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Democracy, freedom and equality: Social constitutionalism among balance, autority and State intervention*

Democracia, libertad e igualdad: El constitucionalismo Social entre el equilibrio, la autoridad y la intervención Estatal

Democracia, liberdade e igualdade: O constitucionalismo social entre o equilíbrio, a autoridade e a Intervenção Estatal

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Abstract:

This article presents political and legal aspects of social constitutionalism in the passage from the 19th to the 20th century. The problem of the nation and the Kelsen-Schmitt debate allow a comparative analysis between the social constitutions of Mexico (1917) and Brazil (1934). The hypothesis is that individual and social rights and a democratic structure are not enough to protect against authoritarianism when the rhetoric of nationalism and identity prevails. We must seek a democratic balance in the implementation of these two categories of rights to guarantee levels of social solidarity beyond the nation.
Keywords: Social constitutionalism. Nationalism. Democracy. Individual and social rights.

Resumen:

Este artículo presenta aspectos políticos y jurídicos del constitucionalismo social en el pasaje del siglo XIX para el XX. El problema de la nación y el debate Kelsen-Schmitt permiten un análisis comparado entre las constituciones de carácter social de México (1917) y de Brasil (1934). La hipótesis es que derechos individuales y sociales y una estructura democrática no bastan para proteger contra el autoritarismo cuando prevalece la retórica del nacionalismo y de la identidad. Hay que buscar el equilibrio democrático en la efectuación de esas dos categorías de derechos, a garantizar niveles de solidaridad social para allá de la nación.
Palabras-clave: *Constitucionalismo social. Nacionalismo. Democracia. Derechos individuales y sociales.*

Resumo:

Este artigo apresenta aspectos políticos e jurídicos do constitucionalismo social na passagem do século XIX para o XX. O problema da nação e o debate Kelsen-Schmitt permitem uma análise comparada entre as constituições de caráter social do México (1917) e do Brasil (1934). A hipótese é a de que direitos individuais e sociais e uma estrutura democrática não bastam para proteger contra o autoritarismo quando prevalece a retórica do nacionalismo e da identidade. Deve-se buscar o equilíbrio democrático na efetivação dessas duas categorias de direitos, garantindo níveis de solidariedade social para além da ideia de nação.
Palavras-chave: *Constitucionalismo social. Nacionalismo. Democracia. Direitos individuais e sociais.*

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1 Introduction

Today we are experiencing the consequences of the discourses of exhaustion of the state as the guarantor of social solidarity and the emptying of democracy, freedom and equality as legal and political values. Austerity emerges as a hegemonic position in proposals that mimic the metaphor of Columbus' egg. The stimulus to economic growth, without any concern for the reduction of social inequalities, arises as a pretext for the worsening of living conditions. What is perceived is the cover-up, emblematic experience of social rights. This fundamental legacy in the tradition of constitutionalism from 1910 to 1940 has, increasingly, its operability diminished, with its functions relegated to the background in political decisions in contemporaneity.

At the same time, we identify the return of identity, conservative and xenophobic discourses. Discourses that demand, on the one hand, the "national" unity of the people for the resumption of social solidarity and, paradoxically, the denial of the rights of freedom and equality to foreigners (or simply non-citizens, those who are not admitted as part of the people), on the other hand.

That moment can be compared to the exhaustion of nineteenth-century liberalism and twentieth-century nationalism, when the idea of the sufficiency of the market for social life was replaced by the demand that the state would realize the welfare of its people, as well as its ethical unity. Thus, this article seeks an understanding of the political and legal aspects of the role of social rights in the context of the political conception of social constitutionalism in the first half of the twentieth century.

The starting point is the presentation of the problem of the nation and nationalism, which clarifies the prevalence of the state over rights and how the state assumes the function of fulfilling the life and integrity of its people, understood as a unit. In terms of constitutional theory and normativity, this prevalence of the State over people is present in the debate between Kelsen and Schmitt regarding the relationship between democracy, state and constitution.

To this debate is added a moment of comparative documentary analysis of the social constitutions of Mexico (1917) and Brazil (1934). An attempt is made to make the relationship between the documents, their limits, the models of State and the authoritarianisms that underlie them. The hypothesis is that individual and social rights, even when they are found in a democratic constitutional structure, are not enough to protect against authoritarianism when the rhetoric of nationalism and identity prevails. The solution is to seek democratic balance in the realization of

these two categories of rights, to guarantee higher levels of social solidarity beyond the nation. The authors believe that this study is central to the discussion about democracy, freedom, and equality in the context of today's crisis.

2 Liberal constitutionalism and the nation

It is a commonplace to say that constitutionalism begins with liberal theories. In England, the doctrine of limits to the power of the king developed and the process began that would lead to the institutionalization of the separation of powers, with its own functions and relations of interdependence, with mutual control. It is with English liberalism and its derivations that the discussion about individual natural rights that will be known, in the tradition of constitutional law, as first-generation rights and, later, as human rights in the UN Declaration of 1948 takes place. These rights are freedom, equality and property (with their derivatives, such as freedom of the press, religion and expression, for example). They are, therefore, rights of protection of individuals against possible abuses of the use of force by the political power (the sovereign king, mainly).

It is also known that the institutionalization of these constitutional elements took place, especially, with the independence of the United States of America, which gave the new sovereign state the republican form, the separation of powers and a federative structure in a formal legal document: a written constitution. Then, with the first ten amendments to the constitution, they established a charter of fundamental rights (see Dippel, 2007). The example was given of the ability of a people to govern itself by means of a juridical document that bound all citizens that would be an inspiration for the entire West, from Europe to Latin America.

But the ability to govern oneself refers to the determination of a population on how to govern itself, that is, how the exercise of power over the territory and the people who occupy it will be. Thus, constitutionalism is conceived as strictly linked to democracy: the constitution has to be the manifestation or consent of citizens about their government and their organization (Dippel, 2007; FioravantI, 2001).

It is here that a problem arises for the constitutional theory that tends to place democracy as an inherent characteristic of constitutional movements since the independence of the United States: who are these citizens? The question is relevant, because the first constitutional regimes were not

exactly democratic, but, in their rhetoric, they cried out for the people and/or for the nation[1].

Constitutional theory has not given adequate attention to the problem of the nation and nationalism in the definition and differences of the constitutional regimes that have been called constitutional generations. Thus, it is clear that constitutionalists have difficulty in explaining authoritarian regimes or regimes of very limited representativeness to those that concentrate the country's wealth, even if they are constitutions that claim to be democratic and liberal. The problem of the formation of the nation and its link with constitutional structures is essential for the understanding of the first constitutional structures and their contradictions with respect to the idealist vision reproduced by authors of constitutional law.

With the definition of the territorial state in Europe, when the submission of the entire population of a territory to the sovereignty of the king is defined, the legal relations and the reference of authority are established having as a reference the monarch, the source, if not of the law (but also of him), of the recognition of the legal orders that regulate the various social orders and of the reference of the same authority over all the subjects of the crown. This has created a feeling of unity, whose reference would be the monarch with the privileges and rights that he managed for the various layers of the population[2]. Thus, to be French, for example, was to be a subject of the King of France.

The sense of belonging and identity in the colonies of America is no different: being a subject of the Crown to which the colony belongs, with the privileges of free men (having the same rights with a legal status that is guaranteed to them), is what gives them a feeling of belonging to a community[3]. Thus, he is the figure of the king who guarantees the unity of the territory and the people.

The end of absolutism brings about a change in the legitimacy of political power: of the divinity of the monarch or of its recognition by the people for the people as the recipient of power. Two things are involved in this change: political decisions were to be made for the people by their representatives (the supremacy of the law as the source of law – something that began in England)

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1 See, for example, the classic text by Sieyès (2001) regarding the constituent power of the French third estate.

2 Elias (1993) identifies well this task of the king to manage the rights and privileges of diverse social groups in order to maintain political and social balance, demonstrating the limitations of the absolute power of the sovereign. The evolution and definition of the territorial state and its relationship with absolutism and sovereignty can be seen in Bobbitt, 2003.

3 That is a very similar situation in the America of the three languages: English, Spanish and Portuguese. See, for example, Greene, 2008; Young, 2008; Kraay, 2008; Guerra, 1997; Malerba, 2007.

and the king, limited by the legislative power, as the representative of the nation, the set of all people subject to the same laws.

With the end of class differences and the law as the representation of the will of the people applicable to all equally, in Europe the feeling of belonging becomes for all those who are subject to the same law, the criterion of equality. Political power refers to the people, no longer to the divinity of the king. The people are a group of equals (even if in the abstract), for the benefit of whom power works.

Thus, in Europe, when power changes to be a function of the good of equal individuals, no longer an expression of the will and greatness of the sovereign king, we have the formation of the nation-state, in which the state, as an organized bureaucratic apparatus, with well-defined legislative and executive functions, is responsible for the development and greatness of the set of individuals. the nation (see Bobbitt, 2003).

This transformation between social relations and political power, with the function of an impersonal apparatus for thinking and carrying out the development of all, leads to two consequences: the state is solely responsible for the advancement and greatness of the national collectivity; the nation is transformed into a community of shared pasts, difficulties, projects, desires and visions of the future (Renan, 2007). Thus, a state emerges that mobilizes and realizes the nation (desires and visions), which is above individuals, but because it is the only condition for realizing the public interest and the greatness of the collectivity, at the same time that it is expected that this realization will be in conformity with the established rules and means. so that there is predictability and the abuse of power is avoided; that is, the action of the State must occur in accordance with the rules of law, whose responsibility lies with the legislative power, the representative of the national will. It is the liberal rule of law, which will be known as the "positivist state", because it can do everything that is necessary for the common good, but only in accordance with the law[4].

In Latin America, the development of the rule of law occurs in the same way, but the idea of nation arises in opposition to European colonialism. The formation of the state in the former colonies takes place from the process of separation from the colonial structure in which they lived and to which the elites owed their identities. To the extent that the metropolises try to tighten

4 On the difference between *rule of law*, *Rechtsstaat* (the positivist state or *état légal*) and *état de droit*, see Rosenfeld, 2001.

control of their lands in America and deny equal treatment to the descendants of Europeans born there, there is a movement of these elites for the recognition of their local identities and the consequent demand for independence. As in Europe, the rhetoric is of the freedom of the nation, the need to guarantee its rights in the scenario of greatness of nations in the international sphere and the right of the people to freely determine how they wish to be governed, but always having as a reference the rule of law given to themselves.

To define a people in each of the colonies, the ideologues of the nation will try to create and justify a criterion of belonging to a community, using equivalents of European rhetoric, even if this is not the perception of the most popular layers, for whom the reference of identity remains in the concrete community (pre-modern criterion of identity)[5]. With the independences conquered, the political engineering of the formation of the state and attempts to maintain the political and social balance are necessary. The state is formed before the nation, which arises only after equilibrium has been acquired. Power needs the recognition of its legitimacy, which depends on the consent of the people, following the criterion of sharing a common history (even if invented[6]), recognizing the same difficulties and desiring the same conquests and achievements of greatness for the whole. From there a people was formed in the independent countries of Latin America. With liberal constitutionalism, it is therefore possible to speak of nations, but not necessarily of nationalisms, as we will present below.

3 From the nation to nationalism

The doctrine of constitutional law has no difficulty only in explaining the prevalence of the state over natural rights in the era of liberalism (the nineteenth century) and the lack of democracy in those same countries, despite the rhetoric of the interest of the people and representativeness. It is also difficult for constitutionalists to explain the departure from liberal representativeness for authoritarian or totalitarian regimes.

The authors' tendency is to describe an evolution of complexity and improvement of fundamental rights based on constitutional paradigms. Constitutional law would have evolved from individual rights to social rights. It is true that not without many struggles and a lot of blood, but

5 See footnote 7.
6 Hobsbawn (2006) speaks of the "invention of traditions".

without a doubt an increase in the quality of the protection of the subjects: beyond individual rights, now also social rights (rights of protection of the worker and of the employment relationship, association and unionization, insurance against unemployment, retirement, health, etc.). education, among others). Along with social rights, the intervention of the state to improve the living conditions of the people (public transport, distribution of water and electricity, sanitation, public investment in infrastructure, social assistance, etc.). It is the emergence of the social state and of the so-called social constitutionalism.

Another gap left by jurists is with regard to the structure of the state, taking as established that the idea of constitutionalism only admits an organization based on the separation of powers and on democratic-representative regimes, typical of the liberal model of the state. Following this line, constitutionalists treat authoritarianism as exceptions to, and ruptures of, the process of development of the constitution, development that fruit of the rationality of the history of constitutional law. But it is possible to say that authoritarianism was a way of realizing the social state and overcoming the social crisis left by the liberal model in the first post-war period.

However, the relationship made between the formation of the state and the nation, added to the question of nationalism, may well allow connections that bring to light the fact that it is the very evolution of the so-called democratic elements, popular legitimacy and the conquest of social rights that allow the abuses of political power of exacerbated nationalisms.

As said, the formation of the idea of nation brings with it the idea of a community that shares a history, achievements, and expectations about the common future (Renan, 2007). The beginning of this conception can be seen at the very moment of the French Revolution, when Abbot Sieyès (2001) defends the legitimacy of the French third estate to change the country's constitution in the name of the entire nation.

Such an understanding of the nation forms a feeling of unity based on the objectification of shared desires, an intersubjectivity of feeling. It is not necessary, at least not the main one, to have objective criteria of belonging that are external to the subjects, such as ethnicity (race), language, religion, tradition, etc. To be a national is, at least, to be equally subject to the same laws, those in which it is possible to participate in the formation, even if indirectly, for the joint realization of the

common good, of the collectivity[7].

But, if we accept the thesis that the formation of nations has to do with the competition of societies for economic development due to industrialization (according to Gellner, 1981; 1983), a competition for progress and for the position of power among nations also began, whose greatness is the responsibility of the State as organizer and realizer of the (common) public will. That dispute leads to discussions about the greatness of the people and what makes the people stronger or thinner. The identification of identity, of belonging to the people, now requires objective criteria that indicate why an individual is part of one people and not another[8].

In the turn of the nineteenth century to the twentieth century, the two ways of justifying or identifying what a nation is are possible and come into collision[9]. Beyond the dispute regarding what forms identity, the discourse that identifies a people with a race arises[10]. Such a situation is behind the shift from the nation-state to the nation-state[11].

Although the nation of the nineteenth century is fully compatible with the liberal state of the nineteenth century, the promises of liberalism and of the nation are not realized[12] (at least not completely).[13] The vast majority of the population has no property or resources, living in misery. Without resources, they do not have equality, because they do not live like the bourgeoisie and they do not get laws that compensate for the difference. Thus, they do not have freedom, because they are subject to the will of their employers or to their own fate and private charity, when they are part of the immense mass of unemployed and helpless.

Since the nation of the nineteenth century was plural (these were not the objective criteria of

7 This is one of the elements that help to understand the formation of the centrality of the state for collective life and the development of legal positivism in the nineteenth century. A discussion of this topic can be found in SIMON, 2016.

8 The nation can be considered a "morphology", a set of objective social elements that, when shared, give unity and identity to a community (Baechler, 1997). In this work he accepted Baechler's concept of morphology, but not his description of the formation of nations. Baechler (1997, p. 22) also speaks of a "tension between a substantial community and a contractual community".

9 This tension can be seen in Marcel Mauss's (2017) attempt, in 1923, to define and identify the process of formation of modern nations.

10 In America, the discussion of race and even of miscegenation as a tendency to form a race of their own among Latin peoples is clearly linked to the problem of the treatment of slavery and, consequently, of the social position of blacks and indigenous peoples. See, for example, Weinstein (2008) and Gerstle (2008).

11 Follow the description of Philip Bobbitt (2003), but with the increase in the problem of race.

12 On the failure of the promises of Modernity, which began with liberalism, see Santos, 2000.

13 And this is a point on which the current description of constitutionalism fails to understand, which makes it difficult to relate the development of social constitutionalism to twentieth-century authoritarianism in the history of constitutional law.

identity that determined belonging to a community), the process of formation of the territorial state allowed different specific communities to recognize submission to the same central power, and then, with the modern state of liberal character, to imagine themselves as part of the same community[14] (even with their differences), when they could take part (through representation) in the formation of common interest. But the difference in the development of individuals (mainly between owners and workers), the absurd concentration of reins, the maintenance of a legal system that maintained and reproduced this process of exclusion and the limitations of political participation of groups excluded from the distribution of national wealth lead to conflicts and disputes over criteria for compensating for this economic and social exclusion.

There are, therefore, two types of movements that lead to social constitutionalism: the identification of exclusion with certain types of social homogeneity and the search of the excluded as a whole for the improvement of their living conditions. Both lead to demands for social rights, the increase in expectations about the actions of the state and the consequent constitutional alterations to make such changes in demands viable.

In the first case (whose main examples are in Europe) we see the growth of separatist movements (Gellner, 1983) or the expulsion of people who do not meet the criteria of identity. As the territorial state made different peoples under the same government, the concentration of power, wealth or both remained in the hands of one of the component groups of society, to the exclusion of the others. Such a situation tended to increase the perception of exclusion and to create the awareness of belonging to excluded groups or the constructed perception of native groups plundered of their rights and wealth. Thus, when a social group perceives that the excluded or plundered speak the same language, have the same color, similar physiognomic characteristics, share the same religion, come from the same home, etc., this perception generates the primacy of objective criteria over intersubjectively shared criteria. Groups that are alienated from politics, from wealth, when they perceive that they share close characteristics, create a stronger feeling of identity, which leads them to break with the old identity of feelings and projects of common life, since they were excluded from that project.

The perception of exclusion and belonging to the excluded class for objective reasons, even more so when the excluded individuals tended to integrate into a community of future projects and

14 The idea of the nation as an "imagined community" belongs to Anderson, 2008.

conquests, entails the search for self-recognition, of identity, and, consequently, leads to the demand for a state of their own, whose task will be to distribute wealth and develop the lives of those who share the same criteria that now generate the identity. And that demands a strong state, which controls and intervenes in the economy, which distributes income and protects against the enemies (external and internal) of that people and their characteristics that generate their way of life. The state is the representation of the unity of the people and exists to realize it. The state is the expression of the community itself and, therefore, is above the law. It is the nation-state (Bobbitt, 2003).

Even when there was no perception of different identities within the nation-state, the factors of exclusion and concentration of wealth and power were present. Social movements will begin the struggles for better living conditions, following the example of others, or what it means that they will fight for social rights. Due to pressure from the masses, or out of fear of the separatism that could occur, the elites or groups whose rhetoric was that of the realization of the common good and protection of the people (populisms) modify their constitutions and even their behavior to realize the elements that characterize the social state. Such a realization could happen in a reasonably democratic way or through dictatorships, but always with the strong rhetoric of belief in great leaders, with strong executives imposing themselves on the legislatures and the greatness, protection and common good of the people. Countries like France seem to have gone through this movement. And that seems to be the case in the Americas. By democratic means or by dictatorships, the objective was to realize the social state.

4 Between unity and pluralism: the problem of the constitution in Schmitt and Kelsen

The passage from the formation of the nation to nationalism and its populist and authoritarian consequences form the context of all Western constitutionalism from the beginning to the middle of the twentieth century. The conflict between the liberal nation of shared projects to be promoted by the state and the nationalism of protection of the identity of the people against possible enemies, as well as the dispute between the liberal model of distribution of power and representation against the identity demands of national unity and appeal to the masses to say their will (an understanding of direct democracy) mark the context of economic recovery, institutional political reforms and the realization of the state of social welfare, characteristic of the period immediately prior to the

First World War until the end of the Second War.

That is exactly the context of the debate between two of the most prominent constitutionalists of the twentieth century: Carl Schmitt and Hans Kelsen. The main dispute is directed at what will be the idea of constitutional jurisdiction, over who should defend the constitution. From the clash between the two authors, constitutionalists have given relevance to the legitimacy of the courts (mainly a specifically constitutional court) to be the privileged interpreters of the constitutional text and for the guarantee of fundamental rights, as a criterion for the realization of justice, understood as the protection of the human being. Little is said about the role that constitutional jurisdiction plays in the attempt to balance the relationship between majority and social minorities. Even less is the contribution that relates Kelsen's defense of the jurisdictional control of constitutionality and Schmitt's defense of the role of the president with the problem of nationalism.

The political context is very important for the understanding of the theoretical preferences and political divergences between the two important authors. Carl Schmitt was German and Germany was seriously damaged after the First War, with serious social and economic problems. In addition, the process of unification of Germany took place with the formation of a strong state, based on the rhetoric of the legitimacy of the nation, being perhaps the first state to appeal to race to base its nationalism, already with Bismarck. The appeal to the unity, identity, and pride of the Germans was the motto for its reconstruction (Bobbitt, 2003).

Germany is seen as a community based on the objective criteria of race, not as a community of individuals who share the same goals and projects[15]. Thus the German people, who form the Germanic nation, are perceived as a pure race, whose mixture makes them weak, and those who want to overthrow their way of life are enemies to be fought. Those who are not of the race put the strength of the community at risk and must be extirpated from its bosom.

This is the direction taken by Carl Schmitt's constitutional and political theory. For the Tudescan theoretician, it was necessary to consider the people as an objective unity, which should prevail and remain. The way of life and the maintenance of the people defined their political form. The decision on how they will be governed is their constitution. Thus, a constitution is the fundamental political decision of a people. Schmitt then makes the difference between a constitution (the political expression of the life and unity of the people) and a constitutional norm

15 Or a substantial, non-contractual community, as Baechler (1997) says.

(the norm of the text that legally organizes that decision). The state is the very form of organization of the life of the people. Therefore, it is its expression, the guarantee of its unity and survival (Schmitt, 1996).

The state, as an expression of the unity of the people, needs to prevail over differences and particular interests. The proportional representativeness of society[16] is a reflection of its disunity, of its dissolution. Parliament cannot be the representation of the nation. The one who represents the unity of the nation is the president of the *Reich*, because he was voted for by an absolute majority, thus being able to represent the whole of the people, since he speaks for the majority. And since the constitution is the fundamental political decision of the people, it needs to be preserved by those who represent it, not by those who represent the interests of parties that dispute each other. The constitution also cannot be protected by the judiciary, because he only applies norms. Judges can even apply constitutional norms, but the political form and unity of the people must be guaranteed by the president, who is the only legitimate person to make decisions that preserve the entire community and the state (Schimitt, 2007).

Thus, sovereignty is to ensure the integrity of the people and must be exercised when they are at risk. In such a situation, the legal system, which limits the actions of power, must be suspended so that the person responsible for the unity of the state can do what is necessary to guarantee its integrity. Once again, the protector of the people, the representative of unity elected by the majority (not the representatives of the parties, with their particular interests), the guarantor of the constitution is the one who must exercise such power. With the legal system suspended, the president has no limits to ensure the good of his people.

Schmitt, then, defines the sovereign as the one who decides in the state of exception. Since there is an identification between the state and the people, the former must intervene in all spheres of social life to guarantee unity and the common good. For Schmitt, the social state is the total state. In addition, those who put the state and the integrity of the people at risk need to be eliminated from the social sphere. Politics is, therefore, the conflict between friend and enemy, and the enemy must be eliminated (Schmitt, 2006). Schmitt's political and constitutional logic leads to the acceptance that there are moments of authoritarianism (the exception) to ensure the common good, unity and the protection of the people and their identity. And the protector of the people is only

16 The proportional electoral system for the legislative system was present in the Weimar constitution.

one, who represents their unity: the president.

Kelsen was already Austrian and still lived during the end of the Austro-Hungarian Empire. Ora, the empire ruled by Franz Joseph I squeezed out exactly what characterized an empire[17]: the multiplicity of kingdoms and peoples that, within the territory, reported to a central authority, responsible for the unity of the people. It was with the end of the First World War that the empire was dissolved and the kingdoms that made it up were established as nation-states, in the sense indicated by the twentieth century[18]. More than that, Kelsen was of Jewish descent and, after the war, suffered persecution and contempt attributed to that people.

These circumstances show that Kelsen was well aware of the problem of the relationship between majority and minority in a political organization and of the possible arbitrariness of the use of discourse about popular aspirations, of identity protected against the dangers of the foreigner (the "other") and of democracy as the will of the masses. Well aware of this danger, Kelsen assumes ethical relativism, denies the possibility of a single true moral theory (something of a totalitarian nature for him) and gives a political meaning to relativism when he defends that justice is related to the coexistence of diverse ethical and political positions without one excluding the other (Kelsen, 2001).

Following this line, Kelsen develops his argument about the protection of the constitution. Starting from the question of the hierarchy of norms, in order for the constitution to be the norm regulating the others, it must be protected against attempts by the executive and the legislature to ignore it. According to the author of the Vienna School, the legislative power cannot be responsible for protecting the constitution, since it is the one interested in the approval of the questioned norm. The head of the executive branch cannot also be a judge, since he stops the use of force and can act arbitrarily, freeing himself from the idea of legality.

Recognizing the plural formation of society and the abstraction without empirical support of identity (in the strong sense, based on the aforementioned objective criteria), Kelsen defends social pluralism and the political role of the legislature with the proportional electoral system. Democracy depends on the possibility of giving minorities a voice and protection against their elimination (see Kelsen, 2000).

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17 See, for example, the concept of Mauss, 2017.

18 Kelsen went so far as to tell the Minister of War of the Empire, at the end of the conflict, that the idea of empire as they knew it would come to an end (Kelsen, 2011).

It is here that the political importance of constitutional jurisdiction arises in the political engineering of a constitution: with the superior norm of the legal system protected, rights and the political system are protected against the formation of occasional majorities. The judiciary must be responsible for saying whether or not a norm is in conformity with the constitution, because it is an impartial body, not interested in the production of the norm (Kelsen appeals to the general principle that no one can be a judge in his own cause). The one responsible for the control has to be a court with exclusive competence to define the constitutionality of the rules, so that there is certainty and unity of decisions. And such a court must only say whether or not the norm is constitutional, without adding to other considerations, so as not to enter the space reserved for the legislative power (it must be a "negative legislator"). Understood in this way, constitutional jurisdiction is a political strategy for the balance of powers, for the guarantee of the superiority of the constitution, for the protection of minorities against the deliberations of occasional majorities and as a containment of authoritarian outbursts (Kelsen, 2003).

This important divergence present in the Kelsen and Schmitt debate is presented in the context of the decisions and engineering of the constitutions of the social state. And such is exactly the conflict of survival of the liberal nation of the nineteenth century against the growth of the nationalisms of the twentieth century, which are, in turn, precisely the movements for the realization of social rights.

5 Conclusion: Indications of authoritarianism and nationalism in democratic social constitutions (the constitutions of Mexico of 1917 and Brazil of 1934)

The dispute between Schmitt and Kelsen is representative of the problem of the nation and of the nationalism of the passage from the nineteenth century to the twentieth century. It is also an example of the divergence on conceptions about the concept of democracy.

For Schmitt, democracy is the identification of rulers and governed (Schmitt, 1996). Still, for Kelsen, democracy depends on the protection and preservation of minorities (Kelsen, 2000). For Kelsen, the constitution must be a set of norms that regulate, organize, limit and balance the exercise of state power. For Schmitt, the constitution is the realization of the political life of the people, who organize themselves in the state. Thus, politics is outside the law, which cannot limit it, it barely organizes it in social normality.

Kelsen's position reflects the nineteenth-century conception of the nation, in which a plural society is united under the same legal system, which reflects its political choices (through the proportional representation of its components) in the laws and in the constitution. Schmitt's position is in accordance with nationalism and the idea of identity and protection of the people of the twentieth century, being that the constitutional text organizes the constitution of the people, its fundamental political decision.

This difference between Kelsen and Schmitt and the political and legal tensions that it entails are synthesized in the formation of social constitutionalism at the beginning of the twentieth century. And the achievements, as well as their risks, appear in the constitutional texts of the time. Such is the case of the constitutions of Mexico in 1917 (considered the first constitution of a social state) and of Brazil in 1934 (the first constitution of a Brazilian social state). Both are constitutions that emerged from democratic processes and with enumerations of new individual and social rights, but allowed the risk of authoritarianism in the name of the good of the people and their identity. The paradox that remains hidden in the legal literature is that the mere emergence of a new category of rights does not immunize the diagnosis of the absence of a critique of this authoritarian institutional dynamic.

With regard to the Constitution of Mexico, it begins by announcing the list of fundamental rights and prohibiting their suspension, except in the cases provided for in the text itself. However, Article 6 then sees the generic use of the common good and order as a possible limit in the abstract for freedom of expression, under the clause of disturbance of "public order." This is a common clause in nineteenth-century nations for the action of the state over individuals, guaranteeing its superiority in determining the common good (a typical characteristic of the nation-state). Free religious expression is guaranteed and Congress was prohibited from creating laws prohibiting or establishing any religion, but the Constitution authorized the law to define certain criminal practices (Articles 24 and 130). There is also, as is typical of a constitution of a social state, a wide list of workers' rights and social security, without, as yet, denying the bosses the recognition of the conditions of productivity of the capitalist model (Article 123).

When it comes to freedom of the press, there are more general clauses linked to the protection of the integrity of the nation: writings may not violate morality and public peace (Article 7). And there is an interesting judicial "guarantee" for "crimes committed through the press against public order or the external or internal security of the nation" (Article 20). They will be tried by a jury, a

rhetorical appeal that brings the analysis of the degree of reprobation of the crime to the popular perception of the offense to the nation.

Political restriction through the idea of belonging to the nation arises in the right of petition, which is restricted to citizens with regard to "political questions", the meaning of which is not defined (Article 8). The right of assembly to citizens is also restricted when exercised to discuss matters of political interest to the country (Article 9).

With regard to property, the most characteristic right of liberalism, the intervention and possibility of limitation by the "Nation" due to the public interest is foreseen, the limitation having as one of its motives the distribution of wealth, which characterizes the social model of the state (Article 27). The same article provides that the regulation of property must stimulate the development of agriculture, combat latifundia, protect the small owner and protect property against damage that may harm society. Populations that lacked water and land had the right to access them, and the acquisition of private lands for that purpose was of public utility.

Another characteristic of the social state is the nationalization of strategic natural resources and the restriction of their exploitation to national or foreign persons or companies, as long as they are regulated by Mexican law, which characterizes intervention and regulation by the state of economic production for the benefit of the greater interest of the nation. The Constitution also nationalized the assets of religious cults (Article 27) and declared revisable contracts that would have allowed the private grabbing of land, water or mineral resources of "the nation" (Article 27, f).

Another interesting norm in the Mexican Constitution of 1917 is the prohibition of corporations from acquiring rural farms or obtaining longer lands than what is strictly necessary for the activity of exploitation of mineral resources (Article 27, IV). To this must be added the fragmentation of the latifundia, the protection of small agricultural property and the guarantee of access to land and water for agricultural populations (Article 27), as well as the guarantee of the common property of the populations that maintained their communal status and the nullity of the laws that have withdrawn this right from them (Article 27, VI and VII). Add to this the provision for the protection of the family's patrimony so that it is not subject to taxes (Article 27, f) and the concern for food security and the protection of peasants against large corporations can thus be perceived. It is also perceived how the land is seen as an object of protection for the most needy and of the well-being of the people, not simply an object of investment and accumulation. But all

always in the name of the nation.

The problem of land and immovable property is also present in the concern to avoid concentration and real estate speculation. Banks could only have the root benefits necessary for their activities (Article 27, V). And each state or territory would make its laws to limit the maximum extent of land it could own (Article 27, a), with the consequent fractionation of surplus land (Article 27, b)

Thus, all monopolies and tax privileges are prohibited, with the exception of what the constitution considered to be in the national interest, such as strategic services for minting coins and issuing banknotes, postal services, radiotelegraphy and the protection of intellectual rights. The norm is clear in seeking to combat forms of economic control that may affect price controls and free competition, with the exception of workers' associations and cooperatives from the classification of monopoly (Article 28).

The Constitution, in its original version of 1917, also showed the role of guaranteeing the order when it provided for the possibility of the president suspending, throughout the country if necessary, the constitutional guarantees that would prevent the actions necessary for the protection of the people (Article 29), with the recognition of extraordinary legislative powers given to his person (Article 49). Even though demanding the approval of Congress, there was no provision for a role of rights to be suspended or which could not be. The suspension of individual constitutional guarantees was exactly the resource to decree a state of emergency. In turn, the president could be politically accused of "treason", an expression that was not defined in the Constitution (Article 108).

With regard to the duties of Mexicans, reference should be made to the obligatory nature of military training to be provided in schools, as well as to the duty to periodically attend military training and to enlist and serve in the National Guard, for the defense of internal order and of the homeland as a whole (art. 31, I, II and III). Thus, all citizens are potentially soldiers, reminiscent of the universal conscription of the French nation in the time of Napoleon (Bobbitt, 2003).

Regarding the rights of Mexicans, they have preference for jobs before foreigners. And only Mexicans by birth can serve in the security forces or in the Army in peacetime, and at any time in the navy or for positions of officers in the merchant navy (Article 32). It should be remembered that "Mexican by birth" was only the children of Mexicans, following the criterion of *jus sanguinis* (Article 30). And the Executive was given the prerogative to expel foreigners whom it deemed

inconvenient, without prior trial, and they were still forbidden any participation in the political affairs of the country (Article 33).

In addition, to be a citizen it was necessary to "have an honest way of life". Citizens could vote or be voted for, be appointed to jobs or commissions, associate to deal with political matters, take up arms for the defense of the Republic, exercise the right of petition (Article 35). As obligations, a citizen had to: register to vote and declare to the municipality his form of subsistence and his property; to make military enlistment; to vote and to hold elective positions and to perform the offices of municipal councillors and electoral and jury functions (Article 36). The commitment made to someone not to comply with the Constitution, the subjection to trial for a crime whose penalty was corporal, vagrancy or customary drunkenness, being a fugitive from justice are cause for the suspension of citizenship rights. There was provision for legal regulations on the loss and other causes for suspension of these rights (Article 38).

Beyond the rights and guarantees, in relation to the political form, the Mexican Constitution of 1917 announced the people as the sovereign (exercised through the public powers of the Union and the states) and their right to change their form of government, being that their will at the time was to be a representative republic, democratic and federative (Articles 39 to 41). The separation of powers was recognized, with a bicameral congress (articles 49 and 50). To be a representative of the nation or of the states, it was necessary to be Mexican by birth and not to be a minister of religious worship (Article 55, I and VI).

The Constitution does not fail to refer to the concern with the maintenance of "race". The Federal Health Council should create measures against alcoholism and "the sale of substances that poison the individual and *degenerate the race*," to be reviewed later by Congress (Article 73, XVI, 4, emphasis ours).

It can be seen in the Mexican Constitution of 1917, therefore, the strong role of the state in the intervention and regulation of the social and economic life of the people for the prevention of accumulation and concentration of wealth, for the determination of belonging to the Mexican people and for the defense of the nation against foreign enemies and in the interior. this always in the name of the "Mexican nation", to the point of suspension of the constitution by the President in the name of the people and the nation and with concern for the race of Mexicans.

The preamble of the Brazilian Constitution of 1934, in tune with the Mexican context, specifically indicates the purpose of "organizing a democratic regime that guarantees *the nation*

unity, freedom, justice, and social and economic well-being" (emphasis ours). Although the shortest constitutional text in Brazilian constitutionalism (officially valid for one year), its plan allowed for a new arrangement on Brazilian political and social organization – without excluding the role of rural oligarchies, but with the inclusion of other social categories (military, industrial, and urban populations).

In general, the text adopts measures, in principle, more progressive from the institutional point of view, but in social dynamics, with the perpetuation of authoritarian and exclusionary tendencies. In the name of the "national", the inclusion is partial and arbitrary. In the struggle against the provincial oligarchies of São Paulo and Minas Gerais ("The Republic of Coffee with Milk"), a greater concentration of powers in the federal government has produced an even more authoritarian context centered on the figure of the president as head of state and of the nation. The creation of electoral justice and compulsory and secret voting from the age of 18, with the recognition of women's right to vote, expanded the universe of voters, but prohibited the vote of beggars and illiterate people (mostly of indigenous and black ethnic origin). Beyond this implicit racial criterion, poverty and access to education continued to be effective barriers to participation in political society.

In the context of extended rights, without a doubt, the most expressive contribution occurred in labor law. Article 124 presents a series of labor rights whose permanence persists to this day (despite recent trends to empty these social guarantees). In addition to the minimum wage, guarantees of non-discrimination based on age or sex, the Constitution provided for maximum daily limits on hours worked, aid in the case of sickness and maternity benefits, among other guarantees.

Despite the prediction of guarantee "to every individual and all professions of Union" (Article 123), the practice of employers' and workers' organizations was highly dependent on the central government, in particular for a quaint "labor justice" that was established in a way that was linked to the executive branch. There, a kind of capture of the unions by government interests (better known as the phenomenon of "peleguismo") has emerged, guaranteeing the primacy of the state over the protection and realization of the common good.

In relation to the economic order, the Brazilian constitutional text of 1934 presented as vectors "principles of justice and the necessities of national life, to guarantee an existence worthy of man" (Article 113). This concern for a dignified life that could be marked by the prediction of

"assistance to the poor" was guaranteed by the Federal Government (Article 125). The institutional reality, however, denied this apparent social progress: the law establishing this social service was not approved, limiting itself to the guarantee of free justice (Article 64).

In the same sense, for the first time in Brazilian law, it does insert the clause of a social function of property, which "cannot be exercised against the collective interest." So was the prediction of expropriation according to generic criteria of "public utility" and "social interest". Such legal requirements, however, were not regulated by the legislature's act and the expectation of land reform remained on the horizon. In other words, there was the merely formal provision of new types of intervention in private property.

The modification in the property regime that can be pointed out as effective was the nationalization of the wealth of the subsoil and waterfalls (Article 115), as well as the possibility of "socialization" of private companies, which could be subjected to a different mechanism of intervention in line with economic activity (Articles 120 and 121).

Comparatively, one realizes that the mere formal addition of rights did not become an effective guarantee of freedoms or social welfare, but saw the increase of the power of the state in the name of the nation. Perhaps it is exactly this opinion that reinforces the diagnosis that the acquisition of new rights cannot be celebrated, when authoritarian and nationalist indications have been committed to abusive and poorly decentralized practices, lacking control.

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