, Tese (doutorado) – Universidade de São Paulo, Faculdade de Direito, São Paulo, 2010, p. 69.

[30] Bastos, *O Ensino Jurídico no Brasil*, cit., p. 126.

[31] de Lima Lopes, *O direito na história: lições introdutórias*, cit., p. 321.

[32] L.M. Schwarcz, *O Espetáculo das Raças: Cientistas, Instituições e Questão Racial no Brasil-1870-1930*, São Paulo, Companhia das Letras, 1993, pp. 146-151; A.C. Wolkmer, *História do direito no Brasil*, Rio de Janeiro, Forense, 2002, pp. 81-83.

[33] S. Adorno, *Os aprendizes do poder: o bacharelismo liberal na política brasileira* cit., pp. 92-95; L.M. Schwarcz, *O Espetáculo das Raças: Cientistas, Instituições e Questão Racial no Brasil-1870-1930* cit., p. 174; Wolkmer, *História do direito no Brasil*, cit., p. 83.

[34] Schwarcz, *O Espetáculo das Raças: Cientistas, Instituições e Questão Racial no Brasil-1870-1930*, cit., pp. 186-187.

[35] J.M. de Carvalho, *A construção da ordem: a elite política imperial. Teatro de sombras: a política imperial*, Rio de Janeiro, Civilização Brasileira, 2010[5], pp. 39-44; R. Sontag, *Triatoma baccalaureatus: sobre a crise do bacharelismo na Primeira República*, in «Espaço Jurídico», 9, n. 1, 2008, p. 68.

[36] Fonseca, *Os juristas e a cultura jurídica brasileira na segunda metade do século XIX*, cit., p. 369.

[37] *Ibidem*.

[38] A. Venâncio Filho, *Das arcadas ao bacharelismo*, São Paulo, Perspectiva, 1982[2], p. 136.

[39] M.C. Alvarez, *A Formação da Modernidade Penal no Brasil: Bacharéis, Juristas e a Criminologia*, in R.M. Fonseca, A.C.L. Seelaender (eds.), *História do direito em perspectiva*, Curitiba, Juruá, 2012, p. 292.

[40] Bastos, *O Ensino Jurídico no Brasil*, cit., p. 136.

[41] J.L. Lobo, *A opinião pública entre pensamento e arquivo: encarnação e releituras de uma categoria constitucional no Brasil monárquico*, Dissertação (mestrado) - Universidade Federal do Paraná, Setor de Ciências Jurídicas, Programa de Pós-Graduação em Direito, Curitiba, 2015.

[42] E.S. Pena, *Ser advogado no Brasil Império: uniformização e disciplina no discurso jurídico de formação*, in «Tuiuti: Ciência e Cultura», 23, FCHLA 03, October 2001, pp. 57-60; L.M. Schwarcz, *O Espetáculo das Raças: Cientistas, Instituições e Questão Racial no Brasil-1870-1930*, São Paulo, Companhia das Letras, 1993, pp. 129-131.

[43] Venâncio Filho, *Das arcadas ao bacharelismo*, cit., pp. 148-151.

[44] L.M. Galvão, *Espaços de construção da interpretação constitucional: análise dos congressos jurídicos da Primeira República*, 2012, pp. 1-24.

[45] H.C. Monteiro Barahona Ramos, *A Revista "O Direito" – Periodismo Jurídico e Política no final do Império do Brasil*, Dissertação (mestrado) – Universidade Federal Fluminense, Programa de Pós-Graduação em Sociologia e Direito, Niterói, 2009.

[46] Pivatto, *Idéias impressas: O direito e a história na doutrina constitucional brasileira na primeira república*, cit.; P.M. Pivatto, *Leituras republicanas: produção e difusão de livros de Direito Constitucional brasileiro na Primeira República*, in «História», 30, n. 2, August-December 2011, pp. 144-178.

[47] See W.C.L. Silva, *Os guardiões da linguagem e da política: o bacharelismo na República Velha*, in «Justiça & História», 5, n. 10, 2005, pp. 1-23; S.B. de Holanda, *Raízes do Brasil*, São Paulo, Companhia das Letras, 1995[26]; G. Freire, *Sobrados e Mucambos*, Rio de Janeiro, José Olympio, 1977; Adorno, *Os aprendizes do poder: o bacharelismo liberal na política brasileira*, cit.; E.S. Pena, *Pajens da casa imperial: jurisconsultos, escravidão e a lei de 1871*, Campinas, UNICAMP, 2001; Id., *Ser advogado no Brasil Império: uniformização e disciplina no discurso jurídico de formação*, cit.; E.C. Coelho, *As profissões imperiais: medicina, engenharia e advocacia no Rio de Janeiro (1822-1930)*, Rio de Janeiro, Record, 1999; Schwarcz, *O Espetáculo das Raças: Cientistas, Instituições e Questão Racial no Brasil-1870-1930* cit.; D.M. de Sá, *A ciência como profissão: médicos, bacharéis e cientistas no Brasil (1895-1935)*, Rio de Janeiro, Fiocruz, 2006.

[48] Alvarez, *A Formação da Modernidade Penal no Brasil: Bacharéis, Juristas e a Criminologia*, cit., p. 287.

[49] de Sá, *A ciência como profissão: médicos, bacharéis e cientistas no Brasil (1895-1935)*, cit., p. 22.

[50] Ivi, pp. 84-85.

[51] Alvarez, *A Formação da Modernidade Penal no Brasil: Bacharéis, Juristas e a Criminologia*, cit., pp. 287-288.

[52] de Sá, *A ciência como profissão: médicos, bacharéis e cientistas no Brasil (1895-1935)*, cit., pp. 46-47.

[53] Alvarez, *A Formação da Modernidade Penal no Brasil: Bacharéis, Juristas e a Criminologia*, cit., p. 288.

[54] Fonseca, *Os juristas e a cultura jurídica brasileira na segunda metade do século XIX*, cit., pp. 358-360.

[55] Alvarez, *A Formação da Modernidade Penal no Brasil: Bacharéis, Juristas e a Criminologia*, cit., p. 15; A.C.L. Seelaender, *A doutrina estrangeira e o jurista brasileiro: usos, estratégias e recriações*, in C.A. Vestena, G.S. Siqueira (eds.), *Direito e experiências jurídicas: temas de história do direito*, Belo Horizonte, Arraes, 2013, v. 3, p. 8.

[56] R.M. Morse, *O Espelho de Próspero: cultura e idéias nas Américas*, transl. Paulo Neves, São Paulo, Companhia das Letras, 1988, pp. 71-77; P. Mercadante, *A Consciência conservadora no Brasil*, Rio de Janeiro, Nova Fronteira, 1980[3], pp. 210-211.

[57] I wrote more extensively on this subject in the following article: G. Castagna Machado, *Os "ideais civilizacionais" e a construção da imagem do direito pelos juristas na Primeira República: anglo-americanos, franco-portugueses e germanistas*, in «Revista da Faculdade de Direito - Universidade Federal de Minas Gerais», 74, 2019, pp. 257-282.

[58] There was even an effort to pass this into Law in Decree 848 of 1890, which established in its article 386: «Article. 386. Shall constitute subsidiary legislation in omissive cases the old laws of criminal, civil and commercial procedures, not contrary to the provisions and spirit of this decree. The statutes of the educated peoples, and especially

those governing legal relations in the Republic of the United States of America, the common law and equity cases, will also be subsidiary to federal case law and procedure».

59 In the sense that the concept is employed here, it is neither expected nor demanded here that the citation of foreign works, legislation and institutions should have any "fidelity" to the citation in its original context, especially due to the use of Peter Burke's theoretical framework for cultural translation, which excludes extremes such as "pure originality" or "pure fidelity", in this paper (P. Burke, *Cultures of Translation in Early Modern Europe*, in P. Burke, R.P.-C. Hsia (eds.), *Cultural Translation in Early Modern Europe*, Cambridge, Cambridge University Press, 2007, pp. 7-38; P. Burke, *Cultural Hybridity*, Cambridge, Polity Press, 2009; P. Burke, *Translating Knowledge, Translating Cultures*, in M. North (ed.), *Kultureller Austausch. Bilanz und Perspektiven der Frühneuzeitforschung*, Köln, Weimar, Wien, Böhlau, 2009, pp. 69-88.) What is sought to understand here is the reasoning of the Brazilian author(s): namely, their reasons for preferring authors or institutions from one country over another.

60 A.C.L. Seelaender, *A doutrina estrangeira e o jurista brasileiro: usos, estratégias e recriações*, in C.A. Vestena, G.S. Siqueira (eds.), *Direito e experiências jurídicas: temas de história do direito*, Belo Horizonte, Arraes, v. 3, 2013, pp. 1-11.

61 A.M. Hespanha, *As culturas jurídicas dos mundos emergentes: o caso brasileiro*, in «Revista da Faculdade de Direito - UFPR», 56, 2012, p. 16.

62 J.R. de Lima Lopes, *Naturalismo jurídico no pensamento brasileiro*, São Paulo, Saraiva, 2014.

63 L.B. Rodrigues, *História do Supremo Tribunal Federal. Volume III – Doutrina Brasileira do Habeas-Corpus (1910-1926)*, Rio de Janeiro, Civilização Brasileira, 1991², pp. 118-130.

64 A.P. Grinover, A.M. Gomes Filho, A.S. Fernandes, *Recursos no processo penal*, São Paulo, Revista dos Tribunais, 2004⁴, pp. 347-348.

65 L.E. Bueno Vidigal, *Direito Processual Civil*, São Paulo, Saraiva, 1965, p. 17.

66 Cfr., Revista do Supremo Tribunal Federal, v. 2, 1ª parte, 1914, pp. 266-267.