

# History of Brazilian Constitutional Law: 1824's Constitution of the Empire of Brasil and the Private Slavery System

## História do Direito Constitucional Brasileiro: a Constituição do Império do Brasil de 1824 e o Sistema Econômico Escravocrata

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**Abstract:** This article has as its subject the history of 1824's constitution of the Empire of Brazil aiming to analyze its relations with the prevailing Brazilian slavery system at the time. The problem with the research concentrates precisely in an apparent contradiction between the text of a liberal economic constitution and the functioning of an incompatible private economic system, initially, according to those statements. It's assumed that the problem can't be analyzed by the separation between theory and practice, but, instead, by an interpenetration of this instances through the law and the effective functioning of state institutions. The theoretical framework adopted in the text for analysis is the historical materialism, and the authors used as a basis for research are inscribed in this context. The deductive method chosen was analytical chapter, final considerations and bibliographic references.

**Keywords:** Fundamental Rights. Private Relations. Constitutionalism. Freedom. Slavery.

**Resumo:** Este artigo tem como tema a história da Constituição do Império do Brasil de 1824, com o objetivo de analisar suas relações com o sistema de escravidão vigente à época. O problema de pesquisa se concentra, mais precisamente, na aparente contradição entre a convivência do texto economicamente liberal da Constituição com o funcionamento do sistema escravocrata. A pesquisa supõe que o problema não pode ser analisado por uma pretensa separação entre a teoria e a prática, mas sim pela interpenetração dessas instâncias através da lei e do funcionamento efetivo das instituições do Estado. O referencial teórico adotado no texto é o materialismo histórico, e os teóricos utilizados como base de pesquisa estão inseridos nesse contexto. O método escolhido foi o dedutivo e o artigo está dividido em introdução, capítulo analítico, considerações finais e referenciais bibliográficas.

**Palavras-chave:** Direitos Fundamentais. Relações Privadas. Constitucionalismo. Liberdade. Escravidão.

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## 1 Introduction

The following article opens a series of writings using the Brazilian Constitution history as theme. It may be asked if such a pretention wouldn't be exhausted in the historiography of law, whereas the issue has already been discussed by many authors. However, we came to the conclusion that the approach proposed in this work is perceptibly different from the others already done in the past. Our purpose is to identify, in their respective constitutions, aspects related to constitutionally adopted ideologies and economic processes contained therein that were underestimated by other authors.

This particular emphasis *justifies* the resumption of this task and makes it important. In social, political and legal sciences, the themes are repeated since classical antiquity, but always with new connotations, new approaches, new needs and theoretical milestone imposed by the historical moment, by people's experiences, by technological advances or simply by paradigms changes which provide some logic to the organization of societies.

In Brazilian Constitutions, since 1824's Constitution of the Empire, it's possible to identify clearly defined ideologies. Perhaps the charter that offers more challenges may be exactly the one from 1824, since there seems to be a dissonance between the constitutionally adopted ideology and the logic of real social reproduction which was behind of it, and we have a charter of liberal model coexisting with a model of slavery economy. To identify how this connection between the constitutional text and the reality operated – whether through a separation between theory and practical or through veiled functionality, inverted, unreported – is the *main purpose* of this research.

But researches don't become effective only with themes and problems. The survey taker must be equipped with a lens with which he may be able to see a more interesting aspect of the reality to the detriment of others, no less important, but which must remain temporarily in the shadow, because it's not human to conduct an *approach about everything*. The theoretical reference condensed in *State Type Theory*, Marxist

worldview, will be a common thread that will guide us in the approach and analysis of the elements proposed in the issue, both in the imperial charter, object of this article, as in the subsequent charters.

The texts of Brazilian Constitutions reveal the development of the Brazilian state from a more opened liberalism to the autarkic state interventionism, and how, throughout history, Brazil has left its eminently agrarian exporting nation status to become a moderately advanced industrial capitalist nation, but it accumulated structural impasses, inherited from the past, which impedes Brazil to develop its productive forces to the point of building a real political and economic autonomy front of a globalized world.

Brazilian constitutions reflect their time. They are more than just law texts, constituting the synthesis of the historical moment in which they existed and the sum of national, international, social, political, economic, cultural, ideological problems of their time. The importance of law as a concentrated policy has already been stated, as a more developed state of political disputes placed in society. But law, as also stated, is the inseparable unity of laws and their implementation in the real world. The law becomes a state action in the concretion of the norm, revealing its characteristic of a conscious social engineering.

The law, as a concentrated policy, reflects a very high level of abstraction of the real political struggles placed in society. It represents the docket of the force's correlations between the social interests in dispute. In this way, it is not enough to study the text of the constitutions, but it would be also insufficient to study the economic infrastructure of the society in a time without analyzing its concrete realization in reality, because a mode of production doesn't represent an isolated part of the whole, but rather constitutes a unity between the economical, the political and the ideological, between the Law and the application of the laws.

The observation is necessary because, as expressed in the popular song, "appearances can be deceiving by those who hate and by those who love", hiding the essence of the processes and the purely theoretical analysis of a text like the Constitution of the 1824's Empire of Brazil could lead the observer to mistakenly assert that the constitutionally

adopted ideology by this charter could be a liberal-bourgeois ideology. It is only possible to focus on this mistake if the observer leaves aside the implementation of the rule in the real plane considering it as a moment as important for the law as its concentration in the abstract norm.

But first, it's necessary to go deeper into the methodology that will guide this analysis and which is intrinsically linked to the chosen theoretical reference. We start from the premise that the history of the Brazilian National State met at least two distinct types of state: a modern state of slavery (reproductive political structure of slaveholding socioeconomic relations) that consolidates around the period of 1808-1831 and that persists to the events concatenated of the Abolition of Slavery, the Proclamation of the Republic and the emergence of the 1891 Republican Constitution and, later, a bourgeois state (reproductive political structure of slave-owning socioeconomic relations), which persists to the present days.

To meditate between these two types of State would be a unique historical experience of a *Transition State*, which would keep the features of the ancient one, the previous slavery state, already carrying features of the new, in other words, the bourgeois state that would be established in the sequence. This transitional historical period, that goes from the events narrated above until the Revolution of 1930 and which was marked by some specific processes (Old Republic, Colonelism, Governors Policy, Politics of Coffee and Milk), has a fundamental importance for the actual Brazilian reality because it contributed to mold the political forms that survive until today in Brazilian politics as reminiscences of the past.

One final note: all the Brazilian constitutions were born from moments of rupture, in other words, moments of crisis in Brazilian history, where different societal forms transited and it is enough for us to work with the constitutional status of the revolution. In the perspective of this work, the term revolution will be used in the meaning given by Florestan Fernandes (2006, p. 239), denoting a set of economic, technological, social, psychological and cultural transformations and wide policies, that don't necessarily need to coincide with the moment of a political revolution, i.e., a *coup d'État*, a large popular or collective

movement, or the seizure of the political power, which is the visible moment of a revolutionary process.

On the contrary, the revolution is a wider concept, a major process of transition between different forms, where there is not, necessarily, a precedence of the economic over the political nor the political over the economic, it all depends on the singularities of the correlation of social forces in dispute at that historical moment. The truth is that such a particular social and economic structure cannot be settled as hegemonic in a social formation without the constitution of its correlated reproductive political structure.

Historically, there were social formations where the economic and social revolution preceded the political one, which represented its crowning achievement, but there were groups that first witnessed a political revolution that created the propitious environment for profound transformations in economic and social relations. England, for example, experienced a bourgeois political revolution of conciliation, leading to an unwritten constitution, agreed between the monarchy and the bourgeoisie, giving rise to hybrid institutions that exist until today and that allowed the coexistence of two historically anachronistic social sectors. France, in turn, met a radical and jacobine political revolution, which unlike to the English revolution, did not misrepresented the decadent aristocracy, completely rebuilding its political and legal institutions.

The argument here is used to demonstrate that there is no pre-established model of revolution, i.e., processes of social rupture or transformation that gives rise to a constitution. Those are attached to the singularities of each social formation and to the correlation between social forces in dispute. The important thing, however, is that the constitutions arise from sociological facts, from moments of rupture that characterize the fact of power. What is new is born and grows within the old, creating moments of deep social tension and political crisis.

Therefore, in dynamic societies, the succession of constitutions should not be considered as a negative symptom of instability. The instability is the very nature of those societies that require new legal and political experiments. But constitutions are born to die, to get overcome

by others or by new forms of social, political and economic organization. Everything that is born is doomed to perish and to change and the law and the constitutions are not free of it. They last as long as they are able to reproduce certain conditions for which they were intended. Exhausted in their functions, must give way to new experiments without any attachment to the traditions of outdated forms.

## **2 The 1824's Constitution of the Empire of Brazil and the New the Private Slavery System**

With the declaration of Independence on September 7, 1822, a revolutionary event of greatest magnitude in Brazilian political history, Brazil goes from colony condition to independent country, with the establishment of a national state (PRADO JR., 2004 p. 83), since in colonial times Brazil had no political and economic autonomy against Portugal. The 1824's Constitution of the Empire, granted by D. Pedro I, is the first formal organization document of the new National State that declares itself as a corporation of individuals, around the Emperor.

Thus, in a foreground, it is worth highlighting the innovative character of a charter that, despite of all the problems that surrounded it, the fact that it was granted by the Emperor and that it served for the development and reproduction of a slave-like societal form, as it will be seen below, it was born from a factual process with revolutionary nature, of political liberation of Brazil and that allows it to create a State apparatus, initiating the long process of consolidation of the Brazilian nation.

The term “revolutionary” is not used here in the conventional way, because what was interesting was not how the process of Independence took history as loan. The fact is that, with or without popular participation, by an agreement between the elites or not, by national or external interests, it was formed a politically autonomous national state in Brazil that did not exist before, a fact of high relevance.

After analyzing the Brazilian National State's process of formation and the granting of the 1824's constitutional charter, in a world-historical perspective, it is clear that the very consolidation of this structure was an indirect consequence of the French Revolution and its historical developments embodied in the Napoleonic Wars (PRADO Jr., 2004, p. 101), which had the effect of politically and militarily expanding the new bourgeois social format throughout Europe and its colonies under the flag of liberty, fraternity and equality.

In other words, there was a promise, embodied in a speech of liberation of the peoples from the oppression of the absolutism. Since the French revolutionary event in the late eighteenth century until the year of 1815, the bourgeois manners began to expand themselves in Europe through more or less violent processes, wars and occupations. In other words, through political processes of expansion or for the consolidation of the classic liberalism ideals against the *ancien regime*.

After this, the Industrial Revolution would take the lead in the economic expansion of the capitalist mode of production and would witness an explosive expansion of the financial interconnection activities between the European nations and their colonies, which would transform the entire nineteenth century in an environment of relative unstable peace and in a multipolar power balance system. So, it was no longer the consolidation of "freedom" that mattered, but the consolidation of a relatively legal, political and economic security system that could ensure a minimum institutional environment conducive to the expansion of the capitalist mode of production.

During this period of economic expansion of the bourgeoisie, the constitutionalism and the formation of National States, easily controllable by the nations of the center of capitalism, constituted in strategies for laying the foundations of an international economic system, commanded mostly, by the nation that led the process of consolidation of the capitalist mode of production. Thereby, England would allow and even sponsor the formation of National States which being economically controlled would constitute their base of support against the increase of the power of other European powers (POLANYI, 2000, p. 20-21).

The process of the Independence of Brazil operated precisely in this context of transition between the military expansion of French hegemony and the economic expansion of mercantile forms of English hegemony. The arrival of the Portuguese royal family to Brazil, in an articulation led by the English government, occurred during the Napoleonic clashes that spread throughout Europe. Portugal represented a valuable ally to England “[...] not only because of the gap that had opened up in the Napoleonic blockade, but also because of the basis offered by the Portuguese ports to the British fleet and its naval operations” (PRADO JR., 2004, p. 127). In any case, once the Napoleonic troops occupied Portugal, England would change its strategy seeking compensation from the “great American colony”:

The British plan to compensate their defeats in the European continent with the conquest of ibero-American colonies is obvious. In the case of Brasil, the circumstances favored and facilitated the plan. There was no need for armies and armed interventions, since the Portuguese sovereign understood it was more convenient to accept the British offer and embark under their protection toward Brazil. It retained its crown and titles, but may have given its independence and freedom of action to the English ally. The Portuguese monarchy will be nothing more than a plaything in the hands of England. The sovereign will remain in Rio de Janeiro under the guard of a British naval division that will be responsible for leading the fight against the French occupation. A British general, Beresford, will be the supreme commander of the Portuguese army and the effective governor of the kingdom liberated in 1809. (PRADO JR., 2004, p. 128)

After European peace, which has been decreed in the Concert of Europe in 1815, consolidating the British influence in the soil of the United Kingdom of Brazil and Algarves, conflicts of interests would operate among the old allies, forcing the return of the royal family to Portugal and leading the English influence to consolidate with the Independence and the constitutionalization of the new National State. In this process, Brazil assumed the external debt of Portugal with England, as a condition imposed in exchange for the recognition of the new nation:

the Brazilian national state was born, in debt and under the sign of the interests of industrial expansion from England.

This makes it possible to affirm that the political and economic development of Brazil operated in close articulation with the development of capitalism from England, inserted in a central/peripheral relationship, which is determinant of Brazil's particular position in the international division of labor and its underdeveloped state and dependence (FURTADO, 2000, p. 21-30).

For this reason, as will be seen, the Brazilian National State wasn't born free of deep contradictions that decisively conditioned its full sovereignty. If the Brazilian State had externally aligned itself with the interests of the expansion of capitalism from England, internally that expansion presupposed to keep the national economy hostage of the old Enslave Mode of Production. And the Constitution of the Empire of Brazil, 1824, under a liberal-bourgeois discourse would try to establish the legal framework reproducer of this peculiar logic of internal/external relationship, which could also be described as a relationship between the internal progress of the commercial capital, in function of the external advance of industrial capital.

For this reflection, interested in the relationship between the constitutional text and the political and economic functions that the charter of 1824 was able to reproduce in reality, it is essential to define, in the foreground, the kind of State (its class nature) existent, through a comprehensive analysis of the Brazilian social formation. It is not about isolating the social infrastructure nor the much existed State, but to understand how the State was articulated to reproduce an hegemonic mode of production. More specifically, assuming that a mode of production is characterized not only by the economic base of a society, but mainly, by the political structure of that societal form, it would be possible to identify a political model of economic development registered in the Constitution of the Empire of Brazil ?

Since 1808, with the arrival of the Portuguese royal family to the New World and the opening of the ports to "friendly nations" (i.e., England), Brazil had suffer strong influence of english liberalism,

influence that would crystallize the first Brazilian constitutional charter, for which was constitutional subject only what concerned the structure of State powers and the declaration of individual rights and guarantees, which was expressly stated in article 178 of the Constitution of the Empire of Brazil, 1824:

Art. 178. It is only constitutional what gives respect to the limits and respective duties of the Political Powers and to the Political Rights and individual of the citizens. All that is not Constitutional can be changed without the formalities referred by the ordinary Law.

It seems clear, however, that this liberalism of Smithian model had nothing to do with the Brazilian or Portuguese traditions, becoming much more a graft provoked by the expansion of the English domain that sought to “[...] unify the material civilization in the hole world” (FURTADO, 2000, p. 73), that an ideology that could develop autonomously in Brazilian territory. The constitutional charter of 1824, analyzed in isolation as a theoretical text, would lead us to believe that, in Brazil, the ideology adopted by the imperial constitution would be liberal-bourgeois. However, the industry, a fundamental institution of the constitution of the capitalist mode of production, was repudiated by the Imperial State, as recalled by Buonicore (2004, p 141.): “The economic policy of slave imperial state wasn’t only non-industrializing, it was an anti-industrialist policy”.

Where is the contradiction? There is no contradiction. Economic liberalism disseminated by England, which has constituted the world markets, had developed itself from the old colonial pre-capitalist regime, shaping the world economy from a central-peripheral colonial relationship that had the power to concentrate technological development in the center of the system, to the detriment of a correlated depletion of riches in the colonial periphery, which would specialize in providing raw materials for the English production. This equation is translated into the Ricardian formulation of the Theory of Comparative Advantage.

Thus, the same liberalism enshrined in the Constitution of the 1824's Empire of Brazil was capable of internally reproducing an slave order and, externally, an order based on an international division of labor, where Brazil positioned itself as a supplier of primary products for the English industrialization. This was the nodal point of the argument: the liberal discourse was widely used, all over the world, at that historical moment, to justify slavery, while the arguments against it always drew on internationalist theories, as Polanyi (2000, p. 181) recalls: "In North America, the South called for laissez-faire arguments to justify slavery; the North called for arms intervention to establish a free labor market".

Before entering the (reproductive) political aspects of the 1824's Constitution of the Empire of Brazil we need to be clear about the nature of the existing social structure and upon which the constitution was based. Colonial Brazil was consolidated in a moment of transition from the world of economy of feudalism to mercantilism and then, the capitalism, as an economy of export of primary products with low value added, founded on a productive economy based on slave labor, with dominance of mercantile forms, where the main commodity generating financial surplus was the slave.

The Brazilian location in the international division of labor placed it as an economy of the periphery as opposed to the central economies. In this international division of labor, it would be incumbent upon the peripheral nations to produce raw materials, of low added value and in abundance, to give sustainability to the process of accelerated industrialization of the central countries, especially in England. The way it was historically used for this accelerated production of raw materials in the still sparsely populated colonies was compulsory hand labor that satisfied two pressing needs: the need for workforce and the need for circulation of the mercantile capital embodied in the most valuable commodity at that time: the slave.

Thus, the nation as a synthesis or clash between the internal and external (the formation of a local economy in opposition to the dominant foreign interests) led to the conception of an internally slave economic formation , supplier of primary products to the highly developed

nations, it is worth mentioning, an economy of internally pre-capitalist production, functionally at the service of the development of capitalism abroad, in a world system of division of labor that can be considered complementary and functional and non-dual or hybrid.

When the Brazilian independence happened in the nineteenth century, England was already living the period conventionally called as Industrial Revolution, where capitalism would be consolidated within the transitional mercantile forms of primitive accumulation to establish itself as a mode of production of the value form, i.e., of surplus-value (D-M-D'), with large expansive capacity of its structuring institutions. Thus, at the time of Brazilian Independence and the granting of the Constitutional Charter of 1824, Brazil was settled on a social formation based on internal slave production, externally subordinated to the supply of raw materials of low added value to the English capitalist production.

There was no contradiction in this articulation, which presented perfect conformation of objectives. After all, the unequal development of peripheral economies constituted assumption presupposition of accumulation in the central economies. The adoption of liberal economic principles in the constitutional Charter of the Empire, therefore, would seem at first sight to be in contradiction to the social formation and to the predominant slave mode of production at that time and that would still have historical longevity until the *débâcle* of the model in 1888-1891 (with the abolition of slavery, Proclamation of the Republic and the promulgation of the first republican constitution), is entirely consistent with the internal articulation of a mode of production where the mercantile function of capital is sovereign and destined to concentrating surplus abroad, for the development of industrial capital in England.

In fact, the mode of production is a notion that is not restricted to the infrastructural terrain of a society, it is worth mentioning that the terrain of production, including the superstructural field, i.e., the political, cultural and ideological reproduction. It is the same as saying that there could be no slave mode of production in Brazil if slave-like socioeconomic relations did not find their parallel in a structurally slave state because "[...] the reproduction of slave production relations in any

social formation will only be possible if there's exists an enslave state there" (SAES, 1990, p. 101).

When it is affirmed that the Constitution of the Empire of Brazil, in 1824, was a charter influenced by English liberalism, we could imagine some contradiction between a liberal constitution constituting the structure of a slave state, which is quickly dispelled when evaluating as constitutionally adopted ideology had new meaning before the Brazilian social formation and reproduced in the center layout / periphery functionality.

For this purpose, we should bear in mind the main ideological characteristics typical of an ideal slave-owning State and of a law of slavery, in order to evaluate how the English liberalism, enshrined in the charter of 1824, re-signified itself in the Brazilian reality and which social relations it was able to reproduce. Saes (1990, p. 101) was able to define in detail the differences between the legal systems of pre-capitalist and capitalist social formations. The author explains that in order to recognize the class character of a legal system we cannot only evaluate their laws, but also the organization of its State apparatus, in which it is inferred that the reproduction of that State comprises the unity of law/law enforcement, *i.e.*, of the implementation of the abstract rules that concentrate on other policy determinations derived from political disputes actually existing in society. Saes (1990, p. 101) continues:

The fundamental principle of the law of slavery is the classification of men into two big categories: the one of the beings that are endowed with subjective will (persons) and the beings who are devoid of subjective will (things), these being subject to their will and constituting themselves in their ownership.

This means that the slave law doesn't recognize the legal principle of *equality* or *isonomy* among the members of the exploiting and exploited fundamental classes, which was already known to Lenin, who offers us an excellent overview of the process that has taken place since ancient slave societies, from feudalism to the advent of capitalism. For him too, this process has taken place from the full institutionalization of

inequality in the juridical order to the full institutionalization of formal equality within the law:

[...] The essential fact was that slaves were not considered human beings; not only were they not considered citizens, but even humans. Roman legislation considered them as objects. The law of homicide, not to mention other laws concerning to the protection of the human person, didn't included slaves. The law defended slave-owners as the only citizens to whom full rights were recognized [...] The change in the mode of exploitation transformed the slave state into a feudal state. This was of enormous importance. In slave society reigned the absolute lack of rights of the slave, who were not recognized as human beings; in feudal society the subjection of the peasant to the land reigned[...] The development of trade and the exchange of commodities led to the formation of a new class: the capitalists. The economic forces of the landlords were declining and the forces of the new class, the representatives of capital, were developing. The transformation of society takes place so that all citizens were, so to speak, equal, so that the former division disappeared into slavers and slaves, that everyone, regardless of the capital they had – whether if they owned land on private property or if had no other property than the strength of their arms – they should all be equal before the law. (LENIN, 1980, p 159-162)

That, by the way, is embodied a major feature of the liberal right conception: the recognition of the legal and formal equality of all before the law, as a condition of universal rights subject condition capable of freely contract its goods in the market: capital and workforce. Formal equality confers on everyone, regardless of social class, the quality of subject of rights and freedom, conquered with formal equality, confers on all the autonomy of the will, the subjective foundation of the contract. In this sense, Saes (1990, p. 38) elucidates:

On the other hand, bourgeois law constitutes a radical rupture in relation to the historically prior types of law, because it also defines the owner of the means of production and the direct producer as being generally endowed with subjective will and therefore capable

of performing the same acts. Thus, the bourgeois law equalizes all agents of production, converting them into individual subjects; that is, into individuals equally capable of doing acts of will. The equalization and individualization of all agents of production gain a generic expression in the figure of the legal capacity in general and a specific expression in the particular figure of the contract (= exchange act resulting from the manifestation of the will of two subjects).

But, if slave law did not recognize equality among the members of the fundamental classes, it did not automatically recognize the possibility, for members of the fundamental exploited class (the slaves), to participate in the State apparatus as civil servants, much less recognize a political regime in which the members of that class could, through political dispute, occupy positions of political representation within the state apparatus, constituting a closed instrument of the class that commanded it, which was also perceived by Lenin:

The slavers republics differed by their internal organization: there were aristocratic and democratic republics. In aristocratic republic, a reduced number of privileged people participated in the elections; in the democratic one everyone participated - but always all the slavers - everyone, except the slaves. It is necessary to take into account this fundamental circumstance, because it, better than any other, sheds light on the problem of the State and clearly indicates the essence of it. (LENIN, 1980, p. 159)

Therefore, we could summarize the two main characteristics of slave law: a) institutionalization of inequality among men (a statement that the members of the fundamental classes are legally unequal, some constituting themselves as subjects of rights and others as things or, in the best of hypotheses, in subjects of obligations); b) the prohibition of the participation of members of the fundamental exploited class in the State apparatus (either in the bureaucracy or in the political representation), which therefore constitutes a closed political instrument of class domination. It is based on these two fundamental points that 1824's Constitution of the Empire of Brazil must be analyzed.

Let's see some examples taken from the very 1824's Constitution of the Empire of Brazil. It was a slave constitution, declaredly classist (unlike the bourgeois constitutions, which deny any class character). It excludes any possibility of slave representation in the State apparatus, even excluding the census criterion, most of the order of free men of that same representation. Look at the characteristics of the political regime defined in it:

1. Article 1 makes clear that the State is a corporation composed by the political association of all Brazilian citizens (individuals) around a particular individual, the Emperor (unlike the bourgeois constitutions where the state is impersonal, and before the union of abstract legal entities, in a federation, or a totally abstract legal entity, in unitary States).
2. Article 3 declares the Imperial State government "monarchical, hereditary, constitutional and representative", but the only class that is represented is the ruling one, because, as we will see, voting is census and not universal, which excludes a good part of the order of free man.
3. Article 10 recognizes the Legislative, the Executive, the Judiciary and the Moderating powers of the State and, as known, the latter one gave the Emperor the last word in any matter of the state.
4. Article 11 states that the representatives of the Brazilian Nation are the Emperor and the General Assembly, which, as will be seen, was chosen by census voting criteria;
5. Article 43 subjects the senators to the choice of the Emperor by means of triple lists, on which the Emperor would choose the third in the List.
6. Article 45, item IV, establishes the census vote when declaring that in order to be eligible as a senator the citizen must have "an annual income of eight hundred thousand *réis* for goods, industry, commerce or jobs".

7. Article 75 required that the candidate for the General Councils of the Province (species of Legislative Assemblies) should prove “decent subsistence”.
8. Article 90 states that the elections to choose the Deputies and senators will be held indirectly and in two phases and the mass of free men (first-degree voters) would elect, in Parochial Assemblies, the provincial voters (voters of second degree) who, in turn, would choose the representatives of the nation.
9. Article 92, item V, makes ineligible and without the right to vote in the first degree to the Parochial Assemblies, the free man who does not demonstrate “annual net income of one hundred thousand *réis* for root goods, industry, commerce or employment”.
10. Article 94, item I, makes ineligible and without the right to vote for the Province Councils, deputies and senators, who “do not have an annual net income of two hundred thousand *réis* for root goods, industry, commerce or employment and the free men, *i.e.*, freed black people or manumission objects.
11. Article 95, item I, states that only those who prove income of “four hundred thousand *réis* of net income” may be appointed deputies.
12. The Articles 98 to 101, give the Emperor the power to: appoint senators; approve and suspend resolutions of the Provincial Councils; dissolve the Chamber of Deputies, calling another; suspend magistrates; pardon criminal penalties imposed by the Judiciary; etc.
13. Article 102, subsections III and IV, confer to the Emperor the appointment of magistrates and public officials in their positions, by subjective criteria (privileges).

From these provisions we can see the exclusionary character of the State apparatus not only of members of the fundamental exploited class (the slaves) but also as a large part of the order of free man, which provides us the immediate dimension of the State as a class instrument and not as a place of class struggle.

But this charter, as already mentioned, influenced by classical liberalism, adopted an abstentionist position in the economic structure of society, limiting itself to structuring the state apparatus and to declaring the rights and guarantees of individual citizens (*rectius*, free men). This charter never declares that Brazilian society was based on a slave mode of production or in a system based on inequality among men.

Well, if the public law is the complementary logical correlative of the interventionist State, private law is the complement of the abstentionist State. Thus, as there has been no historical experience of a pure abstentionist State, it is necessary to evaluate together the imperial legal order (mainly the private law) to conceive its class nature, even because, as already intuited before, by its own world historical context where this country legislation was framed, it would be inconceivable to openly admit the slavery as an institution, which gave rise to a *embarrassed* slave law.

In fact, it's not possible to find the words "slavery" or "slave" in the constitutional charter of the Empire of Brazil, not even once. If the existence of the slave as a person is not recognized and it's not even openly declared that men are unequal to each other, whether belonging to one class or another, members of fundamental exploited class cannot have representation in the slaver State nor integrate the establishment of its bureaucracy.

However, that constitutionally ideology adopted, liberal in appearance (for which the function of the constitution is to define the structure of the State and individual rights and guarantees, refraining from entering in the economic field, given to free initiative), received a new meaning, adapting itself to the needs of a social formation founded on slave labor, i.e.: it was in its interpretation/application that the slave character of the law could be perceived.

Well. Then, how was the slave mode of production reproduced by this charter? 1824's Constitution of the Empire of Brazil guaranteed a typical bourgeois liberal right, inscribed in item XXII, of its article 179:

Property Rights are guaranteed in all its plenitude. If the legally verified public good requires the use and utilization of the citizen's property, he will be previously indemnified for the value of it. The law will mark the cases in which this one exception will occur, and will give the rules to determine the indemnity.

Based in the plenitude of the private property, it would become “meek and peaceful” to understand the legality of the enslavement of black people before the constitutional regime of 1824. That is, an absolutely formal constitution: liberal in its form, admitting any content conferred upon it, which cannot but be paralleled by the Lassalle thesis (1985) that at certain historical moments, the juridical constitutions, sheets of paper, passively adapt to the real constitution, i.e., to real relations of power existing in the society.

Slavery, as an institution, thus, found implicit constitutional grounds, but it would explicitly appear ashamed in infraconstitutional legislation. The Consolidation of Civil Laws of Teixeira de Freitas (2002), document of legal effectiveness at that time, it is illuminating this harmonious coexistence between theoretical liberalism and practical slavery:

It should be noted that there is not a single place in our text where we talk about slaves. We have, indeed, slavery among us; but if this evil thing is an exception, of which we regret, condemned to be extinguished in a more or less remote time; let us make an exception, a separate chapter, in the reform of our Civil Laws; let us not lax them with shameful dispositions, which cannot serve for posterity: let the state of freedom exist without its odious correlative. The laws concerning to slavery (which are not many) will be classified separately, and will form our Black Code. (FREITAS, 2002, p. XXXVII)

A Black Code! That is, a legislative provision embarrassed to legitimize the slave relations. This Black Code worked by elaborating in the text of the Law the dispositions on private property and placing in footnotes (The Black Code, marginal), the equal assimilation of the slaves

to the property whose property was wanted to guarantee to the slave owners. Here are some examples of Title II, of the Consolidation of Civil Laws, of Teixeira de Freitas under the “Das Cousas” law:

Art. 42. Goods are of three kinds: furniture, real estate and demandable shares (1).

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(1) [...] In the class of movables goods enter the livestock, and in the class of livestock enter the slaves. The slaves, as property items, should be considered things; they do not equate at all with other livestocks, much less to inanimate objects, and therefore have peculiar legislation.

Art. 48. The following are considered integral part of mining Factories, and sugar, and crop stalks, to not be dismembered in executions (7): the machines, oxen, horses, and all the furniture effectively and immediately used for working on the same factories, and crops (8).

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(7) Slaves over the age of 14, and the slaves over 12, are also considered as component parts of these establishments, but only to not be dismembered on executions.

(8) It is so-called privilege of integrity [...] Commonly known as sugar mill master's privilege [...] Parts of agricultural estates are considered for the purpose of being mortgaged (Article 2, §1 of the new Mortgage Law) the slaves and the animals belonging to the said properties, which are specified in the contract, being mortgaged with them. (FREITAS, 2002, p. 35, 49)

The technique consisted in designating, in footnotes, that the whole law of things was applied to the slaves not as persons, but as “things”, in the broadest sense of the term: things within the commerce, being purchased, sold, donated, loaned, guarantee, succeeded by act between living or cause mortis, etc. In this sense, it is impossible not to remember the Kant's aphorism (1993, p. 176), that men should not be confused with the law of things!

The Commercial Code of 1850, in full force until the advent of the Civil Code of 2002, also did not refer to the slave at any moment. But

when it's defined in its Article 1 that: "All persons who, in accordance with the laws of this Empire, may be in the free administration of their persons and properties, and are not expressly forbidden in this Code", and as the Consolidation of Civil Laws declared that the slave has no rights, but one thing evident was that the slaves were prevented from exercising acts of commerce even though they were not directly mentioned in the text.

Saes (1990) emphasizes that the place where imperial legislation openly declared the inequality between free men and slaves was in the material and criminal procedural law in force at that time. For him (1990, p. 112):

The penal legislation of the Empire (both substantive and procedural) openly indicated its slaver character. This legislation, like civil legislation and unlike the other codes, expressly mentioned the slave: elaborated under the pressure of the growing scarcity of slaves and the class struggle, it conferred on the slave, from the criminal point of view (i.e., as subject and object of crime), different treatment. Thus, for example, if the punishment of free men was only legitimate when ordered and enforced by slave public justice (i.e., by landowners and slaveholders while invested in the pre-bourgeois manner of the judicial function), conversely, it was legitimate to privately punish slave men (private jail, corporal punishment), by their masters [...] In addition, if every free man could present a complaint against the offender, this right was expressly forbidden to the slave when his offender was, at the same time, his master.

As already pointed out, there is a theoretical and practical unity between the state legal order and its implementation by the State apparatus. Thus, law and organization of the state apparatus are mutually dependent. If the Slavery law of the Empire (because it did not recognize the principle of formal equality among the members of the fundamental classes) declared the slaves things, consequently the access of these men to the tasks of the State was forbidden, as emphasized by Saes (1990, p. 115) when quoting the imperial jurist Malheiros:

Since man is reduced to the condition of thing, becoming subject to the power and dominion or property of another, he is dead, deprived of all rights, and has no representation whatsoever as Roman law has already decided. It cannot, therefore, claim political rights, the rights of the city, in the phrase of the “king-people”: nor exercise public office: what is enshrined in several ancient country laws, and is still our current right, as incontestable principles, although they recognize that this is one of the great evils resulting from slavery.

Only the order of free men and within it, those who proved a minimum income (census criterion), could enter the State apparatus, then instrument of the class of slaves owners to maintain the hegemonic Slave Production Mode. The members of the producing class, the fundamental exploited class, were placed outside the state, object of it, and, therefore, without any right to political representation before it as in Marx’s formula about the Roman Empire (1997, p. 200):

In ancient Rome the class struggle was developed only within a privileged minority, between the rich and the poor free citizens, while the great mass production, the slaves, formed the purely passive pedestal for these combatants.

This led to the explicit admission of the class character of the state, which does not occur before the capitalist mode of production, since bourgeois law declares itself to be an egalitarian right, with the State presenting itself as sphere of universalization of the interests of the whole society.

Finally, it is concluded, that 1824’s Constitution of the Empire of Brazil adopted a classical liberal formal ideology (as described by Adam Smith), by which the matter of the constitution would be only the organization of the State apparatus and the declaration of individual rights and guarantees, abstaining from defining the economic order (definition that was bound by Teixeira de Freitas’ Consolidation of Civil Laws), reproducing the content of slave social relations.

Therefore, it is incorrect to qualify the Constitution of the Empire as a liberal charter in contradiction with the slave character of civil law

and economic and social structure as if the juridical order would admit these internal contradictions. For Saes (1990, p. 108): “between the Constitution and imperial civil law there was no contradiction, but an unity with the dominance of civil law, where the categories of slave and freeman were defined.”

As a consequence, the State and the imperial Constitution of 1824 constituted an organic whole, a logical reproducer of the slavery mode of production, in spite of a liberal-bourgeois ideological rhetoric. There is not, of course, at its core, a political project of national development, but only a structure capable of reproducing the form of the economic organization then in force.

### **3 Conclusion**

The purpose of this study, announced in the introduction, was to verify a relatively unexplored aspect in Brazilian constitutional history, i.e., the apparently contradictory coexistence between a constitution of a liberal model, such as the 1824’s Constitution of the Empire of Brazil and a private economic regime based on slave production relations which, since the beginning was announced as a difficult problem to be solved.

The initial hypothesis, confirmed in the course of the text, was that a legal system cannot be judged only by its formal statements. As the popular wisdom says “paper accepts anything” and, therefore, the nature of a constitution cannot be judged by what it says directly. The analysis of the discourse also presupposes to verify how they articulate their statements with the practical effects that it exerts in reality, although it doesn’t explicitly declare them.

This led us to the understanding that a juridical order is the indivisible unity between text and context, between Law and Law Enforcement through the institutions that compose the State apparatus, and it is not yet possible to separate the public from the private law, that within the state work in close relation of complementation.

In the case of the 1824's Imperial Constitution, it became evident that its liberal economic content did not hinder the reproduction of slave social relations in the economic base of society. Instead, it ended up legitimizing these same relations through the adoption of full private property rights as a fundamental right of landowners, including human beings held as slaves.

In this sense, the public law, through the Constitution, and private law, through the Consolidation of Civil Laws of Teixeira de Freitas, complemented each other in a functional way: the first one offering the legitimacy of private property to the order; the second one offering to the order the legitimacy of private property on people considered as slaves.

With this, it is expected that the economic analysis of the Constitution may offer new ways, not yet explored in Brazilian constitutional theory, for the analysis of our legal system that, like a mine, hides treasures not yet known by theoretical and practical jurists.

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