The mild weapon of the crown: making the constitutional value of pardon with public opinion and the interference of the moderating power over the judiciary (Brazil, 1823-1889)

A doce arma da coroa: o valor constitucional do direito de graça efetiva-se na opinião pública e na interferência do poder moderador sobre o judiciário (Brasil, 1823-1889)

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Y pues es el fausto día/ que se cumple el año vuestro/ de dar perdón al convicto/ y dar libertad al preso/ (...)/ Vos sois príncipe cristiano/ y yo, por mi estado, debo/ pediros lo más benigno/ y vos no usar lo sangriento./ Muerte puede dar cualquiera;/ vida, sólo puede hacerlo/ Díos: luego sólo con darla/ podéis a Díos pareceros
Sor Juana Inés de la Cruz, Inundacion Castálida (1689). Con ocasión de celebrar el primer año que cumplió el hijo del señor virrey, le pide a su excelencia indulto para un reo, vv. 161-164; 181-188

1. Introduction: the foundations of a double-faced institution

Freedom and imprisonment. Benign and bloody. Death and life. The poetry of Sor Juana Inés de La Cruz, exquisitely baroque as it could only be, testifies the incessant clash of opposites. This Mexican nun from the Spanish *siglo de oro* embodied in her own life and work the contrasts that pervaded

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her poems: writer of pieces of religious devotion and ardent love, a Mexican native in the court of the Spanish viceroys, a scholarly and intellectual woman in a world dominated by men. In the verses cited at the epigraph to this work, Sor Juana appeals to the son of the viceroy of New Spain, in his first birthday, to pardon a man about to go to the gallows. The boy, though less than a year old, was already lavishly covered by titles and riches; yet, as the nun bravely pointed out, anyone could take life – even a one-year-old baby – but only God, who came to the world himself as a fragile baby in a manger, could give life. Pardon was able to encapsulate these contrasts and make alike the rich and the poor babies, king and God, the doomed and the powerful, by allowing them to spare the life of a helpless man.

Regardless of the stimulating theological and artistic dimensions of mercy, my interest here will be on its legal features. Yet, even in law, royal pardon is a compound of opposites. I am referring to its dubious nature as both a feature of criminal and constitutional law. Pardon, as the suspension of punishment, obviously lies in the field of criminal law. Previous studies, referring to multiple times and jurisdictions, showed how pardon can introduce new attenuating circumstances[1], help to cope with habits of private negotiation[2], take into consideration social norms and moral[3], ease prison management[4], pave the way for the creation of parole[5], among several other connections with state punishment. However, pardon has also an important constitutional value: it showed the magnanimity of the ruler[6], it was a valuable tool for the administration of revolts[7], it could deliver transitional justice[8] and rendered the executive branch able to bypass legislative inaction[9]. After all, royal clemency is a display of discretionary power that is problematic even today[10].

1 ALESSI, 2007, p. 93; GRUPP, 1963.

2 BELLABARBA, 1999.

3 STRANGE, 2010.

4 STRANGE, 2016.

5 KOTKAS, 2007; STRONATI, 2009; STRANGE, 2016.

6 GAUVARD, 1995; 2011.

7 DORRIS, 1928; HARVEY, 1965; LUGO, 2015; SCHEUTZ, 2011; SNYDER, 1971.

8 NUBOLA, 2011; FOCARDI, 2011.

9 Especially for the abolition of death penalty (STRONATI, 2009; DE BROUWER, 2009; RIBEIRO, 2005).

10 SERRAINO, 2019.

These constitutional features generally tended to be seen as anomalies after the great criminal reforms of the 18th and 19th centuries. Conversely, in the Early Modernity, pardon was a fundamental part of the very logic of criminal law[11]. The penalties that were so stark back then must be compensated by the providential mercy of the sovereign; statutory law would instill fear, and the magnanimity of the monarch would be repaid by love from the citizens. The cycle would allow the political power to rule its citizens through a constant duality[12]. The modern way of thought rejected this reasoning, claiming that penalties had to be softer and more certain; pardon would undermine this task. This led prominent figures of 18th-century reformism to reject that royal mercy would be needed in a well-designed system of criminal law; famously, Beccaria claimed that pardon was the most beautiful prerogative of the crown[13], yet it would become unnecessary if the laws were adequately crafted[14]. Kant also generally rejected the institute, with few exceptions[15]. This hostile intellectual environment led to several changes in the daily functioning of the institute in the 18th century[16].

Therefore, at the dawn of modern legal thought, pardon was rejected in the intellectual world. It was retained, however, in almost all jurisdictions of the western world, with the most prominent exception of revolutionary France[17], and was still constantly used in almost every jurisdiction[18]. Actually, its constitutional features were the ones being rejected, as they were more in line with the logic of early modern governance.

However, these aspects were still present in 19th-century Brazil, as the historiography has already shown for some contexts. For example, royal mercy helped to cope with the revolts from the Regency period and with the transition from the *Ancien Régime* penal order to the modern codified logic[19]. It also helped to abolish the death penalty: from 1876 onwards, the

11 MASSUCHETTO; PEREIRA, 2020.

12 HESPANHA, 1993; 2010.

13 A poetic expression that was used by several jurists and philosophers and can be traced back at least to Seneca (s/d, p. 67).

14 BECCARIA, s/d, p. 114.

15 KOTKAS, 2011; MOORE, 1989.

16 COHEN, 2007.

17 COSTA, 2019a.

18 For the example of 19th century Germany, cf. (KESPER-BIERMAN, 2011).

19 COSTA, 2019b.

emperor started to pardon every capital conviction, creating a conscience that such kind of penalty did not integrate the Brazilian legal order anymore, even though it would not be formally stripped away from law books until 1890[20]. Royal mercy also played a prominent role in the quest for the abolition of slavery[21]. In fact, the power to pardon was present in the constitution[22], not in the criminal code. However, we still lack a comprehensive analysis of the constitutional dimension of pardon, which can also enlighten the relations between the moderating power and the judiciary, and how the theoretical assumptions regarding the nation and its representation worked on daily practices. This is the gap this paper aims to fill.

My approach towards the problem will be divided in two parts. First, I will investigate how the public opinion treated the institute and how public discussions were able to shape pardon. As we shall see, public opinion was an important part of 19th-century constitutional theory, and its analysis is important to understand the mutual connections between the monarch and civil society. In the second part, I will analyze how the Brazilian emperor, while using pardon, managed to interfere in some parts of the legislation in order to make it operate better.

2. The voice of (a certain) people: the constitutional dimension of public opinion in the parliament, the press, and the Council of State

There is more than only law in each constitution, and non-legal instruments are meant to fuel its mechanisms. This is particularly true for 19th-century constitutions, in which the absence of judicial review led to most of its issues being solved by politics[23]. The main conceptual resource to perform this task was the notion of *public opinion*. Both "high" and "low" Brazilian legal cultures considered it an important cornerstone of the constitutional order. This *public opinion* corresponds to the voice of the "people" in the

20 RIBEIRO, 2005, p. 306.

21 PIROLA, 2016.

22 Art. 101, § 8º: "Art. 101. O Imperador exerce o Poder Moderador: (...) VIII. Perdoando, e moderando as penas impostas e os Réos condemnados por Sentença" (BRASIL, 1824).

23 As said by Judá Leão Lobo and Luís Fernando Lopes Pereira (2014, p. 188), "the concept of constitution was highly political" (original: *o conceito constituição continha acentuada politicidade*). A clear example of this situation is judicial review. In Brazil – as in many continental European constitutions – its responsibility would fall into the hands of parliament, public opinion and other political agents, rather than the judiciary (CONTINENTINO, 2015).

public sphere, which can evaluate the acts of public servants to render them accountable for their acts. The publicity of state acts, contrasting with the "tradition of secrecy"[24] from the *Ancien Régime* and early 19th century, would allow for a consistent *responsibility* of state officials. This link between publicity and responsibility would be bridged by public opinion[25], which would allow the evaluation of the actions of public servants by citizens. Public agents would then feel constrained even when there was no legal coercion; and if a sanction was prescribed, there would be scrutiny of its application. It was held as a fundamental concept of the constitutional theory of liberalism[26], capable of bridging the gaps that remained in the constitutional architecture and enabling the supremacy of the people's sovereignty[27] to be implemented within an otherwise exclusionary institutional framework.

Public opinion would be expressed through the press[28], the right of petition (*direito de petição*), or ultimately in the elections[29]. In a public discussion that connected scholarly references, parliamentary debates, and daily press[30], the "nation" could express itself directly and help to guide its own destiny.

In Brazil, both the parliament and the emperor were deemed by the constitution as representatives of the nation[31]. Therefore, they could both express the public opinion – or be guided by it. As pardon was capable to interfere in the decisions of another branch – the judiciary – which was not considered as a representative of the nation[32] and neither regarded in

24 MANNORI; SORDI, 2013, p. 180.

25 LOBO, 2017.

26 Which means that the concept of public opinion appeared in the Brazilian public debate around the 1820's (NEVES, 2014).

27 BROTERO, 1842, p. 21.

28 LOBO; PEREIRA, 2014.

29 SARASÓLA, 2006.

30 LOBO, 2015.

31 Which excluded, for instance, the judiciary. Cf. art. 10 of the 1824 constitution: "Art. 11. Os Representantes da Nação Brazileira são o Imperador, e a Assembléa Geral" (BRASIL, 1824).

32 The judiciary was regarded by many jurists as a part of the executive branch, and only later in the 19th century there was a mode wide acknowledgement of a higher degree of freedom of interpretation. Until that point, the judge must strictly follow the dictates of the parliament, the true representative of the people. Cf. (STOLLEIS, 2014).

a great fashion[33], it could be a privileged tool to make the views of public opinion resonate in concrete legal practice. I will then analyze the places where public opinion could be heard and measure how it affected the practice of pardon.

Public opinion can be traced back to a few institutions in a place such as 19th-century Brazil, which was so wary of popular mingling in politics. In fact, the amount of people that could vote ("active citizens" in the constitutional language) could hardly surpass 10% of the total population and fell down to as few as 0,8% by the end of the empire[34]. As the opinions of so few were taken into consideration, we can also restrict the places where something was deemed of *public* relevance. The palpable prophets through whom the voice of the abstract people could resonate were the Council of State, the parliament, and the press. The first one constituted one of the main organs of the monarchy, being described as "its brain" in a widely quoted remark by Joaquim Nabuco. Its daily operation has already been detailed[35], and there is a good account of the justice section[36], which dealt with pardon. I will talk about this section further on, as it was crucial for the correction of legislation. We will concentrate now on the parliament and, right after it, on the press.

The parliament expressed in a quite satisfactory fashion the wills of a small and homogenous stratum of the population that could vote. Its debates circulated widely in the newspapers, creating a sort of circularity between sources. Though parliamentary records must be approached with methodological conscience[37], they are largely complete and allow a unique glimpse into the political and ideological landscape of 19th-century Brazil.

One important occasion that allows us to see this in action are the debates of the 1823 Brazilian constitutional assembly. Immediately after the independence, in 1822, state-building was in question and the perpetual risk of fragmentation of the newborn empire was constantly haunting the political elites. Moreover, the constitutional features of the country were

33 The so-called anti-case law ideology – ideologia antigiurisprudenziale (CAVANNA, 2005, p. 41).

34 CARVALHO, 2008, p. 395.

35 CARVALHO, 2008, pp. 355-390.

36 LIMA LOPES, 2010. For a critical evaluation of this work, cf. (LOBO, 2018).

37 For the risks of this kind of source, cf. (DANTAS; VELLOSO, 2018).

not yet established[38], and the pardoning power, which would be assigned to the monarch in the 1824 constitution, was still in dispute. For instance, at least on one occasion, a congressman proposed a project to pardon several inmates to celebrate the establishment of the assembly[39]. There was also a discussion of a request for pardon from some navy workers; it was rejected on the grounds that it should be considered only by the emperor[40]. The legitimacy of the institute was challenged[41], and it was considered as a possible solution to release those convicted under a law that would soon be revoked[42]. This shows that the place of state mercy was not quite clear in the early 1820s, though the mechanism was definitely seen as constitutionally relevant.

However, the bluntest way to observe the public opinion on the issue is through the press, where ordinary people could express their positions on particular pardons or on the whole idea of state forgiveness. But the newspapers also show signs of deeper trains of the legal culture. The constant appearance of pardon-related material demonstrates that imperial clemency was surrounded by an atmosphere of general acceptance by the public.

From the 1860s onwards, it is possible to see several discussions and individual interventions on the proceedings of imperial decisions. Some newspapers published full petitions from defendants[43], allowing the public

38 For the process that led to the creation of the constitution and its intellectual genealogy, cf. (LYNCH, 2014; SLEMIAN, 2009).

39 Proposition from Pereira Sampaio, tabled in 6th May 1823: "A assembléa geral constituinte e legislativa do Brazil, desejando marcar o solemne e plausivel dia da sua installação com o sello de clemencia para com os desgraçados cidadãos processados criminalmente, decreta o seguinte: 1.º Serão perdoados e immediatamente soltos todos os que ao tempo da publicação deste decreto estiverem seguros, afiançados, e prezos em qualquer das cadêas do Imperio por crimes não exceptuados nos perdões que em occasião de applausos se costumão conceder: e se tiverem parte, além da justiça, se livrarão como seguros. 2.º Gozarão deste mesmo indulto todos os que pelos ditos crimes estiverem ausentes do Imperio ou homisiados, logo que se recolhão, e se apresentem ao juiz da culpa dentro de 8 mezes contados da publicaçao. do presente decreto. Paço da assemblea, 4 de Maio.de 1823" (BRASIL, 1874).

40 BRASIL, 1874h [1823], p. 69.

41 BRASIL, 1874g [1823], p. 86.

42 BRASIL, 1874g [1823], p. 140.

43 Examples: "Correio Paulistano", 17 October 1867; "Diário de São Paulo", 6 April 1866; "Diário do Rio de Janeiro", 18 August 1870; "Correio Paulistano", 19 December 1872; "Diário de Pernambuco", 22 May 1872; "Jornal do Comércio", 5 May 1872 and 9 March1875; "A actualidade: órgão do partido liberal", 3 May 1878; "Diário do Rio de Janeiro", 18 August 1870; "Diário de Pernambuco", 19 July 1873; "Gazeta de Notícias", 2 December 1889; "O Raio", 10 September 1882.

to understand the grounds of the pleas. Some people, without any direct relation to the cases, published letters to the emperor calling for a pardon request to be granted[44] or rejected[45] – and they sometimes received replies[46]. A few times, the imperial delay to decide on specific cases was censored[47], and this also happened to denials of requests[48]. The granting of some pardons was sometimes praised[49], other times criticized[50], and *a posteriori* justifications were published – probably to recover the wounded honor of the former convicted[51].

However, the place where royal mercy appears most frequently, especially after the 1850's, is on the official records published by newspapers. In these sections, the press listed all letters, communications, and decisions made by some government agencies, usually from the same province where they were published. They are of quite different natures, including brief data such as the name of the plaintiff and what was being requested, such as a demand for information from a judge, a request to annex some documents to the petition, the sending of documents to the Ministry of Justice, among others. In the recordings of the Ministry of Justice, which were published in several newspapers, it is normal to see the results of pardon requests – granting, denials and/or the final penalty in cases of partial concessions. Moreover, since the beginning of the empire, the press normally presented in the first pages of newspapers the main news from abroad; among them, there are frequently pardons granted by foreign monarchs.

The frequent reports of pardoning without any trace of surprise or objection indicates that it developed an aura of ordinariness: the public

44 "Jornal do Comércio", 6 May 1872.

45 Example: "Jornal do Commércio", 1 October 1861, with the justification that the petitioner had escaped; "Jornal do Comércio", 12 January 1862; "Diário do Rio de Janeiro", 10 December 1870; "Jornal do Comércio", 27 November 1873; "A reforma", 16 May 1871; "Jornal do Comércio", 21 May 1882.

46 Example: "Diário do Comércio", 16 October1870.

47 Example: "Correio Mercantil", 7 July 1865; "Jornal do Recife", 2 July 1875.

48 Example: "A Reforma", 8 March 1871.

49 Example: "Jornal do Comércio", 20 February 1885; "Jornal do Comércio", 21 April 1883; "Gazeta de Notícias", 21 July 1888; "A Pátria", 24 April 1867.

50 Example: In 27 March 1874, the "Jornal do Recife" defended the pardon of a person convicted to the death sentence that had waited for 30 years for the execution; "Província de Minas", 1 May 1881.

51 "O Paiz", 11 April 1878.

opinion treated it as part of the routine. Another proof of this situation is the presence of prices for pardon petitions in advertising displaying the prices of the services of one lawyer published in the *capixaba* press; this indicates that petitioning pardon was a common service. Figures 1 and 2 show this peculiar practice[52]:

Figure 1 – List of prices of the services of one lawyer. In highlight, the price of a pardon petition.

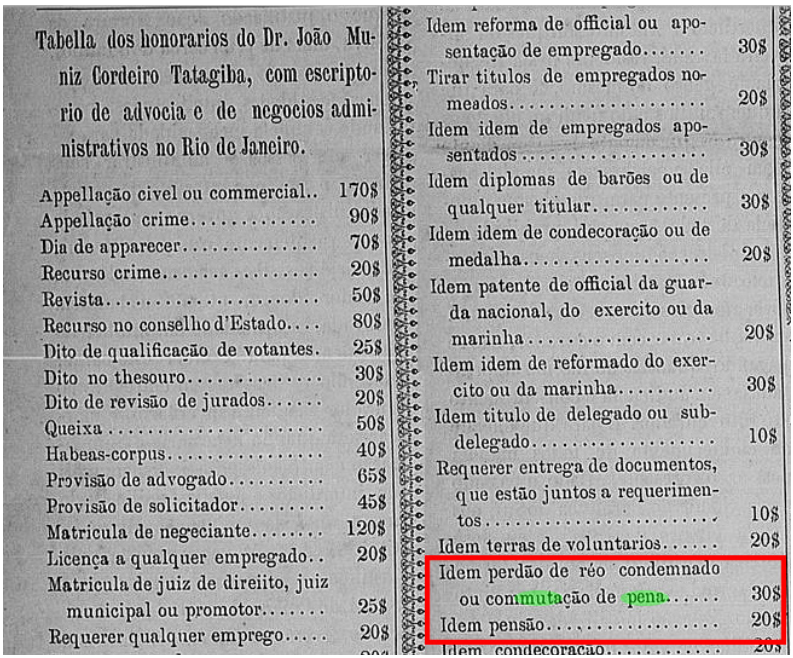

Tabella dos honorarios do Dr. João Muniz Cordeiro Tatagiba, com escriptorio de advocia e de negocios administrativos no Rio de Janeiro.

Appellação civel ou commercial..	170$
Appellação crime.....	90$
Dia de apparecer.....	70$
Recurso crime.....	20$
Revista.....	50$
Recurso no conselho d'Estado....	80$
Dito de qualificação de votantes.	25$
Dito no thesouro.....	30$
Dito de revisão de jurados.....	20$
Queixa.....	50$
Habeas-corpus.....	40$
Provisão de advogado.....	65$
Provisão de solicitador.....	45$
Matricula de negeciante.....	120$
Licença a qualquer empregado..	20$
Matricula de juiz de direiito, juiz municipal ou promotor.....	25$
Requerer qualquer emprego.....	20$
Idem reforma de official ou aposentação de empregado.....	30$
Tirar titulos de empregados nomeados.....	20$
Idem idem de empregados aposentados.....	30$
Idem diplomas de barões ou de qualquer titular.....	30$
Idem idem de condecoração ou de medalha.....	20$
Idem patente de official da guarda nacional, do exercito ou da marinha.....	20$
Idem idem de reformado do exercito ou da marinha.....	30$
Idem titulo de delegado ou subdelegado.....	10$
Requerer entrega de documentos, que estão juntos a requerimentos.....	10$
Idem terras de voluntarios.....	20$
Idem perdão de réo condemnado ou commutação de pena.....	30$
Idem pensão.....	20$
Idem condecoração.....	20$

Source: Published by "O Eleitor" on 2 January 1881.

52 A comparison between the prices of a pardon petition and the wage levels of 19th century Brazil enables us to see how accessible a lawyer was. A study coordinated by Eulalia Lobo et al. (1971) shows some valuable information. By the end of the 1880's, a book-keeper of the Ordem Terceira received 400 mil-reis and a caixeiro, 100. In 1874, a factory worker of the Ordem got 20 mil-reis. In 1858, a master mason got around 44 mil réis. In 1882, a mason aid received 29 mil reis. The rent of a cortiço (slum) room was around 9-12 mil-réis in 1882. This means that a pardon petition was not cheap, but not particularly costly either. Its price ranged between two-thirds and one time and a half of manual workers. This is not quite different from the prices currently set by the Brazilian bar (OAB), that frequently are beyond the minimum wage. This was a value that probably prevented the use of lawyers by imprisoned slaves or underpaid workers, but not by manual workers with a bit more experience.

Figure 2 – Prices of the services of one lawyer. In highlight, the price of a pardon petition.

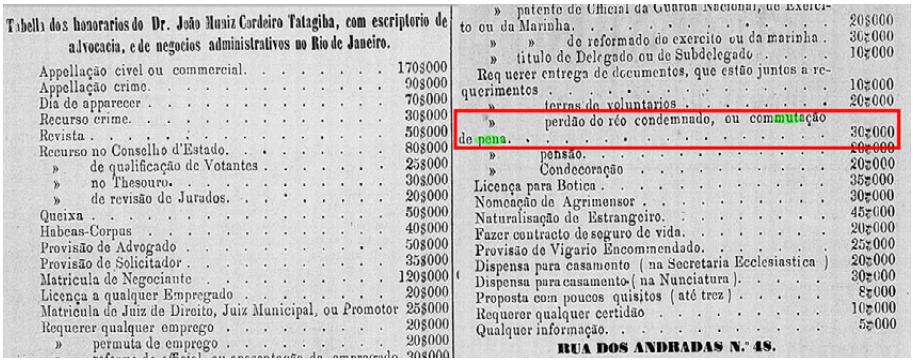

Tabella dos honorarios do Dr. João Muniz Cordeiro Tatagiba, com escriptorio de advocacia, e de negocios administrativos no Rio de Janeiro.

Appellação civel ou commercial	170$000
Appellação crime	90$000
Dia de apparecer	70$000
Recurso crime	30$000
Revista	50$000
Recurso no Conselho d'Estado	80$000
» de qualificação de Votantes	25$000
» no Thesouro	30$000
» de revisão de Jurados	20$000
Queixa	50$000
Habeas-Corpus	40$000
Provisão de Advogado	50$000
Provisão de Solicitador	35$000
Matricula de Negociante	120$000
Licença a qualquer Empregado	20$000
Matricula de Juiz de Direito, Juiz Municipal, ou Promotor	25$000
Requerer qualquer emprego	20$000
» permuta de emprego	20$000
» patente de Official da Guarda Nacional, de Exercito ou da Marinha	20$000
» » de reformado do exercito ou da marinha	30$000
» titulo de Delegado ou de Subdelegado	10$000
Requerer entrega de documentos, que estão juntos a requerimentos	10$000
» terras de voluntarios	20$000
» perdão do réo condemnado, ou commutação de pena	30$000
» pensão	20$000
» Condecoração	35$000
Licença para Botica	30$000
Nomeação de Agrimensor	45$000
Naturalisação de Estrangeiro	20$000
Fazer contracto de seguro de vida	25$000
Provisão de Vigario Encommendado	20$000
Dispensa para casamento (na Secretaria Ecclesiastica)	30$000
Dispensa para casamento (na Nunciatura)	8$000
Proposta com poucos quisitos (até trez)	10$000
Requerer qualquer certidão	5$000
Qualquer informação	

RUA DOS ANDRADAS N.° 48.

Source: Published by "O Espírito-Santense" on 9 April 1874.

We can take two conclusions from the previous discussions. First of all, pardon was effectively incorporated into the consideration of Brazilian public opinion of the 19th century. It was held as a relevant procedure, which was worth of a periodical critical assessment, based on the flux of concrete cases; furthermore, through newspapers and sometimes the parliament, it was part of the discussion on how the Brazilian society should be ruled: what was moral or not, which behaviors were accepted or not, how the State should act, among other issues. Second, there were almost no debates on the legitimacy of the institute in itself: it was taken for granted.

3. How the nation of utopian dreams can be heard in tangible debates: discussions of particular pardons

Now that we have established some general characteristics of the public discussion on pardon, we can move on to a microanalysis of a few cases in which specific pardons or particular aspects of it were questioned by the public opinion. By doing so, we will be able to understand how the trends described in the previous section concretely unfolded in the daily life of the Brazilian monarchy.

Much of the public discussion developed in both press and parliament happened in the turbulent decades of 1830 and 1840. Right after the resignation of Brazil's first emperor, Pedro I, national unity was put in question, and many revolts popped throughout the empire. To a large extent, this

alarming situation came to an end only after 1842, when the crown's heir, Pedro II, was enthroned. This event should have taken place once Pedro had reached the age of 18, but it was advanced in four years. Some uprisings still had to be fought, but the most critical years of state-building were behind the crown.

Pardon was frequently used after the end of revolutions to finish the turmoil and to please and integrate the former leaders of the uprisings. For instance, the "*Farrapos*" war, a separatist conflict in the province of Rio Grande do Sul that developed throughout 10 years from 1835 to 1845, was followed by pardons and amnesties. There was some discussion in parliament regarding which legal option should be preferred[53] and criticism of royal forgiveness altogether[54]. Regarding the "*Sabinada*", from Bahia, there were some attacks in the press to the possibility of conceding amnesty to the rebels[55]. Some people suggested that it would be better to pardon them, in a more individualized analysis of each case, rather than grant a global pardon[56]. This last option would, according to some, reproduce the impunity that was regarded as endemic to Brazil and one of its most dreadful evils. By mid-1840s, some even talked about a "terrible clemency"[57] that only favored the friends of government[58].

Nonetheless, one of the main discussions on royal mercy followed the more obscure *revolta do ano da fumaça* ("riot of the smoky year") that took place in Minas Gerais in 1833. The reasons of the revolt seem to be opposition to certain leaders of the provincial government[59]. Tensions were high following the disputes between centralists and federalists in previous years; after failed attempts to reform imperial institutions, some soldiers freed the prison inmates of Ouro Preto, back then the capital of the province of Minas Gerais, and proclaimed the fall of the president of the province. Bernardo Pereira de Vasconcellos, a future prominent conservative politician, tried to seize power in defense of legality, but was imprisoned.

53 BRASIL, 1874a [1844], p. 142; 1874f [1843], p. 308.

54 BRASIL, 1874a [1844], p. 185.

55 "Diário do Rio de Janeiro", 31 January 1840.

56 "Jornal do Comércio", 31 January 1840.

57 "O Brasil", 18 January 1845.

58 "O Brasil", 8 March 1845.

59 SILVA, 1998.

Meanwhile, the president of Minas Gerais ran away to São João del Rey and both he and the insurgents tried to gain recognition from the central government[60]. The regency, however, sent some soldiers and incarcerated the rioters, putting an end to the turmoil.

Among the leaders of the conspiracy, there was the engineer João de Verna Bilstein. He was fired from a government position in the previous year and was trying to find other office. More than one year after the events in Ouro Preto, the central government used pardon to reduce his penalty from perpetual forced labor [*galés*] to exile to the province of Rio Grande do Sul[61]. The outraged president of Minas Gerais, Limpo de Abreu, resigned explicitly stating the commutation of Bilstein's sentence as the reason[62]. This dramatic quarrel was followed by some discussion in the press and agitation of the public opinion. Many municipal chambers and groups of inhabitants of some cities published petitions in the press against the central government – in particular, against the pardon granted to Bilstein – and in favor of Abreu; that was the case of Lavras[63], Mariana[64], Campanha[65], Curvelo[66], Queluz[67], São João del Rey[68], and even the capital Ouro Preto[69].

Some criticized the commutation into exile to another province, for it would simply displace an agitator that could bring unrest to another part of the empire[70]. Others were more direct, insinuating that the pardon had been obtained by corruption[71]. Newspapers connected with the government, however, defended the measure[72], arguing that criticism was only an attempt of the opposition to destabilize the rightful leaders of the regency[73].

60 BARATA, 2014.
61 "Correio Official : In Medio Posita Virtus" (RJ), 29 November 1834, p. 2.
62 "Correio Official : In Medio Posita Virtus" (RJ), 23 December 1834, p. 2.
63 "Astro de Minas", 29 January 1835.
64 "Astro de Minas", 29 January 1835.
65 "Astro de Minas", 5 February 1835.
66 "Astro de Minas", 12 January 1835.
67 "O Universal", 14 January 1835.
68 "O Universal", 12 January 1835.
69 "Jornal do Comércio", 12 January 1835.
70 "O Sete de Abril", ed. 210, 1835.
71 "Astro de Minas", ed. 1114 de 1835.
72 "Correio Oficial", 23 October 1834.
73 "Correio Oficial", 27 October 1834.

Moreover, they considered the penalty to be harsh even after the commutation and defended that it should have become even lighter[74]. Others said that it was not the government's fault, as the congressmen from Minas Gerais themselves had recommended the commutation[75].

A few days later, a congressman even felt compelled to publish a letter in the press arguing that the constitution did not allow the government to unmake its decision[76]. The fallout became unbearable, and the minister of justice resigned[77], amidst accusations that the pardon given had been only an attempt to demonstrate authority[78], which actually showed the weakness of the government[79]. The "Sete de Abril", a newspaper controlled by Bernardo Pereira de Vasconcellos, attacked the minister[80] and highlighted how divisive and reckless his decisions were[81]. By the end of the day, Bilstein received a second commutation; this time into expulsion from the empire for 15 years[82] – a penalty known as *desterro para fora do império*.

The case, however, had little to do with pardon. As the newspaper "Mutuca Picante" said, Bernardo Pereira de Vasconcellos used the situation to get revenge against the government, who refused to offer him a ministry[83]. The disputes between "Mutuca Picante" and "Sete de Abril" over the pardon of Bilstein actually reflected broader political disputes concerning the abolition of the slave trade[84]. The discussions on royal mercy were merely a proxy for the fight between political groups. Pardon was an important part of Brazilian political life; its political valence meant that much broader disputes could take place over this common background.

After the turbulent years of the regency, pardon would be discussed once again in the 1860s; this time, regarding the Paraguayan War, the biggest armed conflict that ever plagued South America. The government

74 "Correio Oficial", 16 January1835.

75 "Correio Oficial", 28 January 1835.

76 "Jornal do Commercio", 15 January 1835.

77 "Jornal do Commercio", 17 January 1835.

78 "Sete de Abril", 10 January 1835.

79 "O Universal", 28 January 1835.

80 "Sete de Abril", 24 January 1835.

81 "Sete de Abril", 28 February 1835.

82 "Correio Official : In Medio Posita Virtus" (RJ), 12 March December 1835, p. 1.

83 "Mutuca Picante", 2 January 1835.

84 FERRETTI, 2014.

started to pardon convicted men under the condition that they would join the Brazilian Army and take part in the warfare. However, there was no legal provision allowing the emperor to impose conditions over mercy. In 1868, this strategy would be heavily criticized in the Senate by the opposition[85]. Some senators argued that Brazilian law did not allow this kind of procedure[86]. Moreover, it put at stake some factors that were not meant to be considered when deciding the granting of pardon: instead of the atonement of the convicted, the government would decide based on its military convenience[87]. But this discussion was not fruitful, as the emperor continued to pardon. However, it is interesting for it shows public opinion being expressed in the parliament. As a matter of fact, these parliamentary discussions did not concern any kind of legislation and were not meant to create any further legal obligation. On the contrary, they were meant to develop an interpretation of the law already in force, and to influence the application of such interpretation by the moderating power. The Paraguayan War was not the only occasion when members of parliament tried to censor acts of pardon from government officials[88] – though probably this incident was just an excuse to inflict political damage.

Another example of great public discussion on pardon were the reactions to the systematic commutations of all death penalties after 1876. Many farm and slave owners, noticing the increasing numbers of royal clemency, started to criticize the government and even the emperor, stating that he had in fact abolished a law, something that was not part of its constitutional functions. These debates were held both in the press and in the parliament. I will not detail such discussions, as previous historiography has already discussed these issues[89].

Pardon, therefore, was not kept hidden in the dusty shelves of bureaucracy: it was, conversely, often scrutinized by the grand tribunal of public opinion. It appeared both in the newspaper pages and in the parliament chambers, being the object of sometimes heated debate. This is a strong

85 BRASIL, 1874d [1868], p. 134.

86 BRASIL, 1874c [1867], p. 274.

87 BRASIL, 1874c [1867], p. 24.

88 For instance, the criticism of dep. Sayão Lobato against the president of Rio Grande do Sul (BRASIL, 1874b [1855]).

89 RIBEIRO, 2005; COSTA, 2019a.

sign that, at least in 19th-century Brazil, royal mercy was not treated as a mere formality that belonged to cold formularies: it was an integral part of political life and was frequently called into action to solve dramatic convulsions. As such, it had to be discussed by citizens. Public opinion tried to control, or at least evaluate the flux of pardons. It would then be able to help the nation to keep a close eye in an imperial prerogative that, as such, could not be restrained by the judiciary, and upon which the legislative could not rule.

4. From the ethereal heavens down to the dusty courts: corrections of judicial procedure

Pardon, as a source of discretionary power, can enable the central government to interfere in the daily functioning of the judiciary branch. It has already been shown how important legislative changes in 19th-century Brazil were preceded by consistent commutations of penalties which paved the way for corrections in the deficient laws then in force. This was the case with the abolition of death penalty, with the Law of 10 June 1835 and with the creation of *revisão criminal*[90]. In this section, I would like to discuss how more specific aspects of Brazilian law, that had most to do with the daily functioning of the judiciary, were adjusted with the help of pardon.

One important issue in 19th-century Brazilian law was the reception of the jury. Inspired by its European counterparts, Brazilian legislators introduced this kind of procedure in the 1832 Code of Criminal Procedure. However, many aspects of it were left without proper regulation. When some problems arose concerning both form and content of the decisions, pardon became a useful resource in the pursuit of more acceptable results.

In the harsh environment of a society based on slave labor, the rulings on the crimes committed by those in captivity would hardly be fair. Actually, the members of juries would frequently be slave owners, something that could result in convictions based on little evidence. Sometimes, the Brazilian Council of State would use the argument that there was not sufficient evidence to recommend the reduction of penalty to the moderating power[91], even though

90 COSTA, 2019a.

91 The council of state was sometimes consulted before the imperial decision, but the emperor generally followed its opinions. For the second council of state, that existed between 1824-1834 (COSTA, 2019b).

the measure of punishment, as established in the 1830 criminal code, should be fixed considering only the guilt of the defendant, not the amount of evidence. Notwithstanding that, the Council of State recommended the commutation of the penalty of a slave in 1854 on the grounds that there was enough evidence to consider him guilty, but not so much that would authorize a death sentence[92]. The same was reported almost 15 years earlier in parliament[93]. The Council of State also recommended commutations when the jury did not consider the fact that the defendant was a minor[94].

There was also discussion on procedural matters. Some defendants attempted to obtain a commutation on the grounds of procedural nullities that otherwise could not be fixed[95]. One debate, held on 28 January 1854[96], clarifies how the Council of State dealt with procedural issues in a quite creative manner. Elias Velloso de Oliveira was sent to the galleys due to a sentence for murder; against the verdict, he filled an appeal called *protesto por novo júri* ("protest for a new jury") and got a new judgment, in which he received a death sentence. He then applied to the Council of State for pardon; the judge, in the report sent to the council, stated that there was no sufficient evidence to convict Oliveira, but the tribunal could not rule on the merits of the sentence, only on the formalities. Therefore, he asked for the Council of State to pardon the defendant. The Councilors stated that there was not enough written evidence of the crime, but most of the procedure of the jury was developed orally, and they should consider that there was oral evidence that had not been written down. However, aware that there were two juries with conflicting verdicts, they decided that the votes in both juries should be summed; as the result would be in favor of the defendant, he should then receive a commutation. Accordingly, the Council maintained the consideration of the special oral structure of the jury and also held the interpretation that an appeal could not lead to a worse result for the defendant. They did so by inventing a procedure that was not in the code: the fiction of a single jury made of the two that existed before. It was a rather creative way to pardon on procedural grounds.

92 CAROATÁ, 1884, p. 465.

93 In 3 November 1841 (BRASIL, 1874e [1841]).

94 CAROATÁ, 1884, p. 610.

95 CAROATÁ, 1884, p. 177.

96 CAROATÁ, 1884, p. 397.

The Council of State also discussed the requisites of crimes in its debates on pardon. For instance, he pardoned a defendant that committed the crime of *injuria* (insult) through a private letter; the judiciary considered that there was no need to use a public mean to commit the crime, while the Council of State thought otherwise[97]. This sort of crime, however, was considered private in Brazilian doctrine; that is to say, one that offends only a citizen, not the public order; therefore, some people said that even the emperor could not pardon such offenses[98].

Other examples may be recalled. On one occasion, the judge informed the Council that there was no adequate place in his county (*comarca*) where convicted people could serve sentences of prison with labor; some of them were being treated as if they were sentenced to the galleys. The councilors suggested a commutation to compensate the extra harshness of the sentence[99]. In another case, a person sentenced to death got a commutation after waiting 16 years for an execution that did not come; this was considered unhuman and the imposition of a suffering that was not mandated either by law or by the sentence[100].

These cases show us an important characteristic of 19th-century Brazilian law – especially regarding criminal issues. The Council of State, through the emperor and his pardoning power, could control the actions of the judiciary branch. Whether judges had forgotten to take some circumstance into consideration, had failed to conduct the procedure, or simply had taken bad decisions, the central power could always, through pardon, mild the conditions the defendants had to face. Moreover, this did not concern only judges. Decisions of jurors were also scrutinized by the central government, and the councilors did not hesitate to reform decisions they considered unlawful or even unreasonable. This showed how great was the power wielded by monarch and its immediate aids, but how it also carried a great risk. Doctrine sometimes criticized how the moderating power interfered into the judiciary branch because it seemed like some sort of micromanagement that could easily turn into despotism. Pinto Júnior, in 1874, explicitly stated those risks:

97 BRASIL, s/d, p. 24.

98 "Jornal do Comércio", 26 de março de 1871.

99 CAROATÁ, 1884, p. 100.

100 CAROATÁ, 1884, p. 395.

> the interference of royal power in the creation of laws and in the action of the executive branch, though broad, is not of so dreadful consequences, as it is the case with its so immediate and direct interference in the judiciary. The feudal times, when justice was made in the name of the king, are gone[101].

Feudalism could be over, but the role of the emperor in the system of justice was not. Justice was his inspiration, and pardon, his tool.

5. Conclusion: How archaic criminal devices can be turned into fruitful constitutional ingredients

How could a seemingly insignificant and outdated instrument such as pardon exercise so much power in the legalistic environment of 19th-century Brazil?

Pardon, as a matter of fact, was deeply entangled with the logics of pre-modern governance. It reinforced the king's position as both the judge of last resort and the good, forgiving father. Such logics did not suit well the separation of powers that was so crucial to the *legal absolutism*[102] of the 1800s.

However, Brazil had a peculiarity not shared with its European counterparts. The tropical empire had enacted a fourth power: the *pouvoir moderateur* from Benjamin Constant, enshrined in the constitution and developed in the Brazilian constitutional thought. The emperor, under such institutional design, was not meant to simply wait for the political drama to unfold: he both reigned and ruled, in explicit contrast with the English constitutional experience. This rather peculiar situation implied that the monarch could – and should – act as the expression of the public opinion and represent the nation as a whole. As an active player, he should correct the exaggerations and missteps of the other branches of government. This was possibly truer for pardon than for any other royal prerogative.

As we saw, the emperor exercised his power from the top of a complex system that involved both press and parliament. They would promote public debate to evaluate most aspects of the emperor's actions and

101 PINTO JR, 1874, pp. 108-109.

102 Understood as the absolute grappling of law by the state, which, from the 19th century onwards, start to act as the only possible source of law (GROSSI, 2010, p. 83; 1998).

guide his otherwise unlimited power: they were the informal checks and balances of a system that lacked judicial review. As a matter of fact, the parliament itself was considered as a stage for discussion: its proceedings were published daily in the newspapers, triggering all sorts of opinions from members of the public. Moreover, the Brazilian General Assembly could not only discuss legislation, but also examine the actions of the executive and moderating branches. The written dissemination of public documents, such as information on pardons, and opinions, letters and commentaries, turned a sovereign prerogative that could be forgotten in the drawers of bureaucracy into an object of public scrutiny. Therefore, the emperor could act accordingly to the "requests from the nation" and, at the same time, be criticized by the very same people when he failed to protect the interests of the population.

Judiciary flaws could also be corrected, and the Council of State, as the brains of the monarchy, would guide the actions of the emperor. The many obstacles of criminal procedure could be corrected, and prison administration would be turned into a more manageable task. But it is interesting to notice how centralized this endeavor had become. The fortune of single unimportant inmates from distant jails would be discussed in the highest spheres of the Rio de Janeiro imperial court.

Pardon, therefore, gives us a meaningful glimpse into the functioning of the Brazilian imperial government. A system that, in formal terms, relied heavily on the emperor, but which was in practice also entrusted to some other actors. The public opinion was central, and the press, though not formally a part of the State, was crucial to the functioning of its engines. The Council of State had an important role overviewing the State apparatus. And the quest for centralization was a crucial aspect of the daily activity of the court's administration, as most of those institutions had their seats in Rio de Janeiro. How successful those forces were, and the day-to-day adversities of their tasks, however, are topics for another research.

As diverse as they are, legal institutes change constantly. Pardon entered the 19th century as a reminiscence from the Portuguese *Ancien Régime*, but throughout the empire, it adjusted itself to the new reality of Brazilian law. It became an important piece of constitutional engineering and, as such, it is a privileged observatory of 19th-century public law and its underlying ideologies.

References

A ACTUALIDADE: Órgão do Partido Liberal. Ouro Preto (MG): 1878-1882.

ALESSI, Giorgia. *Il processo penale:* profilo storico. Roma; Bari: Laterza, 2007.

A PÁTRIA. São Félix: 1891-1899.

A PROVÍNCIA DE MINAS: Órgão do Partido Conservador. Ouro Preto: 1884-1974.

A REFORMA: Órgão Democrático: Rio de Janeiro, 1869-1879.

ASTRO DE MINAS. São João d'El-Rey: 1827-1839

BARATA, Alexandre Mansur. A revolta do ano da fumaça. *Revista do Arquivo Público Mineiro*, n. 50, v. 1, pp. 79-91, jan./jun, 2014.

BECCARIA, Cesare Bonesana, Marquês de. *Dos delitos e das penas*. S. l.: s.d.. Disponível em: http://www.ebooksbrasil.org/adobeebook/delitosB.pdf. Acesso em: 16 fev. 2016.

BELLABARBA, Marco. Pace pubblica e pace privata: linguaggi e istituzioni processuali nell'Italia moderna. In: BELLABARBA, Marco; SCHWERHOFF, Gerd; ZORZI, Andrea (Orgs.). *Criminalià e giustizia in Germania e in Italia:* pratiche giudiziarie e linguaggi giuridici tra tardo medioevo ed età moderna. Bolonha; Berlin: Il Mulino; Duncker & Humboldt, 1999.

BRASIL. *Constituição política do Império do Brasil*: Carta de Lei de 25 de Março de 1824. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao24.htm. Acesso em: 16 maio 2021.

BRASIL. *Annaes do parlamento brasileiro* 1844, Tomo 1. Rio de Janeiro: Tipografia do Imperial Instituto Artístico, 1874a.

BRASIL. *Annaes do parlamento brasileiro* 1855, Tomo 3. Rio de Janeiro: Tipografia do Imperial Instituto Artístico, 1874b.

BRASIL. *Annaes do parlamento brasileiro* 1867, Apêndice. Rio de Janeiro: Tipografia do Imperial Instituto Artístico, 1874c.

BRASIL. *Annaes do parlamento brasileiro* 1868. Rio de Janeiro: Tipografia do Imperial Instituto Artístico, 1874d.

BRASIL. *Annaes do parlamento brasileiro* 1841, Tomo 3. Rio de Janeiro: Tipografia do Imperial Instituto Artístico, 1874e.

BRASIL. *Annaes do parlamento brasileiro* 1843, Tomo 1b. Rio de Janeiro: Tipografia do Imperial Instituto Artístico, 1874f.

BRASIL. *Annaes do parlamento brasileiro*: assembleia constituinte 1823, Tomo 1. Rio de Janeiro: Tipografia do Imperial Instituto Artístico, 1874g.

BRASIL. *Annaes do parlamento brasileiro:* assembleia constituinte 1823, Tomo 2. Rio de Janeiro: Tipografia do Imperial Instituto Artístico, 1874h.

BRASIL. *Annaes do Senado Imperial* 1867, Tomo 2. Rio de Janeiro: Tipografia do Imperial Instituto Artístico, 1874i.

BRASIL. *Consultas da Secção de Justiça do Conselho de Estado*, 1872-1889. Rio de Janeiro: s/ed., s/d.

BROTERO, José Maria de Avellar. *A filosofia do direito constitucional por um ex-magistrado*. São Paulo: Tipografia do Governo, 1842.

CAROATÁ, José Próspero Jeová da Silva. *Imperiaes resoluções sobre consultas tomadas na seção de justiça do Conselho de Estado, desde 1842 quando começou a funcionar até hoje*. Rio de Janeiro: Garnier, 1884,

CARVALHO, José Murilo de. *A construção da ordem*: a elite política imperial. *Teatro de sombras:* a política imperial. 4ª ed. Rio de Janeiro: Civilização Brasileira, 2008.

CAVANNA, Adriano. *Storia del diritto moderno in Europa*: le fonti e il pensiero giuridico, 2. Milano: Giuffrè, 2005.

COHEN, Débora. La procédure de grâce au XVIIIe siècle: restaurer un ordre ou reconnaître l'innocence? *Revue d'histoire moderne et contemporaine*, v. 54, n. 2, pp. 91-116, abr./jun., 2007.

CONTINENTINO, Marcelo Casseb. *História do Controle da Constitucionalidade das Leis no Brasil*: percursos do pensamento constitucional no século XIX (1824-1891). 1. ed. São Paulo: Almedina, 2015.

CORREIO MERCANTIL. Rio de Janeiro: 1830-1836.

CORREIO OFFICIAL. Rio de Janeiro: 1833-1841.

CORREIO PAULISTANO. São Paulo: 1854-1942.

COSTA, Arthur Barrêtto de Almeida Costa. Poder e Punição Através da Clemência: O Direito de Graça entre Direito Penal e Constitucional na Cultura Jurídica Brasileira (1824-1924). *Revista do IHGB*, a. 180, v. 481, pp. 255-304, set./dez., 2019a.

COSTA, Arthur Barrêtto de Almeida. Perdoar e Punir em tempos de Transição: O Recurso de Graça no Conselho de Estado do Brasil (1828-1834). *Rev. Direito Práx.*, v. 10, n. 4, pp. 2341-2366, Dec. 2019b.

DANTAS, Mônica Duarte; VELLOSO, Júlio Cesar de Oliveira Debates parlamentares e seus usos pelos historiadores. *Revista do IHGB*, n. 477, pp. 45-71, mai./ago. 2018

DE BROUWER, Jérome. Abolir? La peine de mort et l'avènement de l'abolition de fait en Belgique. *Annales de droit de Louvain.* 69 (3), pp. 211-227, 2009.

DIÁRIO DE PERNAMBUCO. Recife: 1825-1984.
DIÁRIO DE SÃO PAULO: Jornal Diário e Livre. São Paulo: 1865-1878.
DIÁRIO DO RIO DE JANEIRO. Rio de Janeiro: 1821-1878.
DORRIS, J. T. Pardoning the Leaders of the Confederacy. *The Mississippi Valley Historical Review*, v. 15, n. 1, pp. 3-21, Jun., 1928.
FERRETTI, Danilo José Zioni. Entre profecias e prognósticos: Januário da Cunha Barbosa, a escravidão e o futuro da nação (1830-1836). *Tempo*, v. 20, pp. 1-22, jan./dez., 2014.
FOCARDI, Filipo. Giustizia e ragion di stato. La punizioni dei criminali di guerra tedeschi in Italia. In: HÄRTER, Karl; NUBOLA, Cecilia (Orgs). *Grazia e giustizia*: figure dela clemenza fra tardo medioevo ed età contemporanea. Bologna: Il Mulino, 2011.
GAUVARD, Claude. Grâce et execution capitale: les deux visages de la justice royale française à la fin du moyen âge. *Bibliothèque de l'École des Chartes*, v. 153, nº. 2, pp. 275-290, jul./dez., 1995.
GAUVARD, Claude. La grazia del re di Francia alla fine del medioevo. In: HÄRTER, Karl; NUBOLA, Cecilia (Orgs). *Grazia e giustizia:* figure dela clemenza fra tardo medioevo ed età contemporanea. Bologna: Il Mulino, 2011.
GAZETA DE NOTÍCIAS. Rio de Janeiro: 1875-1956.
GROSSI, Paolo. *Assolutismo giuridico e diritto privato.* Milano: Giuffrè, 1998.
GROSSI, Paolo. *A history of European Law.* Chichester: Wiley-Blackwell, 2010.
GRUPP, Stanley. Some historical aspects of pardon in England. *The American Journal of Legal History*, v. 7, n. 1, pp. 51-62, jan., 1963.
HARVEY, Barbara. Draft Letters Patent of Manumission and Pardon for the Men of Somerset in 1381. *The English Historical Review*, v. 80, n. 314, pp. 89-91, jan. 1965.
HESPANHA, Antônio Manuel. Da "iustitia" à "disciplina": textos, poder e política penal no Antigo Regime. In: HESPANHA, Antônio Manuel. *Justiça e litiosidade*: História e prospectiva. Lisboa: Fundação Calouste Gulbenkian, 1993.
HESPANHA, Antônio Manuel. As outras razões da política: a economia da "graça". In: HESPANHA, Antônio Manuel. *A política perdida*: ordem e governo antes da modernidade. Curitiba: Juruá, 2010.
JORNAL DO COMMERCIO. Rio de Janeiro: 1874-1952.
JORNAL DO RECIFE. Recife: 1858-1938.

KESPER-BIERMAN, Sylvia. La grazia nella Germania dello XIX secolo. In: HÄRTER, Karl; NUBOLA, Cecilia (Orgs). *Grazia e giustizia:* figure dela clemenza fra tardo medioevo ed età contemporanea. Bologna: Il Mulino, 2011.

KOTKAS, Toomas. Kant on the right of pardon: a necessity and ruler's personal forgiveness. *Kant studien*, v. 102, n. 4, S. 413-421, 2011.

KOTKAS, Toomas. Pardoning in nineteenth century Finland: at the interface of early modern and modern criminal law. *Rechtsgeschichte*, Frankfurt am Main, v. 5, n. 10, pp. 152-168, jul/dez, 2007.

LIMA LOPES, José Reinaldo de. *O oráculo de Delfos*: Conselho de Estado no Brasil Império. São Paulo: Saraiva, 2010.

LOBO, Eulália Maria Lahmeyer; CANAVARROS, Octavio; FERES, Zakia; GONÇALVES, Sônia; MADUREIRA, Lucena Barbosa. Evolução dos preços e do padrão de vida no Rio de Janeiro, 1820-1930. *Revista Brasileira de Economia*, n. 25, v. 4, pp. 235-265, out./dez. 1971.

LOBO, Judá Leão; PEREIRA, Luís Fernando Lopes. A imprensa do segundo reinado no processo político-constitucional: força moral e opinião pública. *Revista da Faculdade de Direito – UFPR*, vol. 59, n. 1, pp. 179-206, 2014.

LOBO, Judá Leão. Discussão pública e formação da cultura jurídica: contribuição metodológica à história do direito brasileira. *Quaestio Iuris*, vol. 08, nº. 03, pp. 1688-1710, 2015.

LOBO, Judá Leão. Estudo sobre "O oráculo de delfos: o conselho de estado no Brasil-Império", de José Reinaldo de Lima Lopes. *Rev. Direito Práx.*, v. 9, n. 3, pp. 1363-1400, Sept. 2018.

LOBO, Judá Leão. O que é a opinião pública? Estudo de história constitucional brasileira. *Quaestio Iuris*, vol. 10, nº. 01, pp. 494-518, 2017.

LUGO, Gibran Bautista y. Cédulas del perdón real a los rebeldes de la Ciudad de México, 1627. *Estudios de Historia Novohispana*, n. 52, pp. 68-74, 2015.

LYNCH, Christian Edward Cyrill. *Monarquia sem despotismo e liberdade sem anarquia*: o pensamento político do Marquês de Caravelas (1821-1836). Belo Horizonte: Editora UFMG, 2014.

MANNORI, Luca; SORDI, Bernardo. *Storia del diritto amministrativo*. 5ª Ed. Roma; Bari: Laterza, 2013.

MASSUCHETTO, Vanessa Caroline; PEREIRA, Luís Fernando Lopes. O rei como dispensador da graça: autos de livramento crime e cultura jurídica criminal em Curitiba (1777-1800). Tempo, Niterói , v. 26, n. 1, pp. 123-142, Apr. 2020 .

MOORE, Kathleen Dean. *Pardons*: justice, mercy and the public interest. New York: 1989.

MUTUCA PICANTE. Rio de Janeiro: 1834-1835.

NEVES, Lúcia Bastos Pereira das. Opinião pública. In: FERES JR, João (Org.). *Léxico da história dos conceitos políticos no Brasil***.** Belo Horizonte: Editora UFMG, 2014.

NUBOLA, Cecilia. Giustizia, perdono, oblio: la grazia in Itália dall'età moderna ad oggi. In: HÄRTER, Karl; NUBOLA, Cecilia (Orgs). *Grazia e giustizia*: figure dela clemenza fra tardo medioevo ed età contemporanea. Bologna: Il Mulino, 2011.

O BRASIL. Rio de Janeiro: 1863-1876.

O PAIZ. Cuiabá: 1884-1934.

O RAIO. Aracaju: 1875-1885.

O SETE D'ABRIL. Rio de Janeiro: 1833-1839.

O UNIVERSAL: Imparcialidade, Justiça e Tolerância. São Luís: 1852.

PINTO JÚNIOR, Joaquim Antônio. No crime de injúrias, o perdão ou a comutação da pena estão subordinados a condições especiais. *Gazeta Jurídica*, a. 2, v. 3, pp. 105-114, 5 de abril de 1874.

PIROLA, Ricardo Figueiredo. Cartas ao Imperador: os pedidos de perdão de réus escravos e a decisão de 17 de outubro de 1872. *Almanack*, n. 13, pp. 130-152, Aug. 2016.

RIBEIRO, João Luís. *No meio das galinhas, as baratas não têm razão*: a lei de 10 de junho de 1835: os escravos e a pena de morte no Império do Brasil (1822-1889). Rio de Janeiro: Renovar, 2005.

SARASÓLA, Ignácio Fernandes. Opinión pública y "liberdades de expressión" em el constitucionalismo español (1726-1845). *Historia Constitucional*, n. 7, pp. 159-186, 2006.

SCHEUTZ, Martin. Una lunga lotta per la giustizia? Rivolta e pacificazioni dopo il tumulti nel Salzkammergut del 1601-1602. In: HÄRTER, Karl; NUBOLA, Cecilia (Orgs). *Grazia e giustizia*: figure dela clemenza fra tardo medioevo ed età contemporanea. Bologna: Il Mulino, 2011.

SENECA, Lucius Annasus. *Moral Essays*. Trad. John W. Basore. London: W. Heinemann, 1928-1935. 3 vols.: Volume III, s/d. Disponível em: http://www.stoics.com/seneca_essays_book_3.html.

SERRAINO, Marco. Gratia Gratiae Gratia. La clemenza individuale tra pienezza e divisione del potere. *Materiali per una storia della cultura giuridica*, nº 1/2019, pp. 227-258, jan./dez. 2019.

SILVA, Wlamir. Usos da fumaça: a revolta do Ano da Fumaça e a afirmação moderada na Província de Minas. *Locus – Revista De História*, v. 4, n. 1, pp. 105-118, 1998.

SLEMIAN, Andrea. *Sob o império das leis*: constituição e unidade nacional na formação do Brasil (1822-1834). São Paulo: Hucitec, 2009.

SNYDER, Henry L. The Pardon of Lord Bolingbroke. *The Historical Journal*, v. 14, n. 2, pp. 227-240, Jun., 1971.

STOLLEIS, Michael. Interpretação Judicial na Transição do Antigo Regime ao Constitucionalismo. *Cadernos do PPGDir./UFRGS*, v. 9, n. 2, dez. 2014.

STRANGE, Carolyn. *Discretionary justice*: pardon and parole in New York from the revolution to the depression. New York: New York University Press, 2016.

STRANGE, Carolyn. The unwritten law of executive justice: pardoning patricide in reconstruction-era New York. *Law and History Review*, v. 28, n. 4, pp. 891-930, nov. 2010.

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RESUMO: A graça é um instrumento ambivalente, com raízes tanto no direito penal como no constitucional. O objetivo deste trabalho é compreender a dimensão constitucional da clemência real no Brasil império. Analisei duas de suas principais expressões. Em primeiro lugar, tratei da opinião pública, que foi um dos principais elementos da teoria constitucional do século XIX e investiguei como a sociedade civil interagia com os comportamentos do Estado em relação ao perdão. Os principais aspectos abordados foram discussões sobre a legitimidade da própria existência da graça e a pertinência de perdões específicos. Em segundo lugar, tentei entender como o monarca interferiu em certas partes do direito brasileiro para conduzi-lo a um melhor desempenho. A principal área analisada foi o funcionamento do júri. O lugar especial do perdão na paisagem constitucional brasileira do século XIX só pode ser efetivamente compreendido com referência à particular separação de poderes do Brasil oitocentista, que concedia ao imperador um poder especial: o moderador. As principais conclusões foram que a opinião pública, expressa principalmente na imprensa e no parlamento, teve um papel importante tanto na formação do perdão quanto na sua legitimação; e que o imperador, através do poder moderador, usou o perdão para lidar com alguns maus funcionamentos da legislação brasileira.
Palavras-chave: graça, misericórdia real, poder moderador, constitucionalismo oitocentista, Constituição de 1824.

ABSTRACT: Pardon is an ambivalent tool, with roots both in criminal and constitutional law. This paper aims to understand the constitutional characteristics of royal clemency in imperial Brazil. I analyzed two of these features that can be deemed more prominent. First, I looked into the public opinion, which was one of the crucial mechanisms of 19th-century constitutional theory and investigated how civil society interacted with the state's impulses regarding pardon. The main aspects I dealt with were discussions on the legitimacy of the very existence of royal mercy and the pertinence of specific pardons. Second, I investigated how the monarch interfered in certain parts of Brazilian legislation to push it into a better performance. The main aspect handled with recourse to pardon was the functioning of the jury. The special place of pardon in Brazilian 19th-century constitutional landscape can only be understood taking into consideration its connection with the particular Brazilian separation of powers, which granted the emperor a unique moderating power. The main conclusions were that the public opinion, expressed mainly in the press and the parliament, had an important role in both shaping pardon and legitimizing it; and that the emperor, through the moderating power, used pardon to cope with some malfunctioning of Brazilian legislation.
Keywords: Pardon, royal mercy, moderating power, 19th-century constitutionalism, 1824 Constitution.

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