

CONSTITUTIONAL LEGAL CULTURE IN IMPERIAL BRAZIL: CITIZENSHIP, POSITIVISM, AND EVOLUTIONISM*

ACCEPTED:

INVITED

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How to cite this paper: LIMA, F. R. de S. Constitutional legal culture in Imperial Brazil: citizenship, positivism, and evolutionism. *Revista Direito Mackenzie*, São Paulo, SP, v. 18, n. 3, e17525EN, 2024. <http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317525EN>

* This article is a part of the results from the research project entitled: Theoretical Innovation, Legal Culture, and Citizen and Economic Institutions, conducted as part of Universidade Presbiteriana Mackenzie's Graduate Program in Political and Economic Law, under the research line called: Citizens shaping the State. Tradução: Charles Maxwell Meyer Lantz.



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- **ABSTRACT:** This article analyzes the essay *A questão do poder moderador: O governo parlamentar no Brasil* by Tobias Barreto, aiming to identify the scientific framework that underpins the work. The research is part of the project *Theoretical Innovation, Legal Culture, and Citizen and Economic Institutions*, linked to the Graduate Program in Political and Economic Law at Universidade Presbiteriana Mackenzie, under the research line *Citizenship Shaping the State*. Based on the central question “What is the social science model that underlies Tobias Barreto’s essay on the Moderating Power?”, the study employs a methodology that considers theoretical foundations as the initial assumptions that support scientific reasoning and social foundations as the factors reflecting the researcher’s reality.
- **KEYWORDS:** Brazilian legal culture; Tobias Barreto; Constitutionalism, Moderating Power.

CULTURA JURÍDICA CONSTITUCIONAL NO BRASIL IMPERIAL: CIDADANIA, POSITIVISMO E EVOLUCIONISMO

- **RESUMO:** Este artigo analisa o ensaio *A questão do poder moderador. O governo parlamentar no Brasil*, de Tobias Barreto, buscando identificar a matriz científica que fundamenta a obra. A pesquisa insere-se no projeto *Inovação Teórica, Cultura Jurídica e Instituições Cidadãs e Econômicas*, vinculado ao Programa de Pós-graduação em Direito Político e Econômico da Universidade Presbiteriana Mackenzie, sob a linha de pesquisa *A Cidadania Modelando o Estado*. A partir da questão central “Qual o modelo de ciência social que fundamenta o ensaio do Poder Moderador de Tobias Barreto?”, o estudo utiliza uma metodologia que considera os fundamentos teóricos como os pressupostos iniciais que sustentam o raciocínio científico e os fundamentos sociais como os fatores que refletem a realidade do pesquisador.
- **PALAVRAS-CHAVE:** Cultura jurídica brasileira; Tobias Barreto; Constitucionalismo; Poder Moderador.



1. Brazilian constitutionalism takes its first steps

Throughout Brazilian history, Brazilian constitutions have demonstrated similarities and differences with constitutional texts from other countries. That is because constitutional states are the products of the constitutional movement, which was influenced by the French and English revolutions, and by the US' achievement of independence. Each one took place using its model, but allowing it to become a supranational movement, which would thus be capable of use by other countries, as happened in Brazil (Silva, 2021, p. 31-35).¹

Implementing constitutionalism into non-revolutionary social circles took place with adaptations to the non-European and non-US realities. Brazil is a textbook case of this process of incorporating legal constitutional culture into its legal order. Brazil's model for its constitution was heavily influenced by the European and US models, especially during the rule of the Portuguese monarchy (Silva, 2011, p. 26)².

Perhaps even due to the reality of the monarchical system, the beginning of Brazilian constitutionalism occurred from the top down, with an emphasis on the method rather than on rights or social change.³ A good example of this process is the 1824 Constitution, which divides the powers of the State and its functions with liberal aspirations, and at the same time guarantees the monarch's rule, as the Moderating Power (Silva, 2011, p. 27).

The word 'constitution' can have various semantic meanings: among others, Maurizio Fioravante offers both a revolutionary and an institutional definition of the idea of a constitution.

The revolution brings a new social order, with the promise of justice, merely through equality. The European scenario of inequality was the motivation behind the rise of the new social order through revolution. In this movement, the constitutions were to be guaranteed by a new and more equal social order, called the constitutional order (Fioravante, 2018, p. 11).

1 See Silva (2021, p. 31-35). On the convergence of monarchy, liberalism, and theory, see Vesting (2022, p. 30-34). For a definition of constitutionalism from Legal Philosophy, see Celano (2021, p. 101-134).

2 Silva (2011, p. 26).

3 Holanda (2006, p. 160). Lopes; Queiroz; ACCA (2006, p. 462): "on the Assembly and the Constitution put forth, can be appreciated in his VOTE TO REJECT THE PROPOSED CONSTITUTION. Along with journalist CIPRIANO BARATA, CANECA led a campaign that caused the municipal councils of Recife and Olinda to refuse to pledge their allegiance to the 1824 Constitution".

Institutionally, the Constitution was to be capable of bestowing political legitimacy upon this new social order and, at the same time, regulating the laws of this new social order that would come to be after the revolution.

Modern States claim legitimacy for their power structures – this is their power to exercise State functions. Constitutions semantically acquired this function of recognizing and legitimizing State structures.⁴

On the Brazil side, the advent of autonomy for Brazil's legal life began with the arrival of the Royal Family to Brazil in 1808. To flee from Napoleon, ruling prince João VI landed at Porto Seguro with thousands of people and then moved on to Rio de Janeiro. The status as a colony of Portugal would quickly be overcome.

Brazil's nation-state came about in the context of European constitutional liberalism. According to José Afonso da Silva, the monarchist phase of Brazilian constitutionalism begins with the royal family coming to Brazil (Silva, 2011, p. 25).

Napoleon Bonaparte was defeated by the British in 1814. The natural outcome would have been the royal family returning to Portugal now that the danger was gone. But that isn't what happened. Now King, Dom João VI decided not to return to Portugal and elevated Brazil's status as part of the United Kingdom of Portugal and Algarves in 1815, which increased the dissatisfaction in the Portuguese courts.

In 1820, Brazil's protagonism and the discontent with Portugal being ruled by an Englishman brought about the Porto Revolution, which resulted in a provisional government that demanded the immediate return of the King back to Portugal.

The decision of whether to stay in Brazil or return to Portugal was not easy for Dom João VI, since he had adapted to Brazil, and only went back in 1821, under threat of losing the Portuguese throne. His son Pedro de Alcântara stayed as ruler of Brazil, who would come to be known as Dom Pedro I (Fausto, 2019, p. 112-116).

Also in 1821, the Portuguese-majority courts made countless decisions to reduce the autonomy of Brazil. There were many retaliations, everything from transferring public offices opened in Brazil to Lisbon until there was an order for the ruling prince to return to Portugal. Against the courts, Dom Pedro I chose to remain in Brazil – and this decision was eternalized as “Stay Day” on January 9, 1822.

The actions that took place on both sides were in favor of a split, leading to the historic September 7, 1822, on which Dom Pedro I made the famous “Cry of Ipiranga”

4 Constitucionalismo. Carocci Editori: Roma, 2018, p. 10.



for the independence of Brazil, which materialized through various military conflicts against the Portuguese troops resident in Brazil (Fausto, 2019, p. 114-116).

The topic of the Constitution came about in Brazilian political debate months before the Declaration of Independence. As it was another product of Europe, liberal philosophy enchanted the Brazilian elite of the time. Dom Pedro I himself praised liberal values in his speeches, calling elections for the Constituent Assembly, perhaps in seeking the support of these elites (Silva, 2021, p. 66).

In May 1823, the elites began the undertaking of the constituent assembly in the city of Rio de Janeiro. In his speech to open the effort, Dom Pedro I affirms that the emperor would swear allegiance to the future Constitution “if it was worthy of Brazil and of himself” (Fausto, 2019, p. 115-116).

The profile of most of those elected was moderately liberal. Despite this, the relationship between the Assembly and the Emperor quickly deteriorated, bringing about its dissolution and a few lower house members being arrested, including the noteworthy Andradas brothers, whose role was decisive during Independence. José Bonifácio de Andrada e Silva led the ministry of government created by Dom Pedro I after the “Cry to Stay”.

This divergence that led to the dissolution of the Constituent Assembly was centered on the extent of the power of the Executive Branch (Emperor) and the Legislative Branch. In the proposals, moderate liberal values championed by the majority of the members of the Constituent Assembly conflicted with values important to the Old Regime, championed by the Brazilian monarch.⁵

The dissolution of the Assembly was not enough to extinguish the ideology that had already been implanted in Brazilian elites of a constitutional monarchy, capable of coexisting with slavery, among other idiosyncrasies (Silva, 2011, p. 46-50).

This is how Emperor Dom Pedro I granted the Political Constitution of the Empire of Brazil on March 25, 1824, the content of which was indeed inspired by the proposals from the dissolved Constituent Assembly, but with marked modifications, in the form of the Moderating Power, influenced by the writings of Frenchman Benjamin Constant, to centralize power in the Emperor (Fausto, 2019, p. 128-131).⁶

5 Decreto de 12 de novembro de 1823. For a general history, see Fausto (2019, p. 127-128). For constitutional law, see Silva (2021, p. 67).

6 Fausto (2019, p. 128-131). “Conselho que substituiria a Assembleia (13 de novembro de 1823). José Reinaldo de Lima Lopes, Rafael Mafei Rabelo Queiroz, Thiago dos Santos Acca. Curso de História do Direito, p. 462: “On this

2. What to analyze and why

It is almost an intuitive conclusion that only after the creation of law courses in Brazil in 1827 (in São Paulo and Olinda), Brazilian legal culture flourished. That is true in academic terms, because, before these new colleges, Brazil had legal practice and a certain culture that sustained it.

The law courses that opened up in Olinda and São Paulo blazed a path for the formation of a legal culture of Brazilian academic training. Which does not mean that we don't already have a certain legal culture (Lopes, 2014, p. 15-19).

This cohort of jurists trained at our colleges had as its leader Tobias Barreto, among others. The Imperial Constitution of 1824 was a recurring theme for the first generations of jurists, with a focus on the Moderating Power which was already differentiated from the revolutionary values of the constitutionalist movement.

On the Brazilian side, the constitutional ideas were incorporated into a reality that is different when compared to the European or US realities. Brazil incorporated constitutional ideology without revolution nor a new social order, because there was social and political continuity, not a fissure.

An example of this social and political continuity is that the 1824 Constitution was granted to maintain those who were in power with constitutional guarantees, and when it comes to the liberal values incorporated into the text, there is notably new regulation of individual rights within the body of the constitution rather than in the preamble as had been done in the 1793 French Constitution (Silva, 2011, p. 38).

The sixty-five years of the Imperial Constitution being in force is possibly an indication that this document positivized the values of that society, guaranteeing political stability and the extremely important national unity of Brazil (Silva, 2011, p. 34, 35 and 37).

It is as a result of the confluence of these factors that I choose the theme of this essay: "The issue of the moderating power. (*O Governo Parlamentar no Brasil*)" by Tobias

episode we present the decree of November 12, 1823, DECREE OF DISSOLUTION, the public justification for the dissolution (PROCLAMATION OF NOVEMBER 13), the decree of CREATION OF THE STATE COUNCIL with members named exclusively by the Emperor (who will write the constitution to be granted), and the MANIFESTO of November 16, 1823. The CONSTITUTION written by the Council was created on November 13, and the final one was sworn by DOM PEDRO I in March 1824, establishing the basis for the imperial political system. With a few modifications, it was in force until the end of the Empire in 1889. The Carta - called this because it was "granted" (that is, unilaterally given or imposed) by the Emperor, not written by a free Constituent Assembly - "enriched the principle of a unitary monarchy; it specifies, for example, relations between those who are different".

Barreto,⁷To answer the second question: which social science model supports the essay on the Moderating Power by Tobias Barreto? That is why my goal is to identify which scientific basis is used by Tobias Barreto in the aforementioned text.

This article is part of the results of the research project: “Theoretical Innovation, Legal Culture, and Citizen and Economic Institutions”, conducted as part of Universidade Presbiteriana Mackenzie’s Graduate Program in Political and Economic Law, under the research line called: “Citizens shaping the State”.

Methodologically, in my observations on the text that is the object of this analysis, I use the premise that the theoretical foundations are assumptions, starting points used for a certain rational analysis, through which - or with which - the rationale begins, feeding the reasonings that will find a certain objectivity in the scientific community.

In the same way, I consider social foundations to be guiding social factors in the eyes of the observer, that is, the social reality on which the scientist is based in their analysis. It is the idea of: “where I’m coming from” that is so in vogue at the moment. It is not about purity but rather predominance of a theoretical foundation and a social reality in guiding the research process which ranges from the exploratory sources, to the collection of data, to the analysis and the organization of the sources collected, and the writing.

3. The analysis of the work by Tobias Barreto

Tobias Barreto’s first work was published in 1871 in the *Americano*, a journal for which Barreto was an editor, under the title “The Moderating Power”. The subtitle: “*The parliamentary government of Brazil*” did not appear in Tobias Barreto’s version; Silvio Romero added it when he published it in *Estudos de Direito* in 1898.

The strategy of presenting the article itself is interesting and not so typical of Brazilian debate at the time. Tobias Barreto chose three works to submit to the scrutiny of scientific thinking. Countless times, he uses the words ‘scientific’ and ‘philosophical’, almost like synonyms, to disqualify the works he analyzes.

7 A Questão do Poder Moderador (O Governo Parlamentar no Brasil). In: A Questão do Poder Moderador e outros ensaios brasileiros. Seleção e Coordenação Hilton Rocha. Petrópolis: Editora Vozes, 1977, p. 81-121.



The work was written at two moments in time, with the last part being written twelve years later. The essay shows a throughline on the parliamentary system; however, they could have been published as separate works, notably due to the difference in theoretical assumptions.

3.1 First Reading

The first reading brought about the impression that the language was excessively harsh on the works and their authors, chosen by Tobias Barreto as theoretical adversaries. I used the word “excessive” because the language used is closer to a disqualification than to a debate of ideas.

Even during the first reading, I perceived a lack of an indication of alternatives or even an interpretation by Tobias Barreto of the Moderating Power. The harsh manner of presenting his critiques and the absence of suggestions on the issue probably led to a negative impact on its publication, both by conservatives and liberals.⁸

The first pages criticize the belief in a world that would be unreal to the Brazilian reality, which seems to be the underpinning of the idea of a British-style parliamentary government, and a Moderating Power, based on the belief of moral superiority of the Emperor.

The text confronts the ideas espoused in texts by Zacaria de Góis e Vasconcelos, Visconde do Uruguai, and Brás Florentino, calling them teleological, metaphysical, and void of scientific value, this being easily found through social philosophy, whose manner of thinking will cause the next generation to have fun with the content of the writings by Brazilian writers.

3.2 Social Philosophy

The fourth paragraph uses the expressions’ social philosophy, teleological, and metaphysical in their thought, enshrining the hope that social philosophy “*had swept away from intelligence the leftover teleological and metaphysical prejudices, which still foster the*

8 Lopes (2014, p. 298): “Tobias Barreto is controversial among conservatives and liberals. He doesn’t mince words about Conselheiro Zacarias, who intends to offer a liberal version of the Brazilian monarchy. First, he affirms the uselessness of the debate, because for him neither of the sides takes on the issue in depth”

*taste for sterile formulas and dead-end questions. [...]”*⁹ To explain his ideas, the author uses examples of religious faith and gives the illusion of belief in putting the royals on a moral pedestal, to compare this situation with adhering to an old theological philosophy.

Footnote no. 3 clarifies that part of the text was influenced by the visions of August Comte, while the other part was not.

Thus, the first part of the text is underpinned by the positivism of August Comte in its critique of the three authors, chosen as theoretical enemies. He wrote: “[...] Subaltern critics espousing maxims they absorbed from aging books, do not know, cannot know the general direction in which sociology is moving. They lack the broad experience and living science adapted to the times.”¹⁰

This excerpt highlights the lack of courage on the part of Brazilian writers to confront Brazil’s true problems. Based on Huet, he affirms that that century required courage from everyone.¹¹

Tobias Barreto confronts possible comparisons between Brazil and the constitutional English monarchy, with a grounding in Hegel, highlighting that the institutional role of the King is completely different in the two countries. Thus, insisting on such a comparison would be to fall into “senseless opinionatedness”.¹²

Tobias Barreto’s work is classified as Germanophilia by historians. Even more so, his works are classified as pioneering for his generation of works heavily grounded in German authors. The above paragraphs demonstrate this.

However, I do not believe that specifically, in the work “A questão do poder moderador. (O Governo Parlamentar no Brasil)” Germans had a fundamental role in scientific architecture, which is visible through an analysis of the arguments used. They are cited but do not play a relevant role in the rational architecture defended by Tobias Barreto. Herein, I assert that it was the French who “got into the author’s head” in terms of theoretical basis; and in terms of social basis, it was also the English.

The idea of science as an instrument for observing and understanding things is clear in the Tobias Barreto work that is the focus of this article (Moraes Filho; Tobias Barreto, 1977, p. 24). Only after expressing his understanding of the facts does the author

9 A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p. 81.

10 A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p. 83.

11 A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p. 83.

12 A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p. 84.

answer his theoretical adversaries, grounded in the difference between the social evolution of the French and the English, in comparison to that of Brazil.

A considerable part of the text is dedicated to a description of the way that English society evolved until arriving at the parliamentary model of government.¹³ Thus, his argument is centered on the comparison between the changing political power relations of the three countries.

Comparison made on pages 87 to 93.¹⁴ For noteworthy references to the process of change in English society, see pages 87, 90, and 92. There is an effort to characterize English society through Protestantism, its many different laws, beginning with the Magna Carta, and through the experience of monarchical government, to put English society in sync with the parliamentary constitutional monarchy model.¹⁵

Mentions of the change process in Brazilian society can be found on pages 84, 85, and 87, especially when it comes to Catholic education, Brazilian laws, and the 1824 Constitution, which grants the emperor sovereign power.¹⁶

He also mentions the customs that shape Brazilian social and political practice, which, according to the author, are different than those of English society. All of this is to say that the gradual growth of government practices within society is a guarantee of a consistent type of government.

Indeed, the theories that came from this context may be considered incorporated into customs. The flipside of this goes in the direction of declaring the ineffectiveness of the new theories which were born in realities very different from the place where they are to be applied. That is the rationale that permeates the center of Tobias Barreto's critique of incorporating the Moderating Power and Parliamentary Government in Brazil.

This first part of Tobias Barreto's work is Comtian, with positivist and non-sociological analysis, being that the reasoning used by Barreto is not influenced by a given social theory. Comte used expressions like "sociology" and "new science", not to create a type of sociology, but to develop his philosophical theory known as positivism (Comte, 1997, p. 65).

13 See Bethell, Leslie on Brazil during the imperial era being an informal part of the British empire. O Brasil no século XIX: parte do "império informal britânico. In: Carvalho, J. M. de; Campos, A. P. *Perspectivas da cidadania no Brasil Império*. Rio de Janeiro: Ed. Civilização Brasileira, 2011, p. 15-36.

14 A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p. 87-93.

15 A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p.87,90, and 92.

16 A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p. 87, 90, and 92.



Thus, the first part of the work is a positivist contribution. The work is a good example of how positivism was received in Brazil because his argumentation is along the lines of a critique of teleological and metaphysical ideas and presents praise for scientific ideas, which are the basis of August Comte's (1798-1857) positivist thinking.¹⁷

The thinking undertaken by this French philosopher describes societal relations and science in three phases: theological, metaphysical, and positivist. The last one is humanity's most advanced stage, being that it represents the predominance of technology, the sciences; and the first two represent backwardness in society because they represent primitive stages in evolution (Comte, 2005, 23, 24, 28, 34, 41, and 43; Blackburn, 1997, p. 65).

Comte's positivism highlights the historicity of ideas, which result from different historical moments and the respective realities from which they are produced. Tobias Barreto adopts the premise of historicity in comparing the English and French realities with the Brazilian one, affirming that ideas have "birth certificates". He categorically defends the impossibility of the Moderating Power and parliamentary system being effective in Brazil, being that they were built from and for a social fabric that is very different from Brazil's.

4. Second Part of Work

The second part of the work was written twelve years after the first.¹⁸ This return to an older written work and advancing it allowed Tobias Barreto to mature certain ideas that he had already presented, abandon others, and even present new observations. This second part is much more interesting than the first. It is evident that the author has matured, whether it be in the way he writes, the change in philosophical assumptions, the objectivity of his arguments in contrast with a predominance of attacks on other authors' works found in the first part.

In this second part, Tobias Barreto returns to ideas rather than people, concentrating his criticism on the adoption of a parliamentary system in Brazil. Furthermore, while in the first part of the text, the history of England is narrated romantically, in the second part the author presents a social construction of English constitutionalism

17 On the life and works of August Comte, see Giannotti, J. A. Vida e Obra. In: Comte, A. Curso de Filosofia Positiva. Tradução José Arthur Giannotti e Miguel Lemos. São Paulo: Nova cultural, 2005, p. 5-14.

18 Information from Tobias Barreto himself, see. A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p.



with a little bit of criticism, but still very far from the sharp criticisms that are so common in Barreto's works, especially when directed at Brazilian authors.

One of the pillars of the reasoning of the second part is that the parliamentary system was formed as a result of past experiences by English society. It seems to present the last stage of English constitutionalism, which went through a "long and painful political education, decapitating a king and decapitating a dynasty [...]".¹⁹

Next, Barreto mocks the fact that the copiers of the parliamentary system should go through the same process that the English went through. Next, he says that this would be impossible because "every nation has its history" and repetition would make it a caricature.²⁰

This second part is constructed in a different way when it comes to bibliographic references. Mapping the theoretical premises adopted was very difficult, at least in terms of the identification of the theoretical framework connected to a given author or intellectual movement. If in the first part, August Comte is used as a lens by Tobias Barreto, in the second part of the work a theoretical line of thought was ostensibly not shown.

The work cites Gladstone, Emile Olivier, Lord Burleigh, Julio Froebel, Erskine May, Sir Stafford Northcote, and Montesquieu without presenting the sources. There is no reference whatsoever to works or pages. On the other hand, Marx, Goethe, and Kant are referenced, but their citations are used to reference the central argument of the chapter and not to form a central argument. The Germans that were cited were used as secondary in the construction of the work's thesis.

The chapter essentially presents social and historical facts that are essential to the formation of English constitutionalism, with a light mention of French history and, afterward, displays the central argument that there is no similarity at all between the European and Brazilian realities.

At first reading, I thought that perhaps Barreto was describing the history of England and France through the works of the authors cited immediately above and had forgotten to add references. However, the presence of bibliographic references for German authors and the quality of the linguistic styling of the paragraphs made me discard that hypothesis and, thus, re-read the aforementioned chapter a few more times.

19 A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p. 109.

20 A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p. 109.



Successive re-readings of the second part – items IV, V, and IV²¹ – brought me to the hypothesis that I might be reading a work from Barreto’s Germanophile phase, so that the English authors and the French author cited had not been read to write this chapter, but rather referenced in the German works. It was a type of “as cited in” reference, which did not exist in Brazil at the time of the writing of the work analyzed herein.

In any case, any possible formal slips in references are not of the utmost relevance to our analysis here. What is important is the finding that the social and historical data on England and France, which are central to the critique undertaken by Barreto, were not collected from native authors, but from German historians. As a result, I started to research who these authors were, as well as how to think about this discovery that could impact a response to the central research question.

I re-read the work in question once again and sifted out the references, citations, and explanations within the body of the text and in the footnotes. The footnotes are either explanatory or bibliographical. The explanatory notes compared the reality described in the work—almost always that of England—with that of Brazil.

The bibliographical footnotes are all references to German authors describing English constitutionalism. In researching these works and their authors, I saw that they are German historians, recognized for their research on the English constitutional system, either more favorably like Gneit Rudolph²² (1816-1899), or more critical like Henrich von Treitschke²³ (1834-1896).

As a result of this analysis, the hypothesis of classifying the second part as Germanophilia is strengthened. And we have the references! However, what is not clear is if those references were fundamental for the argument he presented or were just in his work “for the English to see” [for appearances] – an expression coined in Brazil’s Imperial Era. New readings of the work and the references to German authors available on the internet would lead us, however, in another direction: that the German authors were only used as middleman references. Meaning: The German historians cited were

21 A Questão do Poder Moderador (O Governo Parlamentar no Brasil), p. 105-121.

22 Bornhak (1896, p. 81-97). Available at: <http://www.jstor.org/stable/1009745>. Access on: 2 Aug. 2024.

23 Muller, F. L. (2015). Before the West: Rudolf von Gneist’s English utopia. In: R. Bavaj, R.; Steber, M. (eds.), German Images of the West. The History of a Modern Concept. New York: Berghahn, 2015, cap. 9, p. 152-166. Davis (1915, p. 456-459). Available at: <http://www.jstor.org/stable/1009745>. Access on: 2 Aug. 2024. Sontag (1939, p. 127-39). Available at: <https://www.jstor.org/stable/20028982>. Access on: 2 Aug. 2024. Graveney (2023, p. 245-268). Available at: <https://web.p.ebscohost.com/ehost/detail/detail?vid=0&sid=dd95e577-77c1-46e0-b122-a6fa1ba644e4%40redis&bdata=Jmxhbmcc9cHQYnImc2l0ZT1laG9zdC1saXZl#AN=163049479&db=aph>. Access on: 2 Aug. 2024.

the references through which Tobias Barreto saw – and described – the formation of British constitutionalism. This became clear.

Through the German authors, the second part of Tobias Barreto's work makes comparisons between the social, historical, and constitutional realities of England and Brazil. The question that arises is: Despite the words in footnote no. 3, would Barreto have abandoned Comtian philosophy?²⁴

New re-readings and reflections have led to the affirmative conclusion. The second part of the work does not use positivist jargon – teleological, positivist, metaphysical, scientific – as he did repeatedly throughout the first part. The Comtian paradigms no longer predominate the arguments developed throughout the second part of the work.

Thus, what is behind the incessant comparison between English and Brazilian society? I re-read, once again, the second part of the work and noticed this affirmation from the author: “The Brazilian social organism is not the English social organism. [...]”²⁵

A light bulb went off and I immediately thought of Herbert Spencer, philosopher and biologist who applied Darwinism to describe the social organism as a living organism. Spencer was very influential in social sciences in the 19th century.²⁶ His works had an impact on scientific thought at the time, despite the repeated criticisms that he received from his peers, including Charles Darwin.

Spencer's ideas were shaped through many different references, the most remarkable being that of Charles Darwin; to a certain extent, it was also influenced by August Comte, which perhaps brought the Comtian Tobias Barreto closer to his works. Comtian positivism may have helped open up the doors to the evolutionism of Herbert Spencer, welcomed by Brazilian jurists under the First Republic.

The Brazilian legal academic culture began with the opening of law programs in Olinda and São Paulo. From there, Brazil trained its first generations of jurists on Brazilian soil. The emergence of the Brazilian science of law is owed in large part to

24 A questão do poder moderador (O Governo Parlamentar no Brasil), p. 83. “3. The reader will not be surprised to hear me discuss sociology. A large part of this study was published for the first time in October 1871 in the *Americano*, a journal for which I was one of the editors; and at that time I still believed in the possibility of A. Comte's visions.”

25 A questão do poder moderador (O Governo Parlamentar no Brasil), p. 113.

26 Herbert Spencer's main works are: Spencer, H. *Primeiros princípios*. São Paulo: Ex Machina, 2015. Spencer, H. *The principles of biology*. New York: D. Appleton and Company, 1900. Spencer, H. *The principles of biology*. Berlin: Heptagon Verlag, 2013.

the graduation of these holders of bachelor's degrees in law, and, successively, to the epistemological references adopted in their writings.

Tobias Barreto provides some clues to identifying the guiding influences for the first Brazilian jurists. With this, the study of Tobias Barreto represents an intellectual effort to analyze an important debate in Brazilian legal history, especially when it comes to the historicity of the incorporation of foreign ideas of constitutionalism in Imperial Brazil.

In the Comtian universe, the term positivism is used to designate a philosophical guideline characterized by a devotion to science through the sanctification of the scientific method, in blind confidence in the evolution of humanity through scientific knowledge.²⁷ Through it, the famous Order and Progress phrase on the Brazilian flag came about. This philosophical ideology influenced thinkers from many different Western countries, especially during the second half of the 19th century, and received a great deal of support from the bourgeoisie who benefited from the technical-scientific evolution.²⁸

The first part of the article by Tobias Barreto which is analyzed is an example of August Comte's influence on Brazilian positivism. Barreto was, thus, a representative of the positivist philosophical movement in Brazil. The level of influence of Comte on the first generations of academics who graduated from Brazilian law schools cannot be analyzed due to the limited scope of this article.

What can be defended as a research conclusion is that the first part of this important work (*Poder Moderador*) from an important figure from the first generations of Brazilian jurists developed his theorized under heavy influence from August Comte's positivist system and the second part of the text by Barreto is influenced by the philosophical ideas of evolutionism by Englishman Herbert Spencer.

Therefore, Tobias Barreto's text analyzed herein helped pave the intellectual path for Brazilian naturalism, which was so well described by José Reinaldo de Lima Lopes, that it will be influenced by the reception of the works of Herbert Spencer by Brazilian jurists of the First Republic.

27 On Comtian positivism, see Comte (2005, p. 26). In Brazil, positivism was such an important movement that the teaching literature directed at high schoolers considers it important enough to mention *cf.* Chauí (1999); Cotrim (1999); Aranha; Pires (1998).

28 Yet on positivism, see Reale (2004, p. 10-13).



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