



## **Behind the theoretical debate between Hans Kelsen and Carl Schmitt: the nineteenth century constitutionalism and German public law**

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*ABSTRACT: This paper aims to explore the history of 19th century constitutionalism and German public law behind the theoretical discussion on the constitutional jurisdiction in the doctrines of Hans Kelsen and Carl Schmitt. The doctrines on the question of sovereignty and constitution between the 19th and early 20th centuries also become the object of study as they reflect on the theoretical debate between Hans Kelsen's legal positivism and Carl Schmitt's decisionism. Finally, from the concepts of separation of powers, sovereignty, and constitution provided by these authors, the research aims to identify the theoretical lines and concepts that may have contributed to the construction of the notion of guardian of the constitution. As a result, it is possible to verify that while Schmitt's constitutional theory carries much of his "political theology" with it, Kelsen sought, with his Pure Theory of Law, to evade from the theological method present in other legal theories (especially in Schmitt's). His intention was to build a legal science free of strange elements to law, such as morality, politics, and religion, which reflected in the choice of who should be the guardian of the constitution. We developed this research by analysing the historical sources and bibliographical research in the main writings of Carl Schmitt and Hans Kelsen on constitutional theory. As historiography, we sought specialised literature on the main subjects and theorists researched, from notable names from that time and by contemporary well-known authors.*

*KEYWORDS: German public law – legal positivism – decisionism – constitutional jurisdiction – guardian of the constitution.*

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## 1. Introduction

The constitutional theory of the twentieth century, specifically from 1928 to 1931, was involved in the debates between Carl Schmitt and Hans Kelsen. Their theoretical differences suffered from the changes to German public law in the previous century. Based on this context, the research problem aims to identify the history of nineteenth century constitutionalism and German public law behind the theoretical discussion around the constitutional jurisdiction in the doctrines of Hans Kelsen and Carl Schmitt.

The subject, however, was not studied in enough detail in the legal science, since most of the scholars paid attention to the interpretation of their writings or the debate around the guardian of the constitution and its applicability in modern societies, which justifies the unprecedented nature of this research.

To respond to the research problem, the suggested hypothesis is that the German public law of the nineteenth century contributed to the construction of the constitutional theory of both authors. Kelsen departs from the traditional idea of a separation of powers, the concept of a constitution, and the rule of law to build a pure theory of law free from elements external to legal science (such as morality, politics, and religion). In contrast, Schmitt, on the contrary, reintroduces some concepts of the theories that defended the monarchical principle during the nineteenth century. In this sense, Schmitt's decisionism proposes a re-reading of the concept of sovereignty and constitution, taking into consideration political aspects.

To confirm the suggested hypothesis, we defined three specific objectives: (i) to briefly examine the separation of powers according to the rule of law in the nineteenth century in Germany; (ii) to analyse the concepts of sovereignty and constitution developed during the nineteenth-century German constitutionalism and their impacts in the theories of Carl Schmitt and Hans Kelsen; and, (iii) to identify the main concepts that interfered in the choice of who should be the guardian of the constitution, that is, the president of the *Reich* or a constitutional court.

Regarding the methodology, in order to develop this research, we have analysed the literature considering the works of Hans Kelsen and Carl Schmitt, particularly those related to constitutional law and State theory. As specialised literature on this subject, the research of contemporary scholars such as jurists and historians of law, such as Pietro Costa, Michael Stolleis and Maurizio Fioravanti were relevant bibliographical resources.

## 2. Separation of powers and rule of law in the German public law

The prehistory of the formation of the concept of rule of law between the Enlightenment and the French Revolution provided the context and conditions that made possible the emergence of its meaning in the eighteenth century from the relations between power and law in the political-legal visions that constituted its prehistory. In the eighteenth century, Locke and Montesquieu identified in law the path to freedom, both having recognised that the way to avoid the degeneration of a political regime into despotism was to reconcile freedom and law. The principles of legality and legal equality were formulated as a result of the relationship that had formed between the people, law and freedom in the struggle against absolutism.

Nevertheless, a constitution cannot be limited to giving legal form to society but must also determine an order built around the fundamental rights of its citizen.

For Professor Pietro Costa,<sup>1</sup> it is possible to affirm the existence of a relationship of substantial continuity between the constitutionalism of the late eighteenth century and the constitutionalism of the second half of the twentieth century, whose synthesis consecrated the formula democratic-constitutional State.

“[...] It was in Germany that, throughout the nineteenth century, the expression ‘Rule of Law’ abandoned the realm of ‘prehistory’ and officially entered that of ‘history’. It was in Germany that a doctrine developed which would strongly (even though belatedly) affect both Italian and French legal cultures.”<sup>2</sup> As Pietro Costa points out, the expression rule of law has redefined the relationship between power and law, especially the development of politics and jurisprudence in Europe during the seventeenth and eighteenth centuries. From the perspective of the French Revolution and the German Revolutions of 1848, the belief in the law as means for protecting and strengthening individuals’ freedom, property, and rights had prevented sovereignty from being seen as a threat.

This shield against tyranny was a kind of harmony that characterised the relationship between sovereignty, law, and individual rights. However, this belief in the law acting as an intermediary between citizens and power was replaced by a potential discrepancy between the formal lawfulness and substantial despotism of legislative provisions. Due to the problems that the prehistory of the rule of law in the French territory presented, the German juspublicistic knowledge attempts to distance itself from the French model based on the conceptions proposed by Friedrich Julius Stahl and Robert von Mohl.

Friedrich Julius Stahl<sup>3</sup> (1802-1861), a conservative theorist and critic of liberalism, understood that the State should be under the rule of law as a solution and the trend of his time. This State must determine precisely the limits of its own actions and ensure the freedom of its citizens. However, on other hand, this concept represented an attack on the liberal conception of *Rechtsstaat*.

Robert von Mohl (1799-1895)<sup>4</sup> understood the *Rechtsstaat* as an association in which the state members claim, above all, equality before the law, no longer considering personal differences, so that the application of general rules should take place without considering the status or social class of individuals. According to Costa,<sup>5</sup> the rule of law designed from Mohl is a type of State capable of evaluating exactly the measure and limits of its intervention, determined not to compromise the autonomy of individual choices and initiatives to value individual and collective resources through the strengthening of freedom. The concept elaborated by Robert von Mohl places individual freedom as the end and limit of State activity.

The bourgeois revolutions of 1789 and 1848 made the democratic ideal a common political thought of the nineteenth and twentieth centuries. In Germany, the constitutional history of the first half of the nineteenth century was basically summed up in discussions between those in favor of the monarchist principle (*das monarchisches Prinzip*) and the defenders of the *Rechtsstaat*. After the 1848 Revolution, an attempt was made to restore the monarchy from the limitation of the rule

<sup>1</sup> Pietro Costa, *Soberania, representação e democracia: ensaios de história do Pensamento Jurídico* (Curitiba: Juruá, 2010), 244.

<sup>2</sup> Pietro Costa and Danilo Zolo, *The rule of law: history, theory and criticism* (Dordrecht: Springer, 2007), 87.

<sup>3</sup> Friedrich Julius Stahl, *Die Philosophie des Rechts* (Tübingen: JCB Mohr, 1878).

<sup>4</sup> Robert von Mohl, *Encyclopädie der Staatswissenschaften* (Tübingen: Laupp, 1859), 329.

<sup>5</sup> Costa and Zolo, *The rule of law*, 124-126.

of law, to model the State's action "according to the law", which led to a kind of neutralisation of the *Rechtsstaat*.

As professor Michael Stolleis<sup>6</sup> highlights, after the revolutions of 1848, and with the 1849 German Constitution, the development of a rule of law was seen as a priority element, which reconfigured the whole Theory of the State and Administrative Law, both of which began to present more scientific elements, dissociating themselves from those "non-legal", mainly politics. However, the conceptions of *Rechtsstaat* from 1850 onwards suffered a kind of "accommodation" to the monarchical principle, differing greatly from the liberal perspectives defended in the *Paulskirchenverfassung* and beginning to consolidate a kind of "formalization" of legal science.

The concern with the rule of law also appears in the writings of the formalist Carl Friedrich von Gerber,<sup>7</sup> who "distanced himself from the organicist and historicist tradition by making the State-person the exclusive object of legal knowledge".<sup>8</sup> The organicist and historicist tradition understood the rule of law on the grounds of a homogeneity of the State as a social organisation. It was with Gerber that legal science looked at the publicist with other eyes: the State no longer appears alone and simply the product of historical development but is actively responsible for the unity of the people (*Volk*), no longer the passive subject of an organic history.<sup>9</sup> With Gerber, individual rights were conceived of as reflections of a legal system centered around the State's will.

After the 1849 Constitution, the prevailing doctrine in Germany was that composed by theorists who defended the monarchical principle, such as Carl Friedrich von Gerber and Paul Laband – successors of Stahl's formalism, who sought to empty the organ theory defended by Otto Bähr and Otto von Gierke. Consequently, post-1850 State law was associated with the positivist trend, as were the Jewish and positivist representatives of political science and public law. Paul Laband (1838-1918), who became known for his publication "The Law of the State of the German Empire" (*Staatsrecht des Deutschen Reichs*) published in 1876, under the Bismarck Constitution of 1871 and Georg Jellinek (1851-1911), exercised their influence on administrative law, so much so that the "Policy Manual" (*Das Handbuch der Politik*) was led by Laband and Jellinek.

The struggle for the bourgeois constitutional State is common to nineteenth century Jewish writers in favor of the rule of law. According to Theodor Maunz,<sup>10</sup> particularly Laband and Jellinek (and later Kelsen) gave the struggle for the rule of law a special character: they understood it as a State that establishes the principle of equality before the law, the one that, in applying the law, does not allow a distinction between classes, property, religion and race.

<sup>6</sup> Michael Stolleis, *O direito público na Alemanha: uma introdução a sua história do século XVI ao XXI* (São Paulo: Saraiva Educação, 2018), 88-90.

<sup>7</sup> Carl Friedrich Gerber, "Lineamenti di diritto pubblico tedesco", in *Diritto pubblico* (Milano: Giuffrè, 1971).

<sup>8</sup> Costa and Zolo, *The rule of law*, 95.

<sup>9</sup> Giovanni Bisogni, *Weimar e l'unità politica e giuridica dello Stato: saggio su Rudolf Smend, Hermann Heller, Carl Schmitt* (Napoli: Edizioni scientifiche italiane, 2005), 23.

<sup>10</sup> Theodor Maunz, "Das Judentum in der Verwaltungswissenschaft", *Kritische Justiz*, v. 47, no. 4 (2014): 361-369, 365.

### 3. The definitions of sovereignty and constitution from the nineteenth century constitutionalism

The idea of constitution as the fundamental norm of the State, responsible for guaranteeing individual rights, was built in the nineteenth century at the same time as the liberal regimes of the United States and Europe.<sup>11</sup> In this sense, the constitution would serve to impose limits on the State, avoiding the concentration of powers in the hands of the monarch, which could lead to a despotic government, or a dictatorship of the people through popular sovereignty. This is an important fact for understanding the purpose of the constitution after the 1789 Revolution. From the moment the people are understood as one of the elements of the State, from the perspective of the traditional general theories of the State, the bearer of the constituent power should also be the titular of sovereignty.

In accordance with Caravale,<sup>12</sup> from the second half of the nineteenth century to the first half of the twentieth century, several scholars of public law in Western Europe were willing to develop theories about the State and its constitution. At the end of the eighteenth century, Bismarck's policy contributed to the affirmation of a German theory of the rule of law,<sup>13</sup> especially with Carl Friedrich Gerber in the 1860s, with the idea of the legal personality of the State. Shortly after, followed by Paul Laband who in the 1870s, defended the nature of the State as a power of command and execution, theorising the essence of the law as an expression of State authority and endowed with binding force. After that, Georg Jellinek, in the early 1890s, with a theory that understood the individual as a subordinate subject to the State and the holder of rights only to the extent that he belongs, as a citizen, to the State.

In the first half of the nineteenth century, Ferdinand Lassalle (1825-1864) developed his main theses on constituent power and constitution, in the texts *On the Essence of Constitutions*, and *What is a Political Constitution?* In general, Lassalle<sup>14</sup> defended the sociological aspect of the concept of constitution, valuing the facts more than the written norms and promoting discussions about what a constitution should be from the definition of its essence, and how it differs from other laws. The sociological analysis of the constitution made by Lassalle<sup>15</sup> suggests that the constitution of a country will only be effective when it reflects its real factors of power, that is, according to the dominant social class or commanding authority: monarchy, aristocracy, the great bourgeoisie and the bankers.

In this way, it is possible to establish a counterpoint of Lassalle's analysis with the historical context of the eighteenth and nineteenth centuries. Prior to the promulgation of the French Constitution of 1791, the Declaration of the Rights of the Man and of the Citizen was drawn up in 1789, a portrait of the Enlightenment's expressions in favor of the themes of freedom, equality, and fraternity, as well as respect for the separation of powers. That is, portraying the power factors of the

<sup>11</sup> Vera Karam de Chueiri and Miguel G. Godoy, „Constitutionalism and democracy: sovereignty and constituent power“, *Revista Direito GV*, v. 6, no. 1 (2010): 159-174.

<sup>12</sup> Mario Caravale, *Storia del diritto nell'Europa moderna e contemporanea* (Gius. Laterza & Figli Spa, 2012), 336-337.

<sup>13</sup> From the German idea of Rechtsstaat, French legal science built the concept of Etat Légal, whose main exponents were Raymond Carré de Malberg (1861-1935), León Duguit (1859-1928) and Maurice Hauriou (1856-1929).

<sup>14</sup> Ferdinand Lassalle, *A essência da Constituição* (Rio de Janeiro: Editora Lumen Juris, 2000).

<sup>15</sup> Ferdinand Lassalle, *Que é uma Constituição?* (São Paulo: Edições e Publicações Brasil, 1933), 17.

time. For Lassalle,<sup>16</sup> there are two types of constitutions: a written constitution – that could be reduced to a sheet of paper when it does not express the reality – and a real constitution.

In the twentieth century, the juspublicist Konrad Hesse (1919-2005) confronts Lassalle's proposal in *The Normative Force of the Constitution*, a text published in 1959 originally in German (*Die Normative Kraft Der Verfassung*). Hesse<sup>17</sup> stated that the real constitution and the legal constitution are in a cooperative relationship: they condition each other but do not depend on each other, with legal being conditioned to historical reality. Hesse<sup>18</sup> (1991) stressed the normative force of the constitution as strictly necessary to ensure the effectiveness of the legal constitution, since within the scope of the constitution there is no external guarantee for the execution of its precepts, unlike in other spheres of the legal order. This active force of the constitution is only present through the will of power and the will of the constitution, the latter being based on the necessity and value of an unbreakable normative order, which protects the State against unbridled arbitrariness.

In the nineteenth century, as has been said, there are an extensive number of authors who were willing to build a concept of the constitution, among which was Georg Jellinek (1851-1911), one of the most important juspublicists of the late nineteenth century. Basically, as Michael Stolleis<sup>19</sup> emphasizes, the theoretical balance of the nineteenth century was made by Georg Jellinek's *General State Theory* published in 1900. Following neokantianism philosophy and the distinction between “*Is*” and “*Ought to*”, Jellinek provided a social theory of the State and, on the normative level, a general theory of law and State.

According to Jellinek,<sup>20</sup> a State's constitution generally comprehends the legal principles that designate the State organs, determine their nature, their mutual relationship and their sphere of competencies, and the fundamental position of the individuals concerning the power of the State.

In this context, Jellinek suggests that every permanent association needs an order, according to which its will is formed and carried out, its area is delimited, the position of its members in it and how it is regulated are also determined. Such an order is called a constitution. Therefore, every State must have a constitution. A constitutionless State would be anarchy.<sup>21</sup>

Regarding the constitution in a material sense, when questioning the content of the constitution in States that have a written document, Jellinek posits that the constitution contains the basic characteristics of the organisation and responsibilities of the State, as well as the principles for the recognition of the rights of individuals: “*But what is the content of the constitution in those States which have a constitutional charter? In general, the answer is that it contains the main characteristics of the organization of the State and its powers, as well as the principles for the recognition of the rights of the people*”.<sup>22</sup>

<sup>16</sup> Lassalle, *A essência da Constituição*.

<sup>17</sup> Konrad Hesse, *A força normativa da Constituição* (Porto Alegre: Fabris, 1991).

<sup>18</sup> Hesse, *A força*, 10-11.

<sup>19</sup> Stolleis, *O direito público na Alemanha*, 97.

<sup>20</sup> Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Verlag von O. Häring, 1914), 504.

<sup>21</sup> Original: *Jeder dauernde Verband bedarf einer Ordnung, der gemäß sein Wille gebildet und vollzogen, sein Bereich abgegrenzt, die Stellung seiner Mitglieder in ihm und zu ihm geregelt wird. Eine derartige Ordnung heißt eine Verfassung. Notwendig hat daher jeder Staat eine Verfassung. Ein verfassungsloser Staat wäre Anarchie.*

<sup>22</sup> Jellinek, *Allgemeine*, p. 532. Original: *Was aber ist Inhalt der Verfassung in jenen Staaten, die eine Verfassungsurkunde besitzen? Im allgemeinen läßt sich darauf antworten, daß sie die Grundzüge der staatlichen*

The definition brought by Jellinek starts from the idea of the constitution as a set of legal principles that tend to regulate the State bodies and the State itself, so that it also serves as an instrument of legitimacy for the government. That is, according to Maurizio Fioravanti,<sup>23</sup> Jellinek's positivism proposes a material concept in which the constitution is supposed to presuppose the State, not vice versa, so, before the State there can be no constitution, neither formal nor material.

However, the definition of a constitution brought by Jellinek, as well as his general State theory, is linked to legal positivism and the identification of a legal personality of the State. Thus, for Michael Stolleis,<sup>24</sup> Jellinek presented the State as a territorial corporation of public law, whose existence presupposed three elements: a State territory, a State people, and a State power, and so representing the transition from the nineteenth century constitutional monarchy to a democratic industrial society.

In his legal theory of the State, Jellinek<sup>25</sup> admitted the existence, therefore, of a sociological theory of the State, in which the State is both a social phenomenon and a legal institution, so that the sociological concept has as its object of study the element "Is" of the State, while the legal concept sets out to study the norms that are the "Ought to" of the State. Georg Jellinek's basic methodological idea, close to that of State sociology, is to understand the State as a social entity, whose existence is independent of law. In the chapter dedicated to Jellinek, Kelsen<sup>26</sup> highlights that for him the State as a social fact is a power and, as such, is a prior presupposition of law, whose norms emanate from a power above the members bound by it, and whose binding force must be guaranteed by such power. The State is also a legal institution and, by placing itself under the law, becomes the bearer of rights and duties. As a subject of law, it is the subject of the doctrine of State Law Theory, and therefore, Jellinek vigorously protests the error made at that time in identifying State Theory with State legal Theory. At first, he tries to achieve a social concept of the State in order then to obtain a juridical concept of the State.

Departing from the duality of State and law, Kelsen<sup>27</sup> sees the State as a legal entity - a corporation, starting from the premise that it is a community created by a national legal order and that, at the same time, it is the personification of this legal order, precisely because the power of the State refers to the effectiveness of this order, thus granting material content to the fundamental norm (*Grundnorm*). During the twentieth century, Hans Kelsen's legal positivism tries to make a synthesis of democracy and constitutionalism from the idea of the constitutional rule of law.

The constitutional rule of law widely theorised by Hans Kelsen<sup>28</sup> shows itself as a fusion of the democratic State with the protection of fundamental rights constitutionally provided. With Kelsen's proposal, it is possible to control administrative and legislative activity avoiding the historical arbitrariness already

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*Organisation und Zuständigkeiten, sowie die Prinzipien für die Anerkennung der Rechte der Untertanen enthält.*

<sup>23</sup> Maurizio Fioravanti, "As doutrinas da constituição em sentido material", *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, v. 4, no. 2 (2012): 103-109, 104.

<sup>24</sup> Stolleis, *O direito público na Alemanha*, 97.

<sup>25</sup> Jellinek, *Allgemeine*, 20, 174-183.

<sup>26</sup> Hans Kelsen, *Der soziologische und der juristische staatsbegriff: kritische untersuchung des verhältnisses von Staat und Recht* (1922).

<sup>27</sup> Hans Kelsen, *Reine Rechtslehre* [1960] (Wien: Österreichische Staatsdruckerei, 1992).

<sup>28</sup> Hans Kelsen, *General theory of law and state* (The Lawbook Exchange, Ltd., 1999).

experienced, parliamentary majorities or the despotism. In this sense, the primacy of parliamentary sovereignty can be reviewed by a judicial body.

In accordance with Kelsen's theory, whose foundation is in the *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*<sup>29</sup> of 1911, the law becomes an important instrument against the major congressmen, that is, a means capable of avoiding the despotism of the majorities. This is because their tyrannical degeneration is prevented by the joint action of two elements: the primacy of the rule over power, the hierarchical superiority of the constitution in the confrontations with the law, and the possibility of entrusting to a judicial body the control of legislative activity.<sup>30</sup>

At the beginning of the First World War, Carl Schmitt<sup>31</sup> published *Der Wert des Staates und die Bedeutung des Einzelnen*, dedicating his work to counter the positivist vision of the relationship between "power" and "law", especially the neokantianism. The theoretical approach adopted by Schmitt collides with the German public law of the late nineteenth and early twentieth centuries, especially Gerber, Laband, Jellinek and Kelsen. He reconducts the theory of law to the political dimension.

Schmitt looked at the State as the instance of articulation of the ideal law and its phatic plan, through which it is realised, that is, the State as a phatic reality is thought in the view of Law as a normative reality that actually exists and it is capable of realising *Sein* and *Sollen*. It is as if the State is the realisation of the law, that is why the expression *Rechtsstaat*, in English, means rule of law.

In 1925, Hans Kelsen published his *Allgemeine Staatslehre*,<sup>32</sup> defending the distinction between State and law, in which the State is the personification of the legal order. However, in identifying the State with the legal system, although it took the traditional trinity (State power, territory, and people) as its static elements, it dissociated itself from many traditional components, with greater reason in the "dynamic" part, which dealt with the functions of the State, the organs of law creation and their methods.<sup>33</sup>

Kelsen<sup>34</sup> offered a concept of the constitution from a legal point of view, based on the replacement of a general theory of the State by a theory of the constitution, according to which the legal character of the constitution comes from the basic norm (*Grundnorm*), and not from the State or from facticity. In this sense, the content of the General State Theory, for Kelsen, is the study of the problems related to the validity and production of the State order, that is, the legal order. Thus, for Hans Kelsen, the General Theory of the State corresponds to the General Theory of the constitution. However, the basic norm is not necessarily understood as a hypothetical logical assumption that serves as a foundation of validity for the constitution, but it also resembles the principle of effectiveness. Kelsen's principle of effectiveness as a content of the *Grundnorm* is, according to Tomaz and Lima,<sup>35</sup> projected as a norm of

<sup>29</sup> Hans Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze* (Tübingen: Mohr, 1923).

<sup>30</sup> Costa, *Soberania*, 2010.

<sup>31</sup> Carl Schmitt, *Der Wert des Staates und die Bedeutung des einzelnen* (Tübingen: JCB Mohr Siebeck, 1914), 50-53.

<sup>32</sup> Hans Kelsen's theses in his work provoked Carl Schmitt (1888-1985), Rudolf Smend (1882 - 1975) and Hermann Heller (1891-1933), who wrote the following essays, respectively, in opposition to the Austrian jurist: *Verfassungslehre* (1928), *Verfassung und Verfassungsrecht* (1928), and *Staatslehre* (1934).

<sup>33</sup> Stolleis, *O direito público na Alemanha*, 128.

<sup>34</sup> Hans Kelsen, *Reine Rechtslehre* (Wien: Österreichische staatsdruckerei, 1992).

<sup>35</sup> Carlos Alberto Simões de Tomaz and Renata Mantovani de Lima, "O princípio da efetividade



International Law, which would allow the conception of the basic norm not as a presupposed norm, but as a postulated norm.

Among the effects that his book triggered, it is worth mentioning Carl Schmitt's opposition when he published the *Constitution Theory* in 1928 as a reply to legal positivism. Professor Michael Stolleis<sup>36</sup> explains that while Kelsen's work described bourgeois parliamentarianism and the rule of law as the “*still dominant*” form, Schmitt made it clear that these forms were archaic and useless. In this way, Schmitt distinguished constitutional law (concretely in force) and the “*constitution*” as the object of the theory of the constitution, developing the foundations of constitutions, the rule of law and fundamental rights, the democratic, monarchical, and aristocratic elements of modern constitutions, as well as the links between States.

Although Carl Schmitt's intention was to develop a general State theory, he ended up writing a constitutional theory, since he believes that State and constitution would be somehow intertwined, since his constitution theory presupposes a political decision. For Schmitt, the constitution would not be reduced to a simple set of written rules, but would be more than that: “*Indeed, Schmitt believed a genuine constitution was more than the sum of positive legal statutes in the written constitution. He believed the constitution was the soul of a political community*”.<sup>37</sup>

For Schmitt,<sup>38</sup> the concept of constitution is only possible from the distinction between constitution and constitutional law. The constitution in a positive sense originates from an act of constituent power, so political unity arises during the “*establishment of a constitution*”. Such a constitution is a conscious decision, which the political unit reaches for itself and supplies itself through the bearer of constituent power. In this sense, the constitution is valid by virtue of the political will existing in the power that establishes it. The constitution, therefore, presupposes a political decision prior to it, taken by a power or authority that exists politically. On the other hand, constitutional laws are valid on the basis of the constitution and presuppose a constitution: “*the distinction between constitution and constitutional law, however, is only possible because the essence of the constitution is not contained in a statute or in a norm. Prior to the establishment of any norm, there is a fundamental political decision by the bearer of the constitution-making power. In a democracy, more specifically, this is a decision by the people; in a genuine monarchy, it is a decision by the monarch*”.<sup>39</sup>

One of the examples brought by Schmitt (2008) is the French Constitution of 1791, which contains the political decision of the French people for the constitutional monarchy with two “*representatives of the nation*”: the king and the legislative body. Likewise, the French constitution of 1852 contained the decision of the French people for the hereditary empire of Napoleon III. In the case of Germany, political decisions are fundamental to the Weimar Constitution,<sup>40</sup> so

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como conteúdo da norma fundamental (grundnorm) de Kelsen”, *Revista de Direito Internacional*, v. 12, no. 2 (2015): 44-55.

<sup>36</sup> Stolleis, *O direito público na Alemanha*, 131.

<sup>37</sup> Benjamin Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (Oxford: Oxford University Press, 2017), 136.

<sup>38</sup> Carl Schmitt, *Constitutional theory* (Durham: Duke University Press, 2008).

<sup>39</sup> Schmitt, *Constitutional*, 77.

<sup>40</sup> Friedrich Ebert, *Die Verfassung des Deutschen Reichs* (Schwarzburg, den 11. August 1919), [https://www.jura.uni-wuerzburg.de/fileadmin/02160100/Elektronische\\_Texte/Verfassungstexte/Die\\_Weimarer\\_Reichsverfassung\\_2017ge.pdf](https://www.jura.uni-wuerzburg.de/fileadmin/02160100/Elektronische_Texte/Verfassungstexte/Die_Weimarer_Reichsverfassung_2017ge.pdf), accessed October 15, 2020.

by the conscious political decision the German people decided for democracy and saw the expression of this decision transcribed to the preamble<sup>41</sup> of the Weimar Constitution and in Art. 1, (2).<sup>42</sup>

Despite the concept of constitution supported by Hans Kelsen's legal positivism and by Carl Schmitt's decisionism, the Italian jurist Costantino Mortati,<sup>43</sup> in his 1940 text *La costituzione in senso materiale*, starts from the idea that the constitution has a political origin, in the sense that it is the product of will and choices, however, it is not the decision of a people, as Schmitt proposed. The legal character of the formal constitution loses all meaning when separated from political and social traces, making the formal constitution a mere piece of paper.

Regarding the differences of views between Schmitt and Kelsen, Maurizio Fioravanti<sup>44</sup> asserts that for Costantino Mortati, Kelsen's writings the existence of a constitution in Kelsen's writings was denied, being considered valid and possible only by the constitution written by political actors and a Parliament. In relation to Schmitt, a constitution existed in a material sense and it could even impose itself as an instrument of an authoritarian power when the formal one no longer made sense.

Some examples of different approaches to the concept of the constitution have been brought here: among the positivists, Georg Jellinek and Hans Kelsen; from the sociological perspective, Ferdinand Lassalle; from the institutionalists, Costantino Mortati; and from the decisionist perspective, Carl Schmitt. In general, Kelsen offers a juridical concept of constitution, while Schmitt focuses on the political aspect, based on his definition of sovereign. For this reason, for Schmitt's decisionism,<sup>45</sup> the essence of the constitution is not contained in a law or a norm, since before a norm is established, there resides a political decision of the bearer of constituent power, that is, the people in democracy and the monarch in the authentic monarchy. This difference in theoretical approach will be reflected in the theoretical discussions about who should be the guardian of the constitution: a constitutional court<sup>46</sup> or the president of the Reich.<sup>47</sup>

#### 4. Considerations on the concept of guardian of the constitution according to Carl Schmitt and Hans Kelsen

The first half of the twentieth century, between the years 1928 and 1931, was the arena of the theoretical debates conducted by Carl Schmitt and Hans Kelsen, regarding the guardianship of the constitution and all criticism of the general State and legal theory. The beginning of the Weimar Republic marked the crisis in the liberal choice for democracy and State organization, but also in uniting the social (fundamental rights) and the liberal aspects such as the idea of separation of powers and the rule of law. Weimar was the arena of theoretical debates between the scientificity of law

<sup>41</sup> Das Deutsche Volk, einig in seinen Stämmen und von dem Willen beseelt, sein Reich in Freiheit und Gerechtigkeit zu erneuern und zu festigen, dem inneren und dem äußeren Frieden zu dienen und den gesellschaftlichen Fortschritt zu fördern, hat sich diese Verfassung gegeben (Ebert, *Die Verfassung*, 1919).

<sup>42</sup> Article 1. Das Deutsche Reich ist eine Republik. Die Staatsgewalt geht vom Volke aus. (Ebert, *Die Verfassung*, 1919).

<sup>43</sup> Costantino Mortati, *La costituzione in senso materiale* (Milano: Giuffrè Editore, 1998).

<sup>44</sup> Fioravanti, *As doutrinas*, 431-432.

<sup>45</sup> Schmitt, *Constitutional*, 77.

<sup>46</sup> Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* (Berlin-Grunewald: W. Rothschild, 1931).

<sup>47</sup> Schmitt, *Der Hüter*.

and the idea of reconstructing political unity which, according to Schmitt, was now fragmented by pluralism, federalism, and what he called polycracy.

The text *Wesen und Entwicklung der Staatsgerichtsbarkeit*<sup>48</sup> from 1928 contains Kelsen's defense in favor of a constitutional court as guardian of the constitution. Kelsen's argument for the introduction of a constitutional court is based on the so-called *Stufenbaulehre* from Adolf Julius Merkl. According to this theory, the creation of a lower norm must respect a higher norm, that is, a hierarchical structure. Therefore, according to the *Pure Theory of Law*,<sup>49</sup> the basis of the validity of a norm can only be another norm. Regarding the application of the *Stufenbau*, Kelsen<sup>50</sup> states that “*the foundation of the validity of one norm can only be the validity of another norm*”.<sup>51</sup>

Involved in the discussions on the issue of constitutional revision, Carl Schmitt, in turn, challenged the proposal to create a constitutional court in several articles that, when compiled, were presented in the 1931 book, *Der Hüter der Verfassung*.<sup>52</sup> Parts of Carl Schmitt's approach in *Der Hüter der Verfassung* were already present in previous texts, such as *Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung* of 1924, and, in 1929, in the text *Das Reichsgericht als Hüter der Verfassung*, also written by Schmitt.

In short, Lars Vinx<sup>53</sup> points out that for Schmitt, granting constitutional review powers would exceed the legitimate powers of a court. This is because, in deciding on the constitutionality of legislation or government acts, such a decision would be a political choice, which would make the court a constitutional legislator, violating the separation of powers.

For Kelsen,<sup>54</sup> the legal system is fundamentally a set of valid legal rules, arranged in a hierarchical structure, whose top is occupied by the *Grundnorm*, the latter understood by Kelsen as the ultimate element of validity of the law. From the point of view of legal positivism, Kelsen responded incisively to Schmitt's book, also in 1931, in the essay *Wer soll der Hüter der Verfassung sein?* In this essay, the Austrian jurist addressed the problem of the constitutional guarantee, that is, his concern around the idea of an institution capable of controlling the administrative acts of the State to ensure that the constitutional limits of the Parliament and government are not exceeded. In developing his thesis on the creation of a constitutional court, Kelsen<sup>55</sup> confronted the constitutional theories prevalent in the nineteenth century which, guided by the monarchic principle, argued that the monarch would be the guardian of the constitution. In addition, Kelsen<sup>56</sup> dedicates part of his writing to the analysis of Article 48 of the Weimar Constitution, criticising Schmitt's interpretation of putting the president of the *Reich* as the guardian.

<sup>48</sup> Heinrich Triepel, Hans Kelsen, Max Layer and Ernst von Hippel, *Wesen und Entwicklung der Staatsgerichtsbarkeit. Überprüfung von Verwaltungsakten durch die ordentlichen Gerichte, Verhandlungen der Tagung der Deutschen Staatsrechtslehrer zu Wien am 23. und 24. April 1928* (Berlin: Walter de Gruyter, 1929).

<sup>49</sup> Thomas Olechowski, “Legal hierarchies in the works of Hans Kelsen and Adolf Julius Merkl”, *Reconsidering Constitutional Formation II Decisive Constitutional Normativity* (Springer, Cham, 2018), 353-362.

<sup>50</sup> Kelsen, *Reine Rechtslehre*, 196.

<sup>51</sup> Original: *Der Geltungsgrund einer Norm kann nur die Geltung einer anderen Norm sein.*

<sup>52</sup> Schmitt, *Der Hüter*.

<sup>53</sup> Lars Vinx, *The Guardian of the Constitution* (Cambridge: Cambridge University Press, 2015), 9.

<sup>54</sup> Kelsen, *Reine Rechtslehre*.

<sup>55</sup> Kelsen, *Wer soll*.

<sup>56</sup> Kelsen, *Wer soll*.

For Schmitt<sup>57</sup> the competence to settle constitutional disputes is exclusive to the *Reichspräsident*, while Kelsen<sup>58</sup> sustained the need to create a specific, independent court, which would be responsible for defending the constitution from its violations. Regarding the duty performed by the guardian of the constitution, for Schmitt<sup>59</sup> no judicial court could be an effective guardian of the constitution.

On the other hand, Carl Schmitt states that, before a rule, there will always be a decision that, in this case, will be the sovereign's decision. Schmitt's first thesis at the very beginning of the book *Political Theology* that the "Sovereign is he who decides on the exception".<sup>60</sup> Schmitt's insertion of the sovereign as the only one who decides on the state of exception apparently deviates from modern beliefs on the rule of law, separation of powers, and judicial review of executive and legislative acts. This first thesis identifies three critical concepts: sovereignty, decision and exception. However, Schmitt does not affirm that the sovereign is only present in the decision for the exception, he is also present in the rule of law so, the sovereign is at the position where law and exception intersect.

For Kahn<sup>61</sup> by stating that all political perceptions are directed towards seeing the world through the legal framework, but not to prevent the exceptional situation. However, the exception cannot be understood as a normal situation: the nature of the norms is such that the exception will take on the character of a normative element, in view of which the norms will attempt to include this exceptional situation. So, according to Kahn,<sup>62</sup> there can be no exception without reference to a norm because without that, the exception becomes anarchy.

Regarding the second thesis, Carl Schmitt's argument that "all significant concepts of the modern theory of the state are secularized theological concepts".<sup>63</sup> apparently reveals an attempt to establish the following analogy: if in theology, God has the power of miraculous intervention, then in the State, the sovereign decides on the exception. This attribution of a theological origin to political concepts is opposed to the distancing of religion in modern State theory.

As Macedo Júnior<sup>64</sup> emphasizes, Carl Schmitt's thought has elements of Jean Bodin and Thomas Hobbes, who were responsible for the formation of the concept of sovereignty in modern legal thought. According to Macedo Junior,<sup>65</sup> for a decision-oriented jurist, such as Carl Schmitt, the source of all laws is not the command as pure command, but the authority or sovereignty of a final decision, which comes along with the command. That is, the definition of sovereign is strictly linked to the power of decision, so the sovereign is the one who decides in the state of exception.

For Carl Schmitt the concept of law is mainly determined by a previous order, since the source of all law, for the decision maker, is that of the authority or sovereignty

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<sup>57</sup> Schmitt, *Der Hüter*.

<sup>58</sup> Kelsen, *Wer soll*.

<sup>59</sup> Schmitt, *Der Hüter*.

<sup>60</sup> Carl Schmitt, *Political Theology: four chapters on the concept of sovereignty* (Chicago: University of Chicago Press, 2005), 5.

<sup>61</sup> Paul W. Kahn, *Political theology: four new chapters on the concept of sovereignty* (Columbia: Columbia University Press, 2011), 34.

<sup>62</sup> Kahn, *Political theology*.

<sup>63</sup> Schmitt, *Political*, 36.

<sup>64</sup> Ronaldo Porto Macedo Júnior, "Constituição, soberania e ditadura em Carl Schmitt", *Lua Nova: Revista de Cultura e Política*, v. 42 (1997): 119-144, <https://doi.org/10.1590/S0102-64451997000300005>.

<sup>65</sup> Macedo Júnior, *Constituição*.

of a final decision, since the legal order, like every order, rests on a decision and not on a legal norm. For Hans Kelsen's legal positivism, the law is conceived as a system of legal norms, free of ideologies and separate from politics, whose validity is based on the *Grundnorm*.

## 5. Conclusions

According to the readings cited herein, the understanding of Carl Schmitt's doctrinal posture allows us to perceive a certain influence of Bodin and Hobbes in the formation of his decisionism, especially regarding the definition of sovereignty. That is, from the moment that Schmitt conceives the idea that political unity is formed by the political decision of the constituent power, that would be the justification for the distinction between the constitution and constitutional law, leading the guardian – president of the *Reich* – to the duty of protecting the material constitution.

If on the one hand Schmitt's decisionist conception understands the constitution as the fundamental political decision of a people, for Kelsen's normative positivist perspective the hierarchical structure (*Stufenbau*) is found in the *Grundnorm* that sustains the unity of the legal system and it is this hierarchical structure that constitutes the constitution in a logical-legal sense. Kelsen's theoretical position, in addition to being a continuation of positivist thought, can also be construed as a rupture with the traditional State theory in the nineteenth century, especially with the doctrines that defend the monarchical principle and the duality of State/law, similar to Georg Jellinek.

Even though the construction of the concept of the constitution was approached differently in terms of its nature, definition, characteristics and functions in each doctrinal trend that crossed the nineteenth and twentieth centuries, mainly due to the different political, economic and social structures, we observed that some concepts from the Enlightenment of the eighteenth century were also relevant to the construction of a State under the rule of law. In its historical structures from nineteenth and twentieth centuries, Germany demonstrates that not only political, legal, and social history intervened in the re-signification of concepts from the French Revolution and the Enlightenment, but that linguistics also suffered the impact: the expression *Rechtsstaat*, for example, from the first half of the nineteenth century was not only found in the writings of liberal jurists, but also in conservative ones, including those defending the monarchy, which demonstrated that the concept of *Rechtsstaat* is not static and predetermined, but can assume different forms. It is important to notice that some of these concepts reflected in the development of German public law throughout the second half of the nineteenth century, also appear (in a distinct and subtle way) as topics of debate in the theoretical-constitutional struggle between Carl Schmitt and Hans Kelsen.

To summarise, Kelsen's positivism attempted to deviate from the theological method and resolve the errors of the traditional State theories that preceded him by building a pure theory of law, removing elements such morality, politics, and religion from the legal science. Carl Schmitt's political theology, on the contrary, by understanding that the concepts developed in State theory are secularised theological concepts, attempts to identify traditional State theories that present a theological basis reflected in the concept of sovereignty and the choice of who should be the guardian of the constitution.

In conclusion, the main element that attributes validity to the legal order, for Kelsen is the *Grundnorm* (the basic norm), while for Schmitt, it is the *Grundentscheidung*, the basic decision. Contrary to the Kelsen proposal, Schmitt does not identify the foundation of law as a hypothetical norm. For him, the constitution comes from a real power that is, the constitution. It is much more important than that formal and written regulatory instrument, since there is no point in having a written constitution in disharmony with the basic political decision. The conception of the constitution and, consequently, its element of validity rests on the political aspect, that is, on the *Grundentscheidung*. The result is that in Schmitt's work, the reasoning is the obverse of Kelsen's thesis, as it presupposes that legal validity derives from a pure decision.