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SOLIDARITY IN NORTH-AMERICAN CONSTITUTIONALISM

A SOLIDARIEDADE NO CONSTITUCIONALISMO NORTE-AMERICANO

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RESUMO

A solidariedade se revela uma perspectiva fundamental no âmbito do constitucionalismo. O modelo norte-americano pode ser visualizado com adjetivos específicos, que lhe fornecem um tom diferenciado. O institucionalismo histórico e a teoria democrática dualista, desenvolvidos por Stephen Griffin e Bruce Ackerman respectivamente, podem fornecer uma caracterização peculiar de um constitucionalismo em que o Poder Judiciário encontra abrangência, mas em que outros feixes de atuação não podem ser desconsiderados no processo de aplicação e interpretação da Constituição de 1787. Nesse sentido, as pressões populares e atuação conjunta do Legislativo e do Executivo merecem apreciação, como forma de estabelecimento dos direitos inerentes, mormente aqueles ligados à solidariedade e implementação de políticas públicas em conjugação aos direitos sociais.

Palavras-Chave: Solidariedade; Constitucionalismo; Institucionalismo Histórico; Teoria Dualista Democrática; Judicialização.

ABSTRACT

Solidarity is a fundamental perspective in the constitutional framework. The American model can be visualized with specific adjectives, which give it a differentiated tone. The historical institutionalism and dualist democratic theory developed by Stephen Griffin and Bruce Ackerman respectively can provide a peculiar characterization of a constitutionalism in which the Judiciary finds scope, but in which other action beams cannot be disregarded in the process of application and interpretation of the 1787 Constitution. In this sense, the popular pressures and joint action of the Legislative and Executive deserve appreciation, as a way to establish the inherent rights, especially those related to solidarity and implementation of public policies in conjunction with social rights.

KEYWORDS: Solidarity; Constitutionalism; Historical Institutionalism; Dualist Democratic Theory; Judicialization.

INTRODUCTION

Solidarity reveals itself as a principle to be observed not only in Brazilian Law, in a context of broad, inclusive public policies that comply with constitutional and legal precepts, but also in the North-American case, in its political and legal system.

Considering the nuances that characterize the North-American system, with its political and legal peculiarities, we aim at verifying and instrumentalizing solidarity in the opportune reality as a fact expressible by a historical pursuit, relative to an ever imperative need in the implementation of public policies.

Differently from the Brazilian case, it is worth mentioning the role that can be attributed to the political element as an effective concatenator of these policies, which fill the North American constitutionalism in a bias that is always intended to be up to date with the popular demands, with no exclusive action by the Judiciary Power for the concreteness of the constitutionally established guidelines.

At the heart of the matter is the debate held by representatives of the doctrine, such as Stephen Griffin and Bruce Ackerman, who delimit the theoretical framework of the present study.

The authors mentioned above develop a work that considers North-American constitutionalism as being affected by historical and political determinants that go beyond the main lines of the North-American Constitution of 1787, making up a constitutional study that is not based only and exclusively on the actions of the courts and jurisprudence, as it is observed more vehemently in other places

in the hemisphere, such as Brazil itself and its increasing judicialization of politics after the 1988 Constitution.

The aim is to investigate how solidarity finds a concrete expression in American constitutionalism, at the same time as we seek to understand the scope of the political and legal fields in the delimitation of this same constitutionalism. Is it only the Judiciary that acts vehemently in the elucidated context? Can the political field present a preponderance for the scope of this task? Does the Judiciary effectively fulfill an indispensable function for the delimitation of public policies that are constitutional and that concretize the principle of solidarity? These are some questions that will be duly pondered in the analysis that will take place.

To this end, the study begins by highlighting solidarity as an element with unique peculiarities in American society since the time of its formation, focusing on the historical period beginning in the nineteenth century, moving on to the consonant analysis of historical institutionalism and dualist theory, Griffin and Ackerman's approaches on how American constitutionalism develops, in the context of a theory of constitutional change. Finally, before entering the conclusion, we face the issue of the judicialization of politics, and whether the determinants that characterize it are assessable in the concrete case.

The approach method to be adopted in the research is the hypothetical-deductive, because the intellectual work will be based on the appreciation of the formulated hypothesis, confronting it with the existing knowledge, expressed by the national and international doctrines related to the theme, especially the analysis of the U.S. Constitution and its interconnections with the political and legal fields, the latter expressed by the Supreme Court, using Luhmann's terminology.

On the other hand, the method of procedure to be adopted in the research is based on a bibliographical survey, expressed through the argumentative-dissertative method, since the intention is to present the theme in due depth, based on national and international doctrine related to the theme. The focus is on the study of the constitutional document cited and the applicable interconnections. As for the results, the analysis seeks to assess whether constitutional change, the focus of the American constitutionalism portrayed here, is related to solidarity as a primacy of jurisdictional action in compliance with constitutional precepts, or whether constitutional change is reported as an explanatory process for the opening and conquest of rights, based on a historical

institutionalism supported by the political element, which finds its basis of support in popular demands and pressures.

1 SOLIDARITY PERMEATING THE POLITICAL AND SOCIAL FIELDS IN THE NORTH AMERICAN CONTEXT

Solidarity is a constant feature of the North American system.

Despite the fact that the North American state is predominantly proclaimed as being liberal, the intimate characteristics of solidarity as a relevant principle remain opposable. Indeed, values such as liberty, equality and solidarity are complementary and one cannot persist without the other (FARIAS, 2006, p. 39).

Solidarity can be understood today as a principled framework, which can be reflected in the normative sphere, no longer limited to the phenomena and enlightenment spectrum of the eighteenth-century revolutions, expressed by liberty, equality and fraternity. It now embraces, in its core, the plurality of human relationships, participation in public affairs, reverberating in its core the joint human action that seeks to preserve individualities within a plurality, while at the same time directing the political and legal organicity to the complementation of the inherent needs that may find casuistic lag in the social plan[1]. Social rights must be observed within this framework, having fundamental rights as a reference.

This updated facet of solidarity gained strength as from the late 19th century and early 20th century, with the structuring of the Welfare State. The establishment of the latter strengthened the idea of solidarity, an issue that came to enjoy a strong position not only in the social field, but also in the political (with the implementation of public policies) and legal fields, as a reflection of that first situational force.

The welfare state is commonly seen as an antithesis to the liberal state, more concerned with the freedom to negotiate at the expense of the inherent rights of the people (BONAVIDES, 2011). However, it can be considered as a new approach made to the demands that arose and the rights that found a state of precariousness before the public and private actions. Far from developing the Liberal State in its gaps, the Social State or State of Solidarity can be conceived as

[1] A questão da assistência social como paradigma da solidariedade no Estado Social é enfocada pela doutrina, como se nota na obra de José Fernando de Castro Farias, a título exemplificativo.

an innovation of the social evolution itself, relating to the political and legal fields as an interconnected structure.

In this sense, the reality of the Social State deserves due inquiry as to its conceptual depth, considering the Liberal State in terms of content. "It was about establishing a vision of society as a perpetual invention and reinvention of new procedures for managing the social. It moved in the gap between the forces of the past and the forces of the future" (FARIAS, 1999, p. 63).

The United States of America, even though it is considered a liberal state, affianced more closely to the creative creeds of Alexander Hamilton over Thomas Jefferson, also has the element of solidarity in its nature.

The Constitution of 1787 was enacted in the wake of a political movement driven by Hamiltonian federalism that seeks a greater governmental intervention in specific localities. Despite the criticism that can be directed at this intervention for violating the rights inherent to the states singularly considered, in the wake of the Jeffersonian defense, the constitutional document remained as a framework that can reflect a liberal political-economic situation, but that assumes specific features regarding solidarity as a principle, especially with regard to the power conferred on the Union to intervene in state issues that could harm even the situation of U.S. citizens. As already stated, there is no freedom without solidarity, even in a state considered to be liberal.

In this way, the American Congress, acting in conjunction with the Executive, can act to provide due fiscal and tax control throughout the Union, monitoring the taxes collected by the states, and it is possible to act within this context when it is found that a measure has the potential to harm the well-being of the United States of America, with the Union not being considered "solely" in this definition. Section 8 of Art. 1 of the Constitution of 1787[2] provides for this understanding.

It should also be made clear that the issue of solidarity as a principle was not only opposable with sensitive features in the North American legal system. Even with the mentioned liberal content, the question of solidarity as social participation in public affairs and assistance in the communal sphere is qualified as an own characteristic of American citizenship in earlier times.

The full associativism of the citizens that make up the social structure is observable in moments such as that advocated by the century of North American

[2] Section 8º. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States (...)".

independence. Any grievance that may be constituted for the composition of interests of a peculiar locality, such as a village or a smaller geographic structure, gains the agenda of North American affairs.

It can be seen from this how the issue of solidarity deserves due reflexion, since the political and social entanglement is palatable, so that the social issue can be understood as a demand of strong propulsion by the population since these times, and even at earlier times in American history.

Alexis of Tocqueville focuses on this involvement, which may present participation in the development of solidarity in the American state (TOCQUEVILLE, 2014, p. 219-220):

> O habitante dos Estados Unidos aprende desde o nascimento que deve contar consigo mesmo para lutar contra os males e os embaraços da vida; ele lança à autoridade social um olhar desconfiado e inquieto, e só apela para o seu poder quando não pode dispensá-lo. Isso começa a se perceber desde a escola, onde as crianças se submetem, até mesmo nos jogos, as regras que elas mesmas estabelecem e punem entre si os delitos que elas mesmas definem. O mesmo espírito se encontra em todos os atos da vida social. Um problema qualquer ocorre na via pública, a passagem é interrompida, o tráfego detido; os vizinhos logo se estabelecem em corpo deliberador; dessa assembleia improvisada sairá um poder executivo que remediará o mal, antes que a ideia de uma autoridade preexistente à dos interessados se apresente à imaginação de alguém. Se se trata de um prazer, logo se associarão para dar maior esplendor e regularidade à festa. Unem enfim para resistir a inimigos totalmente intelectuais: combatem em comum a intemperança. Nos Estados Unidos, as pessoas se associam com fins de segurança pública, comércio e indústria, moral e religião. Não há nada que a vontade humana desespere alcançar pela livre ação da força coletiva dos indivíduos.

Therefore, it is said that participation in public affairs leads to the strengthening of solidarity. The social field presses on the political field as a pretension that is inherent to social behavior, and is conducive to political participation in any corner whatsoever. In this case, even though a liberal State model persists, solidarity is not unscathed, presuming joint action by citizens before the political power, with the Judiciary power endorsing this claim on several occasions. This last issue will be better dealt with in the subsequent item.

2 HISTORICAL INSTITUTIONALISM AND DUALIST THEORY

In the theme of understanding solidarity in American constitutionalism, it is adopted the position of encompassing in the present study an understanding of the constitutional changes that take place in the national case in question, using Stephen Griffin and Bruce Ackerman as theoretical references. The theory of constitutional change incorporates different refinements in their work.

In effect, as the Welfare State grew stronger at the end of the 19th century and the beginning of the 20th century, it prompted the Judiciary to take a more arduous role, with the aim of realizing the social rights planned in constitutional documents that had arisen, such as the Weimar Constitution and the Mexican Constitution. Solidarity has not escaped this spectrum, and has accompanied the framework that is enforceable before the courts.

Griffin and Ackerman, in turn, present a distinct view to the question of American constitutionalism, notably when they analyze constitutional change and its effects on the enforceability of rights.

Historical institutionalism is developed by Stephen Griffin and deserves due consideration as a way of viewing American constitutionalism, through the theory of constitutional change, in which the judiciary, a constituent of the legal field, stands out as a field of action that is not decisive for the due perpetration of rights, such as those provided by the Constitution of 1787, citing social rights.

It is a point in the circle being studied at the present time that the Judiciary may be raised to a second level in the way the Constitution of 1787 is interpreted. What is meant is that the Legislative Branch, in a normative framework of execution, together with the Executive Branch carry out the proper application and variation of the constitutional precepts according to realistic needs. In other words, the Constitution is changed, and it is mainly the Executive, through the President, that fills the vitally important channel for this processing. The Judiciary is left with a role of rights concretion, but not with exclusivity or prominence.

It ends up going from a normativism of the Founding Fathers to a democracy of rights, demandable by the popular sovereignty, by the constituted constitutional powers. The period of accentuated concession of civil rights, beginning in the 1950s, denotes an understanding of responsibility in this enhancement by all constitutional bodies, establishing what Griffin understands, it is emphasized, as a democracy of rights (VIEIRA; MASTRODI NETO; VALLE, 2005, p. 20) .

Having in mind the difficult process of constitutional change, especially in the case of Art. 5 of the U.S. Constitution[3] making it impossible even to consider the participation of the states in the composition of national legislative frameworks (Dahl, 2015, p. 86-87), politics can act decisively in the pursuit of social needs desirable at the appropriate historical moment. Political instability is a problem raised in the concrete case (SIFFERT, 2002, p. 62-63):

> O problema quanto às mudanças constitucionais se colocou para aqueles que a criaram. Se a Constituição permite mudanças muito facilmente corre o risco de não servir como estrutura política e de se tornar refém de diferentes arrebatamentos políticos. De outro lado, se estas mudanças se tornam muito difíceis de serem produzidas podem levar a uma instabilidade política e ao repúdio da Constituição através de mudanças produzidas fora do âmbito das emendas.

For Griffin, the most visible moments in the actions of the Executive and Legislative branches of government, applying the Constitution, 1787, and consensual rights in a principled way, came at definable times, such as post-Civil War Reconstruction and the New Deal, the latter of the scope and responsibility of President Franklin Delano Roosevelt.

It does not mean to say that it was only at major political moments such as those cited that constitutional change was perpetrated. In the act of purchase of Louisiana by Thomas Jefferson, then president of the United States of America, at the beginning of the 19th century, there was thought about the possibility of a constitutional amendment that would allow the acquisition. Due to Napoleon's fear of changing his mind about selling the mentioned territory, since France was at war with Great Britain, it was decided to proceed with the acquisition without this constitutional seal, which ended up with the support of the Congress. The basis of the adopted position was the imperative need to maintain the national sovereignty in disputed territories, as well as to preserve the security and legal

[3] "Article 5º. The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provide that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate".

integrity of the American national state, considering the preamble and Article 4 (Sections 2 and 4) of the Constitution of 1787[4].

More recently, the implementation of the Obamacare[5] program by President Barack Obama in 2014, after intense debate since 2012, imposing an obligation on all US citizens to purchase a health plan when not covered by a government plan (at the time, 40 million Americans did not have a health plan), reflected a trend in the social field that was welcomed by the political field, and was later endorsed as constitutional by the Supreme Court. It recognized the right to health in a specific facet, in the face of the stratificated facet of liberty in a purely liberal and timeless analysis of the Constitution, of 1787.

In the case of Reconstruction, numerous agencies were created in order to perpetrate administrative decentralization, such as the Interstate Commerce Commission, the Federal Trade Commission, the Federal Reserve Board, among others that were created to approximate rights at the constitutional level (GRIFFIN, 1996, p. 79).

With Roosevelt, the same approach was observed, with the implementation of the New Deal and its policy of economic reconstruction that, according to the president himself, could not be based on postulates identical to those of the Founding Fathers, since the constitutional principles should adapt to new conditions, not remaining immutable (COMPARATO, 2010). The human composition of the Supreme Court would deserve changes, due to its game of obstructing the implementation of various measures advocated by the New Deal.

In the temporal agenda of the Roosevelt administration is its confrontation with the Supreme Court to instrumentalize the New Deal. Even with this barrier, his efforts to enforce the Constitution of 1787, as well as his Bill of Rights, are evident. American welfare merited consideration for government welfare programs, such as the Social Security Act of 1935, which provided for

[4] "We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America". (...) Article 4º. Section 2º. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states (...). Section 4º. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence".

[5] Até a confecção do presente artigo, o presidente Donald Trump reitera uma ação política específica pelo afastamento da política pública retratada. Embora tenha encontrado certos insucessos nas votações do Congresso em prol do enfraquecimento do Obamacare, age por outras frentes, como pela autorização federal aos Estados para solicitarem alterações específicas na cobertura prevista pelo programa.

unemployment insurance, pensions for the elderly, as well as assistance for the deficients, poor elderly and dependent children (BRINKLEY, 2014, p. 66).

In Griffin's words, American constitutionalism can be characterized as a promoter of rights, especially those provided in the Constitution of 1787, and those that are derived from them, as long as the Executive and Legislative branches act on a primordial level, reflecting social participation on the political level, mirroring their demands (GRIFFIN, 1996, p. 41):

> The experience of American constitutionalism shows that you can maintain the written quality of the constitution only at the expense of abandoning the framework character of the document and you can maintain the framework character of the constitution only by abandoning the idea that all important constitutional change must occur through formal amendment.

This is to say that the meaning of the Constitution can take on another feature, expressed by "(...) a text based institutional practice in which authoritative interpreters can create new constitutional norms" (GRIFFIN, 1996, p. 56).

Bruce Ackerman treats the highlighted issue from another bias. His scope of scope refers to the dualist democratic theory, which resembles Griffin in approaching the constitutional change, but considered specific tessituras.

A differentiation is made between the democratic models within the same political angle. The decisory group made by the political representative body stands out, which in itself translates into today's political-bureaucratic activity, in which the elected representatives exercise their activities in the elected Houses or Assemblies. In other words, we cannot visualize a political action of the masses with effectiveness and actuality in this first democratic scenario.

In a second moment, according to Ackerman, the people are illustrated as politically engaged, engendering and seeking transformations in the system (ACKERMAN, 1991, p. 6):

> Decisions by the People occur rarely, and under special constitutional conditions. Before gaining the authority to make supreme law in the name of the People, a movement's political partisans must first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their

> fellow Americans to support their initiative as its merits are discussed time and again, in the deliberative for a provided for "higher lawmaking". It is only then that a political movement earns the enhanced legitimacy the dualist Constitution accords to decisions made by the People.

Considering this understanding, the main constitutional changes occurred at the key moments already listed by Griffin, adding to this list the moment of the original adoption of the Constitution of 1787 and its Bill of Rights. He clarifies, however, that these changes occurred far from legality, posthumously presupposed in art. 5 of the constitutional cited document.

Thus, one finds on one side the constitutional transformations, taken as legal, resulting from an intense popular democratic activity that reflected in the Legislative and, especially, in the Executive. However, they occurred outside the guidelines imposed by the Constitution, of 1787, in its formal aspect.

The judiciary continues to play an important role in the American democracy, preserving the applicability of the guidelines of the Constitution of 1787. However, this activity can be curtailed if it afflicts negatively that delimited sense of dual democracy, especially in opposition to popularly engaged activities (MONTEBELLO, 2002, p. 102-103):

> Ackerman deixa claro, contudo, que a revisão judicial perderá sua legitimidade caso venha a invalidar conquistas revolucionárias resultantes da deliberação soberana do povo, ainda que a mesma confronte direitos fundamentais constitucionais. É dizer, a Suprema Corte deve se submeter à democracia hierarquicamente superior, ou seja, às grandes decisões políticas tomadas por uma cidadania fortemente engajada.

In other terms, the source of law, in the featured thought, is said to refer to the people, to the constituent citizens of the United States of America, so that the true interpretation of the Constitution's attributions is remissible to the dual democratic power with a predominance of the popular masses in their intense political activity.

Provisions that appear as fundamental rights, that are valued as affectionate to solidarity itself, find support for instrumentalization through public policies that provide catalyzing mechanisms, even if they are permeated, unrelatedly to the constitutional legislative activity.

By presupposed logic, the popular activity that sees the need to establish a state religion, to the detriment of the one provided for in the Constitution, of

1787, in its 1st amendment[6], deserves support, and it is up to the Supreme Court only to back up this position, fruit of dual and fundamental democratic activity in the process of constitutional change since past times (MONTEBELLO, 2002, p. 103).

The same goes for solidarity and implementation of social rights in the context of a liberal state. The democratic activity coming from the popular masses reveals itself as a permissive apt for such, even if going through the art. 5 of the Constitution of 1787 and fundamental aspects of its constitutional dynamics (SMANIO, 2015).

3 JUDICIALIZATION OF POLITICS?

In light of the analyzed proposal of constitutional change for the North American case, the role that the Judiciary plays in the adopted system is investigated, even regarding the implementation of public policies via judicial activism or the so-called judicialization of politics.

Historically, a deep activity of the North American Judiciary can be seen, especially of its Supreme Court, since its formation as an independent state. Upon his assumption of the office of the president of the United States of America in 1801, Thomas Jefferson faced the intervention of the Supreme Court, headed by John Marshall, when his predecessor, John Adams, made several appointments in the Administration in earlier and lower moments to the assumption of the new president, an issue solved by the Judiciary. This is the famous Marbury v. Madison case of 1803. It should be pointed out that the Constitution itself, of 1787, does not vehemently approve the Federal Judiciary's disposal to have a more comprehensive role with regard to political issues, which demonstrates the Supreme Court's tender proposal for a judicialization that would develop over time (SOUTO, 2015, p. 5):

> O fato é que o sintetismo da Lei Fundamental norte-americana não permitiu que se estabelecesse, de forma expressa e inequívoca, a competência da Suprema Corte para decretar a inconstitucionalidade de lei ou ato normativo dos demais Poderes da República. Não parece ter sido essa uma atitude deliberada, isto é, de forma proposital não

[6] "Amendment 1º. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances".

> previram a competência da Suprema Corte para declarar a inconstitucionalidade de lei, ainda que não se possa esquecer que, se tal dispositivo tivesse sido inserido de forma direta, expressa, muito provavelmente a ratificação do Texto pelos Estados teria sofrido uma oposição ainda maior à efetivamente verificada.

This activity has traveled a growing line throughout its history, with constant clashes with the legislative and executive branches of the government. The case of the New Deal reflects this reality.

Due to this position of the Supreme Court, we address the issue of the constitutional change and the implementation of public policies, how those related to solidarity relate to the judiciary in its basic functions.

Even when considering the enforceable judicialization of politics, in the North American case, the status quo refers to a reality that does not fit into this assertion. The own figure of the constitutional mutation, which could be opposable, remains placed in the background, given the theoretical clippings allocated in the present exposition[7].

It is understood that the postures adopted by the Judiciary do nothing more than reflect a position expressed by Ackerman's dual democracy, in its popular facet, and that contaminates the Executive and Legislative branches. In this way, the legal measures adopted by the North American Supreme Court would represent the homologation of tendencies already written in the other powers, observing the power instilled by Ackerman's dual democracy.

Ackerman expresses this position in the famous case of the Slaughterhouses[8]:

> (...) it is not the case that every important constitutional question ends up in the courts for full-dress resolution. Sometimes, as in Slaughterhouse, courts simply acknowledge the constitutional conclusion reached by others after long and bitter years of argument.

[7] Na mutação constitucional, tem-se uma alteração no sentido e alcance das disposições constitucionais, enquanto no caso da mudança constitucional norte-americana tem-se um espectro mais dilatado de abrangência, que mudança constitucional profunda no pós-anos 30 do século passado. reveste o texto constitucional de uma nova inspiração, deixando em segundo plano o normativismo dos Founding Fathers para a recuperação de uma democracia de direitos.

[8] Trata-se de um movimento propagado pelos matadouros de Nova Orleans contra o governo estadual, em razão da criação de um monopólio de matadouros com o potencial de afetar negativamente seus negócios. Na visão dos primeiros, as emendas da Reconstrução forneciam aos brancos e aos negros direitos como cidadãos norte- americanos, incluindo o direito de competir em um cenário de livre mercado, sem interferências legislativas injustificadas. A Suprema Corte rejeitou a demanda dos matadouros de Nova Orleans.

> The challenge is to take those non-Tocquevillean truths seriously. The great precedents established by Presidents and Congresses in dialogue with their fellow citizens, command respect even if their significance is given scant acknowledgment in judicial opinions. It is about time for lawyers to move beyond their myopic focus on the work of the courts. It is not too late for them to redeem the promise made by the first words of the constitutional text, and to treat We the People as the principal architect of America's constitutional destiny (ACKERMAN, 1998, p. 252).

It is said that a moment of the Supreme Court's retreat from interventionist and laissez-faire reforms by the New Deal agreed with the spirit of democracy, since the interpretative principles that had been adopted judicially stood in the face of the dualistic democracy exposed or, in other terms, the historical institutionalism that includes the democratic values that should drive the nation's political activity, with reflexion in the legal field (and all grounded in the social field).

The judicialization was affected in this process, with the implementation of social policies, and of solidarity itself, supported by the activities of the Legislative and Executive branches (DUARTE; MOURA; MASTRODI; TSUBONE, 2005, p. 83):

> ACKERMAN e os defensores de sua teoria, em contrate, advertem-nos que, em realidade, a essência da constituição tinha sido transformada pelas políticas sociais e econômicas do governo Roosevelt – não simplesmente se tratava apenas de que aquelas interpretações anteriores a esse citado momento constitucional revelaram-se equivocadas e, por consequência, forma corrigidas ou o equilíbrio de poder entre os poderes Legislativo e Judiciário foi ajustado. Houve, sublinhamos, lembrando ACKERMAN e seus seguidores, uma mudança constitucional profunda no pós-anos 30 do século passado. reveste o texto constitucional de uma nova inspiração, deixando em segundo plano o normativismo dos Founding Fathers para a recuperação de uma democracia de direitos.

The supremacy of the Constitution and of popular sovereignty remain latent in the face of the power of the Judiciary, a fact that is more dynamic in peripheral societies.

Wherever a duly organized and politically active society cannot be visualized, the Judiciary is recognized as a suitable instance for unleveling the difficulties in implementing social policies in the context of the concept of solidarity.

The structure of the three powers revealing itself in a precarious way, with its inadvertent functioning, in the terms of a pertinent and position Social State, ends up propelling the deposit of social hopes on the back of the Judiciary, recognized its internal organicity and its affection to legal and constitutional principles específicult to a given society, pluralistic as it is recognized today (DUARTE; MOURA; MASTRODI; TSUBONE, 2005, p. 102-103).

Once a diverse democracy, in which the historical institutionalism and the dualist democratic theory gain robustness, it is understood that the Legislative and the Executive can fulfill this role, even with political and social implementations passing outside the guidelines imposed by the Judiciary, in parallel to what the infra-constitutional and constitutional order disposes of.

Vanice Lírio do Val's position highlights the mentioned debate (VALLE, 2005, p.149-150):

> Aliás, é importante destacar, a mudança constitucional brasileira normalmente se dá diretamente no plano da constituição jurídica, porque não se vê, no mais das vezes, o consenso constitucional que permitiria localizá-la, ainda que inicialmente, no plano da constituição política. No particular, portanto, nosso processo é inverso: a proposta de modificação se inicia no plano da constituição jurídica, a partir da qual se constrói, se não o consenso quanto ao mérito, ao menos o consenso quanto à inexorabilidade das mudanças empreendidas - eis que formalizadas no texto.

There is an inflexion, verificating the inversion from the legal to the political constitution. The judicialization of politics, therefore, would not fit into the North American model according to the theoretical framework adopted.

CONCLUSION

American constitutionalism can be understood from the perspective of a State built essentially under the liberal aegis, as outlined by Alexander Hamilton and the Federalist Party in the early days of its history.

However, it is possible to assert that solidarity, an outstanding characteristic of the Social State, was given attention in the North American constitutional space. Public policies were structured based on the assertion initially defined in this work, in order to complement the spirit of the Constitution of 1787 in its present day.

In these terms, based on the theoretical frameworks adopted for the pertinent approach, namely, Stephen Griffin and Bruce Ackerman, it was denoted that this instrumentalization has been perpetrated in a process of constitutional innovation that passes diagonally to the constitutional document, although it may be considered legal and in accordance with the American democratic spirit.

The historical institutionalism and the dualist democratic theory coexist in the conceptual aspect that the Legislative and the Executive have the power to interfere decisively in the process of applying the constitutional normativity, without the interference of the Judiciary, moving away from the contemplation of the ideal of judicialization of politics, which would be typical of the peripheral countries.

Based on this assertion, the activity of the Legislative and Executive branches, motivated by popular and citizen agitation for reforms that are pertinent to the specific historical context, provides them with the mobility to use the Constitution and its arguments to adjust relevant policies and legal-administrative measures in order to enforce social needs. In various historical periods, this has been observed, as in the cases of Reconstruction, in a post-Civil War period, and Roosevelt's New Deal.

The Judiciary, with the exception of its historical activism, has been left with the role of oficializing policies already decanted in the social environment and conducted by the two other branches of government in the constitutional arena. The example given of a principle contrary to the letter of the constitution, but adopted by popular sovereignty at a new historical moment, with the implementation of safeguard public policies at an early moment before the Supreme Court's manifestation, denotes this position.

Therefore, it is not clear, according to the understanding developed, that a judicialization of politics, or a process of constitutional mutation, in the terms engendered by the Brazilian doctrine, has been observed.

What we have seen is the stabilization of the Constitution of 1787 as a volatile institution, which receives its founding articles in a historical and punctual instrumentalization by the Legislative and Executive branches, with the endorsement of the people in their process of continuous demand for the fulfillment of their needs, even through social policies linked to solidarity.

Popular sovereignty, a principle of vital importance to American constitutionalism, was observed in the actions of these three branches, and, obliquely, the Constitution of 1787 as its mirror document. What could be

considered illegal in a Brazilian doctrinal system that focuses the entire constitutional process on its Judiciary, gains legality in a system in which the branches that are more likely to popular representativeness foster the space for public policies that become desirable.

Popular sovereignty triumphs, and constitutionalism finds a management space away from the activism and self-promotion of the Judiciary, which does not always reflete about the purity of its actions with regard to national interests.

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