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Globalization, Global Governance, and Challenges to Contemporary Constitutionalism: The (Trans) Constitutional Perspective and the Dialogue Among Jurisdictions*

Thaís Vandresen,¹ Maria Cláudia S. Antunes de Souza²

ABSTRACT: This article **focuses** on the challenges facing contemporary constitutionalism before the irreversibility of globalization and the prospect of global governance. The **goal of this article** is to identify the proposals concerning the development of a global constitutionalism, as well as analyze the limits and possibilities of proposed trans-constitutionalism as an alternative to establish juridical “dialogues” among different legal normative orders. The study is **justified**, having in mind the need for re-contextualization of contemporary constitutionalism, given the fragility of the concept of sovereignty and the multiplicity of regulatory sources, especially concerning the international protection of human rights. Rationale inductive basis was the **methodology** used for reporting.

* After the presentation of this study at the Second CONPEDI Internationalization Meeting in May 2015, part of this article - but with a different goal - was published in Portuguese in the ebook: Thaís Vandresen & M. Viecili, *Globalização, governança global e os desafios ao constitucionalismo contemporâneo: análise das teorias acerca da (im)possibilidade de se pensar o constitucionalismo global*, in 1 ELEMENTOS DE CONSTITUCIONALISMO E TRANSNACIONALIDADE 311-34 (Perugia, 2015).

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KEYWORDS: Globalization; Global Governance; Trans-constitutionalism.

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INTRODUCTION

The objective of the present discourse about globalization is to analyze theoretical positions about the limits and possibilities to improve global governance – which boosted the discussion of a global constitutionalism – while searching for a consensus between various political, cultural, and social interests that interact in transnational spaces.

Therefore, this article begins by presenting some guidelines about globalization and covering approaches about its concept and evolutionary process to discuss the need to consider global governance. Once establishing a foundation of the globalization process and its irreversibility, this article will explore the theme of the consequences of this process in contemporary constitutionalism. Consequences resulting from the fragility of the concept of sovereignty and the multiplicity of regulatory sources, especially in regard to international protection of human rights, contemporary constitutionalism needs to reframe its field in the political and transnational legal space.

Finally, this article focuses on the limits and possibilities of the theoretical alternative trans-constitutionalism developed by Marcelo Neves in Brazil. This article shows mainly the limits and possibilities regarding the need for “dialogue” and interaction among different jurisdictions in solving common constitutional issues and going beyond the state’s borders national.

1. Guidelines About Globalization and Global Governance

Before extrapolating the problems facing contemporary constitutionalism, it is important to draw some guidelines about globalization and global governance. The reason for this is because these phenomena have been converging for a disruption of paradigms that directly affect the national state (and consequently the theoretical basis that sustains it – modern constitutionalism), it is necessary to resize the approach regarding its scope and limits.³

The term “globalization” is used by Anthony Giddens to refer to “processes that are intensifying relations and local social interdependence.”⁴ Among the factors contributing to its development, Gid-

3. ANTHONY GIDDENS, *SOCIOLOGIA* 61 (Artmed ed, 4th, 2005).

4. GIDDENS, *supra* note 3.

dens detaches the expansion of global communications, the development of a global economy model (evidenced by transnational corporations), political changes, and the appearance and implementation of regional mechanisms and international governance.⁵

Giddens, using the classification developed by David Held, discusses three theoretical positions about the understanding of the globalization phenomenon: the skeptics, the hyper-globalizers, and the transformationalists.⁶ The **skeptics** minimize the consequences of globalization, especially from the economic point of view.⁷ Despite admitting greater commercial interaction with other countries, skeptics assert this would not be sufficient to characterize a globalized economy, considering the primary focus is put on regional blocks with heavy reliance on national regulations.⁸ The **hyper-globalizers**, in turn, maximize the effects of globalization that would be responsible for creating a new global order regardless of frontiers, leading to the disappearance of the nation-state.⁹ In turn, the **transformationalists** see beyond the economic aspect of the phenomenon, taking into consideration its political and cultural character; they conceive it as a dynamic process, open and constantly liable to changes in which the Nation-States do not lose their sovereignty, but restructure it.¹⁰

When dealing with the legal production in the context of globalization, Maurizio Oliviero and Paulo Márcio Cruz also seem to adopt this “transformationalist” stance when they admit the wear of modern constitutional state paradigm – focused on the monopoly of rules produced by the sovereign state.¹¹ However, rightly, Oliviero and Cruz do not speak in “overcoming” of the state law, but in “transformation” of the legal production by the state, which should suit the content of the legislative and constitutional formulations to the new

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. OCTAVIO IANNI, A ERA DO GLOBALISMO 36 (Civilização Brasileira, 1996) (It is adopted on the conducting of this work the transformationalist conception of globalization, that “rhymes with the integration and with homogenization the same way as with differentiation and fragmentation [...] The same forces that promote integration arouse antagonism”).

11. *Id.*

external normative references.¹² Regarding the impacts of globalization within legal production, Oliviero and Cruz conclude that it “modifies its historical characters and assumes two outer lines: the absence of a ‘stable territorial relationship,’ on the one hand, and pluralism of legal systems of reference, on the other.”¹³

Whichever the position adopted, more heretical or extremist, the fact is that while the phenomenon of globalization progresses, “existing structures and political models reveal themselves unprepared to manage a full risk world, inequalities and challenges that transcend national boundaries.”¹⁴ In this sense, it starts to speak of governance that transcends the nation-state towards the creation of a global democratic structure.

Ulrich Beck also approximates his concept of globalization (or globality) to Anthony Giddens’ when he takes the mutual strengthening of relations across national boundaries as a basic presupposition.¹⁵ By analyzing the process of globalization, Beck believes that the transition from the national state to the transnational era will be possible by means of a new configuration of political space, that is, by overcoming the idea of separate worlds or “monocentric power structure” by a model of “polycentric distribution of power in which a wide range of transnational and national actors to cooperate and compete with each other.”¹⁶ Given the irreversible globalization framework, nation-states see their sovereignty, their identity and their sphere of power, irremediably under the interdependence of transnational actors.¹⁷

Thus, the approach to a global governance is justified, because of the globalization process, especially in the face of the nation-state ba-

12. *Id.*

13. Maurizio Oliviero & Paulo Márcio Cruz, *Fundamentos de direito transnacional*, in DIREITO GLOBAL: TRANSNACIONALIDADE E GLOBALIZAÇÃO JURÍDICA 34-35 (Alexandre Morais da Rosa & Márcio Ricardo Staffen eds., Univali, 2013).

14. GIDDENS, *supra* note 3, at 78.

15. ULRICH BECK, O QUE É GLOBALIZAÇÃO? EQUÍVOCOS AO GLOBALISMO: RESPOSTAS À GLOBALIZAÇÃO 34 (1999).

16. “And the German professor continues: “There are therefore two arenas of global societies: the society of the States where the main variables remain to be the rules of diplomacy and national power and the world of transnational sub-politics, which houses the most disparate actors, as international companies, Greenpeace, Amnesty International, in addition to the World Bank, NATO, EU etc.” *Id.* at 35.

17. *Id.* at 30.

sis: modern constitutional law is evidenced by the concept of sovereignty crisis, in view of the proliferation of regulatory sources and decision-making bodies that transcend national borders.

In this context, Andreas Osiander¹⁸ also alerts to the sovereign crisis in its modern concept. With the expansion of globalization, “modern states are also tied into a complex structure of governance that creates a network of cooperation and mutual restraint,” whose participation, although “voluntary” is presented by the irreversible costs that the non-participation of States in this process might entail.¹⁹

In 2006, a study group of the International Law Commission of the United Nations presented a report on the fragmentation of international law and the difficulties arising from its diversification and expansion.²⁰ The group concluded, “one aspect of globalization is the emergence of technically specialized cooperation networks with a global scope.”²¹ The dynamics involving specialized spheres of life such as “trade, environment, human rights, diplomacy, communication, medicine, crime prevention, energy production, security, [and] indigenous cooperation,”²² demand levels of cooperation and integration that go beyond national borders and dare international law. The dynamics show themselves to be insufficient to generate effective governance mechanisms, given the transnational nature of these networks.²³

As a result, these “cooperation networks” tend to develop their own rules and/or systems of rules by means of harmonization of national and regional laws, which results in the appearance of international treaties and organizations tailored to the needs and interests of each network at the regional level; therefore, fragmented on an international point of view.²⁴ This fragmentation of international law entails “the rise of specialized rules and rule-systems that have no clear

18. Andreas Osiander, *Sovereignty, international relations, and the Westphalian Myth*, 55(2) INT'L ORG. 283 (2001).

19. *Id.*

20. Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Rep. of the Study Grp. of the Int'l Law Comm'n, 58th Sess., May 1 - June 9, July 11 - Aug. 6, 2011, ¶ 1, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter Fragmentation].

21. Fragmentation, *supra* note 20, at ¶ 481.

22. *Id.*

23. *Id.*

24. *Id.* at ¶ 482.

relationship to each other . . . [a]nswers to legal questions become dependent on whom you ask, what rule-system is your focus on.”²⁵

It is urgent that an analysis of the limits and possibilities of improving global governance be completed. According to Cynthia Hewitt de Alcántara, the term governance refers to the existence of a political process that “involves building consensus, or obtaining the consent or acquiescence necessary to carry out a programme, in an arena where many different interests are in play.”²⁶

It is therefore beyond the nation-state that the challenges of contemporary constitutionalism are presented and the discussion of global constitutionalism becomes articulated at the global level. In this sense, “[g]lobal constitutionalism is an agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere.”²⁷ Despite the criticism about the empirical reality of this proposition, as well as the impossibility of legitimacy that it seems to have, global constitutionalism can reduce the failure of national constitutional law and even serve as a hermeneutics proposal for a national constitutional law approach when faced with international law, especially when dealing with interactional protection of human rights.

Anne Peters,²⁸ examining the merits of such a proposal and taking into account the legitimacy and the democratic *deficit* inherent in the question, warns that “global constitutionalism should not be used to bestow false legitimacy on international law, nor should the complaint that international law lacks legitimacy undermine the authority of international law as such.”²⁹ From the foregoing, it follows that the process of globalization and discussions about the (im)possibility of a global governance challenges contemporary constitutionalism; that given the fragility of the concept of sovereignty and multiplicity of regulatory sources, especially, in what refers to international protection of human rights.

25. *Id.* at ¶ 483.

26. Cynthia Hewitt de Alcántara, *Uses and Abuses of the Concept of Governance*, 155 INT’L SOC. SCI. J., 105 (1998).

27. Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOBAL LEGAL STUD. 409, 410 (2009).

28. *Id.* at 409.

29. *Id.* at 410.

2. The Weakness of the Concept of Sovereignty and the “Problem” of Contemporary Constitutionalism

The history of the development of the notion of sovereignty is confusing, on a large scale, with the development of international law. The Peace of Westphalia, which brought an end to the Thirty Years’ War in 1648, added a new chapter in state sovereignty in the history of international law.³⁰ Before the Thirty Years’ War, the European world of Christianity was largely dominated by the power struggle between popes and emperors.³¹ As a result of its defeat, the Holy Roman Empire was dissolved in hundreds of relatively independent authorities that started to exercise sovereignty over their populations and territories. This theoretically marked the birth of the modern nation-state system.³²

The doctrine of sovereignty has evolved gradually with the changes in the fundamentals of its legitimacy. With the overcoming of absolutism and the emergence of the constitutional modern state, the idea of sovereignty has shifted and transitioned from an absolute meaning to a democratic dimension, based on the formula “we the peoples.”³³ The modern concept of sovereignty implies, in the broad sense “the power of control of a final instance, in a political society and, consequently, the difference between this and other human associations which organization cannot find that supreme power, exclusive, non-derivative.”³⁴ This dimension of sovereignty, which gives the nation-state total independence in face of any external power, has become the hallmark of the modern constitutional state.³⁵

Currently, to set or even unravel the nature of the category “sovereignty” is an arduous task, considering that only supporting the concept as the effective state control capacity is insufficient, but in a certain way still needed to form within the international system.

By analyzing the constitutional modern state and its vicissitudes, Paulo Marcio Cruz points out the weakness of the concept of sover-

30. Winston P. Nagant & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Preemptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 N.C. J. INT’L L. & COM. REG. 388 (2013).

31. *Id.*

32. *Id.* at 406-7.

33. *Id.* at 387.

34. NORBERTO BOBBIO, DICIONÁRIO DE POLÍTICA 1179 (5th ed. 2000).

35. Nagant & Root, *supra* note 30, at 377-78.

eighty due to integration and globalization and attends to the need to overcome the modern concept of sovereignty.³⁶ There is already consensus that state sovereignty, in its modern sense, can be an obstacle to international protection of human rights, as well as to the effectiveness of international law. This is so unless there is a change of doctrinal focus of the sovereignty category seen as a component of a constitutive process of the wider world, which would encompass the idea of an “interdependent sovereignty.”³⁷

Matteucci notes the eclipse of the political-legal concept of sovereignty based on the conclusion of the predominance of constitutional theories and de-constitution of the modern state, as a unique and autonomous center of power, considering the pluralistic reality of democratic societies.³⁸ In this approach, there is no way to ignore the interdependence of states in international relations that gradually intensifies in the global environment under various hues, mitigating the border limits. There is no need to talk about full state power or that this power is fading, only that it is disappearing as “a particular form of power organization, which had its strong point in the political-legal concept of sovereignty.”³⁹

Faced with the need to focus the debate on the international promotion and protection of human rights, the nation-state’s sovereignty idea still suffers another shift, which can be observed in three fields. First, in the field of international organization, states already recognize that organizations like the UN or the European Union may make decisions on issues that they no longer have a decisive influence.⁴⁰ Second, states already recognize the jurisdiction (especially on human rights) of regional and international judicial institutions, and accept that citizens can resort to such bodies.⁴¹ Third, in the conflict and foreign intervention field, states tend to accept the relativity

36. PAULO MÁRCIO CRUZ, *DA SOBERANIA À TRANSNACIONALIDADE: DEMOCRACIA, DIREITO E ESTADO NO SÉCULO XXI* 85 (Univali, 2011).

37. MAURY ROBERTO VIVIANI, *CONSTITUCIONALISMO GLOBAL: CRÍTICA EM FACE DA REALIDADE DAS RELAÇÕES INTERNACIONAIS NO CENÁRIO DE UMA NOVA ORDEM MUNDIAL* 106 (2014).

38. Nicola Matteucci, *Comentários ao verbete “Soberania,”* in *DICIONÁRIO DE POLÍTICA* 1189 (5th ed. 2000(2)).

39. *Id.*

40. Masahiro Miyoshi, *Sovereignty and International Law* (Feb. 11, 2015), https://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro_miyoshi_paper.pdf.

41. *Id.*

of their sovereignty for the protection of people who eventually suffered serious human rights violations.⁴²

In other words, issues that were previously considered to be exclusively within state purview and the exercise of their sovereignty are now performed based on the integration between states through international organizations, multilateral instruments, and integrated communities.⁴³ Cruz emphasizes that this trans-national “integration” goes beyond a simple cooperation.⁴⁴ The constitutional modern state not only contracts binding obligations under international treaties, but also submits to external bodies’ control as the observance thereof, transferring powers, including jurisdiction, of such authorities.⁴⁵

Canotilho notes that the constitutional political preconditions are outside the national and state space.⁴⁶ In this sense, even if the constitutions continue to represent the “Magna Carta of national identity,” their normative force must yield “before new political-organizational phenotypes, and fit, in the political terms and in legislative terms, on the regulative schemes of the new open associations of open national states.”⁴⁷ The rise of non-state international actors shows the decline of the traditional concept of sovereignty and imposes the challenge to contemporary constitutionalism to re-contextualize before cross-border regulatory claims.⁴⁸ It is clear that the instruments, as well as the jurisdiction of international protection of human rights tend to expand. Especially because, according to Bardie,⁴⁹ “to promote human rights around the world is both a moral obligation and the reflected conviction that the offense that it is made a part of the world reacts on somewhere that goes beyond the borders of sovereignty.”⁵⁰

42. *Id.*

43. *Id.*

44. CRUZ, *supra* note 36, at 90.

45. *Id.* at 11.

46. J.J. GOMES CANOTILHO, “BRANCOSOS” E INTERCONSTITUCIONALIDADE: ITINERÁRIOS DOS DISCURSOS SOBRE A HISTORICIDADE CONSTITUCIONAL, 109-10 (Almedina, 2d ed. 2008).

47. *Id.*

48. BERTRAND BADIE, UM MUNDO SEM SOBERANIA 28 (Piaget, 1999).

49. *Id.* at 176.

50. Jack Donnelly, *Human Rights and State Sovereignty*, UNIV. DENVER PAPERS 10-11 (2004), <http://mysite.du.edu/~jdonnell/papers/hrsov%20v4a.htm>.

This urgent need to carry out the international protection of human rights imposes certain challenges to contemporary constitutionalism. Anne Peters points to four important elements of constitutionalism, when considering the feasibility of a discussion about a global constitutionalism:

- 1) The sovereignty of the State is no longer the rule of international law, which becomes re-contextualized in a horizontal system of “juxtaposed actors” guided by the responsibility to protect human rights;
- 2) The principle of State decision needs to be replaced by a majority decision process, however, the representation of the most populous States results in the overall representation inequality;
- 3) The widespread ratification of international treaties for the protection of human rights, climate, and even free trade does not necessarily reflect genuine commitments, but it is often the result of imbalances and power maneuvers;
- 4) The international dispute resolution is given by an almost compulsory adherence to jurisdiction international courts, being that the legalization of these decisions have clear constitutional aspects.⁵¹

Given this turn, by analyzing the European context, Canotilho presents his proposal for the theory of inter-constitutionality that “studies the inter-constitutional competitive relationship, convergence, juxtaposition and conflicts of various constitutions and various constituent powers in the same political space.”⁵² Canotilho points out the need to break dominant paradigms in referencing the “constitution state” to overcome theories of isolated “constitutional moments” and permutation of a “hierarchical-normative” scheme of constitutional law “by a multipolar system of constitutional *governance*.”⁵³

Gunther Teubner notes that the constitutional issues that arise beyond the nation-state and out of institutionalized politics raised the debate about the crisis of modern constitutionalism, which is divided

51. Peters, *supra* note 27, at 398-99.

52. Canotilho, *supra* note 46, at 265-66.

53. *Id.*

into arguments about transnational constitutionalism “whose status – social theory, issue of constitutional law, political manifesto, social utopia – remains nuclear.”⁵⁴ According to the Teubner, both theoretical positions, which are polarized, attest to the decline of modern constitutionalism because of trans-nationalization.⁵⁵ Some argue that modern constitutionalism, which historically developed from nation-state constitutions, has overshadowed its base with the advent of the European Union, the transnational regimes, and the transfer of political power to private actors.⁵⁶ They argue alternatives to the national constitution cannot be found in the transnational political space that lack representativeness, cultural hegemony, and public deliberation.⁵⁷ Thus, the response to the crisis would be the re-nationalization or re-politicization.⁵⁸ However, according to Teubner, others argue for a new democratic constitutionalism, which could serve as a compensatory to regulate the dynamics of global capitalism under the aegis of constitutional global politics.⁵⁹

Globalization and its destructive effects such as, environmental degradation, ethnic-religious conflicts with extraterritorial effects, the search for energy sources, poverty, and inequality are responsible for the phenomenon of migration, and has led to a downsizing of constitutionalism at the global level which aims to be, to some extent, a universal regulatory speech.⁶⁰ However, resizing of constitutionalism in a global level takes effect on the national legal systems of nation-states, especially, on the interpretation and application of law by the courts that face the dichotomy between the principle of constitutional supremacy and compliance with the principles of international law, endangering two of the most important dogmas that Hans Kelsen has developed: the stepped structure of the legal system and the monistic theory of international law.⁶¹

54. Gunther Teubner, *Constitutionalising Polycontextuality*, SOC. & LEGAL STUD. 1 (2010), http://www.jura.uni-frankfurt.de/42852930/constitutionalisingpolycontextuality_eng.pdf.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 2.

59. Teubner, *supra* note 54, at 2.

60. *Id.* at 3.

Given the weakening of modern constitutionalism marked by the transfer of political power and government responsibilities of nation-states to trans-national organizations the question remains whether constitutionalism is at the end or if there is a need to talk about re-birth or reframing.⁶²

In this sense, Teubner deals with the false premise of starting at an empty transnational constitution and transferring the effective discussion of a global constitutionalism, given that constitutional institutions have already settled in the international sphere with amazing density, becoming part of a global, although fragmented, constitutional order.⁶³ Teubner disagrees with creating a new global constitutional order, and would rather have a transformation of a transnational constitutional order already in force.⁶⁴ The current constitutional question is how to identify the actual structures of the existing global constitutionalism, criticize its shortcomings, and formulate realistic proposals for rules limiting its power.⁶⁵

Constitutionalism can be studied from its earliest roots with the Hebrews, from the plurality of the medieval period to the modern development. However, as Fioravante notes, there isn't *one* constitutionalism.⁶⁶ There are various doctrines about the constitution, with the intention that it may theoretically represent the existence of an order for society and its powers.⁶⁷ In this sense, the contemporary constitutionalism faces the challenge of being "a constitutional right that has exceeded the frontiers of the respective States and has become directly relevant to other jurisdictions, including non-state

61. Alexandre Douglas Zaidan de Carvalho, *Transconstitucionalism or Cosmopolitanism: Perspectives for a Dialogical Semantics in Contemporary Constitutionalism*, SOC. SCI. RES. (Feb. 10, 2015, 9:00 AM), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474144.

62. *Id.*

63. Teubner, *supra* note 54 at 19.

64. *Id.* at 4-6.

65. For a more complete accurate analysis about the global constitutionalism trends, see, in Portuguese: André Basto Lupi, Mário João Ferreira Monte & Maury Roberto Viviani, *Em Busca de Fundamentos para o Constitucionalismo Global: Esboço de Tendências Teóricas para a Constitucionalização no Âmbito de Uma Nova Ordem Mundial*, in *DIREITO E TRANSNACIONALIZAÇÃO* (Univali, 2013).

66. MAURIZIO FIORAVANTE, *CONSTITUCIÓN DE LA ANTIGÜEDAD A NUESTROS DÍAS* 12 (Trotta, 2001).

67. *Id.*

ones.”⁶⁸ An alternative analysis, developed by Marcelo Neves in Brazil, addresses the theoretical perspective of trans-constitutionalism and the dialogue between legal systems.⁶⁹ This theory examines its limits and possibilities as an alternative to deal with constitutional issues beyond the borders of the nation-state, and its actual use, specifically, by the Supreme Brazilian Federal Court.

3. Limits and Possibilities of the Trans-constitutionalism Theoretical Alternative and the “Dialogue” Among Jurisdictions.

“No one, I think, will dispute the fact of a global system,”⁷⁰ this is how Niklas Luhmann starts his famous essay on globalization.⁷¹ As discussed earlier, before the irreversibility of the phenomenon of globalization and insurgency of transnational normative places, the national state overcame the notion of sovereignty developed after the Peace of Westphalia and did without tools for mediation between law and politics.⁷² Instead, it utilized the direct action of judges and courts, especially in matters relating to the protection of human rights, which promoted an exchange (dialogue) of common hermeneutical experience.

Brazilian Minister of the Supreme Court, Cezar Peluso, reaffirmed this resizing of the relationship between law and politics in contemporary constitutionalism, and the need for dialogue between national and international decision-making bodies dealing with constitutional issues at the opening of the World Conference on Constitutional Justice.⁷³ The Minister pointed out that legal operations are increasingly acquiring trans-national character, “the growing interdependence among nations now requires dual challenge to national judiciaries. On the one hand, there is frequent interaction with

68. MARCELO NEVES, *TRANSCONSTITUCIONALISMO* 19 (Martins Fontes, 2013).

69. *Id.*

70. Niklas Luhmann, *Globalization or World Society: How to Conceive of Modern Society?*, 1 *INT’L REV. SOC.* 67 (1997).

71. *Id.*

72. *See supra* section 2.

73. BRASIL, Supremo Tribunal Federal, *Pronunciamento do Ministro Cezar Peluso no Abertura da Conferência Mundial Sobre Justiça Constitucional* 1, STF (Feb. 22, 2015, 10:00 AM), http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/discursocongresso17_01_11.pdf.

regulatory systems of other nations. On the other, bridges are built between autonomous legal systems.”⁷⁴

In this context, and specifically in Brazil, Marcelo Neves develops his theory of the trans-constitutionalism.⁷⁵ He proposes more than a “dialogue,” in the sense of understanding or consensus between different legal systems,⁷⁶ but a communication guided by a “double contingency” in plan of constitutional problems (which are presented beyond the legal proceedings, also in international, supranational, and transnational private actors’ organizations): cross communications that would result in reciprocal learning.⁷⁷ Under this systemic point of view, the state is characterized by a division of jurisdiction control horizontally distributed and that this process is captured in the interpretive process of law, especially in the constitutional field based on the theory developed by Hans Kelsen that places the constitution at the top of the legal system hierarchy.⁷⁸ In this sense, the constitution outlines the limits and shapes of the interpretative role of constitutional courts.

The Latin American culture, according to Flavia Piovesan, adopted a legal paradigm with three characteristics:

- (a) the prevalence of the theoretical framework of Hans Kelsen, based on the supremacy of the constitution—although the Austrian author defends a theory of monism with primacy of international law; (b) hermeticism of a le-

74. *Id.*

75. The trans-constitutionalism worked here relates primarily to the theoretical proposal espoused by Marcelo Neves in his thesis at the University of *Largo de São Francisco (FDUSP)*, being inserted into the autopoietic systemic paradigm developed by Niklas Luhmann.

76. Marcelo Neves, *Do diálogo entre cortes supremas e a corte interamericana de direitos humanos ao transconstitucionalismo na América Latina*, REVISTA DE INFORMAÇÃO LEGISLATIVA 193 (Jan./Mar. 2014).

77. MARCELO NEVES, *TRANSCONSTITUCIONALISMO* 270-77 (Martins Fontes, 2013).

78. HANS KELSEN, *TEORIA PURA DO DIREITO* 247 (Martins Fontes, 6th ed. 1998) (In this sense, “[T]he Right to apply creates, in all these cases, a frame within which there are various application possibilities and is therefore consistent with the law any act that it remains within this framework or frame, which complete this frame in either possible direction [.]. Saying that a judicial decision is based on the law, does not mean, in fact, but that it is inserted inside the frame or framework that law represents – does not mean it is the individual standard, only that is one of the individual standards that can be produced within the frame of the general rule.”).

gal science strictly normative; and (c) state approach, based on structural concepts from the nation-state.⁷⁹

Marcelo Neves, in this point, does not neglect the importance of the constitution when he mentions that, “the constitutional sentence,” normatively subjected to the constitution, he says, “making it happen, which is constitutional.”⁸⁰ However, Hans Kelsen’s hierarchical model interpretation does not seem to be the most useful when it comes to decisions about human rights, which can be introduced by national tribunals, international tribunals, or both. When it comes to human or fundamental rights, Neves clarifies that the path must be the “joint model” or the “interweaving of legal systems, so that all present themselves able to rebuild itself permanently by learning” between legal systems interested in solving the same constitutional problems.⁸¹ Here, Neves passes to make use of the “intertwined hierarchies” concept developed by Douglas Hofstadter in specifying that the constitution, even if put as “core of self-foundation normative of the State” and constitute inviolable core, “can be involved, in the dynamic constitutional game, with other levels (interlaced) in a super-intertwined level.”⁸² In this sense, the constitution is permanently reconstructed through interpretation processes.

The trans-constitutionalism becomes an alternative theory built to handle the increasing fragmentation of the law and international law when confronted with the possibility of a relationship among diverse legal orders.⁸³ In this sense, the theory describes the possibility of dialogue based on the “structural coupling” and “transition bridges” among transverse legal rationales, as a complex approach, to deal with the constitutional issues they share.⁸⁴

Couplings are selective filtering mechanisms between systems’ structures suffering reciprocal influence, allowing structural changes between these partial systems without losing their autonomy.⁸⁵ In

79. FLÁVIA PIOVESAN, DIREITOS HUMANOS E JUSTIÇA INTERNACIONAL 118 (Saraiva, 5th, 2014).

80. MARCELO NEVES, TRANSCONSTITUCIONALISMO 270-77 (Martins Fontes, 2013).

81. *Id.*

82. *Id.* at 295.

83. *Id.*

84. *Id.*

this sense, these are examples of structural couplings: the university (coupling between education and science), art galleries (coupling between art and economics), and public opinion (coupling between politics and mass media).⁸⁶ With regard to the science of law, the constitution is the coupling between the legal and political systems.⁸⁷

The proposal Neves' suggests is to build "transition bridges" between cross rationalities, going beyond the notion of a constitution as a mere structural coupling, but instead as an "instance of mutual and lasting relationship of learning and exchange of experience with particular conceptions already processed, respectively, in politics and law."⁸⁸ These "transition bridges" between several partial rationalities would avoid the danger of "atomization" (which would cause the insulation and the crystallization of state orders in its own sovereignty) and "imperial expansion" (little reflective global constitutionalism on local and regional differences with excessive imposition of only one discursive sphere).⁸⁹

The prospect of Marcelo Neves, in proposing this network of cooperation between legal perspectives, is guided by the need for protection of human rights internationally. In this sense, Flavia Piovesan identified that Latin American constitutions already "establish constitutional clauses that allow interaction between the constitutional order and the international order, extending and expanding the constitutionality block."⁹⁰

The Brazilian model of the compatibility control of domestic legislation with the constitution is a hybrid, covering both the diffuse control of constitutionality, in which any judge or court may declare

85. MARCELO NEVES, *TRANSCONSTITUTIONALISMO* 37 (Martins Fontes, 2013) ("The structural couplings serve prior to the guarantee of reciprocal autonomy by the selectivity of the influences, relating disordered complexities in mutual monitoring [...] The promoter's interlacement of cross-rationality serve mainly to the exchange and reciprocal learning from experiences with different rationales, taking into account the mutual sharing of complexity foreordained by the systems and therefore understood by the receiver (stable and concentrated interference in terms of structures)").

86. *Id.*

87. Clemens Mattheis, *The System Theory of Niklas Luhmann and the Constitutionalization of the World Society*, 4 *GOETTINGEN J. INT'L L.* 625, 631 (2012), http://www.gojil.eu/issues/42/42_article_mattheis.pdf.

88. MARCELO NEVES, *TRANSCONSTITUTIONALISMO* 62 (Martins Fontes, 2013).

89. *Id.* at 45-47.

90. *Id.*

the unconstitutionality of a certain legal norm (American model), as well as concentrated control, in which the Brazilian Supreme Court focuses the power to review the constitutionality of laws passed by the Parliament (European model). After recent changes in constitutional texts in Latin America, it is possible to realize the development by both the doctrine and jurisprudence, and from another control parameter: the conventionality.⁹¹

The conventionality control demands that the courts proceed to the analyze vertical compliance of law “not only with the *[c]onstitution* as a paradigm, but also with *international treaties* (especially human rights, but not only them) ratified by the government into effect in the country.”⁹² The development of conventionality control is concomitant with the change process of Latin American constitutions occurring in recent decades, when these began giving special and differentiated treatment to human rights. Thus, specifically, in Latin America the “constitutional process of international law is combined with the process of internationalization of constitutional law.”⁹³

The 1988 Brazilian Constitution, in Article 5º, Paragraph 2º, establishes that the rights and guarantees expressed in the constitution do not exclude other rights stemming from international treaties ratified by Brazil.⁹⁴ That constitution was amended in 2004 to include Paragraph 3º of Article 5º, establishing that international treaties and conventions on human rights that are approved by the National Congress, may be equivalent to the following constitutional amendments:

The Argentine Constitution, after the constitutional reform in 1994, article 75, item 22 establishes that while treaties generally have supra-legal hierarchy, the protection of human rights treaties have constitutional status; The 1993 Peruvian Constitution states that constitutional rights must be interpreted in accordance with the Universal Declaration of Human Rights and with international treaties rectified by the country (Peruvian Constitutional Court decision recorded in

91. Valerio de Oliveira Mazzuoli, *Teoria geral do controle de convencionalidade no direito brasileiro*, in *CONTROLE DE CONVENCIONALIDADE: UM PANORAMA LATINO-AMERICANO: BRASIL, ARGENTINA, CHINA, MÉXICO, PERU, URUGUAI 4* (Gazeta Jurídica, 2013).

92. *Id.* (emphasis added).

93. *Id.* at 118.

94. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 para. 2 (Braz.).

2005 supports the thesis of the constitutional status of international treaties about human rights); The 1991 Colombian Constitution, after the reform in 1997, in article 93 confers special hierarchy to human rights treaties in the domestic system. The 1980 Chilean Constitution, renovated in 1989, has standardized the need that the State has to respect the rights and guarantees presented in international and duly ratified treaties.⁹⁵

In Latin America specifically, it is evident that constitutional work aims to ensure a greater effectiveness of international treaties to protect human rights, which it verifies in three characteristics:

- a) at the apex of the legal system are the Constitution and international human rights treaties;
- b) the “openness” of law marked by dialogue between jurisdictions redefining domestic legal experience;
- c) the human rights approach replacing the state approach, reinforcing and consecrating popular sovereignty and security at the national level.⁹⁶

Aware of this new approach to Latin American constitutionalism, the proposal of Marcelo Neves is the reaffirmation of a cooperative exchange between legal perspectives, which have been entered into the orders issued by national and international courts, to the extent that common cases to various legal systems could be addressed together.⁹⁷ What trans-constitutionalism therefore proposes, “is the intertwining of various legal systems, both state and transnational and supranational institutions, around the same problems of-constitutional nature.”⁹⁸ In Neves’ approach, the trans-constitutionalism between legal systems can take place between public international law and state law; between supranational law and state law; between state legal systems; between state and transnational legal systems; between

95. Flávia Piovesan, *Controle de Convencionalidade, Direitos Humanos e Diálogo entre Jurisdições*, in *CONTROLE DE CONVENCIONALIDADE: UM PANORAMA LATINO-AMERICANO: BRASIL, ARGENTINA, CHINA, MÉXICO, PERU, URUGUAI* 118 (Gazeta Jurídica, 2013)..

96. *Id.* at 118-20.

97. *Id.* at 118.

98. MARCELO NEVES, *TRANSCONSTITUCIONALISMO* 25 (MARTINS FONTES, 2013).

state legal systems and extra-states local orders; and between supra-national law and international law.⁹⁹

A practical example of trans-constitutionalism between international order and state order can be seen in the relationship between the Inter-American Human Rights System, established by the American Convention on Human Rights– Pact of San Jose, Costa Rica (“ACHR”) and the constitutional orders of the signatory states.

The ACHR established the list of rights that must be respected and guaranteed by the member states-parties and for this purpose, the Convention established two monitoring bodies: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights,¹⁰⁰ the latter with advisory and contentious jurisdiction. In this context, trans-constitutionalism is not just an enforcement of the decisions of the Inter-American Court of Human Rights (“IACHR”) to national courts with constitutional jurisdiction, but also a catalyst for national courts to begin to revise its case law based on the IACHR’s decisions, extending the application of contract law by the courts.¹⁰¹

The first Brazilian case in this vein emerged when the question of conflict between Article 7, n. 7 of the American Convention on Human Rights and Article 5, LXVII, of the Brazilian Constitution was submitted to the Brazilian Supreme Court.¹⁰² The clash of norms resides in the fact that the institute for civil arrest of an unfaithful trustee has been included in the Brazilian constitutional provision as permitted, while the Convention prohibits it.

99. *Id.* at 115-234.

100. The decisions of the Inter-American Court of Human Rights have binding and mandatory force, and the State condemned his immediate compliance. However, it is necessary that the State-party recognize the jurisdiction of the Court, as this is presented in the form of optional clause. “By December 2013, 22 out of 25 States-parties to the American Convention on Human Rights had accepted the compulsory jurisdiction of the Court. The Brazilian government finally recognized the jurisdiction of the Court by means of Legislative Decree n. 89 of December 3, 1998.” Flávia Piovesan, *Controle de Convencionalidade, Direitos Humanos e Diálogo entre Jurisdições*, in *CONTROLE DE CONVENCIONALIDADE: UM PANORAMA LATINO-AMERICANO: BRASIL, ARGENTINA, CHINA, MÉXICO, PERU, URUGUAI* 153 (Gazeta Jurídica, 2013).

101. Marcelo Neves, *Do diálogo entre cortes supremas e a corte interamericana de direitos humanos ao transconstitucionalismo na América Latina*, *REVISTA DE INFORMAÇÃO LEGISLATIVA* 195 (Jan./Mar. 2014).

102. *Id.* at 193-95.

In December 2008, the Brazilian Supreme Court¹⁰³ decided by majority that international human rights treaties, if not incorporated into national law by force of constitutional amendment force (special legislative procedure), assume supra-legal status, but at the same time are considered infra-constitutional.¹⁰⁴ The argument in favor of the supra-legal hierarchy as ratified by the Convention serves as a basis of the decision of the Brazilian Supreme Court; in the sense that, although the Federal Constitution permits the civil imprisonment of an unfaithful trustee, the infra-law could freely decide about their continuity or prohibition, taking into account the primacy of international standard in face of internal infra-constitutional legislation.¹⁰⁵ The decision represents the solution of a conflict that resizes the internal validity of the ACHR in order to expand the rights constitutionally established in Brazilian law. The decision therefore placed “in the foreground the effort for the formation of a cross-rationality, which shows itself as bearable for both legal parties involved.”¹⁰⁶ In addition, trans-constitutionalism working with other state legal systems made this evident in recent decisions applied by the Brazilian Federal Supreme Court. In Latin America, there is still a tradition of references to devices, judgments, and foreign constitutional doctrines. While Brazilian constitutional law has been strongly marked by the U.S. constitutional model, it is also possible to see the influence of European constitutionalism in the resolution of constitutional conflicts.¹⁰⁷

An emblematic case is the judgment of *Habeas Corpus* 82434/RS, adjudicated on November 17, 2003, which featured “as racist crime to publish books with anti-Semitic content (denial of the existence of the Holocaust).”¹⁰⁸ In the reasoning of the decision, the

103. The reasoning behind now commented decisions was entered in the trial of the Supreme Court: S.T.F., Ap. Civ. No. 349/SP, RE349.703 Rio Grande Do Sul, Relator: Min. Gilmar Mendes, 12.03.2008, Diário do Judiciário [D.J.], 04.06.09 (Braz.).

104. *Id.*

105. Marcelo Neves, *Do diálogo entre cortes supremas e a corte interamericana de direitos humanos ao transconstitucionalismo na América Latina*, REVISTA DE INFORMAÇÃO LEGISLATIVA 195 (Jan./Mar. 2014).

106. *Id.* at 196.

107. Marcelo Neves, *Do diálogo entre cortes supremas e a corte interamericana de direitos humanos ao transconstitucionalismo na América Latina*, REVISTA DE INFORMAÇÃO LEGISLATIVA 198 (Jan./Mar. 2014).

108. *Id.*

Brazilian Supreme Court invoked the foreign constitutional jurisprudence, which was fundamental to the debate¹⁰⁹ for the demarcation of the matter.¹¹⁰

Having made these points, it should be noted what the limits to trans-constitutionalism approach are. The question is whether there is a competent body or organization to address issues involving the “legal systems of entanglement” and how to find a legitimate way for the internal adequacy of decisions, based on external elements, while the constitutional theory insists to claim the national state sovereignty.¹¹¹ Another crucial issue to watch is the constant invocation of the case law of other jurisdictions, which may give rise to the already lived historical episode of “colonialism” in the field of Latin American legal culture.¹¹²

For trans-constitutionalism, it is necessary to renounce the ultimate primacy of either order, defining as a legitimating condition the fact that there is no law, including public international law itself, which can be presented as the last discursive reason.¹¹³ The “uncritical importation of legislative and doctrinal models” can still give rise to “an inadequate incorporation of precedents.”¹¹⁴

If trans-constitutionalism has brought a “crusade constitutional fertilization,” in the understanding and integration between jurisdictions facing constitutional problems that are common, then the “dialogue between jurisdictions” proposed here entails a necessary criti-

109. In this case, we highlighted the set menu of the judged: “9. Comparative law. Having Brazil as an example, the laws of organized countries under the aegis of modern democratic rule of law also adopted into its legal system punishments for offenses that encourage and propagate racial segregation. Manifestations of the US Supreme Court, the House of Lords in England and California Court of Appeal in the United States that devoted an understanding that apply sanctions to those who transgress the rules of good social interaction with human groups that symbolize the practice of racism.” S..T.F., Habeas Corpus 82424, Relator: Moreira Alves, 17.09.03, DIARIO DA JUSTICA [D.J.], 19.03.04., (Braz.).

110. *Id.*

111. Carvalho, *supra* note 61, at 10.

112. Marcelo Neves, *Do diálogo entre cortes supremas e a corte interamericana de direitos humanos ao transconstitucionalismo na América Latina*, REVISTA DE INFORMAÇÃO LEGISLATIVA 199 (Jan./Mar. 2014).

113. MARCELO NEVES, *TRANSCONSTITUCIONALISMO* 118 (Martins Fontes, 2013).

114. *Id.*

cal framework for the development of national constitutional law, as well as for the effectiveness of human rights.¹¹⁵

4. CONCLUSIONS

This article sought to establish parameters for the study of globalization and to organize a brief overview of some theoretical trends that attempt to face the challenges of global governance with repercussions in political theory and contemporary constitutional law. We conclude that the trans-constitutional discussion regarding the shock of different normative orders at the global level is the result of globalization. This context presents the theoretical weaknesses of the Latin American legal paradigm essentially positivist and sometimes insensitive to contingencies and demands of political, social, and legal processes that transcend the boundaries of the nation-state.

In this perspective, and given the growing insurgency of international actors both in rules production and in governing policy, the myth of sovereignty is checked. The irreversibility of globalization and the search for consensus between different rationalities have international protection of human rights at its point of convergence. Thus, international protection of human rights emerges at the point of convergence of the irreversibility of globalization and the search for consensus between different rationalities.

The markedly asymmetric world society makes relevant negative conditions to the completion of trans-constitutionalism as a normative-functional requirement on a global scale. As stated by Gunther Teubner, “In the sea of globality, there are only islands of constitutionality.”¹¹⁶ The development of cross rationalities between legal systems faces a number of obstacles both in the development of the national legal systems and outside of state political communities.

In the external plan, the colonization process of right by other social systems (economy and politics) makes the law, and the global public sphere itself, an instrument for the benefit of the upmarket *lex*. However, the process is a detriment to the legal protection and human rights policy, and it precludes the “trans-national dialogue” for its effective applicability. International law remains subject to the logic of

115. MARCELO NEVES, *TRANSCONSTITUTIONALISMO* 118 (Martins Fontes, 2013).

116. Teubner, *supra* note 54, at 14.

power by the political asymmetry between states, which precludes the consensus in the plural public sphere of trans-constitutionalism.

In regards to protection of human rights, the functional requirement of global regulation of the legal system exceeds state borders and the discussion about the possibility of a global constitutionalism or lack thereof becomes relevant. Internally, the difficulties of trans-constitutionalism are characterized by asymmetric “forms of law,” that is, the ways in which the right relates to decision criteria. Decision criteria spans, but is not limited to customary and positive standards and judicial precedents, principles, and activism; a fact observed particularly in the countries of late modernity. In such countries, the social complexity is both deconstructive and self-destructive.

Upon analysis, from the trans-constitutionalism theory, there is a possibility of unique processes of “dialogue between different constitutional jurisdictions,” with the starting point being the protection of human rights in a scenario that is developing beyond traditional national boundaries.

It remains that there is much to be learned and as Norberto Bobbio reminds us, “the only reason for hope is that history knows long time and short time [...] The prophets of happy times look away.”¹¹⁷

117. NORBERTO BOBBIO, *A ERA DOS DIREITOS* 210 (Campus, 2004).