Who watches the watchmen? Kelsen and Schmitt on the guardian of the Constitution

Quem vigia os vigilantes? Kelsen e Schmitt sobre o guardião da Constituição

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Abstract: This article analyses one of the most well-known debates in 20th-century political and legal theory between Carl Schmitt and Hans Kelsen. Although it dates back to the early years of the Weimar Republic, the discussion of the guardian of the constitution focused on the years 1928 and 1931, when the personalistic character of power took place within discussions of constitutional jurisdiction. This article proposes to analyze part of Schmitt's argument constructed during the 1920s that, to some extent, anticipates the arguments later developed in *Der Hüter der Verfassung*.
Keywords: sovereignty; control; power.

Resumo: O presente artigo analisa um dos debates mais conhecidos da teoria política e jurídica do século XX, qual seja, entre Carl Schmitt e Hans Kelsen. Ainda que remonte aos primeiros anos da República de Weimar, a discussão sobre o guardião da constituição se concentrou nos anos 1928 e 1931, ocasião em que o caráter personalista do poder tomou lugar no interior das discussões sobre a jurisdição constitucional. Sob tal pano de fundo, o presente artigo analisa parte do argumento schmittiano construído durante a década de 1920 que, em alguma medida, antecipam os argumentos posteriormente desenvolvidos em *Der Hüter der Verfassung*.
Palavras-chave: soberania; controle; poder.

I. Introduction

The controversy over constitutional jurisdiction and the role to be played by constitutional courts was the culmination of a dispute between the two notable European jurists Carl Schmitt and Hans Kelsen.[1] As soon as Schmitt published *The Guardian of the Constitution in* 1931, Kelsen immediately responded by denouncing the nature of the thesis as being heir to the monarchical principle. "Since the true *political* objective of preventing an effective guarantee of the constitution could not be openly declared", Kelsen says of Schmitt's thesis of the guardian of the constitution, "it was masked by the doctrine that such a guarantee would be the task of the head of state" (Kelsen, 2003a, p. 241). For him, the political function of the constitution was to establish legal limits to the exercise of power, and the guarantee of the constitution meant precisely the security provided by the legal form that these limits would not be exceeded. For Kelsen, the Schmittian thesis makes use of two conceptions: that interpretative activity would consist of a subsumption task, that the judicial decision would already be contained in the law, "only 'deduced' from it through a logical operation" correspond-

[1] Although the aim is not to completely reconstruct the important debate between Schmitt and Kelsen, it's worth pointing out that there are several studies that focus more closely on it, and we're interested here in the particularity with which Schmitt uses the confrontation with Kelsen as a way of affirming his formulations. Among the specialists on Kelsen in Brazil, we would like to highlight the work of Alan Ibn Chahrur, whose doctoral thesis is one of the largest studies on the author (cf. Chahrur, A. I. *O positivismo crítico: continuidade e ruptura no pensamento de Hans Kelsen* [*Critical positivism: continuity and rupture in Hans Kelsen's thought*] Thesis (doctorate) – State University of Campinas, Institute of Philosophy and Human Sciences. Campinas, 2017; Chahrur. A importância teórica e prática da norma fundamental [The theoretical and practical importance of the fundamental norm]. In: Chahrur; Ramiro (Orgs.) *Labirintos da filosofia do direito: estudos em homenagem a Oswaldo Giacoia Junior* [*Labyrinths of the philosophy of law: studies in honor of Oswaldo Giacoia Junior]*. São Paulo: LiberArs, 2018; on the debate with Schmitt, see also Chahrur. O guardião da constituição a partir da dualidade entre *politeia* e *nomoi*: o argumento de Hans Kelsen [The guardian of the constitution based on the duality between *politeia* and *nomoi*: Hans Kelsen's argument]. In: Ramiro, C. H. L.; Bueno, R. (Orgs.). *Sonhos e pesadelos da democracia em Weimar: tensões entre Carl Schmitt e Hans Kelsen* [*Dreams and nightmares of democracy in Weimar: tensions between Carl Schmitt and Hans Kelsen*]. São Paulo: LiberArs, 2017). At least one chapter of Schmitt's *Political Theology* was dedicated to this "tense and irreconcilable dialogue", as Giacoia Jr. (2018, p. 143-144) reminds us, around the concept of sovereignty. In fact, it's no coincidence that the presentation of the Brazilian translation of *The Guardian of the Constitution* was by Gilmar Mendes, a member of Brazilian's Supreme Federal Court, for whom – after all – Kelsen had "won" the debate.

ing to "jurisdiction as legal automatism"; and the conception that "subjective right is nothing other than a technical expedient for guaranteeing the state order" (Kelsen, 2003a, p. 273). By using the monarchical principle —according to which the natural guardian of the constitutional text would be the monarch— Schmitt was aiming to compensate for the loss of power that the head of state had experienced in the transition from absolute to constitutional monarchy. The aim, then, was to prevent the Constitution from being effectively guarded at least against violations by those who most threatened it, that is, the monarch himself or, more precisely, the government.

What to do when the legal system doesn't offer a way out in cases of extreme urgency is the problem to which Schmitt tries to provide answers, but Schmitt's gamble is not disconnected from his political thought, which is affiliated with a Catholic and counter-revolutionary tradition. The sovereign is beyond the limits of the legal, and the political decision to suspend the current order is beyond the reach of the normative order. Although it dates back to the early years of the Weimar Republic, the discussion of the guardian of the constitution focused on the years 1928 and 1931, and since this debate is one of the most well-known in 20th-century political and legal theory when the personalistic character of power took place within discussions of constitutional jurisdiction the repercussions are many and it ends up by influencing part of the political and philosophical debates of our days. This article analyses part of Schmitt's argument constructed during the 1920s that, to some extent, anticipates the arguments later developed in *Der Hüter der Verfassung*.

II. Situating the Kelsen-Schmitt's debate

Kelsen calls the attempt to conceal the character of the monarch's function to make possible this notion that only the government is the natural guardian of the constitution "remarkable audacity": the monarch is taken as a third instance, above the antagonisms, holder of a supposedly neutral power. "How could the monarch, holder of a large portion or even all of the state's power, be a neutral instance concerning the exercise of such power, and the only one with the vocation to control its constitutionality?", asks Kelsen (2003a, p. 241), and then goes on to say that it would be pointless to resort to the objection that this is a clear contradiction because in an "intellectual system whose deep kinship with theology is not ignored by anyone today, the prin-

ciple of contradiction no longer has a place. What matters is not whether the theses of such a constitutional theory are true, but whether they achieve their political goal" (Kelsen, 2003a, p. 242): a movement that seeks to place the monarch as guardian of the constitution and against the establishment of a constitutional court. Kelsen situates Schmitt as a member of this movement that marked the political atmosphere of the monarchy, showing surprise that in the debate on contributions to public law in a different epochal situation, there should be a publication that discusses the guardianship of the constitution in Schmitt's terms: "Even more surprising, however, is that this writing takes its oldest play from the dregs of the constitutional theatre [...] the thesis that the head of state, and no other body, is the competent guardian of the constitution [...]" (Kelsen, 2003a, p. 243).

Normativism considers the norm to be unrelated to the factual decision that establishes it, the guardianship of the constitutional text doesn't even appear as a problem because the legal order would be defended by the constitution itself, since a given law should be subsumed under a hierarchically superior norm, being under the guardianship of the constitution itself. This is the meaning of Kelsen's surprise at seeing in 1931 a question being asked about the guardianship of the constitutional text: for normativism, this would not be an object of tension, because if there were an incompatibility between a norm and the constitution, the former would be invalidated as a result of this collision, the stronger norm would defend and protect the weaker one. As we read in Schmitt's text, in the question about the guardian of the constitution, "it is a question of protecting the stronger norm concerning the weaker norm. For a normativist and formalist logic, this is not a problem at all, the stronger validity cannot be threatened or jeopardized by a weaker one" (Schmitt, 1931, p. 41). In the wake of Benjamin Constant, Schmitt (1931, p. 128) tries to give new contours to the notion of a neutral power, even though he recognizes the non-existence of the situation of the 19th-century constitutional monarchy, with its separation between state and society, politics and economics, and that, therefore, the categories of such a state could not be applied to the concrete Weimarian situation. However, even so, Kelsen considers that Schmitt tries to take up categories from, so to speak, monarchical constitutionalism, applying them to the Weimar constitutional text: "[...] it bears on its forehead its link to the time, its birth from a specific historical-political situation: the doctrine of the *neutral pouvoir of the* head of state! This formula of Constant's becomes, in Schmitt's hands, a capital instrument for his interpretation of the Constitution" (Kelsen, 2003a, p. 245).

By invoking Article 48 of the Weimar constitution, the *Reich* president now had the power to issue decrees with the force of law. Through what Kelsen calls an extensive interpretation of the constitutional provision, Schmitt was seeking to "extend the competence" of the president in such a way that he "does not escape becoming a sovereign master of the state, reaching a position of power that is not diminished by the fact that Schmitt refuses to designate it a 'dictatorship'" (Kelsen, 2003a, p. 246). In *The Judicial Control of Constitutionality*, writing about the broad interpretation of this provision, Kelsen foresaw the collapse of the regime: "The improper use of Article 48 of the Weimar Constitution [...] was the means by which the democratic character of the German Republic was destroyed and the advent of the National Socialist regime was prepared" (Kelsen, 2003b, p. 306).

> [Schmitt] states that in constitutional monarchy the danger of a violation of the Constitution came from the government, that is, from the sphere of the *executive,* a circumstance that should be completely eliminated by the idea of both a "neutral" power of the monarch in the function of head of government and of the executive, and of his vocation to act as guardian of the Constitution! Schmitt, here, recognizes the danger from the monarchical government in the 19th century only with the intention of being able to say that "today", that is, in the 20th century and in the democratic republic, the fear of a constitutional violation would be directed "above all against the legislator", that is, not against the presidential government, but against Parliament. As if *today* in Germany the question of the constitutionality of the activity that the *government*, consisting of president and ministers, carries out on the basis of Art. 48, was not a matter of life and death for the Weimar Constitution! (Kelsen, 2003a, p. 247)

Among Schmitt's interprets, in the wake of the argument defending the extension of the president's exceptional powers to combat the crises typical of the liberal-parliamentary state, Bueno shares Kelsen's view that the use of Article 48 and the extended interpretation given by Schmitt helped to undermine the Weimar regime – a view not accepted by some of Schmitt's interlocutors and commentators, such as George Schwab, for whom, on the contrary, the use of the provision was one of the causes of the regime's longevity, as it allowed economic and social crises to be dealt with: Schmitt would have been concerned about the conditions inherited in the wake of Germany's defeat in the Great War and the centrifugal forces emanating in the new republic, so as to seek ways to combat such changes (see Schwab,

2005, p. xli; 2016, p. 88, especially *Schmitt and the Weimar Constitution: 1921-1933*).

In this sense, Schmitt's last efforts were to re-establish a state authority to the now non-existent Weimar Republic, since it had been undermined by the introduction of pluralism – which canceled out the political and transferred its monopoly to the parties – which involved directly strengthening the powers of the president, This resulted in the formulation of the concept of the total state in *Der Hüter der Verfassung*, ultimately advocating that the German state return to being a state "endowed with the specific instruments of state power, such as the army and the bureaucracy, as well as the power of exception in Article 48 of the Weimar Constitution" (Bercovici, 2003, p. 82). 82). Schwab would say that the point for Schmitt, at least from 1921 to 1924 – but extending throughout the 1920s and part of the following decade – was to combat the disintegration of the state machinery and "preserve the essential resources of the Weimar system. He therefore set himself the specific task of exploiting the legal possibilities that the Weimar Constitution offered to combat crises" (Schwab, 2016, p. 88).

In his reading of Kelsen, Schmitt seeks to demonstrate that the decision on the constitutionality of laws and the eventual decision that such laws are unconstitutional by a college —a supreme court, a constitutional court— would not be jurisdictional, something he believes to be mistaken, because it would imply thinking of the decision on the constitutionality of laws and their eventual annulment by the court as a *political* act, and therefore not properly jurisdictional. "If we see 'the political' in the resolution of conflicts of interest, in the 'decision' —to use Schmitt's terminology— we find in every judicial judgment, to a greater or lesser degree, a decisional element, an element of the exercise of power" (Kelsen, 2003a, p. 251). Contrary to Schmitt's reading, Kelsen believes that there is only a quantitative difference between the political character of legislation and that of jurisdiction, not a qualitative one. If there were no politics involved in the jurisdiction, international jurisdiction would be impossible for Kelsen: "Every legal conflict is a conflict of interest or power, and therefore every legal controversy is a political controversy, and every conflict that is qualified as one of interest, power or politics can be decided as a legal controversy" (Kelsen, 2003a, p. 252). The review of legislative acts by such an independent court would be a clear affront to state sovereignty.

For his part, Schmitt would not accept that the abstract control of norms was not a question of the application of norms, and therefore an operation

of the practice of judicial decision-making, since only "general rules are compared to one another, but not subsumed or 'applied' to one another" (Schmitt, 1931, p. 42) as if there were no link between norm and fact. "If constitutional justice were a justice of constitutional law over ordinary law," says Schmitt, "the justice of a norm as such would be the justice of a norm over another norm as such. *But there is no justice of the norm over a norm* [...]" (Schmitt, 1931, p. 41. Emphasis added). For an author who thought of law as fundamentally political, the supposed neutrality of Kelsenian positivism was nothing more than a "disguised reflection of liberal ideals in political and legal philosophy, aimed at guaranteeing the security and freedoms of the bourgeoisie vis-à-vis the state" (Mendes, 2007, p. xi). Schmitt rejects the normativist thesis of the identity between the legal order and the state, showing that the Kelsenian method is precisely the unfolding of the old liberal denial of the state through law. For Schmitt, the creation or even the recognition of a constitutional court acting as guardian of the constitution would imply the transfer of powers from legislation to the judiciary, "politicizing it and upsetting the balance of the constitutional system of the rule of law" (Mendes, 2007, p. xi).

Kelsen countered Schmitt by saying that the object of constitutionality control was not the subject matter of a given law, but the form, the constitutionality of its creation. "The *factual support* that must be subsumed under the constitutional norm when deciding on the constitutionality of a law is not a norm [...] but the production of the norm" (KELSEN, 2003a, p. 257). Kelsen rejects Schmitt's thesis that there is no jurisdiction of constitutional law over an ordinary law or jurisdiction of a norm over another norm, i.e., that a given law cannot be the guardian of another law. Schmitt disagreed with the attribution of the defense of the legal order invalidating rules that might conflict with the constitutional text —to the judiciary and judges. If the content of the constitution were the subject of discussion, only a body unbound by normative content —unlike judges who are bound by the normative hierarchy— could decide on its interpretation. The opposition to the thesis of the subsumption of "a stronger norm" to a "weaker norm" considers that normativism confuses the application of one norm to another with the application of a general norm to a singular fact: "The application of a norm to another norm is something qualitatively different from the application of a norm to a fact, and the subsumption of a law under another law [...] is something essentially different from the subsumption of a regulated fact under its regulation" (Schmitt, 1931, p. 42). Thus, the relationship between

stronger and weaker norms is not a matter of subsuming something singular to something universal, but of comparing two equally general norms, not the application of one norm to another, but "a comparison established between two norms whose normative content would have to be interpreted by a body that, in determining this same content, could not fail to decide without any normative link" (Sá, 2006, p. 315).

> Also, in deciding doubts and differences of opinion about whether there is a contradiction between two norms, one norm is not applied to the other, but – because the doubts and differences of opinion only concern the content of the constitutional law – a doubtful normative content is actually put beyond doubt and authentically verified. This is the removal of an obscurity about the content of constitutional law and thus the *determination of the content of the law, therefore in matters of legislation, and even constitutional legislation, and not justice*. (Schmitt, 1931, p. 45. Emphasis added)

Ultimately, what Schmitt is trying to show by opposing Kelsen's normativism is that a law cannot be the guardian of another law. To think of a court that guards the constitutional text as Kelsen conceives it would only be possible for Schmitt if one took the constitution as a contract or compromise. For Schmitt, a body that puts beyond doubt, authentically resolving the doubtful content of a law, would effectively play the role of legislator: anybody that authentically puts beyond doubt a doubtful legislative content, functions as a legislator in the matter. If it casts doubt on the dubious content of a constitutional law, then it functions as a constitutional legislator (Schmitt, 1931, p. 45). Commenting on this passage by Schmitt, Sá says that if the defense of the constitution could be entrusted to a judge, placing the courts as the guardians of the constitution, who would decide according to an original link to the constitution, it would mean that the constitution would interpret itself, "that its content would be unequivocal and indisputable, and that the judgment of the judge in charge of guarding it, the judgment of the court that would ensure its validity, would be nothing more than the expression of a simple self-interpretation of the constitution" (Sá, 2006, p. 316). "However," he continues, "since no law is unequivocal in its content, the constitution cannot interpret itself and, to that extent, it cannot appear as the guardian of the laws that constitute the legal order as a whole" (SÁ, 2006, p. 316). Consequently, since one law cannot be the guardian of another, and since the content of the constitutional text cannot fail to serve

as an object of dispute —it cannot fail to be constantly interpreted— "the body capable of protecting the constitution by interpreting its content inevitably emerges not as justice, in its original dependence on a law that binds it, *but as a legislative act by which the law itself, in its concrete content, is created*" (Sá, 2006, p. 316). This is the meaning of Schmitt's assertion that anybody that places itself above the constitutional text in a matter —which precisely removes doubt from a legislative content that, before that decision, appeared doubtful— plays the role of legislator. The debate on the guardianship of the constitution then finds itself in a situation that is summarized by Sá as follows: coming out of the liberal and democratic revolt against the state of government of the absolute monarchy, the legislative state, a state of law now understood as a constitutional state, found itself in a "fundamental difficulty" in determining the body that should ensure the guardianship or defense of its constitution.

The German constitutional situation would be characterized by the fact that many rules and regulations from the 19th century had been preserved, rules based above all on the separation of state and society. The 19th-century state was a neutral state that was guided by non-intervention, and the debate about the protection of the constitution was beginning to be contested against parliament and it will be expressed in laws. Political parties became strong structures, representing interests, classes, and religions, and Parliament was reduced to a stage of struggle and division that no longer guaranteed the unity of the will of the people, degenerating into a "pluralist state". The debate about the guardian of the constitution and the critical stance towards proposals such as Kelsen's for a constitutional court soon gave way to a diagnosis of a crisis —of decision, of state authority— and a bet on the last constitutional way (or answer, as Sá puts it): the strengthening of the president. Since the Weimar Constitution establishes the democratic idea of the homogeneous and indivisible unity of the entire German people, granted by the constituent power and by a political decision, "all interpretations and applications of the Weimar Constitution that endeavor to make it a contract, a compromise or something similar, are solemnly rejected as wounding the spirit of the constitution" (Schmitt, 1931, p. 62).

In a situation of total politicization, especially in the face of a widening of the state's duties and problems, Schmitt would say, perhaps the problem introduced by this new situation could be eliminated by the government, but certainly not by the judiciary. The problem of total politicization, the indistinction between state and society, goes through the problem of the guard-

ian of the Constitution and Schmitt's bet on the figure of the president as its protector, and not on a court as Kelsen defends, ignoring, as Kelsen reminds us, "the fact that legislative expansion also takes place, to a considerable extent, through the government's power of decree, particularly when, based on an interpretation of art. 48-2 [...] the government's power of decree takes the place of Parliament's legislative power" (Kelsen, 2003a, p. 275). Schmitt (2013) recognized and defended the idea that the second part of Article 48 allowed the *Reich* President to establish a commissar dictatorship. As a "neutral, intermediary, regulating and maintaining power" (Schmitt, 1931, p. 137), the *Reich* President would be the arbiter above conflicts and classes —which in Kelsen's view makes Schmitt's assertion that the President represents a neutral power, a figure independent of political parties and class interests, appears to be a fiction— invested with powers that make him independent of legislative bodies.

Incidentally, commenting on the constitutional history of the 19th century and Constant's doctrine of neutral, intermediary, and regulatory power, Schmitt (1931, p. 132-133) cites the Portuguese constitution and even refers to Brazil's first constitution, of 25 March 1824, as an example of a constitutional text in which this doctrine was incorporated quite literally (*ziemlich wörtlich*), quoting directly from article 98.[2] The point here is precisely to emphasize what is important to Schmitt in our constitutional text: the moderating power. The debate about guarding the constitution takes the form of a debate about the exercise of power. In Schmitt's view, Sá recalls, power "is either exercised directly as power, recognizing no other power to limit it, or, recognizing a higher power above it, it is not purely and simply power" (Sá, 2006, p. 103). In these terms, Kelsen's proposal to limit the power of the state ends up replacing it with another power that will act as the guardian of the law, not by limiting the power of the state, but by transferring it "into the hands of another representative of the state, that is, transferring the state itself to another body whose power now constitutes it as the guardian and founder of the realization of the law" (Sá, 2006, p. 103). The protection of the constitution, the highest function of the state, is a political function. The methodological mistake, says Schmitt, always remains the same, be-

[2] "Art. 98: The Moderating Power is the key to all political organization, and is delegated privately to the emperor, as Supreme Head of the Nation, and its First Representative, so that he may incessantly oversee the maintenance of the Independence, balance and harmony of the other Political Powers".

cause since it is always only men who can set themselves up as guardians of the laws, distrust of the guardian leads to the choice of others, which doesn't help at all.

Before setting up a court as the guardian of the constitution for highly political questions and conflicts —which could be overburdened and threatened by such politicization— we should remember the "positive content" of the Weimar constitution and its constitutional system: "[...] there is already a guardian of the constitution, namely the President of the Reich" (Schmitt, 1931, p. 158). The constitutional text took care to grant this: stability and permanence, independence from parliamentary majorities, the type of competence given to this body (since it is not an individual) – the dissolution of the *Reichstag* (art. 25), holding referendums (art. 73), protection of the constitution (art. 48) – all in the sense that it would have the power to protect the constitution. 48) – all to create a body that is neutral in terms of party politics due to its direct relationship with the state as a whole, and as such, "is the capable defender and guardian of the constitutional situation and the constitutional functioning of the supreme bodies of the *Reich*" which, in case of need, is "endowed with *effective powers* for the *active protection of the* Constitution" (Schmitt, 1931, p. 158). The Reich President occupies a central role of party-political neutrality and independence because he is built on a plebiscitary basis. In contrast to Schmitt's concern that setting up a court would imply a politicized, overburdened, and threatened jurisdiction, Kelsen asks: "How could jurisdiction be overburdened and threatened by constitutional jurisdiction, when the latter —as Schmitt unceasingly endeavored to demonstrate— is absolutely not *jurisdiction*?" (Kelsen, 2003a, p. 262). It's not that he wasn't also concerned about Schmitt's question regarding the limits of jurisdiction in general or constitutional jurisdiction. It is a problem that must also be dealt with, says Kelsen, and if one wished to restrict the power of the courts, thus limiting the political character of their function, "one must then limit as much as possible the margin of discretion that the laws grant to the use of that power" (Kelsen, 2003a, p. 262), and this is a concession that to some extent Schmitt would not be willing to make. Schmitt's gamble involves pure decision, an uninfluenced decision, distancing "the binding of the juridical from prior legal structures that determine it. Schmitt's proposal is therefore to link the occurrence of the juridical to the pure unconditioned will that emerges in the realm of the political" (Bueno, 2010, p. 1046).

This defense of the Reich president who, in his actions, carries with him the unity of the people, led Schmitt to defend Hitler's arbitrary acts

at the 1934 conference, establishing him as the protector of the law. It's worth a brief parenthesis: Alexandre Sá points out that until the end of 1932 Schmitt's endeavor was, to some extent, to curb National Socialism, in a movement against the Nazis, including public interventions in this direction. Roberto Bueno will say, however, that more elements bring him closer to the National Socialists than one or two points that might distance him.[3] It is the President of the *Reich* who protects the law and watches over the constitution. His reading of art. 48 allowed him, already in *The Dictatorship* and *Political Theology, to* consider that this provision established the sovereign character of the president, but the fact that it proclaimed the "state of exception" under some control of parliament still corresponded, for Schmitt, to the tendencies of the liberal rule of law that tries to exclude the problem of sovereignty by distributing competences and providing for reciprocal controls – in the limit: mitigating sovereign power in a proceduralism. About Hitler's actions, Schmitt says, "[...] the *Führer*'s action was an exercise of legitimate jurisdiction. His action was not subordinate to justice, but constitutes supreme justice" (Schmitt, 1934, p. 946), establishing him as the guardian of the constitution and defender of the law, as the sovereign through whom the acclamation of the people materializes, unlike parliament, which manifests itself as the expression of a will divided by partisan interests that aim for totality.

The state must take precedence over other institutions. The defense of such a strong state is linked to the need to overcome the classic liberal tripartition of powers, precisely because the state cannot be fragmented into autonomous powers, opposing each other[4]. The possibility of suspending the prevailing order, partially or totally, takes place in the bowels of the legal system itself, based on an essentially political decision. The president

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[3] The expanded interpretation of the Weimar constitution would have allowed Schmitt to use the constitutional text against the internal upheavals of the republic, under the veil of safeguarding the regime and defending constitutional provisions, bringing the president closer to a dictator commissioner of action. "The *Führer* protects the law from the worst kind of abuse when, at the moment of danger, he immediately creates law by virtue of his leadership [...]. Justice comes from leadership" (Schmitt, 1934, p. 946), he said in his 1934 speech *The Führer protects the law,* the purpose of which was to support Hitler's actions in persecuting political opponents. In moments of threat to order, the *Führer* intervenes, acting as supreme judge, distinguishing friend from foe, taking the necessary measures to stop the chaos.

[4] (2013, p. 58), "the *Führer* [...] would absorb legislative functions (through measures, decrees, legislative delegations, etc.) and judicial functions. The *Führer* would then be the very guardian of the Constitution".

of the *Reich* acts as an extraordinary lawmaker, and it is up to the sovereign to determine what public order and security are, even when they are threatened. Wolin states that granting this "dictatorial character" to sovereign power implies solving certain ontological problems that plague its structure, above all the apparently unbridgeable chasm between universal and particular, abstract and concrete, a concern of *Lebensphilosophie* in the key of the Schmittian variant. The state of exception would represent the prospect of an existential transformation of life in its "everydayness": "[...] the norm must be 'destroyed' insofar as it represents the reign of the merely 'conceptual', the 'abstract', the substance of life in its 'pulsating fluidity' is prevented from coming to the surface" (WOLIN, 1990, p. 398). "The cardinal virtue of the exception", in this reading of political existentialism – to use Wolin's term, but which was first used by Marcuse in 1934 to refer to Schmitt's theory of the total-authoritarian state and the demand for new anthropology – is that it "explodes the routinization to which life is subjected under conditions of juridical normality" (WOLIN, 1990, p. 398). Standing above individuals, the state, in its decision-making capacity, is considered the final arbiter on questions of "concrete indifference": it is the state that must ultimately *decide*. Among the commentators, Bueno sees in these arguments the announcement of the devaluation of liberal institutions, characteristic of a considerable part of Schmitt's work in the 1920s. According to him, by subordinating the autonomy of the legal sphere to the reasons of the state, Schmitt removes any potential for opposition from civil society. It is worth noting, however, that the president's actions as a dictator are not uniformly seen by commentators as an affront to the constitutional text; on the contrary, they would be precisely its guarantee.

III. Dictatorship in the Weimarian Constitution

In his 1924 text, *The Dictatorship of the Reich President under Article 48 of the Weimar Constitution,* Schmitt gives a reading of presidential prerogatives that does not hide his defense of far-reaching emergency measures. It is in this vein that Sá is trying to clarify a point of debate: whether, in his actions, the president acts as a *commissar* dictator or a *sovereign* dictator. But the point is that the dictatorial character of the president is not denied, linked to a notion of a privileged relationship that the leader would have with the sovereign people due to his direct election by the entire German people,

being able to act on their behalf, as their supreme representative, assuming, in case of need, the *status of a dictator*. Such a dictatorship would never be a sovereign dictatorship, but a commissariat dictatorship, and such confusion would simply mean canceling the Weimar Constitution. The internal coherence of the Schmittian argument demands that the president be treated as distinct from the sovereign dictator, rather a commissar dictator who is bound to the order he aims to secure, acting as if he were, but not as sovereign. In the 1920s, dictatorship was a topic close to Schmitt's heart, and he took on other fronts from *Political Theology in* strengthening the president within the constitutional text, a suitable means of restoring sovereignty in an era undermined by the neutralization of conflict, the mechanisms of political pluralism, such as parliament, and the submission of the political.

Schmitt's political anti-liberalism is linked to decisionism: the decision is aimed at strengthening state authority, hence the glorification of political will without restriction of content and direction. One of the central phrases of *Political Theology* is that "all the concepts [...] of modern state doctrine are secularized theological concepts" (Schmitt, 1979, p. 49), to reintroduce a strong "personal" element into modern politics, an element that had fallen by the wayside with the eclipse of political absolutism. Hence the emphasis on the "personal" aspect of the exceptional decision. This relationship that Schmitt makes between the concepts of modern state doctrine and secularized theological concepts —understanding political concepts in the light of a meaning provided to them by the reference of the spiritual world or the metaphysical structure that underpins them— implies that the exception plays a role in modern politics comparable to that of the miracle in theology: by secularizing theological concepts, the transubstantiation of the degraded political body is sought, a feat, moreover, that can only be accomplished by a strong sovereign figure, analogous to the monarch whose sovereign power came from divine providence. The exception defines the normal situation under which the law originates. In stating that the state of exception has a meaning analogous to the miracle in theology, Schmitt goes beyond Donoso Cortés. It is the sovereign who defines whether there is an abnormal situation and decides on the exception; the legitimacy of his action is given by concreteness.

In *Die Diktatur,* Schmitt transposes the exception from the legal sphere into the realm of political theory, setting the tone for an argument whose developments permeated his political thought throughout the 1920s: the political must take precedence over the legal. Schmitt did not welcome the Western

ideal of a constitutional government, or at the very least, the notion that there is a certain set of normative principles, embodied in the constitution as a legal basis, which limit the actions of the sovereign. Even though the dictator's actions are limited in time, in this text there is already the notion that the *situation of things*, a term often used by Donoso Cortés, can lead to the use of extraordinary means to preserve the state against internal disorders as well as external threats. The form this takes in *Political Theology* emphasizes that it is the exception, and not the constitutional text, that forms the substratum of the state: only the state retains the final decision-making power to suspend the conditions of political normality by declaring a state of exception. However, it's important to say that Schmitt seeks to distance the concept of dictatorship from despotism, formulating a distinction between the aforementioned concepts of "commissar dictatorship" and "sovereign dictatorship": the commissar dictatorship enters the scene with specific political objectives, while the sovereign dictatorship provides unlimited powers, resembling the original constituent power, creator of the order. In any case, although the internal movement of the texts differs between the works *Die Diktatur* and *Politische Theologie,* what underlies both is still the valorization of emergency powers and their superimposition on the legal – which leads to a "latitudinarian" interpretation of art. 48 of the Weimar Constitution, especially in the defense of emergency powers free from any constitutional restrictions. Neumann (2009, p. 43) recalls that the "idea of the totalitarian state arose from the demand that all power be concentrated in the hands of the president", identifying Schmitt, as "the most intelligent and reliable of all the National Socialist constitutional lawyers" (p. 49), as one of the ideologues of National Socialism. Like self-defense, dictatorship involves not only action but also counter-action (*Gegenaktion*). "The commissarial dictatorship suspends the Constitution *in concreto* to protect the Constitution itself *in* its concrete existence" (Schmitt, 1964, p. 136), a peculiar means that protects the constitutional text against an attack that threatens to destroy it.

> Dictatorship protects a given constitution against an attack that threatens to suppress that constitution. [...] The dictator's action must create a situation in which the law can be realized, because every legal norm presupposes, as a homogeneous means, a normal situation in which it is valid. Therefore, dictatorship is a problem of concrete reality, without ceasing to be a legal problem. *The Constitution can be suspended without ceasing to be valid, since suspension only means a concrete exception*. Therefore, it is also necessary to explain that

> the Constitution can only be suspended for certain districts of the state. [...] within the state constituted by the Constitution as a legal concept there is no circumscribed territorial space that can be deprived of its validity, nor any period of time in which it should not be in force, nor any determined circle of people who, without ceasing to be citizens of the state, should be treated as "enemies" or "rebels" without rights. *But exactly such exceptions belong to the essence of dictatorship and are possible because it is a commission of action determined according to the situation of things*. (Schmitt, 1964, p. 136-137. Emphasis added)

The long quotation is justified precisely because the way Schmitt constructs the argument will reappear the following year in a very similar way – but no longer under the veil of the defense of the dictatorship. By saying that the suspension in whole or in part of the constitutional text, which implodes the validity of fundamental rights and guarantees, does not make the constitution invalid, but without validity for as long as the exceptional state lasts, he reappears in full in *Political Theology*. Resorting to the situation of things as a justification for a sovereign free of restraints is something that will accompany him throughout the Weimarian period —serving as the basis for his later defense of an authoritarian government under a strong state. What is important to note at the moment is that in the sovereign dictatorship, instead of relying on a right based on it —therefore constitutional— he seeks to create a situation that makes a new constitution possible, in other words, he invokes "not an existing constitution, but one that must be brought into being" (Schmitt, 1964, p. 137). Making use of passages from *Die Diktatur* in which Schmitt states his understanding of the impossibility of having both a constitutional text and a sovereign dictatorship – because while the commissar dictator is authorized by a constituted body and has his provision in the existing constitutional text, the sovereign dictatorship derives immediately from the constituent power which, being original, *establishes* a new constitution – Bendersky says that it was not in Schmitt's objectives to elevate the president to the level of sovereign dictator, being above the constitution (see Bendersky, 1983, p. 76). Bendersky supports this thesis because, during an exceptional state, the president assumes the functions of a commissar dictator to preserve the constitutional order in force —dictatorship as a commission for action— and even though he can suspend part of the constitutional text, such measures would be temporary and the constitution would have to be restored to its original form after the moment of crisis. However,

in this interval in which the law is removed, there is no limitation on sovereign power. Although Schmitt recognizes, as Bendersky says, the impossibility of changing the form of government from a republic to a monarchy, as well as partially revoking or revising the constitutional text via article 48, when commenting on the dictatorship in the rule of law – through the figure of the state of siege – the constitutional provision states that the Reich president could take all necessary measures, at his discretion, according to the situation – he could even, referring to a speech by the then Reich Minister of Justice, Eugen Schiffer, in the Constitutional Assembly before the promulgation of the Weimar constitution, "cover cities with poisonous gases if, in the specific case, this is the necessary measure for the re-establishment of security and order" (Schmitt, 1964, p. 201).

In this way of reading the text on the dictatorship, we can see the presence of an open interpretation of article 48, to the limit, that there would be no obstacle to what the situation might demand in restoring the normal situation, something that will also appear in *Politische Theologie*. For such unlimited powers not to mean a dissolution of the entire existing legal order – moreover, to say that it is something constitutional – with the transmission of absolute sovereignty to the Reich President, Schmitt says that it would be necessary to take into account that such measures only apply to factual measures as a result of the positive force of the constitution, interference in the sphere of constitutionally guaranteed freedoms would always manifest itself factually. For Bendersky (1983, p. 35), this statement by Schmitt is prudent, as it would run counter to future interpretations of Schmitt's work as one that intentionally undermined the Weimar constitution and opened the way for a totalitarian dictatorship, a reading that to some extent is shared by the way Bueno seeks to present Schmittian thought in Brazil. According to Bendersky, at this point in the text, Schmitt would be opposing Schiffer's understanding – who inferred from article 48 that there were no limitations, that the power granted was unlimited – arguing that such an inference would be valid in itself only for de facto measures, for legislation and the administration of justice, by a provision in the constitutional text, i.e. the constitution fully provides for the provision, the power granted could not be unlimited precisely because of a limitation of principle.

According to Schmitt (1964, p. 202), if legislative acts were to fall under the power granted to the president by Article 48, it would be an "unlimited delegation and [...] a contradiction that still does not suspend the constitution." Schmitt adds, "the president, or the *Reichstag,* would be-

come the bearer of a *pouvoir constituant,* and the constitution, being part of the constituted order, would remain a provisional and precarious solution." The control that parliament exercises over the Reich President would make it impossible, according to Bendersky, to speak of unlimited power. It should be remembered that the text on dictatorship was published in 1921, *Political Theology* in 1922, and *The Historical and Spiritual Situation of Current Parliamentarianism* in 1923, so Schmitt's critique of parliament had not yet been fully developed, which is perhaps why he bets on parliament as a limiter of absolute sovereign power. The contradiction pointed out by Schmitt in the constitutional text arises because in addition to the general power of action to achieve the restoration of public security and order, the president could temporarily suspend the validity, in whole or in part, of the fundamental rights established in the legal provisions relating to personal liberty (art. 114), inviolability of the home (art. 115), secrecy of correspondence (art. 117), freedom of the press (art. 118), freedom of assembly (art. 123), freedom of association (art. 124), just as he relativized private property (art. 153).

> As opposed to the unlimited power granted [...], here the power is limited in the sense that the fundamental rights susceptible to interference are enumerated exhaustively. [...] the enumeration in no way signifies a delegation of legislative power, but only an empowerment for de facto action, by virtue of which it is not necessary to take into account the rights that, in the concrete case, oppose such action. The fundamental rights listed are, of course, numerous and their content is so general that the empowerment hardly contains a delimitation [...]. Despite this, it remains a strange regulation, since it first grants the power to suspend the entire existing legal order, including Article 159, and then lists a limited number of fundamental rights that can be suspended. It makes no sense to allow the Reich President to cover cities with poisonous gases, threaten the death penalty and express himself through extraordinary commissions, while on the other hand having to guarantee [...] that he can allow the civil authorities, for example, to ban periodicals. The right to life and death is granted implicitly, while the right to suspend freedom of the press is granted explicitly. (Schmitt, 1964, p. 202-203)

Schmitt was not surprised by these contradictions in the Weimar constitutional text, precisely because they were the result of the combination of sovereign dictatorship and commissarial dictatorship. In the transition

from royal absolutism to the bourgeois rule of law, it was assumed that from then on the unity of the state would be definitively guaranteed, that "security could be altered by riots and mutinies, but homogeneity would not be seriously threatened by social groups within the state" (Schmitt, 1964, p. 203), as if it were possible to calculate and regulate in advance the actions of individuals or a group of individuals aimed at altering the existing legal order. The 1921 text already contained the outline of the argument developed in *Politische Theologie* that such a limitation via regulation could perhaps jeopardize the end to be achieved. Readings such as Bendersky's indicate that Schmitt, at the beginning of the Weimar Republic, was concerned about the possible development of a dictatorship along the lines of what would become National Socialism – something also present in the 1923 text, when he said that the dictatorship seemed to him to be an interruption in the continuity of development, a mechanical intervention in organic evolution (see Schmitt, 2017, p. 68) -, contributing to the interpretation that Schmitt was not fully focused on developing an elaborate totalitarian theory at the beginning of the 1920s. Bendersky considers Schmitt an opportunist who, taking advantage of the influence of National Socialism on the development of his intellectual career, was concerned, "like the Nazi *Kronjurist*, [with] establishing a constitutional framework for the Third *Reich*" (Bendersky, 1983, p. 242). In his reading, Schmitt saw National Socialism as an early movement that required a better development of its political and legal theoretical foundations: "His attempt to provide such foundations along the lines of a traditional authoritarian regime was abandoned and he [Schmitt] succeeded only in helping to consolidate a totalitarian dictatorship" (Bendersky, 1983, p. 242). Bendersky comments that members of the party hierarchy welcomed his support in the early stages of the regime – because of his reputation which lent respectability to the movement – but as soon as Schmitt tried to exert any real influence, an internal struggle began to eliminate him: "In 1936, the *Deutsche Briefe* aptly summarized its situation in Schiller's phrase: '*The Moor has done his duty, the Moor can go*'" (Bendersky, 1983, p. 242; Bendersky, 1979, pp. 309-328). Even so, Bendersky is reluctant to recognize a totalitarian potential in Schmitt's work, which Bueno defends and credits Schmitt's work not only with being receptive to dictatorships but also with having its ultimate development in the realization of the totalitarian state in the Third Reich.

As presented in *Political Theology,* Schmittian decisionism demands the superiority of the state over the law, which is why in the exception the or-

der subsists, even though it is not a legal order. The concrete situation brings this separation to light. The origin of law is through decision and not based on a norm, because "a general norm, as the current legal norm presents itself, can never cover an absolute exception and therefore never fully justify the decision that there is a real case of exception" (Schmitt, 1979, p. 11). Only the sovereign decision can guarantee order. The sovereign creates and guarantees the situation as a whole, holding a monopoly on this decision. Hence Schmitt's assertion that the case of exception reveals more clearly the essence of state authority. Ultimately, this relates to the problem of the unpredictability of the law in subsuming all exceptional situations. It is precisely because the norm has gaps that it is necessary to recognize the decision, not a decision delimited by the norm, but a decision that creates the norm, not a strictly legal decisionism that originates exclusively from the rule, but a political decisionism that nevertheless creates the rule.

Schmitt starts from the concrete emergency case to explain normality: the exception reveals the legal element of the decision in its absolute purity. For what he calls the "philosophy of concrete life", the exception is more important than the rule because the rule itself only lives from the exception. The source of all law therefore lies in the authority and sovereignty of a final decision. The element of the decision precedes the moment when the legal order is established and is unattainable by the order once it has been created. Law consists of the unification of the *Führer*'s will in the form of law, with subjects unconditionally subject to the politically unified will of the leader. The liberal state's tendency to regulate the state of exception represents an attempt to circumscribe the case in which the law suspends itself, which is why Schmitt questions where the law creates this *vigor* or force, and how it would be logically possible for a norm to be valid except for a concrete case that it cannot factually fully cover? Cases of extraordinary danger to security and order require such treatment as to remove normative bindings. The essence of sovereignty involves both deciding what is an exception and taking the measures appropriate to this exceptional situation, and is understood not as a monopoly on force, but as a monopoly on the ability to decide on the exception and also on normality. Designating something as an exception involves saying something about the nature and quality of the rule. The decision on the exception is above the normative framework insofar as it consists of the temporary suspension of legal restrictions on sovereignty, while the exception is what defines the condition of possibility for the right to exist. This is the meaning of the statement: "It cannot be clearly indicated

when there is a case of emergency, nor can it be enumerated in terms of content what can be done in such cases, when it really is an extreme emergency case that must be eliminated" (Schmitt, 1979, p. 12). The rule of law has no competence to deal with the content of the state of exception.

According to Schmitt, all the trends in the development of the modern rule of law were aimed at eliminating a sovereign whose power was not limited by the legal order, but whether or not the extreme exceptional case could be eliminated was not a legal question. The essence of sovereignty —and the entire legal order— is revealed in and through the exception: "[...] situated at the extremity of the legal order, [the state of exception] is what makes the essence of normality intelligible, because sovereignty as supreme *potestas* is not defined by the monopoly of force, but by the monopoly of *decision*" (Giacoia Jr., 2018, p. 149). Schmitt will criticize the defense of the decentralization of decision-making, the attempt to limit what we could see as a certain arbitrariness of the sovereign's decisions —since they are unlimited by the norm. The author is opposed to normativism, which seeks to deny the possibility of defending a sovereign decision that decides without normative limits.

IV. Conclusion

The discussion about who should be the guardian of the Constitution revolves around the concept of sovereignty. Kelsen sees law as a logical system of hierarchically arranged rules, with consistency, coherence, and completeness. It would be important for him to define sovereignty in an inextricable relationship with the concept of norm, in such a way that "a man or a group of men is given the predicate 'sovereign' only insofar as it is assumed that they represent a norm (or group of norms) as supreme" (Giacoia Jr., 2018, p. 145). It is precisely in this sense that Kelsen would claim that the sovereign state is a supreme order, which is not derived from any other higher order and which is presupposed as supreme.

The truth content of sovereignty depends on positive law: an order can only be said to be sovereign if it is not included in any other order, from which it follows that the concept of sovereignty necessarily refers to the world legal order. According to Schmitt, under Kant emergency law would no longer even be considered law, which is why he finds it understandable that a neo-Kantian like Kelsen would not systematically know what to do

with a state of emergency. However, according to Schmitt, even rationalists should be interested in the fact that the legal order could foresee the exceptional case and suspend itself. It is in this vein that Schmitt, treating this as an "old liberal denial", states that Kelsen solves the problem of the concept of sovereignty simply by denying it. It is a doctrine of identity between the state and the legal order so that the state is neither the author nor the source of the legal order. According to Kelsen, Schmitt continues, all these notions would be personifications and hypostases, duplicates of the uniform and identical legal system for different subjects. "The state, that is, the legal order, is a system of attributions to a final point of attribution and an ultimate fundamental norm" (Schmitt, 1979, p. 28). This debate also includes violence: while Kelsen excludes it from the limits of purely juridical rationality, Schmitt, on the other hand, places it at the heart of the norm, because no norm subsists in chaos. Hence, if there is no order, no law dominates and prevails – an order that, in turn, can only be created violently. "In the essence of law lies a victorious decision: the implementation and securing of an order, which, in crisis situations, must be defended with all violence" (Giacoia Jr., 2018, p. 215).

What to do when the legal system doesn't offer a way out in cases of extreme urgency is the problem to which Schmitt tries to provide answers, but Schmitt's gamble is not disconnected from his political thought, which is affiliated with a Catholic and counter-revolutionary tradition. "Schmitt saw the dangers of democratic suicide. As an antidote, he advocated a strong leader, reinforced by a strong bureaucracy, who should ban radical movements and rule by decree" (Müller, 2003, p. 36). For Bueno, such an alternative involves "allowing the [sovereign] power to respond with the necessary means, whatever they may be, so that effectiveness, measured by the restoration of normality, is achieved" (Bueno, 2010, p. 1140). The sovereign is beyond the limits of the legal, and the political decision to suspend the current order is beyond the reach of the normative order. The implications are internal and external: in the first case, his power translates into the power to decide on the exception and the suspension of the current legal order; on the external level, it implies recognizing in the sovereign the ability to decide on the friends and enemies of the state, more specifically, to decide on the possibility of war, requiring citizens to be exposed to danger and ready to kill. Despite the internal divergences in Schmitt's studies in this regard, it is against this backdrop that Schmitt was able to conclude the work dedicated to the search for a guardian of the constitution with the bet on the *last* and *only* in-

stance capable of confronting pluralism, of saving the state from the power complexes that dispute the state totality and the monopoly of the political.

Published as a book in 1931, *Der Hüter der Verfassung* inaugurated the discussion on the total state and the attempt to account for a concrete situation in which state authority was undermined in the bowels of the Weimarian state itself, at the limit, a state dedicated to the satisfaction of private aspirations, whose power and sovereignty dissolves in the management of the relationships of groups that endeavor to submit it to their service. A weak state that is constantly threatened with dissolution; a state that is no longer sovereign, but a complex of disputed powers whose administration depends on organized economic and social interests: a state that is total not because of its strength, but because the demands and compromises between parties and organizations forced it to increase its intervention exponentially, while at the same time subordinating its strength. Behind the debate about the guardianship of the constitution —whether it should fall to a court or the president— lies a dialogue about power, whether centralized or not, a debate that is still of fundamental importance for contemporary political and legal theory.

In any case, our aim was simply to make a brief note of the importance of this constitutional debate today, that is, in circumstances marked by populism, political conflicts of all kinds and, even more so, increasingly marked by direct action by the judiciary, not just in Brazil, but throughout the world. This is not to say that we should simply follow the lines laid down by Schmitt; on the contrary, we need to understand his criticisms of the Rule of Law in order to strengthen it and remain vigilant against any attempt to destroy it. He is an important author who has by no means gone unnoticed by 20th century authors who have looked at issues relating to law, politics, liberalism and the problems that the rule of law and liberal-parliamentary democracy routinely and continuously face. In the wake of the question raised by Jean-François Kervégan's work, entitled « *Que faire de Carl Schmitt ?* », well, perhaps we can do anything but neglect him. The ostracism and condemnation of this "subject" on account of his political choices in 1933 —which were completely and utterly reprehensible—, in no way nullifies his singular contribution and the questions he raised —from which we cannot easily escape.

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APA

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