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Rights of nature. The cutting edge of contemporary social constitutionalism

Derechos de la naturaleza. La avanzada del constitucionalismo social contemporáneo

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ABSTRACT: The contribution presented in this research explores the trajectories of constitutionalism in its history, which accompanies the most relevant events of the modern era. The author has set out to highlight the interrelations of social factors, the interests of natural and legal persons, the role of states and political groups and parties, and ideological anchors, as the main elements that lead to constitutional texts being placed in the leading role in the social fabric where they are today. The most novel expressions of constitutionalism are explored, among which the definition and recognition of the rights of nature constitute one of the most novel and important forms of its expression.

KEYWORDS: Constitution, political system, law, human rights.

RESUMEN: La contribución que se presenta incursiona en las trayectorias del constitucionalismo en su historia que acompaña los acontecimientos más relevantes de la era moderna. La autora se ha propuesto como objetivo destacar las interrelaciones de factores sociales, intereses de personas naturales y jurídicas, rol de los estados y de grupos y partidos políticos, anclajes ideológicos, como elementos principales que conducen a colocar los textos constitucionales en el papel protagónico del tejido social donde hoy se encuentran. Se incursiona en las expresiones más novedosas del constitucionalismo entre las que la definición y reconocimiento de los derechos de la naturaleza constituye una de las más novedosas e importantes formas de expresión del mismo.

PALABRAS CLAVE: Constitución, sistema político, Derecho, derechos humanos.

JEL CODE: D23, B25.

INTRODUCTION

The proclaimed rule of law has been gradually establishing itself as a guarantor of social rights through different legal systems and political structures. The globalisation of the 21st century is distinguished, among other factors, by the socialisation of experiences that find in technologies and social networks a scope that was unimaginable only decades ago. This has an impact on the perception and assumption of human rights as an amplified claim of individuals.

In what follows, we will now move through some of the main threads that run through the state of the art of constitutionalism studies.

The theoretical study of constitutionalism reveals its elaborations in correspondence with the social system that gives rise to them. During the 20th century, and especially in

its second half, assessments of constitutionalism were biased by the political criteria of the evaluator. If constitutionalism originated in a capitalist social system, it was generally accepted by academia. If, on the other hand, it originated in a social system of those then known as "socialist", it was repudiated even before it was studied.

These positions biased the study of the experiences of various nations, which limited the progress of studies on social constitutionalism. In the opinion of the author of this essay, any position that delegitimises per se the experience of any nation is questionable. I draw here on the concept of "situated knowledge" (Núñez, 2019), and notions of the epistemology of the observer (Watzlawick and Krieg, 2000).

In both theoretical constructs, there are important foundations that lead to revealing in the experience of each nation the most dissimilar edges that contribute to knowledge, without having to be discarded only because of their origin.

For this reason, the author does not agree with the disqualifying affirmation based on the questionable expression, due to its absolute nature, of the negation or inversion of the principle of closure, which states that "everything that is not prohibited is permitted" (CRE, 2008, art. 19). In other words, the application of its opposite is taken as a basis for the delegitimisation of the entirely legal system. In other words, "everything that is not permitted is prohibited". Although the author does not support this inversion of a legal principle, she considers, based on the contributions of the complex thinking of Edgar Morin (1998), that such a position leads to an unjustifiable simplification that detracts from the value of the conclusions that emanate from it. These constitutions - e.g., the Soviet ones of 1918, 1924, 1936, and 1977 - fall within the ontological classification formulated by Professor K. Loewenstein (1980) (quoted in the book "The Constitution of

the Soviet Union"). Loewenstein (1980) (quoted by Paolantonio, 1987, p. 208) into semantic Constitutions, which are those "disguise Constitutions" that establish a mere normative system that serves to justify the holding of power by its current holders without respecting individual rights.

Social processes are complex systems, in which a very broad spectrum of factors that have an impact on the social fabric at the same time and with different energies, act in unison. Internal and external, subjective and objective, economic-political-cultural-legal, etc. factors come together. These and many other reasons make it advisable to place the filter of situated knowledge and the epistemology of the observer in the critical analysis of the constitutionalist experiences in each country, which will make it possible to reveal the positive aspects that are surely present in each one, as well as their undesirable components in other latitudes or national experiences. Furthermore,

> From a Piagetian understanding, knowledge is always a permanent construction characterised by difficulty, as conscious knowledge requires effort on the part of the person. Moreover, it is conceived as a process of permanent search for equilibrium, that is, a game of imbalance and rebalancing that is achieved as the mind becomes involved and tries to get to know the world and people. (Hernández, 2017, p. 39)

With the 20th century came new types of social processes that "...emphasised non-linearity over linearity, complexity oversimplification, the impossibility of eliminating the measurer from the measurement..."[1] . These are elements to

1 Wallerstein (2003) deals with a study that was conducted by the Gulbenkian Commission set up to elaborate ideas on the restructuring of the social sciences in 1993 and which, under the leadership of Professor Wallerstein, involved the work of 10 world-leading scientists. Of these, six came from the social sciences, two from the natural sciences, and two from the humanities. The book in question is a compilation of the results of this wide-ranging work.

be considered in any analysis, especially in the social sciences. Among other things, this has made it possible to place the theme of human rights as an aspiration for self-realization on a national and regional level in political discourse, legal texts, economic structures, and social demands. This helps to understand the global force that law, and specifically constitutionalism, has acquired in the most diverse multicultural settings.

A clear example of this is that the universe of indigenous cultures has managed to place their claims, leaders, and social practices in the daily exercise of the state, governments, of the institutions of law, as actors of political and economic power in many parts of the world, and even to bring their leaders to key positions in the construction of public policies in many countries.

This whole process of change with which humanity has welcomed the 21st century finds in the specialised literature of the legal and political sciences a prolific elaboration of different trends that contribute to understanding the complexities of today's world and its understanding in theory.

The realisation of the rights of nature has been one of the most important issues in recent years, especially since the Rio de Janeiro Summit in 1992. This is due to the obvious depletion of the planet's natural resources and the effects of climate change. At the same time, however, it is one of the most controversial issues on which politicians, academics, and social leaders often do not find common ground.

The problem that motivates this essay lies in the insufficient protection of nature's rights, which leads to the continued depletion of its resources and a significant increase in the effects of climate change.

The hypothesis that animates this essay is that, although knowledge has advanced to the point of elaborating

legal precepts that place the rights of nature in a place of visibility in countries and on a global scale, which is sometimes even expressed in a basic legal order for the exercise and protection of the rights of nature, the absence of procedural actions leaves gaps that prevent an effective result in the protection of life.

1. CONTEXTUALISATION OF CONSTITUTIONALISM

The primary antecedents of constitutionalism appear in the Middle Ages, embodied in the medieval charters and charters. The most important of these is the Charter of Aragon of 1283, which became a kind of law to even the monarch had to obey.

The Renaissance, which displaced submission to faith and the search for truth in sacred texts, towards the path to truth through science and its social bearer, the person, drew the historical frontier that drove the origin of constitutionalism. The first expression recognised as being closest to the idea of the limitation of powers that prevailed in the origins of constitutionalism is found in the Agreement of the People, which, although it was not admitted, did lead to the emergence in 1653 of the Instrument, which was approved by the English Parliament, becoming one of the interesting paradoxes in the history of law, being the first and only constitution of that State "which has not had one until today", as Paolantonio (1987, p. 199) points out.

The understanding of the need for a body of law with a constitutional character emerges from the conjunction of two transcendental political processes in the history of humanity, and in this, the authors in the specialised literature agree. These are the French Revolution and the Declaration of the Rights of Man and the Citizen. But this researcher considers that this duality should be added, to form a robust triad, the process of independence of the English colonies in the North of

the Americas and the proclamation of citizens' rights in them, among which the Virginia Declaration of Rights of 1776 and the Massachusetts Declaration of Rights of 1780 stand out as the most advanced examples.

From this triad of events and political-legal-economic thought, Constitutionalism emerged, with its ideological bases recognised in the human rights and then proclaimed in what we know today as first and second-generation rights, which are the basis of the rest of the set of rights on an international scale identified as fourth, fifth and sixth generation rights.

The first manifestation of constitutionalism has liberal ideological foundations, and it could not be otherwise since it is a fruit of the legal political context in which it arose. Its function was understood as limiting or restricting the exercise of political power. The role of the constitutional body can be understood according to the following formula: "Liberalism is the regime of the rule of law, separated from civil society by a clear and stable boundary of a constitutional nature" (Paolantonio, 1987, p. 206).

The advance of constitutionalism, in its history, distances itself from liberal ideology, and then from neoliberal variants (although points of contact with ordoliberalism can be observed) (Guillén, 2019) to place greater emphasis on human rights, which later became social constitutionalism.

This appears in its most amplified expressions in the years following the First World War, although it has its roots in the process of transformation from an agrarian to industrial societies, which matured throughout the 19th century, and which finds expression in constitutionalism from the social and political effects of this essentially economic transformation.

An explanation of this scope can be found in the literature from the approach of Pieter Sieferle (2009), who

visualises the relevant role of energy in this process according to the logic that the "fossil-energy transformation manifested itself in several partial revolutions, especially in the revolution of the transport and communication system, in the revolution of urbanisation and the demographic revolution" (p. 87). This is the point at which the economic and political-legal processes that lead to the social approach of constitutionalism, and which are expressed in the emergence of social rights in these texts, come together.

2. LIBERAL AND SOCIAL CONSTITUTIONALISM

The difference between liberal and social constitutionalism is sometimes understood as a phenomenon of wills and not of circumstances. The recognition of the role of rights, according to Paolontino, was already embodied since the French Revolution, but:

> It happened that members of the ruling classes illegitimately took advantage of the liberal ideology to preserve and increase their privileges, betraying the ethical principles that govern the doctrine and generating an enormous mistrust among the people towards anything with the liberal label. (Paolantonio, 1987, p. 207)

The author does not entirely agree with this approach, which she again considers being a simplification of the complexities of legal frameworks and their effects on social behaviour. A nation's legal system has sufficient instruments to "shield" constitutional jurisdiction at a level that is not absolute (nothing is absolute in human life) but adequate. There have always been and always will be people who try to obtain individual benefits by circumventing the rough and tumble of the law. But that is all it is, actions against the legal status that do not determine the legal ethos of society.

The distinction between the conceptions and practices of liberal and social constitutionalism lies in the essential weight of the social rights that the latter hierarchises as the ethos of the legal system, and this degree to which rights are scaled up sees its appearance from the Second World War onwards.

The most obvious demonstration of this essential difference between the two comes from observing the most acute social problems experienced by European countries in the 21st century, which for years were attributed to the primacy in the splendour of social constitutionalism that had its foundations in the proclaimed welfare state.

The most current events in the European Union show populations affected by high unemployment figures, social violence, and severely damaged economies that have diminished the levels of wellbeing previously achieved.

In today's Europe they prevail:

> In highly fragmented societies, without social agents capable of mobilising, with a population subjected to the dictates of consumption and controlled by the carrot and stick of credit and its repayment, only the Law (and that Law with a capital letter that is the Constitution) can serve as a fulcrum for a strategy of resistance and struggle. (Cabo de la Vega, 2012, p. 55)

Social dynamics are complex. They involve a vigorous spectrum of motives, interests, actions, institutions, people, communities, nature, cultures, scientific knowledge, technologies, and an even wider range of components of the social fabric, which, all together and with very different forces and tendencies, act and shape what we call society and nation.

It is difficult to draw clear dividing lines that mark inviolable boundaries between different expressions of this social life. Europe, which comes from the 20th century

leaving behind half a century of the welfare state, protected by social constitutionalism that some take as a reference not without reason, shows in the 21st century political, economic, and social practices protected by a regional normativity that is more reminiscent of the harshest moments of liberal constitutionalism.

It may be thought, not without reason, that in this half of the 21st century in Europe, both expressions of classical constitutionalism, the liberal and the social, converge in a difficult contradiction.

In Latin America, however, not in all the magnificent diversity of the region, but several countries, the strong irruption of constitutional changes of a markedly social character can be seen. Ecuador, Argentina, Bolivia, Cuba, Honduras, Venezuela, and Mexico (whose intentions in this direction have just been opened by President Andrés Manuel López Obrador) have been the most prominent. The focus of these constitutional changes has mainly been on the issue of human rights and the protection of multiculturalism of which most of the countries are repositories. These experiences even brought the second indigenous president of the Americas to the highest position of state (the first was Benito Juárez in Mexico, although this is hardly remembered).

But as in the old continent (i.e., Europe), these advances are taking place during deep political tensions and high levels of social conflict. The issue of the pluriculturality of peoples has perhaps been the one that has attracted the most attention from constitutional scholars. However, it is not the only novel one. The author of this essay considers that the treatment of the rights of nature in the constitutional changes taking place in Latin America is even more so, due to its global impact.

This is a less trodden path, both in the practice of law and in the universe of legal, environmental, economic, political, and so-called natural sciences.

It is, as recognised in the specialised literature, the most obvious transdisciplinary object of law - science. The rights of nature cannot be understood from the law, from ecology, or even from the conjunction of both disciplines, which seem to be the closest to the subject.

Philosophical perspectives are needed to provide epistemic and ethical approaches, and economic perspectives to unravel the complicated web of economic development interests that damage the planet's ecological reserves and become robust predatory interests. To this, it is recommended to add lesser-known transdisciplines such as political ecology, precision technologies (drones for example), the science of sustainability, and pluricultural perspectives that enrich the understanding of non-human life and help us to discard once and for all the utilitarian approach that sought to dominate nature, which has turned out to be something like dominating the indomitable.

Furthermore, "the circular economy currently has a great inspirational force and constitutes a reasonable strategy to achieve the much-desired global sustainability. This requires the joint work of government, business, academia, and society in general" (Almeida and Díaz, 2020, p. 46).

3. THE RIGHTS OF NATURE

As can be seen, the issues of the rights of nature involve a wide range of disciplines. But this is not a condition that is exclusive to this field of knowledge. The neurosciences, the cognotechno-sciences, speak to us of a trend in scientific progress towards the integration of knowledge from which the

rights of nature do not escape. The author intends to defend the need for an epistemic treatment of this field of knowledge whose launching pad is the legal sciences, but whose global scope is the development of life.

The rights of nature are first and foremost a transdiscipline, which marks their epistemological status, and not only a novel construction of knowledge that requires transdisciplinary approaches (Gudynas, 2016). Nor is it the only one in this field. It is accompanied by many other perspectives whose conceptual and practical conjunction must be constructed from the logic of nature and its rights, and not from the well-known and limited logic of each discipline.

Ecuador is rightly considered a pioneer in the constitutional recognition of the rights of nature. The text of the 2008 Montecristi Constitution attests to this. The novelty of the subject allows for the incorporation of an interesting group of concepts and debates (Gudynas, 2016) in the field of ethics, such as the values of nature, environmental citizenship, biodiversity values, nature, environment, environmental management, responsible citizenship, and others. It is about the gradual construction of a new ethics of nature[2] .

The Constitution of the Republic of Ecuador, proclaimed in 2008, expresses from the preamble definitions of the value of nature for life. Article 10 recognises rights on an equal footing with the rights of individuals. It states:

> Art. 10.- Individuals, communities, peoples, nationalities, and collectives are holders and shall enjoy the rights guaranteed in the Constitution and international instruments.

2 In the literature, we find the expression "ethics in the face of nature" (Gudynas, 2016, n. p.), which the author of this essay considers deserves a broader theoretical discussion in light of current technological advances.

> Nature shall be the subject of those rights recognised by the Constitution. (CRE, 2008, art. 10)

In Chapter VI, dedicated to the Rights of Freedom, the prohibition is declared that, in the free exercise of the right to conscientious objection, it is forbidden to "undermine other rights, or cause harm to people or nature" (CRE, 2008, art. 66.12).

Further on in the chapter itself, it states: "The right to live in a healthy, ecologically balanced environment, free of pollution and in harmony with nature" (CRE, 2008, art. 66.27).

Up to this part of the constitutional text, it does not differ from the usual declarations of principles underlying a utilitarian view of nature for the benefit of human life. What makes the Constitution of Montecristi different is contained in Chapter VII, a section entirely dedicated to the rights of nature.

The chapter begins with cardinal formulations:

> Art. 71.- Nature or Pacha Mama, where life is reproduced and realised, has the right to full respect for its existence and the maintenance and regeneration of its vital cycles, structure, functions, and evolutionary processes.
>
> Any person, community, people, or nationality may demand from the public authority the fulfillment of the rights of nature. In applying and interpreting these rights, the principles established in the Constitution shall be observed, as appropriate. The State shall encourage natural and legal persons and collectives to protect nature and shall promote respect for all the elements that make up an ecosystem.
>
> Art. 72.- Nature has the right to restoration (...). (CRE, 2008, arts. 71-72).

He concludes by pointing out:

> Art. 74.- Individuals, communities, peoples, and nationalities shall have the right to benefit from the environment and the natural resources that allow them to live well.
>
> Environmental services shall not be subject to appropriation; their production, provision, use, and exploitation shall be regulated by the State. (CRE, 2008, art. 74)

Undoubtedly, the inclusion of these regulatory concepts constitutes an important step forward in respecting the rights of nature.

However, the author would like to draw the reader's attention to the limited identification of these rights, which is a sign of the scarce theoretical elaboration and presence of these rights in public policies.

It is a field of knowledge that is still almost untouched in the legal and political spheres. On the other hand, political speeches from the world's great tribunes are often more abundant than the actions of practical materialisation of what these speeches propose.

And if these limitations are so evident in one of the few constitutions in the world that have endowed itself with such a section recognising the existence of "rights of nature", they are even more limited in the practical implementation of these rights through their presence in doctrine, in rules in procedural actions and, therefore, in jurisprudence in general.

This is an essential subject, still pending, for studies in the legal sciences.

CONCLUSIONS

The history of constitutionalism allows us to see the sources of the contradictory tendencies it has shown in the two decades of the 21st century. At the same time, however, it also makes it possible to see the guidelines that are leading it in the direction of a strengthening of social constitutionalism that makes the legal and social logic of rights prevail, including the rights of nature.

Moreover, the society in which we live today needs to amplify the spaces for the socialisation of knowledge built in the field of the rights of nature. It is not a matter of dividing into parts the universe of life rights that must be defended, many of which have yet to be identified, conceptualised, and incorporated into the legislative bodies of the global community and each nation. At the same time as progress is made in the field of knowledge in any of its parts, these advances must find expression in public policies, in academic debates, in community enclaves, and be protected by effective jurisprudence. These are the paths that humanity must still follow.

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